1764.

LESLIES &c. *v.* GRANT, &c.

the forfeiting person, nor is now against the crown as coming in his place, and dismisses the claim; as also the said interlocutors of the 22d of December 1758, and the 3d February and 6th of December 1759, complained of be, and the same are hereby reversed, and that the said appellant's claim be sustained.

For Appellant, *Alex. Lockhart, Wm. Johnstone.*
For Respondent, *C. Yorke, Thomas Miller.*

CHARLES CAJETAN COUNT LESLIE, LEOPOLDUS COUNT LESLIE, Eldest Son, ANTHONY LESLIE, Second Son, and CHARLES COUNT LESLIE, Third Son, of the said COUNT CHARLES CAJETAN LESLIE - - - } *Appellants;*

PETER LESLIE GRANT, and his CURATOR, Ad Litem - - - } *Respondents.*

House of Lords, *2d February* 1763.

ALIEN—PROOF.—A person, a natural born subject of England, had issue born abroad before the 7 Anne (Naturalization act), out of the ligeance of the King. This son had issue, Count Anthony Leslie, also born out of the ligeance of the King; Question of law submitted to the whole judges of England: Whether Anthony was capable of inheriting land estates in Scotland? Held unanimously, on full consideration of the statutes, that Anthony Count Leslie, was to be deemed an alien, and not capable to inherit such estate—That the statutes extended only to the children of a natural born subject of the first degree, and not to the grandchildren, and Anthony's father not being a natural born subject of England, but an alien born abroad, before the passing of the 7 Anne, he could take no benefit.—Proof rejected in consequence of diet not being regularly intimated in terms of commission issued.

FOR the circumstances of this case, vide Craigie and Stewart's Reports, p. 324. It arose out of a settlement of the estate of Balquhain by entail, with conditions, that should the first heir of entail also succeed to estates in Germany, then in that event, the estate of Balquhain was to devolve on the next heirs therein specially called—the object being that the two estates should be kept separate, and enjoyed

by different branches of the family; and, in particular, that Balquhain should be enjoyed only by protestant members of the family, excluding papist branches. 1763. LESLIES, &c v. GRANT, &c.

In the Court of Session, it was found, that Count Charles Cajetan Leslie having succeeded to both estates, must denude his right to Balquhain in favour of the next heir of entail, who was James Leslie of Pitcaple, and that as Count Leopoldus and Antonius Leslie were only called in their order, as heirs male of Balquhain, in the event that had happened, therefore, the estate was not to be denuded in their favour:—But on appeal to the House of Lords, this judgment was reversed; and it was found and declared, that Antonius Count Leslie, was the next heir of tailzie entitled to succeed. Feb. 11, 1741. April 29, 1742.

The question then came to be, whether Antonius, being the grandson of a natural born subject (Earnest) and the son of Count Cajetan Leslie, (who was born in Germany, before 7 Anne, out of the ligeance of the King,) was to be deemed an alien, he being the subject of a foreign state, born in Germany, and a papist?

A proof was allowed and taken in foreign parts: Whether Charles Cajetan Count Leslie the father, and Antonius Count Leslie, his second son, on whom the estate of Balquhain devolved, (the eldest son taking the estate in Germany), were born without his Majesty's allegiance and papists? After report of the proof was taken, and debate on the objections thereto, and on the merits of the whole cause, the Lords of Session, of this date, pronounced this interlocutor; Dec. 4, 1761.

" Repel the objection that the pursuer has not made the " Crown a party in the process; and also repel the objection " of the two sons alleged by the defenders, to be procreate " of the body of Count Leopoldus not being called, in re- " spect this objection was proponed among other dilatory " defences, and repelled by the interlocutor of the Court, " dated 29th July 1757, which, upon appeal, was affirmed by " a decree of the House of Lords the 6th April 1758, sustain " the objection to the proof taken at Venice; but find it " proven by the testimonies of witnesses and other legal evi- " dence adduced in this cause, that John Grant of Ballin- " dallock, defender, is past the age of 15 years and a pro- " fessed papist, and found it proven that Charles Cajetan " Count Leslie, and his three sons, Counts Leopoldus, An- " tonius, and Charles, defenders, were all and each of them " born abroad, and in foreign parts, out of the ligeance of

1763.

LESLIES &c. *v.* GRANT &c.

" the Crown of Great Britain, whereby the said Counts " Leopoldus, Antonius, and Charles, being aliens, have no " inheritable blood, and cannot succeed to heritage in Scot- " land; and therefore find and declare the retour of the " service of Antonius Count Leslie as heir of tailzie and pro- " vision to the deceased Earnest Leslie of Balquhain, dated " 2d August 1742 years, with the decree of adjudication in " implement, at the instance of the said Antonius Count " Leslie, against the said Charles Cajetan Count Leslie, his " father, void and null."

