Foreign-Born Children of Disloyal Parents: Adam Muthana, Mary Arcedeckne, and the Natural-Born

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INTRODUCTION

Can Adam Muthana, the foreign-born child of an alien Islamic State of Iraq and Syria (“ISIS”) combatant and a New Jersey-born ISIS adherent, grow up to be president of the United States? He can if he attains the age of thirty-five, resides in the United States for fourteen years, and is a natural-born citizen. He has a facial claim to statutory derivative citizenship at birth through his mother, and some scholars argue that anyone who is a citizen at birth is a natural-born citizen. Nevertheless, there

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1 B.A., Washington & Lee University; J.D., Harvard Law School; D.Phil., Oxford University; Member, New York State Bar. The author gratefully acknowledges Professor Eileen Denza for sharing her comments and opinions on the Muthana case; the staffs of the United Kingdom Parliamentary Archives, the New York Public Library, the National Library of Ireland, and the libraries of Trinity College Dublin and the University of Cambridge; Linda Watson of Transcription Services Ltd.; and the editors of the St. John’s Law Review.

2 See U.S. CONST. art. II, § 1, cl. 5 (the “Presidential Eligibility Clause”).

3 See infra notes 234–236.

are significant disputes over whether he will be allowed to reside here, whether he is a citizen, and if so, whether he is natural-born.\footnote{See, e.g., Expedited Complaint for Declaratory Judgment, Injunctive Relief and Petition for Writ of Mandamus, Muthana v. Pompeo, Case 1:19-cv-00445 (D.D.C. Feb. 21, 2019) [hereinafter Complaint]; John Vlahoplus, \textit{Toward Natural Born Derivative Citizenship}, 7 BRIT. J. AM. LEGAL STUD. 71, 75, 83 (2018) (derivative citizens are not natural-born under historical and doctrinal theories of constitutional interpretation). After this Article was written, the District Court ruled in favor of the defendant in \textit{Muthana}, and the petitioner appealed. Brief for Petitioner-Appellant, Muthana v. Pompeo, No. 19-5362 (D.C. Cir. Feb. 24, 2020).}

Much of United States citizenship law developed from English and British sources that may help frame the debate over Muthana’s status and that of his mother. In particular, the House of Lords decision in \textit{Arcedeckne et ux. v. Horan et al., et e contra} (1730)\footnote{The decision for respondents in the appeal (appellants in the cross appeal) was without opinion. 23 HL Jour. (1730) 563 (Gr. Brit.). Transcriptions of primary source materials from the case are attached as appendices. Appellants' surname was likely pronounced “Archdeacon.” See J. Gennadius, \textit{The Proper Pronunciation of Greek}, 38 \textit{NINETEENTH CENTURY: A MONTHLY REV.} 681, 685 n.11 (James Knowles ed., 1895).} may help because it determined whether the foreign-born Mary Arcedeckne was natural-born even though both of her parents were disloyal subjects.

The two cases have notable similarities. The \textit{Arcedeckne} case occurred in the context of domestic and international conflicts between Protestants and Catholics. English Protestants feared Catholicism and repressed it both in England and in Ireland. Actions to achieve greater religious freedom or to restore a Catholic monarch prior to the \textit{Arcedeckne} decision included the failed Gunpowder Plot to destroy Parliament in 1605,\footnote{See, e.g., \textit{MARY HAYDEN \\& GEORGE A. MOONAN, A SHORT HISTORY OF THE IRISH PEOPLE FROM THE EARLIEST TIMES TO 1920}, 338 et seq. (1922).} war against William of Orange in 1688–91,\footnote{See, e.g., Ben Johnson, \textit{The Jacobite Revolts: Chronology}, HISTORIC UK, https://www.historic-uk.com/HistoryUK/HistoryofScotland/The-Jacobite-Revolts-Chronology/ (last visited Oct. 22, 2019).} support for a planned French invasion in 1708,\footnote{See, e.g., id.} and Jacobite risings in England, Scotland, and Ireland in 1715 and 1719.\footnote{See, e.g., U.K. Parliament, \textit{Catholics and Nonconformists}, https://www.parliament.uk/about/living-heritage/transformingsociety/private-lives/religion/overview/catholicsnonconformists/ (last visited Oct. 21, 2019).} Protestants reacted to these actions with greater suspicion of Catholic subjects’ loyalty and additional repression.\footnote{See, e.g., id.} It was in this
context that Mary Arcedeckne’s Irish Catholic father fought against English rule in Ireland until his exile to France, where she was born and where he continued to fight in French service against the English crown until his death in 1703.12

The Muthana case is unfolding in another period of domestic and international religious conflict. Some consider Islam to be engaged in a global war with nation states or other religions.13 Actions against the United States include the failed attempt to destroy the World Trade Center in 1993, the attacks of September 11, and continuing domestic and international terrorist acts. The United States and its allies have been engaged in long-running actual or proxy wars with a de facto Islamic state in Afghanistan, a self-proclaimed Islamic state in Iraq and Syria, and the Islamic Republic of Iran in the Middle East14 and in Africa.15 American reactions to these events have included suspicion of American Muslims’ loyalty,16 a national registry of all alien men entering the country from predominantly Arab and Muslim nations,17 a Muslim travel

Conservative Member of the European Parliament for South-East England, noted the similarities between contemporary British suspicion of Muslims and earlier British suspicion of Catholics. See Daniel Hannan, Muslims are Trying To Prove Their Loyalty, TELEGRAPH (Feb. 27, 2008), https://www.telegraph.co.uk/comment/columnists/danielhannan/3555475/Muslims-are-trying-to-prove-their-loyalty.html.

12 See infra note 45.


17 See, e.g., Elsadig Elsheikh et al., Legalizing Othering: The United States of Islamophobia, HAAS INST., at 32 (Sept. 2017), http://haasinstutute.berkeley.edu/
ban, warrantless domestic surveillance and domestic discrimination and hate crimes against Muslims and those mistaken for them. In this context, Hoda Muthana—who was born and raised in the United States as a Muslim—traveled to Syria, joined ISIS, incited Americans to commit domestic terrorist acts, and bore her son Adam.

Both cases raise similar questions about the effects of the parents’ disloyal actions on their own nationality and that of their foreign-born children. This Article considers the two cases based on common law and relevant English, British, and American nationality statutes. It provides the first extended analysis of *Arcedeckne v. Horan*, based in part on previously unpublished material from the case. It identifies issues for Adam Muthana’s claim to citizenship and for the United States government’s challenges to the citizenship of the Muthanas. It concludes that if Adam Muthana is a United States citizen, he is not natural-born and therefore cannot grow up to be president.

I. THE CASE OF MARY ARCEDECKNE

*Arcedeckne* is one of the most important but least noted cases in British nationality law. The House of Lords decision was a groundbreaking interpretation of The Foreign Protestants
Naturalization Act, 1708 (the “Act of Ann.”) and significantly affected the terms of The British Nationality Act, 1730 (the “Act of Geo. II”) and The British Nationality Act, 1772 (the “Act of Geo. III”). The three acts were not fully replaced until 1914, and they may continue to affect British status for some persons who can trace their ancestry to that year.

A. Historical Background

Two strands of Irish, English, and British history are crucial to the Arcedekne decision. The first is the English subjugation of Ireland and legal discrimination against Catholics, which led to the exodus of tens of thousands of Irish subjects to Catholic nations on the continent. The second is the enactment of English and British statutes in the seventeenth and early eighteenth centuries granting foreign-born persons the privileges of natural-born subjects. These combined to raise the question whether the Act of Ann. deemed Mary Arcedekne, the foreign-born daughter of disloyal Irish parents, to be natural-born and therefore capable of inheriting lands in Ireland.

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24 An Act for Naturalizing Foreign Protestants 1708, 7 Ann. c. 5, repealed except as to section 3 by An Act to Repeal the Act of the Seventh Year of Her Majesties Reign Intitled An Act for Naturalizing Foreign Protestants 1711, 10 Ann. c. 9; for the short title see An Act to Facilitate the Citation of Sundry Acts of Parliament 1896, 59 & 60 Vict. c. 14, sch. 1.

25 An Act to Explain a Clause in an Act Made in the Seventh Year of the Reign of Her Late Majesty Queen Anne (for Naturalizing Foreign Protestants) Which Relates to the Children of the Natural-Born Subjects of the Crown of England or of Great Britain 1730, 4 Geo. 2 c. 21; for the short title, see An Act to Facilitate the Citation of Sundry Acts of Parliament 1896, 59 & 60 Vict. c. 14, sch. 1. The Act of Geo. II was enacted and received royal assent in 1731. See infra notes 122–126 and accompanying text. Britain only began in 1793 to date acts of parliament by the date of royal assent rather than the date the parliamentary session began. See Acts of Parliament (Commencement) Act 1793, 33 Geo. 3 c. 13. For the effects of the Act of Ann. on the Act of Geo. II, see infra Section I.C.

26 See An Act to Extend the Provisions of an Act, Made in the Fourth Year of the Reign of His Late Majesty King George the Second, Entitled “An Act to Explain a Clause in an Act, Made in the Seventh Year of the Reign of Her late Majesty Queen Anne, for Naturalizing Foreign Protestants, Which Relates to the Children of the Natural-Born Subjects of the Crown of England, or of Great Britain,” to the Children of Such Children 1772, 13 Geo. 3 c. 21; for the short title, see An Act to Facilitate the Citation of Sundry Acts of Parliament 1896, 59 & 60 Vict. c. 14, sch. 1. For the effects of the Act of Ann. on the Act of Geo. III, see infra note 146 and accompanying text.


28 See id. at 105.
1. Subjugation, Discrimination, and Exodus

England subjugated Ireland by a series of military actions beginning in the twelfth century and by numerous later-enacted statutes that discriminated against Catholics in both Ireland and England. Many Irish emigrated to gain greater personal freedom or to continue to fight for independence in the service of foreign Catholic sovereigns. An estimated one hundred and twenty thousand Irish died in foreign military service in the four decades preceding the Arcedeckne decision.

English actions to repress Catholicism included deposing and exiling the Catholic James II of England (VII of Scotland) to replace the Catholic members of the House of Stuart with the Protestants William of Orange and Mary and restricting the English and Irish crowns to Protestants. Catholic actions to secure greater religious liberties and to restore the House of Stuart prior to the Arcedeckne decision included the failed Gunpowder Plot in 1605, the Williamite War of 1688–91, support for a planned French invasion in 1708, and Jacobite risings in 1715 and 1719.

A discriminatory law that was critical to Arcedeckne was An Act to prevent the further growth of Popery in 1703. This statute generally prescribed primogeniture for Irish Protestants but gavelkind for Irish Catholics. That is, a first-born Protestant in Ireland inherited Irish lands from a Catholic decedent in their entirety, Catholic survivors, on the other hand, inherited in equal shares.

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29 See, e.g., JOHN RYAN, IRELAND FROM A.D. 800 TO A.D. 1600, at 89–112 (1900).
32 See 18 SCOTT, supra note 31, at 11.
33 See An Act for the Further Limitation of the Crown and Better Securing the Rights and Liberties of the Subject 1700, 12 & 13 Will. 3 c. 2, § 1.
34 See supra notes 7–10 and accompanying text.
35 An Act to Prevent the Further Growth of Popery 1703, 2 Ann. c. 6, § 7.
36 See id. at § 12.
37 See id. at § 10.
In an era when land was a principal source of wealth and power, this statute encouraged conversion. It consolidated power in the hands of Protestants who would support English rule and dispersed that of Catholics who might resist it. The Welsh practice of gavelkind had been a major factor in the earlier English conquest of Wales.\textsuperscript{38}

A military engagement that was critical to the case was the 1691 Siege of Limerick.\textsuperscript{39} Besieged Irish and French forces negotiated a peaceful end to the engagement.\textsuperscript{40} The resulting Treaty of Limerick\textsuperscript{41} granted capitulating Irish forces safe passage to France under arms.\textsuperscript{42} Some twenty thousand Irish departed under the treaty’s terms\textsuperscript{43} in what came to be known as the Flight of the Wild Geese.\textsuperscript{44} Among them was Dennis Hannin, an Irish Catholic natural-born subject and later the father of Mary Arcedeckne.\textsuperscript{45}

\textsuperscript{38} See, e.g., PHILIP YORKE, THE ROYAL TRIBE OF WALES 46 (Wrexham 1799).
\textsuperscript{39} See, e.g., CHARLES O’KELLY, THE JACOBITE WAR IN IRELAND (1688–1691) 101–08 (Dublin, 2d ed. 1894) (describing the second siege of Limerick in the war).
\textsuperscript{40} See, e.g., id. at 107–08.
\textsuperscript{41} For the text of the treaty, see 1 FRANCIS PLOWDEN, AN HISTORICAL REVIEW OF THE STATE OF IRELAND, FROM THE INVASION OF THAT COUNTRY UNDER HENRY II TO ITS UNION WITH GREAT BRITAIN ON THE FIRST OF JANUARY 1801 1 app. at 189 (1805), https://hdl.handle.net/2027/umn.31951002411653d?urlappend=%3Bseq=445.
\textsuperscript{42} See Treaty of Limerick, Mil. art. II, Oct. 3, 1691; 1 JAMES MULLALLA, A VIEW OF IRISH AFFAIRS SINCE THE REVOLUTION OF 1688, 152–53 (Dublin 1795).
\textsuperscript{44} See, e.g., O’KELLY, supra note 39, at 108.
\textsuperscript{45} See THO. LUTWYCHE & N. FAZAKERLY, The Case of the Appellants in the Original Appeal, and Respondents to the Cross-Appeal, Arcedeckne et ux. v. Horan et al., et e contra, lines 30–32, 139 (1730), Parliamentary Archives, HL/PO/JU/4/3/6 (attached as Appendix 5) (Dennis Hannin married Eleanor O’Mara in France and had one child, Mary; both Dennis and Eleanor were natural-born subjects); P. YORKE & C. TALBOT, The Case of the Said James Horan, Respondent in the Original, and Appellant in the Cross Appeal, Arcedeckne et ux. v. Horan et al., et e contra, lines 24–27, 91 (1730), Parliamentary Archives, HL/PO/JU/4/3/6 (attached as Appendix 6) (Dennis Hanyn, a Catholic who surrendered at Limerick, went to France and fought in French service against England until his death in 1703). Line number citations to these documents are to their transcriptions attached as appendices.
2. Statutory Grants of Privileges of the Natural-Born

At common law, all persons born within the dominions and allegiance of the sovereign were natural-born subjects.46 The only foreign-born persons who were natural-born subjects were children of ambassadors.47 All others were aliens. The common law allowed aliens only limited rights to real property within the realm.48 Only letters patent from the sovereign or an act of Parliament could grant them some or all of the privileges of a natural-born subject.49

It is not clear when the common law rule developed. A 1350 statute50 (the “Act of Edw. III”) provided in part

that all children inheritors, which from henceforth shall be born without the ligeance of the King, whose fathers and mothers at the time of their birth be and shall be at the faith and ligeance of the King of England, shall have and enjoy the same benefits and advantages, to have and bear the inheritance within the same ligeance, as the other inheritors aforesaid in time to come; so always, that the mothers of such children do pass the sea by the license and wills of their husbands.51

Keechang Kim argues that the common law rule had not developed by 1350 and that the Act of Edw. III merely overrode rules of procedure that prevented the foreign-born from proving their right to inherit.52 Others consider that the common law rule was in place in 1350.53 Among these, some argue that the Act granted only the limited right to inherit,54 others that it

46 See, e.g., 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 354, 357 (Oxford, 1st ed. 1765); cf. Godfrey v. Dixon (1619), 79 Eng. Rep. 462, 463, Cro. Jac. 539 (“[T]rue it is there was a disability, but not in the blood, viz. his blood was not the cause of his disability, but the place of his birth; for the law respects not the blood, where there is not any allegiance . . . .”).

47 See, e.g., 12 HL JOUR. (1666) 86 (Gr. Brit.); BLACKSTONE, supra note 46, at 361; FRANSMAN, supra note 27, at 131. Some consider British ships to be British territory for this purpose and all children of the monarch to be natural-born. See, e.g., FRANSMAN, supra note 27, at 131.

48 See, e.g., BLACKSTONE, supra note 46, at 360–61.

49 See, e.g., id. at 362.

50 A Statute for Those Who are Born in Parts Beyond Sea 1350, 25 Edw. 3, stat. 2 (also known as De natis ultra mare).

51 Id. at cl. 5.


granted all of the rights of natural-born subjects. In any event the Act had a checkered history, alternately being invoked in some periods and apparently forgotten in others.

Beginning in the seventeenth century, English and later British statutes began to increase the classes of foreign-born who would receive the privileges of natural-born subjects. A 1663 statute provided that any foreigner who set up the bona fide trade and manufacture of certain cloths and tapestries and who took oaths of allegiance and supremacy would “enjoy all privileges whatsoever as the natural-born subjects of this kingdom.”

A 1677 statute provided that children born abroad to natural-born subjects during Charles II’s absence from the kingdom in the Interregnum would, upon satisfying certain conditions, be

declared and shall for ever be esteemed and taken to all Intents and Purposes to be and to have beene the Kings Naturall borne Subjects of this Kingdome . . . and shall be adjudged reputed and taken to be and to have beene in every respect and degree Naturall borne Subjects and free to all intents purposes and constructions as if they and every of them had beene borne in England.

A 1707 statute designed in part to encourage foreign sailors to serve on British ships provided that those who served for two years

shall, to all intents and purposes, be deemed and taken to be a natural-born subject of her Majesty's kingdom of Great Britain, and have and enjoy all the privileges, powers, rights, and capacities which such foreign mariner or seaman could, should,

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55 See, e.g., Duroure, 4 T.R. at 308.
56 See, e.g., Clive Parry, British Nationality Law and the History of Naturalisation 91 (1954).
57 See An Act for Encouraging the Manufactures of Making Linnen Cloth and Tapestry 1663, 15 Car. 2 c. 15, § 3.
58 See An Act for the Naturalizing of Children of his Majestyes English Subjects Borne in Forreigne Countries during During the Late Troubles 1677, 29 Car. 2 c. 6, cl. 1. For a similar statute naturalizing children born to parents who had served in a foreign war, see An Act to Naturalize the Children of Such Officers and Souldiers & Others the Natural Born Subjects of this Realme Who Have Been Borne Abroad During the Warr the Parents of Such Children Haveing Been in the Service of this Government 1697–98, 9 & 10 Will. 3 c. 20, §§ 3, 4.
or ought to have had and enjoyed, in case he had been a natural-born subject of her Majesty's, and actually a native within the kingdom of Great Britain.\textsuperscript{59}

Finally, the 1708 Act of Ann. recognized that the “Wealth and Strength” of the nation depended on an “Increase of People” and therefore simplified the naturalization of foreign Protestants and provided “[t]hat the Children of all natural-born Subjects born out of the Ligeance 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.”\textsuperscript{60} Mary Arcedeckne relied on this statute to assert her right to inherit Irish lands.\textsuperscript{61}

\textbf{B. Litigation}

\textbf{1. Principal Facts}\textsuperscript{62}

While in France, Dennis Hannin met and married another Irish natural-born subject, Eleanor O'Mara.\textsuperscript{63} They had one child, Mary, born in France.\textsuperscript{64} Hannin served in the French armed forces in continuing warfare against England until his death in 1703.\textsuperscript{65} Mary Hannin later married Mathias Arcedeckne.\textsuperscript{66} Beginning in 1719, she abjured Catholicism, conformed to the Church of Ireland, and satisfied the requirements of other statutes to inherit land in Ireland.\textsuperscript{67} She then claimed sole inheritance of Irish lands as a Protestant first-born collateral heir to a great uncle who had died in 1712.\textsuperscript{68}

\textsuperscript{59} See An Act for the Encouragement of the Trade to America 1707, 6 Ann. c. 37 § 20.
\textsuperscript{60} See The Foreign Protestants Naturalization Act 1708, 7 Ann. c. 5 § 3, repealed except as to section 3 by An Act to Repeal the Act of the Seventh Year of Her Majesties Reign Intituled An Act for Naturalizing Foreign Protestants 1711, 10 Ann. c. 9.
\textsuperscript{61} Petition and Appeal of Mathias Arcedeckne and his wife, Arcedeckne et ux v. Horan et al, et e contra, lines 48–53 (1729), U.K. Parliamentary Archives, HL/PO/JO/10/3/223/9 (Eng.) (attached as Appendix 1).
\textsuperscript{62} This summary resolves factual disputes in favor of the losing appellants to the extent they are consistent with the final decision.
\textsuperscript{63} See LUTWYCHE & FAZAKERLY, supra note 45, at lines 30–31.
\textsuperscript{64} See id. at line 3.
\textsuperscript{65} See YORKE & TALBOT, supra note 45, at lines 24–27.
\textsuperscript{66} See LUTWYCHE & FAZAKERLY, supra note 45, at line 2 (“Mathias”); YORKE & TALBOT, supra note 45, lines 59–62, 65–66 (marriage). For alternate spellings see id. (“Matthias”); PLOWDEN, supra note 23, at 47 (“Arcedeen”).
\textsuperscript{67} See LUTWYCHE & FAZAKERLY, supra note 45, at lines 111–14, 118–23.
\textsuperscript{68} See id. lines 77–78 and adjacent margin.
2. Prior Litigation History and Briefs in the House of Lords

The litigation of the Arcedecknes’ claim took many years and wound through several court decisions.69 One found for the Arcedecknes, granting them an accounting and a redemption of the premises.70 A subsequent decision affirmed their right to temporary possession of the premises but held the rest of their claims in abeyance for a year and a half.71 The case ultimately reached the House of Lords in 1730, with the Arcedecknes appealing and Horan cross appealing the decisions that went against each.72 Arcedeckne asserted that “by Force of” the Act of Ann. she “is to be deemed, adjudged and taken to be a natural-born Subject of this Kingdom to all Intents, Constructions and Purposes whatsoever”,73 that she had abjured Catholicism and conformed to the Church of Ireland;74 and that she had satisfied all conditions in other applicable statutes to inherit Irish lands.75 Therefore she was entitled to inherit entirely.76

Attorney General Philip Yorke and Solicitor General Charles Talbot represented respondents before the House of Lords.77 They raised a number of defenses including that Mary was an alien at common law, did not meet the conditions of the Act of Ann., and did not fulfill the requirements of other statutes to inherit Irish lands.78

Yorke and Talbot raised two mutually exclusive challenges to Arcedeckne’s claim under the Act of Ann. The first was that “her Father, at the time of her Birth, ought not to be considered as a natural-born subject within the Meaning of that Act” because he had left Ireland pursuant to the Treaty of Limerick

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69 For a description of the proceedings below in the Court of Exchequer, see id. at lines 115–62.
70 See id. at lines 141–49.
71 See id. at lines 158–62.
72 The procedural history in the House of Lords appears in 23 HL JOUR. (1730) 310, 380, 454, 456, 497, 513, 553, 555–56, 560–63.
73 LUTWYCHE & FAZAKERLY, supra note 45, at lines 173–75.
74 See id. at lines 176–78.
75 See id.
76 See id. at lines 77–78, 176–81.
77 See YORKE & TALBOT, supra note 45, at lines 253–54 (identifying counsel as P. YORKE and C. TALBOT); JAMES WILLIAM NORTON-KYSHE, THE LAW AND PRIVILEGES RELATING TO THE ATTORNEY-GENERAL AND SOLICITOR-GENERAL OF ENGLAND xi (London 1897) (Yorke as Attorney General and Talbot as Solicitor General from 1727 to 1734).
78 See YORKE & TALBOT, supra note 45, at lines 196–234.
and thereby transferred his allegiance to the king of France.\textsuperscript{79} England treated those who had left under the treaty as prisoners of war if later captured in arms; they could not have continued to be subjects “unless it be consistent with the Duty of a Subject to bear Arms against his Sovereign.”\textsuperscript{80} Intentionally or not, Yorke and Talbot imputed to the Act of Ann. a requirement of the Act of Edw. III, which expressly applied only if the parents were at the faith and ligeance of the king at the time of the child’s birth.\textsuperscript{81}

The second challenge was that if \textit{Dennis Hanyn} could be supposed to have continued a Subject of the Crown of England in Point of Duty . . . yet it can’t be imagined that it was the Intent of the Legislature who made that Act of Naturalization, to give the Privilege of a Subject to the Children of one who had forfeited all Right to the Protection of the Laws, and done all that in him lay to transfer his Allegiance, and make himself cease to be a Subject, the Intention of the Legislature seeming to be to extend the Privileges granted by that Act to the Children of such Subjects only who stayed in Foreign Parts on lawful Occasions.\textsuperscript{82}

Yorke and Talbot justified their interpretation on normative and consequentialist grounds:

Upon the Whole therefore, and as this is a Case that may affect great Numbers of Protestant Purchasers in Ireland, and seems to be calculated to let in the Issue of such who left Ireland with the late King James, to dispute the Titles of very many Estates in Ireland with the present Possessors of them, which would be of the most mischievous Tendency, and greatly disturb the Peace and Tranquility of that Kingdom, the said James Horan humbly hopes, that the Appeal . . . be dismissed, with Costs . . . and that the said James Horan may have such other Relief, as to your Lordships shall seem proper.\textsuperscript{83}

Mary Arcedeckne’s claim was squarely within the letter of the Act of Ann. Yorke and Talbot’s first challenge, on the other hand, was inconsistent with general English legal principles. Natural-born subjects owed indelible allegiance to the


\textsuperscript{80} \textit{YORKE & TALBOT, supra} note 45, at lines 210–13.

