THE

AMERICAN LAW REGISTER.

JANUARY 1886.

CITIZENSHIP.

I. CHILDREN born in the United States of alien parents are citizens of the United States.

II. Children born abroad of American parents are aliens.

These are general rules subject to very few exceptions. And these exceptions rest upon principles which are in harmony with the principles upon which the general rules are based.

I. The subject of citizenship is practically a national one. Each nation must necessarily determine for itself who are and who are not its citizens. And when it has so decided, its decision is authoritative within its own territory, and conclusively binding upon every department of its government and upon every one charged with the execution, or affected by the operation of its laws.

It is true that when a citizen goes abroad he is without the jurisdiction of his own nation, and within the jurisdiction of other nations, and subject to their laws. And consequently, when the laws of his own country are not in harmony with those of his foreign residence, conflicting claims may cause complication between the two nations, and create international questions which may call for diplomatic adjustment, or result in war. Yet in all such complications, each nation asserts its own law and recognises no superior authority.

Under our law the child of British parents, born in the United

States is a citizen of this country. Under the common law the same child is a subject of Great Britain. Under the law of France, children born in that country of alien parents, are aliens. Consequently while the allegiance of a child born in this country of English parents is claimed by both nations, the allegiance of a child born in France of American parents is claimed by neither nation. There is no tribunal having authority to settle such conflicting claims, and no law binding upon the nations asserting such claims. The question of citizenship involves practically and almost exclusively the reciprocal obligations of a nation and those who claim or are claimed to be its citizens. So long as a person remains in a country, it is a matter of no consequence to other nations whether or not he be accorded the rights of citizenship in the place of his residence. It certainly could give no offence to France if all the rights, privileges and immunities of American citizenship should be given to one claimed to be a subject of France while he is domiciled in the United States. But even when the citizen goes abroad his citizenship depends upon national laws. The nation that he looks to for protection will give or withhold it, so far as his right to it is supported by its own laws, regardless of the laws of other nations or of any supposed conflicting law of nations.

If, then, there is any law of the United States declaring who are citizens, that is the law and the only law for us. The constitution of the United States has clearly and authoritatively defined citizenship of the United States. The Fourteenth Amendment provides that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States, and of the state wherein they reside. Assuming this to be the supreme law of the land we need look no farther, but must confine our inquiry to the ascertainment of the meaning of this law. Citizenship with us must rest upon birth or naturalization. Naturalization is regulated by Congress, and depends upon legislation, which may at any time be altered at the discretion of Congress. But citizenship founded on birth is recognised and guaranteed by the constitution, and is not subject to and cannot be affected by legislation.[1]

But birth alone in this country does not constitute citizenship of the United States. To entitle one to citizenship with us he must

[1] This is the reason why no reference is made in the article to sects. 1992 and 1993 of the Revised Statutes; nor to any previous legislation of Congress.

not only be a native, but he must also have been at the time of his birth "subject to the jurisdiction of the United States." When is a person subject to the jurisdiction of the United States? The Fourteenth Amendment was prepared by able lawyers and statesmen, and was critically examined and thoroughly considered before it was submitted for ratification to the several states. It was certainly their purpose to make an accurate, comprehensible and certain definition of that citizenship to which they were about to attach as incidents the most valuable rights, privileges and immunities. It was reasonably to be expected that these lawyers and statesmen would use language which was familiar to lawyers and statesmen, and which had acquired an accurate meaning, and would convey no uncertain sound. And they did so. They have used words of no unusual sound or uncertain import. The word jurisdiction means authority, power, potential authority, actual power. The jurisdiction of a nation extends so far, and only so far, as its authority prevails, its power is exerted and its laws operate.

The authority of a nation is co-extensive with its territory. The authority of a nation is limited to its territory. The authority of a nation is exclusive and supreme over persons and property within its own territory.

In his work on the Conflict of Laws, No. 2 (ch. 2, secs. 17–20, 29–31), Judge STORY says, "before entering upon any examination of the various heads which a treatise upon the conflict of laws will naturally embrace it seems necessary to advert to a few general maxims or axioms, which constitute the basis upon which all reasonings on the subject must necessarily rest." And these "general maxims or axioms" are stated by him as follows: "The first and most general maxim or proposition is that which has been already adverted to, that every nation possesses an exclusive sovereignty and jurisdiction within its own territory. The direct consequence of this rule is that the laws of every state affect and bind directly all property, whether real or personal, within its territory, and all persons who are residents within it, whether natural-born subjects or aliens, and also all contracts made and acts done within it."

