CITIZENSHIP AND ALLEGIANCE.

II. NATIONALITY IN ENGLISH LAW.

By the modern law of monarchical states, the term citizen (civis) has been rejected in favour of subject (subjectus, subditus). There are citizens in France and in the United States of America, but the law and language of England know of subjects only. As an abstract term, to signify the status of a British subject, we cannot use subjection, and are driven, therefore, to speak of nationality in this sense, though in its proper use this word signifies a man's race and descent, not his political status. This use of subject, as the modern equivalent of citizen, is awkward, because in a wider, earlier, and still permissible sense, subject includes any person subject to the power and jurisdiction of the state, and therefore a resident alien no less than a subject in the narrower sense. A subject who is a citizen may be distinguished, when distinction is necessary, as a natural subject. One who is not a citizen may be termed an alien subject.

The disuse of the term citizen is significant of an important change of ideas. It is the direct outcome of the substitution of feudal for Roman conceptions in law and politics. The Romans conceived of the state as an association of fellow-members, incorporated into one body politic or respublica. But the principles of feudal monarchy substituted the crown for the respublica. The notion of the state as an incorporate community is to this day unknown to English law; there is no respublica of which men can be members or citizens. The Crown is a corporation in law; but the nation, the aggregate of the subjects of the Crown, has no recognized legal identity or personality. There is in law no populus Britannicus, as there was once a populus Romanus. Roman citizens were men bound to one another by the personal bond of fellow-membership of one body; but British subjects are men bound, not to one another, but to a common superior. The term citizen connotes the privilege of common membership of one state; but the term subject connotes the burden of a common subjection to one lord and king. The former idea is natural in a republican form of government, such as that of Rome before the empire, and it arises

1 The only citizens recognized by English law are municipal, not national. Civis has become equivalent to municeps, just as civitas has been identified with vila.
again, whenever in modern times a republican is substituted for a monarchical government. Yet it must be noted that it was feudal monarchy, and not imperialism, which substituted subjects for citizens. The original conception did not lapse with the fall of republican government at Rome, but endured throughout the empire. The Roman emperor never bore towards the cives Romani that personal relation which the feudal king bears towards his subjects. The emperor was simply the supreme magistrate of the state; above him stood the respublica, the body politic whose members were those Roman citizens of whom he himself was one.

In English law, subjects, whether natural or alien, are those who owe allegiance to the Crown. By allegiance is meant the feudal obligation of fidelity and obedience due from a vassal to his lord—an obligation which has as its counterpart the duty of protection and guardianship which the lord owes to his vassal. The king is the supreme feudal lord of all the people, as well as of all the land, of England. They are his men, his fideles, his faithful. They owe him such fealty as any vassal owes his lord, for he is their sovereign lord the king. In the technical phrase of feudalism they are ad jurem regis—in the faith of the king. The oath of allegiance is simply a variant of that oath of fealty which binds together lord and vassal in any other case.¹

Allegiance is of two kinds. That which natural subjects owe is permanent and personal, while that which is due from alien subjects is merely temporary and local. A natural subject remains bound at all times and in all places; he is permanently entitled to the king’s protection, and permanently bound by the bond of fealty. But an alien subject is such only by reason of his residence within the king’s dominions; so long as such residence continues he stands within the king’s protection, and owes him a correlative allegiance. So long, but so long only, he is the king’s subject. Like any other subject he may be guilty of treason. Like any other subject he must obey the king’s laws, and submit himself to the royal government and jurisdiction. But he may withdraw himself at any time from all such obligation, and for what he does

¹ The older oath of allegiance ran as follows: ‘You shall swear that from this day forward you shall be true and faithful to our sovereign lord the king and his heirs, and truth and faith shall bear of life and member and terrene honour, and you shall neither know nor hear of any ill or damage intened unto him that you shall not defend. So help you Almighty God.’ 2 State Trials, 618; Co. Litt. 62 b; Blackstone, i. 368. An interesting account of the oath of allegiance is contained in Sir Frederick Pollock’s Essays in Jurisprudence and Ethics, p. 176. It is to be noted that the oath of allegiance is not feudal in its origin. The custom of taking an oath of fidelity to the sovereign was known during the Roman Empire, and was adopted by the kings of the barbarians in Western Europe. At a later date, however, the oath became in form and significance essentially feudal. See Fustel de Coulanges, La Monarchie Francaise, p. 55.
Beyond the realm of England he will not answer to the king of England. The natural subject, on the contrary, can in no way sever the bond of fealty. He possesses an enduring status which he can by no means abandon. Nemo potest exare patriam.

