Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 449.

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

WONG KIM ARK, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF OF THE APPELLEE.

Statement.

Wong Kim Ark, the petitioner below, was born in 1873 in the City of San Francisco, California, of Chinese parents. In 1890 he left this country for the first time and went on a temporary visit to China with his parents. In the same year he returned to the United States, and was, without question, permitted to land. He remained in the United States until 1894, when he made another temporary visit to China, and returned to this country in August of the following year on the steamer "Coptic" of the

Occidental and Oriental Line. Upon his arrival in the United States he made application to the Collector of Customs at the port of San Francisco for permission to land. This application was denied on the ground that he was a Chinese laborer, debarred by law from entering this country, and was not, as he claimed, a citizen of the United States. He then applied to the United States District Court for the Northern District of California for a writ of *habeas corpus*, alleging in his petition that he was a citizen of the United States, and was restrained of his liberty, without due process of law, by the Collector of Customs of the Port of San Francisco, and by the General Manager of the Occidental and Oriental Steamship Company, acting under the direction of said Collector of Customs. Upon the return of the writ of *habeas corpus* the petitioner was discharged, the Court below being of opinion that he was a citizen of the United States, and therefore improperly restrained of his liberty. From this judgment the Government has appealed.

The case below was heard upon an agreed statement of facts, which will be found at pages 10 and 11 of the record, and is as follows:

I.

That the said Wong Kim Ark was born in the year 1873 at No. 751 Sacramento street, in the City and County of San Francisco, State of California, United States of America, and that his mother and father were persons of Chinese descent, and subjects of the Emperor of China, and that said Wong Kim Ark was and is a laborer.

II.

That at the time of his said birth his mother and father were domiciled residents of the United States, and had established and enjoyed a permanent domicile

and residence therein at said City and County of San Francisco, State aforesaid.

III.

That said mother and father of said Wong Kim Ark continued to reside and remain in the United States until the year 1890, when they departed for China.

IV.

That during all the time of their said residence in the United States as domiciled residents therein, the said mother and father of said Wong Kim Ark were engaged in the prosecution of business, and were never engaged in any diplomatic or official capacity under the Emperor of China.

V.

That ever since the birth of said Wong Kim Ark, at the time and place hereinbefore stated and stipulated, he has had but one residence, to wit, a residence in said State of California, in the United States of America, and that he has never changed or lost said residence or gained or acquired another residence, and there resided claiming to be a citizen of the United States.

VI.

That in the year 1890 the said Wong Kim Ark departed for China upon a temporary visit and with the intention of returning to the United States, and did return thereto on the 26th day of July, 1890, on the steamship "Gaelic," and was permitted to enter the United States by the Collector of Customs upon the sole ground that he was a native-born citizen of the United States.

VII.

That after his said return the said Wong Kim Ark remained in the United States, claiming to be a citizen thereof, until the year 1894, when he again departed for China, upon a temporary visit, and with the intention of returning to the United States, and did return thereto in the month of August, 1895, and applied to the Collector of Customs to be permitted to land, and that such application was denied upon the sole ground that said Wong Kim Ark was not a citizen of the United States.

VIII.

That said Wong Kim Ark has not, either by himself or his parents, acting for him, ever renounced his allegiance to the United States, and that he has never done or committed any act or thing to exclude him therefrom.

Argument.

The single question presented upon this appeal is this: Are the children born in this country of alien residents not connected with the diplomatic service citizens of the United States?

It is a mere chance that the petitioner below was a Chinaman, and that fact has not, so far as we can conceive, any bearing upon the case at bar. Whether Wong Kim Ark shall be permitted to land in this country, or what the rights of the Chinese race may be, is of little importance. The case, as we understand it, which is before this Court for decision, is much larger and broader, and the question now up for discussion is whether the children born in this country to any alien resident are citizens of the United States, without regard to the country from which their parents

came, and irrespective of whether they are of English, Irish, French, German or any other extraction?

As the District Court said in its opinion (Record, p. 15):

> "If the contention of counsel for the Government be correct, it will inevitably result that thousands of persons of both sexes, who have been heretofore considered as citizens of the United States, and have always been treated as such, will be, to all intents and purposes, denationalized, and remanded to a state of alienage. Included among these are thousands of voters who are exercising the right of suffrage as American citizens, and whose right as such is not, and never has been, questioned, because birth within the country seems to have been recognized generally as conclusive upon the question of citizenship."

The Fourteenth Amendment of the Constitution of the United States, so far as it is of interest in this case, is as follows:

"All persons born * * * in the United States and subject to the jurisdiction thereof are citizens of the United States."

The petitioner, Wong Kim Ark, apparently conforms to the requirements of this amendment. The argument of the Government is, however, that his parents were subjects of the Emperor of China, and that, therefore, he was not at the time of his birth "subject to the jurisdiction" of the United States, and that in consequence Wong Kim Ark cannot be a citizen, it being necessary, before a person can be a citizen of the United States by birth, that, at the time of, and coincident with, his birth, he should be "subject to the jurisdiction thereof."

The decision of this question would, therefore, seem to turn upon the meaning of the words "subject to the jurisdiction thereof" as used in the Fourteenth Amendment to the Constitution.

Briefs of the Government.

Before proceeding to any independent discussion of this subject it will perhaps be useful to refer to the main points upon which the Government relies in support of its contention that Wong Kim Ark was not at the time of his birth "subject to the jurisdiction" of the United States.

It is substantially conceded that the Fourteenth Amendment is but declaratory of the law as it previously existed, and it is practically admitted that, since the adoption of the Fourteenth Amendment, every judicial decision directly upon the question in controversy has been adverse to the Government's present position.

It is, however, urged most earnestly by the Solicitor General and by Mr. Collins, the *amicus curiæ*, that this long-standing interpretation of who was a citizen of the United States is wrong, and has been wrong from the very beginning, in that the Courts have resorted to the common law to aid them in their decisions, while the question was really one of the law of nations. Further than that, the Government seriously presses the point that there is no common law in the United States, and that, therefore, in ascertaining the meaning of words used in the Constitution, but not there defined, it is not permissible to inquire how they were commonly understood by lawyers at the time of the adoption of the Constitution, or in other words what their meaning was at common law.

The two fundamental theories, therefore, now advanced by the Government, and upon which its entire argument stands or falls, are:

FIRST. That there is no common law in the United States.

SECOND. That the question of citizenship in a nation is to be determined by the rules of international law.

(*a*) Perhaps we do not fully understand the argument of the Government that there is no common law in the United States, but as we read the authorities which have been cited by the Solicitor-General, this Court has simply held that "there are no common law offenses against the United States" (United States vs. Britton, 108 U. S., 199–206).

This proposition is too well established to admit of dispute, but it is not clear how it can affect the present discussion. The question whether a man is "subject to the jurisdiction" of the United States is not, we take it, to be determined by the common law, but by the principles of the common law, which is a very different matter.

In other words, it has often been decided by this Court that, in determining the meaning of the words used in the Constitution and the statutes of the United States and not therein defined, it is both proper and necessary to seek in the common law, as the source and origin of our jurisprudence, their true definition; and the question fairly raised here is not whether there is a common law in the United States, but whether it is admissible, in construing and defining words used in the Constitution, to refer to the common law.

The case of Smith vs. Alabama, 124 U. S., 465, is referred to upon the brief of the Solicitor General in support of the proposition that there is no common law in the United States.

If the counsel for the Government had read this case through he would have found on page 478 the following statement:

> "There is, however, one clear exception to the statement that there is no national common law. The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law and are to be read in the light of its history. The code of

constitutional and statutory construction which therefore is gradually formed by the judgments of this Court in the application of the Constitution and the laws and treaties made in pursuance thereof, has for its basis, so much of the common law as may be implied in the subject and constitutes a common law resting on national authority."

In Moore vs. The United States, 91 U. S., 270, the question before the Court was as to what rule of law should determine the admissibility of evidence in the Court of Claims. This Court said, page 273:

"By what law is the Court of Claims to be governed in this respect? May it adopt its own rules of evidence? or is it to be governed by some system of law? In our opinion it must be governed by law, and we know of no system of law by which it should be governed other than the common law. *That is the system from which our judicial ideas and legal definitions are derived. The language of the Constitution and of many Acts of Congress could not be understood without reference to the common law.*"

It was said in Minor vs. Happersett, 21 Wallace, 162–167:

"The Constitution does not in words say who shall be natural-born citizens. Resort must be had elsewhere to ascertain that. At common law, with the nomenclature of which the framers of the Constitution were familiar, it was never doubted that all children born in a country of parents who were its citizens, became themselves upon their birth citizens also."

In Gardner vs. Ward, 2 Mass. Rep., 244, the question was as to the right of the plaintiff to vote. As

the Court said in its opinion "this question * * * depends altogether upon this inquiry—whether H. Gardner was, at that time, *a citizen of the United States* or an alien."

This case was decided in 1805. Theophilus Parsons appeared for the plaintiff. Mr. Dane for the defendant. Mr. Dane was unsuccessful, and in the similar case of Kilham vs. Ward, 2 Mass., 236, he had Story as counsel. He was again unsuccessful. There is no doubt but that the cases were well presented in behalf of the defendants, yet it was held that the question of citizenship of the United States was to be decided by the principles of the common law. The Court said at page 245:

"*In determining this question we are to be governed altogether by the principles of the common law*, 'and from whatever source these may have been derived and in whatever form expressed, the substantial part of them is founded in reason and in nature of government.'

"I take it, then, to be established, with a few exceptions, not requiring our present notice, that a man born within the jurisdiction of the common law is a citizen of the country wherein he is born. By this circumstance of his birth, he is subjected to the duty of allegiance which is claimed and enforced by the sovereign of his native land, and becomes reciprocally entitled to the protection of that sovereign and to the other rights and advantages, which are included in the term 'citizenship.'"

In the case of Ainslie vs. Martin, 9 Mass., 454, 456 Chief-Justice Parsons said:

"Our statutes recognize alienage and its effects, but have not defined it. *We must, therefore, look to the common law for its definition.* By this law, to make a man an alien, he must be

born without the allegiance of the common-wealth."

If it is permissible to look to the common law for the definition of "alienage" when used in a statute, it would seem to follow that it was equally permissible to look to the common law for the definition of "citizen" when used in the Constitution, and we submit that it is of little importance in the case at bar whether there is or is not a common law in the United States, so long as the proposition asserted in the foregoing authorities is sound, that resort can be had to the common law for the meaning of words found but not defined in the Constitution.

(b) The second theory of the appellant is that the question of citizenship in the United States is to be determined by the law of nations and not by the law of the United States.

We should have supposed it difficult to find a question more widely separated from the domain of international law than the status of a citizen in any country. It would seem as if the right of citizenship was for each country to determine for itself, and that any nation would guard with jealous interest the right to decide who should be its members. That is to say, it is a matter of local and national law, as distinguished from international law, and the United States would be the last to surrender the privilege of determining, by its own law, who were or were not its citizens.

> "The answer to the question, Who is a citizen? is different in different States, and depends on the laws and constitution of each." (Aristotle, Politics, Book III., c. s. 2 and 3.)