"Another maxim or proposition is that no state or nation can by its laws directly affect or bind property out of its own territory, or bind persons not resident therein, whether they are natural-born subjects or others."

And the same author says on this subject, "Huberus has laid down

these axioms, which he deems sufficient to solve all the intricacies of the subject. The first is, that the laws of every empire have force only within the limits of its own government, and bind all who are subjects thereof, but not beyond these limits. The second is, that all persons who are found within the limits of a government, whether their residence is permanent or temporary, are to be deemed subjects thereof. The third is, that the rulers of every empire from comity admit that the laws of every people in force within its own limits ought to have the same force every where so far as they do not prejudice the powers or rights of other governments or their citizens. * * * Indeed, his first two maxims will in the present day scarcely be disputed by any one; and the last seems irresistibly to flow from the right and duty of every nation to protect its own subjects against injuries resulting from the unjust and prejudicial influence of foreign laws, and to refuse its aid to carry into effect any foreign laws which are repugnant to its own interests and policy."

If these be universally recognised principles of law governing the conduct of nations, the framers of the Fourteenth Amendment, who were familiar with them, must have had them in mind in preparing the amendment, and selected their language with immediate reference to these fundamental maxims.

Having in mind then these general maxims and that the laws of the United States were supreme and exclusive within the territory of the United States, and their force and operation co-extensive with that territory, and bound "all persons who are resident within it, whether natural-born subjects or aliens," they used the language of the Fourteenth Amendment advisedly, and intended to extend the rights of citizenship to all persons who at their birth became subject to the authority and laws of the United States. It might be pertinently asked, if all persons born within the territorial limits of the United States became *ipso facto* "subject to the jurisdiction thereof," what was the necessity or propriety of using in this definition of citizenship two equivalent expressions "born in the United States" and "subject to the jurisdiction thereof." The reason was that the framers of the Fourteenth Amendment were aware that there were certain well known and universally recognised exceptions to the rule of territorial jurisdiction and supremacy, which rendered the qualification "subject to the jurisdiction thereof," necessary to an accurate complete definition.

For example, a foreign minister actually resident within the ter-

ritory of the United States is considered to be and remain within the territory of his own state, subject to the laws of his own country, both with respect to his personal status and his rights of property. He is, therefore, in no respect subject to the jurisdiction of the United States, though within the territory of the United States. And the same fiction of extra-territoriality attaches to and fixes the national status of his children born in the United States, who are in theory born upon the soil of the sovereign whom the parent represents.

Again, alien parents, acting under the authority of their own sovereign and in hostility to the nation in whose territory they may be at the birth of their children, are not subject to the jurisdiction of the invaded country. And children born under such circumstances are born subject to the jurisdiction of the country to which their parents belong. National vessels in a foreign port are not regarded as within the territory of the nation in whose harbor they may be, and their crews are everywhere subject to the jurisdiction of the sovereign to which they belong. Consequently, children born on such vessels are native-born subjects of the nation whose flag these vessels carry. Since the adoption of the Fourteenth Amendment, our courts have recognised other exceptions to or qualifications of the general rule. But in all of them the child born in the United States was not at the time subject to the complete jurisdiction of the United States.

The Supreme Court of the United States (*Elk* v. *Wilkins*, 112 U. S. 94), has held that an Indian born in the United States, but being at the time of his birth a member of one of the Indian tribes, which still exists, and is recognised as a tribe by the government of the United States, was not at the time of his birth "subject to the jurisdiction of the United States," in the sense in which those words are used in the Constitution, as those words were intended to embrace those only who were subject to the *complete* jurisdiction of the United States, which could not be properly said of Indians in tribal relations." Two of the justices of the court dissented, not on the ground that the Indian whose citizenship was denied had been born "subject to the jurisdiction of the United States," but because he had since severed all connection with his tribe, and was residing in good faith outside of Indian reservations, and within one of the United States.

In another case (*McKay* v. *Campbell*, 2 Saw. C. C. Rep. 118),

decided since the adoption of the Fourteenth Amendment, in the District Court of the District of Oregon, it was held that the child of a British subject, born in Oregon during the joint occupation of the country under the convention between the United States and Great Britain, was not a citizen of the United States, not because his father was an alien, but because he was not born subject to the jurisdiction of the United States. The court held that although the territory was ultimately conceded to belong to the United States, yet during such joint occupation "the country as to British subjects therein was British soil, and subject to the jurisdiction of the king of Great Britain, but as to citizens of the United States it was American soil, and subject to the jurisdiction of the United States."