The term allegiance is a comparatively modern corruption of ligeance (ligeantia), which is derived from the adjective lieg (ligius), meaning absolute or unqualified. Allegiance signified originally liege fealty, that is to say, absolute and unqualified fealty, as opposed to that qualified or conditional fealty which a vassal owed and swore to a lord, saving the faith—which he owed already to some other lord having superior and prior claims upon him. There is nothing in feudal theory or practice to prevent a man from having more lords than one. In such a case he owes fealty to both; he is ad fidem utriusque domini. But he can owe liege fealty (ligeantia) to one only. He can have two lords, but not two liege lords. This was a fundamental maxim of feudalism. Unus et idem dux in dux omnium domino domi esse non potest. The fealty which he owes to one of them is not unqualified; it is subject always to the claim of him who is not only his lord, but his liege lord—of him to whom he owes not merely fealty but allegiance. If enmity and war shall arise between two lords, he who is in the faith of each must adhere to him in whose ligeance he is.

Such, then, was the original meaning of allegiance. But as feudalism grew and prospered, binding all men within the kingdom into a hierarchy of lords and vassals, from the king downwards, and as the king made good his position as the sovereign lord of all men within his kingdom, it became clear that there was no liege fealty possible or lawful, save that which was due to the king himself. He was the only liege lord because he was the supreme lord of all. His claim to fidelity and obedience was above all others. All faith or fealty which a man owed to any other lord was subject to that which he owed to his lord the king. ‘I become your man from this day forth,’ so runs the common oath of fealty, ‘for life, for member, and for worldly honour, and shall bear you faith for the lands that I claim to hold of you, saving the faith that I owe unto our lord the king.’ So it came about that allegiance took on its modern meaning, and came to signify

1 Forsyth’s Cases and Opinions in Constitutional Law, p. 262.
2 Du Cange, sub voc. Ligius. ‘Ligia fidelitas est omnimodo fides quam vassulus domino nemine excepto praestat.—Ligius est dictur qui dominum suo . . . fidem omnem contra quemvis praestat.’ Leges Henrici Primi. c. 43, § 6 (Thorpe’s Ancient Laws and Institutes, i. 543). ‘Quotcumque domines aliqui habeat . . . ei magis obnoxius est . . . cuius ligius est.’ Bracton, f. 79 b. ‘Si inter domines suos capitales orientur inimicitiae, in propria persona semper stabit cum eo cui fecit ligeantiam.’ Craig’s Jus Feudale, p. 79.
3 Pollock’s Essays on Jurisprudence and Ethics, p. 179.
exclusively the fidelity due from a subject to his king, he being the only person by whom fidelity of so absolute a sort could be lawfully demanded.

It is clear that so long as the original feudal significance of the term allegiance persisted, an alien subject could not be said to owe allegiance to the English king. For he already owed it to his own king, and a double allegiance was impossible. His true relation to the king of England, in whose dominions he resided, was one of fealty indeed, but not of liege fealty. He was in his faith, but not in his allegiance. The distinction comes out clearly in one of the few passages in which Bracton refers to the matter. He considers the case of a man who owes fealty both to the king of England and to the king of France—who is ad fidel utriusque regis. What shall happen, he asks, if war breaks out between these two countries? Which of his two lords shall this man serve? Bracton’s answer is that he must serve in person with that king to whom he owes allegiance (cum eo cui fecit ligeantiam).\(^1\) When, however, allegiance came to mean specifically fealty owed to the king, as contrasted with that owed to other lords, this distinction was forgotten, and all who were ad fidel regis were said to owe him allegiance, whether they were aliens or subjects. Hence it became necessary to distinguish between two sorts of allegiance—that which is personal, permanent, and absolute, as being due from natural subjects, and that which is merely local, temporary, and qualified, as being due from aliens by reason of their residency, and which in the strict theory of feudalism is not truly allegiance at all.

