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A STUDY UPON THE LEGAL AND POLITICAL STATUS OF THE NATIVES OF ALASKA.

In view of the probable extension of the townsite law to Alaska at an early day, and the natural sequences of progress and organization of municipalities, and the necessity for determining who within the territory are entitled to the privileges of citizenship and the exercise of the elective franchise, Senate bill 4546, "To define Citizenship and Prescribing the Qualifications of Voters in Alaska," is timely. Whether it goes far enough to answer all the purposes designed may be doubted. If the legal status of the natives is in doubt, the question ought to be settled by appropriate legislation before controversy arises. The bill provides "that all male citizens of the United States above the age of twenty-one years, &c., who are able to read, write and speak the English language, shall be entitled to vote at any election in said territory," but does not determine whether or not the natives are citizens of the United States. We are left to our own surmises as to whether Congress considers them citizens or resident aliens.

It may be well to consider, therefore, some of the facts bearing upon that subject, and compare the conditions and circumstances of this case with those which determined the relations of the other Indian tribes of the United States to our Government and our laws.

The question before the Supreme Court of the United States in *Worcester v. The State of Georgia* (1832), 6 Pet. (31 U. S.) 521, involved the status of the "Indian Nations"

recognized by the United States as independent political communities retaining their original rights from time immemorial; and the reasoning of Chief Justice MARSHALL, who delivered the opinion, is conclusive that discovery gives title and rights only relatively between discoverers, and not between the people who take possession as discoverers of a country and the aboriginal inhabitants thereof; that the relations between invaders and the co-resident aboriginal peoples, if not determined by treaty, are at length established by relative strength. In the latter case, the world at first acquiesces in their relations because existing *de facto* and at length as regulations *de jure*.

It has been well said by Judge LAFAYETTE DAWSON, that from the organization of the Government to the present time, the various Indian tribes of the United States have been treated as free and independent within their respective territories, governed by their tribal laws and customs in all matters pertaining to their internal affairs and the manner of their enforcement. They have been excused from all allegiance to the municipal laws of the whites in relation to tribal affairs, subject, however, to such restraints as were from time to time deemed necessary for their own protection and for the protection of the whites adjacent to them, and he cites in support of his proposition: *Cherokee Nation v. Georgia* (1831), 5 Pet. (30 U. S.) 1, 16, 17; *Jackson v. Goodell* (1822), 20 Johns. (N. Y.) 193.

This policy has prevailed in relation to all Indians having tribal relations and customs, and the Government has recognized the tribes as independent nations without limitation other than that of the quality of the sovereignty they might exercise, until 1871, when after one hundred years' experience, Congress adopted a new policy and passed a law declaring that "no tribe or nation within the territory of the United States shall be acknowledged or recognized as an independent nation, or power with which the United States may contract by treaty: but no obligation of any treaty lawfully made and ratified with such Indian nation or tribe

prior to March 3, 1871, shall be therefore invalidated or impaired."

The recognition of tribes and independent nations, sometimes termed "domestic nations," within the borders of our land, carried with it the recognition of their local or tribal laws and customs. The policy was adopted at an early day under the stress of circumstances compelling the Government to seek peaceful relations with organized bands of savage and cruel men, who might be useful as allies but dangerous as enemies. The relation once established could not be abandoned at will, and the system has continued ever since, though considerably modified since 1871, and has been a fruitful source of trouble and danger to the people, and a most perplexing problem for the statesman. It is easy to see that certain anomalous results have come out of this condition of things, not from the fact alone that there exists a nation within a nation, or rather peoples having some of the attributes of sovereignty, of which examples may be found elsewhere, but growing out of all the circumstances and the character and customs of the people. Not the least of these unfortunate conditions are those growing out of the fact that we have people permanently residing within our borders who are not subject to our laws in all respects, but for whom we are responsible. They not only lack the homogeneity from which we expect the development of a worthy citizenship, but they sustain to us the relation of a one-sided alienism. They seem to have some of the rights of foreign nations, with the added privilege of receiving the treatment of dependent subjects. The rights are largely on one side. At the same time, their tastes and habits are those of the savage inoculated with the vices but not the virtues of civilization, and they are privileged to continue their offensive customs and remain a stench in the nostrils of civilization, without interference and with little hope of reform or improvement. They have been the practical embodiment of a legalized pauperism without the restraints of return obligations. They can demand food and

clothes of us, but we cannot demand of them even conformity to our laws and customs.