The national allegiance of the parent does not, *per se*, in any respect affect the *status* of a child born in the United States. Such a child is born "subject to the jurisdiction" of the United States, whether the father be at the time in the United States or not. If the father be in the United States he is himself "subject to the jurisdiction thereof." If he is out of the United States he is beyond their jurisdiction, but the child is not.

Certainly the *status* of the child cannot depend upon the fact that his father is or is not in the United States at the time of his birth, when the constitution has prescribed as the only condition that the child shall at the time of his birth be himself "subject to the jurisdiction of the United States."

The conclusions which the plain, certain and positive language of the Fourteenth Amendment renders inevitable, are: 1st. That the children born in the United States of alien parents, unless at the time of their birth they be not in fact "subject to the jurisdiction" of the United States, are citizens of the United States; and 2d. The children born abroad of American parents are not citizens of the United States, even though the residence of the parent or parents in the foreign country be merely temporary, unless the parents be abroad in the service of the United States. The first of these conclusions has received judicial sanction in a recent case (*In re Look Tin Sing*, 4 West Coast Rep. 363; 21 Fed. Rep. 905), in which the Circuit Court of the District of California decided that a child born in San Francisco, of Mongolian parents, who were themselves, not only aliens, but incapable of becoming naturalized was by reason of his birth a citizen of the United States.

The court could have made no other decision under the constitution. The child when born was absolutely and completely subject to the jurisdiction of the United States, and so were his parents, if at the time they were both in this country. The parents being aliens, owed allegiance to their sovereign, the Emperor of China, but being beyond his territory they were not subject to his jurisdiction or laws. A citizen or subject when abroad owes certain duties to his sovereign, but these duties need not be recognised by the citizen and cannot be enforced by the sovereign, so long as the former remains away from home and beyond the jurisdiction of the sovereign.

Speaking of the binding force upon a citizen of the laws of his own country, Justice STORY says: "Whatever may be the intrinsic or obligatory force of such laws upon such persons, if they should return to their native country, *they can have none in other nations wherein they reside.* Such laws may give rise to personal relations between the sovereign and subject, to be enforced in his own domains, but they do not rightfully extend to other nations, '*statuta suo clauduntur territorio nec ultra territorium disponunt,*' nor indeed is there strictly speaking any difference in this respect, whether such laws concern the persons or concern the property of native subjects. * * *

"When, therefore, we speak of the right of a state to bind its own native subjects everywhere, we speak only of its own claim and exercise of sovereignty over them *when they return within its own territorial jurisdiction*, and not of its rights to compel or require obedience to such laws on the part of other nations within their own territorial sovereignty. On the contrary, every nation has an exclusive right to regulate persons and things within its own territory, according to its own sovereign will and public policy:" Story on Conflict of Laws, sect. 20.

It is contended by some that under the Fourteenth Amendment children take their status from their parents, unaffected by the place of their birth, and that the children of aliens, though born in the United States, are not citizens of the United States. The contention is, that the words "subject to the jurisdiction of the United States," do not mean under the actual authority of the United States and subject to their laws, but owing allegiance to the United States. And it is contended that as the alien parent, though within the territory of the United States, still owes allegiance to

his sovereign, he is subject to the jurisdiction of that sovereign, and not to that of the United States, and that the child taking his status from the parent, is in the same manner and to the same extent, subject to the jurisdiction of the same foreign sovereign or nation. It is said that the words "subject to the jurisdiction thereof," do not mean "territorial jurisdiction," but national jurisdiction, that is, the jurisdiction "which a nation possesses over its citizens or subjects as such." There is no such distinction between national and territorial jurisdiction as is here suggested. All jurisdiction is territorial. The jurisdiction of a nation is co-extensive with and confined to its territorial limits. Within its own territory the jurisdiction of a nation is supreme and exclusive. Beyond its own territory, and within the territory of a foreign nation, it has no jurisdiction whatever over persons or property. Jurisdiction is "the power to make, declare and apply the law," or "the power or right of exercising authority." It implies actual and potential power and authority.

Nations have claims upon the allegiance and fidelity of their citizens, wherever they may be, and the citizens of a country everywhere owe duties to it. But these claims cannot be enforced, and these duties need not be recognised, so long as the citizen remains from home; for so long as he is abroad he is beyond the jurisdiction of his country, out of its power and not subject to its law. That which is denominated "national jurisdiction," and defined as "the jurisdiction which a nation possesses over those who are its citizens or subjects as such," when they are beyond its territorial jurisdiction, is no jurisdiction at all. It is not actual or potential, and the citizen is not "subject" to it in any sense of the term.