\textsuperscript{81} \textit{Of Those that Be Born Beyond Sea} 1350, 25 Edw. 3 stat. 2, cl. 5.

\textsuperscript{82} \textit{YORKE & TALBOT, supra} note 45, at lines 214–20.

\textsuperscript{83} \textit{Id.} at lines 242–52.
sovereign. They could not unilaterally renounce their natural allegiance, and the Treaty of Limerick does not expressly consent to renunciation. England may well have treated those who left under the treaty as prisoners of war if later captured in arms. However, that may have been a matter of grace rather than law. The sovereign always retained the power to pardon traitors and outlaws, and there are earlier and later precedents of sovereigns pardonning natural-born subjects who had committed treason under extenuating circumstances. The most notable was that of Aeneas MacDonald, a natural-born subject captured in the Jacobite rebellion of 1745 and pardoned because he had lived abroad since his infancy.

Yorke and Talbot’s second challenge draws some support from prior case law. The court in *Hyde v. Hill* held that the Act of Edw. III did not apply to those who went abroad without the king’s license or who stayed abroad beyond the term of that license. That precedent combined with Yorke and Talbot’s normative and consequentialist arguments might justify a decision for respondents.

3. House of Lords Decision

The House of Lords held for respondents without an opinion. However, John Burke, a co-respondent in the case, petitioned the House of Lords in 1731 during their consideration of a bill to explain the Act of Ann., which became the Act of Geo. II. He reminded the Lords of the history of the case and that they had ruled for respondents on the grounds “that the said Mary Hanyn under the Circumstances herein before set forth was not within the meaning or intention of the Act of the 7th of the late Queen

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84 See, e.g., BLACKSTONE, supra note 46, at 357–58.
85 See, e.g., id.
86 See The Trial of George Busby at Derby Assizes, for High Treason, Being a Romish Priest (1681) 8 How. St. Tr. 525, 550 (Assiz.).
87 See Proceedings Against Aeneas Macdonald (1747) 18 How. St. Tr. 858, 860.
88 See id.
89 Hyde v. Hill (1582) 78 Eng. Rep. 270, 270. This case was an early example of socioeconomic discrimination in derivative nationality or inheritance law; the applicable licensing statute exempted “lords and other great men of the realm, and true and notable merchants, and the King’s soldiers.” None Shall Transport Gold or Silver, nor Depart out of the Realm, Without License 1381, 5 Rich. 2 c. 2, § 6 (Eng.).
90 John Burke, The Humble Petition of John Burke on Behalf of Himself and of James Horan (1731) Parliamentary Archives, HL/PO/JO/10/6/398, lines 60–68 (attached as Appendix 8).
for Naturalizing Foreign Protestants.”91 This suggests that the Lords found for respondents on both grounds in the alternative. Yorke and Talbot’s first challenge was based on the “Meaning” of the Act of Ann.,92 and their second challenge on the “Intention of the Legislature” that enacted it.93 Therefore, Dennis Hannin was not a natural-born subject at Mary’s birth and, even if he was, then he was not within the intent of the statute. It appears that Yorke and Talbot’s normative and consequentialist arguments triumphed over the express terms of the Act of Ann. and historic English legal principles governing natural allegiance. Intriguingly, however, additional material in Burke’s petition combined with the drafting history of the Act of Geo. II, discussed below, suggest that Dennis Hannin remained a natural-born subject and that the Arcedecknes lost only because offspring like Mary were not within the intent of the legislature in making the Act of Ann.94

There is one other potential source of period information on the decision. The United Kingdom Parliamentary Archives holds a series of records of House of Lords decisions from the period including ones like Arcedeckne that lacked opinions.95 The series contains the printed cases of the opposing sides—which are like

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91 Id. at lines 41–43.
92 YORKE & TALBOT, supra note 45, at line 205.
93 Id. at line 216.
94 Francis Plowden quotes what he calls the reason for the judgment in the case “as stated and signed by P. YORKE and C. TALBOT.” PLOWDEN, supra note 23, at 48. The quotation is identical to Yorke and Talbot’s first challenge in their House of Lords brief (excepting nominal grammatical differences). Id. at 48–49 (quotation); YORKE & TALBOT, supra note 45, at lines 202–13 (first challenge). The author has been unable to find any work by Yorke and Talbot that includes this language other than the brief. In addition, Plowden’s statement is inconsistent with Burke’s petition and the structure of the Act of Geo. II. Finally, Horan’s printed brief in the House of Lords was submitted under the names of “P. YORKE” and “C. TALBOT” with the same upper and lower case typesetting that Plowden references. Plowden may have mistaken Yorke and Talbot’s argument for the court’s decision. Alternatively, Plowden might have believed that the Arcedecknes lost on both grounds, because he also writes that Parliament attempted to explain the Act of Ann. “after the determination of the case of HORAN and ARCEDECNE; when the plain import of the words of the 7th of Queen ANNE was found to extend beyond the meaning of the Legislature in passing it.” PLOWDEN, supra note 23, at 54; cf. John Vlahoplus, “Natural Born Citizen”: A Response to Thomas H. Lee, 67 AM. U. L. REV. F. 15, 27 (2018) (following Plowden to interpret Arcedeckne as holding that Dennis Hannin had ceased to be a natural-born subject).
briefs in American courts—and on some “the Judgment has been endorsed in manuscript on the final page of the successful party’s case.”

Manuscript on the final page of the archives’s copy of James Horan’s case reads simply “Orders Complain[ed] off by the Resp[onden]e[s] Cross Appeal Reversed and the Appellants Bill Dismiss[e].” Manuscript on copies in the collections of the National Library of Ireland and the University of Cambridge Library also note that the decree Horan complained of was reversed and the Arcedecknes’ bill dismissed.

However, a copy in the collection of the library of Trinity College Dublin contains additional information in manuscript on the first and last pages. It is not known who the author was or whether the information reflected the views of an observer, of counsel, or of the judges. The handwriting is difficult to make out, and the author uses a number of abbreviations. The first page contains a summary Hannin family tree and a summary chain of title to the disputed premises. The final page contains

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96 Id.
97 See YORKE & TALBOT, supra note 45.
98 The library did not provide a citation for the document.
99 See Matthias Arcedeckne, and Mary Arcedeckne, alias Hanyn, his wife, . . . appellants. James Horan, gent. Florence Callanane, William Burke, Nicholas Arcedeckne, . . . respondents. The said James Horan, —— — appellant. The said Matthias Arcedeckne, and Mary Arcedeckne, his wife - respondents. The case of the said James Horan, respondent in the original, and appellant in the cross appeal, University of Cambridge Library, Rare Books Room, 7250.a.269.
100 See Matthias Arcedeckne, and Mary Arcedeckne, alias Hanyn, his wife . . . appellants. James Horan, gent. Florence Callanane, William Burke, Nicholas Arcedeckne . . . respondents. The said James Horan, —— —— appellant. The said Matthias Arcedeckne, and Mary Arcedeckne, his wife - respondents. The case of the said James Horan, respondent in the original, and appellant in the cross appeal, OCLC number 79525533, Trinity College Dublin Library (attached as Appendix 7) [hereinafter Horan, Trinity College Transcription].
101 The manuscript uses “Hanyn” like the Horan filings rather than “Hannin” like the Arcedeckne filings, so it is unlikely that the Arcedecknes or their counsel wrote it. This copy of the case of James Horan notes in manuscript that the case was to be heard on Tuesday, the 5th of May. The Parliamentary Archive’s copy of the case of the appellants states in print that the hearing was to be Wednesday, the 6th of May. The case was argued on both the 5th and 6th, with judgment given on the 6th. See 23 HL JOUR. (1730) 562–63 (Gr. Brit.). The Parliamentary Archive’s copy of the case of James Horan has blanks for the day, date, and month that the case was to be heard, see YORKE & TALBOT, supra note 45, at lines 266–67, as do copies of both cases in the National Library of Ireland and the copy of the case of James Horan in the University of Cambridge Library.
what appears to be substantive commentary on the case. A professional transcription follows, subject to cautions from the transcriber about relying on it:

11 I shant [return/relate] [to the/to you/___?] H[igh] treason amounts to license admitted ar[e] Subjects, & can’t transfer alleg[iance].
[but ?] a man who comits treason is not subject.
Supose after thi[sh]ould not ret[urn]; he comit treason; sh[ould] not he be guilty
If it don’t extend to Ireland it will not to Plantation.

___]efal
Should be a child born at [a] tim[e]
[wh]en parents we[r]e nat[ural] born subjects declar[e]d th[e]mselves ^ to be & he x sey she was once an alien.102

This suggests that Dennis Hannin could not transfer his allegiance and remained a subject in point of duty. In addition, it suggests that legal interpretation included consequential analysis, including whether a given rule that extends to Ireland would extend to “Plantation,” which may have referred to the Plantation of English and Scottish Protestants on confiscated Irish lands in Ulster in the north of Ireland.103

4. Significant Legal Implications

The decision has three significant legal implications. First, the Act of Ann. was retroactive. It was enacted by a parliament whose term began in 1708, but Mary Arcedeckne was born earlier, her father having died in 1703.104 Second, the common law rule continued to apply into the eighteenth century. Mary Arcedeckne was foreign-born and did not benefit from any statute. Therefore, she was an alien and could not inherit Irish lands. Third, normative and consequentialist arguments were permissible in legal interpretation and could supersede express

102 Horan, Trinity College Transcription, supra note 100, at lines 32–49 (italics omitted).
104 See YORKE & TALBOT, supra note 45, at lines 26–27.
statutory language. The terms of the Act of Ann. applied to children of natural-born subjects without any exception. Nevertheless, the House of Lords recognized an implicit exception after Yorke and Talbot argued that finding for the Arcedecknes would prejudice Protestants, “would be of the most mischievous Tendency, and [would] greatly disturb the Peace and Tranquility of” Ireland.  

The decision might also have some implicit implications about the status of the Act of Edw. III in the eighteenth century. Arcedeckne did not claim any right to inherit under that statute, even though both of her parents were natural-born subjects. It may have been that the statute was generally forgotten, as some have suggested. It may have been that there was some question whether it applied in Ireland, although a later case determined that Poynings’ Law had incorporated it in Irish law.  

Alternatively, there may have been questions whether Mary Arcedeckne qualified under the Act of Edw. III. Hyde v. Hill had denied the benefit of the act where the parents had gone abroad without license or stayed beyond the term of a license, presumably because that demonstrated their lack of actual ligeance to the monarch. There is no evidence that Dennis Hannin or Eleanor O’Mara violated any license requirement, and the Treaty of Limerick’s leave had no time limit. Nonetheless, it may have been more difficult in practice to claim under a statute that expressly required their “faith and ligeance” than one that merely required them to be natural-born subjects.  

In addition, the Act of Edw. III only applied if “the mothers of such children do pass the sea by the license and wills of their husbands.” But Eleanor O’Mara had already passed the sea before Dennis Hannin met and married her. The operation of the statute was the subject of important historical dispute. Lord Bacon argued in 1608 that the statute applied to all posterity, so that “descendents are naturalized to all generations: for every generation is still of liege parents, and therefore naturalized: so

105 See id. at lines 242–52.
106 See, e.g., FARRY, supra note 56, at 91.
109 Of Those that Be Born Beyond Sea 1350, 25 Edw. 3 stat. 2, cl. 5.
110 Id.
111 See LUTWYCHE & FAZAKERLY, supra note 45, at lines 30–32.
as you may have whole tribes and lineages of English in foreign
countries.” The statute’s text contradicts Bacon, however. The
literal terms require a wife to be physically present in the realm
and then pass the sea with the consent of her husband before the
act could apply to later-born children, ensuring some pre-natal
marital connection to the realm for anyone who might benefit
under the Act. The House of Lords and Parliament later
rejected Bacon’s interpretation, as discussed below.

C. Effects on the Act of Geo. II

The disputed clause in the Act of Ann. raised several
important issues. It deemed foreign-born children to be
natural-born subjects of the kingdom rather than of the
sovereign, contrary to fundamental legal principles. It did not
clearly state whether one parent or both had to be natural-born
subjects. And the scope of Parliament’s intent was unclear
after the Archedeckne decision.

In 1731 Parliament enacted the Act of Geo. II to explain that
clause. Section 1 provides that “by virtue of” the two acts,
foreign-born children are adjudged, taken, and “declared to be
natural-born subjects of the crown of Great Britain, to all intents,
constructions and purposes whatsoever” if their “fathers were or
shall be natural-born subjects of the crown of England, or of
Great Britain, at the time of the birth of such children . . . .”
This explains that the Act of Ann. applies to children of
natural-born fathers. It also explains that the father must be a
natural-born subject at the time of the child’s birth, consistent
with Yorke and Talbot’s interpretation of the clause and with the
similar provision in the Act of Edw. III.

Section 2 explains that nothing in the Acts of Ann. or Geo. II
did or should be construed to make any foreign-born children “to
be natural born subjects” if their fathers were, at the time of the
children’s birth, (a) attainted of high treason, (b) liable to
penalties of high treason or felony should they return to Great

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112 See Lord Bacon, Speech of Lord Bacon, as Counsel for Calvin, in the
Exchequer Chamber (1608) 2 How. St. Tr. 560, 585 (as long as none married aliens).
114 See infra notes 144 and accompanying text.
115 See, e.g., PARRY, supra note 56, at 77.
116 See, e.g., id. at 76.
117 Francis Plowden wrote that the Act of Geo. II responded to the Archedeckne
decision. See PLOWDEN, supra note 23, at 54–55.
118 1731, 4 Geo. 2 c. 21 § 1.
Britain or Ireland without license, or (c) “in the actual service of any foreign prince or state then in enmity with the crown of England, or of Great Britain” (“tainted” fathers).119 Those children “are, were and shall be and remain in the same state, plight and condition to all intents, constructions and purposes whatsoever, as they would have been in” had the two Acts never been made.120 This codified the House of Lords’ interpretation in Arcedeckne. The terms of Sections 1 and 2 suggest that Yorke and Talbot’s first challenge was incorrect. Dennis Hannin and those similarly situated remained natural-born subjects and continued to owe indelible natural allegiance to the sovereign.121 However, their children were not within the legislative intent of the Act of Ann. because of their fathers’ disloyalty.

It appears that the House of Commons proposed Sections 1 and 2. The initial bill was introduced on March 5, 1731122 and likely included only Section 1. On March 18 the bill was committed to a Committee of the whole House with the instruction

that they have Power to receive a Clause, to prevent the Children of Persons outlawed, or attainted of high Treason, or prohibited from returning into this Kingdom, or Ireland, or being in the Service of any Prince or State in Enmity with the Crown of Great Britain, who were born out of the Leigance of his Majesty, from being deemed natural-born Subjects of this Kingdom.123

The House agreed to an amended bill on March 24,124 passed it on March 26,125 and ordered it sent to the House of Lords on March 30.126

In an apparent act of grace, Section 3 of the Act of Geo. II contains a retroactive proviso added by the House of Lords127 generally declaring children of tainted fathers to be natural-born subjects if the children (1) had previously moved to the dominions, professed the Protestant religion, and resided for two years; (2) had previously moved to the dominions, professed the

119 Id. § 2.
120 Id.
121 See supra Sections I.B.2–I.B.3
122 See 21 HC JOUR. (1731) 661 (Gr. Brit.).
123 See id. at 680.
124 See id. at 696.
125 See id. at 700.
126 See id. at 704.
127 See infra notes 131–138 and accompanying text.
Protestant religion, and died there; (3) had previously been in actual and continued possession of rents and profits of the lands for one year; or (4) had previously conveyed the lands for good and valuable consideration to persons who thereafter had been in actual and continued possession of rents and profits from them for six months.128 This proviso benefitted some foreign-born persons as well as subjects who had acquired land from those who otherwise lacked good title under the Arcedeckne precedent.

Astonishingly, this proviso would have reversed the result in Arcedeckne after years of litigation. Burke’s petition to the House of Lords explained that respondents’ title:

may be Subjected to be againe called in question by the s[ai]d Mathias & Mary Arcedeckne by Virtue of a Clause in a Bill now under your Lordships Consider[ation] Intituled an Act to Explain a Clause in an Act made the Seventh year of the Reign of her late Majestie Queen Ann for Naturalizing Foreign Protestants which relates to the Children of Naturall Born Subjects of the Crown of England or Great Britain should the same Pass into a Law . . . .129

Burke explained that Mary Arcedeckne had been in Ireland since 1719 and professed the Protestant religion and had also been in actual possession of the disputed premises, with the result that if the bill becomes law “she will be Naturalized to all Intents and Purposes by the said Clause and Consequently She, her Issue, & those deriving under her may thereby gain a Title (they now have not)” at Horan and Burke’s expense.130 He asked that the final bill include a savings clause for himself and Horan or otherwise relieve them of the effect of the proviso.131

The final terms of the proviso apparently respond to this request. On April 22 the petition was read in the House of Lords and the bill was re-committed to a Committee of the whole House to consider an additional amendment in consideration of the petition.132 The Committee made an amendment and reported it on April 23 and 24,133 and the House of Lords approved the

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128 The British Nationality Act 1730, 4 Geo. 2 c. 21, § 3.
129 Burke, supra note 90, at lines 61–66.
130 Id. at lines 73–75.
131 Id. at lines 81–85.
132 See 23 HL JOUR. (1731) 681 (Gr. Brit.). The House of Lords had already begun to consider an amendment to which Burke presumably responded. See id. at 675 (April 14).
133 See id. at 683–85.
amended bill on April 26. The House of Commons Journal for April 28 reports the Lords’ complete amendment, stating “At the End of the Bill add the Proviso” and setting out Section 3 of the final Act in its entirety with minor formatting differences. The final terms of Section 3 “except[] always out of this Proviso all Children of such Persons, who went out of Ireland in pursuance of the Articles of Limerick . . . .” The House of Commons approved the amended bill on April 28, and the final act received royal assent on May 7.

Burke’s explanation and the structure of the proviso confirm that Dennis Hannin remained a natural-born subject. The proviso could not have naturalized Mary Arcedeckne and thereby threatened Horan and Burke’s title unless her father had been a natural-born subject within the meaning of the Act of Ann. and Section 1 of the Act of Geo. II. The proviso only naturalized offspring who were not within the Act of Ann. at their births because their natural-born fathers were tainted.

D. Subsequent Developments

There were three important subsequent developments. The first was confirmation of Yorke and Talbot’s interpretation that the Act of Ann. granted its beneficiaries the privileges of the natural-born. Textual analyses of the late seventeenth and early eighteenth-century statutes do not clearly determine whether the statutes granted their beneficiaries the privileges of the natural-born or made them natural-born. The 1663 statute encouraging the production of certain cloths provides only that its beneficiaries would “enjoy all privileges whatsoever, as the natural-born subjects of this kingdom.” The Act of Ann. provides that the foreign-born children “shall be deemed, adjudged, and taken to be natural born subjects of this kingdom, to all intents, constructions, and purposes whatsoever.” This

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134 See id. at 687.
135 See 21 HC JOUR. (1731) 746 (Gr. Brit.).
136 See The British Nationality Act 1730, 4 Geo. 2 c. 21, § 3.
137 See 21 HC JOUR. (1731) 747 (Gr. Brit.).
138 See id. at 754.
139 See An Act for Encouraging the Manufactures of Making Linnen Cloth and Tapestry 1663, 15 Car. 2 c. 15, § 3.
140 The Foreign Protestants Naturalization Act 1708, 7 Ann. c. 5, § 3, repealed except as to section 3 by An Act to repeal the Act of the Seventh Year of Her Majesties Reign Intituled An Act for Naturalizing Foreign Protestants 1711, 10 Ann. c. 9.
could be read in contrast to the former statute to make the children natural-born subjects. Alternatively, it could be read consistently only to give the children the rights and privileges of the natural-born by a legal fiction through its use of the terms “deemed” and “to all intents.”141 The 1707 statute encouraging trade creates more textual ambiguity. It deems mariners to be natural-born subjects, like the Act of Ann. But it also specifically grants them the privileges of natural-born subjects, like the 1663 statute.

Attorney General Yorke and Solicitor General Talbot describe the Act of Ann. only as granting the privileges of the natural-born in their Arcedecne brief. They argue that “it can't be imagined that it was the Intent of the Legislature who made that Act of Naturalization, to give the Privilege of a Subject to the Children of one who had forfeited all Right to the Protection of the Laws” and that “the Intention of the Legislature seem[s] to be to extend the Privileges granted by that Act to the Children of such Subjects only who stayed in Foreign Parts on lawful Occasions.”142 In addition the instructions to the Committee of the whole House of Commons in 1731 stated “that they have Power to receive a Clause, to prevent the Children... from being deemed natural-born Subjects of this Kingdom.”143

Ultimately, the House of Lords held in 1763 that the Act merely deemed persons to be natural-born by a legal fiction; it did not make them natural-born.144 Consequently, their foreign-born children could not benefit under the Act.145 And the 1772 Act of Geo. III described the beneficiaries of the Act of Ann. merely as being “intitled to all the rights and privileges of natural-born subjects” while extending those privileges to a limited class of the second generation born abroad.

142 See YORKE & TALBOT, supra note 45, at lines 215–20.
143 See 21 HC JOUR. (1731) 680 (Gr. Brit.).
144 See Leslies v. Grant (1763) 2 Pat. 68, 76–77 (finding that the Act of Ann. only applied to the first generation born abroad because it encompassed only fathers who were natural-born subjects in fact, not by fiction). The court considered a line of statutes, including the Act of Edw. III, and found that none of them applied to the second generation born abroad. See id. at 73–74 n.* (arguments from Act of Edw. III); id. at 77 (“None of the provisions in the statutory laws, therefore, extend to grandchildren.”).
145 See id. at 77.
discriminating on grounds that included religion and excluding children of tainted fathers.146 These subsequent authorities confirm Yorke and Talbot’s description of the Act of Ann.

The second development was the judicial determination that the Acts of Ann., Geo. II, and Geo. III provided a comprehensive statement of the law regarding the status of foreign-born children of natural-born parents, foreclosing further disputes over prior law and the scope of the paternal disloyalty disqualification.147 In *Fitch v. Weber*, for example, the court rejected a claim that paternal disloyalty, other than that expressly specified in the statutes, could prevent the Acts from applying to a child, explaining that “[t]he privilege conferred by the statutes is the privilege of the children and not of the father, and is conferred upon the children for the benefit of the State.”148

Finally, an 1854 decision of the House of Lords held that the term “at the time of the birth of such children” in the Act of Geo. II prevented its application to non-marital children whose parents subsequently married, even if the marriage retroactively legitimated them to the date of their birth.149 The Lords were apparently unaware of the connection between the text of the Act and the *Arcedeckne* case, which involved the possible loss of nationality rather than the parents’ original marital status. The

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146 See British Nationality Act 1772, 13 Geo. 3 c. 21, § 1 (description of fathers and naturalization of their foreign-born children); *id.* § 2 (incorporation by reference of taint exclusions from the Act of Geo. II); *id.* § 3 (condition of taking the sacrament in “the Church of England, or in some Protestant or reformed Congregation within this Kingdom of Great Britain” to receive specified benefits). Whether the Acts of Ann., Geo. II and Geo. III also imposed involuntary obligations of the natural-born was a matter of dispute. See, e.g., *Great Britain, Report of the Royal Commissioners for Inquiring Into the Laws of Naturalization and Allegiance* viii (London 1869); Vlahoplus, *supra* note 5, at 111 n.235 and accompanying text (balance of authorities suggests that they did not impose involuntary allegiance).