It was then objected, that as no proof had been brought of the non-existence, failure, or disability of Count Leopold Leslie's two sons, no judgment could be pronounced in their

Jan. 13, 1762. favour; but the Court " found it proven by acknowledgment " that the said Leopoldus Count Leslie had at present no " issue."

Proof was next allowed of the death of James Leslie of

Feb. 5, 1762. Pitcaple, whereupon the Lords pronounced this interlocutor: " find it proven that James Leslie of Pitcaple died upon the " 12th day of March 1757 without issue, and therefore in " consequence of the former interlocutor, dated the 13th " January last, finding it proven, that Leopoldus Count Les- " lie has at present no children, and the other former inter- " locutors, dated the 4th December last, find and declare, " that the petitioner, Peter Leslie Grant (respondent and " son to John Grant, next substituted in the entail) is now " the nearest protestant heir of tailzie, entitled to succeed " to the estate of Balquhain, and further, find and declare " that Charles Cajetan Count Leslie, is obliged to make up " titles and denude himself of the said estate of Balquhain " in favour of the said Peter Leslie Grant, that the same is " redeemable by him, from the said Charles Cajetan Count " Leslie, and his eldest son, and his heirs male, for payment " of the sum of ten merks Scots money; and repel the whole " other defences, and decern and declare accordingly." On reclaiming petition the court adhered.

Feb. 5, 1762. Against these interlocutors the present appeal was brought to the House of Lords; and a cross appeal by the respondent, against that part of the interlocutor which sustained the objections to the proof taken at Venice.

Pleaded for the Appellant.—The respondents ought to have brought clear and positive proof of the fact averred by them, that the appellants were born in foreign parts, and are aliens and papists, and not relied, as they have done, on

vague hearsay and report. The fact was of recent date, and ought to have been proved with more certainty from the high rank of the appellant, whose place of birth, the respondents make to be Gratz in Stiria, and the government of that province to have been long in their family. But, instead of plain direct proof, they have only produced two or three German witnesses, of low stations, and very improper to testify in the matter. These witnesses, as was natural to expect, speak to nothing of their own knowledge, but at second or third hand. Nor are the Scots witnesses worthy of greater attention, as they never saw the appellants, nor corresponded with them, and had, therefore, no better means of knowing the fact in question, than the Germans had by hearsay. The two letters produced by Isabel Leslie, are not proved to be of Count Charles Cajetan's handwriting, and, therefore, were not evidence; nay, on comparing them with other writings, admitted to be of Count Charles Cajetan's hand, they are totally unlike. On the law of the case, and assuming the proof to be unexceptionable, it appeared, from the writers of the Scots law, and from judicial determinations, that alienage did not disable a man from inheriting and holding lands in Scotland.

Naturalization indeed, whether by King or Parliament, was necessary for conferring the *jus civitatis*, or enabling the alien to hold offices or dignities; and when granted, was always in the most comprehensive words, including the privileges the alien enjoyed, without as well as by it; *that*, for example, of acquiring moveables or personal estates, which it was never doubted but an unnaturalized alien might do. But, admitting that aliens were incapable of inheriting, the son of a natural born subject born abroad, was not so incapable; for he was, by the law of Scotland, a natural born subject; and there is no trace on record, of such being ever passed by, in the descent, as an alien, and the estates going to the crown, or to a remoter heir.—Count Charles Cajetan, though born abroad, was the son of a Scotsman, and, therefore, a natural born Scotsman; and by the union, became a natural born subject of Great Britain, to all intents and purposes whatever, as afterwards declared, by the 7 Anne and 4 Geo. II. This being the case, the appellant Count Anthony, be he born wherever the respondents please, must, as the son of a natural born subject, be one himself, and not an alien; which is the legitimate construction to be put upon the act. Further, both the appellant and respondent claim as special

1763.

LESLIES, &c. v. GRANT, &c.

substitutes, and the benefit of alienage, always redounding to the crown even in case of descent, it is impossible that the respondent Grant, can have any title or benefit from Count Anthony's alienage, whose right continues good, until set aside at the instance of the king.