They cannot become citizens of the United States by abandoning their nomadic life, severing their tribal relations and placing themselves wholly under the jurisdiction of the United States, but must be naturalized like any foreigners. The tendency of legal enactments and judicial decisions is in the direction of bringing the Indians who have severed tribal relations into the full relation of citizenship, but it has not yet reached that point. Indian wars, bloodshed and massacres are the natural sequences of such conditions.

Whether the recognition of these unfortunate results, or the differences in race and qualities, or other causes, led to the adoption on the part of the Government of a different policy in dealing with the native inhabitants of Alaska, we need not inquire. But one thing is certain, they now sustain a very different relation to us; and the question is, what is that relation? Pending legislation does not solve the problem; do the facts and circumstances surrounding the case throw any light upon it?

The third article of the treaty of transfer from the Emperor of Russia to the United States, under which the latter claims the territory of Alaska, is as follows:

The inhabitants of the ceded territory, according to their choice, reserving their natural allegiance, may return to Russia within three years; but if they should prefer to remain in the ceded territory, they, with the exception of the uncivilized tribes, shall be admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property and religion. The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country.

It is evident the words "may return to Russia" are used in the significance of "may remove to Russia;" otherwise the reservation of "their natural allegiance" would afford no protection to those Russian subjects who had not come from Russia. The rights of property and persons belonging to Russia were transferred to the United States, with the ex-

ception of expressed reservations. Three inquiries naturally suggest themselves, to wit:

1. Who, if any, are not included in the class denominated "the uncivilized tribes" excepted from the guaranties of citizenship in the United States?"

2. What laws and regulations have been adopted by the United States, applicable to the said uncivilized tribes of Alaska?

3. What constitutes civilization within the meaning of the laws of the United States?

The reservations, in the treaty of purchase, of the privileges and immunities of citizenship to certain inhabitants of Alaska, are as complete and perfect guaranties of their rights as the sanctions of law can afford; and it only remains to determine who are embraced within the class for which they are intended.

At the time of the transfer the people inhabiting Alaska were Russians, natives and creoles, or the descendants of Russian fathers and native mothers. During most of the Russian occupancy the Russian Government was represented by officers who were also representatives of the Russian American Company, through which the government was in the main administered, and by the Græco-Russian Church, which was really a government institution. Hence the policy of these representative institutions ought to be studied in connection with the study of the direct policy of the Government, as having a bearing upon the standing of the inhabitants in regard to citizenship.

The Russian American Company from the first considered the great mass of the natives as individuals rather than tribes, though individuals of a lower order. They were accessories to business, useful in many ways, but more to be feared than the wild beasts of the forest, and perhaps thought of more frequently than otherwise as dangerous animals without responsibility and without rights. Exceptional cases of a different relation become more and more frequent among them until a large portion of the Aleuts and the Kadiak Eskimos were apparently on the same footing as the

whites. Russian men married native women and raised families who mingled with equal freedom among whites and natives and this class, sometimes still called creoles, springing from this intermixture, some 1,600 souls, are now generally denominated Russians. The church made rapid progress in converting these people, natives as well as creoles. At the beginning of the Nineteenth Century nearly all the islanders "were baptized and reported to the holy synod as voluntary converts and good Christians." The offices of the church were conferred without distinction of race. Veniaminoff, one of the most prominent of the "Reverend Fathers," was a creole, and before the transfer a great majority of the clergymen and deacons were natives. At the present time eleven out of the thirteen ordained priests, and an equally large proportion of the sixty-seven unordained assistants, are of native or mixed blood.

As early as 1785 it was said that the Russians "at all the outlying stations lived with the aborigines in the manner of the natives, taking quite naturally to filth, privation and hardship, and on the other hand dividing with their savage friends all the little comforts of rude civilization which by chance fell to their lot." In 1787 Empress Catherine of Russia issued an address to the Aleuts in which she calls them "her faithful subjects" and "those islanders who are already under the control of the Russian crown."