147 See, e.g., *Duroure v. Jones* (1791) 4 T.R. 300, 309 (Kenyon, C.J.) (the three acts now represent “a Parliamentary exposition of this law” that forecloses further arguments about prior law); *Fitch v. Weber* (1847) 6 Hare 51, 62–63 (Wigram, V.C.) (the disqualifications in section 2 of the Act of Geo. II are exclusive; no paternal disloyalty could exclude a child from the benefits of the Act other than those that it expressly specifies). However, there is no indication that the Acts repealed the common law rule making foreign-born children of British ambassadors natural-born subjects.

148 See *Shedden v. Patrick* (1854) 149 Rev. Rep. 55, 90–91 (a non-marital child is *nullius filius* and therefore does not have a British father).
United States executive branch reached the opposite conclusion under a similar United States derivative citizenship statute, finding that the “relationship should be recognized as existing from the date of the child’s birth.”150

II. THE CASE OF ADAM MUTHANA

A. Citizenship by Birth and by Naturalization

The United States recognizes two types of citizenship: by birth and by naturalization.151 Citizenship by birth is conferred by birth within and subject to the jurisdiction of the United States.152 It is natural-born citizenship under the original Constitution.153 It is the common law rule of which the Fourteenth Amendment’s citizenship clause is merely declaratory.154 In this context, “subject to the jurisdiction” means “within the allegiance.”155 Consequently, the original constitutional law of the “natural-born” determines birthright

152 See, e.g., United States v. Wong Kim Ark, 169 U.S. 649, 702–03 (1898) (“[C]itizenship by birth is established by the mere fact of birth . . . in the United States, and subject to the jurisdiction thereof.”); Inglis v. Trustees of the Sailor’s Snug Harbor, 28 U.S. (1 Pet.) 99, 155 (1830) (Story, J., dissenting on other grounds) (“[A]llegiance by birth, is that which arises from being born within the dominions and under the protection of a particular sovereign.”), quoted and relied upon by Wong Kim Ark, 169 U.S. at 659; McKay v. Campbell, 16 F. Cas. 161, 165 (D. Or. 1871) (No. 8,840) (“To be a citizen of the United States by reason of his birth, a person must not only be born within its territorial limits, but he must also be born subject to its jurisdiction—that is, in its power and obedience.”).
153 See Dred Scott v. Sandford, 60 U.S. (1 How.) 363, 576 (1856) (Curtis, J., dissenting) (“[T]he Constitution uses the language, ‘a natural-born citizen.’ It thus assumes that citizenship may be acquired by birth. Undoubtedly, this language . . . was used in reference to that principle of public law, well understood in this country at the time of the adoption of the Constitution, which referred citizenship to the place of birth.”); Wong Kim Ark, 169 U.S. at 662 (adopting Justice Curtis’s opinion); Minor, 88 U.S. at 167 (citizenship “by birth” is natural-born citizenship; that which results from Congress’s power to establish a uniform rule of naturalization is “by naturalization”); Elk v. Wilkins, 112 U.S. 94, 101–02 (1884) (citizenship “by birth” results from birth within and under the jurisdiction of the United States; it is “art. 2, sect. 1” natural-born citizenship; and it is distinct from “art. 1, sect. 8” naturalized citizenship).
154 See, e.g., Minor, 88 U.S. at 165, 170 (declaratory as to child of citizen parents); Wong Kim Ark, 169 U.S. at 676 (declaratory as to child of alien parents); McKay, 16 F. Cas. at 165 (declaratory).
155 See Wong Kim Ark, 169 U.S. at 654–55 (“born within the allegiance, the obedience, or the power, or, as would be said at this day, within the jurisdiction”).
United States citizenship. If, instead, the Amendment’s citizenship clause is narrower than the common law, then it should be only a safe harbor, not an exclusive definition. The original constitutional incorporation of natural-born citizenship should remain in force. The Fourteenth Amendment does not encompass foreign-born children of American ambassadors, for example, but there is no reason to conclude that the amendment repealed that type of natural-born citizenship.

B. Background of the Muthana Case

Hoda Muthana was born in New Jersey on October 28, 1994.\textsuperscript{156} Her father is a former member of Yemen’s mission to the United Nations.\textsuperscript{157} Yemen terminated his position on June 1, 1994, on account of the country’s civil war, and he surrendered all of his United Nations identification on June 2, 1994.\textsuperscript{158} The diplomatic records of the United States Mission to the United Nations record that his diplomatic position terminated on September 1, 1994, almost two months before Hoda Muthana’s birth.\textsuperscript{159} Based on these facts, the United States recognized Hoda Muthana’s citizenship and issued her a passport in 2005 and a renewal passport in 2014.\textsuperscript{160}

Hoda Muthana grew up a Muslim in the United States and left in 2014 to join ISIS in Syria.\textsuperscript{161} She burned her passport and incited other Americans to commit terrorist acts on United States soil including inciting Americans to drive vehicles into crowds.\textsuperscript{162} In 2017, she had her son by an ISIS fighter whom she had married in ISIS-occupied Syrian territory.\textsuperscript{163} She later fled that territory with her son and renounced ISIS.\textsuperscript{164} She seeks to return to the United States with her son, recognizing and accepting that she will face criminal charges on her return.\textsuperscript{165}

\begin{thebibliography}{9}
\bibitem{156} Complaint, supra note 5, para. 20.
\bibitem{157} Id. para. 18.
\bibitem{158} Id. para. 29.
\bibitem{159} Id. para. 26.
\bibitem{160} Id. para. 21.
\bibitem{162} See, e.g., Lind, supra note 1.
\bibitem{163} Id.
\bibitem{164} See, e.g., Complaint, supra note 5, para. 38.
\bibitem{165} Id. para. 9.
\end{thebibliography}
However, the federal executive branch denies that she is a citizen and refuses to allow her to enter the United States. The executive appears to have taken this position without any legal process and announced it by tweet. The Federal Bureau of Investigation has prevented her family from sending money to her for her support, asserting that it would violate federal law against providing support to terrorists, despite her renunciation of ISIS and her desire to return to the United States to face justice.

C. Citizenship of Hoda Muthana

1. Original Citizenship

Hoda Muthana was born in the United States. The only question about her original citizenship is whether she was born subject to its jurisdiction. The executive branch argues that her father held diplomatic immunity then, the immunity extended to his family, and therefore she was not born subject to United States jurisdiction. The Supreme Court of the United States cases on which the executive relies assert a rule that children born in the United States to ministers or consuls of foreign states or sovereigns do not acquire citizenship under the Fourteenth Amendment’s citizenship clause. This argument

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166 Id. para. 36.
167 Id. paras. 120–21.
169 Id. at 9.
Slaughter-House Cases, 83 U.S. 36, 73 (1872) (phrase “was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States”); United States v. Wong Kim Ark, 169 U.S. 649, 693 (1898) ("[t]he Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory” “with the exceptions or qualifications (as old as the rule itself) of” (among other exceptions) “children of foreign sovereigns or their ministers").
Id. The Slaughter-House statement also excludes children of foreign citizens or subjects generally. This is inconsistent with the common law rule. See, e.g., infra note 212 and accompanying text. It does not survive Wong Kim Ark, which recognized the birthright citizenship of a United States-born child of Chinese national parents. See United States v. Wong Kim Ark, 169 U.S. 649, 705 (1898).
faces significant challenges, at least for the executive’s allies who claim to adhere to textualist or originalist theories of legal interpretation.170

a. Textualism and the Vienna Convention on Diplomatic Relations

The executive does not dispute that Yemen had terminated Ahmed Muthana before Hoda Muthana’s birth or that United Nations records confirm that. Instead, the executive argues that his diplomatic immunity continued until the United States received official notification of the termination, which did not occur until after her birth.171 The executive relies on Article 43 of the 1961 Vienna Convention on Diplomatic Relations (the “Vienna Convention”), which provides:

The function of a diplomatic agent comes to an end, inter alia:
(a) On notification by the sending State to the receiving State that the function of the diplomatic agent has come to an end;
(b) On notification by the receiving State to the sending State that, in accordance with paragraph 2 of article 9, it refuses to recognize the diplomatic agent as a member of the mission.172

The executive has not yet asserted a second expected argument, that Ahmed Muthana’s diplomatic immunity would have survived termination on September 1 because Article 39 of the Vienna Convention provides that a terminated diplomat’s immunity continues until “he leaves the country, or on expiry of a reasonable period in which to do so.”173

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171 Complaint, supra note 5, para. 25.


173 Vienna Convention, supra note 172, art. 39(2); see Complaint, supra note 5, para. 41. There is United States authority generally interpreting “reasonable” in this context to mean thirty days. See United States v. Guinand, 688 F. Supp. 774, 774 (D.D.C. 1988); Complaint, supra note 5, para. 41. Some other nations generally interpret “reasonable” to mean longer periods, up to six months. See EILEEN DENZA, DIPLOMATIC LAW: COMMENTARY ON THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS 355 (4th ed., Oxford Univ. Press 2016) (1976). The period may be extended because of a difficult pregnancy requiring specialized treatment. See id. at 354–55 (citing the unreported 1992 decision in Gomaa v. Ministry of
The executive’s argument from Article 43 is inconsistent with the Article’s text, which provides that its examples are only two circumstances among others (“inter alia”) under which a diplomat’s function terminates. The two examples are non-exclusive.\textsuperscript{174} Professor Eileen Denza, a leading scholar and former senior legal advisor to the British government, explains that the Vienna Convention’s drafters were under extreme time pressure and knowingly left Article 43 incomplete.\textsuperscript{175} “While the Vienna Conference accepted that it ought properly to contain an exhaustive list of circumstances which would bring the functions of a diplomatic agent to an end, they failed to formulate such a list.”\textsuperscript{176}

The executive uses a consequentialist argument to support its position: that actual notice is critical to preserving control over immunity, including United States control over the immunity of its diplomats.\textsuperscript{177} Ahmed Muthuna provides a consequentialist counterargument: an actual notice condition would permit states to abuse diplomatic immunity by deliberately failing to provide notice of a diplomat’s termination.\textsuperscript{178} The executive’s argument would also allow the United Nations to abuse immunity of terminated members of missions: it was the United Nations that notified the United States of Ahmed Muthana’s original appointment and failed to timely notify the United States of his termination.\textsuperscript{179}

On closer examination the executive’s consequentialist argument is a non sequitur. It gives as an example that “the United States would not want a foreign state to determine—without notification from the United States—that one of our

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\item Foreign Affairs). However, there are no indications of such difficulties in the Muthana case, and in any event an extended period would likely be unreasonable given the likelihood that the family had decided earlier to remain in the United States. See, e.g., Complaint, supra note 5, paras. 42, 51–52.
\item See DENZA, supra note 173, at 389.
\item Id. (footnote omitted); cf. id. (“The Article ought to prescribe not simply the various methods by which the functions of a diplomatic agent may be brought to an end, but the time at which this occurs.”).
\item See Response, supra note 168, at 13–14.
\item See Response, supra note 168, at 4–5.
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mission members no longer is employed by the Embassy or to commence criminal prosecution based on its own determination of employment by the United States.\textsuperscript{180} But Muthana’s case does not involve the receiving state asserting jurisdiction over an agent of a sending state, as the executive argues. It involves the United Nations’s own documented determination that Muthana was no longer a member of Yemen’s mission after September 1, 1994. Giving effect to that documentation ensures the United Nations’s control over the immunities of mission members and prevents the United Nations from abusing diplomatic immunity by failing to provide timely notice to the United States.\textsuperscript{181}

What other circumstances bring a diplomat’s function to an end other than those in Article 43? Professor Denza writes that the only other circumstances are death of the diplomat, breach of diplomatic relations, and disappearance of the sending or receiving sovereign, such as through the death or abdication of the sending head of state, relying on Satow.\textsuperscript{182} Consequently, based on the executive’s pleadings, her opinion is that Ahmed Muthana’s immunity continued until the United States received notice of his termination.\textsuperscript{183} However, earlier actual and draft international conventions provided that neither a change in political regime nor death or resignation of the head of state would terminate the diplomatic agent’s mission.\textsuperscript{184} This suggests that the other circumstances are not coextensive with Satow’s list. Regardless of the resolution of this point, the Muthana case is a challenge for those who interpret the law based on text alone or on a purported factual determination of the public meaning of words in the text.

\textsuperscript{180} Id. at 14.

\textsuperscript{181} A receiving state can declare a diplomat persona non grata and demand her withdrawal. See Vienna Convention at art. 43(b). However, this cannot prevent the possibility of abuse by failure to provide notice of termination. The receiving state cannot demand the withdrawal of a former diplomat on the ground of prior termination without knowing of the termination.

\textsuperscript{182} See DENZA, supra note 173, at 390. But see, e.g., 10 AMERICAN LAW AND PROCEDURE 54 (James Parker Hall, ed., 1920) (“The mission of a diplomatic agent is terminated . . . by his dismissal by the government to which he is accredited . . . .”).

\textsuperscript{183} Private correspondence with Professor Denza.

\textsuperscript{184} See Diplomatic Privileges and Immunities, 26 AM. J. INT’L L. SUPP. 19, 171 (1932) (Project of American Institute of International Law, 1925, draft art. 32); id. at 174 (Project of the International Commission of American Jurists, 1927, draft art. 32); id. at 177 (Convention on Diplomatic Officers, Adopted at Havana, February 20, 1928, art. 25).
b. Historical Precedent and the Foreign Ambassador Rule

Historical precedent also challenges the executive’s argument. There is no direct founding-era authority for the proposition that children born in England to parents with diplomatic immunity were aliens. Coke does not mention such a rule or any other exception for children of foreign diplomats in his classic 1608 disquisition on the English law of subjects and aliens in *Calvin’s Case*. He only states that the common law rule excludes children of hostile foreign occupying forces.

The United Kingdom government advises that the common law rule excludes only children of ambassadors, not those of other diplomats. Consistent with this interpretation, Piggott concludes that the common law rule only excludes children of foreign ambassadors, not children of others who share immunity from arrest, children of those who receive a similar privilege by convention or comity, or children of officials who are not personal representatives of their Sovereign. The common law rule might have been based on the function and character of ambassadors as personal representatives mediating between sovereign heads of state, not on the incidental immunity that they and less important officials shared.

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185 See generally *Calvin v. Smith* (1608) 7 Co. Rep. 1a. The author could not find any reference to such a rule or any other exception for children of foreign diplomats in Coke’s *Institutes*, Wood’s *Institute*, or Blackstone’s *Commentaries* but cannot be sure that they do not include one because they are longer works published in many editions. Coke does acknowledge the rule that applied to foreign-born children of English ambassadors in his report of *Calvin’s Case*. See infra note 215–216 and accompanying text.

186 See *Calvin*, 7 Co. Rep. at 6a.


188 See 1 Sir Francis Piggott, *Nationality* 42 (1907). Piggott concludes that the same common law rule applied to children of English and foreign ambassadors and makes the statement described in the text with regard to that unitary rule. See id.

189 The executive also relies on other authorities that connect the exception to the foreign official’s immunity rather than role. See Response, supra note 168, at 9–10: *Nikos v. Attorney Gen.*, 939 F.2d 1065, 1066 (D.C. Cir. 1991) (“Because one parent was a foreign official with diplomatic immunity when each child was born, the birth did not confer United States citizenship.”); see also 8 C.F.R. § 101.3(a)(1) (“A person born in the United States to a foreign diplomatic officer accredited to the United States, as a matter of international law, is
The origin and scope of the foreign ambassador rule are uncertain. Piggott writes that the rule is the same as the English ambassador rule, which itself was always assumed without the benefit of any definite decision. He warns that the “difficulty about the rule is one which is common to all rules which are assumed and not expressly enunciated: its extent has never been worked out.” Other twentieth-century writers suppose that the common law foreign ambassador rule applied more broadly.

The rationale of the foreign ambassador rule is also uncertain. Cockburn explains that the rationale is that ambassadors “car[r]y their own nationality with them.” de Hart offers a different rationale: the foreign ambassador does not owe obedience to the Crown.

An originalist might respond that these authorities are incorrect—the result of losing the original meaning of the common law rule because of the passage of time and America’s separation from traditional sources of common law education. Cf. Seth Barrett Tillman, Either/Or: Professors Zephyr Rain Teachout and Akhil Reed Amar – Contradictions and Suggested Reconciliation 108 (Jan. 12, 2012) (unpublished manuscript) (available at https://ssrn.com/abstract=1970909).

See PIGGOTT, supra note 188, at 42.

Id. (referring to the English ambassador rule, of which the foreign ambassador rule was simply the converse). Piggott notes that Coke refers to the English ambassador rule in Calvin’s Case. See id. Notably, however, Coke does not mention the foreign ambassador rule in his report of the case. The only persons born in the realm that he describes as aliens are those born to hostile foreign occupying forces. See Calvin, 7 Co. Rep. at 6a.

See, e.g., ALBERT VENN DICEY, A DIGEST OF THE LAW OF ENGLAND WITH REFERENCE TO THE CONFLICT OF LAWS 168 (2d ed. 1908) (rule applies to any child of a foreign “ambassador or other diplomatic agent accredited to the Crown,” but for support cites only COCKBURN, infra note 193, at 7, which only refers to children of ambassadors); Edward Louis de Hart, The English Law of Nationality and Naturalisation, 2 J. SOC’Y COMP. LEGIS. 13 (1900) (rule applies to children of foreign attachés and of “other members of a foreign mission,” perhaps even of their servants). A British government committee reported in 1901 that the limits of the exception for children of diplomats other than ambassadors “have not been exactly ascertained.” See GREAT BRITAIN, REPORT OF THE INTER-DEPARTMENTAL COMMITTEE APPOINTED BY THE SECRETARY OF STATE FOR THE HOME DEPARTMENT TO CONSIDER THE DOUBTS AND DIFFICULTIES WHICH HAVE ARISEN IN CONNEXION WITH THE INTERPRETATION AND ADMINISTRATION OF THE ACTS RELATING TO NATURALIZATION 7 (1901).

See THE RIGHT HON. SIR ALEX COCKBURN, NATIONALITY: OR THE LAW RELATING TO SUBJECTS AND ALIENS, CONSIDERED WITH A VIEW TO FUTURE LEGISLATION 7 (London 1869).

See de Hart, supra note 192, at 13.
question of ambassadors' obligations to the Crown, at times subjecting them to liability for high treason. High treason is a breach of allegiance to the monarch, so English common law recognized at times that ambassadors owed allegiance to, or, as would be said today, were within the jurisdiction of, the monarch. Parliament did not preclude their arrest by statute until 1708.

The foreign ambassador rule is also inconsistent with the generally acknowledged justification of natural allegiance by birth, which is the monarch's protection of the infant within the dominions at birth: "Natural allegiance is such as is due from all men born within the king's dominions immediately upon their birth. For, immediately upon their birth, they are under the king's protection; at a time too, when (during their infancy) they are incapable of protecting themselves." English monarchs protected aliens who were in the realm even temporarily, excluding hostile occupying forces. In addition, signatories to the Vienna Convention have a legal obligation to protect foreign ambassadors and their families.

Ahmed Muthana was not an ambassador by title. He was First Secretary of the Permanent Mission of Yemen to the United Nations, a seventh-ranked diplomatic position. Moreover, he

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2 See, e.g., 6 Giles Jacob, The Law-Dictionary: Explaining the Rise, Progress, and Present State, of the English Law 264 (Philadelphia, T.E. Tomlin, comp. 1811) (treason by an ambassador "is a positive breach of local allegiance").
3 See United States v. Wong Kim Ark, 169 U.S. 649, 655 (1898) ("B)orn within the allegiance, the obedience, or the power, or, as would be said at this day, within the jurisdiction . . . .").
4 Id. at 655, 684–85; see also An Act for Preserving the Privileges of Ambassadors, and Other Public Ministers of Foreign Princes and States 1708, 7 Ann. c. 12, §§ 1–3.
5 Blackstone, supra note 46, at 357 (footnote omitted); see also Calvin v. Smith (1608) 7 Co. Rep. 1a, 4b, 6a.
6 See, e.g., Calvin, 7 Co. Rep. at 6a–6b (protection of aliens generally, excepting hostile occupying forces); 4 William Blackstone, Commentaries on the Laws of England 70–71 (Oxford, 4th ed. 1770); Inglis v. Trustees of the Sailor's Snug Harbour, 28 U.S. (3 Pet.) 99, 155 (1830) (Story, J., dissenting on other grounds) ("So the children of an ambassador are held to be subjects of the prince whom he represents, although born under the actual protection and in the dominions of a foreign prince.").
8 See Response, supra note 168, at 4–5.
would not have been an ambassador by function at the adoption of the Constitution. Blackstone defined “embassadors” as messengers from one “potentate” to another. A “potentate” was generally understood to be a monarch, prince, or sovereign. The United Nations is not a monarch, prince or sovereign. It did not exist at the adoption of the Constitution, nor did any equivalent transnational institution.

Muthana received immunity under the United Nations headquarters agreement, not the Vienna Convention. The headquarters agreement requires the United States to provide the same immunity to specified persons as it does “to diplomatic envoys accredited to it” but does not make them diplomatic envoys to the United States. Yemen was not the “sending State” within the terms of the Vienna Convention, and Muthana did not have the status “of a diplomat accredited to the US.” Muthana was not a minister or consul of a foreign state or sovereign to the United States. Therefore, he was not within the Supreme Court’s description of the common law rule in United States v. Wong Kim Ark. He was not an ambassador personally representing a sovereign, and therefore, not within the common law rule under Piggott’s interpretation or apparently under the United Kingdom government’s interpretation, which limits the rule to children of ambassadors, not those of other diplomats.

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204 See, e.g., BLACKSTONE, supra note 195, at 253–56.
208 Professor Eileen Denza, private correspondence.
209 Id. The United Nations does not even claim the same immunities for its officials as do sovereign states. The Secretary General has “the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations.” See Convention on the Privileges and Immunities of the United Nations Adopted by the General Assembly of the United Nations on 13 February 1946, art. V, § 20, Feb. 13, 1946, 1 U.N.T.S. 15.
210 See Response, supra note 168, at 9.
An alternative description of the grounds of natural allegiance in Calvin’s Case is birth within the dominions to parents who are under the actual obedience of the monarch. Because the monarch protected aliens who were in the realm even temporarily, other than hostile occupying forces, they owed local allegiance and consequently their children born in the realm were natural-born subjects. Given an ambassador’s historical liability for high treason based on local allegiance to the monarch, even this alternative ground might be considered inconsistent with the foreign ambassador rule. This alternative ground could be indicative of an incomplete transition in English law from distinguishing the free and unfree based on parental status to distinguishing subjects and aliens based on allegiance.

The rule that foreign-born children of English ambassadors are natural-born is itself unclear, as Piggott notes. Coke asserted that the children are only natural-born if both parents are English, perhaps believing that the Act of Edw. III declared the common law. Blackstone explained that they were natural-born by a principle of postliminium, a Roman law fiction that a person had never been away. John Adams read the rule broadly to cover the ambassador, his family, and any of his country men and women attached to the embassy. Judges queried by the House of Lords in 1667 concluded more narrowly without explanation only “[t]hat the Children of Ambassadors

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212 See id. at 6a.
213 See supra note 198.
214 For that transition, see KIM, supra note 52, at 1–15.
215 See Calvin, 7 Co. Rep. at 18a (asserting that the English ambassador rule as he describes it was part of the common law).
216 See BLACKSTONE, supra note 46, at 361. Blackstone explains that the English ambassador does not owe even a local allegiance to the receiving sovereign, so the child is held to be born under the English monarch’s allegiance by a kind of postliminium. See id. The parent’s lack of local allegiance under English principles says nothing about the receiving sovereign’s nationality law, however. In any event it does not justify the conclusion that the foreign-born child is born within the allegiance of the English monarch. The English ambassador rule may have been a practical expedient, or it may have been a remnant of prior English law of the free and unfree described in KIM, supra note 52, at 1–15.
217 See FRANCIS GOULDMAN, A COPIOUS DICTIONARY IN THREE PARTS (unpaginated) (London 1664).
(employed by the King) born in Foreign Countries are no Aliens.”219 This statement and Coke’s are not limited to births within the country in which the ambassador served and suggest that the rule was not based on the ambassador having diplomatic immunity in the child’s place of birth.