Pleaded for the Respondents—As among the ancient states, particularly the Grecian and Roman, no alien could hold lands, so by the practice of most civilized countries in Europe at present, particularly England, Scotland, and France, no alien can hold lands in any of these countries, and that agreeably to the maxims of the Roman and feudal laws. That such is the law of England and France, is not, nor can be disputed; that such was the law of Scotland, antecedent to the union with England, is plain from a variety of authorities cited to the court; whereby it appeared that the king naturalized foreigners, in order to entitle them to hold land estates; and by many acts of Parliament to the same purpose, particularly, *that* in the year 1707, upon the intended union of the two kingdoms; the consequence whereof is, upon the supposal, that the several descendents of Count Charles Cajetan Leslie are aliens, that the estate of Balquhain, which would have devolved upon Count Anthony, had he been capable of inheriting, falls to the respondent, as called next to the succession.

From the proof brought before the Court in this cause, independent of that part which has been rejected; it is manifest, that Count Cajetan and all his children have been born in foreign parts; and the necessary consequence whereof is, that at least his children are aliens, however he himself may claim the privilege of a natural born subject, under the acts 7 Queen Anne, and of King Geo. II.—But this personal privilege, supposing it ever so well founded, Count Charles Cajetan cannot avail himself of; because by the settlement of the estate of Balquhain, he stands bound to denude in consequence of the succession to the German estate opening to him. And this privilege, which the father was entitled to plead, as a natural born subject, born abroad, is confined to him alone, and does not entitle his issue to the same benefit. In regard to the cross appeal brought by the respondent,—it was wrong, after the House of Lords had determined that the proof taken at Venice should be received virtually, to disregard it, as after that judgment, ordering it to form a part of the process, it ought to have had its due weight, and not been totally rejected. But even supposing that the ob-

jection made to the proof taken at Venice were good, and the certificates relative thereto, shewing, that notice of the diets was put into the post-office *there*, and had come to Edinburgh, instead of remaining *there*, were objectionable, still the proof otherwise adduced, independently of this part of the evidence, being conclusive, the proof taken at Venice ought to have been received to the effect of supporting that evidence.*

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* *Note.*—The argument of counsel, as noted by Lord Hardwicke, acting for the Lord Chancellor (Northington), appearing different from the above, taken from the printed appeal, it is given below.

Lord Advocate of Scotland for appellants.—Four points of view:—

1. As to the statute 7 Anne, cap. 5.
2. As to the statute 4 Geo. II. cap. 21.
3. As to the act 25 Geo. II. for naturalizing foreign Protestants.
4. As to the common law.

By the common law of Scotland, the son of a natural born subject of Scotland born abroad was deemed in law a natural born subject.

So it was by the common law of England, according to the statute of 25 Edward III. stat. 2.

Mr. Forrester ad idem.

42 Edw. III. c. 3.

Hyde and Hill, Cro. Reports Eliz. p. 3.

If husband and wife go abroad without license; or if with license, and they stay beyond the time of the license, the children born abroad after *that* are aliens.

Croke's Reports, Car. 601.

Littleton, 23.—The same case stated, though merchant married a Popish woman.

How they regard the words of the statute 25 Edw. III., which required both father and mother to be at the faith and ligeance of the king.

Many factories established abroad, where families have resided for many generations.

It is said the statute *De natis ultra mare* had been restrained by construction.

The genius of the present times tends to enlarging and not to contracting of these cases.

Mr. Attorney-General for respondent.

Two questions.

1. Whether by the common law of Scotland Count Anthony is excluded from the succession?

2. Supposing he is excluded by the common law, Whether he is aided by any statute made in England or Great Britain? This leads to a third question.

3. Supposing he is not a natural born subject himself, Whether he is so by being the son of a natural born subject?

The point they put it upon is the latter, That Count Anthony is capable as the son of a natural born subject.

1763.

LESLIES, &c. v. GRANT, &c.

After hearing counsel, the following question of law was put to the whole judges in England.

Earnest, a natural born subject of England, had issue, Charles Cajetan, now alive, born before the seventh year of

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As to the passage cited out of Sir Thomas Craig, "Si parentes sint ad fidem domini regis."

That means going abroad in the service of the king, or with license.

2d Point. Whether Count Anthony is made capable by any statute whatsoever.

Objection two ways.

1. By the treaty of Union, in consequence of the statute De natis ultra mare.

2. By the conception of the statute 7 Anne.

As to the first, I should presume it a doubtful case if the statute occasioned the statute 7 Anne.

That statute, 25 Edw. III., is declaratory as to the children of the crown; as to common subjects it is enacting.

In the first, the expression children of the crown includes all issue. In the other as to subjects, not so.

The second part gives power to the king to naturalize certain parties by name. These cases refer to sons.

It appears by the cases on this statute that there never was a statute of so doubtful a construction.

Lord Coke takes no notice of it in Coke-Littleton, p. 8.

Littl. Reports, 28, King, &c.

Sir Robert Sawyer's arguments in the case of Sandys, and the East India case, 7th vol. of the State Trials.