In 1840 a census was taken by the authority of the Russian Government of the residents of the Russian colony in America, and the enumeration showed :

Russians and other Europeans	714
Creoles	1,451
Aleuts	4,007
Other natives, probably Eskimos	1,410
Total	<u>7,582</u>

In 1860 another census was taken, and the figures read as follows:

Russians and other Europeans	784
Creoles	1,676
Natives	9,540
Total	<u>12,000</u>

It appears that in 1860 the Russian Government considered that its jurisdiction over the natives had extended, for the Aleuts had diminished in number nearly one-half. And still the great body of the Eskimos, all the interior or Athabaskan Indians, and a portion of the Thlinket tribes were left out. Those outside of the church and retaining their tribal relations were accorded no privileges, either by the church, the Russian American Company, or the Government.

These are all the facts we have from which to draw our conclusions regarding the Russian policy; and perhaps they are sufficient, since citizenship in an absolute monarchy is not indicated by the same signs as in a republic. Individual responsibility, personal protection, implicit obedience and loyalty to the ruler, complete the list of qualifications for private citizenship where imperialism is absolute, as in Russia.

If under the Russian regime the Christianized Aleuts and Eskimos, and of course those of mixed blood, were citizens of the Czar's dominion, the United States, as the legal successor of Russia, and under the treaty which provides that those who remain "shall be admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States," must also receive and treat them as citizens and give them all the privileges which that term implies: *Ainslie v. Martin* (1813), 9 Mass. 454.

In this connection we cannot omit a consideration of the construction given by the United States upon the force of this treaty obligation indicated by the dealings of the Government with the native people of Alaska, and especially the decisions of the courts bearing upon the subject.

Ever since the transfer in 1867 the United States has uniformly adhered to the rule received from its predecessor, and even extending the policy to the Eskimos and Athabaskan tribes, of treating them all as individuals and not as aggregations. It has at no time recognized any tribal relation among them and has never treated with them in any capacity. They have always been regarded as dependent subjects, amenable to the penal and other laws of the United

States, subject to the jurisdiction of the courts, entitled to no rations and having individual responsibilities. Their local customs or laws for the enforcement of contracts and for the punishment of offenses among themselves have been ignored or forcibly suppressed. The Government has assumed a kind of guardianship over them as governments always do over orphans, idiots and insane persons, ceasing its parental care in cases where the need of it has apparently ceased to exist. Evidence of this policy is observable in the legislative enactments relative to Alaska since the acquisition. The unorganized Alaska Act of July 27, 1868 (R. S. 343) and the so-called "Organic Act" of 1884 make provision for the collection of revenues and for the government of the country without any reservations or qualifications as to persons or classes of the inhabitants over whom it shall have jurisdiction and authority. The mining laws of the United States are extended to Alaska and it is made a land district with register and receiver having the usual duties of those officers. A commission is also provided to examine into and report upon the condition of the Indians residing in said Territory, what lands, if any, should be reserved for their use, and what provision should be made for their education, what rights by occupation of settlers should be recognized, and all other facts that may be necessary to enable Congress to determine what limitations or conditions should be imposed, when the land laws of the United States shall be extended to said district (Sec. 12). March 3, 1873, an act was passed by Congress amending Section 1 of the Alaska Act of 1867 so as to extend over the country Sections 20 and 21 of the Intercourse Act of 1834, prohibiting the introduction and disposition of spirituous liquors therein, and Judge DEADY correctly reasons that the extension of these two sections only, excludes the idea of the intention to extend the whole act, and that Congress did not intend to make Alaska, Indian country except so far as concerns the introduction and disposition of spirituous liquors.

The courts have also repeatedly decided that Alaska is not Indian country, and that the aboriginal inhabitants cannot

be considered dependent or domestic nations ; that the courts of the United States have the jurisdiction to try the Indians of this territory according to the United States laws, and the local rules and customs of these peoples cannot be allowed to prevail : *In re Sah Qua*, 1 Alaskan Repr. 6 ; *Kie v. United States* (1886), 11 Saw. 579 ; *United States v. Savaloff* (1872), 2 Id. 311.