The acquisition of British Nationality. By what titles, then, does a man become a British subject? What are the sources of permanent allegiance? From what classes of men does the king of England require fealty as being their liege lord? Our law on this point is partly common and partly statutory, and it recognizes five distinct sources of British nationality:—(1) Birth within the dominions of the Crown; (2) Descent from British subjects; (3) Continued residence in a territory after it has been conquered or otherwise acquired by the Crown; (4) The marriage of an alien woman to a British subject; (5) Naturalization, that is to say, an agreement by which an alien is received into the permanent allegiance of the Crown.

The first of these titles, namely, birth in British dominions, is by far the most important. Apart from certain statutory modifications of the older common law, a man’s blood and descent are

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\(^1\) Bracton, f. 427 b.
irrelevant in this matter. He may be by blood a Frenchman or a Chinaman, but if he first saw the light on British soil he is a British subject. Conversely if he is born beyond the boundaries of the empire, he is judged an alien, though he may be an Englishman by blood and parentage. The rule is not a mere peculiarity of English law. Until limited or abrogated by modern legislation it was the common law of all feudal Europe. It was received in France until the Code Napoléon. ‘Les citoyens, les vrais et naturels Français,’ says Pothier, ‘sont ceux qui sont nés dans l’étendue de la domination française.’ To this day by the law of Spain all persons are Spanish subjects who are born in Spanish territory. There is no more striking contrast than that which is afforded by this principle, between ancient and modern theories of citizenship. It never entered the head of any Roman that a man of alien parentage should become a citius Romanus through the accident of birth in Roman territory, or that a man of Roman blood should forfeit his citizenship by birth beyond the limits of the pax Romana. As a test and title of state-membership, descent was in Roman theory everything, and place of birth nothing. Feudalism reversed this principle. It substituted the jus soli for the jus sanguinis. Modern legislation has restored to some extent the Roman doctrine and re-established in part the claim of the jus sanguinis, but in England, at least, the jus soli retains to this day the predominant influence which feudal theory conferred upon it.

The jus sanguinis has already been sufficiently explained. We have seen that it is the direct and obvious outcome of the relation between citizenship and nationality. A man belonged to the Roman state, because he belonged to the Roman nation. The two things ran together, and the one status was hereditary because the other was. But what explanation are we to give of the jus soli which feudalism substituted for the jus sanguinis? By what reasoning were feudal lawyers led to sever in this fashion the bond that had hitherto existed between state-membership and nationality? Let us consider the case of a Frenchman born in England, and deemed accordingly to be a natural subject of the king of England. Like all other residents of the realm, he owes fealty to the king whose realm it is, for he stands within the king’s protection, and the king will demand fealty from all men who live under the shelter of his laws and government. All such men are his men, and he is their feudal lord. The maxim is: Protectio trahit subjectionem, et subjectio protectionem. These two things are

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1 Traité des Personnes et des Choses, § 43.
2 Civil Code of Spain, § 17.
3 Case of the Postnati, 2 State Trials, p. 614.
necessarily correlative. But why should such fealty amount to
liege fealty? Why should this Frenchman stand not merely in the
faith of the English king, but in his allegiance? Is his allegiance
not rather due to the king of France? The answer seems clearly
this, that that fealty is liege fealty which is first in order of time.
All who are born within the protection of the king of England are
his men, and the fealty due by them is and remains liege fealty,
because there is no other that has any claim to be preferred before
it. This man is of French blood indeed, but he is not yet within
the protection of the king of France. When he crosses the Channel,
he will carry with him into France the permanent allegiance
already imposed upon him, and the faith which he will then owe to
the king of France he will owe saving the faith which he owes
to his liege and sovereign lord, the king of England. So with the
Englishman born in France. He is an alien in England, because
from the day of his birth he has been in the exclusive faith and
allegiance of the king of France, and no man can have two liege
lords. If he comes to the country of his parentage he will then enter
into the faith of the king of England, but not into his allegiance.