This proposition of the government has, we think, arisen from a mistaken notion as to the true character of the question in this case, and it seems somewhat re-

markable that the Solicitor-General should take the position that the Government of the United States is to be administered, not in accordance with the laws of the United States, but in accordance with the law of nations, and that the vital question of who compose the great body of their citizens is to be determined, not by the law of the United States, but by the rules of international law.

In the case of Scott vs. Sandford, 19 How., 393, 451, Chief-Justice Taney used the following language:

> "But in considering the question before us, it must be borne in mind that there is no law of nations standing between the people of the United States and their Government, and interfering with their relation to each other. The powers of the Government and the rights of the citizen under it, are positive and practical regulations plainly written down. * * * And no laws or usages of other nations, or reasoning of statesmen or jurists * * * can enlarge the powers of the Government or take from the citizens the rights they have reserved."

Mr. Justice Story, in Inglis vs. Trustees of the Sailors' Snug Harbor, 3 Pet., 99, 162, when speaking upon the question of citizenship, said:

> "The ground of this doctrine is that each Government had a right to decide for itself who should be admitted or deemed citizens."

Mr. Stanbery, then Attorney-General, said in Warren's Case, 12 Opin. Atty.-Gen., 319, 325:

> "A question as to status or citizenship, if it arose in the United States, would be determined by our own law."

The question in Warren's case was, whether a man born in Ireland, but naturalized as a citizen of the

United States, was entitled, when arraigned in a British court for the offense of treason felony, to the privilege of a jury *de mediatate*, which would have been a jury composed half of British subjects and half of aliens from Great Britain born in the United States. This right was given by the British law only to an alien. The English Court, when Warren filed his plea demanding the privilege of a jury *de mediatate*, decided that Warren was a citizen and subject of Great Britain by reason of his birth, and that he could not become an alien by expatriation or abjuration of his allegiance, or by being clothed with a new allegiance in a foreign country. This decision was acquiesced in by Mr. Stanbery, for the reason given by him that a question of citizenship must be determined by the law of the country in which the question is raised and not by international law, or, as he said at page 325: "*I have no hesitation in saying that we have here only a question of British law, and that Warren's condition as to alienage or citizenship for the purposes of this case is to be fixed by that law alone.*"

If it is possible for a man to be a citizen of a country by the law of that country, and a citizen of another country by the rules of international law, then the question which doctrine shall prevail is to be determined according to the manner in which it arises for decision, whether as an international question or simply as a local and national matter.

To put the idea sought to be conveyed in another form, if there is any conflict between the law of any country and international law, "the law of nations, as to particular matters, may be, as to such particular countries, either expanded or contracted by local legislation" (Greisser Case, 2 Whart. Int. Dig., 399).

As was said in the case of Lynch vs. Clarke, 1 Sand. Ch., 583, 660, in determining who was a citizen of this country.

> "In reference to the argument that the United States should establish a rule on proper principles, and which shall be just to other nations, it may be said that this is purely a matter of municipal regulation, in every country."

Lord Justice BRETT, in Niboyet vs. Niboyet, L. R., 4 Pr. Div., 1, 12, said.

> "By the universal independence of nations, each binds by its personal laws its natural born subjects and all who may become its subjects."

It is not at all certain that this principle of International Law, as it is called, which is supposed to declare that a child born to aliens while residing in a foreign country takes the nationality of his father, is anything more than a name. As a matter of fact, no nation, so far as we have been able to ascertain, decides or pretends to decide the status of its citizens by any other law than its own.

It is true that different nations have different laws upon this subject, and the laws of some of these nations are more or less in accord, but there is no great unanimity among them.

England now holds to the rule that birth within its dominions makes a man a subject of the Queen, unless, if born of aliens, he elects the nationality of his parents (33 Vict., Chap. 14).

In France a similar doctrine prevails, and is as follows :

> "The French law considers all children of foreigners born in France as French citizens, unless before coming of age they decline French citizenship. * * * Otherwise they are amenable to obligatory military service and punishment as deserters if they endeavor to evade it" (49 Alb. L. J., 20).

In Denmark, Portugal and Holland the law is appa-

really the same as that of France, as Lord Cockburn in his work on Nationality says, at pages 14 and 15, that birth within their dominions confers citizenship on the offspring of alien parents, subject to the right of the individual concerned to reject it at majority.

Another rule is adopted by Belgium, Spain, Italy, Greece, the Grand Duchy of Baden, Russia, Russia-Poland and the Ottoman Empire, where birth within their dominions confers citizenship on the offspring of alien parents on the right being claimed on certain specified conditions (Cockburn on Nationality, 14 and 15).

It is clear, therefore, that each country has enacted its own law as to who is or who is not its citizen, and has never fallen back upon any principle of international law for the decision of the question.

All that can possibly be argued from the state of the law of citizenship in the different countries of Europe is that it might be advisable for the people of the United States to pass a law or amend their constitution, if they saw fit, so as to conform with the laws of the majority of these countries, but we fail to see how the counsel for the government have shown that the status of a citizen was or ever can be determined in the Courts of a country by the law of nations or by any other law than its own. In other words, the question before this Court is not what is the proper policy for the United States to adopt, but what is the meaning of an amendment of their constitution, and the constitution must be interpreted, as we think, by the light of the principles of our own law and not by the law of other countries or the law of nations. "*The laws of the United States determine what persons shall be regarded as citizens, irrespective of such persons' pleasure or the laws or pleasure of any other government*" (State vs. Adams, 45 Iowa, 99, 101).

(c) It is conceded by the Government that this Court has never decided the question which arises upon this

appeal, but it is claimed by the Solicitor-General that the two decisions of Elk vs. Wilkins, 112 U. S., 94, and The Slaughter-House Cases, 16 Wall., 36, indicate that in the judgment of this Court a child born in the United States to alien parents is not a citizen thereof.

In the briefs of the appellant the greatest reliance seems to be placed upon the case of Elk vs. Wilkins (*supra*), in which it was held that the words of the Fourteenth Amendment, "subject to the jurisdiction thereof," referred to the time of the birth of the alleged citizen, and that if he was born a member of a distinct political community, although born within the limits of the United States, he could not be considered as born subject to the jurisdiction of the United States within the meaning of the Fourteenth Amendment. This Court therefore decided that John Elk, having been born of Indian parents, who had not abandoned their tribal relations, was at his birth a member of a distinct political community, and not then subject to the jurisdiction of the United States, and was therefore not a native-born citizen of this country and could only become a citizen thereof by naturalization.

This decision, as we understand it, simply emphasized the doctrine, long recognized in this country, that the Indians were and always had been independent nations. They were, it is true, within the geographical limits of the United States, but the different Indian Governments were considered as a nation or nations within a nation, and "were regarded and treated as foreign governments, as much so as if an ocean had separated the red man from the white" (Scott vs. Sanford, 19 How., 393, 404).

By the Eighth Section of the First Article of the Constitution it was provided that "Congress shall have power * * * to regulate commerce with foreign nations, and among the several States *and with the Indian tribes.*"

In the early case of Goodell vs. Jackson, 20 Johnson's Reports, 693, 712, it is said:

"Though born within our territorial limits, the Indians are considered as born under the dominion of their tribes. They are not our subjects, born within the purview of the law, because they are not born in obedience to us. They belong, by birth, to their own tribes, and these tribes are placed under our protection and dependent upon us; but still we recognize them as national communities."

In other words, the Elk case simply decided that an Indian, who himself voluntarily abandoned his tribal relations and became a member of the general body of the inhabitants of this country, occupied the same position as any other emigrant or alien, and could not insist that he had any other or greater rights because his place of birth was geographically within the limits of the United States. As Chief Justice TANEY said: "If an individual should leave his nation or tribe and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people" (Scott vs. Sanford, 19 How., 393, 404).

The Elk case is in no way similar to the case at bar, and would seem to have little bearing upon the question of whether an alien's children born in the United States are citizens thereof. The Indian Elk was not in the position of Wong Kim Ark, but of Wong Kim Ark's father. They were both alien residents of this country.

A parallel situation to that of the appellee would have been the question of the citizenship of any children which might have been born to Elk after he had abandoned his tribe and become an alien resident of the United States.

No such question is directly decided by the Supreme Court in Elk vs. Wilkins, but in the opinion of Mr. Justice GRAY the case of United States vs. Elm, 23 Int. Rev. Rec., 419, was referred to with apparent approval.

In this latter case, which was decided by Judge

WALLACE, Circuit Judge of the Northern District of New York, the Indian, Elm, occupied the same position which children born to Elk after he had left his tribe would have held, and which Wong Kim Ark now holds, and it was decided that he was a citizen of the United States by reason of his birth.

The opinion of the Court in U. S. vs. Elm was in part as follows:

"It is not enough to confer citizenship on the defendant that he was born in the United States, it must also appear that he was 'subject to the jurisdiction thereof' within the meaning of the Fourteenth Amendment.

"In a general sense, every person born in the United States is within the jurisdiction thereof while he remains in the country. *Aliens, while residing here, owe a local allegiance, and are equally bound with citizens to obey all general laws for the maintenance of peace and order which do not relate specially to our own citizens, and they are amenable to the ordinary tribunals of the country.*"

Judge WALLACE then enumerates the classes of people in the United States who are not "subject to the jurisdiction thereof" and refers to the children of ambassadors and to Indians who maintain their tribal relations and are therefore regarded as "distinct political communities." He afterwards goes on as follows:

"If defendant's tribe continued to maintain its tribal integrity and he continued to recognize his tribal relations, his status as a citizen would not be affected by the Fourteenth Amendment; but such is not his case. His tribe has ceased to maintain its tribal integrity, and he has abandoned his tribal relations, as will hereafter

appear, and because of these facts * * * he is a citizen within the meaning of the Fourteenth Amendment."

The only reasonable interpretation of Elk vs. Wilkins *(supra)* is that it decided one question only, viz: that a man born to parents, who were members of an Indian tribe at the time of his birth, was not at his birth "subject to the jurisdiction" of the United States, and was not therefore by reason of such birth a citizen thereof. This decision goes no further. If any other inference or conclusion could properly be drawn from this case, it would be that this Court, by its approval of United States vs. Elm, indicated that John Elk's children, born after he had left his tribe, and John Elk himself, if he had been born subsequent to the abandonment of their tribal relations by his parents, would have been citizens of the United States.

We therefore submit that Elk vs. Wilkins *(supra)* is no authority either for or against the proposition that a man born in the United States to alien parents resident therein is a citizen thereof.

There is nothing in the decision itself of the Slaughter House Cases, 16 Wall., 36, which would tend to show that this Court had in mind the question now before it, except the following statement (p. 73), made without any previous argument or reference to any authority :

> "The phrase 'subject to its jurisdiction' was intended to exclude from its operation children of ministers, consuls and citizens or subjects of foreign states born within the United States."