There is another serious objection to this construction of the constitution. It would render a provision which was intended to clearly and definitely settle the question of citizenship, and to remove the uncertainty which prevailed, as vague and uncertain as the pre-existing law on the subject. If we substitute for the words of the amendment "subject to the jurisdiction thereof," the meaning attributed to them, the constitution would read as follows: "All persons born in the United States, and subject to that jurisdiction which the United States possesses over those who are its citizens or subjects as such, are citizens of the United States, &c." And as citizens of the United States only are subject to such jurisdiction, the amendment could be reduced to the still more simple form:

"All citizens born in the United States, and at the time citizens of the United States, are citizens of the United States."

The argument for this construction, which takes all sense and meaning from the amendment, is based upon the fact that, in the Civil Rights Bill, which was passed by Congress before the adoption of the proposed Fourteenth Amendment, citizenship was defined as follows: "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."

The presumption is reasonable that, in adopting different language in the Fourteenth Amendment from that already in use in the Civil Rights Bill, to define citizenship, the Congress which proposed the amendment were not satisfied with their first definition, and if the Civil Rights Bill was susceptible of the construction we are considering, it is not to be wondered at that they should deem it necessary to revise and reform their definition. For if the words "subject to any foreign power," were, as asserted, equivalent to "subjects of any foreign power," the definition was unmeaning and threw no light whatever upon the question of citizenship. Making the substitution, the Civil Rights Bill would read as follows: "All persons born in the United States, and not subjects of any foreign power, * * * are declared to be citizens of the United States."

The question attempted to be solved being, what persons born in the United States are to be deemed citizens of the United States, how much nearer are we brought to a solution by a declaration that all persons so born are citizens of the United States who are "not subjects of any foreign power?"

But the Congress which passed the Civil Rights Bill cannot be justly charged with such senseless legislation, and that act is not susceptible of any such construction. The words "*subject to* any foreign power," are not the equivalents of "*subjects of* any foreign power." One may be the subject *of* a nation and not subject *to* it. An alien, though the subject *of* another nation, is, nevertheless, subject to the authority and laws of the nation in whose territory he may be, and is not subject *to* the jurisdiction of his own nation.

II. That the child of American parents born in a foreign country is an alien, is a corollary of the conclusion that the child of alien parents born in this country is an American citizen. In

each case the child is, at the time of its birth, subject to the jurisdiction of the country in which it is born. If, therefore, a child born of Chinese parents in the United States is a citizen, for the same reason a child born of American parents in China is not an American citizen.

This is, however, true only upon the assumption that the Fourteenth Amendment contains, not only an authoritative declaration who are citizens of the United States, but also a comprehensive and exhaustive definition of citizenship, including all who are within its terms, and excluding all who are without them.

The adoption of the Fourteenth Amendment was so recent that the causes which led to it are well known. Its history is given by Justice MILLER, in the *Slaughter-House Cases*, 16 Wall. 36, as follows: "The first section of the Fourteenth article, to which our attention is more especially invited, opens with a definition of citizenship—not only citizenship of the United States, but citizenship of the states. No such definition was previously found in the constitution, nor had any attempt been made to define it by Act of Congress. It had been the occasion of much discussion in the courts by the executive departments and in the public journals. It had been said by eminent judges that no man was a citizen of the United States except as he was a citizen of one of the states composing the Union.

"Those, therefore, who had been born and resided always in the District of Columbia, or in the territories, though within the United States, were not citizens. Whether this proposition was sound or not, had never been judicially decided. But it had been held by this court, in the celebrated *Dred Scott Case*, only a few years before the outbreak of the civil war, that a man of African descent, whether a slave or not, was not and could not be a citizen of a state or of the United States. This decision, while it met the condemnation of some of the ablest statesmen and constitutional lawyers of the country, had never been overruled, and if it was to be accepted as a constitutional limitation of the right of citizenship, then all the negro race who had recently been made freemen, were still not only not citizens but were incapable of becoming so by anything short of an amendment to the constitution." 16 Wall. 36.

And having stated thus the uncertainty and doubt which prevailed respecting the whole subject of citizenship, the court says:

"To remove this difficulty primarily and *to establish a clear and comprehensive definition of citizenship*, which should declare what

should constitute citizenship of the United States and also citizenship of a state, the first clause of the first section was framed."

Justice FIELD, in his dissenting opinion in the same cases, after referring to the same previous uncertainty as to citizenship, says: "The first clause of the Fourteenth Amendment changes this whole subject and removes it from the region of discussion and doubt. It recognises in express terms, if it does not create, citizens of the United States, and it makes their citizenship dependent upon the place of their birth, or the fact of their adoption, and not upon the constitution or laws of any state or the condition of their ancestry."