A subject at going abroad without license *animo remanendi* is not *ad fidem regis*.

As to the statute 7 Anne. That act, according to the opinion of Lord Hailes, restrains naturalization within the father as a natural born subject.

Coke on Littleton, 29.

Natural *born subjects* are mentioned in the acts of Parliament to be a subject born in England. Neither Count Anthony's father nor himself was born in England.

The children of natural born subjects have a privilege, but this must be the immediate issue, not issue in general.

Statute 4 Geo. II. The act places the word children in the precise sense of immediate children, in all the cases exemplified by the words of the act. Reads the act.

The first part of the statute 7 Anne relates to the naturalization of foreign Protestants, and the clause in question ought to be construed consistently with that intent.

Mr. Wedderburn ad idem.

The appellant, Anthony, cannot bring himself within the statute 25 Edw. III., because his father was not at the faith and ligeance of the king.

But his grandfather was, because he was born in Scotland.

the reign of Queen Anne, out of the ligeance of the king, who has issue, Anthony, born out of this ligeance of the king.

Question.—Whether Anthony is capable to inherit, or take land for his own benefit, or ought to be deemed an alien?

The Lord Chief Justice Pratt, delivered the unanimous opinion of the judges present, upon the said question, as follows:—

* "In this case, all the judges are of opinion, that Count Anthony is to be deemed an alien, and not capable of inheriting, or taking lands for his own benefit."

"Count Anthony was son of Count Charles Cajetan, who is admitted to have been born out of the kingdom, before the statute 7

Whatever persons are born abroad of fathers, who go abroad for lawful purposes *animo remanendi*, it is very reasonable to naturalize them.

But nothing more useless and improper than to allow those to be naturalized, who, as far as they are able, have proffered their allegiance to, and are absolutely settled in a foreign country.

If you go beyond children there is no staying. They admit they cannot do so without resting upon a fiction.

The words are almost as strong as if there had been an express clause.

To reach the appellants' construction of the statute, you must change *children* into *posterity*, *fathers* into *ancestors*.

A construction which would be casting to the winds the entire act of settlement.

Upon the act *De Natis ultra mare*, Count Anthony could not have pleaded that his father was living at the faith and ligeance of the king.

Is Count Anthony a subject of Great Britain?

Suppose Count Anthony had come over in arms against the king? He would have been considered as a prisoner of war.

Suppose he was an officer in the employ of the army, would he be guilty of felony for going into a foreign service without the king's license?

But independently, the 7 Anne has no retrospect; and therefore cannot benefit Count Anthony, whose father was born abroad before the passing of that act.

Mr. Forrester (Rp^{t}.)

The respondents have, in every instance, considered the children of an Englishman born abroad as aliens by the common law. I say they were denizens.

If you construe the act 7 Anne to extend only to the children of persons who were actually born within the king's dominions, you will exclude the children of ambassadors and merchants, who go abroad for trade, or in military service.

It will be for your Lordships' judgment to draw the line.

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* From notes taken by Lord Hardwicke.

1763.

LESLIE, &c. v. GRANT, &c.

Anne; and nothing shewn to prove that his father lived in the faith and ligeance of the king of England at that time."

"Three points of view present themselves:"—

"1*st*, Consideration of the case, as it stood before the act of 7th Anne.

2*d*, How it stands by a construction of the act.

3*d*, The inconveniences of that construction, or otherwise."

"1*st*, It is impossible to state with precision, how the common law stood as to alienage, before the statute 25 Edw. III. (stat. 2), *De natis ultra mare*."

"It looks as if that was the construction which brings from out of the ligeance of the realm, and not out of the faith and ligeance of the king. By the law of England these two cases are distinct."

"I looked into Cotton's records, to see what passed in 17 Edw. III. as to the question, whether it was started before."

"They held the case of the king's children, to be clear, (*i. e.* that the children of whatever degree enjoyed the privilege); and that the inference of the children of subjects born abroad, was very doubtful; and therefore it was undetermined.

"42 Edw. III. The question was asked, what would be the rights of children born at Calais, Gascoigne, &c.; and whether they would be held as born within the dominions of the king, or beyond the ligeance,—the king of England then assuming the title of King of Great Britain, France and Ireland? The answer is, that the common law took place as to the one, and the statute 25 Edw. III. as to the other."

"The saying of Hussy in Richard III.'s time is incorrect; and this sanctioned by reference to the statute, 25 Edw. III."

"The doubt of the law was, whether any person ends his connection, and ceases to live at the faith and ligeance of the king, who chiefly resides elsewhere, and bound so to do. As for example; Ambassadors—persons going abroad with license—Merchants going abroad for merchandize, clearly so; but as to those persons going abroad without license, is a point not determined."