These words were *obiter dicta*, and whatever force or value they may have, in the opinion of the counsel for the Government, is certainly weakened by the fact that Mr. Justice MILLER, in the very next paragraph (p. 74), said :

> "Not only may a man be a citizen of the United States without being a citizen of a State, but an important element is necessary to convert the former into the latter. He must reside within the State to make him a citizen of it, *but it is only necessary that he should be born * * * in the United States to be a citizen of the Union.*"

This Court did not seem to think that what was said in the Slaughter House cases was to be considered as in any way a decision upon the present question, for in the subsequent case of Minor vs. Happersett, 21 Wall., 162–167, the Court speaking by Chief Justice WAITE declined to express an opinion upon the precise question involved in this case and said :

> "Some authorities go further and include as citizens children born within the jurisdiction without reference to the citizenship of their parents; as to this class there had been doubts, but never as to the first. For the purposes of this case it is not necessary to solve these doubts. It is sufficient for everything we have now to consider that all children born of citizen parents within the jurisdiction, are themselves citizens."

The examination of these cases of Elk vs. Wilkins and the Slaughter House Cases would seem to show that this Court has never considered whether birth in the United States of alien parents resident therein makes a man a citizen thereof, and to assist the Court in arriving at any conclusion upon this question it will be necessary to resort to some other source than its own decisions.

POINT I.

Wong Kim Ark at the time of his birth was "subject to the jurisdiction" of the United States within the meaning of the words as used in the Fourteenth Amendment to the Constitution.

In considering this question it will not be without advantage to see at the outset just what the situation of the father of Wong Kim Ark was in this country at the time his son was born and what his relations were to this government.

He was, as appears by the agreed statement of facts, a subject of the Emperor of China, having a "permanent domicile and residence" in California, and the first inquiry which suggests itself is whether his position is in any way different from that of other aliens residing in the United States.

Prior to the passage of the Act of Parliament of 33 Vict., Ch. 14, a person born a British subject was not permitted to throw off or in any way escape from his allegiance to the crown. Once a subject of the King of Great Britain, he was always a British subject.

As was said by Mr. Stanbery in Warren's Case, 10 Opin. Atty. Gen., 319, 322:

> "According to English law, perfectly well established, a native-born citizen of Great Britain does not become an alien by expatriation or abjuration of his allegiance, or by being clothed with a new allegiance in a foreign country."

In Cockburn on Nationality, at page 63, will be found the following:

> "At variance in this respect with the laws of all other civilized nations, the law of England

> * * * asserts, as an inflexible rule, that no British subject can put off his country or the natural allegiance which he owes to the Sovereign—even with the assent of the Sovereign; in short, that natural allegiance cannot be got rid of by anything less than an Act of the Legislature, of which it is believed no instance has occurred."

In Deck vs. Deck, 2 Sw. & Tr., 90, the question was as to the Court's jurisdiction over a matrimonial cause in which the plaintiff was an English woman, and the defendant a natural-born English subject, domiciled in the United States. The Court pronounced for the jurisdiction upon the ground that the defendant, "being a natural-born English subject, could not shake off his liability to the authority of the laws of his native country" (Syllabus).

The subject of Great Britain, therefore, who became a permanent resident of the United States was not permitted by the country of his birth to become the subject of any other nation. Was it, however, ever doubted that, though he failed to become naturalized, his children born to him here, were born within the jurisdiction of the United States? Did it ever occur to any one that a child so born was considered by this Government as born within the jurisdiction of Great Britain and a subject of the Queen?

The Courts of Great Britain have never so held. An application was made in the case of *In re* Bourgoise, 41 Ch. Div., 310, for the appointment of a guardian of two infant children. It appeared that the father of the children, a Frenchman, had been naturalized in England and was there married to an Englishwoman. He afterwards returned to France, and the children in question were born there. The application was denied for the reason that, among other things, the petitioners were French subjects by the mere fact of their birth. Lord Justice COTTON said, at page 319:

> "They were the children of an Englishwoman who married a Frenchman who obtained naturalization here; but they were born abroad, and *prima facie*, according to the laws of England, and I suppose according to the law of all civilized countries, that makes them subjects of the French State. If they had been born in England they would, without any act of Parliament, have been subjects of the English Crown."

It has been held by this Court in Yick Wo vs. Hopkins, 118 U. S., 356, that the Chinese race is within the protection of the Fourteenth Amendment to the Constitution, and that Chinamen are entitled to the equal protection of the laws of every State. If one portion of this Fourteenth Amendment includes within its scope and meaning the Chinese race, it is not clear why the same people do not come within the terms of another portion of the same amendment.

The father of Wong Kim Ark had an unquestionable right to the protection of the laws of this country as against the citizens or other inhabitants thereof, but, further than that, he had a right to invoke the aid of this nation against the Emperor of China, whose subject he was by birth. This is the doctrine of this Court, which has said:

> "By the law of nations, doubtless, aliens residing in a country with the intention of making it a permanent place of abode acquire, in one sense, a domicile there; and, while they are permitted by the nation to retain such a residence and domicile, are subject to its laws, *and may invoke its protection against other nations*" (Chinese Cases, 149 U. S., 698–724).

In return for this protection the father of Wong Kim Ark owed allegiance to the United States—that is to say, he owed obedience to them, and the only obedience possible in a republic is obedience to its laws.

The father of the appellee being subject to the jurisdiction of the United States in the sense that he could invoke their protection against the country of his origin and owed obedience to their laws, it is not clear what further could be meant by these words, and it would seem that Wong Kim Ark's father was, while in the United States, subject to their jurisdiction.

In Radich vs. Hutchins, 95 U. S., 210, the plaintiff was an alien resident in the Southern States at the time of the war and a subject of the Emperor of Russia. He brought an action to recover certain money and property which had been paid by him to the Confederate Government for the privilege of exporting certain cotton. The defendant demurred, and the demurrer was sustained. Upon appeal to this Court the judgment below was affirmed upon the ground that the transaction was "fatally tainted," inasmuch as the plaintiff had assisted the Southern States "in their war against the Government and authority of the United States." Upon the question of the allegiance of a resident alien, the Court said at page 211:

> "If at the time the transaction took place which has given rise to the present action the plaintiff was a subject of the Emperor of Russia, as he alleges, that fact cannot affect the decision of the case, or any question presented for our consideration. He was then a resident of the State of Texas, and engaged in business there. As a foreigner domiciled in the country, he was bound to obey all the laws of the United States not immediately relating to citizenship, and was equally amenable with citizens to the penalties prescribed for their infraction. He owed allegiance to the government of the country so long as he resided within its limits, and can claim no exemption from the statutes passed to punish treason, or the giving of aid and comfort to the insurgent States."

In Carlisle vs. United States, 16 Wall., 147, it was decided that British subjects resident in the Southern States during the War of the Rebellion owed allegiance to the United States and were subject to prosecution for violation of the laws of the United States against treason and for giving aid and comfort to the rebellion. This Court, in its opinion, discusses at length what is meant by "allegiance," and says at page 154:

> "The claimants were residents in the United States prior to the commencement of the rebellion. They so allege in their petition; they were, therefore, bound to obey all the laws of the country, not immediately relating to citizenship, during their sojourn in it; and they were equally amenable with citizens for any infraction of those laws. 'The rights of sovereignty,' says Wildman in his Institutes on International Law, 'extend to all persons and things not privileged that are within the territory. They extend to all strangers therein, not only to those who are naturalized and to those who are domiciled therein, having taken up their abode with the intention of permanent residence, but also to those whose residence is transitory. All strangers are under the protection of the sovereign while they are within his territories, and owe a temporary allegiance in return for that protection.'
>
> "By allegiance is meant the obligation of fidelity and obedience which the individual owes to the government under which he lives, or to his sovereign in return for the protection he receives. It may be an absolute and permanent obligation, or it may be a qualified and temporary one. The citizen or subject owes an absolute and permanent allegiance to his government or sovereign, or at least until, by some open and and distinct act, he renounces it and becomes a

> citizen or subject of another government or another sovereign. The alien, whilst domiciled in the country, owes a local and temporary allegiance, which continues during the period of his residence.
>
> "This obligation of temporary allegiance by an alien resident in a friendly country is everywhere recognized by publicists and statesmen. In the case of Thrasher, a citizen of the United States resident in Cuba, who complained of injuries suffered from the government of that island, Mr. Webster, then Secretary of State, made, in 1851, a report to the President in answer to a resolution of the House of Representatives, in which he said: 'Every foreigner born residing in a country owes to that country allegiance and obedience to its laws so long as he remains in it as a duty upon him by the mere fact of his residence, and that temporary protection which he enjoys, and is as much bound to obey its laws as native subjects or citizens. This is the universal understanding in all civilized states, and nowhere a more established doctrine than in this country.' And again: 'Independently of a residence with intention to continue such residence; independently of any domiciliation; independently of the taking of any oath of allegiance or of renouncing any former allegiance, it is well know that, by the public law, an alien or a stranger born, for so long a time as he continues within the dominions of a foreign government, owes obedience to the laws of that government, and may be *punished for treason* or other crimes as a native-born subject might be, unless his case is varied by some treaty stipulation.'"

In Hall's International Law, page 204, is the following:

> "During the civil war in the United States the British Government showed itself willing that foreign countries should assume to themselves a very liberal measure of rights in this direction over its subjects. Lord Lyons was instructed 'that there is no rule or principle of international law which prohibits the government of any country from requiring aliens, resident within its territories, to serve in the militia or police of the country, or to contribute to the support of such establishments'; and, though objection was afterwards taken to English subjects being compelled 'to serve in the armies in a civil war, where, besides the ordinary incidents of battle, they might be exposed to be treated as rebels and traitors in a quarrel in which, as aliens, they would have no concern,' it was at the same time said that the Government 'might well be content to leave British subjects voluntarily domiciled in a foreign country, liable to all the obligations ordinarily incident to such foreign domicile, including, when imposed by the municipal law of such country, service in the Militia or National Guard or local police, for the maintenance of internal peace and order, or even, to a limited extent, for the defense of the territory from foreign invasion.'"

Whether Wong Kim Ark was himself at the time of his birth subject to the jurisdiction of the United States does not depend upon whether his father was or not, but we take it that it is of some importance in this case that the father of Wong Kim Ark was, at the time his son was born, subject to the jurisdiction of the United

States within any plain construction of these words, and under the authorities cited could have been tried for treason or drafted into the armies of the United States to defend the country from a foreign invasion. He certainly was not a member of any nation which was within the limits of the United States, and he was not subject to any other political jurisdiction.

This Government has recognized the Indian tribes as independent political communities, because they were the original inhabitants of the country, but it has never extended this doctrine so far as to say that a foreign country may establish within our borders an independent political community. If the doctrine advanced by the Solicitor-General should prevail, then we should have independent Chinese, English and German kingdoms within our boundaries, and the children born in these communities would remain English, German or Chinese subjects, incapable even of naturalization, as our law stands to-day. The Monroe Doctrine has received the most vigorous support of this Government since it was first advanced, but would seem to be entirely nullified by the doctrine the Solicitor-General now asks this Court to declare to be the law of the United States. If independent political communities can be established by foreign nations within our own country itself, it would hardly seem worth while to pay attention to the establishment of any such community in South or Central America.

