[1946] A.C. 347

[HOUSE OF LORDS.]

JOYCE APPELLANT;
AND
DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT.

1945 Dec. 10, 11, 12, 13, 18. LORD JOWITT L.C., LORD MACMILLAN, LORD WRIGHT,

1946 Feb. 1. LORD PORTER and LORD SIMONDS.

Criminal law - Treason - Adherence to the King's enemies without the realm - Alien - Local allegiance - Protection - British passport - Protecting country left by alien - Allegiance not divested - Treason Act, 1351 (25 Edw. 3, stat. 5, c. 2).

In 1933 the appellant, an American citizen, who had resided in British territory for about twenty-four years, applied for and obtained a British passport, describing himself as a British subject by birth and stating that he required it for the purpose of holiday touring in Belgium, France, Germany, Switzerland, Italy and Austria. On its expiration, he obtained renewals on September 24, 1938 and on August 24, 1939, each for a period of one year, again describing himself as a British subject. After the outbreak of war between Great Britain and Germany and before the expiration of the validity of the renewed passport, he was proved to have been employed by the German radio company and to have delivered from enemy territory broadcast talks in English hostile to Great Britain. The passport was not found in his possession when he was arrested. Having been convicted of high treason he appealed:-

Held (1.) that an alien abroad holding a British passport enjoys the protection of the Crown and if he is adherent to the King's enemies he is guilty of treason, so long as he has not renounced that protection; (2.) (per Lord Jowitt L.C., Lord Macmillan Lord Wright and Lord Simonds, Lord Porter dissenting) that the judge at the trial had given a proper direction to the jury who could not have failed to appreciate from it that it was for them to consider whether at the material times the appellant continued to enjoy the protection afforded by the passport.

Per Lord Porter: The renewal of the passport did not prove conclusively in law that the duty of allegiance continued until the passport ceased to be valid, unless some action on the part of the Crown or of the appellant put an end to that protection; the onus was not on the appellant to show that the duty had been terminated.

Resolution of the judges of January 12, 1707, Foster's Crown Cases, 3rd ed., p. 185, discussed.

Decision of the Court of Criminal Appeal (sub nom. R. v. Joyce) [1945] W. N. 220; 173 L. T. 377, affirmed. {*348}

APPEAL from the Court of Criminal Appeal.

The facts, stated by Lord Jowitt L.C. and Lord Porter, were as follows: The appellant, William Joyce, was charged at the Central Criminal Court on three counts, upon the third of which only he was convicted. That count was as follows:

"Statement of offence.

"High Treason by adhering to the King's enemies elsewhere than in the King's Realm, to wit, in the German Realm, contrary to the Treason Act, 1351.

"Particulars of offence.

"William Joyce, on September 18, 1939, and on divers other days thereafter and between that day and July 2, 1940, being then - to wit on the several days - a person owing allegiance to our Lord the King, and

whilst on the said several days an open and public war was being prosecuted and carried on by the German Realm and its subjects against our Lord the King and his subjects, then and on the said several days traitorously contriving and intending to aid and assist the said enemies of our Lord the King against our Lord the King and his subjects did traitorously adhere to and aid and comfort the said enemies in parts beyond the seas without the Realm of England, to wit, in the Realm of Germany by broadcasting to the subjects of our Lord the King propaganda on behalf of the said enemies of our Lord the King."

The first and second counts, upon which the appellant was found not guilty, were based upon the assumption that he was at all material times a British subject. This assumption was proved to be incorrect; therefore upon these counts the appellant was acquitted.

