Fitch v Weber 6 Hare 51, 67 ER 1077
Report Date: 1847
[6-Hare-51] FITCH v. WEBER. Dec. 4, 6, 11, 1847.
[SC 17 L. J. Ch. 361; 12 Jur. 645. See In re Bourgoise, 1889, 41 Ch. D. 320.]
A. who was by birth an Englishman, emigrated to the United States of America after the recognition of their independence by the Treaty of 1783, and took the oaths of obedience to the American Government, and of abjuration of all other allegiance, married an American woman, and had a son of that marriage (B.) born in the United States. B. had a son (C.), who was also born in America, out of the Queen's dominions. Held, that C. was capable of inheriting real estate as a British subject within the statutes 13 Geo. 3, c. 21, and 4 Geo. 2, c. 21.
The abjuration by a British subject of his allegiance to the Crown, and his promise of obedience to a foreign state, although it might have rendered him liable, under the statute 3 James 1, c. 4, ss. 22, 23, to the penalty of high treason, does not therefore disqualify the children of such British subject from inheriting, in the absence of any attainder of such British subject by judgment, outlawry or otherwise.
The exclusion from the benefits of the statute 4 Geo. 2, c. 21, s. 2, of the children of

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fathers who, at the time of their birth, were liable to the penalties of high treason or felony in case of the returning into this kingdom or Ireland without the Royal license, is not to be construed as requiring the Court to determine incidentally, and in the absence of the party charged, that he has been guilty of treason or felony; but the exclusion must be construed as restricted to that class of offences in which the penalty is annexed to the fact of returning without license.
The privileges which the statutes 4 Geo. 2, c. 21, and 13 Geo. 3, c. 21, confer are the privileges of the children, and not of the father; and, therefore, acts intended by a British-born subject to have the effect of acts of abandonment or abjuration of his rights in that character do not deprive his children of the benefit of the statutes of the 4 Geo. 2, c. 21, and 13 Geo. 3, c. 21, unless such acts bring them within the disqualifying provisions of those statutes.
A person claiming the benefit of the statute 13 Geo. 3, c. 21, does not lose that benefit only because he does not conform or qualify in the manner prescribed by sect. 3 of that statute, within five years from the accruer of his right or interest.

The decree made at the hearing of this cause in 1841 directed the Master to inquire who was or were the heir at law or co-heirs at law of the testatrix, Anne Taylor, living at her death, with liberty to state special circumstances relating thereto.

The Master reported that several claims to be the heir or co-heirs had been made before him:- 1st, that of the Defendant, William Willock, who claimed to be heir at law; 2d, that of the Plaintiff, James Taylor Willock, who claimed to be heir at law in the event of the Defendant, William Willock, failing to establish his said claim; 3d, that of all the Plaintiffs (namely Catherine Fitch, James Taylor Willock, Emmeline Willock and Julia Caroline Willock), who claimed to be deemed and considered co-heirs in the event, aforesaid; and, 4th, that of the Defendants, Thomas Dobbs Butler and Fanny Eglinton, who claimed to be such co-heirs.

The Master stated the pedigree which, so far as relates to the several parties claiming to be heirs or co-heirs of Anne Taylor, is represented in the following table

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[6-Hare-52] WILLIAM AND CATHERINE WILLOCK.

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[6-Hare-53] The Master, by his report, found that the Defendant, William Willock, was the heir at law of the testatrix, Anne Taylor, living at her death. And be found that a statement had been laid before him on behalf of the Defendants, Thomas Dobbs Butler and Fanny Eglinton, in respect of the claim of the Defendant, William Willock, as heir at law of the testatrix, wherein it was alleged that Thomas Willock, the grandfather of the Defendant, William Willock, the claimant, did, in or about the year 1784, quit England, and emigrate to the United States of America; that he made his domicile in Norfolk county, in the state of Virginia, in the said United States, and did not retain a domicile in this country; that he married a native of Norfolk county, and did all necessary acts whereby to become naturalised as a citizen of the United States, and that he did accordingly become naturalised; that William Willock, one of the children of the said Thomas Willock, was born in Norfolk county aforesaid, that the said Defendant, William Willock, the claimant, was born in the island of Cuba; and it was by such statement submitted to him that, under the circumstances aforesaid, the said Thomas Willock ceased to be a subject of the Crown of Great Britain, and was not a subject of that Crown at the time of

the birth of any or either of his children, and that such children were not and are not children of a natural-born subject of Great Britain within the intent and meaning of the Acts of Parliament in that case made and provided, and are, therefore, aliens, and incapable of inheriting real property in the kingdom of Great Britain.