We think the counsel for the Government have been misled by the decision of the Court in Elk vs. Wilkins, 112 U. S., where it was said that the words "subject to the jurisdiction" of the United States meant "subject to the political jurisdiction thereof." All that was then intended was that the Indians were independent nations, and that any tribe of Indians was as distinct a political community as England, and that the political jurisdiction over the Indians, so long as they held to their tribal relation, was in their own nation, just as

England had jurisdiction over the people of Great Britain. They were considered a nation within a nation. It can hardly, however, be seriously argued that each unnaturalized Englishman, Scotchman or Frenchman in this country is, while he remains here, within the political jurisdiction of England or France.

Political jurisdiction of a nation is exercised within its own boundaries, and is not tolerated within the dominions of another country. Each nation must take care of the people who live in it, and cannot for a moment recognize the right of another nation to exercise a political jurisdiction within its limits. The position of the Indians is special, and the reasons for it have been previously stated.

Putting aside the question of whether the father of Wong Kim Ark was "subject to the jurisdiction" of the United States while he resided here, we then come to the independent consideration of the status of the appellee himself. His father may or may not have been subject to the jurisdiction of this country, although we think we have shown that he was, but the question of the citizenship of Wong Kim Ark rests on an entirely different basis. A man cannot inherit his citizenship from his father as he does his property. It is something between himself and the country of his birth, and in no way connected with the relations of the family as distinct from the State. As Mr. Bates, then Attorney-General, said in 10 Opin. of Atty.-Gen., 382, 399: "It is an error to suppose that citizenship is ever hereditary. It never 'passes by descent.' It is as original in the child as it was in his parents. It is always either born with him or given to him directly by law."

In McKay vs. Campbell, 2 Sawy., 118, the syllabus is as follows:

> "By the common law a child born within the allegiance of the United States is born a subject

> thereof, without reference to the political status or condition of its parents."

It is admitted that Wong Kim Ark was born in the United States, and has lived here ever since. The only question is whether he comes within the second condition of perfect citizenship required by the Fourteenth Amendment, and was "subject to the jurisdiction" of the United States at his birth.

As was said in Jones vs. McMasters, 20 How., 8, 20, *mutatis mutandis* (the italicised words alone are our own):

> "The *appellee* was born under the dominion of the *American* Republic, and has lived under it ever since *his* birth, and beyond all question, therefore, is a citizen of that Government owing it allegiance, which has never been interrupted or changed."

At the time of his birth Wong Kim Ark was entitled to the protection of the United States, and in return owed to them allegiance. The difficulty is perhaps with the meaning of the word "allegiance," but it is certainly not easy in a Republic to give it any other meaning than obedience to the laws of the Republic, which are the expressed will of the people, who are the sovereign.

> "The term 'citizen' as understood in our law is precisely analagous to the term subject in the common law, and the change of phrase has entirely resulted from the change of government. The sovereignty has been transferred from one man to the collective body of the people, and he who before was a 'subject of the King' is now 'a citizen of the State'" (State vs. Manuel, 3 Dev. & Battle's N. C. R., 26).

This Court has said that "By allegiance is meant

the obligation of fidelity and obedience which the individual owes to the Government under which he lives, or to his sovereign in return for the protection he receives" (Carlisle vs. United States, 16 Wall., 147, 154). In the case of Minor vs. Happersett, 21 Wall., 162, 166, Chief-Justice WAITE in speaking of allegiance, said: "Allegiance and protection are, in this connection, reciprocal obligations. The one is a compensation for the other; allegiance for protection and protection for allegiance." According to Mr. Justice STORY in Inglis vs. Trustees of the Sailor's Snug Harbor, 3 Pet., 99, 155, "allegiance is nothing more than the tie or duty of obedience of a subject to the sovereign under whose protection he is; *and allegiance by birth is that which arises from being born within the dominions and under the protection of a particular sovereign.*"

If, then, a man is "subject to the jurisdiction" of the United States when he owes to them allegiance and is entitled to their protection, it would seem that both Wong Kim Ark and his father come within the requirement of the Fourteenth Amendment, and were, at the time of the former's birth, within the territory of the United States, "subject to the jurisdiction thereof."

It may be said that, under this construction of these words, they were unnecessary and there was no reason for their insertion in the Constitution. The other side may say that, if our argument is correct, it was sufficient to provide that any man born in the United States was a citizen thereof, as it follows that a man by the mere fact of his birth in this country owes the Government allegiance and is entitled to its protection, and is therefore "subject to its jurisdiction," as we interpret these words.

The purpose, however, of this clause was to except that class which had always been previously excepted from citizenship in a State by the mere fact of birth, viz.: the children of foreign ambassadors, who, under a fiction of law, were deemed the subjects of the country of their parents on the theory that "an Ambassador's house is reputed part of his Sovereign's realm," and the American Indians who, though born within the boundaries of our country, were deemed independent nations.

In the first section of the act of Congress approved March 26, 1790 (1 Stat. at Large, 103), it is enacted:

> "That any alien being a free white person, who shall have resided within the limits and *under the jurisdiction of the United States* for the term of two years, may be admitted to become a citizen thereof."

We take it that no difference in meaning can be assigned to the clause "under the jurisdiction of the United States," found in the naturalization act, and the words of the Fourteenth Amendment, "subject to the jurisdiction thereof." The words are used in the same connection in both places. In each case they have reference to a condition precedent to citizenship. A man, to be entitled to become a citizen by naturalization, must have been "under the jurisdiction of the United States" for two years. Only those born within the territory of the United States, and "subject to the jurisdiction thereof," can be citizens under the Constitution by reason of their birth.

The applicant for a certificate of naturalization is considered to have been "under the jurisdiction of the United States" during his alienage because he owes to this country allegiance and obedience to its laws and is entitled to its protection. The purpose of the words was undoubtedly only to except foreigners in the diplomatic service, who were considered subjects of the countries they represented and not "under the jurisdiction of the United States."

If any other interpretation was put upon these words as used in the Naturalization Act and they were supposed to except the alien residents of this country upon the ground that such alien residents were not "under the

jurisdiction of the United States," it is not plain how there could ever have been any practical application of this law. These words are still found in the Revised Statutes relating to naturalization (U. S. Rev. Stat., § 2165).

It is a little difficult to see what distinction can be drawn between the two cases. If an alien who resides in the territory of this country is "under the jurisdiction of the United States" for the purposes of naturalization, it would seem to follow that a man born here and always residing here must be "subject to the jurisdiction thereof," and must have been so at his birth.

Setting aside the fact that the petitioner below is of Chinese extraction (for "we may suspect that race was the cause of the hostility, but it is not so averred." U. S. vs. Cruikshank, 92 U. S., 542, 556), and assuming that the appellee was the son of a German alien, who had never been naturalized (which assumption will in no way affect the legal question involved here), it would then be very clear that his father, after his long years of residence in this country, would be entitled to a certificate of naturalization and was "under the jurisdiction of the United States" within the meaning of the act. If, then, the father is "under the jurisdiction of the United States," what is it which prevents the son, with the added fact of birth in our territory, being "subject to the jurisdiction thereof?"

This exception of the children of foreign ambassadors and the kindred exception of the Indians were well known to the framers of the amendment, and it was a matter of common knowledge that the former, leaving out the question of slaves, was the only substantial exception to citizenship by reason of birth which was known to the common law. It is a matter of history that the Fourteenth Amendment, and the contemporaneous legislation known as the Civil Rights Bill, were, in the opinion of Congress at the time, but declaratory of the rule in regard to citizenship, as known to the common law. It has also been so held by the courts.

Judge Deady in McKay vs. Campbell, 2 Sawy., 118–130, said:

> "It is not to be presumed that the amendment was made to the Constitution to change the rule of the common law, but rather to declare and enforce it uniformly throughout the United States and the several States."

In Minor vs. Happersett, 21 Wall., 162, 165, Chief-Justice Waite, after saying that women were, without doubt, citizens of this country, and, after referring to the Fourteenth Amendment in support of his statement, says:

> "But in our opinion it did not need this amendment to give them that position."

In the note on page 49 of Kent's Commentaries (14th Ed.), after giving the words of the Fourteenth Amendment, it is said:

> "This seems to fix upon us the doctrine stated in the text, and derived from the principle of the common law, that all persons born within the dominions of the Crown, with hardly an exception, are to all intents and purposes British subjects."

Any debate of Congress on the Civil Rights Bill contains frequent statements that the bill is but declaratory of the common law as it already existed.

The Civil Rights Bill was approved April 9th, 1866 (14 U. S. Stat. at Large, 27), and was passed two years prior to the adoption of the Fourteenth Amendment to the Constitution. The words used therein relating to the question of citizenship are similar to those we are now seeking to define. They are as follows:

> "All persons born in the United States and not subject to any foreign power * * * are hereby declared to be citizens of the United States."

We do not see what substantial distinction can be drawn between the words of the Civil Rights Bill and the clause of the Fourteenth Amendment. In the one case the condition of citizenship is birth "not subject to any foreign power," and in the other it is birth "subject to the jurisdiction" of the United States.

The Civil Rights Bill was vetoed by President Johnson, and his interpretation of these words perhaps goes as far to show what they were supposed to mean at the time they were used as any other. It was very clear to him that a man in the position of Wong Kim Ark was not subject to the jurisdiction of any foreign power, and was subject to the jurisdiction of the United States, for he says in his veto message (Congr. Globe, 39th Congress, p. 1679):

> "By the first section of the bill all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States. *This provision comprehends the Chinese of the Pacific States*, Indians subject to taxation, the people called Gypsies, as well as the entire race designated as blacks, persons of color, negroes, mulattoes and persons of African blood. *Every individual of those races born in the United States is, by the bill, made a citizen of the United States.*"

In United States vs. Rhodes, 1 Abb. U. S. Rep., 28, the constitutionality of the Civil Rights Bill came up for decision in a Federal Court, apparently, for the first time. Mr. Justice SWAYNE in his opinion said at pages 38, 40 and 41:

> "The act of Congress confers citizenship. Who are citizens, and what are their rights? The Constitution uses the words 'citizen' and 'natural-born citizens'; but neither that instrument nor any act of Congress has attempted to define their meaning. * * * All persons born in the allegiance of the king are natural-born subjects, and all persons born in the allegiance of the United States are natural-born citizens. Birth and allegiance go together. Such is the rule of the common law, and it is the common law of this country as well as of England. There are two exceptions, and only two, to the universality of its application. The children of ambassadors are in theory born in the allegiance of the powers the ambassadors represent, and slaves in legal contemplation are property, and not persons. * * *
>
> "'Citizens under our Constitution and laws means free inhabitants born within the United States or naturalized under the laws of Congress.'
>
> "*We find no warrant for the opinion that this great principle of the common law has ever been changed in the United States. It has always obtained here with the same vigor, and subject only to the same exceptions, since as before the Revolution.*"

As Lord COCKBURN says in his book on Nationality, page 7:

> "By the common law of England every person born within the dominions of the Crown, no matter whether of English or of foreign parents, and, in the latter case, whether the parents were settled or merely temporarily sojourning in the country, was an English subject, save only the children of foreign Ambassadors (who were ex-

cepted because their fathers carried their own nationality with them), or a child born to a foreigner during the hostile occupation of any part of the territories of England."