The two ambassador rules exemplify problems with relying on historical materials to determine constitutional rights. As Lord Ellesmere argued in his opinion in Calvin’s Case, historical interpretation “is alwaies darke, obscure, and vncerten, of what kingdome, countrey, or place soeuer . . . .”220

c. Additional Statutory and Equitable Issues

Hoda Muthana’s parents were naturalized in the United States after her birth.221 A federal statute automatically naturalizes resident minors who were “born outside of the United States” upon the naturalization of their custodial parents.222 If “born outside” means born outside of either the borders or the allegiance of the United States, then she might have been naturalized under this provision. If it means only outside of the borders, then the statute would have a possibly unintentional gap for cases like hers.223

Ahmed Muthana makes a final claim that the federal government is equitably estopped from denying his daughter’s citizenship on the ground that it had previously recognized her citizenship and thus prevented the family from taking any other actions to secure her status.224 The executive argues that

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220 See Lord Ellesmere, Lord Chancellor Ellesmere’s Speech in the Exchequer Chamber, in the Case of the Postnati, 2 How. St. Tr. 659, 678 (opinion of Lord Ellesmere in the Chancery case of Calvin v. Bingley) (excepting only “the diuine histories written in the bible”).
224 See Complaint, supra note 5, paras. 67–82. A person who claims American citizenship cannot apply for naturalization. See Efron ex rel. Efron v. United States,
Congress has specified the terms for acquiring citizenship at birth by statute and that courts have no equitable authority to confer citizenship contrary to congressionally imposed limitations.\textsuperscript{225}

The executive misstates both the grounds of Hoda Muthana’s claim and the judiciary’s authority. She claims natural-born citizenship under original constitutional law and the declaratory Fourteenth Amendment.\textsuperscript{226} The congressional statute granting citizenship to those born within and subject to the jurisdiction of the United States is irrelevant. Ahmed Muthana asks the court to recognize his daughter’s constitutional citizenship, not to confer citizenship under a congressional statute.\textsuperscript{227}

Moreover, a court has the authority to recognize even citizenship conferred by statutes contrary to their express terms in appropriate circumstances.\textsuperscript{228} An originalist might conclude that the executive is asserting a contentious interpretation of an assumed but never defined common law rule and applying it to a representative serving in a function that was not ambassadorial at common law in a transnational institution unknown to the common law. Under that or other theories of constitutional interpretation, an equitable approach that respects settled expectations might be appropriate, just as the House of Lords found it appropriate to interpret the Act of Ann. in a manner that protected settled expectations of existing property owners in Arcedeckne.

2. Potential Loss of Citizenship

If Hoda Muthana was a citizen when she joined ISIS, she should continue to be a citizen despite her subsequent disloyal actions. Only knowing and voluntary renunciation, not disloyal

\textsuperscript{1} F. Supp. 2d 1468, 1469 (S.D. Fla. 1998); Lisa Maria Perez, Note, Citizenship Denied: The Insular Cases and the Fourteenth Amendment, 94 VA. L. REV. 1029, 1032 (2008).

\textsuperscript{225} See Response, \textit{supra} note 168, at 24.

\textsuperscript{226} See Complaint, \textit{supra} note 5, paras. 49–50, 57.

\textsuperscript{227} See id. para. 1.

\textsuperscript{228} See Sessions v. Morales-Santana, 137 S. Ct. 1678, 1700–01 (2017) (however choosing an alternative remedy in the case); Schneider v. Rusk, 377 U.S. 163, 164 (1964) (recognizing that foreign-born children would receive statutory derivative citizenship if the Court invalidated a statute that had involuntarily expatriated their citizen mother before their births); John Vlahoplus, Sessions v. Morales-Santana: Beyond the Mean Remedy, 17 CONN. PUB. INT. L. J. 311, 325 (2018) (the Court struck down the statute, and the United States recognized the children’s statutory citizenship and issued passports to them).
acts, can deprive her of her citizenship. Federal law and State Department practice require specifically defined actions to renounce citizenship, and there is no evidence that she took any of those actions. Like Dennis Hannin, she appears to have done everything short of what was legally required to terminate her natural allegiance.

Treating other actions as forfeiting American citizenship risks eviscerating liability for treason. Americans who travel to other countries to fight for enemies in wartime could assert that they had forfeited their citizenship and were alien enemies rather than traitors. On the other hand, absent a declaration of war or enactment of criminal law on point by the people’s representatives in Congress, Americans should be able to support armed forces abroad regardless of presidential actions that support opposing forces.

D. Citizenship of Adam Muthana

1. Generally

Adam Muthana was born outside the United States to parents who were not ambassadors, so he can only be a citizen under statutory naturalization law. If Hoda Muthana was a citizen at his birth, then he facially appears to qualify for United States citizenship at birth under derivative citizenship statutes that trace their history to the first federal naturalization act in

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231 Cf. Yorke & Talbot, supra note 45, at lines 217–18 (“one who had forfeited all Right to the Protection of the Laws, and done all that in him lay to transfer his Allegiance, and make himself cease to be a Subject”).

232 However, merely traveling on an American passport to join the enemy could constitute treason under the much criticized reasoning in Joyce v. Director of Public Prosecutions [1946] AC 347, 1 All ER 186 (American citizen who traveled to Nazi Germany on a fraudulently obtained British passport to aid the German war effort committed treason against George VI by breaching local allegiance incurred from the passport’s invocation of the King’s protection for the holder).

233 For the right to engage in foreign combat that is not proscribed by statute or in aid of the nation’s enemies, see Wiborg v. United States, 163 U.S. 632, 653–54 (1896).
Federal statutes grant citizenship at birth to the foreign-born child of a citizen mother and an alien father if
(a) they were married and the mother had previously been physically present in the United States or its outlying possessions for five years, at least two of which were after she had attained the age of fourteen, or (b) they were unmarried and she “had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year.”

The applicable rule depends on the marriage’s legal validity, which is generally determined under the law of the place of celebration. That raises the question whether to apply the law of Syria or the law of the self-proclaimed Islamic State of Iraq and Syria. The United States recognizes the principle that “acts necessary to peace and good order among citizens, such for example, as acts sanctioning and protecting marriage . . . which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual, though unlawful government . . . .”

Three open questions remain: whether ISIS constituted an actual government at the time of Hoda Muthana’s marriage; whether Syria recognizes a similar legal principle; and if not, whether the United States or Syrian principle would apply to determine the validity of her marriage.

234 See An Act to Establish an Uniform Rule of Naturalization, March 26, 1790, ch. 3, 2 Stat. 103 (repealed 1795).
236 Id. § 1409(c).
238 See Texas v. White, 74 U.S. (7 Wall.) 700, 733 (1869); see also Baldy v. Hunter, 171 U.S. 388, 400–01 (1898) (transactions like marriages done “in the ordinary course of civil society” within the territory of the “local de facto governments” of the “so-called Confederate States” were valid for United States legal purposes even though those governments were unlawful).
239 If Hoda Muthana had left to join ISIS before age sixteen, like the United Kingdom citizen Shamima Begum, the issue would be critical to the case. Cf. Karla Adam, Shamima Begum, Teenager Who Joined ISIS, to Lose UK Citizenship, WASH. POST (Feb. 20, 2019) (Begum left the United Kingdom to join ISIS at age fifteen and had children abroad), https://www.washingtonpost.com/world/europe/shamima-begum-teenager-who-joined-isis-to-lose-uk-citizenship/2019/02/20/3b02f0e9-3ded-47f6-856d-9e9e995f027b_story.html?noredirect=on&utm_term=.ca5ec1c2883a.
2. Potential Grounds for Preclusion

Even if Hoda Muthana satisfied the requirements of the applicable statute, precedents suggest two ways that her disloyalty might preclude Adam Muthana’s claim to derivative citizenship. First, courts might interpret the statute to contain a parental disloyalty exclusion based on Arcedeckne. Some scholars place particular interpretive weight on British legal history proximate to the adoption of the Constitution and acts of the First Congress. Like the Act of Ann., the text of the derivative citizenship statute that might apply to Adam Muthana and that of the original one enacted by the First Congress in 1790 are silent on the question of parental loyalty. A court might therefore interpret the federal statute consistently with the Act of Ann. to contain an implicit exclusion, just as many interpreted the gender-neutral 1790 act to apply only to children of citizen fathers like the Act of Ann.

The second way that parental disloyalty might preclude Adam Muthana’s derivative citizenship follows from the question of whose right the statute creates. The preamble to the Act of Ann. expressly states its purpose to be to increase the “Wealth and Strength of [the] nation” by increasing its people. Britain
interpreted that to create a right of the child, not of the parent, for the benefit of the state. Current United Kingdom law appears to continue to grant the right to the child.

United States derivative citizenship statutes have never articulated whose right they create, or for whose benefit. If they create a right of the child, Adam Muthana would face impediments to challenging a government denial of his citizenship. One who claims derivative citizenship “is an alien as far as the Constitution is concerned” and claims only naturalized citizenship under federal statutes. Aliens to the Constitution have few rights against the federal government because “[t]he reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization.” When exercising its broad powers over naturalization, for example, “Congress regularly makes rules that would be unacceptable if applied to citizens.”

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245 See Fitch v. Weber (1847) 6 Hare 51, 62.
246 The United Kingdom Home Secretary has advised that the prospective revocation of a mother’s citizenship because of her adherence to ISIS would not affect the derivative citizenship of her previously foreign-born child because “[c]hildren should not suffer, so if a parent loses their British citizenship it does not affect the rights of their child.” See Esther Addley & Redwan Ahmed, Shamima Begum Will Not Be Allowed Here, Says Bangladesh, GUARDIAN (Feb. 20, 2019), https://www.theguardian.com/uk-news/2019/feb/20/rights-of-shamima-begums-son-not-affected-says-javid; Esther Addley & Daniel Boffey, Shamima Begum’s Family Hope to Bring Her Baby to UK, GUARDIAN (Feb. 21, 2019), https://www.theguardian.com/uk-news/2019/feb/21/shamima-begums-family-hope-to-bring-her-baby-to-uk. The child’s right proved hollow in that case, however, because he died of exposure in a refugee camp shortly after the United Kingdom government refused to allow his mother to return home with him. See, e.g., Shamima Begum: Sajid Javid Criticised as Baby Dies, BBC NEWS (Mar. 9, 2019), https://www.bbc.com/news/uk-47506145.
248 See, e.g., United States v. Wong Kim Ark, 169 U.S. 649, 702–03 (1898) ("A person born out of the jurisdiction of the United States can only become a citizen by being naturalized . . . as in the enactments conferring citizenship upon foreign-born children of citizens . . ."); Miller, 523 U.S. at 453–54 (Scalia, J., concurring).
251 Id. at 79–80.
If the derivative citizenship statute instead creates a right of the parent, then a living constitutional interpretation might find on equitable or other grounds that Hoda Muthana forfeited her statutory right that her child receive American citizenship. Parents cannot renounce their children’s citizenship, but nothing prevents a parent from forfeiting or refusing to exercise her own rights even though that might affect her child. A parent has the right to renounce her citizenship shortly before her child’s foreign birth, for example, and the child could not challenge that renunciation on the ground that it deprived him of derivative citizenship.

The legislative histories of federal derivative citizenship statutes identify a variety of purposes. Some suggest that a purpose is to encourage foreign commerce for the benefit of the United States. Others suggest that a purpose is to benefit the child, such as by making it possible for a child to inherit land when state law limited the rights of aliens to real property. Significant legislative history suggests that a purpose is to benefit the citizen parent by recognizing her physical connection to her child and ensuring that she can return to the United States with the child. Hoda Muthana’s conduct might raise

\footnote{252 See Bureau of Consular Affairs, supra note 230.}
\footnote{253 See To Revise and Codify the Nationality Laws of the United States into a Comprehensive Nationality Code: Hearings on H.R. 6127 and H.R. 9980 Before the H. Comm. on Immigration and Naturalization, 76th Cong. 422 (1945) [hereinafter Hearings], https://hdl.handle.net/2027/mdp.39015019148942.}
\footnote{254 See, e.g., History, supra note 247, at 145 (statement of Rep. Elias Boudinot: importance of naturalization for children generally to hold lands); id. at 529 (statement of Rep. Burke: foreign-born children of American citizens “ought to be entitled to be citizens”). Another example is the first statutory grant of derivative citizenship to children born out of wedlock to citizen mothers, which one drafter described as obviously intended to “give[] citizenship to those unfortunate children who are born illegitimately to American mothers.” Hearings, supra note 253, at 43 (statement of Richard Flournoy, Department of State).}
\footnote{255 See, e.g., Relating to Naturalization and Citizenship Status of Children Whose Mothers are Citizens of the United States, and Relating to the Removal of Certain Inequalities: Hearings Before the Comm. on Immigration and Naturalization on H.R. 3673 and H.R. 77, 73d Cong. 25 (1933) (statement of Mrs. Donald R. Hooker, member of the National Council of the Woman’s Party) (“[I]t not an unnatural law to tell me, as a mother, that my child, flesh of my flesh and bone of my bone, is an alien? I tell you, Mr. Chairman and gentlemen, that is a lie, and American women know it is a lie; my child is not an alien.”).}
\footnote{256 See, e.g., id. at 49 (statement of Ruth Taunton, Business Women’s Legislative Council of California) (“[I]f the law of this country finds that it is right to let a father bring back a child born abroad—a father who is a citizen of the United States—it is certainly right that a mother who is a citizen of the United States shall bring back
normative questions about whether to interpret the derivative citizenship statutes to respect her interest in bringing her child to the United States.

The Supreme Court recently held in Sessions v. Morales-Santana that the statutory right is a right of the parent, allowing the Court to apply intermediate scrutiny to a derivative citizenship statute that discriminated on the ground of parental gender because it discriminated against the citizen parent rather than the otherwise-alien child.\(^{257}\) If the decision means that the statutory right is exclusively parental, it could create both legal and practical difficulties for Adam Muthana in pursuing a claim to derivative citizenship. These include issues with standing and access to the United States, particularly if the executive branch succeeds in preventing his mother from returning to the United States or accessing the courts. If national security outweighs the citizen parent’s rights, for example, her foreign-born offspring likely could not invoke third party standing to assert her right to his derivative citizenship.\(^{258}\)

Hoda Muthana may well be a citizen, and Professor Stephen Vladeck writes that “[a]lthough the Supreme Court has never squarely been presented with such a case, it seems likely that, in an appropriate case, the Court would recognize that someone who is lawfully a citizen has the right to return to the United States.”\(^{259}\) But the executive branch would likely dispute that Hoda Muthana’s is such an appropriate case given its views on her child that is born abroad. It is a question of being humane.”);


\(^{258}\) For the contrasting circumstance where the right outweighs the government’s interest, see, e.g., Miller v. Albright, 523 U.S. 420, 450 (1998) (O’Connor, J., concurring in judgment):

[Where a hindrance impedes the assertion of a claim, the right likely will not be asserted—and thus the relevant law will not be enforced—unless the Court recognizes third-party standing. In Barrows, for example, the Court permitted third-party standing because “the reasons which underlie [the] rule denying standing to raise another’s rights” were “outweighed by the need to protect the fundamental rights” which otherwise would have been denied.

the “fluid and complex” threat that “radical Islamic terrorism” poses to domestic security. Despite her renunciation of ISIS and desire to return to the United States to face justice, the executive branch considers her to continue to be a terrorist who could pose a risk to the American people.

The Morales-Santana decision also raises issues for foreign-born children whose citizen parents do not reconcile with the United States. If Hoda Muthana had retained her antipathy toward the nation, continued to support ISIS, and refused to allow her son to have anything to do with the United States, he would not have third party standing to assert her right to his derivative citizenship. Even if a concurrent first-party statutory claim to derivative citizenship survives Morales-Santana and Adam Muthana could prove that the government denied it on the ground of religious discrimination, he likely could not meet the high bar that aliens to the Constitution face in challenging federal actions. Justice Black has characterized

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262 See, e.g., Madison Dibble, Pompeo Makes It Clear Where He Stands on ISIS Defector: ‘She Is Not a US Citizen and She’s Not Coming Back,’ IJR (Feb. 24, 2019, 2:38 PM), https://ijr.com/pompeo-makes-it-clear-where-he-stands-on-isis-defector/ (statement of Secretary of State Michael R. Pompeo) (“She’s a noncitizen terrorist. . . . She’s not coming back to the United States to create the risk that, someday, she’ll return to the battlefield and continue to put at risk American people.”).


264 Major cases that preceded Miller and Morales-Santana involved first party claims to derivative citizenship. See, e.g., Rogers v. Bellei, 401 U.S. 815, 827 (1971). The Morales-Santana Court did not address the question whether the foreign-born child continues to have a concurrent first party right to claim derivative citizenship under federal statutes after the decision in the case. 137 S. Ct. 1678 (2017).
the standard as a reverse shock-the-conscience test, and the high bar applies to challenges of presidential as well as congressional actions.

3. Natural-Born Citizenship

Some argue that the Acts of Edw. III, Ann., and Geo. II were declaratory of the common law so that foreign-born children of American citizens are natural-born citizens within the constitutional meaning of that term. Arcedeckne and its progeny contradict this interpretation. The common law rule remained unchanged in the eighteenth century: only those born within the dominions and allegiance of the monarch or to ambassadors, and perhaps some other diplomats, abroad were natural-born subjects at common law.


Finally, some claim that anyone who receives statutory citizenship at the moment of birth, but not those naturalized afterward, is a natural-born citizen, relying on the Acts of Ann. and Geo. II. However, both of those statutes were retroactive, deeming persons to be natural-born who were alive at enactment and in some cases already deceased. Arcedeckne and its

265 See Bellei, 401 U.S. at 844 (Black, J., dissenting) (“The majority applies the ‘shock-the-conscience’ test to uphold, rather than strike, a federal statute. It is a dangerous concept of constitutional law that allows the majority to conclude that, because it cannot say the statute is ‘irrational or arbitrary or unfair,’ the statute must be constitutional.”).
268 See, e.g., Ramsey, supra note 54, at 212–13.
269 Id. at 223.
270 See supra note 4 and accompanying text.
271 See Vlahoplus, supra note 5, at 97 n.150.
progeny contradict these theories and support the interpretation that only those who would have been natural-born subjects at common law are natural-born citizens under the Constitution. Historical and doctrinal theories of constitutional interpretation support the conclusion that Adam Muthana is not a natural-born citizen and cannot grow up to be president, even if he is a citizen from birth.

Muthana’s case also exemplifies some of the complexities and arbitrariness of applying foreign law to determine the derivative citizenship of children born to American citizens abroad. This alone is grounds for restricting a living constitutional interpretation of “natural-born” to the common law rule, at least until statutory law grants derivative citizenship to every child born of any American parent anywhere outside of the country regardless of the parent’s gender, marital status, prior residence or physical presence in the United States, or other circumstances.

CONCLUSION

The Arcedeckne case and its progeny remain significant, not only within the context of British nationality law, but also as precedents for interpreting the Presidential Eligibility Clause and framing issues surrounding the citizenship of foreign-born children of disloyal parents. In addition, the case demonstrates the role of normative and consequentialist arguments in legal interpretation in the years preceding the adoption of the United States Constitution. Even the highest British court interpreting a statute as important as one determining British nationality considered and acted on such arguments.

The cases of Adam Muthana and Mary Arcedeckne highlight challenges that both living constitutional and originalist theories of interpretation face. Express reliance on normative arguments in Arcedeckne extended religious discrimination against Catholics beyond the express terms of the Act of Ann. Express reliance on normative arguments might lead to extending religious discrimination against Muslims beyond statutory and constitutional text today. Justifying changing interpretations of the Constitution by reference to changed circumstances can lead to religious discrimination and authoritarianism in an era of
global terrorism.\textsuperscript{272} The executive’s position in \textit{Muthana} suggests that it relies on just such a consequentialist or living constitutional theory of legal interpretation.

On the other hand, the history of the Acts of Ann. and Geo. II and their progeny support a narrow constitutional interpretation limiting presidential eligibility to those who are natural-born at common law, challenging the broader interpretations of some originalists. Those who would justify a broader interpretation that includes anyone who is a citizen at birth, such as Senator Ted Cruz, might recognize and embrace the original role of normative and consequentialist arguments in Anglo-American jurisprudence. If they succeed in developing a convincing argument for the broader interpretation, and if Adam Muthana’s mother was a citizen at his birth, then both he and Senator Cruz could be eligible to the presidency.

\textsuperscript{272} \textit{Cf.} Landler & Schmitt, \textit{supra} note 261 (discussing executive branch’s belief that global circumstances have changed, with the rise of Islamic terrorism becoming “more fluid and complex than ever” and requiring a multi-front campaign to ensure domestic safety); Relman, \textit{supra} note 260 (discussing executive’s special focus on terrorism by Muslims and disregard of domestic white supremacist terrorism).
APPENDIX 1

Description: Petition and Appeal of Mathias Arcedeckne and his wife.
Source: U.K. Parliamentary Archives
Reference: HL/PO/JO/10/3/223/9
Title: Arcedeckne et ux v Horan et al, et e contra
Date: [3 Feb 1729]
Transcribed by: Transcription Services Ltd
www.transcriptionservicesltd.com
email: enquiries@tslmanx.net

1. To the Right Honourable the Lords Spiritual and Temporall in Parliament assembled
2. The Humble Petition and appeal of Mathias Arcedeckne and Mary Arcedeckne al[i]a[s Hannen his wife
3. Sheweth
4. That your Petitioners Filed their bill in his Majestyes Court of Exchequer in Ireland against James Horan Florance Collanan William Burke ~ ~ ~ ~ ~ ~ ~ ~ ~ ~ ~ ~ ~ ~ ~ ~ ~ ~ Redmond Arcedeckne ^ and others
thereby Seting forth That James Hannen being Seized in Fee of the Lands of [to]kerboy and Ballymahane ^ in the County of Galway did
5. convey the Same in Mortgage to Cornelius Horan Gentleman for the Sum of three Hundred pounds

1023
Subject to a Redemption at a Day long Since past That the Said Cornelius Horan did Convey over his Interest in the

7. Said Mortgage Lands to Florance Collanan and James Dillon And that James Hannen the Mortgagor paid unto the said Collanan and Dillon the mony due on the said Mortgaged Lands which payment being Made after the day limited

8. by the deed for redemption of the Said Mortgages And the said James Hannen having no reconveyance of the said Mortgaged Lands nor the deed of Mortgage given up to him the Estate in Law notwithstanding the payment of the Said Mortgage

9. Money remained in the Said Cornelius Horan and his assigns And that the Said James Hannen Mortgaged other parts of his Estate to one Nicholas Arcedeckne for five Hundred pounds That the Said James Hannen had an only

10. Brother Mortagh Hannen who died in the said James Hannens lifetime, leaving Issue Denis Hannen his Eldest Son and Hugh and Michael Hannen his younger Sons That the Said Dennis Hannen also died in the life

11. time of the Said James Hannen leaving issue by Elianor o'Marra his wife Your Petitioner Mary, That the Said James Hannen dyed without Issue by means whereof all the Said James Estate descended to your Petitioner Mary
as heiress at Law to him, That at the time of the Said James Hannen’s Death your Petitioner Mary was an Infant of Tender years and was then in the Kingdom of France where She was borne, the Said Hugh and Michael Hannen taking advantag[es] of your Petitioner Mary’s Infancy and absence out of the Kingdom Pretended they were heirs at Law to the Said James Hannen, brought an Ejectment for the recovery of the Said Lands against Margarett Hannen who Possessed herself of the Said Estate Pretending the Said James Hannen by will devised the same to her, That on the Tryall of the said Ejectment your Petitioner Mary’s Title being insisted on in barr of the Title of the said Hugh and Michael Hannen, they on their part alledged that your Petitioner Mary was not the Daughter of the said Denis Hannen, and ^ that if she had been, she was an alien incapable to inherit by being born in France That your Petitioner Mary’s Father and Mother being Marryed in France and your Petitioner Mary born there no Evidence Cou’d be then given to the Jury of your Petitioners Title, And the said James Hannens will by which he devised his Estate to the Said Margrett Hannen being void by an Act of Parliament made in Ireland intitled an Act to Prevent the further Growth of Popery So that the s[ai]^d Land descended to Hugh and Michael Hannen as heirs to the said James who died a papist And that such
proceedings were had on the said Ejectment, that the said Hugh and Michael Hannen thereupon obtained

19. Judgment and were put into Possession of the said Lands, That your Petitioners did further set forth by their bill that they intermarried, and that your Petitioner Mary came into Ireland and was Educated in the

20. Protestant Religion and designed when she came of Proper Age to perform the requisites directed by the said Act of Parliament to prevent the further Growth of Popery So as to hinder the said Estate descending