Title by descent. By the common law no man was a British
subject simply because his father was such before him, nor was any
man an alien because of alien blood. For in the theory of feudal
allegiance the *jus sanguinis* was of no account. By a series of
modern statutes\(^1\), however, title by descent has received partial
recognition, and British nationality is now inheritable through
males for two generations. He whose father or father's father was
born within the empire, does now himself inherit the status of
a British subject. But in the third generation this heritable
quality of the blood dies out, and must be renewed by birth within
the dominions of the Crown. To this extent but no further the *jus
sanguinis* is recognized by English law side by side with the *jus soli*.
Continental legislation has gone much further in rejecting feudal
principles in favour of the older doctrines of the Roman law.
Every child of a French citizen is himself a citizen wherever born\(^2\),
and so also in the laws of Italy and Spain\(^3\).

The chief cause of this recurrence in modern times to older
principles is doubtless to be found in the influence of the concep-
tion of nationality. Feudalism had in theory severed all connexion
between membership of the state and membership of the nation.
The king's subjects are all who are received into the king's alle-
giance, and their nationality matters not at all. Nevertheless in
practice the state and the nation tend to coincidence even under

\(^1\) 7 Anne, c. 5; 4 Geo. II. c. 27; 13 Geo. III. c. 21.
\(^2\) Code Civil, § 8.
\(^3\) Italian Civil Code, art. i, § 4; Spanish Civil Code, § 17.
feudalism. Men that are born in England are commonly Englishmen by blood as well as by allegiance; men that are born beyond the seas stand commonly outside the English race, as well as beyond the protection and fealty of the English king. As feudalism fades, and the claims of nationality begin to reassert themselves, the exceptions to this coincidence begin to be recognized as anomalous. It is felt to be unreasonable that a man should by the accident of his place of birth forfeit his membership of the state to which his fathers belonged, and in due time legislation confers partial recognition upon the claims of descent.

*Title by conquest or acquisition of new territory.* If the king of England adds new territories to his dominions, whether by conquest, cession, occupation, or otherwise, the inhabitants of these territories cease to be aliens and become forthwith British subjects. ‘The conquered inhabitants,’ says Lord Mansfield, ‘once received under the king’s protection became subjects, and were to be universally considered in this light, and not as enemies or aliens.’ We have seen already that no such principle was ever accepted by Roman law. The subject provincials of the empire remained *peregrini*. The *civitas Romana* was the exclusive privilege of their conquerors, until or unless it was extended to the conquered by express and voluntary grant. Very different is the doctrine of feudalism. The conquered are forthwith under the protection of him by whose arms they have been subdued. Therefore, they are in his faith, and owe him fealty, and this fealty is liege fealty or allegiance, because there is no longer any other lord who has superior claims to their obedience. The edge of the sword has cut the bond of allegiance which formerly subsisted between them and their sovereign. His former subjects no longer stand in his protection, they are no longer his men at all, therefore they are the liege men and natural subjects of their conqueror.

*Title by marriage.* The common law did not recognize marriage as affecting in any way the nationality of the parties. An alien woman who married a British subject remained an alien none the less, and a woman who was a British subject could not put off her allegiance by becoming the wife of an alien. In this respect our

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1 To this day English law has derogated in no way from the feudal principle that a man of alien parentage born in England is a British subject, save by entitling him on attaining his majority to disclaim the status thus imposed upon him. In England the doctrine of alienage through birth beyond the seas worked special hardship and injustice through the operation of the rule that no alien could inherit English land. The son of an Englishman, if born abroad, could not inherit his father’s real estate. A partial remedy was supplied by legislation in the reign of Edward III, 25 Ed. III. ‘De natis ultra mare.’ See *De Veer v. Stone*, 22 Ch. D. 243.

2 *Campbell v. Hall*, Coup. 204.
law agreed with that of Rome. By the Naturalization Act, 1870, however, it has been provided that a wife shall have the same nationality as her husband.

Title by naturalization. Naturalization is an agreement by which an alien is received into the permanent allegiance of the Crown, and thereby becomes a natural subject. It is of two kinds, for such reception may be effected either by the royal prerogative or by virtue of statutory authority. In the former case it is called denization, and in the latter naturalization in a strict sense. These two methods differ in some respects in their effects, the former being less efficient than the latter, and failing to place a subject by reception on the same level in all respects as a subject by birth. For this and other reasons reception by royal prerogative is now become obsolete in practice.