The appellant was born in the United States of America, in 1906, the son of a naturalized American citizen who had previously been a British subject by birth. He thereby became himself a natural born American citizen. At about three years of age he was brought to Ireland, where he stayed until about 1921, when he came to England. He stayed in England until 1939. He was then thirty-three years of age. He was brought up and educated within the King's Dominions, and he settled there. On July 4, 1933, he applied for a British passport, describing himself as a British subject by birth, born in Galway. He asked for the passport for the purpose of holiday touring in Belgium, France, Germany, Switzerland, Italy and Austria. He was granted the passport for a period of five {*349} years. The document was not produced, but its contents were duly proved. In it he was described as a British subject. On September 26, 1938, he applied for a renewal of the passport for a period of one year. He again declared that he was a British subject and had not lost that national status. His application was granted. On August 24, 1939, he again applied for a renewal of his passport for a further period of one year, repeating the same declaration. His application was granted, the passport, as appears from the endorsement on the declaration, being extended to July 1, 1940. On some day after August 24, 1939, the appellant left the realm, his parents, his brothers and his sister remaining in England. The exact date and manner of his departure were not proved. On his arrest in the year 1945 there was found on his person a "work book" issued by the German State on October 4, 1939, from which it appeared that he had been employed by the German radio company of Berlin as an announcer of English news from September 18, 1939. In this document his nationality was stated to be "Great Britain" and his special qualification "English." The passport was not found and nothing further was known of it. It was proved by uncontradicted evidence that he had, between September 3, 1939, and December 10, 1939, broadcast propaganda on behalf of the enemy. He did not give evidence but in a statement made after his arrest in Germany he said (inter alia): "In 1940 I acquired German nationality. ... As, by reason of my opinions, I was not conscientiously disposed to fight for Britain against Germany, I decided to leave the country. ... Realizing, however, that at this critical juncture I had declined to serve Britain I drew the logical conclusion that I should have no moral right to return to that country of my own free will and that it would be best to apply for German citizenship and make my home in Germany." After argument on the law, Tucker J. said to counsel for the Crown and for the appellant: "I shall direct the jury on count 3 that on August 24, 1939, when the passport was applied for, the prisoner beyond a shadow of doubt owed allegiance to the Crown of this country and that on the evidence given, if they accept it, nothing happened at the material time thereafter to put an end to the allegiance that he then owed. It will remain for the jury, and for the jury alone, as to whether or not at the relevant dates he adhered to the King's enemies with intent {*350} to assist the King's enemies. If both or either of you desire to address the jury on that issue, of course now is your opportunity." Both counsel proceeded to address the jury, the defence submitting that the appellant had not adhered to the King's enemies and the Crown that he had. No other topic was touched on and no argument was addressed to the question whether the appellant still had the passport in his possession and retained it for use or whether he still owed allegiance to the British Crown. Tucker J. then summed up and the appellant was found guilty on the third count of the indictment, and sentenced to death on September 19, 1945. An appeal was brought to the Court of Criminal Appeal on the following grounds: "(1.) The court wrongly assumed jurisdiction to try an alien for an offence against British law committed in a foreign country. (2.) The learned judge was wrong in law in holding, and misdirected the jury in directing them, that the appellant owed allegiance to His Majesty the King during the period from September 18, 1939, to July 2, 1940. (3.) That there was no evidence that the renewal of the appellant's passport afforded him or was capable of affording him any protection or that the appellant ever availed himself or had any intention of availing himself of any such protection. (4.) If (contary to the appellant's contention) there were any such evidence, the issue was one for the jury and the learned judge failed to direct them thereon." On November 7, 1945, the Court of Criminal Appeal dismissed the appeal. The Attorney-General certified under s. 1, sub-s. 6, of the Criminal Appeal Act, 1907, that the decision of the Court of Criminal Appeal involved a point of law of exceptional public importance

and that in his opinion it was desirable in the public interest that a further appeal should be brought. The appellant accordingly appealed to the House of Lords.