At page 12 of the same work is the following statement:

> "The law of the United States of America agrees with our own. The law of England as to the effect of place of birth in the matter of nationality became the law of America as part of the law of the mother country, which the original settlers carried with them."

If at common law every person born in a country was a citizen thereof with the single exception of the children of foreign ambassadors, and if the Fourteenth Amendment is but declaratory of the common law, it is difficult to see how any other exception than that found in the common law, was intended by the words "subject to the jurisdiction."

The case of Elk vs. Wilkins, 112 U. S., 94, does not, under any true interpretation, extend the meaning of these words. The argument, in the mind of the Court, was simply that children of ambassadors were excepted from the class of citizens by right of birth within the limits of the United States, because, by a fiction, they were deemed subjects of another country, and that likewise the Indians, though born within our geographical boundaries, were by reason of a peculiar environment subjects of another nation within our own, as we ourselves had considered and treated them for years.

We now come to the construction of this amendment by the lower Courts, and the most important case is that of *In re* Look Tin Sing, 10 Sawy., 353, decided by Mr. Justice FIELD. The same question was presented in this case in precisely the same way in which it arises here, and it was then held that a

Chinaman born in the United States of parents not engaged in any diplomatic capacity was a citizen thereof. The opinion of Mr. Justice FIELD was concurred in by Judges SAWYER, SABIN and HOFFMAN. At page 359 the Court said:

> "The jurisdiction of the United States over him at the time of his birth was exclusive of that of any other country."

This is the idea which we have before sought to convey, viz.: that this country could not permit another nation to claim jurisdiction of a man born here. It is, perhaps, conceivable that this Government might in the future by some law permit the individual himself to elect, when of age, what nation he chose for his country, but it is out of the question for our Government to allow another government to say to what country a person born within our territory belongs. That is a national and not an international question, and no nation that we know of has gone so far as to suffer the persons born and still residing in its territory to be claimed by a foreign nation as its citizens. A man born in the United States is, therefore, a citizen of the United States (in the absence of any statute permitting him to elect what country he shall call his own) "unless perchance he should be a citizen of the world. The latter is a creature of the imagination and far too refined for any republic of ancient or modern times" (Talbot vs. Janson, 3 Dallas, 133, 153).

The United States, as well as every other nation, have long recognized the doctrine that they have no jurisdiction outside of their own boundaries, and that a person born in a foreign country is born outside of their jurisdiction and within the jurisdiction of the country of birth. In Section 1993 of the Revised Statutes it is enacted that "all children heretofore born or hereafter born out of the limits *and jurisdiction of*

the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States." By this section it is understood that all children of citizens born in foreign countries shall be deemed, so far as this country is concerned, citizens thereof, but by its express words it is stated that such persons are born *out of its jurisdiction*. If a person born of our citizens in the territory of a foreign power is born out of our jurisdiction, it is not plain why a person born within our limits of foreign citizens is not born out of the jurisdiction of the country of his parents. If born out of the jurisdiction of every country than the United States, then he must have been born "subject to the jurisdiction" of the United States.

The argument that, if the United States have passed a law declaring that children of our citizens born in foreign countries are citizens of the United States, they should then pass a law providing that children of foreigners born in this country are citizens of the country of their parents, can, of course, not be considered by this Court. The question here is what the people of the United States have done, and not what they might or ought to do; and no one doubts the right of this nation to so legislate, if its people should see fit, but so far it has not done so.

In the case of *ex parte* Chin King, 13 Sawy., 333, it was again held by Judge DEADY "that a child born in the United States of Chinese parents is, by the rule of the common law and the Fourteenth Amendment, a citizen of the United States" (syllabus).

Judge DEADY made a similar decision in the case of Yung Sing Hee, 36 Fed. Rep., 437, 438, saying that the petitioner "was born within or subject to the jurisdiction of the United States, and is, therefore, a citizen thereof."

The Circuit Court of Appeals for the Ninth Circuit in Gee Fook Sing vs. United States, 49 Fed. Rep., 146,

came to the same conclusion, Judge HANFORD writing the opinion.

Perhaps the latest case on this subject is Benny vs. O'Brien, 32 Atlantic Reporter, 696. The question before the Supreme Court of New Jersey was "whether a person born in this country of alien parents who, prior to his birth, had their domicile here, is a citizen of the United States," and in a very well considered opinion it was held that he was, the Court saying, at page 697:

> "Two facts must concur—the person must be born here, and he must be subject to the jurisdiction of the United States according to the Fourteenth Amendment, which means, according to the Civil Rights Act, that the person born here is not subject to any foreign power. Allan Benny, whose parents were domiciled here at the time of his birth, is subject to the jurisdiction of the United States, and is not subject to any foreign power. * * * Therefore Allan Benny is a citizen of the United States in virtue of his birth here of alien parents, who, at the time of his birth, were domiciled in this country."

In Fong Yue Ting vs. The United States, 149 U. S., 698, 716, this Court apparently approved of the right of citizenship by reason of birth in the United States, for it said:

> "Chinese persons *not born in this country* have never been recognized as citizens of the United States."

In Comitis vs. Parkerson, 56 Fed. Rep., 556, the Court decided that a native-born woman, by her marriage to an unnaturalized alien resident, did not cease to be a citizen of the United States. In speaking of the position of her husband in this country, Judge BILLINGS said (p. 563):

"By virtue of his settlement and residence here the Constitution makes his children citizens of the United States."

The Solicitor-General has referred to a decision by Secretary Bayard in the Greisser case (2 Whart. Int. Dig., 399), in which it appeared that Richard Greisser, an applicant for a passport, was born in Ohio in 1867, of a German subject domiciled in Germany. He was taken from the United States by his parents when two years old and had always lived in Germany or Switzerland. The passport was denied to him, and Secretary Bayard said:

"The son [the applicant], therefore, *so far as concerns his international relations*, was at the time of his birth of the same nationality as his father. Had he remained in this country till he was of full age and then elected an American nationality, he would, on the same general principles of international law, be now clothed with American nationality."

This is rather a dangerous authority for the Government to rely on here, as under it Wong Kim Ark would be held to be a citizen of the United States, he having remained here until twenty-one and having elected an American nationality. But, aside from that aspect of the Greisser case, Mr. Bayard first considered the question before him entirely from an international point of view. He then said "that the law of nations, as to particular matters, may be, as to such particular countries, either expanded or contracted by local legislation," and inquired as to how far the international rule had been affected by the legislation of the United States. He referred to Section 1992 of the Revised Statutes (Civil Rights Bill) and the Fourteenth Amendment of the Constitution, and without one word of reasoning or the citation of a single authority said that Richard Greisser "was on his birth

'subject to a foreign power,' and 'not subject to the jurisdiction of the United States.'"

Just why and in what way Greisser was subject to a foreign power Mr. Bayard does not tell us. Was he not still looking at the question from the standpoint of the law of nations? Had he freed himself from the view, which many nations have adopted as in their opinion the most liberal, that the nationality of a child is to be determined by the nationality of his father, and not by the place of his birth. It is not plain how Greisser, when born, was in any true sense not "subject to the jurisdiction of the United States." If the German Government had sent its officers to Ohio to bring the father of Greisser, or Greisser himself, back to Germany, and compel him to join the German army, would it have been permitted? Would they not both, father and son, immediately upon their seizure, have been released by our courts upon a writ of *habeas corpus?* Would not both have been held to have been within the safeguards of the Constitution and entitled to the protection of the laws of this country (Chinese Cases, 149 U. S., 698, 716, 724)? Internationally, and perhaps theoretically speaking, Greisser and his father may have been "subject to a foreign power," but locally and practically they were subject to the jurisdiction of the United States.

Whenever international law conflicts with the local law of a particular country, "the law of nations, as to particular matters, may be, as to such particular countries, either expanded or contracted by local legislation" (Secretary Bayard, *supra*). This principle our government would be the first to adopt should any foreign country send its emissaries to our shores for the purpose of compelling those of its subjects who had emigrated to the United States and had not become naturalized or their children born on our soil, to return to the country of their origin. Even enmity to the Chinese race would not permit the creation of any such dangerous precedent.

If this case should be decided in favor of the Government, and it should be held that children born in this country to an alien resident are not "subject to the jurisdiction of the United States" and are "subject to a foreign power," what reply can the Secretary of State make to the Government of Russia or Germany or England in the case suggested? Must he say: I admit that the highest tribunal of my country has decided that the men you are taking away by force to join your armies are not 'subject to the jurisdiction' of my government, and are subject to the jurisdiction of yours, but that decision does not mean that they are subject to the jurisdiction of your government in the sense that obedience can be compelled to that government and its laws, or that they are 'not subject to the jurisdiction' of my government in the sense that the protection of the Constitution and the laws of this country is withheld from them, and these men, born in this country of subjects of your government, who have been seized by your officers, must be released or the friendly relations between our two governments must cease.

Before the United States is forced to take this position, it would seem wise for the Solicitor-General not to attach too great importance to a hastily considered letter of Secretary Bayard, as it would appear that he arrived at the decision expressed by him because of his confounding the question he was then deciding with the question in its supposed international aspect, which was the subject of the first part of his letter to Mr. Winchester, the then Minister to Switzerland.

Further than that the construction put on these words of the Fourteenth Amendment by Mr. Bayard were in no way required by the case before him. It was a mere *obiter dictum*. The question raised by the facts presented to Secretary Bayard was simply whether a United States passport should be given to Greisser to enable him to travel from one European country to another under the care and protection of this Government.

It was strictly an international question and to be considered solely in that aspect.

The question was before the Hon. E. R. Hoar when Attorney-General, as to whether the children born abroad, and there residing, of citizens of the United States, were entitled to passports. He was clearly of opinion that, under our statutes, those who had applied for passports were citizens of the United States, but he seemed to doubt the propriety of this Government issuing passports to them. He said, in 13 Opin., A. G., 89, 91:

> "I understand a passport to be a certificate of citizenship. * * * But while the United States may, by law, fix or declare the conditions constituting citizens of the country within its own territorial jurisdiction, and may confer the rights of American citizens everywhere upon persons who are not rightfully subject to the authority of any foreign country or government, it is clear that the United States cannot, by undertaking to confer the rights of citizenship upon the subjects of a foreign nation, who have not come within our territory, interfere with the just rights of such nation to the government and control of its own subjects. If, therefore, by the laws of the country of their birth, children of American citizens, born in that country, are subjects of its Government, I do not think that it is competent to the United States by any legislation to interfere with that relation, or by undertaking to extend to them the rights of citizens of this country to interfere with the allegiance which they may owe to the country of their birth while they continue within its territory, or to change the relation to other foreign nations which, by reason of their place of birth, may at any time exist. The rule of the common law I understand to be that a person 'born in a

> strange country under the obedience of a strange prince or country is an alien' * * * if the applicants can receive any passport from your department it would seem that it must be a qualified one, which should state that, although they were citizens of the United States, they were only so in the qualified sense which I have indicated."