But how shall a man be received into the allegiance of the king of England when he is already in the allegiance of the king of France? In the strict theory of feudalism this was clearly inadmissible; for no man can have two liege lords. Bracton allows that a man may be ad fidem utriusque regis, but it is to one of them only that he owes allegiance. Yet on the other hand, if a man shall so far forget his duty to his liege lord as to swear allegiance to another, shall he not be bound by his oath? If he undertakes to serve two masters, shall he not be held to his bargain? If the obligations which he has thus taken upon himself are inconsistent with each other, is it not to his own act that he must attribute the evil case in which he finds himself? A double allegiance was irregular de jure, but it may well have been possible de facto. And however this may have been in the days when feudal doctrine was still well remembered, there is no doubt that at the present time a man may be the natural subject of two states at once. This result is brought about, partly by the naturalization of aliens, and partly by the operation of the compromise now accepted in all states between the principle of the jus soli and that of the jus sanguinis. The son of a Frenchman, if born in England, is by the jus soli a British subject, and by the jus sanguinis a citizen of France. The Naturalization Act, 1870, has been careful, however, to provide to some extent against the existence of double allegiance. The reception of a British subject into the allegiance of a foreign state extinguishes his British nationality ipso jure; no alien naturalized in England is to be deemed a British subject while in the country of his original allegiance, so long as by the law of that country he remains a subject of it; and a man who is a British subject by the

1 Bracton, f. 427 b.
jus soli, and a foreigner by the jus sanguinis, may make his election between these two conditions.

The loss of British nationality. A person may cease to be a British subject in four different ways: (1) Residence in territory lost to the Crown of England by conquest, rebellion, cession, or otherwise; (2) Naturalization in a foreign state; (3) The marriage of a woman to an alien; and (4) Declaration of alienage.

‘Allegiance,’ it has been said, ‘by the English law is correlative with protection; and where the sovereign can no longer de jure protect his subjects, their allegiance ceases. Upon this principle allegiance is changed by conquest, or by cession of territory under a treaty.’ Therefore on the establishment and recognition of the independence of the United States of America, the inhabitants of that country lost their British nationality and became aliens. Similarly, when Hanover was lost to the British Crown on the accession of Queen Victoria, the Hanoverians ceased at the same time to be British subjects. In all such cases however, the inhabitants have an election between the old citizenship and the new. If they forthwith leave the territory of their residence and take up a new abode within the dominions of the Crown, they will retain their old allegiance, for no man will be rejected from his allegiance without his own consent.

Save in manner aforesaid, no one could by the common law free himself from the fealty which he owed to his sovereign. The maxim was: Nemo potest exuere patriam—Once a subject always a subject. The Naturalization Act, 1870, has, however, all but abolished this principle of indelible nationality. Any man is now free to throw off his allegiance to the Crown by becoming naturalized in any foreign state. By the same Act it is provided, as already mentioned, that the nationality of a wife shall be the same as that of her husband. An Englishwoman, therefore, who marries a French citizen ceases to owe allegiance to the Crown of England. Lastly, those persons who on their birth obtain a double nationality, are enabled by this statute to make a declaration of alienage, by which they reject the one and retain the other.

Local nationality. We have seen that the law of Rome recognized two distinct forms of citizenship, namely, imperial and local—the universal citizenship of Rome, and the particular citizenship of those territorial divisions of the empire which continued to be called civitates in memory of their origin as independent states.

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1 Forsyth's Cases and Opinions on Constitutional Law, p. 334.
3 Issacsion v. Durnall, 17 Q. B. D. 54.
We have seen that after Caracalla the *civitas Romana* became almost universal, that Rome became *communis patria*, but that every man retained none the less a particular or local citizenship in the *patria* of his birth. We find nothing similar to this in English law. The British empire, like the Roman, is a congeries of different countries, the populations of which live under different laws; but, unlike the case of Rome, there is but one citizenship throughout the length and breadth of the dominions of the Crown. No man is a subject of England, or of Scotland, or of Victoria, or of Quebec. He is a subject of the British empire in its unity, or else he is an alien. No one has by our law any *patria* or fatherland, save the territories of the Crown in all their world-wide compass. Even when England and Scotland were as yet united in a merely personal union, in the century that elapsed between the accession of James I and the Act of Union, there was no distinction between Scottish and English citizenship. He who was a subject of the king in Scotland, was his subject in England also. There was but one king, and therefore but one allegiance 1.