Immediately following the declaration that "all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside," the Fourteenth Amendment declares that, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." According to the rules of legal construction, the words "citizens of the United States," as used twice in this section, are to be taken as applying to the same persons. It is first declared who are citizens of the United States, and then the states are inhibited to abridge the privileges and immunities of *these* citizens of the United States. If there be any citizens of the United States not included in the declaration, such citizens are not within the protection of the inhibition. Is it reasonable to suppose that in adopting this amendment it was intended that certain citizens of the United States should enjoy privileges and immunities not guaranteed to other citizens of the United States? If the view taken by the Supreme Court be not the correct one, if the Fourteenth Amendment be not comprehensive and exclusive, then we have no authoritative and exhaustive definition of citizenship at all. The previous uncertainty on the subject has not been removed. We cannot have recourse to the established principles of the common law upon which citizenship of the state in which that law prevails may be supported. For the common law never has been adopted as the law of the United States. In all respects, then, except so far as the Fourteenth Amendment has expressly granted or recognised citizenship of the United States, we are left to the undefined and indefinable law of nations to ascertain who are and who are not citizens of the United States.

The occasion of and reasons for the adoption of the Fourteenth Amendment, as well as the unambiguous comprehensive language

of the amendment itself, forbid any such narrow construction of so important a constitutional provision. If the Fourteenth Amendment includes all who are citizens of the United States, then the conclusion is irresistible that the children of American parents born abroad are not citizens of the United States.

But it is claimed that the Supreme Court of the United States has decided to the contrary, in the *Slaughter-house Cases*, in which this language is to be found: "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:" 16 Wall. 73.

It cannot be denied that this language gives some countenance to the construction of the Fourteenth Amendment contended for. But when it is considered that the question what constituted citizenship of the United States was not involved in the decision, nor even discussed in the *Slaughter-house Cases*, the only issue being how far and as to what "privileges and immunities" citizens of the United States were guaranteed against hostile state legislation, no one can claim that in using the language cited the court has made an authoritative decision on the subject. The opinion expressed by the learned justice who wrote the opinion of the court, was a mere *obiter dictum*, and was, no doubt, the result of inadvertence. If, in the opinion of the court, the children of *all* citizens or subjects of foreign states born in the United States were excluded, why should the children of ministers and consuls be mentioned?"

In the case of *Elk* v. *Wilkins*, 112 U. S. 102, which was before the Supreme Court in 1884, the construction of the section of the Fourteenth Amendment was necessarily involved, and the court was called upon to decide the meaning of the words, "subject to the jurisdiction thereof," and, in doing so, used the following language: "Indians born within the territorial limits of the United States, members of and owing immediate allegiance to one of the Indian tribes (an alien, though dependent power), although in a geographical sense born in the United States, are no more 'born in the United States and subject to the jurisdiction thereof, within the meaning of the first section of the Fourteenth Amendment, than the children of subjects of any foreign government born *within the domain of that government*, or the children born within the United States, of *ambassadors or other public ministers of foreign nations*."

If, in the opinion of the court, children born of alien parents anywhere become citizens of the country of their parents, would they not have said that these Indians, born members of a recognised tribe, were no more citizens of the United States than the children of subjects of any foreign government born within the domains of this government?

In the case already referred to (4 West Coast Reporter 364), decided in the Circuit Court of the District of California, Justice FIELD says: "They alone are subject to the jurisdiction of the United States who are within their dominions and under the protection of these laws, and with the consequent obligation to obey them when obedience can be rendered; and *only those thus subject* by their birth or naturalization are within the terms of the amendment. The jurisdiction over these latter must, at the time, be both actual and exclusive. The words mentioned except from citizenship children born in the United States of *persons engaged in the diplomatic service of foreign governments, such as ministers and ambassadors*, whose residence, by a fiction of public law is regarded as part of their own country. This extra territoriality of their residence secures to their children born here all the rights and privileges which would enure to them had they been born in the country of their parents."

If the Fourteenth Amendment is susceptible of the construction given it in this article, it includes those who ought not to be citizens and excludes those who should be. It includes the children of persons to whom our laws deny the right of naturalization, and it excludes the children of our own citizens who, at the time of their birth, may be temporarily residing or travelling for pleasure in a foreign land.

There may not be any serious objection to the granting of civil rights to the children of Mongolians, but there is real danger in according political rights to those who have no knowledge of our laws, no appreciation of our principles and no attachment to our government or its institutions.

The Fifteenth Amendment of the constitution supplements the Fourteenth Amendment by prescribing that "the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any state, on account of race, color or previous condition of servitude."

In view of the danger to be feared from the participation in our