Greisser, under international law, being a citizen of Germany or of Switzerland at the time he applied for his passport just as much as a citizen of the United States, there was no reason why he should not have obtained a passport from the country where he lived. In other words, Mr. Bayard might have placed his rather lengthy decision upon the brief grounds stated by his predecessor, Mr. Evarts, when he wrote : "A child who, born in the United States to French parents, goes in his minority to France, and there remains voluntarily after he has become of full age, *may be held to have abjured his American nationality*" (2 Whart. Int. Dig., 396). That is to say, the Greisser case is not the case at bar, and the construction of the amendment of the Constitution was not requisite for its decision. Greisser at the time of his birth was a citizen of this country, but had abjured his nationality, and at the time he asked for a passport he had ceased to be a person born in the United States and subject to the jurisdiction thereof as he was at his birth, but was a person born in the United States and since become subject to a foreign power. He had expatriated himself, and was not entitled to a passport.

There is no expression of opinion, except the letter of Secretary Bayard in the Greisser case, which is contrary to the decisions cited, and we therefore have an unquestioned judicial interpretation of the Constitution acquiesced in for years. The only reason given by the counsel for the Government for now desiring to change this construction is that by international law or

Roman law, or some other law than the law of the United States, the petitioner would not be considered a citizen thereof. It is important to notice that the counsel for the Government does not claim that under international law or Roman law the appellee would not be "subject to the jurisdiction" of the United States, but simply that he would not be a citizen thereof.

The true question is whether Wong Kim Ark at the time of his birth was "subject to the jurisdiction" of this Government. If he was, it follows that he was a citizen of the United States by virtue of the Fourteenth Amendment, without regard to what constitutes a citizen under the rules of international law or any other law.

The argument of the Government and of the *amicus curiæ* is interesting but theoretical. Its tendency is to draw us away from the real question, whether a State should not determine by its own law alone who are its citizens, or, as Attorney-General Bates says in 10 Opin. of Atty-Gen., 382, 390 :

> "The discussion of this great subject of national citizenship has been much embarrassed and obscured by the fact that it is beset with artificial difficulties extrinsic to its nature. * * * And these difficulties, it seems to me, flow mainly from * * * the common habit of many of our best and most learned men * * * of testing the political status and governmental relation of our people by standards drawn from the laws and history of ancient Greece and Rome, without, as I think, taking sufficient account of the organic differences between their governments and ours."

The question who is a citizen of a country is essentially a practical one, to be approached from a practical point of view ; but counsel for the Government seem to

have forgotten the principles declared by the Court in State vs. Manuel, 4 Dev. & Battle's N. C. Rep., 20; 29, in deciding who was a citizen of North Carolina, when it said:

> "Constitutions are not themes proposed for ingenious speculation; but fundamental laws ordained for practical purposes. Their meaning once ascertained by judicial interpretation and contented acquiescence, they are laws in that meaning until the power that formed, shall think proper to change them."

The only question in the present case is as to the construction of the Constitution of the United States. This Court is asked to define the meaning of the words "subject to the jurisdiction" of the United States. It has not been clearly pointed out by counsel for the Government how International Law can control a question of national law, nor why this Court should resort to the law of nations to assist it in interpreting the law of its own country.

It is clear that a nation must have some rule by which to determine who are its citizens. Our argument is that the United States when it adopted the Fourteenth Amendment declared in favor of the simple doctrine that birth within the dominions of a country conferred the right of citizenship therein and intended only to formulate the law as it was then understood in the United States.

The argument of the Solicitor General is that this government, through the Fourteenth Amendment, intended to introduce the more modern and complicated principle of so-called international law (modern at least in the sense that it was never thought of until after the United States had declared their independence), that a child inherited the nationality of his parents, wherever he might be born, and so creating a race of people who, though born and reared

in this country, were to be deemed subjects of a foreign State, and who could not be naturalized under our law, as birth in a foreign country seems necessary to enable a person to take advantage of our Naturalization Act.

The question presented here would seem to be whether the people of the United States, by their adoption of the Fourteenth Amendment to the Constitution, intended to make that a written law which was already the unwritten law of their country, and with which they were familiar, or purposed to introduce the Roman law or the so-called Law of Nations, or more accurately speaking the statute law of some one of the countries of Europe, of which they as a body knew nothing whatever, and which was in seeming conflict with the naturalization acts already on their statute books.

We have not here to decide which is the better doctrine or whether the elective system of the Continental countries of Europe is more in accord with the progress of nations. We do not dispute the right of the people of the United States to amend the Constitution by declaring that "all persons born in the United States of alien parents, who have not been naturalized, shall be deemed citizens and subjects of the country from which their parents came, with the right when of age to become naturalized citizens of the United States." We do not undertake to say that such an amendment would or would not be an improvement upon the Constitution, as we say it stands to-day.

In the case of Tape vs. Hurley, 66 Cal., 473, the question was as to the right of a Chinese girl, who was born and had always lived in the City and County of San Francisco, to admission in the public school of the district in which she resided. The Code of California provided that: "Every school, unless otherwise provided by law, must be open for the admission of all children between six and twenty-one years of age re-

siding in the district." The Court held that she was entitled to attend the school in question, and said (p. 474):

> "As the Legislature has not denied to the children of any race or nationality the right to enter our public schools, the question whether it might have done so does not arise in this case."

So in the case at bar, the people of the United States have not denied to the children born in this country of alien parents the right of citizenship therein, nor have they passed any law declaring them to be the citizens or subjects of the country of their parents, and the question whether they might have done so does not arise in this case.

Our position is that any such discussion is foreign to the issue here, which is what is meant by the words "subject to the jurisdiction thereof," and we respectfully submit that the people of this country intended that these words should be construed in accordance with the principles of law of which they and their fathers before them had knowledge, and not in accordance with the Roman law or the law of any European country with which they were unfamiliar. In other words, they intended that the status of citizenship in the United States should be determined in accordance with the law of the United States and not upon the principles of the Roman law.

POINT II.

Wong Kim Ark is under the common law a citizen of the United States.

The Fourteenth Amendment is conceded to be simply an enactment of the law as it was then understood to exist in this country. It must, therefore, be assumed that, by the common law, birth "subject to the jurisdiction" of the United States, was the condition of citizenship therein, and it is necessary to examine the decisions prior to the adoption of the Fourteenth Amendment to ascertain what was considered under the common law a sufficient subjection to the jurisdiction of the United States to make a man a citizen thereof, and we, perhaps, cannot find a better statement of the rule than that of Mr. Justice Story, when he said, in Inglis vs. Sailors' Snug Harbor, 3 Pet., 99, 164: "*Nothing is better settled at the common law than the doctrine that the children even of aliens born in the country, while the parents are resident there, under the protection of the government, and owing a temporary allegiance thereto, are subjects by birth.*"

The great case of Lynch vs. Clarke, 1 Sand. Ch., 583, was decided in 1844, and has since remained the leading authority upon the question. The case was twice argued and the briefs of counsel are printed in full in the report of the case. They are exhaustive of the subject and very able. The decision itself is remarkable and shows a complete comprehension of the question, coupled with long and patient research.

The bill in the cause was filed by one Bernard Lynch for the purpose of obtaining a declaration that one Clarke was seized of the celebrated Congress Springs in trust for Thomas Lynch, of New York City, then deceased, and that the plaintiff was entitled to all the equitable interests which Thomas Lynch had in the property. Clarke and Thomas Lynch had been part-

ners, and obtained control of the land at Saratoga in the course of their partnership dealings. Julia Lynch was made a defendant in the suit. She was born in the City of New York in 1819. Her father was Patrick Lynch, a brother of Thomas Lynch, the partner of Clarke. Patrick Lynch was a British subject, who came to this country to live in 1815. He was never naturalized and left this country in 1819, soon after his daughter Julia was born, taking her with him. Patrick Lynch never returned to this country except on a temporary visit without his family, when he remained six months. Julia Lynch did not return to the United States until 1834, after the death of her uncle, Thomas Lynch, who was the partner of Clarke.

In her answer the defendant Julia Lynch insisted that she was a native-born citizen of the United States, and, as such, inherited all the real estate of which Thomas Lynch was seized.

In the Lynch case, therefore, the identical question was argued and decided which is presented here, viz.: Is the child born in the United States to an alien resident a citizen thereof?

The only difference between the two cases is that the appellee in the present case has always lived in the United States, whereas Julia Lynch was taken out of the country when still an infant in arms and did not return until she was fifteen years old.

It was urged in behalf of the complainant Lynch, as it is argued here, that there was no common law in the United States. The Chancellor fully and carefully considered the question from this point of view. He quoted with approval from the speech of Mr. Bayard in the House of Representatives in 1802, in which he said: "The Judges of the United States have held generally that the Constitution of the United States was predicated upon an existing common law. * * * The Constitution is unintelligible without reference to the common law. * * * Without this law the

Constitution becomes a dead letter" (p. 654), and expressed himself in the following language at page 652:

> "The Constitution of the United States, like those of all the original States, * * * presupposed the existence and authority of the common law. The principles of that law were the basis of our institutions. In adopting the State and national Constitutions * * * our ancestors rejected so much of the common law as was then inapplicable to their situation, and prescribed new rules for their regulation and government. But in so doing, they did not reject the body of the common law. They founded their respective State Constitutions and the great national compact upon its existing principles, so far as they were consistent and harmonious with the provisions of those Constitutions."

After a most careful analysis of all the authorities on the subject, it was decided that Julia Lynch was a native-born citizen of the United States, and the Chancellor said at page 663:

> "Upon principle, therefore, I can entertain no doubt, but that by the law of the United States, every person born within the dominions and allegiance of the United States, whatever were the situation of his parents, is a natural-born citizen."

In the case of State vs. Manuel, 4 Devereux & Battle's N. C. R., 20, the defendant was convicted of an assault and battery, and was sentenced to pay a fine of twenty dollars, and, it appearing to the Court that he was a free person of color and unable to pay the fine, it was ordered that the Sheriff should hire out the defendant to any person who would pay the said fine for his services for the shortest space of time. From this

judgment the defendant appealed upon the ground that the act under which he had been sentenced was in conflict with the Constitution of North Carolina.

Upon the argument of the appeal the Attorney-General insisted that it was not necessary to examine any constitutional question, for the reason that the defendant could not claim the benefit of the Constitution because he was "*not a citizen of North Carolina.*"

The Court did not agree with the Attorney-General, and expressly decided that a free person of color *if born in North Carolina* was a citizen of North Carolina. The judgment was affirmed for the reason that the Court did not think that the law under which the defendant had been sentenced was in conflict with the Constitution of the State, but upon the question which is of interest in the case at bar the views of the Court were very strong and it was held that citizenship was conferred on free persons by birth, irrespective of any other fact:

> "Whatever distinctions may have existed in the Roman law between citizens and free inhabitants, they are unknown to our institutions. Before our Revolution all free persons born within the dominions of the king of Great Britain, whatever their colors or complexion, were native-born British subjects; those born out of his allegiance were aliens. Slavery did not exist in England, but it did exist in the British colonies. Slaves were not in legal parlance persons, but property. The moment the incapacity—or disqualification of slavery was removed—they became persons, *and were then either British subjects or not British subjects, accordingly as they were or were not born within the allegiance of the British king.* Upon the Revolution, no other change took place in the law of North Carolina than was consequent upon the transition from a colony dependent on an European king to a free and sovereign state. Slaves remained slaves. British subjects in North Carolina became North Carolina freemen. Foreigners, until made members of the State, continued aliens. Slaves manumitted here become freemen, *and therefore if born within North Carolina are citizens of North Carolina, and all free persons born within the State are born citizens of the State*" (p. 24).