The policy of the Government in its dealings with the uncivilized tribes of Alaska has been developed so far, and only so far, perhaps, as to determine that they are individual subjects of the United States, amenable as such to all the general laws of the land ; subject to the ordinary jurisdiction of the courts ; having the same privileges of possession in the lands of the Government that the whites have, and no more, unless especially accorded by the Government ; having no special privileges of local rules and customs which are at variance with the laws of the United States, and entitled to no support or other especial immunities.

What is the legal effect of these conditions, and their recognition by the United States Government ?

In *McKay v. Campbell* (1871), 2 Saw. 118 ; *United States v. Osborne* (1880), 6 Id. 406, and *Elk v. Wilkins* (1884), 112 U. S. 94, Indians who have severed their tribal relations and submitted themselves to the jurisdiction and laws of the United States and the States in which they lived, were denied the rights of citizenship, upon the theory that they were "born members of an independent political community," and could not become citizens by their independent volition, but that there must also be an assent in some form on the part of the United States ; from which the inference is legitimate that their birth in this *quasi*-foreign jurisdiction constituted their sole disability. Several cases have arisen where remnants of tribes have ceased to exist as tribes, and the members were recognized as citizens. In the case of *United States v. Elm*, 23 Int. Rev. Rec. 419, Judge WALLACE held, in 1876, that an Indian, one of such remnants, born in the State of New York, was entitled to vote. In Massachusetts, citizenship is accorded to the rem-

nants of tribes of Indians never recognized by treaties or legislative or executive acts of the United States as distinct political communities: *Danzell v. Webquish* (1871), 108 Mass. 133; *Pells v. Webquish* (1880), 129 Id. 469; *Mass. Statutes*, 1862, ch. 184, and 1869, ch. 463.

In *Fletcher v. Peck* (1810), 6 Cranch (10 U. S.) 87, those Indians whose tribes "have totally extinguished their national fire and submitted themselves to the laws of the United States," are spoken of as standing in a different relation in respect to citizenship than those belonging to tribes still retaining the tribal relation. See also Justice MCLLEAN'S reference to "small remnants of tribes surrounded by white population, who by their reduced numbers had lost the power of self government," and therefore the State laws had been extended over them: *Worcester v. Georgia* (1832), 6 Peters (31 U. S.) 515. Section 1 of the Fourteenth Amendment to the Constitution of the United States says: "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. No State shall make any law which shall abridge the privileges or immunities of citizens of the United States," and Section 2 declares that "Representation shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, *excluding Indians not taxed.*" Justice HARLAN of the United States Supreme Court, in giving the dissenting opinion of himself and Justice WOODS in *Elk v. Wilkins* above cited, takes the ground that the exclusion of Indians not taxed implies that there are Indians who *are* taxed; that is, that are subject to taxation, and that Indians not taxed are those who hold tribal relations, and that only those holding tribal relations are excluded from representation, and that even while a tribe of Indians continues the tribal existence, individual members of the tribe may voluntarily forsake it and submit themselves to the jurisdiction of the United States, and by the Act of April 9, 1866, entitled "An Act to protect all persons in the United States in their civil rights and furnish means

for their vindication," become entitled to all the privileges of citizens of the United States.

An examination of the bill and the debates in the United States Senate while it was pending in that body clear any doubts as to the intention of the framers of that law. The words "Indians not taxed" were not in the bill as originally reported by the Judiciary Committee. Objections being made that it admitted those still maintaining tribal relations to citizenship, Senator Trumbull inserted the words "excluding Indians not taxed," and said in the debate:

Of course we cannot declare the wild Indians who do not recognize the Government of the United States, who are not subject to our laws, with whom we make treaties, who have their own laws, who have their own regulations, whom we do not intend to interfere with or punish for the commission of crimes one upon the other, to be the subjects of the United States in the sense of being citizens. They must be excepted.

And in reply to Senator Hendricks, said:

Does the Senator from Indiana want the wild roaming Indians, not taxed, not subject to our authority, to be citizens of the United States—persons that are not counted in our Government? If he does not, let him not object to this amendment that brings in even the Indian when he shall have cast off his wild habits, and submitted to the laws of organized society and become a citizen: *Cong. Globe*, First Sess. 39th Cong. p. 527.