21. in Gavellkind, And also set forth that untill such time as your Petitioner Mary had performed the said requisites She as one of the heirs in Gavellkind was intitled to one third part of the said Estate and to have an Account

22. of the Profits thereof and after the performance of the said requisites was intitled to the whole and the profits thereof And Further set forth by their bill that by a Clause in Act of Parliament made in England your Petitioner

23. Mary being the Child of a Naturall born Subject of this Kingdom was Naturalized and that one James Horan an Attorney of the Court of Exchequer having full Notice of your Petitioner Mary’s Title bought the said

24. Estate from the said Hugh and Michael Hannen for some Colourable Considerac[i]on who got into the Possession of the said Estate and refused to give your Petitioners the Possession, and in regard the Legall Estate of the said
25. Lands Stood out in the hands of the said Cornelius Horan or his assigns and that the Legall Estate of the said Mortgage to Nicholas Arcedeckne was in his heirs or Executors so as your Petitioners could bring no

26. Action at Law for the recovery of the said Lands And that your Petitioners cou’d not prove the Marriage of the said Denis Hannen and Elonar o’Marra your Petitioner Mary’s said Father and Mother nor her being born of that Marriage but by Persons residing in France Some of which were Prohibited by Law from returning into Ireland, and your Petitioner having no means to compell the other witnesses to come

27. from France to prove your Petitioners Title your Petitioners Prayed by their Bill that they may be decreed to the Possession of the said Lands and to have an Account of the rents and Profits thereof since the death of

28. the said James Hannen, to have the said Deed of Mortgage made to the said Cornelius Horan delivered up to them cancelled and the said Defendants being served with Subpena’s to Answer the Defendants who

29. were the representatives of Nicholas Arcedeckne submited to the redemption of the Mortgage Made to him and to an Account of the Profits but the Defendant Hugh Hannen Stood out Process and never Could be

30. got to put in an Answer being by the Laws of Ireland incapable of Living in that Kingdom, and the Defendants James Horan Florance Collanan and Michael Hannen in their Answers did severally
32. Insist that your Petitioner Mary was not the Daughter of the said Denis Hannen and that if she had been she was an alien born and ought not to be considered in the Discent of the said Estate of the said James Hannen but that the same descended to the said Hugh and Michael Hannan as heirs in Gavellkind and that they for valluable considerac[i]on did Convey the said Estate to the said James Horan And insisted that the Mony due on the said Mortgage made to the said Cornelius Horan was not paid off and discharged, that issue being Settled in the Cause your Petitioners at very Great Expence took out a Commission into the Kingdom of France to Examine witnesses, And Proved that Denis Hannen and Elionar o’Marra were Naturall born Subjects of the Kingdom of Ireland and that they intermarryed And that your Petitioner Mary was the Issue of both their bodyes and the age of your Petitioner Mary and her Pedigree, by which she was proved to be the heir at Law to the said James Hannen Your Petitioners further Shew unto your Lordships that pending the said Suit your Petitioner Mary being arrived at proper age required by the said Act of Parliament to prevent the further Growth of Popery fyled the Bishop of the Diocess Certificat[es] of her Conformity to the protestant Religion and performed the other requisites required by the said Act of Parliament so as to prevent the said Estate from Descending in Gavellkind That the said Cause having
several years depended in the Court of Exchequer the
same came to be heared in the said Court on the
Eleventh day of June one thousand seven hundred and
twenty four on which day the Court ordered and
decreed

that the Petitioners should be intitled to the redemption of
the said Mortgage Made by the said James Hannen to
Cornelius Horan and that the said James Horan shou’d
Account with them for the rents and profits

of the said Mortgaged Lands And that the Defendants the
representatives of the said Nicholas Arcedeckne should
likewise Account with your Petitioners for the rents and
Profits of the lands Mortgaged to him

That the Defendant James Horan Petitioned the said
Court and obtained an order to rehear the same, and
Accordingly the Cause came to be reheared the twenty
fifth day of January one thousand seven hundred and
twenty five and on the rehearing it appearing that your
Petitioner Mary did not regularly Conform to the
Protestant Religion untill after the filing her bill the
Court ordered that the Cause should stand

over and that your Petitioners should fyle a Supplementall
bill by which her Conformity should be put in Issue So
that the whole Cause may be regularly before the Court
to decree thereon That

Accordingly your Petitioners fyled a Supplementall bill
Seting forth the aforesaid several Proceedings and your
Petitioner Mary's Conformity to the Protestant Religion and her having duly performed the requisites directed by the said Act of Parliament to prevent the further Growth of Popery and prayed to be decreed to the whole Estate on both bills, which bill the Defendants Answered And insisted on the same

47. Matters they did in their Answers to the originall Bill

That the said Cause came to be further heared on the said originall and Supplementall Bill, And tho’ it Plainly appeared on the hearing thereof

48. That your Petitioner Mary was heiress at Law to the said James Hannen And that she was the only Child of Denis Hannen and Elionar o’Marra his wife who were both Naturall born Subjects of the Crown of England and tho’ born beyond Sea was Naturalized by A Clause in An Act of Parliament made in this Kingdom for Naturalizing foreign Protestants by which the Children of Naturall born Subjects are Naturalized and which said Clause ^ still stands unrepealed And that your Petitioner Mary had conformed to the Protestant religion according to the direction of the said Act of Parliament to Prevent the Further Growth of Popery, yet the Court was pleased the fourth day of December on thousand seven hundred and twenty seven to order that your Petitioners bill Shou’d be retained for a Year and an half

52. that they should be at Liberty to bring an Ejectment for the recovery of the said Lands and if they did not bring one
in that time their bills to be dismised with costs and no
Temporary barrs to be insisted on That your

53. Petitioners are Advised And humbly Conceive they Are
Greatly/agreived by the said order and Decree of the
fourth day of December one thousand seven hundred
and twenty seven, for that it plainly Appeared to

54. the said Court that your Petitioners Title and Interest in
and to the afores[ai]d Lands and Premises at the time of
Fyling their bill was and is in Equity being for the
redemption of the Mortgages And for an

55. Account And as their Case was Circumstanced not proper
for a tryal at Law Your Petitioners Marys title
depending on the Testimony of witnesses who live in
France Some of whome are Law

56. Incapacitated Ever to return to Ireland and Your
Petitioners Can have no process to Compell the others
to appear to Give Evidence on any Tryall in Ireland,
And do therefore And for divers other Reasons

57. Humbly Appeal to your Lordships And pray that the s[ai]d
order or Decree May be reversed And that the order
made the Eleventh day of June one thousand seven
hundred and twenty four on the first

58. hearing of this Cause may be Confirmed, or to make such
further order in the premises as the Nature and
Circumstance of your Petitioners Case Shall in your
Lordships Judgment require, And

59. That Your Lordships will be pleased to award the Usuall
Summons to the s[ai]d James Horan Florance Collanan
William Burke Nicholas Arcedeckne A Minor by John Lawrence his Guardian
60. Jane Arcedeckne John French Darcy Hamilton Esq[ui]r[es]

Executors of Redmond Arcedeckne dec[eas]ed to Answer
the Premises And that Service on the Respondants
Attorney or Attorneys of the
61. Court of Exchequer in Ireland may be deemed Good Service
62. And your Petitioners shall ever pray &c:
63. Rich[ar]d Malone Mathias Arcedeckne
64. John Taaffe Mary Arcedeckne
1. Mathias Arcedechn and
2. Mary his wife - Appell[an]\textsuperscript{an}
3. James Horan Gent[leman] & others
4. - Respond[en]\textsuperscript{en}
5. The s[ai]\textsuperscript{d} James Horan - Appell[an]\textsuperscript{an}
6. The said Mathias Arcedeckne
7. and Mary his wife - Respond[en]\textsuperscript{en}

8. To the Right Hon[oura]\textsuperscript{ble} the Lords
   Spirituall & Temporall
9. in Parliament Assembled
10. The Humble Petition of the said James Horan
11. Sheweth -
12. **That** your petition in June 1714 in Consideration of £1600 really

13. and bona fide paid by you and of an annuity of £30 per annum ever since by

14. him paid purchased Certain lands in the County of Galway in the Kingdom of Ireland Subject to the payment of Several Mortgages amounting to upwards of £1200

15. with Interest Some at 10 per cent and the rest at 8 per cent per annum without any Notice of any other person

16. whatsoever having any Claim or title to the premisses ~

18. 8ber [October] 1719. **The** Said Appellants Mathias Arcedeckne and Mary his wife Exhibitted their Bill in th° Court of

19. Exchequer in Ireland against you and others pretending that the said Mary Arcedeckne, tho’ an Alien

20. Born was heir att Law to the person under whom those sold to you and derive, and therefore pray’d

21. to be lett into the Redemption of the premisses and to be Decreed thereto. ~

22. **That** in the prosecution of the Said Cause the said Endeavouring att any rate to

23. prove the Said Marys Pedigree there were Several Corrupt practices Committed on their part as
24. forgery, perjury and Subornation of perjury in the Execution of a Complaint for Examination
25. of witnesses in this Cause in France and afterwards in Supporting the Depositions thereby
26. taken, to detect which and defending this Suit your petition has been put to an Expense
27. of more than twice the Value of the Estate in question -

28. 4th xber [December] 1727 .. The Cause being heard the Court decreed that the Appellant's Bill should be retained for a
29. year and a half and they should be at liberty in the Meantime to bring an Ejectment at Law
30. for Recovery of said Lands and that no temporary Barriers should be insisted on by your Petitioner on the
31. Tryall of said Ejectment But in Case the Appellant's Bill should not bring their Ejectment in the time
32. aforesaid the Said Bill to be dismissed with Costs -

33. 3d. Febuary 1728 .. Notwithstanding they as your Petitioner is Advised had no Grounds to Complain of said
34. Decree but to Harrass and tire your Petitioner they Exhibitted their petition & appeal to your Lordship[s]
35. and thereupon Served your Petitioner with your Lordships Summons thereon, & your Petitioner Expecting they served the Appellant's
wo[ul]d proceed thereon So as to bring the Same to a
hearing att y[ou]' Lo[rdshi]pps Barr last Session, did
come over from Ireland w[i]th Attested Coppys of all his
Pleadings Papers & Proofs in this cause
in order to have the Said Appeal heard, But the Appell[an]'s
having never Stirred in forwarding
th° hearing thereof & th° s[ai]'d Session of Parliam[en]'t
being too farr Spent att th° time y[ou]' Pet[itione]'r
arrived here
in London then to Apply to y[ou]' Lo[rdshi]pps for th°
hearing of Said Appeal, your Petitioner was disappo-
=nted therein, and y[ou]' Pet[itione]'r being advised to
Exhibitt a Cross Appeal against th° Appell[an]'s for the
absolute dismissal of th° Appell[an]'s s[ai]'d Bill the Same
was Exhibitted th° 16th day of Jan[ua]ry last &
thereupo=
=n y[ou]' Lo[rdshi]pps Sum[mons]s Issued for th° s[ai]'d
Appell[an]'s Mathias Arcedeckne and his S[ai]'d wife to
putt in
their answeres thereto on th° 20th day of Feb[rua]ry last
w[hi]'th Resp[ond]en's did not do, till on the 3d
Instant, &
y[ou]' Pet[itione]'r is now a Second time come over to attend
th° hearing of Said Appeals But th° s[ai]'d Appell[an]'s
Neglecting to have their s[ai]'d Appeal Sett down to be harrd
att y[ou]' Lo[rdshi]pps Barr y[ou]' Pet[itione]'r was
therefore oblidge
47. in ord[e]r to have th[e] Said Appeals heard this Session to apply to y[ou]r Lo[rdsh]i]pps to have both th[e] Said Appeals
48. Sett down to be heard together in Course next after those already Appointed to be heard w[hi]ch was
49. ordered accordingly by your Lordshipps -

50. That th[e] Causes already Sett down before these, are So many th[a]t y[ou]r Pet[itione]r Apprehends th[e] said Appeals cant come on to be heard ^ in Course this Session by w[hi]ch your Pet[itione]r will be very much prejudiced he being kept out of possession of a Considerable part of his s[ai]d purchased Estate which Entirely
52. depends on the determination to be made by y[ou]r Lo[rdsh]i]pps on hearing these appeals, besides the great hazard he runns in loosing Several of his Material Witnesses, who may in th[e] meantime
die, and it being now upwards of two years Since the Decree pronounced and upwards of 10 (?) Since the bringing this Bill, and the year and a half by th[e] decree allowed the Appell[an]ts for bringing their Ejectment being long Since Expired, and as the Appell[an]ts intention in
58. this Appeal Seems to be only to weary out your Petitioner

59. Therefore and in Regard to the Circumstances of his Case your Petitioner Most Humbly prays that your Lordshipps
will be pleased to order that Said Causes may be Sett down
to be heard att your Lordshipps Barr, on Such by day after
Easter next as your Lordshipps Shall think fitt, So as th[a]'
th[e]
Same may come on together and be heard this Session ~
And your Petitioner will ever Pray &c
Ja[mes] Horan

Petition of James Horan
to bring on an Original & Cross
Appeale from Ireland on
some By day after Easter

Read 20º Martij 1729.
Agents called in & Heard & on
the Question Causes brought forw[ar]d
to Tuesday 21st April next.
APPENDIX 3

Description: Answers of James Horan, William Burke, Florence Callanane, Nicholas Arcedeckne, and Mathias and Mary Arcedeckne

Source: U.K. Parliamentary Archives
Reference: HL/PO/JO/10/4/17
Title: Main Papers (Parchment Main Papers)
Date: Various
Transcribed by: Transcription Services Ltd

www.transcriptionservicesltd.com
email: enquiries@tslmanx.net


2. to the Petition and Appeal of Mathias Arcedeckne

3. and Mary Arcedeckne ai[la]s Hanen his wife Appell[an]ts -

4. The said Respond[en]t not Confessing or acknowledging all or any of

5. the Matters in the said petition and appeal Mentioned for answer

6. thereto Saith that such Decrees were made as in the said Petition

7. and appeal is Mentioned and this Respond[en]t further Saith that he

1039
8. is advised ^ and apprehends that the said Appellants have no reason to
9. Complain of the order and Decree of the fourth day of December
10. one thousand Seven hundred and Twenty Seven in the said Petition
11. Mentioned and Humbly hopes that the Said Appellants said petition
12. and appeal shall be Dismissed with Costs
13. Ja[me]s Horan

14. Answ[e]r of
15. James Horan
16. Gent[leman] to th[e]
17. Appeal of
18. Mathias Arcedeckne
19. & his Wife.

20. Brought in 14°

23. and Appeal of Mathias Arcedeckne and Mary Arcedeckne al[ia]s Hanen his wife Appell[an]ts

24. The Respond[en]ts not confessing or Acknowledging all or any of th° Matters in th° Petition and Appeal Menc[ioned]

25. for answer thereto Say th[a]l° such Decrees were Made as in th° s[ai]d Petition & Appeal is Men[cion]ed and

26. these Respond[en]ts further Say th[a]l° they are advised and App[re]hend th[a]l° th° s[ai]d Appell[an]ts have no reason to Complain

27. of the said ord[er] and Decree of the fourth day of December One thousand Seven hundred and

28. twenty seven in their s[ai]d petition and Appeal Menc[i]on’d and Humbly hope that the said


30. Will[iam] Burke

31. Flo[rence] Callanane

32. Answer of

33. W[illia]m Burke &c to the

34. Appeal of Mathias

35. Arcedeckne &c
36. Brought in 5° Martij 1729

37. Mathias Arcedeckne }
38. et ux[or] [wife] Apell[an] }^\text{se}
39. James Horan et }
40. al Respond[en] }^\text{se}

41. The Answ[e]r of Nicholas Arcedeckne by Jo[h]n
42. Lawrence his Guardian. Jane Arcedeckne Darcy Hamilton
44. and Appeal of Mathias Arcedeckne & Mary his wife

45. The Respond[en] Confess there were such Ord[e]r &
46. decrees made in th[e] Court of Excheq[ue] in Ireland as are mentioned
47. in th[e] Pet[i]tion & appeal & they are ready & willing to abide by the
48. ord[e]r of the 11th of June 1724 or such other ord[e]r as shall be made by th[e] Lordshipps in this Courte
49. P Ward [illegible - Agent per?] s[ai]d Respond[en]t[s]
(d)

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50. The Answ[e]' of

51. Nicholas Arced[ec]kne

52. by his Guardian &

53. others

54. Brought in 4° May 1730

55. The Answ[e]'s of Mathias Arcedeckne & Mary

56. his wife to th[e] Pet[it]ion & Cross appeal of Jame[s]

Horan

57. The s[ai]d Respondents not Confessing all or any of th[e]

58. Matt[e]'s in th[e] said Pet[it]ion & Cross appeal menc[i]on[ed]

59. for answ[e]' thereto say th[a]' such a decree was made on

th[e]

60. 11th of June 1724 as is mentioned in th[e] s[ai]d Cross appeal

and

likewise th[a]' such a decree was made on th[e] 4th of 10th

[October] 1797

62. as is mentioned & they further say they are advised

63. th[e] s[ai]' Decr[e]e of th[e] 11th of June 1724 is Equitable &

Just

64. & therefore Humbly hope it will be affirm[e]d & th[a]' th[e]
65. s[ai]d Decree of th\r 4\textsuperscript{th} of 7\textsuperscript{th} 10\textsuperscript{th} [October] 1727 will be reversed
66. & th\r Petition & Cross appeal of James Horan Dis=
67. missed with Costs
68. Step[hen] Brown
69. Ag[en]\t p[er] Resp[on]d[en]ts

\[8/8\]

(f)
155
70. Answ[e]\r of
71. Mathias Arcedecne
72. & Ux[or] [wife] to the ^ Cross Appeal
73. of James Horan

74. Bro[ugh]\t in 5\textsuperscript{o} Martij 1729.
APPENDIX 4

Description: Petition and Cross Appeal of James Horan
Source: U.K. Parliamentary Archives
Reference: HL/PO/JO/10/3/223/10
Title: Arcedeckne et ux v Horan et al, et a contra
Date: [16 Jan 1730]
Transcribed by: Transcription Services Ltd
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e-mail: enquiries@tslmanx.net

1. To the Right hon[ora]ble the Lords Spirituall and Temporall in Parliament assembled.
2. The humble Petition and Cross Appeal of James Horan Gentleman.
3. Humbly Sheweth
4. That Nicholas Hanyn being Seized in fee Simple of the Towne and Lands of Iskerboy Liskeil ^Ballimaline and other Lands in the Bill (depending in this Cause in the Court of Exchequer in Ireland) mentioned Did (previous to the Marriage of James Hanyn Esquire) with Sisly Hanyn eldest daughter of the said Nicholas Hanyn, which Marriage afterwards took effect) by sufficient Deeds of Lease and Release ^bearing date Respectively the twentieth and twenty first of October one thousand Six hundred and Eighty four Grant and Convey the said Premisses to certain Trustees in the said Deed of release named and to their
heirs to the use of the said Nicholas and Dorothy his wife as to part for their

6. [_____] ^ Survivor And as to the residue to the use of the said James and Sisly and the heirs male of the Body of the said James in possession, the Remainder of the said Part limited to the said Nicholas and Dorothy for Life to the use of the said James and Sisly and the heirs male of the Body of the said James, Remainder of the Whole to the said

7. ^ Nicholas [Hanyns Issue heirs] male of the body Remainder to Mortagh Hanyn only Brother of the said James in tail male, Remainder to the said James and his heirs for Ever.

8. That the said Nicholas Hanyn Some time after making the said Settlement dyed without Issue Male By whose Death the said James became Seized in fee tail of all and Singular the said Premises And the said Mortagh Hanyn dyed in the Life time of the said James leaving issue Hugh and Michael Hanyn his only Surviving Son Who were all Papists. As were also the said

9. James and Mortagh Hanyn

10. That the said James Hanyn having made two Mortgages of part of the said Estate one to Cornelius Horan and the other to Nicholas Archdekne Gentleman deceased, Dyed in the Month of April in the year of our Lord God one thousand Seven hundred & twelve a Papist & without

11. Issue, Which was Several years after passing an Act of Parliament made in Ireland intituled an Act to prevent
the further growth of Popery, By which Act (inter al[ia])
the Estates of Papists are to go and be in Nature of
Gavellkind¹.

12. That Margaret Hanyn Niece and pretended Devisee of the
said James Hanyn got into poss[ess]ion of part of the
said Estate imediately after the decease of the said
James Hanyn, Which said Margaret was also a Papist.

13. That the said Hugh and Michael Hanyn as Nephews and
heirs in Gavell kind to the said James Hanyn brought
an Ejectm[en]¹ for the said Lands poss[ess]ed as
aforesaid by the said Margaret Hanyn, To Which the
said Margaret took defence & She being incapable by
the said Act of Parliament to take by Devise And the
said James

14. Hany n being thought also incapable to Make Such Devise,
The said Hugh and Michael Hanyn obtained a Verdict
& Judgement after a long and Expensive Struggle at
Law And were put into actuall poss[ess]ion of the said
Premissed by an habere facias poss[es]ionem

15. That after the said Hugh and Michael Hanyn were so put
into actuall and peacable poss[ess]ion, they for full &
valuable Consid[erati]™ really & bona fide paid and
Secured to be paid Sold and Conveyed the said
Premisses ¹ Subject to the s[a]ld two Mortgages unto your Pet[itione]
James Horan Who is a Protestant of the Church of
Ireland as by [___] established ¹ who then had Notice the s[a]ld Dennis

¹ Gavelkind - a system of inheritance in which a deceased person’s land is
divided equally among all male heirs.
Hanyn's having any [issue] or of any pretence of title in th' Appell[an]'t

Mary

16. That Several years after your Petitioners said purchase and after he was in the quiet and peaceable poss[ess]ion of part of the said Estate, he filed a Bill in the said Court of Exchequer against Redmond Archdeke[n]e who had got into poss[ess]ion of the said Mortgages to Nicholas Archdeke[n]e as heir and Ex[ecuto]r of the said Nicholas Archdeke[n]e to redeem the said Mortgage made of the said Premisses to the said Nicholas Archdeke[n]e dec[ees]ad And

17. obtained a Decree for redemption thereof And hath Since been put into poss[ess]ion of the said premisses under the said Decree.

18. That the said Decree Establishing the right of Redemption of the said Mortgage to be in Your Petitioner and not [___] th' said Mathias Archdeke[n]e one of the said Nicholas Archdeke[n]es Sons gave out that Dennis Hanyn who was Eldest Son of the said Mortagh Hanyn was dead and left Issue one Daughter th' said [____]d Mary & th[a]l he was Marryed to her and in her right became intitled to the said James Hanyns said Estate or at least to a third Part

19. thereof in gavelkind And in or about the Month of October one thousand Seven hundred and Nineteen the said Mathias Archdeke[n]e and Mary his Wife by her guardian and Prochein amy John Burke Esq[ui]r filed their Bill in the Court of Exchequer for Ireland against Your Petitioners' Florence Callanane Redmond Archdeke[n]e W[illia]m Burk
20. Richard Burke Hugh Hany Hany and Margaret Hany Setting forth the aforesaid Pedigree And that C[omplainan]t Mary tho’ born beyond Sea was by an Act of Parliam[en]t made in England naturalized and made capable to inherit And that by the s[aid] Act ^ passed in Ireland to prevent the growth of Popery it was provided that if the heir at Law of any Papist

21. being under age at the death of his Ancestor Shall Conform to the Protestant Religion, take the Oath of Abjuration and perform the other requisites by a certain time therein menc[i]oned, That the Estate of such Popish Ancestor shall not Descend in gavelkind but be Enjoyed by the heir at Law so conforming, And further that the C[omplainan]t Mary after

22. the death of the said James Came into Ireland a Minor and is educated a Protestant and intermarried with the C[omplainan]t Mathias who is a Protestant And that She designed when She ^ arrived to the age prescribed by the said Acts to Qualifye her Self according to the said Act to prevent the said Estate going in gavelkind And that in the mean

23. time She was intitled to one third of the said Lands as one of the heirs of the said James in gavelkind And wou’d after her Conformity be intitled to an Acc[oun]t of the rents of the whole Lands from the Death of the said James Hany And therefore Prayed that your Pet[itione]t might be Stopp’d from proceeding on his said Decree against the
24. said Redmond Archdeken for redemption of the said Lands Mortgaged to the said Nicholas Archdeken So that the Complainant might have an Opportunity to Sett forth the said Marys title to the Equity of redemption of premises before your Petitioner got into possess[ion] on the said Decree And Such further relief as in the Circumstances of their Case they Shou'd be intitled to

25. That your Petitioner in his defence (inter alia) Insisted that the said Mary if She was the Daughter of the said Dennis Hanyn (which he was a Stranger to) was an Alien born and therefore cou'd not prevent the descent from the said James Hanyn to the said Hugh and Michael Hanyn his Nephews and heirs And insisted, as the truth is, That the

26. said Dennis Hanny [n] was a Papist and took up Arms against their late Majesty's King W[illiam] and Queen Mary in the late rebellion in Ireland And that after the Surrender of Limerick (notwithstanding the indemnity granted by Articles made on Such Surrender) the said Dennis Hanyn Quitted the Kingdome of Ireland

27. and inlisted in the French Kings Service against his lawfull Sovereign and many years after Continued in open Warr with the Crown of England till he Dyed a Papist in France during the Continuance of the said Warr.