The Master also reported that a statement had been laid before him, on the behalf of the Defendant, William Willock, in respect of his claim as heir at law of the said testatrix, whereby it was stated that, in [6-Hare-54] pursuance of the provisions of an Act of Parliament, made in the 13 Geo. 3 (c. 21.), the said Defendant, William Willock, some time in the year 1846, left New York, in the United States of America, where he was previously residing, for the purpose of removing to the kingdom of Great Britain, and that he arrived in England in the month of June 1846, and had continued to inhabit and reside there up to the present time; that, on the 5th day of November 1846, he received the Sacrament of the Lord's Supper according to the usage of the Church of England, and on the 21st day of November 1846 took and subscribed the oaths, and made, repeated, and subscribed the declaration required by the provisions of an Act of Parliament made in the first year of Geo. I (c. 13) and that, at the time and place of taking and subscribing the said oaths, and. of making. repeating and subscribing the said declaration, he produced a certificate signed and attested, as by the provisions of the last-mentioned Act are required, of his having received the Sacrament of the Lord's Supper as aforesaid. And the Master stated the evidence submitted in support of the said statements.

The Defendants, Thomas Dobbs Butler and Fanny Eglinton, who claimed to be co-heirs of the testatrix through her sisters. Elizabeth and Alice, and the Plaintiff, James Taylor Willock, the second son of Thomas Willock, severally excepted to the report.

Mr. Rolt and Mr. Roundell Palmer appeared in support of the exceptions of Thomas Dobbs Butler and Fanny Eglinton; Mr. Walker and Mr. Hardy for the exceptions of James Taylor Willock k; and Mr. Wood and Mr. Rogers, for William Willock, in support of the Master's report.

[6-Hare-55] The arguments in support of the exceptions, so far as the reporter has been able to collect them, were these:-The father of the claimant, found by the Master to be the heir at law and the claimant himself, were both born in a foreign country. The father lived and died there, and the claimant, up to a very recent period, has always lived there. The Court has to apply the law of alienage to this state of things. The common law may be taken to be expressed by Littleton, s. 198, " an alien, which is born out of the legeance of our soveraigne lord the king." This being the principle, and the claimant (as well as his father) having been born out of the King's allegiance, it lies upon the claimant to shew some statute by which he is relieved from the effect of his alien character. The first statute on the subject is the 25 Edw. 3, stat. 2, which prevents mere birth out of the King's allegiance from depriving a child of his benefits as an English subject where both the father and mother, at the time of the child's birth, were of the faith and allegiance of the King, the mother not being abroad against her husband's will. This statute does not assist the claimant. Neither his

mother nor his grandmother were subjects of the King. The next statute(7 Anne, c.5) was made for the naturalisation of foreign Protestants; but the same statute (sect. 3) gives to the children of all natural-born subjects, born out of the Queen's allegiance, the rights of natural-born subjects of this kingdom. The other parts of this statute were repealed by the statute 10 Anne, c. 5; and the 3d section of the statute? Anne, c. 5, was explained and qualified by the statute 4 Geo. 2, c. 1. By that Act all children born or to be born out of the King's allegiance, whose fathers were or should be natural-born subjects of the Crown of England at the time of the birth of such children, were declared to be natural-born subjects of the Crown; but this was accompanied with the proviso, that the benefit [6-Hare-56] of the statute should not extend to children to be born out of the King's allegiance whose fathers, at the time of the birth of such children, should be attainted of high treason, or be liable to the penalties of high treason or felony in case of their returning into this kingdom without license from the Crown, or whose fathers should be in the actual service of a foreign state at the time of the birth in emnity with the Crown of England, all such children en being left to the effect of the common law. The benefits of the statute of Geo. 2 were extended by the statute 13 Geo. 3, c. 21, to all persons born or to be born out of the King's allegiance whose fathers were, or should be, under the statute 4 Geo. 2, c. 21, declared to be natural-born subjects of the British Crown, and all such persons were thereby declared to be natural-born subjects as if they had been born in this kingdom. It followed, first, that upon these statutes and the principle of the common law, those who claimed the benefit of the provisions in favour of persons born abroad ought to shew that they had, at least, accepted the benefit while, in this case, on the contrary, all the acts of Thomas Willock, the person in favour of whom the character of a natural-born subject was claimed (in order to admit the claim of his descendants), manifested an intention to abandon and repudiate the advantages which the statutes offered him. Thomas Willock took the oath of allegiance to the Government of the United States, and thereby expressly renounced and abjured his allegiance to