The opinion in State vs. Manuel was written by Judge GASTON, whom Mr. Justice SWAYNE called "one of the most able and learned Judges this country has produced" (United States vs. Rhodes, 1 Abb. U. S. Rep., 28, 42). The Supreme Court of North Carolina, in the subsequent case of State vs. Newsom, 5 Ired., 250, 253, referred to State vs. Manuel in these words: "That case underwent a very laborious investigation both by the bar and the bench. * * * The case was brought here by appeal, and was felt to be one of great importance in principle. It was considered with an anxiety and care worthy of the principle involved, and which give it a controlling influence and authority on all questions of a similar character."

In the case of the United States vs. Douglas, 17 Fed. Rep., 634, an information was filed against the master of the British bark "Eme" for bringing and landing within the port of Boston one Ah Shong, alleged to be a Chinese laborer, contrary to the Act of Congress of May 6, 1882, which made it a misdemeanor for the master of any vessel to "knowingly bring within the United States on such vessel, and to land or permit to be landed any Chinese laborer from any foreign port or place."

It appeared that Ah Shong had never been a subject or lived in the dominions of the Emperor of China, but that he had been born of Chinese parentage in the Island of Hong Kong after its cession by China to Great Britain in 1842, and that he was and had been from his birth a subject of the Queen of Great Britain.

judgment the defendant appealed upon the ground that the act under which he had been sentenced was in conflict with the Constitution of North Carolina.

Upon the argument of the appeal the Attorney-General insisted that it was not necessary to examine any constitutional question, for the reason that the defendant could not claim the benefit of the Constitution because he was "*not a citizen of North Carolina.*"

The Court did not agree with the Attorney-General, and expressly decided that a free person of color *if born in North Carolina* was a citizen of North Carolina. The judgment was affirmed for the reason that the Court did not think that the law under which the defendant had been sentenced was in conflict with the Constitution of the State, but upon the question which is of interest in the case at bar the views of the Court were very strong and it was held that citizenship was conferred on free persons by birth, irrespective of any other fact:

> "Whatever distinctions may have existed in the Roman law between citizens and free inhabitants, they are unknown to our institutions. Before our Revolution all free persons born within the dominions of the king of Great Britain, whatever their colors or complexion, were native-born British subjects; those born out of his allegiance were aliens. Slavery did not exist in England, but it did exist in the British colonies. Slaves were not in legal parlance persons, but property. The moment the incapacity—or disqualification of slavery was removed—they became persons, *and were then either British subjects or not British subjects, accordingly as they were or were not born within the allegiance of the British king.* Upon the Revolution, no other change took place in the law of North Carolina than was consequent upon the transition from a colony dependent on an European king to a free and sovereign state. Slaves remained slaves. British subjects in North Carolina became North Carolina freemen. Foreigners, until made members of the State, continued aliens. Slaves manumitted here become freemen, *and therefore if born within North Carolina are citizens of North Carolina, and all free persons born within the State are born citizens of the State*" (p. 24).

The opinion in State vs. Manuel was written by Judge GASTON, whom Mr. Justice SWAYNE called "one of the most able and learned Judges this country has produced" (United States vs. Rhodes, 1 Abb. U. S. Rep., 28, 42). The Supreme Court of North Carolina, in the subsequent case of State vs. Newsom, 5 Ired., 250, 253, referred to State vs. Manuel in these words: "That case underwent a very laborious investigation both by the bar and the bench. * * * The case was brought here by appeal, and was felt to be one of great importance in principle. It was considered with an anxiety and care worthy of the principle involved, and which give it a controlling influence and authority on all questions of a similar character."

In the case of the United States vs. Douglas, 17 Fed. Rep., 634, an information was filed against the master of the British bark "Eme" for bringing and landing within the port of Boston one Ah Shong, alleged to be a Chinese laborer, contrary to the Act of Congress of May 6, 1882, which made it a misdemeanor for the master of any vessel to "knowingly bring within the United States on such vessel, and to land or permit to be landed any Chinese laborer from any foreign port or place."

It appeared that Ah Shong had never been a subject or lived in the dominions of the Emperor of China, but that he had been born of Chinese parentage in the Island of Hong Kong after its cession by China to Great Britain in 1842, and that he was and had been from his birth a subject of the Queen of Great Britain.

The Circuit Court for the District of Massachusetts held that the Chinese Exclusion Acts only related to subjects of the Government of China, and that, therefore, Ah Shong, *being a British subject by reason of his birth in the territory of Great Britain*, was not within the purview of the Act of Congress which excluded Chinese laborers from the United States.

In the subsequent case of *In re* Ah Lung, 18 Fed. Rep., 28, it was held by Mr. Justice FIELD that the Chinese Exclusion Act did apply to a Chinaman who was a British subject by reason of his birth in the Island of Hong Kong after its cession to Great Britain. There is, however, no suggestion in his opinion that Ah Lung was not, at the time of his application for permission to enter the United States, a British subject; and the ground of the decision is that the language of the Exclusion Act was "sufficiently broad and comprehensive to embrace all Chinese laborers without regard to the country of which they may be subjects" (p. 32).

These two cases are of great interest in that they deal with the subject from an impersonal point of view and as it applies to another country. It is seemingly decided as a question upon which there can be no doubt that a man born in English territory of Chinese descent is a British subject. If a child born of Chinese parents in English territory is a British subject, it would seem that a child born of Chinese parents on the soil of the United States was an American citizen. That is to say, it is assumed in the cases just referred to that, under the common law, birth within the dominions of a nation confers citizenship therein, and that a man so born is subject to its jurisdiction.

In the case of Lyndon vs. Danville, 28 Vt., 809, the question was as to the proper settlement of a pauper. The facts were as follows: One Ralph Chamberlin, the father of the pauper, was born in Danville, Vermont, in 1800, and had a legal settlement in that town. He married in 1822, and thereafter moved to Stanstead, in the province of Canada East, and there remained until his

death in 1844. The pauper was born in Stanstead in 1826, and, when five or six years old, was brought to Lyndon, Vermont, by his mother. The pauper lived most of his life in Lyndon, and was removed in 1853 to Danville, on the ground that he was a proper charge upon the latter town, as having a derivative settlement there from his father and grandfather. The County Court held that the pauper had a legal settlement in the town of Danville. To this ruling the said town excepted and the exception was sustained upon the ground that the pauper, by reason of his birth in Canada, was an alien and could, therefore, derive no settlement from his father. The Court said at p. 816:

> "The pauper, during his life, could be regarded only as an alien, and subject to all the incapacities of one. He was under no natural allegiance to this country, and the correlative duty of protection was not due from this country to him, except such as is due to all aliens during the time they are within its jurisdiction. * * * Judge SWIFT (2 Swift's Dig., 618), says that 'by the common law, the children of private citizens born abroad are aliens.' Chancellor Kent has remarked (2 Kent's Com., 1) that 'that is the rule of the common law without any regard or reference to the political condition or allegiance of their parents, with the exception of embassadors.' * * * Surely the pauper, in this case, must be regarded as an alien and a subject of the Province of Canada, without reference to the citizenship of his father."

In Albany vs. Derby, 30 Vt., 718, the syllabus is as follows:

> "The offspring of a citizen of this State, born subsequent to April 14, 1802, in a foreign gov-

ernment to which their father had removed *animo manendi*, and who return with their father to the United States after they have become of age, are aliens."

In Dupont vs. Pepper, 1 Harp. Ch. (S. C.), 5, the Court said at page 11:

> "I come, then, to the conclusion, that by the common law, children born abroad could not inherit lands in England, even from their parents who were native subjects. *The character of a natural-born subject, anterior to any of the statutes, was incidental to birth alone.*"

This part of the decision of the South Carolina Court was not reversed by this Court when the case was brought here by writ of error under the title of Shanks vs. Dupont, 3 Pet., 248.

In De Geer vs. Stone, L. R., 22 Ch. Div., 243, it is said in the headnote:

> "There is no foundation for the notion that by the common law of England the posterity of a natural-born British subject, though born abroad, must be treated as British subjects forever.
>
> "The rule that the children born abroad of ambassadors in the service of the Crown of England abroad, are treated as natural-born British subjects, does not apply to the children born abroad of officers in the military service of the Crown in foreign parts."

The different Attorney-Generals of the United States seem to have been very clear in their opinion that birth in this country of alien residents conferred citizenship therein. Mr. Black in a letter to Mr. Cass (1859) 9 A.-G. Opin., 373, said:

> "A free white person born in this country, of foreign parents, is a citizen of the United States."

Mr. Bates in writing to Mr. Seward (1862), 10 A.-G. Opin., 328 was of the same opinion:

> "A child born in the United States of alien parents, who have never been naturalized, is, by the fact of birth, a native-born citizen of the United States, entitled to all the rights and privileges of citizenship."

Mr. Fish, when Secretary of State, made the same ruling in two cases which came before him and said (2 Whart. Int. Dig., 396):

> "So far as concerns our own local law, a child born in the United States to a British subject is a citizen of the United States."

And again

> "The minor child of a Spaniard, born in the United States and while in the United States, or in any other country than Spain, is a citizen of the United States."

Chapter 120 of the Laws of New York of 1872 is, according to its title, "An Act to authorize the descent of real estate to female *citizens* of the United States," and the chief condition precedent to citizenship seems to have been considered by the New York Legislature to have been birth in the United States, for it is provided by this statute that "real estate in this State now belonging to or hereafter coming or descending to *any woman born in the United States or who has been otherwise a citizen thereof.*"

At the time of the adoption of the Constitution it was the law, not only of England and her colonies, but of the Continental countries of Europe, that a child

born within the territory of any government was a citizen thereof. Whatever change there may be at the present time in the countries of Europe in this respect has been brought about since the United States became an independent nation, and is the result of the Code Napoleon, which adopted the principle of election, and permitted a person born in France of foreign parents to elect, when coming of age, either France or the country of his parents as his country.

The appreciation of the people of the United States at the time of the foundation of their government that the general doctrine of all countries was that a man became by birth alone a citizen of the country in which he was born is, we think, shown by the Act of Congress approved March 26th, 1790, which provided that

> "the children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural born citizens" (1 Stat. at Large, 103, 104).