28. That if the said Dennis Hanyn Marryed, he Marryed in France during the said Warr a Woman Who was a Papist, And that if the said Mary was his daughter she
was born in France an Alien Enemy, was Educated in the Popish religion and therefore not inheritable in Ireland, being not within the true intent & meaning of the Clause in favour of the

29. Children of Natural born Subjects in the Act of Parliament made in Great Brittain in the Seventh year of the reign of our late Sovereign Queen Ann And that your Pet[itione] was a fair Protestant Purchaser without any Notice of the said Marys pretended title.

30. That issue being Joined in April one thousand Seven hundred & twenty one a Comic[i]on was taken out by the said Mathias Archdekne and Mary his Wife for Examina[c][i]on of Witnesses in this Cause in the City of Paris in the Kingdome of France returnable Sine Dilac[i]o[n]e Which Comic[i]on was Executed ex parte & returned by the s[ai]d Mathias

31. Archdeke[ne] & Mary his Wife, the Com[issione] on your Pet[itione] behalf not attending the Same And your Pet[itione] haveing strong grounds to Suspect that the said Comic[i]on was unfairly Executed And that Severall gross practices & abuses had been Com[m]itted therein And that the Whole was a very Corrupt proceeding On the twenty Second day of Feb[ruary]

32. one thousand Seven hundred & twenty one Your Pet[itione] Moved the Court to Suppress the said Depositions and for an Attachm[en] ag[ain] Otho Archdeke[ne] brother of the said Mathias who transacted the Execut[i]on of the said Comic[i]on And for a
Comic[i]on to Exa[m]ine Witnesses in France & another
Comic[i]on to Exa[m]ine Witnesses in Ireland in
33. behalf of your Pet[itione]r in the said Cause But the said
Mathias produceing a very positive affid[avi]d in the
Name of one Arthur M' Millan stiled of the City of
London Merch[an]t Sworn before M' Barron Pocklington
one of the Barons of the said Court of Excheq[ue]r on the
fourteenth of February one thousand Seven hundred &
twenty one
34. of the fairness of the Execu[i]on of the said Comic[i]on,
The Court on reading the said Affid[avi]d only granted
your Pet[itione]r a Comic[i]on for Exam[inatio]n of
Witnesses in Ireland returnable the Essoyn Day of the
next Ensueing Easter term and directed that
Publicac[i]on Shou'd pass the first Day of the said term
And that your Pet[itione]r Shou'd App[ear] gratis at the hearing and not Suffer a Conditionall Decree.
35. That your Pet[itione]r haveing further intelligence in this
Matter & being assured the said M' Millans affid[avi]d was false & haveing rec[eav]ed a Certificate from one of
the said Mathias Archdeknes own Com[missione]rs
contradicting the Same Your Pet[itione]r on the
Sixteenth day of April one thousand Seven hundred &
twenty two again Moved the s[ai]d Court
36. of Exchequer to Suppress the said Dep[ositi]ons
Whereupon the Cou[rt] directed the said Matter to be fully
Exa[min]ed into and that full Cost shou'd attend the
Event of it and Ordered two Comic[i]ons to issue, one to
London & the other to Paris And in the mean time all Matters relateing to the Cause were to Stand as they then were.

38. That on return and Publication of the said Comic[i]ons, it fully appeared that neither of the said Mathias Archdeknes Com[missione]'s who Executed the said Comic[i]on for Examinac[i]on of Witnesses on the Meritts nor their Clerk were Sworn as usuall in such Cases ^ and it also appeared that none of the Witnesses whose Dep[ositi]ons had been reported were

39. Sworn to their said Dep[ositi]ons And that one of the said Com[missione]'s hands was forged to the return of the said Comic[i]on And the other Com[missione]'s hand gained thereto by Surprize And that the Affid[avi]t of the said M' Millan was forged as also a Letter produced by the s[ai]d Mathias Archdekne to the Court in Support of the said Affid[avi]t with the Post

40. Marks thereto All Which wicked and Corrupt practices being fully Proved to the Satisfaction of the Court, By Severall Subsequent orders the s[ai]d Mathias Archdekne was Ordered to Pay your Pet[itione]' the Costs of Such Exam[inati]ons Which were taxed at two hundred & fourteen pounds eleven Shillings & ten pence & paid accordingly to your Pet[itione]' by the s[ai]d Mathias

41. That a new Comic[i]on issued for Exam[inati]ons of Witnesses in France on the Meritts & by order of the first December one thousand seven hundred & twenty
two Publica[ion] of all the Dep[ositio]ns taken to the Meritts on the last Comic[ion] in France & of all the Depo[sitio]ns taken to the Meritts in Ireland was Ordered to pass.

42. That afterwards viz[i] [that is to say] On the Eighth of Feb[ruar]y one thousand Seven hundred & twenty three the Cause was Sett down to be heard the first hearing day of the then next Ensueing term.

43. That the said Redmond Archdekne one of the D[efendan]ts to the said bill, brother to the C[laimant] Mathias haveing (pending the s[ai]d Suit) dyed, the said Mathias & Mary his Wife filed their bill of revivor ag[ain]st Nicholas Archdekne (Son & heir Apparent of the s[ai]d Redmond) a Minor by John Lawrence his guardian Jane Archdekne widdow & relict of

44. the said Redmond John French & Darcy Hamilton Esq[uir] Ex[ecutor]s of the said Redmond Archdekne Who being Served with S[ub]p[e]nas to revive, the Cause was thereupon on the said twenty fourth Day of Feb[ruar]y one thousand Seven hundred & twenty three ordered to Stand revised And Publica[ion] haveing passed and a Day

45. x for hearing appointed as herein before sett forth, the Cause Came on to be heard on Thursday the Eleventh Day of June one thousand seven hundred & twenty four against the said Representatives of the said Redmond Archdekne Florence Callanane W[illia]m Burk & your Pet[itione]r only in presence of Councill
46. for the Claimants & the said Defendants the said Representatives of the said Redmond Archdekne none Appearing for the said Florence Callanane & William Burk, tho' it appeared by affidavit they were Served with Summons to hear Judgment And your Petitioner being Served with no proof for hearing Judgment. And therefore not

47. thinking that the Cause could be heard against him was not prepared to Make his defence, nor had any to Appear for him, But yet the Cause was heard exparte against your Petitioner under the said Order of the twenty Second February one thousand Seven hundred & twenty one Which the said Court were pleased to thinke

48. [remained ?] still in force notwithstanding that both Parties did Subsequent to the said order & to the time thereby Limited Examined Witnesses as to the Merritts of the Publication of all the Depositions passed by the said Subsequent order of the first of December one thousand Seven hundred & twenty two & not by the said Order of the twenty Second

49. [February one] thousand Seven hundred & twenty one, All Which induced your Petitioner to think that the said order of the twenty Second February one thousand Seven hundred & twenty one for appearing gratis was of no further avail, And on Which hearing Exparte the Court ordered & Decreed that the Claimants should be intitled to a redemption
50. of the lands of Isherboy and Ballinahim in the Pleadinge menc[i]oned on the Paym[en]t of the Mony Appearing due on the said M[or]gage of three hundred forty two Pounds Entered into by James Hanyn to Cornelius Horan Which Came by mesne [?] Assignm[en]ts to your Pet[itione]r and all Interest due thereon, As also to a redempc[i]on of the Lands

51. of Colliny Castletown Killbegg Liscoyle Cloonday & Corbane on the Paym[en]t of what Shall Appear to remain due of the principall Sum[m]e of five hundred Pounds on the s[ai]d M[or]gage Entered into by the s[ai]d James Hanyn to Nich[ola] Archdekne together w[i]h Interest and Costs And it was referred to the Chief Remb[?] of the said Court to

52. State the Acc[oun]t between the C[laiman]ts & the said Sev[era]ll D[efendan]ts And in Such Acc[oun]t your Pet[itione]r is to give allowance for all Payments theretofore made towards the Discharge of the s[ai]d M[or]gage so Assigned to him And is to Acc[oun]t for all the rents issues & profits of the s[ai]d Lands of Iskerboy & Ballymehan Which had or might have been rec[eive]d thereout by him or those

53. he derives under And the said Jane Archdekne Widdow John French & Darcy Hamilton the Ex[ecuto]rs of the said Redmond Archdekne were in like Manner to give an allowance for all payments theretofore made towards the discharge of the said M[or]gage for five
hundred Pounds or any part thereof And they were to Account

54. for the rents issues & profits of the said lands M[or]'gaged which had or might have been rec[eav]ed by them or any Person or persons under Whome they Derive And in the said Severall Accounts all Partys were to have all just & proper Allowances And if any thing Shou’d Appear difficult the said Chief Remb” [?] was to report the

55. Same Specially On Whose report Such further order Shou’d be made as wou’d be fitt And it is thereby further Ordered & Decreed that on paym[en]’ of the said Principall & Interest of the said M[or]’gage on the s[ai]d Lands of Iskerboy & Ballymahan Your Pet[itione]r Shou’d reconvey & Assign the said M[or]’gaged pr[e]misses to the P[la]intif’s or to Such person

56. or persons as they Shou’d Nominate or Appoint And also that on Payment of Principall Interest and Costs on the said Mortgage of five hundred Pounds The said D[e]f[endant]ts Nicholas Archdekne & the said Ex[ecuto]r” Shou’d reconvey & assign said premisses M[or]’gaged for the Same to the P[la]intif’s or to Such person or persons as they Shou’d

57. Nominate or Appoint for that purpose And that upon paym[en]’ of the s[ai]d Severall Sum[m]es Which Shou’d appear to remain due as aforesaid an In_on [?] Injunction] shou’d issue to put the P[la]intif’s into the actual poss[ess]ion of the said Sev[era]l M[or]’gaged
Lands and the Costs of Suit with respect to your Petition were reserved till after the report made, and it was thereby also Ordered

58. and Decreed that the said Florence Callanane Shou’d on payment as aforesaid join with your Petition in reconveying & assigninge the aforesaid Mortgage of the said Lands of Iskerboy & Ballymahan unless good Cause were by the said Callanane Shewn to the Contrary on the first day of the then next Michælmas term And it was thereby further

59. ordered & Decreed that the Lease in the Pleadings mencioned to be made to the Defendant W[illia]m Burke be Sett aside unless good Cause were by him Shewn to the Contrary on the said first day of the said Michælmas term But before the said Florence Callanane & W[illia]m Burke were to be admitted to Shew Cause they were to Pay five Pounds

60. for the attendance on the said hearing And the said W[illia]m Burk was ordered & Decreed to Pay the Plaintiff’s Costs. ~

61. That [___] on the first December one thousand Seven hundred & twenty four [?five] Petitioned the Court for a [rehear]ing of the said Cause, Setting forthe the[___] said Cause coming on to be heard on the said Eleventh day of June And your Petition Conceiving himself not bound to appear then Did not prepare Council for his defence
62. And that the Court being of Opinion that by the said Order of the twenty Second Feb[ruary] one thousand Seven hundred & twenty one Your Pet[ition] was obliged to appear gratis & not suffer a Condic[i]onal Decree And were pleased upon Opening the P[la]intif[fs] Bill to order your Pet[ition]er answer to be read, no Councill Appearing for him, And upon

63. reading the said answer & hearing of Proofs the Court was pleased to Make the aforesaid Decree And your Pet[ition] being advised that had his Councill been prepared at the hearing to Lay your Pet[ition]r Case fully before the Court, it wou'd have Appeared that the P[la]intif[fs] had no title to redeem the said M[ory]t[gaged Premisses or to

64. bring your Pet[ition] or the other D[e]f[endant]s to an Acc[oun]t or to be Decreed to the poss[ession] of the said M[ory]t[gaged Lands And therefore Prayed that the said Cause might be reheard, Upon which Petition it was Ordered that the said Cause shou'd be Sett down to be reheard at the Same time that the Cause was to be heard or

65. Condic[i]onal Decree against the said other D[e]f[endant]s And the said Cause being Sett down accordingly Came on to be reheard as to your Pet[ition] and heard on the said Condic[i]onal Decree ag[ain] the said D[e]f[endant]s Burk & Callanane on Monday the twenty fifth Day of January one thousand Seven hundred & twenty four
in presence of Councill as well for the Plaintiff as for your Pet[ition] none appearing for the said other D[e]f[edanta]ts tho’ as allledged served w[i]th the said Cond[iciona]l Decree as appeared by affid[avi].

Whereupon & upon opening the Pleadings & reading the Proofs in the Case And on the Plaintiff Councill produceing a paper writing which they allledged to be a Certificate of the Plaintiff haveing Conformed pursuant to Several Acts against the growth of Popery And Praying the same shou’d be read Your Pet[ition] Councill objected against the reading of the said Certificate in regard the Plaintiff Conformity was not put in issue in the said Cause, it not being Suggested by the Plaintiff bill that the Plaintiff Mary has Conformed, but a title was Sett up by the bill in the Plaintiff to a third part of the promises as heirs in gavelkind with Hugh & Michael Hanyn And on Consideration & had of what was offered by Councill on behalf of the Plaintiff & your Pet[ition], it was ordered that the Cause Shou’d Stand over & that the five pounds deposited by your Pet[ition] for the rehearing Shou’d be paid out to your Pet[ition] and that the Plaintiff Shou’d Pay the Cost of that days attendance ~

That the said Plaintiff on the fourteenth May one thousand Seven hundred & twenty five filed their Supplemental bill against your Pet[ition] Setting forth the Substance of the aforesaid bill And your Pet[ition] & the other
D[efendan]ts answers thereto And that the Cause was at issue & Witnesses had been Exa[m][n]ed & Publ[icaci]on passed & tho’ pending the
said Proceedings P[laintiff] Mary being of years of discretion & instructed in the Protestant religion, tho’ not twenty one years of age, Conformed to the Protestant religion inrolled her Certificate & performed the other requisites directed by the said Act to prevent the further growth of Popery and reciteing the afores[ai]d
72. Decree of the Eleventh June one thousand Seven hundred & twenty four, to Which they referred, And that the said Cause was reheard & thereupon it appearing that the P[laintiff] Marys Conformity was in some time after the fileing the said bill & not put in issue therein The Court was of opinion that the
P[laintiffs] cou’d not by the said bill be Decreed to the whole Lands & thereupon directed that the Cause Shou’d Stand over & that the P[laintiffs] shou’d be at Liberty to Lay P[laintiff] Marys Conformity regularly before the Court And to put the Same in issue by amending the said originall bill or by a Suppl[emental] bill And the P[laintiffs] being
74. advised that in regard P[laintiff] Mary did not conform to the Protestant religion in Such Manner as the said Act of Parliam[en]t directs & perform the requisites in the said Act menc[i]oned untill after the fileing of the said originall bill, her Conformity & her performance of the requisites directed by the said Act
75. Cou’d not be Sett forth in the said originall bill, it was therefore necessary for the Plaintiff to file a Supplemental bill in order to bring in Question their title to the whole Lands & to have an Account for the entire rents & profits thereof Since the Death of the said James Hanyn And to Pray it might be taken as part of the

76. said former bill, they therefore in their said Supplemental Bill Sett forth that the Plaintiff Mary is a Protestant of the Church of Ireland as by Law Established, has received the Sacrament & took the Oath of abjuration Subscribed the Declaration & filed the Bishops Certificate of her Conformity & of her having taken

77. the Oaths & Subscribed the Declaration & duly performed all the other requisites required by the said Act, And that by Such her Conformity & performing the requisites the Plaintiff were intitled to the whole Lands & to an Account of the rents & profits thereof And therefore Prayed Such relief in the premises they were

78. intitled to on this & their said Original bill And the benefit of all the Proofs & Deposits and all other orders & proceedings in the said originall Cause against your Petitioner & the said other Defendants, Unto Which bill your Petitioner having put in his answer and thereby

79. Denied that he knew what age the Plaintiff Mary was of pending the said proceedings or Whether She was or is
yet instructed in the Protestant religion, or if she
conformed, or at w[ha]' time or age to the Church of
Ireland as by Law Established or whether She duly
filed her Cert[ificate] or performed all or any the
requisite

80. directed or required by the said Acts And Does not believe
that She is a Protestant or rec[eav]ed the Sacram[en]t according to the usage of the Church of Ireland or took
the Oaths or filed any Bishops Cert[ificate] of her
Conformity or took the Oaths according to the Popery
Acts or that She duly performed all Matters required
thereby

81. or that She was a Protestant within the intent of the said
Acts or that the P[aintiffs] are intitled to the said Lands or
any of them or to any Acc[oun]ts for the rents thereof,
tho’ the P[aintiff] Mary Shou’d be daughter & heir of the
said Dennis Hanyn, W[hi]ch your Pet[itione]r never
knew or admitted, Neither did he know w[ha]' religion

82. the P[aintiff] Mathias is of, but heard he Marryed the P[aintiff]
Mary in France, where as he heard & believes She was
born of Popist Parents & Educated in the Popish
religion And that her Mother is a French or Flemish
Woman & an Alien & that Dennis Hanyn the P[aintiff]
Marys pretended father was

83. in Arms in the late rebellion in Ireland ag[ain]st King
W[illia]m & Queen Mary and Continued so till after the
Surrender of Limerick & then renounceing Any
Allegiance to their said Majestys & refuseing to Live
under their Government went into France and was there
in Arms against their said late Majesties & against the late Queen Ann & never
returned into the Dominions of the Crown of England but dyed in France a Papist, And is advised that the
Plaintiff Mary under these Circumstances is not
naturalized within the true intent & meaning of the
said Act in the Plaintiff's bill And insists on the
Defences in her answer to the original bill in barr of
Plaintiff's demands And insists if the Plaintiff Mary Did at
any time Conform to the Church of Ireland or if She has
any Demand to any part of the premises which your
Petitioner in no Sort admitts And if She had not been
an Alien as your Petitioner insists She
is, that notwithstanding She has not so Conformed as to
hinder the premises from going in gavell kind
According to the said Act to prevent the further growth
of Popery ~
And the Cause being Sett down to be further heard on the
said former Proceedings, the said Supplementary bill &
answer thereto Came accordingly on to be heard in
presence of Council as well for the Plaintiff as for your
Petitioner and was fully debated on the third fifth &
Sixth days of December one thousand Seven
hundred & twenty Six And the Court having taken time to
Consider thereof, it was on Monday the fourth day of
December one thousand Seven hundred & twenty
Seven, Notwithstanding your Petitioner's said defence
hereinbefore Sett forth, Whic[h] was proved to be true &
the Many unjust &

89. corrupt practices aforesaid Com[m]itted by the P[la]intif[fs]

Ordered Adjudged & Decreed that the P[la]intif[fs] bill
Shou’d be retained for a year & a half & that the P[la]intif[fs]
be & are thereby at Liberty in the Mean time to bring
an Ejectm[en]t at Law for recovery of the said Lands,
On the tryall of which s[ai]d Ejectment no

90. temporary Barrs are to be insisted on by the said
Def[enda]nt’s, But in Case the P[la]intif[fs] Shall not bring an
Ejectm[en]t for the s[ai]d Lands in the time aforesaid, It
is thereby further Ordered & Adjudged that the P[la]intif[fs]
said bill Shall be & the Same is thereby dismissed with
Costs And the P[la]intif[fs] may accordingly Make

91. ^ [___] the s[ai]d [___] whereof the process of the s[ai]d Court is from [___] to Issue as

Usuall ~ That on the s[ai]d hearing a paper writeing purporting to be a Copy of the Bishop of

Clonferts Certificate of the P[la]intif[fs] Conformity on the twenty first day of January one

thousand Seven hundred and twenty one, & [___] a Copy of a Certif[icate] dated first February

one thousand seven hundred & twenty

92. ^ one [___] Certificate dated twentieth of Nov[em]ber one thousand seven hundred twenty & three &

a Copy of Another Certificate of the same date ~ ~ ~ ~ ~ ~ were Suffered to be read Altho’ no
due proof was made thereof, And which your Pet[itione]r Humbly Insists ought not to have

been read

93. That your [___] humbly Conceives that the said Court on the

hearing of this Cause ought not to have retained the
said bill, but ought to have Dismissed the Same with
Costs, Wherefore your Pet[itione]r humbly appeals from
the said Decretall order of the Eleventh day of June one thousand Seven hundred
& twenty four & likewise from the said Decree of the fourth of December one thousand Seven hundred & twenty seven to your Lordships & humbly Prays that your Lordships will be Pleased to ~ ~ ~ reverse the Same And that the said bill may be dismissed with Costs And that Y[ou]'Pet[i]tione]'
may have all Such further & other relief in the Premisses as to your Lordships great Wisdome Shall Seem Meet And to that End,
May it Please your Lordships to grant unto your Pet[i]tione your Lordships Order of Sum[m]on directed to the said Mathias Archdekne & Mary his Wife to Put in their answers to this your Pet[i]tione and Cross Appeal by Such Day as your Lordships Shll think fit And that Service of Such Order upon their Att[or]ney or Att[or]neys of the Court of Exchequ[er] in Ireland may be deemed good Service And your Pet[i]tione will Ever Pray &c
P. Yorke
C. Talbot Ja[mes] Horan
APPENDIX 5

Description: Petition and Cross Appeal of James Horan
Source: U.K. Parliamentary Archives
Ref No: HL/PO/JU/4/3/6
Title: Appeal Cases and Writs of Error, series 3 - 1728-1730
Record Category: House of Lords Appeal Cases
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\[ \text{85} \]

1. 6-5

2. \textit{Mathias Arcedeckne Gent[leman]}
   and \textit{Mary} his Wife, \textit{Appellants}.

3. \textit{James Horan Gent[leman] Florence}
   \textit{Collanane, Wil-}

4. \textit{liam Burke, and the Representatives of Ni-} \textit{Respondents}.

5. \textit{cholas Arcedeckne, deceased,} \textit{Appellant}.

6. \textit{And the said James Horan,} \textit{Appellant}.

7. \textit{And the said Mathias Arcedeckne, and Mary} \textit{Respondents}.

1067
8. his Wife,

9. **The CASE of the Appellants in the Original Appeal, and Respondents to the Cross-Appeal.**

   [in left margin - 1688.]

10. **JAMES Hannin, Esq; (since deceased) being seized in Fee of the Lands of Iskerboy, and**

    several other Lands in the County of Galway in Ireland,

    did some time before the late War in that Kingdom, convey Part thereof in Mortgage to

    **Cornelius Horan** and his Heirs,

    [in left margin - Mortgage to Cornelius Horan]

11. with a Proviso or Condition for avoiding the same

    whensoever the said James Hannin or

12. his Heirs should pay the said Cornelius Horan, or his Assigns, the Sum of 342 l. with Interest;

13. which Security was afterwards assigned by the said Cornelius Horan to the Respondent Collanane, in

14. Which Assignment he was a Trustee for one James Dillon,

    as to a third Part, or thereabouts.

    [in left margin - Mortgage to Nicholas Arcedeckne.]

15. THE said James Hannin being pressed by the said Collanane and Dillon for the Payment of the

16. said Money, borrowed 500 l. from Nicholas Arcedeckne, for securing the Payment thereof with In-
20. terest, he conveyed other Part of his Lands to the said Nicholas Arcedeckne and his Heirs, under

21. an indefinite Condition of Redemption, and paid off all or the greatest Part of the Money due on

22. the said Mortgage made to Horan; but the said Collanane and Dillon alledging that the original

23. Mortgage was not then in their Custody, tho’ the same had been duly assigned to them, or one

24. of them, as aforesaid, the said Hannin was contented with their Receipt for the Money so paid,

25. and did not insist on a Reconveyance.