the Crown of Great Britain. He did every act necessary to constitute him an American citizen; he married a native and subject of that foreign state; he held civil offices, and served in the militia of that country; he was domiciled there during the war with England in 1813, and he died there. It was impossible to imagine a more perfect abandonment of the privileges of a British subject. Nor could it-be reasonably contended [6-Hare-57] that a statute passed in this country could have the effect of rendering his children, who were born in a foreign country, British subjects contrary to the whole tenor of his acts and intentions. Secondly, it was insisted that the effect of the treaties between this country and America was to absolve Thomas from his allegiance to the British Crown. The treaty of 1783 dissolved the ties of allegiance which had formerly subsisted between the inhabitants of what constituted British America and the Sovereign of this country; Doe v Acklam (2 B. & C. 779); and the claimant, William Willock, is not within the treaty of 1794; Sutton v Sutton (1 Russ. & Myl. 663), Doe dem. Stanbury v Arkwright (5 Car. & Pa. 575). Thirdly, if Thomas was not absolved by the effect of the compact between the two countries the acts which he had done had made him liable to the penalties of high treason in case he had returned to England without license. The oath of obedience to the United States, and the solemn renunciation and abjuration of his allegiance to this country by Thomas Willock, brought him strictly within the statute 3 Jac. 1, C. 4, Ss. 22, 23, whereby promising obedience to any other prince, state or potentate subjected the person so doing to be adjudged a traitor, and to suffer the penalty of high treason. The liability to such penalty excluded the party from the benefit of the statute of 4 Geo. 2 and of the subsequent statute. And, lastly, even if it could be held that Thomas had neither effectually thrown off his allegiance, nor become liable to the penalty of treason, still he would by his conduct have forfeited all right to be deemed a British subject: Calvin's case (7 Rep. 1), Drummond's case (2 Knapp, P. C. C. 295). If William Willock, the claimant, had in a period of war been taken in arms against this country, there was no principle of [6-Hare-58] international law upon which he could be regarded as a British subject.

On behalf of the Plaintiff, James Taylor Willcock, in support of his exception, it was said that William Willock had not perfected his title by conforming, according

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to the statute 13 Geo. 3, c. 21, s. 3, within five years from the time the title accrued, and that, owing to such omission, the estate would descend on the next heir at law of the testatrix not disqualified.

The arguments in support of the report may be understood from the judgment: several authorities were cited and, in particular, as to the construction to be given to the words "any other prince or state," in the statute 3 Jac. 1, c. 4, ss. 22, 23 4 Black. Com. pp. 87, 88. The statute 9 & 10 Vict. c. 59, repealing the statute 3 Jac. 1, c. 4; Foster's Cr. Law, Macdonald's case, p. 59 ld. 183. And, as to conditions which the party has during his life to perform, Co. Litt. 208 b, s 209 a.

THE VICE-CHANCELLOR [Sir James Wigram]. The Master has found that William Willock, the grandson of Thomas, who was the only brother of the testatrix, Anne Taylor, who left any issue, was the heir at law of the testatrix living at her death; and according to the pedigree, the correctness of which is not in dispute, there is no question but that the Master is right. The question raised by the exceptions has been whether, in the circumstances of the case, the status of Thomas, of William the son, and of William, the grandson, were such as to incapacitate William, the grandson, from taking by descent from Anne Taylor.

[6-Hare-59] The exceptants are, first, the descendants of two sisters of Anne Taylor, who claim to be her co-heirs on the exclusion, of the descendants of Thomas, the brother; secondly, the second son of Thomas, the brother, who claims to be admitted as the heir at law of Anne Taylor, if for the reasons which he assigns the son of the eldest son of Thomas should be excluded.