Without doubt this act was passed to enable children of citizens of the United States, born in other countries, to inherit real estate in this country and to permit them, if they should ever come here, to enter into the rights and privileges of full citizenship without the delay of naturalization. It was passed not to take away the status of the children so far as the country was concerned in which they were born, but to change the rule in regard to their relations to this country as it was then and has always since been understood. Without this law children born abroad of citizens of the United States would come to this country with all the disabilities of aliens, and they would have been debarred at that time in nearly every State from inheriting real property.

The purpose of the act was not to change the relation of other governments to people born within their

dominions, but to change the status of those people to our own Government, from what it was understood to be in this country without such law. The same idea was in the mind of Mr. Justice IREDELL, when he said in Talbot vs. Janson, 3 Dallas, 133, 164:

> "Did any man suppose, when the rights of citizenship were so freely and honorably bestowed on the unfortunate Marquis de la Fayette, that that absolved him as a subject or citizen of his own country? It had only this effect, that whenever he came into this country and chose to reside here he was *ipso facto* to be deemed a citizen, without anything farther. The same consequence, I think, would follow in respect to rights of citizenship conferred by the French Republic upon some illustrious characters in our own and other countries."

In the case of Calais vs. Marshfield, 30 Me., 511, 518, 520, Chief-Justice SHEPLEY said:

> "The laws of the United States determine what persons shall be regarded as citizens irrespective of such person's pleasure. Accordingly the Act of Congress before named [6 Stat. at Large, 79], has been considered as determining that persons were entitled to be regarded as citizens, who were born and had ever continued to reside without the limits of the United States, being the children of citizens; *and such persons might at the same time be the subjects owing allegiance to the government of the country in which they were born.* * * *
>
> "Although the government of one country may grant to persons owing allegiance to that of another, the rights and privileges of citizenship, it is not intended to intimate, that the government making such grant would thereby and without their consent or change of domicile be-

come entitled to their allegiance in respect to any of their political duties or relations."

If it was already the law that children born in a country of alien parents took the nationality of their parents it is not plain how this statute served any useful purpose. The fact of its passag "affirms the deficiency of the common law" (Binney s Article in 2 Amer. Law Reg., 193, 203).

The naturalization laws were subsequently amended several times, but the provision above referred to was not in any way changed until the Act of Congress of April 14th, 1802, was passed, which repealed all then existing laws on the subject, and provided that "the children of persons who *now are or have been* citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States."

It will be noticed that children born in foreign countries of American citizens, who were themselves born after the passage of this act, were not thereby made citizens of the United States. The act, in its terms, applied only to the children of those who then were or had been citizens of the United States.

This remained the state of the naturalization law upon this subject until the Act of Congress of 1855 (10 U. S. Stat. at Large, 604), which was incorporated in Section 1993 of the Revised Statutes and is the law to-day. This section provides that:

> "All children heretofore born, or hereafter born, out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth, citizens thereof, or declared to be citizens of the United States."

The passage of the Act of 1855, has always been attributed to an article said to have been written by Horace Binney, and published in the second volume of

the "American Law Register," at page 193. This article is entitled "The Alienigenæ of the United States," and begins with these words:

> "It does not, probably, occur to the American families who are visiting Europe in great numbers, and remaining there, frequently, for a year or more, that all their children born in a foreign country are Aliens, and when they return home will return under all the disabilities of aliens. Yet this is indisputably the case."

The Act of 1855, is nearly, if not exactly, in the identical words of the proposed legislation suggested by Mr. Binney in his article just referred to, and the people of this country evidently agreed with Mr. Binney that a person born in another country of citizens of the United States was an alien, unless relieved from such alienage by special legislation.

The discussion of this question by Mr. Binney is most exhaustive and interesting. It leaves nothing for further research prior to the time it was written and seems to show conclusively that without statute and under the common law people born in foreign countries of citizens of the United States were aliens. He says in part:

> "The state of the law in the United States is easily deduced. The notion that there is any common law principle to naturalize the children born in foreign countries, of native born American father and mother, father or mother, must be discarded. There is not and never was any such common law principle. But the common law principle of allegiance, was the law of all the States at the time of the Revolution, and at the adoption of the Constitution; and by that principle the citizens of the United States are, with the exception before mentioned, such only

as are either born or made so, born within the limits and under the jurisdiction of the United States, or naturalized by the authority of law, either in one of the States before the Constitution, or since that time, by virtue of an act of the Congress of the United States." The Alienigenæ of the United States (2 Amer. Law Reg., 193, 203).

We confess that we do not quite understand what is meant by the *amicus curiæ* when he says in his brief at page 27:

> "The repulsive absurdity of the monstrous doctrine of double allegiance is so forcibly apparent as to render wholly inexcusable any attempt at these times to invoke it."

We had always supposed that the doctrine of double allegiance was essentially an American doctrine, and that the dual relation of each citizen to the Federal and State Governments was the distinctive mark of the system of government in this country. No difficulty seems to have been apprehended by this Court from the fact that a man owed a double allegiance, and was a subject or citizen of two governments, for it is said in United States vs. Cruikshank, 92 U. S., 542–550:

> "The people of the United States, resident within any State, are subject to two governments—one State and the other national—but there need be no conflict between the two. The powers which one possesses, the other does not. They * * * have separate jurisdictions. * * * It may sometimes happen that a person is amenable to both jurisdictions for one and the same act. * * * This does not, however, necessarily imply that the two governments possess powers in common or bring them into conflict with each other. *It is the natural consequence of a citizenship which owes allegiance to two sovereignties, and claims protection from both.* The citizen cannot complain, because he has voluntarily submitted himself to such a form of government. He owes allegiance to the two departments, so to speak, and within their respective spheres must pay the penalties which each exacts for disobedience to its laws. In return he can demand protection from each within its own jurisdiction."

The supposed dilemma of a double allegiance would appear to be in no way obviated even if the people of the United States should pass such a law as the appellant advises and should enact that children born to alien residents might elect their nationality when of age. Prior to coming of age such persons would be either of no nationality or else of a double nationality. After the age of twenty-one, if they elected the nationality of their parents, they would then owe to the United States the allegiance resulting from residence here and the allegiance due to the country of their election. In other words, a man who lives in a foreign country always owes a double allegiance, and as a practical matter the allegiance due to the country of his residence is of primary importance. To adopt the words of Mr. Justice STORY, used by him in a somewhat different relation, he is "bound *ad utriusque fidem regis*. In an American Court we should be bound to consider him as an American citizen only; in a British Court he would, upon the same principle, be held a British subject" (Inglis vs. Sailors' Snug Harbor, 3 Pet., 99, 161.)

The objection, therefore, of counsel for the Government that a double allegiance results from the law in the United States as it is at the present time, would seem also to apply to the doctrine which the appellant seeks to maintain and is obviously nothing but the re-

sult of a person taking up his residence in a foreign country. "Foreigners in a country are subject to two sovereignties" (Westlake on Int. Law, 126). If by a law of the United States Wong Kim Ark was declared to be a citizen or subject of the country of his parents, he would then owe an allegiance to the United States while he remained here, as well as to the country which had been forced upon him. If, on the other hand, when twenty-one, he had the privilege of election, and elected, as he has done, this country as his nationality, in conformity with the law of many European countries, which the appellant's counsel insists should be our law too, he would still be guilty of being an exponent of "the repulsive absurdity of the monstrous doctrine of double allegiance," for the Emperor of China would continue to consider him as his subject, as the counsel for the Government say the Emperor of China does now. He would then be under the so-called law of nations also a citizen of the United States, and we should still have this nightmare of a double allegiance.

In other words, there is nothing "monstrous" or "repulsive" or "absurd" in the doctrine of double allegiance, and it is the necessary consequence of residence in a foreign country.

The fear suggested at page 34 of the brief of the *amicus curiæ* that our next president might be a Chinaman is equally uncalled for. If a modern Confucius or a greater than Li Hung Chang should be born upon our soil, and the people of the United States should be of the opinion that he was the best person in this country for their president, it is not plain where, if he were elected, the disgrace would lie; but, if there were any, it would seem to fall, not on the Chinese race, but on the white citizens of the United States, who selected a Chinaman as the highest officer of their government.

The counsel for the appellant in their discussion of the principles of international law have forgotten that a man is called a "citizen" of the United States "to

designate by a title the person and the relation he bears to the nation," and that, when the word is so used, "it is understood as conveying the idea of membership of a nation and nothing more" (Minor vs. Happersett, 21 Wall., 162, 166), and that "Citizenship has no necessary connection with the franchise of voting, eligibility to office, or, indeed, with any other rights—civil or political. Women, minors and persons *non compos* are citizens, and none the less so on account of their disabilities" (United States vs. Rhodes, 1 Abb. U. S. Rep., 28, 43).

There would seem to be a remarkable unanimity of opinion in every quarter in which the question ever arose that a person born in this country of alien residents was a citizen thereof, both at the common law and under the Fourteenth Amendment to the Constitution. This Court, the lower Federal Courts and the State Courts have been in accord on this subject without a single dissenting voice. The law officers of the general Government and the various Secretaries of State, with the possible exception of Mr. Bayard, have held the same view and the weight of authority at least appears to be in favor of the proposition that birth in the United States confers citizenship therein, so long as the parents of the child, irrespective of their nationality, are residents of this country.

The only argument advanced by the other side against this position is—(1st) that some European countries have adopted the principle of election and that the United States should do the same, which is a question for Congress to determine; (2d) that by so doing "the repulsive absurdity of the monstrous doctrine of double allegiance" would be done away with, which is not at all clear, and (3d) that if the judgment below was affirmed, a Chinaman might be President of the United States.

We respectfully submit to this Court the question which of these arguments should prevail, and we close our brief with the words of Charles Sumner:

"Here is the great charter of every human being, *drawing vital breath upon this soil*, whatever may be his condition and *whoever may be his parents*. He may be poor, weak, humble, or black—he may be of Caucasian, Jewish, Indian or Ethiopian race—he may be of French, German, English or Irish extraction; but before the Constitution all these distinctions disappear. He is not poor, weak, humble or black, nor is he French, German, English or Irish; he is *man*, the equal of all his fellowmen. He is one of the children of the State, which, like an impartial parent, regards all its offspring with an equal care" (Argument of Charles Sumner on Equality before the Law, quoted in 2 Story on the Constitution, 5th Ed., 1935).

POINT III.

Wong Kim Ark is a citizen of the United States, if the laws of European countries are to determine the question.

As we have shown before, thirteen countries of Europe, including England and France, have adopted, in one form or another, as their law, that children born in their territory, of foreign parents residing therein, have the right of election, and can choose, when of age, if they see fit, the nationality of their parents or the nationality of the country of their birth.

By the agreed statement of facts, the appellee is shown to have been born here, to have lived here ever since his birth, and to have elected this country as his nationality. This would seem to dispose of the case in

favor of the appellee under the doctrine of the law of nations, as it is called by the appellant, or, more properly speaking, under the law of many of the countries of Europe, if it has any application whatever.

POINT IV.

The judgment below discharging Wong Kim Ark from the custody of the Collector of Customs at the Port of San Francisco upon the ground that he was a citizen of the United States should be affirmed.

MAXWELL EVARTS,
Of Counsel for Appellee.