26. THE said James Hannin had only one Brother, called Murtagh Hannin, which said Murtagh

27. died in the Life-time of the said James, leaving Issue Dennis (the Appellant Mary’s late Father)

28. his eldest Son, and Hugh and Michael Hannin his younger Sons, and one Daughter called Marga-

29. ret, who were all Papists.

30. THE said Dennis Hannin, after the late Wars in Ireland, went into France, and there mar-

31. ried Eleanor O-Mara, a Native of Ireland, and died in the Life-time of his said Uncle James

32. Hannin, leaving Issue the Appellant Mary his only Child.

33. BY the Irish Act for preventing the Growth of Popery, it was (among other Things) Enacted,

34. “That all Lands, Tenements, or Hereditaments, whereof any Papist then was, or thereafter should
35. “be seized in Fee-simple or Fee-tail, should from thenceforth, so long as any Papist should be
36. “seized of, or intitled to the same, be of the Nature of Gavelkind, and should for such Estate de-
37. “scend to, and be inherited by all the Sons of such Papist any way inheritable to such Estate, Share
38. “and Share alike, and not descend on, or come to the eldest of such Sons only, being a Papist, as
39. “Heir at Law; and that for want of Issue-Male of such Papist, the same should descend to all
40. “his Daughters any way inheritable to such Estate in equal Proportions; and for want of such
41. “Issue, among the collateral Kindred of such Papist of the Kin of his Father any way inheritable
42. “to such Estate, in equal Degree; and for want of such Kindred, to the collateral Kindred of
43. “such Papist of the Kin of his Mother, any way inheritable to such Estate, and not otherwise:
44. “But it was thereby expressly provided, that if the eldest Son, or Heir at Law of such Papist
45. “should be a Protestant at the Time of the Decease of such Papist, the Lands whereof such Pa-
46. “pist should be so seized, should descend to such eldest Son or Heir at Law, according to the
47. “Rules of the Common Law, so as within three Months after the Decease of such Papist, his
48. “Heir at Law should procure a Certificate from the Bishop of the Diocese, testifying his being a
49. “Protestant of the Church of Ireland, as by Law established, and that such Certificate be inrolled
50. “in the High Court of Chancery within that Time. And if the eldest Son or Heir at Law of
51. “any such Papist, being of the Age of One and Twenty Years at the Decease of such Papist,
52. “should within one year after such Decease become a Protestant, and conform himself to the
53. “Church of Ireland as by Law established; or being then under the Age of 21 Years, should
54. “within one Year after his attaining that Age become a Protestant, and conform himself as afore-
55. “said, that then from the Time of the Inrollment in the Court of Chancery of the Certificate of
56. “the
57. “the Bishop of the Diocese, testifying his being a Protestant, and conforming as aforesaid, such
58. “Inrollment being made within such Year, he should be intitled to, and should from
59. “thence-forth have and enjoy the whole Real Estate of such Papist, as he might have done
60. “if he had been a Protestant at the Time of the Decease of such Papist whose Heir
61. “he is. And it was thereby further provided, that such Lands, Tenements, and Hereditaments,
“during such Time as any Protestant should be seized thereof in Fee-simple or Fee-tail, should
from such Protestant be discendable according to the Rules of the Common Law; and that no
“Person should take Benefit as a Protestant within the Intent and Meaning of that Act, that
“should not subscribe the Declaration, and take and subscribe the Oath of Abjuration therein set
down and expressed, which with the Inrollment of the Bishop’s Certificate, were all the Qua-
“ifications prescribed by that Act.”
[in left margin - 8 Annæ Cap.3.]
BUT by an other Act made for explaining and amending the former, some other Requisites were added, viz. that Persons turning from the Popish to the Protestant Religion should, within six Months after declaring themselves Protestants, receive the Holy Sacrament of the Lord’s Supper,
according to the Usage of the Church of Ireland, and make and subscribe the Declaration, and
take the Oath of Abjuration; and should file in the Court of Chancery, or some other of his Ma-
jesties Four Courts in Dublin, a Certificate or Certificates thereof in like Manner as the Bishop’s Certificate was to be filed by the former Act; but it was not thereby intended in any sort to abridge the Time allowed for Conformity by the first Act in this Case, or in any like Case relating
to the Descent of Lands from a Popish Ancestor.

[In left margin - 1712.]

77. THE said James Hannin died a Papist and without Issue, and the Appellant Mary became his Heir at Law, but she being then in France, and an Infant of about the Age of nine Years, the

79. Respondent William Burke, who was a Relation of the Family, and an Attorney at Law, pos-

80. sessed himself of the said James Hannin’s Title-Deeds and other Writings; and the said Mar-

81. garet Hannin enter’d on the Estate under colour of some Will pretended to be made by the said James Hannin in her Favour.

83. THE said Hugh Hannin and Michael Hannin, taking Advantage of the Appellant Mary’s Infancy and Absence out of Ireland, and being encouraged by the Respondent Horan, who is an Attorney of the Court of Exchequer in Ireland, brought an Ejectment for Recovery of the said Lands, as

86. Heirs in Gavelkind to the said James Hannin; and the said Margaret having taken the Defence on her, the Jury found a special Verdict, whereby (amongst other Things) it was found that the

88. said Dennis Hannin was Heir at Law to the said James Hannin; that the said Dennis was dead,

89. and that he had left an only Child called Mary (the Appellant) then living in France, at which
90. Trial the Respondent Horan was present, and acted as Attorney or Agent for the said Hugh Hannin and Michael Hannin.

91. ALTHO’ the Respondent Horan had full Notice of the Appellant Mary’s Title by the Proof made in open Court on the said Trial, wherein he acted as Attorney or Agent, yet he came to some Agreement with the said Hugh Hannin and Michael Hannin, for buying or purchasing their pretended Right to the Premises, which they were glad to part with for any Consideration how small soever, well knowing that their pretended Title must vanish, when and so soon as the Appellant Mary should be in a Condition to assert her Right to the Premises: And it is pretended, that as well in Consideration of Money lent or laid out for them, and other Sums, amounting to 1600 l. by the Respondent Horan, as also in Consideration of an Annuity of 30 l. per Annum, payable to them during their Lives, they sold and conveyed all the Premises to the Respondent Horan and his Heir; but at the Time of such pretended Bargain, the Respondent Horan very well knew that the said Hannins had no legal or equitable Estate, Right, Title or Interest in the Premises; and it doth not appear that the said Consideration-Money was ever paid.
THE Respondent Horan having obtained the said Conveyance, by which the Appellants insist no-thing did or could pass, and hearing that the Respondent Burke had the Title-Deeds in his Possession, in Consideration of the said Burke's giving up the same to him, agreed to grant him a beneficial Lease of Part of the Premises; and having got the said Title-Deeds into his Power, he possessed himself of the Lands mortgaged to Cornelius Horan as aforesaid, and prevailed on the Tenants of the Lands mortgaged to Nicholas Arcedeckne to attorn to him, and then filed his Bill to redeem the same, and obtained a Decree for that Purpose.

[In left margin - 23 September, 1719.]

THE Appellant Mary, on the 23d of September 1719, abjured the Errors of the Church of Rome, and conformed to the Church of Ireland, as by Law established, and filed the Bishop's Certificate thereof, in pursuance of the said first mentioned Act of Parliament, and afterwards duly performed every thing that was required by the second Act, within the Time prescribed.

[In left margin - October, 1719. Bill.]

THE Appellants exhibited their Bill in the Court of Exchequer in Ireland against the Respondents, setting forth the Matters aforesaid; and that the Appellant Mary's Parents were natural-
117. born Subjects of this Kingdom; and consequently she, tho’ born in France, was by Force of a [in left margin - 7 Annæ Cap.5.]

118. Proviso in the English Act of the 7th Year of the Reign of her late Majesty Queen Anne (inti-

119. tled an Act for Naturalizing foreign Protestants) “to be deemed, adjudged and taken to be a 

120. “natural-born Subject of this Realm, and of Ireland, to all Intents, Constructions and Purposes what-

121. “soever;” and therefore prayed an Account of the Rents and Profits, and to be decreed to the 

122. Lands mortgaged to the said Cornelius Horan, and to a Redemption of the Lands mortgaged 

123. to Nicholas Arcedeckne. [in left margin - Respondent Horan’s Plea.]

124. THE Respondent Horan pleaded that he was a Purchaser for a valuable Consideration, without 

125. Notice of the Appellant’s Title, and that the Appellant Mary was an Alien, and not capable of 

126. inheriting Lands in that Kingdom; and his Plea on Arguing thereof being over-ruled, he and 

127. the other Respondents answered; and the Respondent Horan, in his Answer, insisted on the same 

128. Matters which he had before pleaded; and that the Mortgage made to Cornelius Horan was not 

129. discharged, 

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[folio] 86
130. discharged, but assigned to him, and still subsisting; and
the Respondent Burke, in his Answer,
131. confessed he had got several Deeds and Writings of the said
James Hannin’s into his Hands, and
132. that the Respondent Horan, in Consideration of his
delivering them up to him, agreed to make
133. him a Lease of the Lands mortgaged to Nicholas
Arcedeckne, and insisted to have the Benefit
134. thereof; and the Representatives of the said Nicholas
Arcedeckne submitted to a Redemption,
135. and to account for the Premises mortgaged to him.

[in left margin - 21 June, 1724. Decree on the first Hearing.]
136. THE Appellants reply’d to the said Answers, and
Witnesses being examined in France and Ire-
land, and Publication duly passed, the said Cause came on
to be heard in the said Court of Ex-
chequer; and it appearing beyond contradiction, that the
Appellant Mary was Heir at Law to
139. the said James Hannin; that her Parents were natural-
born Subjects of the Crown of England,
140. and that she had regularly conformed to the Church of
Ireland as by Law established, and had
141. duly qualified herself by performing all that was required
by the said Acts of Parliament, the
142. Court decreed that the Appellants should be admitted to a
Redemption of the Premises; and it
143. was referred to the proper Officer to state the Account
    between the said Parties, wherein they
144. were to have all proper and just Allowances; and on
    Payment of what should appear due on the
145. said Mortgages respectively, for Principal, Interest and
    Costs, the *Respondents* Horan, Collanane,
146. and the Representatives of Nicholas Arcedeckne, were
    respectively to convey the mortgaged Pre-
147. mises to the *Appellants*, or as they should direct; and it was
    further decreed that the Lease men-
148. tioned to be made to the *Respondent* Burke, by the
    *Respondent* Horan, should be set aside; and
149. on Return of the Report such further Order was to be made
    as should be fit.

    [in left margin - 25 January, 1724. Rehearing.]
150. ON the *Respondent* Horan’s Petition the said Cause
    was reheard, and the Point of the *Appellant*
151. *Mary*’s being an Alien was dropped; but it was objected that
    her Conformity to the Protestant
152. Religion was not sufficiently alleged, or put in Issue by
    the Bill; and it was therefore ordered
153. that the Cause should stand over, and that the *Appellants*
    should amend their Bill, of file a sup-
154. plemental one, in order to put the Matter more fully in
    Issue.
155. THE *Appellants* accordingly exhibited a supplemental
    Bill, and the *Respondent* Horan having an-
swered the same, the said Cause came to be further heard in the said Court of Exchequer on the 3rd, 5th and 6th Days of December 1726, and the Court having taken twelve Months Time to consider the Matter, they thought fit on the 4th Day of December 1727, to order and decree that the Appellants Bill should be retained for a Year and half, and that they should be at liberty in the mean time to bring an Ejectment for the Recovery of the Premises, on which Trial no temporary Bars were to be insisted on by the Defendants; but in case the Appellants should not bring an Ejectment in that Time, their Bill was to be dismissed with Costs. THE Appellants have appealed to your Lordships against the said Decretal Order of the 4th Day of December 1727, and the Respondent Horan hath also appealed against the same, as well as against the Order of the 11th Day of June 1724, and he pretends that the Appellants Bill ought to have been dismissed and not retained for any Time. BUT the Appellants, in the Original Appeal, humbly insist and are advised, that the said Decree or Decretal Order of the 11th Day of June 1724 is just, and agreeable to the Rules of Law and Equity; and that the said Decree or Decretal Order of the 4th Day of December 1727. is
170. erroneous for the following (amongst many other)

171. REASONS.

172. FOR that it is fully proved in the Cause, that the Parents of the Appellant Mary were natural-born Subjects of the Realm of Ireland, and therefore she, by Force of the said English Act of Parliament, is to be deemed, adjudged and taken to be a natural-born Subject of this Kingdom to all Intents, Constructions and Purposes whatsoever, and in no sort to be con-idered as an Alien; and since she regularly conformed herself to the Church of Ireland as by Law established, and qualified herself in every respect within the Letter and Meaning of the said Irish Acts, she could not be affected or prejudiced by the said Gavelkind Clause, but was to be adjudged undoubted sole Protestant Heir of her Uncle James Hannin, the Mortgagor, and as such was intitled in a Court of Equity to an Account of the Rents and Profits of all the mortaged [sic] Premises; and therefore the Court of Exchequer ought not to have turned the Appellants over to the Common Law; especially where there was not one single doubtful Fact that was proper to be ascertained by a Jury, and the Appellants had at very great Expence carried through their Cause in Equity where it was proper for Relief.
II. FOR that the Respondent Horan had full Notice of the Appellant Mary's Title before he dealt with her Uncles Hugh Hannin and Michael Hannin for the Purchase of their pretended Right to the Premises, which he knew to be such as could not be assigned either in Law or Equity; and therefore such a Purchaser ought not to have met with Countenance or Favour in any Court, and the rather for that he did not make sufficient Proof of the Payment of the pretended Consideration-Money.

WHEREFORE the Appellants humbly hope the said Order of the 4th Day of December 1727. shall be reversed, and the said Decretal Order of the 11th Day of June 1724. be affirmed or revived, and the Cross-Appeal be dismissed with Costs; or that your Lordships will make such further Order for the Appellants Relief, as to your Lordships in your great Wisdom shall seem meet.

THO[MAS] LUTWYCHE,  
N. FAZAKERLY.

Mathias Arcedeckne and Mary } Appellants.
his Wife, }  
James Horan and others, Respondents.
201. *Et e contra,*

202. The CASE of the *Appellants* in the

203. Original Appeal.

____________________

204. To be heard at the Bar of the House of Lords,

205. on *Wednesday* the 6th Day of *May* 1730.

206. *Judgment May 6 1730.*
APPENDIX 6

Description: The Case of the Said James Horan, Respondent in the Original
Source: U.K. Parliamentary Archives
Ref No: HL/PO/JU/4/3/6
Title: Appeal Cases and Writs of Error, series 3 - 1728-1730
Record Category: House of Lords Appeal Cases
Transcribed by: Transcription Services Ltd
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1. Matthias Arcedeckne, and Mary Arcedeckne,
   *alias* Hanyn, his }
2. Wife, } Appellants.

   Callanane, William Burke, Nicholas }
4. Arcedeckne, *a Minor by* John Lawrence,
   *his Guardian*; Jane Arcedeckne } Respondents.
   *Executors of* Redmond Arce-
6. deckne, *deceas‘d*, }
7. The said James Horan, Appellant.

8. The said Matthias Arcedeckne, and
   Mary Arcedeckne, his Wife, Respondents.

9. The CASE of the said James Horan,
   Respondent in the Original, and Appellant
   in the Cross Appeal.
   [in left margin - 20 & 21 Octob[er]. 1684. Settlement on
   James Hanyn’s Marriage.]

10. NICHOLAS HANYN being seized in Fee-Simple of the
    Town and Lands of Iskerboy, Liskeil,
11. Ballymahine, and other Lands, did (previous to the
    Marriage of James Hanyn, Esq[uire]; with Cicely,
12. eldest Daughter of the said Nicholas Hanyn, which
    Marriage afterwards took Effect) by Lease and Re-
13. lease grant and convey the said Premises to Trustees and
    their Heirs, to the Use of the said Nicholas
14. and Dorothy his Wife, as to Part for their Lives, and the
    Life of the Survivor; and as to the Residue,
15. to the Use of the said James and Cicely, and the Heirs Male
    of the Body of the said James in Possession; the Re-
16. mainder of the said Part limited to the said Nicholas and
    Dorothy for Life, to the Use of the said James and
17. Cicely, and the Heirs Male of the Body of the said James;
    Remainder of the Whole to the said Nicholas and the
18. Heirs Male of his Body; Remainder to Mortagh Hanyn, only Brother of the said James, in Tail Male; Remainder to the said James and his Heirs for ever.

19. The said Nicholas Hanyn, some time after making the said Settlement, died without Issue Male, by whose Death the said James became seized in Tail-Mail of all the said Premises; and the said Mortagh Hanyn died in the Life-time of the said James, leaving Issue Dennis, Hugh and Michael Hanyn, who were all Papists, as were also the said James and Mortagh Hanyn.

[in left margin - Dennis Hanyn serv’d [as] an Officer in the Irish Rebellion, &c.]

20. Dennis Hanyn, in the late Wars in Ireland, served as an Officer in the late King James’s Army, and upon the Reduction of Limerick, went with the late King James’s Army and his Adherents into France, and there served in the French King’s Army during the War between the French King and the Crown of England, and there died in 1703.

[in left margin - & 24 Jan. 1684. mortgage to Cornelius Horan.]

21. The said James Hanyn in January 1684, by Deeds of Lease and Release, in Consideration of 342 l. conveyed the said Lands of Iskerboy and Ballimahin in Mortgage to Cornelius Horan and his Heirs, subject to a Redemption on Payment of 342 l. with Interest, at a Day long since past.
The said *James Hanyn*, in Consideration of 500 l. conveyed the Lands of *Culiny, Castletown, Liskeil, Killbegg*, *Clonday* and *Corbane*, being that Part of the Estate so limited to the said *Nicholas* and *Dorothy* for Life as afore-

said, to *Nicholas Arcedecne* in Fee, subject to Redemption on Payment of the said 500 l. with Interest, at a Day long since past, on making which Mortgages the said *James Hanyn*, and *Cicely* his Wife, levied separate Fines, and suffered separate Common Recoveries, but executed no Deeds, to declare the Uses thereof, nor did the said *Dorothy* join in either of the said Fines or Recoveries, though she lived many Years afterwards.

The said *James Hanyn* died a Papist, and without Issue.

By an Act passed in *Ireland*, intitled, An Act to prevent the further Growth of Popery, it is Enacted, “That all “Lands, Tenements and Hereditaments, whereof any Papist then was, or thereafter should be, seized in Fee-

“or Fee-Tail, should from thenceforth, so long as any Papist should be intitled to the same, be of the Nature of

[in left margin - [] November 1701, [Mo]rgage to Nicho[las] Arcedeckne.]

[in left margin - [] April 1712. Annæ nuper Reginæ]
41. “Gavel Kind, and descend as such.

42. Immediately upon the said James Hanyn’s Death, Margaret Hanyn, who was also a Papist, pretending herself

to be Niece and Deviser of the said James Hanyn, got into Possession of Part of the said Estate, whereupon the said

44. Hugh and Michael Hanyn, two of the Sons of the said Mortagh Hanyn, brought an Ejectment for the said Lands,

and obtained a Verdict and Judgment, and after a long and expensive Suit at Law, were put into actual Possession

of Part of the said Premises by an Habere facias Possessionem.

[in left margin - [__] May, & 1 June, [__], Conveyance James Horan.

47. After the said Hugh and Michael Hanyn were so put into Possession, they by Lease and Release, in Considera-

tion of 1600 l. paid down in Money, and of an Annuity of 30 l. per Annum, to be paid to them during their Lives,

and which was a full and valuable Consideration for the same, sold and conveyed the said Premises, subject to

the said two Mortgages, unto the said James Horan, who is a Protestant of the Church of Ireland as by Law

established, and who had not then any Notice of Dennis Hanyn’s having any Child, or of any Pretence or Title

in the Appellant Mary.

53. Under this Purchase the said James Horan, being intitled to the Equity of Redemption of the said Lands in

54. Mortgage to the said Nicholas Arcedeckne, filed a Bill in the Court of Exchequer in Ireland against Redmond Arce-

55. deckne, who had got into Possession of the said mortgaged Lands, as Heir and Executor of the said Nicholas Arce-

56. deckne, to redeem the said Mortgage made to the said Nicholas Arcedeckne deceased, and obtained a Decree for

57. Redemption thereof.

58. After the said James Horan’s Right of Redemption, which had been contested by the said Redmond Arcedeckne

59. in the strongest Manner, was established by the said Decree, and not before, the Appellant Matthias Arcedeckne,

60. one of the said Nicholas Arcedeckne’s Sons, gave out, that the said Dennis Hanyn, eldest Son of the said Mortagh

61. Hanyn, married in France, and left Issue one Daughter the Appellant Mary, who was then living in France, and

62. that he would go to France, and, if possible, find out and marry such Daughter, and bring her to Ireland, and get
her to conform to the Protestant Religion, and then would
in her Right set up a Title to all the said James Hanyn’s said Estate; or if he could not get her to conform, yet
he should be intitled to one Third thereof, as Heir
in Gavel Kind; and accordingly he went to France, and
returned with the said Mary, whom he pretended to be
the Daughter of the said Dennis, and Heir of the said
James Hanyn, and that he was married to her, and in her
Right became intitled to the said James Hanyn’s Estate, or
at least to a Third Part thereof in Gavel Kind. And,
[in left margin - [__] Octob[er] 1719, [A]ppellants
Arc[dec]kne’s and his Wife’s Bill.]
In October 1719, the said Matthias Arcedeckne and
Mary his Wife, by her Prochein Amy, filed their Bill in the
Court of Exchequer in Ireland against the said James
Horan, Florence Callanane, Redmond Arcedeckne,
William
Burke, Rickard Burke, Hugh Hanyn, Michael Hanyn, and
Margaret Hanyn, setting forth the said pretended
Pedigree, and that the Plaintiff Mary, though born beyond
Sea, was, by an Act of Parliament made in England,
Naturalized, and made capable to inherit; and that by the
said Act passed in Ireland to prevent the Growth of
Popery, it is provided, “That if the Heir at Law of any
Papist being under Age at the Death of his Ancestor
shall
74. “conform to the Protestant Religion, take the Oath of Abjuration, and perform the other Requisites by a certain

75. “Time therein mentioned, the Estate of such Popish Ancestor shall not descend in Gavel Kind, but be enjoyed

76. “by the Heir at Law so conforming”: And further, that the Plaintiff Mary, after the Death of the said James,

77. came into Ireland a Minor, and was educated a Protestant, and intermarried with the Plaintiff Matthias, who is a Protestant, and that she designed, when she arrived to the Age prescribed by the said Act, to qualify herself ac-

79. cording to the said Act in order to prevent the said Estate going in Gavel Kind, and that in the mean Time she

80. was intitled to one Third of the said Lands as one of the Heirs of the said James in Gavel Kind, and would after her Conformity be intitled to an Account of the Rents of the whole Lands from the Death of the said James Hanyn,

82. and therefore prayed that the said James Horan might be stopped from proceeding on the said Decree against the said

83. Redmond Acerdeckne [sic] for Redemption of the said Lands, so that the Plaintiffs might have an Opportunity to

85. set forth the said Mary’s Title to the Equity of Redemption of the Premises before the said James Horan got into
86. Possession under the said Decree.
   [in left margin - Horan’s Answer.]
87. To which Bill the said James Horan pleaded, that the said Mary was an Alien born, and therefore not intitled
to commence the said Suit; which Plea was over ruled for
Informality only, and not on the Merits, whereupon the
88. said James Horan put in his Answer, thereby (inter alia)
   insisting that the said Mary, if she was the Daughter
89. of the said Dennis Hanyn (which he was a Stranger to) was
   an Alien born, and therefore not capable of inherit-
ing the Lands in Question, and insisted, as the Truth is,
90. that the said Dennis Hanyn was a Papist, and took up
91. Arms against their late Majesties King William and Queen
   Mary in the late Rebellion in Ireland, and after the
92. Surrender of Limerick quitted the Kingdom of Ireland, and
   inlisted himself in the French King’s Service, and
93. many Years after continued in open War against the Crown
   of England till he died a Papist in France during the
94. Continuance of the late War, and that if the said Dennis
   Hanyn married, he married in France, during the War; a
95. Woman who was an Alien and a Papist, and if the said
   Mary was his Daughter, she was born in France an
   Alien
96. Enemy, and educated in the Popish Religion, and therefore
   was not inheritable in Ireland, being not within the
true Intent and Meaning of the Clause in Favour of the
Children of natural-born Subjects, in the Act of
Parliament

made in Great-Britain in the 7th Year of Queen Anne, and
that the said James Horan was a Protestant Purchasor
without any Notice of the said Mary’s pretended Title.
[in left margin- Appellant’s Commission to France.]
Issue being joined in April 1721, a Commission was
taken out by the said Matthias Arcedekne, and Mary, his
Wife, for Examination of Witnesses at Paris in France, and
executed by them ex parte; the Commissioners on the
said James Horan’s Behalf not attending the same. And
the said James Horan having strong Grounds to suspect
that the said Commission was unfairly executed, and that
several gross Practices and Abuses had been committed
therein, and that the Whole was a very corrupt Proceeding,
on the 22d of February 1721, he moved the Court
to suppress the said Depositions, and for an Attachment
against Otho Arcedekne, Brother of the said Matthias,
who managed the Execution of the said Commission, and
for a Commission to examine Witnesses in France, and
another Commission to examine Witnesses in Ireland, in
Behalf of the said James Horan. But the said Matthias
producing a very positive Affidavit in the Name of one
Arthur M’c Millan, stiled of the City of London, Mer-
chant, sworn before Mr. Baron Pocklington, one of the Barons of the said Court, on the 14th of February 1721, of the Fairness of the Execution of the said Commission, the Court on Reading the said Affidavit, only granted the said James Horan a Commission for Examination of Witnesses in Ireland, and directed that Publication should pass the First Day of the then next Easter Term, and that the said James Horan should appear gratis at the Hearing, and not suffer a Conditional Decree.