Slade K.C., Curtis-Bennett K.C. and J. Burge for the appellant. It is clear that if this conviction be upheld an alien holding a British passport owes allegiance during its unexpired validity wherever he goes and no matter what he does. The case for the appellant rests on five submissions: (a) The local allegiance due from an alien continues so long only as he is personally present within the King's dominions. (b) The protection which is the counterpart of the local allegiance due from an alien is the protection of our laws and is co-extensive with our legal jurisdiction. It is that which was referred to {*351} in Calvin's case[1] in the maxim: Protectio trahit subjectionem, et subjectio protectionem. (c) Protection means the right to protection and not merely the de facto enjoyment of it, which might be had by a person who obtained a passport by fraud. (d) No court in this country has jurisdiction to try an alien for an offence alleged to have been committed abroad except only in the two cases of piracy jure gentium and an offence committed on board a British ship. Though the legislature would have power to make treason also an exception it has not done so. The Treason Act, 1351, speaks of "a man" - "home" is the actual word used - and the comity of nations requires that that word should be interpreted as a man owing allegiance to the Crown, that is to say a British subject wherever he may be or an alien so long only as he is physically present within the King's dominions. (e) There is no evidence that the renewal of the appellant's passport afforded him or was capable of affording him any protection or that he ever availed himself or intended to avail himself of such protection. Further, even if there was any such evidence, the issue was one for the jury and the learned judge failed to direct them on it. The submission which depends on local allegiance is complementary to that depending on jurisdiction, for whenever an alien leaves the realm local allegiance ceases and he can no longer be tried by the courts of this country. As regards the first point, that an alien owes a local allegiance only so long as he resides within the King's dominions, the nature of allegiance has been long settled: see Calvin's case[2] and In re Stepney Election Petition[3]. A man cannot be guilty of treason if he does not owe allegiance. An act which is treasonable if he owes allegiance is not treasonable if he does not. The allegiance due from an alien is accurately laid down in Blackstone's Commentaries, st ed., vol. 1, pp. 357-9: "Allegiance, both express and implied, is however distinguished by the law into two sorts or species, the one natural, the other local; the former being also perpetual, the latter temporary. .... Local allegiance is such as is due from an alien, or stranger born, for so long time as he continues within the King's dominion and protection: and it ceases the instant such stranger transfers himself from this Kingdom to another. ... As therefore the prince is always under a constant tie to protect his {*352}natural-born subjects, at all times and in all countries, for this reason their allegiance due to him is equally universal and permanent. But, on the other hand, as the prince affords his protection to an alien, only during his residence in this realm, the allegiance of an alien is confined (in point of time) to the duration of such his residence, and (in point of locality) to the dominions of the British empire. ..." Here residence means personal presence within the realm. It has been suggested that this principle is qualified by a passage in Foster's Crown Cases, 1792 ed., p. 185: "And if such alien seeking the protection of the Crown; and having a family and effects here, should during a war with his native country, go thither, and adhere to the King's enemies for purposes of hostility, he might be dealt with as a traitor. For he came and settled here under the protection of the Crown; and though his person was removed for a time, his effects and family continued still under the same protection. This rule was laid down by all the judges assembled at the Queen's command, January 12, 1707." In the margin "Mss. Tracy, Price, Dod and Denton" are cited but the original manuscript cannot be found. This resolution, which is the only authority for the Crown, is also set out, quoting Foster, in Bacon's Abridgement, 7th ed., vol. VII., pp. 583-4, East's Pleas of the Crown, 1803 ed., vol. I., p. 53, Chitty's Prerogatives of the Crown, p. 13, and Hawkins' Pleas of the Crown, 8th ed., vol. I., p. 8 n., most of these treating it with reserve. It is bad law, quite inconsistent with Johnstone v. Pedlar[4], and merely the opinion of the judges in consultation with prosecuting counsel. It was not given as a decision in any case and so is not binding as an authority. An account of this practice may be found in an article on The History of the Parliamentary Declaration of Treason, by Professor Samuel Rezneck (1930) 46 Law Quarterly Review, p. 80, at pp. 85-7. It may be inferred that this resolution had reference to the statute 9 W. 3, c. 1, which made it treason for any person who had been in England before December 11, 1688, and had gone abroad, to return again

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[1](1608) 7 Co. Rep. 1a, 5a.

[2]Ibid. 1a, 4b, 5b.

[3](1886) 17 Q. B. D. 54, 64.

[4][1921] 2 A. C. 262, 292, 297.

without leave. R. v. Lindsay[5] and R. v. Gregg[6] were prosecutions under this Act. It would appear probable that the resolution was designed to show that there was no legal bar to trying Bara and Valiere mentioned in R. v. Gregg[7]). See also Smollett's History of England, vol. II., p. 180. In any {*353} event this resolution is inapplicable to the appellant who did not go from England during a war with his native country and did not leave his family or effects here. To bring the resolution into harmony with the law, "settled" must be given the meaning of "resident" and "resident" must mean physically present, without reference to the duration of the alien's stay here. [They also referred to Bacon's Abridgment, vol. I., P. 178, East's Pleas of the Crown, vol. I., p. 49, Hale's Pleas of the Crown, vol. I., p. 59, Chitty's Prerogatives of the Crown, pp. 10-12, 16 and Coke's Institutes, Part III., p. 4.]