The law might well have been settled otherwise. For the purposes of private international law especially, it might have been wise to follow Roman doctrine in this matter, and to recognize local side by side with imperial citizenship. Every British subject might have been not merely a citizen of the empire as a whole, but a citizen, at the same time, of one of the great territorial divisions of which the empire is composed. But it is not so. The difficulties involved in the exclusive recognition by English law of a single citizenship throughout an empire made up of many different countries having separate laws, legislatures, and governments, have led to a very singular result. A man may be a British subject in one part of the empire, and an alien in another part. In New Zealand he may be an Englishman, and in England a Frenchman. In Victoria he may owe permanent allegiance to the British Crown, and on crossing the border into New South Wales he may find himself an alien. The cause of this remarkable state of the law is that, although the naturalization of alicus is within the power of colonial legislatures, the effect of their legislation is limited to their own territories 2. Therefore a Frenchman naturalized in South Australia remains an alien in all other parts of the empire. His acquired citizenship is British and imperial in name; it is South Australian and local in reality. The legal recognition of local citizenship would have avoided so unreasonable a result. Imperial citizenship would have

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1 *Calvin's Case, or the Case of the Postnati*, 2 State Trials, 559.
2 *Naturalization Act*, 1870, § 16.
remained, as in Rome, exclusively within the gift and jurisdiction of the imperial Parliament, while local citizenship would have been a privilege to be granted or withheld at the will of local legislatures.

The rights of a British subject. We have considered the essential meaning of British nationality, and the methods of its acquisition and loss. It remains to consider its consequences. In what respects, then, do the legal rights and liabilities of a subject differ from those of an alien? In Rome, as we have seen, the essential distinction lay in the possession of different systems of personal law. But no such conception was known to feudalism, or plays any part in the modern law of nationality and allegiance. A Frenchman does not bring with him into England his own law, or any part of it. So soon as he comes within English dominions he submits himself to the burden, and becomes entitled to the benefit, of the law of England. Whether subjects or aliens, all men in England live by the same law. Yet this law does not necessarily give equal rights to both classes, or impose equal obligations upon them. To this day, though in much smaller measure than formerly, it confers privileges upon subjects, which it withholds from aliens, and imposes upon subjects liabilities from which aliens are free. These special rights of subjects are such as are deemed rightly to flow from the fact of permanent allegiance due to the English Crown. These special burdens, on the other hand, are those from which aliens are held exempt by reason of the permanent allegiance which they owe to a foreign government. Let us consider such of them as are of chief importance.

Subjects alone possess political rights. No alien can acquire any measure of political power, or take any part in the government of the realm. In English as in Roman law, citizenship is the sole title to the **suffragium et honores**. For in Rome it was only by that **jus quiritium** from which aliens were excluded, that such rights were given, and in England no man will be admitted to serve the king who does not acknowledge him as his liege lord, and has not been received into his allegiance.

In respect of civil as opposed to political rights, aliens are at the present day in almost all points on an equality with subjects. The uniform tendency of legal development is to abolish all difference between them. Yet there are a few special privileges to which subjects only are entitled. No alien has any legal remedy in respect of an act of state. He will not be heard in an English court of law to complain of the acts of the English Government. Whatsoever grievance he has, he must take with him to his own state, where, peradventure, by way of diplomatic action between the two governments, he may obtain redress. He has the protec-
tion of the law of England against all private persons who do him injury, but between him and the servants of the Crown the laws are silent. A British subject, on the other hand, whether in the realm or out of it, has the same defence against acts of state as against those of private persons. The servants of the Crown will answer to him for all injuries suffered at their hands, and will not be heard to allege the command of the Crown or the exigencies of public policy, for with respect to the subjects of the Crown 'the common law does not understand that sort of reasoning.'

No alien can own a British ship or any share of one. Public policy demands that the British mercantile marine shall remain in the exclusive possession of British subjects. Nor can any alien take advantage of any statute which is expressly or by implication limited to British subjects. For the legislature has thought it upon occasion to confine the benefits, just as it has often confined the burdens, of its enactments to those who owe permanent allegiance to the Crown.