The argument against the claim of William, the grandson, which I shall first notice, is that which was founded upon the two treaties between this country and America, namely, the treaty of the 3d of September 1783, and that of the month of November 1794. I am clear there is nothing in either of those treaties to affect the right of William, the grandson. The treaty of 1783, empowered British-born subjects then settled in America to become American citizens. It did not empower British-born subjects who never had previously been in America to emigrate there at any time thereafter, and throw off their natural allegiance to the Crown of these realms. On this point the case of Doe d. Achmuty v Mulcaster (5 B. & C. 771) is an authority. Thomas Willock never was in America until 1784, and therefore was not a subject of the treaty of 1783. The treaty of November 1794, so far as it empowered British born subjects to become American citizens, was a local Act, and Thomas Willock was not within the localities affected by that treaty. The correctness of the Master's conclusion must therefore depend upon the statutes which were referred to during the argument; the statutes of the 7th of Anne, c. 5; the 4th of Geo. 2, c.- 21; and the 13th of Geo. 3, c. 21.

Thomas Willock, as I have before observed, went to [6-Hare-60] America in 1784, and his son and grandson were both born there, the son in 1788. The son not having been born within the King's

allegiance, his capacity to take by descent depends upon the statute of 7th of Anne, c. 5, explained by the 4th of Geo. 2, c. 21. Now by the former statute (s. 3) it is declared that all the children of natural-born subjects born out of the allegiance of Her Majesty, her heirs and successors, shall be deemed adjudged and taken to be natural-born subjects of this kingdom, to all intents, constructions and purposes whatsoever. The statute of the 4th of Geo. 2, c. 21, explaining that of Anne, requires that the fathers of the children entitled to the benefits of the Act shall be natural-born subjects of the Crown of England or of Great Britain at the time of the birth of such children respectively. The only question, therefore, up to this point in the case would be whether, in 1788, at the time of the birth of William, the son of Thomas, Thomas had ceased to be a natural-born subject of the Crown of England or of Great Britain. The next statute is that of the 13th of Geo. 3, c. 21, which provides that all persons born, or who should thereafter be born out of the allegiance of the Crown of England or of Great Britain, whose fathers were or should be " by virtue of the statute of 4th Geo. 2, made to explain a clause in the Act of the 7th of Anne," entitled to all the rights and privileges of natural-born subjects of the Crown of England or Great Britain, " shall and may be adjudged and taken to be, and are thereby declared and enacted to be natural-born subjects of the Crown of England or Great Britain, to all intents, constructions and purposes whatsoever, as if

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he and they had been and were born in this kingdom." From the language of this Act it is clear that the capacity of William, the grandson, to inherit depends upon the question whether William, the son, at the time of his [6-Hare-61] birth, was entitled to the rights and privileges of a natural-born subject of the Crown of England or Great Britain by virtue of the statute of Geo. 2, made to explain the clause in the statute of Anne relating to natural-born subjects.

The inquiry, then, as to the capacity of William, the grandson, must be answered by transferring the inquiry in the first instance to the capacity of William, the son. Was he entitled at his birth to the rights and privileges of a natural-born subject of the Crown of England or Great Britain-not generally, but by virtue of the explanatory statute of Geo. 2? And here the first question is, as to the disqualifications expressed in the second section of the 4th of Geo. 2. Those disqualifications are three; and they extend, first, to children whose fathers at the time of their births respectively were or should be attainted of high treason, by judgment, or outlawry or otherwise, either in this kingdom or in Ireland; secondly, children whose fathers at the time of the birth of such children respectively were or should be liable to the penalties of high treason or felony, in case of their returning into this kingdom, or into Ireland, without the license of His Majesty, his heirs or successors, or of any of His Majesty's Royal predecessors; and, thirdly, to children whose fathers at the time of the birth of such children respectively were or should be in the actual service of any foreign prince or state then at enmity with the Crown of England or Great Britain. The first and third of these disqualifications give rise to no question in this case. There was no attainder by judgment or outlawry, or otherwise, and there was -no service by Thomas Willock with any foreign prince or state at enmity with the Crown of England.