"At common law, any person not prohibited, might go abroad with license. This appears by reference to the statute, 5 Richard II. Cap. 2, prohibiting the exportation of gold and silver out of the realm, and also all persons to depart out of the realm without license. And yet if a person went to reside, remained, and settled *there*, it was not clear, whether his children were aliens or denizens, (Cro. El. 3. Hyde and Hill held Aliens). The statute 29 Charles II. related to the children of persons who went abroad in the time of the Usurpation. Should they go there by failure in health,—illness would go to presume the occasion of their going abroad. The statute 9 and 10 Wm. III., for acknowledging the children of officers and soldiers serving abroad in the king's service."

"This is strong case; and yet doubtful."

"*But all these related to children of natural born subjects in the first degree.*"

"Lord Coke, in Calvin's case, never takes notice of the grandchildren; and none of those statutes or cases, go further than the first degree. Now, this is precisely the peculiarity in reference to this case. Anthony is not the son of a natural born subject, but only the grandson of one.—his own father, Count Cajetan, having been born in Germany, before the naturalization act 7 Anne, and only himself the son of a natural born subject.

"The notion that prevailed at the time of making the statute, 9 and 10 Wm. III. gained nothing to the statute 7 Anne, which was made during Queen Anne's war, and it is good law, not to carry reading beyond the words of the statute."

"None of the provisions in the statutory laws, therefore, extend to grandchildren."

"2*d*, As to the statute of Queen Anne. The first part naturalizes foreign protestants. The next clause describes or indicates who are in degree fit for naturalization. These are the parent and children, or the child to become so by petition upon the act."

"The statute explains the parent as not wanting naturalization."

"The common law right, and the statutory right, are set in opposition to one another."

"The appellant Count Cajetan admits, that the parent of all others must be a natural born subject, in fact and not by fiction. This strikes at his case."

"But he and his son have taken two ways to extend it, in order to make it serve their own purpose."

"1. By transposing the *father* into the place of the *child*.

"2. By transposing children into *posterity*."

"Count Charles Cajetan is made to be both child and father."

"If the Parliament had intended this to be the case, they would have expressed it more clearly in the act. The act quarto Anne, c. 4, (particularly the binding section), passed two years before, was considered to carry against naturalization to all such *posterity*."

"3*d*, Inconveniences that would arise from entering on a construction of the act. It would let in all sorts of persons into the family rights, Jews, French, &c., without any test or qualification—without any residence."

"The advocates for the full extent of the naturalization have not contended for it without some qualification."

"All the acts I have recited, require some qualification. Were this not the case, in terror, the might naturalize one-half of Europe."

"This would undermine the act of settlement; for if natural born subjects, they are naturalized before a member of this family, then they will be capable of offices, and grants of the lands from the Crown within the explanatory act 1 Geo. I."

1763.

LESLIES, &c. *v.* GRANT, &c.

Lord Hardwicke's observations on the argument—

"Two things in the statute of 25 Edw. 3, show it not to be declaratory of the common law."

"1*st*, It is in future words—'*that shall be born.*'

"2*d*, It requires both father and mother to be natural born subjects; whereas, if it had been the common law, the father's being a natural born subject, would have been sufficient."

After hearing counsel, as well yesterday as to day, upon the other points in the cause; and due consideration had of what was offered on both sides, it was

Ordered and adjudged, that the interlocutors therein complained of be, and the same are hereby affirmed. And it is further ordered, that the Court of Session in Scotland, do give all proper directions, relating to the continuance or discharge of the factor or receiver of the rents and profits of the estate in question, appointed by order of the said Court; and for his accounting for, and paying over, the rents and profits of the said estate, as to the said Court shall seem just.

Judges present—

Pratt, Chief Justice, C. P.

Clive, J.	Adams, B.
Bathirst, J.	Perrot, B.
Wilmot, J.	Lord Mansfield.
Gould, J.	Lord Hardwicke.

For Appellants, *Thomas Miller, Al. Forrester.*

For Respondents, *C. Yorke, Ja. Montgomery, Al. Wedderburn.*

Unreported in Court of Session.

ALEXANDER DUKE OF GORDON and his Curators, *Appellants;*

JAMES EARL OF MORAY and WILLIAM EARL OF FIFE, - - - - } *Respondents.*

House of Lords, *9th March* 1763.

RIGHT OF FISHING.—A difference having arisen as to the import of the judgment of the House of Lords, fixing the boundary between two fishings, as being the line which the sea made upon the coast where it cut the river Spey: Circumstances in which the Court