[in left margin - 16 April 1722. Motion to suppress the Appellants Depositions taken under such Commission for many corrupt Practices.]

The said James Horan having further Intelligence in this Matter, and being assured that the said Mr. Millan’s Affidavit was false, and having received a Certificate from one of the said Matthias Arcedockne’s own Commissioners contradicting the said Affidavit; on the 16th of April 1722, again moved the said Court to suppress the said Depositions: Whereupon the Court directed the said Matter to be fully examined into, and that full Costs should attend the Event of it, and ordered two Commissions to issue, one to London, and the other to Paris, to examine into the same, and in the mean time all Matters relating to the Cause, were to stand as they then were.
121. On Return of the said Commissions, it fully appeared, that neither the said Matthias Arcedreckne’s Commissioners who executed the said first Commission, nor their Clerk, were sworn as usual in such Cases. It also appeared, that none of the Witnesses whose Depositions had been returned, were sworn to their said Depositions;

122. and that one of the Commissioners Hands was forged to the Return of the said Commission, and the other Commissioner’s Hand gained thereto by Surprize, and that the Affidavit of the said Mr. Millan was forged, as also

123. a Letter produced by the said Matthias Arcedreckne to the said Court of Exchequer, in support of the said Affidavit with the Post Mark thereto. All which corrupt Practices being fully proved to the Satisfaction of the Court,

124. the said Matthias Arcedreckne was by several subsequent Orders ordered to pay the said James Horan the Costs of

125. such Examinations which were taxed at 214 l. 11 s. 10 d. and paid accordingly to the said James Horan by the said

126. Matthias, though not one Half of what he really expended. [in left margin - 2d Commission to France.]

127. A second Commission was taken out by the said Matthias Arcedreckne and Mary his Wife, for Examination of

128. Witnesses in France on the Merits; on which Commission they examined the same Witnesses which they formerly
examined in the corrupt Manner aforesaid, and no other; and by Order of the first of December 1722, Publication of all the Depositions taken to the Merits on the last Commission in France, and of all the Depositions taken to the Merits in Ireland, was ordered to pass. Afterwards, viz. on the 8th of February 1723, the Cause was set down to be heard the first Hearing-Day of the next ensuing Term. The said Redmond Arcedeckne, one of the Defendants to the said Bill having (pending the said Suit) died, the same was by Order dated the 24th of February 1723, revived against the Respondents Nicholas Arcedeckne, Son and Heir apparent, and Jane Arcedeckne, Widow and Relict, and John French, and Darcy Hamilton, Executors of the said Redmond Arcedeckne. [in left margin - 11 June 1724. First Decree made ex parte.] The Cause came on to be heard against the said Representatives of the said Redmond Arcedeckne, Florence Callanane, William Burke, and the said James Horan only, in Presence of Council for the Plaintiffs, and the said Defendants the Representatives of the said Redmond Arcedeckne, none appearing for the said Florence Callanane,
and William Burke, though as alledged duly served with Subpœna's to hear Judgment; and the said James Horan

not being served with Process for hearing Judgment, and therefore not thinking the Cause could be heard against him, was not prepared to make his Defence, nor had any Person to appear for him; but yet the Cause was heard ex parte against him, under the said Order of the 22d of February 1721, notwithstanding both Parties did, subsequent to the said Order, and to the Time thereby limited for passing Publication, examine Witnesses as to the merits, and Publication of all the Depositions passed by the said subsequent Order of the first of December 1722, and not by the said Order of the 22d of February 1721. And on the said Hearing ex parte, the Court ordered and decreed to the Plaintiffs, a Redemption of both Mortgages, and a Reassignment and Possession of all the said mortgaged Premises, on Payment of the Principal and Interest due thereupon in the usual Form: And it was also decreed, that the said Florence Callanane should, on Payment as aforesaid, join with the said James Horan in the Reconveyance of the said Mortgage of the Lands of Iskerboy and Ballymahin, unless Cause were by the said Cal-
156. *lanane* shewn to the contrary on the first Day of the then next *Michaelmas* Term. And it as further decreed,
157. that the Lease made to the Defendant *William Burke* should be set aside, unless Cause were at the same time by
158. him shewn to the contrary.

[in left margin - Petition of Rehearing.]

159. The said *James Horan*, on the first of *December* 1724, petitioned the Court for a Re-hearing of the said Cause
160. (*inter alia*) setting forth its being heard against him *ex parte*, and that had his Council been prepared at the Hearing
161. to lay his Case before the Court, it would have appeared that the Plaintiffs had no Title to redeem the said mort-
162. gaged Premises, or to bring the said *James Horan* or the other Defendants to an Account, or to be decreed to the Possession of the said mortgaged Lands; and therefore prayed, that the said Cause might be re-heard: Upon which
164. Petition it was ordered, that the said Cause should be set down to be re-heard at the same time that the Cause was to be heard on the conditional Decree against the said other Defendants.

[in left margin - 25 Jan. 1724, Order on Re-hearing.]

166. The Cause came on to be re-heard as to the said *James Horan*, and heard on the said conditional Decree against
167. the Defendants Burke and Callanane; and the Plaintiffs Council producing a Paper Writing, which they alledged to be a Certificate of the Plaintiff's having conformed pursuant to the several Acts against the Growth of Popery,

168. and praying the same should be read, the said James Horan's Council objected thereto, in regard the Plaintiff's Conformity, was not put in Issue in the Cause, it not being suggested by the Plaintiff's Bill, that the Plaintiff Mary had conformed, but a Title was set up by the Bill in the Plaintiff's, to a third Part of the Premises, as Heirs in Gavel-

170. Kind with Hugh and Michael Hanyn: Whereupon it was ordered, that the Cause should stand over, and that the Plaintiff should pay that Day's Costs.

174. The

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(3)

[in left margin - May 1725, [Su]pplemental Bill.]

175. The Plaintiffs filed their Supplemental Bill against the said James Horan, setting forth, that the Plaintiff Mary was a Protestant of the Church of Ireland as by Law Established, had received the Sacrament, and taken the Oath of Abjuration, subscribed the Declaration, and filed the Bishop's Certificate of her Conformity, and of her
178. having duly performed all the other things required by the said Act; and that the Plaintiffs were thereby intitled to the whole Lands, and to an Account of the Rents and Profits thereof, and prayed Relief accordingly.

179. The said James Horan, by his Answer, deny'd he knew, or believed that the Plaintiff Mary was a Protestant, or that she had duly performed the several Requisites directed by the said Acts.


180. The Cause came on to be further heard on the 3d, 5th, and 6th Days of December 1726, and the Court having taken time to consider thereof, It was on Monday the 4th Day of December 1727, (notwithstanding the said James Horan’s said Defence herein before set forth, which was proved to be true, and the many corrupt Practices afore-said committed by the Plaintiff) decreed, that the Plaintiffs Bill should be retained for a Year and a half; and that the Plaintiffs should be at Liberty in the mean time to bring an Ejectment at Law for Recovery of the said Lands. On the Tryal of which said Ejectment, no temporary Barrs should be insisted on by the said Defendants:

181. But in case the Plaintiffs should not bring an Ejectment for the said Lands in the time aforesaid; It is thereby further ordered and adjudged that the Plaintiffs said Bill shall be, and the same is thereby dismissed with Costs.
190. From this Decree the said Plaintiffs have brought their
Original Appeal, thereby insisting, that they ought to
191. have had a Decree pursuant to the Prayer of their Bill.
192. The said James Horan being advised that the said Bill
ought not to have been retained, but to have been dis-
193. missed with Costs, has brought his Appeal from the said
decretal Order of the 11th of June 1724; and also from
194. the said Decree of the 4th of December 1727; and thereby
humbly prays, that the same may be reversed, and the
195. said Bill dismissed with Costs, for the following Reasons,
amongst others:
196. I. For that the Plaintiff Mary's Title is, as she is
the pretended Daughter of Dennis Hanyn, and the
197. Heir of James
198. Hanyn; but that Fact of her being the Daughter of
Dennis, is not sufficiently proved in the Cause: And
there is no great Reason to suspect from the manner
in which the Proofs, such as they are, were obtained,
that
199. there is no Truth in such Pretence. But supposing
her the Daughter of Dennis, yet as he was at the
Time of
200. her Birth in France, and under the Allegiance of a
Foreign Prince, and she was born there, she was, in the
201. Judgment of the Common Law, an Alien; and as
such, incapable of inheriting the Lands in Question.
II. And it is humbly apprehended, that she is not within the Provision of the Act of the 7th Year of her late Majesty Queen Anne, which makes the Children of natural-born Subjects, though born out of the Allegiance of her Majesty, to be natural-born Subjects of this Kingdom; because her Father, at the time of her Birth, ought not to be considered as a natural-born Subject within the Meaning of that Act, he at that time not being properly a Subject of the Crown of England, in regard he was then in the Country and Service of an alien Enemy, and had left Ireland pursuant to the License given by the Treaty of Limerick; by which those Subjects of Ireland, who then bore Arms for the late King James, had the Liberty of going to France, and in Effect of transferring their Allegiance to another Prince; and from thence such Persons as went from Ireland to France pursuant to the said License, though they continued in Arms against his late Majesty King William,
211. they were ever after treated as Prisoners of War when taken, and not as Rebels; which Treatment supposed,

212. they might lawfully be in open War against the King, and consequently they had ceased to be his Subjects;

213. unless it be consistent with the Duty of a Subject to bear Arms against his Sovereign.

214. III. And if Dennis Hanyn could be supposed to have continued a Subject of the Crown of England in Point of Duty while he was in France and in Arms against the Crown of England, yet it can't be imagined that it was the Intent of the Legislature who made that Act of Naturalization, to give the Privilege of a Subject to the

216. Children of one who had forfeited all Right to the Protection of the Laws, and done all that in him lay to transfer his Allegiance, and make himself cease to be a Subject, the Intention of the Legislature seeming to be to extend the Privileges granted by that Act to the Children of such Subjects only who stayed in Foreign Parts

220. on lawful Occasions.
221. IV. And if the Plaintiff Mary should nevertheless be thought the Heir of James, and as such capable of Inheriting;

222. yet it is apprehended, that she can claim only as Heir in Gavel-Kind, by Virtue of the Act in Ireland of the

223. 2d of the late Queen, which makes the Estates of Papists descend in Gavel-Kind to their Popish Children,

224. since she was once confessedly a Papist, and she has not complied with the Terms required by the Irish Act of the

225. 8th of the late Queen, that gives the Whole to a Popish Son and Heir, upon his Conformity to the Irish Church,

226. since she has not proved any Certificate from the Bishop of the Diocese where she inhabits, testifying her be-

227. ing a Protestant, and that she had conformed to the Church of Ireland, or that such Certificate was inrolled,

228. and from the Proof she has attempted to make of her Conformity, It appears of her own shewing, that it was

229. an imperfect Conformity, having only complied with some few of the things required by the said Acts, and
230. hath not proved that even those Acts of Conformity were made within the time prescribed by the said Act;

231. but on the contrary, from the Proofs in this Cause, it appears they were not made within the time prescribed

232. by that Act, she being obliged by that Act to comply with the Terms thereby required within Three Months

233. after her coming into Ireland; whereas she came into Ireland in July or August 1719, and did not perform any

234. of the Acts required, until January 1721.

235. **V.** James Horan is a Purchaser of the Estate in Question, for a valuable Consideration, without any Notice of the

236. Plaintiffs Right (if any they have) and it's humbly submitted how far it was proper for a Court of Equity to

237. interpose in the Behalf of the Plaintiffs, or to take away any legal Advantage that the Defendant Horan may

238. have in defending himself against an Ejectment, especially considering the Circumstances of this Case, and
what corrupt and unfair Methods have been practised by the Plaintiffs to obtain Evidence to support their Claim, by which the Defendant has been already put to an Expense more than twice the Value of the Estate in Question.

Upon the Whole therefore, and as this is a Case that may affect great Numbers of Protestant Purchasors in Ireland, and seems to be calculated to let in the Issue of such who left Ireland with the late King James, to dispute the Titles of very many Estates in Ireland with the present Possessors of them, which would be of the most mischievous Tendency, and greatly disturb the Peace and Tranquility of that Kingdom, the said James Horan humbly hopes, that the Appeal of the said Matthias Arcedeckne, and Mary his Wife, shall be dismissed, with Costs; and that on the Appeal of the said James Horan, the said Order of the 11th of June 1724, and the said Decree of the 4th of December 1727, shall be both reversed; and the Bill of the said Matthias Arcedeckne, and Mary his Wife, be dismissed, with Costs; and that the said James Horan may have such other Relief, as to your Lordships
shall seem proper.

P. YORKE.

C. TALBOT.

Matthias Arcedeckne, and Mary  }  Appellants.
his Wife,  }  

James Horan, Gent. & al.  }  Respondents.

The said James Horan,  }  Appellant.

The said Matthias Arcedeckne,  }  Respondents.
and Mary his Wife,  }  

The CASE of the said James Horan, Respondent in the Original, and Appellant in the Cross Appeal.

To be heard at the Bar of the House of Lords on [space] the [space] Day of [space] 1730.

Orders Complained off by the Respondent.

Cross Appeal Reversed and the Appellants Bill Dismissed.
APPENDIX 7

Description: Manuscript on printed document—The case of the said James Horan, respondent in the original, and appellant in the cross appeal, in Arcedeckne et ux v Horan et al, et e contra

Source: Trinity College Dublin Library
Ref No: OLS I.cc.21.no.17
WorldCat OCLC number 79525533
Date: Manuscript undated
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Transcribed manuscript in this font.

[page 1: manuscript marginalia only transcribed]

1. Dorothie Hanyn
2. /
3. to use of th[e]m [Part] life
4. /
5. recitur
6. dat[ed] C[irca ?] - 1 James, 1.8 [?]
7. & to Heirs males of Ja[mes]
9. Rem[ainder] to Nicholas in tail
10. Rem[ainder] to Mortagh in tail

1107
11. Remainder to James in fee

12. Nicholas Hanyn

13. /

14. James - Mortagh

15. /

16. Dennis Hugh Mich[ael]

17. /

18. Mary

---

19. Matthias Arcedeckne, and Mary

20. his Wife,

Appellants.


22. The said James Horan, Appellant.

23. The said Matthias Arcedeckne, Respondents.

24. and Mary his Wife,

25. The CASE of the said James Horan, Respondent in the Original, and Appellant in the Cross


27. 

28. 
29. To be heard at the Bar of the House of
30. LORDS on Tuesday the 5th, Day of
31. May - 1730.

32. 11 I shant [return/relate] [to the/ to you/ ___?]
   H[igh] treason
33. amounts to license
34. admitted ar[e] Subjects, & can't
35. transfer alleg[iance].
36. [but ?] a man who comits treason
37. is not subject.
38.
39. Supose after this act that
40. sh[oul]d not ret[urn]; he comit
41. treason; sh[oul]d not he be guilty
42. If it don't extend to Ireland
43. it will not to Plantation.
44. - - -
45. [...]leful
46. Should be a child born at [a] tim[e]
47. w[he]n parents we[r]e nat[ural] born subjects
48. declar[e]d th[e]mselves ^ to be & he x sey
49. she was once an alien
APPENDIX 8

Description: 2 April - Bill explaining Act 7 Anne to Naturalise Foreign Protestants, Read first time this day: 1) Petition of John Burke on behalf of himself and James Horan for amendment mentioned 22 April.

Source: U.K. Parliamentary Archives
Ref No: HL/PO/JO/10/6/398
Title: Main Papers
Date: Read April 1731
Transcribed by: Transcription Services Ltd
www.transcriptionservicesltd.com
email: enquiries@tslmanx.net

1. To the Right Honorable the Lords Spiritual and Temporal in parliament Assembled

2. The Humble Petition of John Burke in behalf of himself and of

3. James Horan

4. Most Humbly Sheweth

5. That James Horan a Protestant of the Established Church having purchased several Lands

6. Tenements and Hereditaments in Ireland (Subject to a Mortgage on Part thereof) from Hugh and Michael Hangu who being Papists were Seized thereof as Heires in Gavel kind by Vertue of the Popery Acts past in that
8. Kingdom, the said James Horan by Vertue of the said Purchase became Immediately possessed of such Part of the Premisses as were out of Mortgage And the residue thereof being in the Possession of Redmond Arcedeckne who Claimed Title under the Mortgage The said Horan obtained a Decree against the said Arcedeckne for Redemption of the same And an Account of the Issues and Profits, But before Mr Horan could Carry his Decree into Execution the said Arcedeckne handed over the Possession of the said Mortgaged Lands to his Brother Mathias Arcedeckne a Papist who Intermarried in France with Mary Hanyn a Papist likewise Daughter and only Child of Dennis Hanyn who was an Officer in the late King James’s Army in Ireland and was Elder Brother to the said Hugh and Michael Hanyn and who left Ireland under the Articles of Lymerick and went into France where he took into the Service of the late French King then in Enmity with this Kingdome and there Married and had Issue One only Child the said Mary and soon after Viz[i] [that is to say] in 1703

18. Died in the s[ai]d French Service

19. A[nn]° 1709 The said Mathias Arcedeckne and his said Wife Exhibited their Bill in the Court of Exchequer in Ireland Setting forth that tho’ said Mary the born beyond Sea was by an Act of Parliament made in England
in the Seventh year of Queen Anne for Naturalizing foreign
Protestants Naturalized and made Capable to
Inherit and that she came into Ireland and that they had
both Conformed to the Protestant Religion And
therefore
Insisted on a Right to the Premisses so Purchased by the
said Horan as the said Mary was Heir at Law to her
Father
Dennis and Prayed to be Decreed thereto and to have an
Account of the Issues and Profits thereof
To which Bill the said Horan by his Answer (inter al[i]a)
insisted that the said Dennis Hany[n] was a
Papist and took up Arms ag[a]ins[ts] their late Majestyes
King William and Queen Mary in the late Rebellion in
Ireland
and after the Surrender of Lymerick quitted the Kingdom
of Ireland and enlisted himself in the French Kings
Service and many years after Continued in Open Warr
against the Crown of England till he died a Papist in
France during the Continuance of the late Warr and that
he was rendered incapable of ever returning to Ireland
by several Acts passed there And that the said Mary was
an Alien born therefore not Inheritable in Ireland she
not being within the Intent and meaning of the Clause in
the Act of the 7th Queen Ann in favour of the Children
of Natural born Subjects
On hearing which Cause on the 24th December 1727 it
was Ordered that the Plain[tiff's] Bill should be
34. retained for a year and a half and that the Plaintiff's
   Should be at liberty in the meantime to bring an
   Ejectment's
35. at Law for Recovery of said Premisses &c
36. From which Decree the Plaintiff appealed to your
   Lordships praying a Decree in their favour
37. for the said Estate And the said James Horan Cross
   Appealed to your Lordships from the same insisting the
38. Plaintiff's Bill should be Dismissed in regard the said
   Mary Hanyn was not within the Intent and meaning
39. of the said Naturalization Act
40. Both which Appeals were heard in the last Session of
   Parliament and your Lordships as it is
41. Apprehended being of Opinion that the said Mary Hanyn
   under the Circumstances herein before set forth
42. was not within the meaning or intention of the Act of the
   7th of the late Queen for Naturalizing Foreign
   Protestants your Lordships were Pleased to Dismiss
   Arcedecknes & his Wifes Appeal and on the Cross
   Appeal
43. of the said James Horan / to dismiss the said Mathias
   Arcedeckne & Mary his Wifes Bill
44. That after this Judgement of your Lordships the said Mathias
   James Horan having Occasion for
45. 1250th he applied to your petitioner a Protestant of the
   Established Church for the same on Mortgage of
47. the s[ai]d Purchased Lands and your Petitioner being
    advised by his Councill that by your Lord[shi]pps
48. Judgement the s[ai]d James Horan had a Clear and
    undoubted title to the Prem[iss]es he did thereupon
    Actually
49. Advance and pay unto the said James Horan 1250li who for
    securing the repayment of the same
50. with Interest did Execute a Deed of Mort[ga]ge of the s[ai]d
    Prem[iss]es to your Petitioner which is all the
51. Security your Petitioner hath for the same
52. The s[ai]d James Horan being afterwards pressed for th[e]
    payment of 780li which he owed
53. to one James Dillon and having not the same to pay it was
    Agreed between them that if your
54. Petitioner should become a Security for the payment of
    s[ai]d Sume the s[ai]d Dillon would be Satisfyed &
55. forbear with the s[ai]d Horan whereupon your Petitioner
    gave his Bond in 1560li penalty with Warr[an]t
56. of Attorney to Confess Judgement thereon for payment of
    780li with Interest and for his
57. Indemnity therein the s[ai]d James Horan did on the 11th
    day of Nov[embe]r last Execute a further
58. Mort[ga]ge of the Premisses for the same unto your
    Petitioner and the said Mortgage are all
59. the Security your Petitioner has for the repayment of
    upwards of 2000li.
60. Notwithstanding that James Horans Title to the s[ai]d
    Premisses hath been Determined
in so Solemn a manner in his favour yett it is apprehended the same may be Subjected to be againe called in question by the s[ai]d Mathias & Mary Arceddeckne by Virtue of a Clause in a Bill now under your Lordships Consideration on Intituled and Act to Explain a Clause in an Act made the Seventh year of the Reign of her late Majestie Queen Ann for Naturalizing Foreign Protestants which relates to the Children of Naturall Born Subjects of the Crown of England or Great Britain should the same Pass into a Law it being apprehended that such Clause as it now Stands may Shake the Title of the said James Horan to the s[ai]d Premisses and with that your Petitioners said Securitys For the said Mary Arceddeckne al[ia]s Hanyn hath been ever since the year 1719 in Ireland and as she Pretends hath Conformed to and Professed the Protestant Religion & was likewise for some time in Actual Possession of that Part of the Premisses which were in Mortgage as aforesaid and might then very Probably Execute some Deeds or Conveyances thereof and it is Apprehended she will be Naturalized to all Intents and Purposes by the said Clause and Consequently She, her Issue, & those deriving under her may thereby gain a
Title (they now have not) to defeat the said Horans said

Purchase and your Petitioners

said Mortgages who both are Protestant Purchasors for a

Valuable Consideration at least

the said Arcedeckne and his Wife may be thereby

Encouraged to bring Suits for recovery

of the said Estate under the Act

May it therefore Please your Lordshipps that the said

Clause may be amended so as that it may not Affect the

said

James Horan or your Petitioner or that there may be a

Saving for the said Horan and your Petitioner in the said

Bill or that they may be otherwise releived herein in

Such manner as to your Lordshipps Great Wisdom and

Justice shall Seem proper

And your Petitioner will ever Pray &c.

John Burke

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1731

April 2

Bill read 1st

this day

April 22

the Humble Petition of

John Burke in behalf
96. of himself and James

97. Horan - That a Clause added

98. by the Com[itt]ee of the whole House on

99. the Bill of Explaining a Clause in

100. the Act for a General Naturalization

101. may be so Amended as not to Affect

102. the Pet[itione]r

103. Read 22º Aprilis 1731.

104. Order’d to be referr’d to the Com[itt]ee of

105. the whole House to whom the s[ai]d

106. Bill is Recom[m]itted.