[6-Hare-62] With respect to the second ground of disqualification, I think it was well argued on the part of William, the grandson, that the words of the 2d section, "in case of their returning into this kingdom, or into Ireland, without the license of His Majesty," &c. are emphatic and restrictive, and clearly point at a known class of offences-that of returning under certain circumstances into this kingdom or Ireland without the license of the Crown. The fact that such a distinct class of offences existed, and that it subjected the offenders to the penalties of treason or felony, is sufficient, in my opinion, to induce any Court of Justice to restrain the words of the statute within the limits contended for. No construction of a statute can be more improbable than that which requires Courts of Justice to determine, incidentally and, in the absence of the party charged, that he had actually been guilty of treason or felony, without ever having come into the kingdom.

An argument of another kind, however, was resorted to. It was said that Thomas Willock, under the circumstances found by the Master, had solemnly abjured his allegiance to the Crown of Great Britain, and had by his acts become an American citizen; and that he had therefore ceased altogether to be a subject of England or of Great Britain before the birth of his son William in 1788.

I think this argument is fallacious. The privilege conferred by the statutes in question upon the children of natural-born subjects, born out of the King's allegiance, is the privilege of the children and not of the father. and is conferred upon the children for the benefit of the State. If the parents do an act which brings them within the disqualifying provisions of the [6-Hare-63] statute, the children, no doubt, may lose the rights and privileges otherwise conferred upon them by the statute. The father may do acts short of this, by which he may subject himself to penalties or forfeitures. But if the question be whether by the acts of the father the children have lost the rights and privileges conferred upon them as the children of a natural-born subject of England or Great Britain, it is not enough to shew that the father has done an act which he May possibly have intended should have a given effect-it must be shewn

that, by the laws of these realms, such act of the father had the effect which the argument ascribes to it; and without that I apprehend the rights and privileges of the children will be unaffected by the acts of the father.

Now nothing, I apprehend, can be more certain than that a natural-born subject cannot throw off his allegiance by any such acts as the Master has found in this case to have been done by Thomas Willock. I do not deny that Thomas Willock may

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have subjected himself to pains and penalties; but that is not the question. The question is upon the rights and privileges of the children; and whilst the obligation of allegiance as a subject remained upon the father, I cannot understand how the rights or privileges of the children would be affected by the acts relied upon.

I am not now called upon to say how far an Act of the Legislature of Great Britain can for all purposes make a man born out of the King, s allegiance a British born subject against his will. All that I am called upon here to decide is that a man entitled under the statutes in question to the rights and privileges of a British-born subject cannot be deprived of those rights [6-Hare-64] and privileges by such acts of his father as have been relied upon in the present case.

With regard to the effect of the statute of the 3d of James 1, c. 4, ss. 22, 23, there is no doubt that it creates an offence; but in the absence of attainder by judgment, outlawry or otherwise, the case falls under the observations I have already made. This appears to me, in substance, to dispose of the question as between the descendants of the sisters of Anne Taylor and William, the grandson of Thomas.

It was, however, contended, upon an exception on the part of James Taylor Willock, the second son of Thomas Willock, that he must be preferred to William, the grandson. The ground of this exception was that William, the grandson, had not, within five years from the time of the accruer of his title, qualified himself by receiving the sacrament, taking the oaths and conforming in the way which is required by the statute of the 13th of Geo. 3. The question made was whether those qualifying acts could be well performed after the five years had expired.

It appears to me that it is impossible to read the Act and not to see that a reasonable time must be allowed after the accruer of the title before the party can be required to do the acts referred to. The meaning of the statute cannot be that the party shall have done them in the lifetime of the person upon whose death the title accrued. If a reasonable time is allowed the case is then brought within the reasoning of Lord Coke, and of the other authorities cited, where the party, being in other respects entitled to the estate, has time allowed him, within which the acts necessary to perfect [6-Hare-65] his title are to be done. It is not necessary to decide whether a party, whose title depends upon the provisions of the statute of Geo. 3, could claim the judgment of the Court in his favour before he had qualified in the manner which the Act prescribes. The Master finds that the qualifying acts in this case have been done. Upon this point it may also be observed that if a party be entitled under the statutes to all the rights and privileges of natural-born subjects, the question as to the acts which he should do to give him a better qualification cannot arise.

I think the Master has come to the right conclusion, and the exceptions must be overruled.