President Johnson vetoed the bill, and in his message says in substance, Indians subject to taxation are citizens of the United States. The Fourteenth Amendment was submitted for adoption at the same session of Congress and the same language was used, and there is every reason for believing those who voted for it had not abandoned the policy so evident in the debates upon the Civil Rights bill, of admitting to national citizenship such Indians as were separated from their tribes and were resident of one of the States or Territories. Besides, the debates, while the Amendment itself was pending, prove that the friends of the measure intended to include in the grant of citizenship, Indians who were within jurisdiction of the States and subject to their laws, because such Indians would be completely under the jurisdiction of the United States. Senator Trumbull remarked:

It is only those who come completely within our jurisdiction, who are subject to our laws, that we think of making citizens; and there can be no objection to the proposition that such persons should be citizens.

In 1870 a committee was appointed by the Senate to inquire into the effect of the Fourteenth Amendment upon treaties with the Indian tribes. Their report says:

Your committee do not hesitate to say that the Indian tribes within the limits of the United States and the individual members of such tribes, while they adhere to and form a part of the tribes to which they belong, are not, within the meaning of the Fourteenth Amendment, subject to the jurisdiction of the United States; and therefore such Indians have not become citizens of the United States by virtue of that Amendment.

The report closes with these significant words:

When the members of any Indian tribe are scattered, they are merged in the mass of our people and become equally subject to the jurisdiction of the United States.

Judge COOLEY, commenting on citizenship conferred by the Fourteenth Amendment, says:

Persons of foreign birth, who have never renounced the allegiance to which they were born, though they may have a residence in this country more or less permanent, for business, instruction or pleasure, are not citizens. Neither are the aboriginal inhabitants of the country citizens, so long as they preserve the tribal relations and recognize the headship of their chiefs. * * They are, as a *quasi*-foreign people * * subject to the jurisdiction of the United States only in a much qualified sense.

When, however, the tribal relations are dissolved, when the headship of the chief, or the authority of the tribe, is no longer recognized, and the individual Indian, turning his back upon his former mode of life, makes himself a member of the civilized community, the case is wholly altered. He then no longer acknowledges a divided allegiance; he joins himself to the body politic; he gives evidence of his purpose to adopt the habits and customs of civilized life; and as his case is then within the terms of this Amendment, it would seem that his right to protection in person, property and privilege, must be as complete as the allegiance to the Government to which he must then be held; as completely, in short, as that of any other native born inhabitant: 2 Story's Const., Cooley's Ed., Sec. 1,933, page 654.

There is no uncertainty as to the principles of law enunciated in these decisions, except upon a single point, and perhaps not upon that. A divided Court held that an Indian

who was born in the tribal relation and had accorded fealty to his tribe as a separate power, could not, of his own volition, and without the consent of the United States, become a citizen with full privileges by the mere act of abandoning his tribal relation and submitting to the jurisdiction and laws thereof, while his tribe retained its distinctive existence and was governed by its peculiar laws. On all other points there is substantial agreement, and it may be considered as settled beyond controversy that the aboriginal inhabitants of a State or Territory who have never been in tribal relations, and those whose tribes have ceased to exist as such, are subject to the complete jurisdiction of the United States and liable to taxation, and are entitled to all the rights and privileges of national citizenship, under the Fourteenth Amendment to the Constitution, unless there is some condition of especial exception.

Is there any condition of especial exception in the case of the Aleuts, the Kodiak Eskimos and part of the Thlinkets, who were recognized by the Russians as citizens? and in the case of the other Thlinkets and the Hydahs, who have entirely abandoned the tribal relations? If not, they must be regarded as citizens, whose rights, as such, cannot be abridged by class legislation based upon race or color, whether civilized or not.

Other questions arise concerning the Arctic Eskimos and the Athabascan Indians of the interior. The Government has heretofore treated them as individuals, and made no treaties with them, and has held them to such personal responsibilities as it was able with its machinery of government and law. But if the questions were to arise in the courts under existing laws, would they be held to be civilized peoples, or uncivilized tribes?