By the common law, now altered by the Naturalization Act, 1870, no alien could hold or inherit land in England, nor could any one inherit such land through an alien. This rule is one of great antiquity, and can be traced back into the thirteenth century, but it seems clear that at a still earlier period no such disability of aliens was recognized by our law. It is not involved in the primitive conception of allegiance, for there is nothing in feudal theory to prevent a man from holding land of two lords, or therefore in two kingdoms. French law, in other respects much harder upon aliens than our own, seems to have put no bar in the way of their ownership of land. It has been suggested with much plausibility that the English rule has its source in the perennial state of war existing in name or in reality between France and England after the loss of the Norman possessions of the English king. Frenchmen are not merely aliens, they are alien enemies, therefore their lands will be seized into the king’s hands, and their inheritances disallowed, until such time as there is peace again between the realms. But peace is long in coming, and the rule becomes in the meantime hardened and generalized into a perpetual and universal disability.

1 Entick v. Carrington, 19 State Trials, at p. 1074; Buran v. Denman, 2 Ex. 157; Mungrove v. Chun Teong Toy [1891] A. C. 272. Quaere to what extent, if at all, a resident alien is, or ought to be, entitled to protection against acts of state. See Pollock on Torts, p. 108 n., 6th ed.
2 Naturalization Act, 1870, § 14; Merchant Shipping Act, 1894, § 1.
3 See, for example, the Wills Act, 1861, providing for the execution of wills out of the realm by British subjects. See also Adam v. British and Foreign Steamship Co. [1898] 2 Q. B. 430, on the construction of Lord Campbell’s Act.
4 An account of the disabilities of aliens by the law of France before the Revolution will be found in Pothier’s Traité des Personnes et des Choses.
5 Pollock and Maitland’s History of English Law, i. 444.
imposed upon all aliens, whether Frenchmen or Spaniards, friends or foes.

The liabilities of British subjects. In some points the position of aliens, instead of being inferior to that of subjects, is superior to it. The reason is that aliens, even though resident within the territory, are partially exempt from the local jurisdiction. In most respects, indeed, the German who comes to England, subjects himself to English law, and submits to the jurisdiction of the English courts and legislature. Yet his submission is not so full and absolute as that of the natural subject. It is qualified by the allegiance which he still owes to his own sovereign. The extent of the jurisdiction which may be exercised by one state over the subjects of another is primarily a matter of international, rather than of civil, law. Civil law, however, follows international, and endeavours to conform to it. Both courts and legislatures seek to restrain their jurisdiction over aliens within the limits allowed by the law of nations. It is a recognized principle of English law that all statutes must be so construed, if possible, as not to overpass these limits. ‘Statutes,’ it has been said, ‘must be understood in general to apply to those only who owe obedience to the laws, and whose interest it is the duty of the legislature to protect. Natural born subjects and persons domiciled or resident within the kingdom owe obedience to the laws of the kingdom, and are within the benefits conferred by the legislature; but no duty can be imposed upon aliens resident abroad, and with them the legislature of this country has no concern, either to protect their interests or to control their rights.’

Therefore, although a British subject will answer in England for treason committed, whether in the realm or out of it, and whether in war or peace, an alien is liable only for what he does within the realm itself, for it is only there that he owes any allegiance to the Crown. And even for acts done by him in British territory he is no traitor, if he come openly with force of arms and in the way of lawful war. For an open enemy, who is an alien, is not within the protection, nor therefore within the allegiance of the Crown, notwithstanding his presence in the realm. ‘If an alien enemy,’ says Coke, ‘come to invade this realm, and be taken in war, he cannot be indicted of treason; for the indictment cannot conclude contra ligantiae suae debitum, for he never was in the protection of the king, nor ever owed any manner of ligeance unto him, but malice and enmity.’