Civilization has been variously defined. Webster says civilized means "instructed in arts, learning, and civil manners; refined; cultivated." And to civilize is "to reclaim from a savage state." Guizot says:

Civilization may be taken to signify the multiplication of artificial
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wants and of the means and refinements of physical enjoyment. * * It may also be taken to imply both a state of physical well being and a state of superior intellectual and moral culture. * * Civilization is an improved condition of man resulting from the establishment of social order in the place of individual independence and lawlessness of the savage or barbarous life, and may exist in various degrees.

The term as used in the third article of the treaty hereinbefore recited and in defining the legal *status* of peoples of the earth in laws, treaties and diplomatic communications generally, it may be presumed, the highest types of civilization are not intended; but rather a condition of orderliness, respect for law, general respectability and more or less attention to education and the arts. The habits of civilized life for the purposes of good citizenship ought to at least include living in permanent homes; conforming in dress and outward habits to the customs of civilized peoples to such an extent as not to shock their sense of decency and propriety; using cooked food; recognizing the family relation and manifesting reasonable respect for it; giving some attention to the education of their children; and acting generally, in the ordinary transactions of life, upon the theory that right, justice and law have claims superior to those of physical power and brute force.

If, then, without expressing an opinion upon facts which may be determined by evidence, these people fail to come within these definitions and exercise a divided fealty—in part to the United States and in part to the regulations and customs of their tribes in conflict with the laws of the United States—then they are subject to the “laws and regulations” adopted by the United States in regard to its aboriginal tribes, and those laws and regulations already in force in other sections of the country are equally applicable here because the conditions are the same.

The Metlakahtla Indians occupy a position entirely different from either of the classes above mentioned, because they are not natives of the territory now or ever belonging to the jurisdiction of the United States. They were allowed by the especial permission of the Government to come as individual immigrants and settle upon the public lands

of the United States, and probably do not sustain any tribal relation, and it is generally considered that their civilization is of an order high enough to make them good and desirable citizens. But they can only become citizens of the United States by naturalization, and an enabling act is necessary for that purpose: *18 Op. Atty. Gen.* 557; *In re Langtry* (1887), 12 Saw. 467; *In re Frank Camille* (1880), 6 Id. 541; *In re Ah Yup* (1878), 5 Id. 155.

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Sitka, January 21, 1891.

ALIEN, *alienigenæ*, is derived from the Latin word *alienus*, and according to the etymology of the word, it signifieth one born in a strange country, under the obedience of a strange prince or country; and therefore *Bracton* saith, that this exception, *propter defectum nationis*, should rather be *propter defectum subjectionis*, or as *Littleton* saith, which is the surest, out of the ligeance of the King: Co. Litt. 128 b.

The Alienigenæ of the United States is an interesting article in THE AMERICAN LAW REGISTER for February, 1854 (O. S. Vol. II, pages 193-210), beginning with the startling 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." This language eventually introduces a discussion of the naturalization laws of the United States.

Citizenship by Naturalization was discussed by Alexander Porter Morse, of Washington, D. C., in THE AMERICAN LAW REGISTER for 1879 (Vol. XVIII, pages 593-612, 665-676), under the different aspects (1) of not being an international concern, (2) of the importance of domicile, (3) of the meaning of the naturalization laws of the United States, and (4) of the persons who can be naturalized, together with a brief discussion of the races excluded from naturalization. This last topic is treated in much the same manner as it is *supra*, by Mr. Knapp.

Citizenship by Naturalization and the citizenship of Indians and Chinese, are subjects briefly treated by D. H. Pingrey, in THE AMERICAN LAW REGISTER for September, 1888 (Vol. XXVII, pages 542-4).

Citizenship, especially by birth, within the jurisdiction of the United States, is discussed by Thomas P. Stoney, of San Francisco, Cal., with some regard to the Chinese question, in THE AMERICAN LAW REGISTER for January, 1886 (Vol. XXV, pages 1-14).

Ludlam v. Ludlam, in the New York Court of Appeals, reported in full in THE AMERICAN LAW REGISTER for August, 1864 (Vol. III, pages 595-616), was a case of denial of inheritance to a child born in Peru of a native mother, but whose father was an American citizen.