So where the legislature sees fit to extend the jurisdiction of

1 Jefferys v. Bocory, 4 Il. L. C. 815. 2 Case of the Postnati, 2 State Trials, 617.
the criminal law to offences committed out of the realm, it is careful to limit the liability thus created to the acts of British subjects. A British subject may by statute be tried in England for murder, bigamy, and certain other crimes committed beyond the seas, but speaking generally no alien coming into this realm can be punished for any act done by him elsewhere.\(^1\)

Alien enemies. We have seen how Roman law distinguished between alien friends and alien enemies. The former are those between whose state and the state of Rome there is a league of friendship, peace, or alliance (foedus amicitiae). By them, though aliens, law and justice are to be had in Rome. All others are alien enemies, between whom and the Romans there is no law save the law of war, and no right save that of the sword. A like distinction is to be found in English law, though in modern times its rigour is much abated. ‘Alien enemies,’ says Blackstone, ‘have no rights, no privileges, unless by the king’s special favour, during the time of war.\(^2\)’ Their property may be confiscated by the Crown, and their persons seized as prisoners of war. They can maintain no action in any court of law. They can acquire no rights by any manner of contract or dealing with the subjects of the Crown, for all such contracts are void, and any subject, trading with an enemy without the special licence of the Crown, is guilty of an offence which renders all his property engaged in such illegal trading liable to capture and forfeiture. But when peace has come again, and the alien enemy is become once more an alien friend, he is remitted to his former standing before the law, and may bring his action even for a cause of action which accrued before the war. For his rights are merely suspended, not destroyed, save so far as the Crown has, during the war, actually exercised its powers of confiscation.

Who, then, shall be deemed alien enemies within the meaning of this rule? Let us hear Sir Edward Coke on the matter. His doctrine is curiously Roman, and differs in important respects from that which is received at the present day. In his view it is not a mere state of peace de facto that makes an alien friend; there is required in England, as in Rome, a foedus amicitiae. ‘Leagues between our sovereign and others,’ he says, ‘are the only means to make aliens friends.\(^3\)’ But all the kings and princes of Christendom are in his time in league with the king of England. Therefore save in actual war their subjects are alien friends in

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\(^1\) Reg. v. Keyp, 2 Ex. Div. 63; Att.-Gen. of N. S. W. v. McLeod [1891] A. C. 455. Even the jurisdiction of the civil courts is in some cases thus limited by considerations of foreign nationality. Ex parte Blain, 12 Ch. D. 522.

\(^2\) Commentaries, l. 372.

\(^3\) Case of the Postnati, 2 State Trials, 653.
England. With pagans and unbelievers, on the other hand, a Christian will have no treaty of friendship. They are perpetual enemies, for whom there is no law in England. 'A perpetual enemy,' he tells us, 'though there be no wars by fire and sword between them, cannot maintain any action, or get anything within this realm. All infidels are in law perpetui inimici, perpetual enemies, for the law presumes not that they will be converted, that being remot a pot entia, a remote possibility, for between them, as with the devils whose subjects they be, and the Christian, there is perpetual hostility and can be no peace.' It is scarcely needful to state that no such law as this is recognized at the present day. League or no league, in Christendom or in heathendom, it is actual war that makes an alien enemy, and actual peace that makes an alien friend. We no longer accept the Roman doctrine that all are enemies who are not friends; all, on the contrary, are friends who are not enemies.

But there is another and more important respect in which the law has developed since the days of Coke. Paradoxical as it may seem, it is well settled that the character of alien enemy no longer depends on nationality or allegiance. When England is at war with France, a Frenchman may be an alien friend, and an Englishman an alien enemy. The determining factor is no longer nationality but domicile. The alien enemy is he who voluntarily adheres to the enemy by living and trading in his country. Whether he belongs by allegiance to the enemy state, or to a neutral state, or to England herself, is a question completely irrelevant. He is accounted an enemy because he adds by his presence and his property to the resources of the enemy state. Therefore, though he be himself an Englishman, his ships and cargoes will be good prize of war for English cruisers, his contracts with Englishmen will be illegal and void, and his suits will not be heard in English courts. Hence it is that an incorporated company, though it owes no allegiance and has no nationality, may none the less be an alien enemy, and subject to all the disabilities of such. Conversely a man may owe allegiance to the enemy state, yet if he withdraws himself from its territories, and takes up his domicile in any neutral state or in England with the leave and licence of the Crown, he will be deemed no enemy of England, but an alien friend, entitled to all the rights and remedies of such, and his allegiance will not be remembered against him.

John W. Salmond.

1 Case of the Postnati, 2 State Trials, 638.
2 [In point of fact, both Elizabeth and James I exchanged compliments with the Sultan.—Ed.]