As to the second proposition that the protection which draws allegiance is the protection of our laws, the appellant while in enemy territory was quite incapable of taking advantage of any protection which this country could have afforded him. He forfeited the right to it when he went to Germany in 1939. Since our laws are territorial they could not protect him there and no protection outside British territory could be such as to found a duty of allegiance. A passport is only a request to a foreign potentate and a command to a British representative to afford the holder assistance. After the appellant left England he did not enjoy the protection of British law and when war was declared even administrative protection was withdrawn from him. If on his trial he had been acquitted and had then proceeded to bring an action for damages in respect of his arrest in Germany and his being brought to England, the defence of act of state would have been a complete answer, since he was a foreigner outside British territory and outside the protection of the law: Johnstone v. Pedlar[8]. [They also referred to Coke's Institutes, Part I., Book II., ss. 198-199; Sovfracht (V/O) v. Van Udens Scheepvaart en Agentuur Maatschappij (N. V. Gebr.)[9]; In re Stepney Election Petition,[10] and R. v. Keyn[11].]

As to the third proposition that protection means the right to protection and not merely the de facto enjoyment of it, no right to protection is derived from a British passport as such. Protection is derived from the fact of being a British subject and that is given whether one has a passport or not. A passport gives protection only in a colloquial sense, not that protection which is the counterpart of allegiance. It has no real legal significance and no rights flow from it. {*354}

It is a mere voucher and means of identification. When day trips to the Continent could be made without passports British subjects who took advantage of them were not any the less entitled to the administrative protection of the Crown. If the appellant's contentions were wrong, strange consequences might arise. If a German, having masqueraded as a British subject till August, 1939, and then received intimation that war was about to break out, had obtained a British passport with a validity of five years, for the purpose of returning to his country, and had joined the German army within that period, he would have been liable to be convicted of treason. Again, if a British subject lawfully holding a British passport went to America and became naturalized there, then although by statute he ceased to be a British subject immediately on his naturalization, yet he would continue to owe allegiance to the British Crown for the unexpired term of his passport. [They referred to De Jager v. Attorney-General for Natal[12]; R. v. Brailsford [13]; Carlisle v. United States [14]; United States v. Villato[15]; two articles on Citizenship and Allegiance by Sir John Salmond (1901) 17 Law Quarterly Review, p. 270; (1902) 18 Law Quarterly Review, pp. 49, 61, 62; an article on The Passport System by W. N. Sibley

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[5](1704) 14 St. Tr. 987.

[6](1708) 14 St. Tr. 1371.

[7]Ibid. 1375.

[8][1921] 2 A. C. 262, 272, 275, 276.

[9][1943] A. C. 203, 209, 212, 223, 224.

[10]17 Q. B. D. 54, 63.

[11] (1876) 2 Ex. D. 63, 150, 235.

[12][1907] A. C. 326.

[13][1906] 2 K. B. 730.

[14](1872) 16 Wallace 147, 153.

[15](1797) 2 Dallas 370.

(1906) 7 Journal of Comparative Legislation (N. S.), p. 26, and Parl. Papers (1872), vol. 70, c. 529 and (1887), vol. 81, c. 5168.]

On the - fourth point that no British court has jurisdiction to try an alien for an offence alleged to have been committed abroad, even on the assumption that the appellant owed allegiance to the British Crown after leaving England, he could still not be tried here (1.) because no statute gives jurisdiction to try an alien for such an offence and (2.) because otherwise it would always be possible merely by alleging that any person owed allegiance to bring him within the jurisdiction of the courts of this country for trial of the question whether he owed allegiance or not. There is a distinction between substantive crime and the jurisdiction to try it. For the court to be able, merely by alleging allegiance to give itself jurisdiction to try the question of law whether or not there was allegiance would offend against the principle that no court can confer jurisdiction on itself. The court admittedly derives jurisdiction to try a British subject by alleging that he is a British subject, but there is a difference {*355} between alleging that a person is a British subject, a fact which founds the courts jurisdiction if it is true, and alleging allegiance which is only a factor in the particular offence charged. Apart from the Naturalization Act, 1870, the general principle still holds good. Nemo potest exuere patriam. Nothing a man does can make him a British subject and nothing he can omit to do can prevent him from being a British subject if he was so born. In the case of a foreigner committing an offence outside British territory, British courts have no jurisdiction to try him: see Halsbury's Laws of England, 2nd ed., vol. IX., pp. 55-6, 62. In construing an Act of Parliament there is a presumption against a violation of international law: Maxwell on Interpretation of Statutes, 8th ed., p. 130. That applies to the Treason Act, 1351. Two later statutes dealt with the trial of treasons committed abroad, both of them purely procedural, the Treason Act, 1543 (35 Hen. 8, c. 2) and the Treason Act, 1551 (5 & 6 Edw. 6, c. 11), the latter repealed by the Treason Act, 1945 (8 & 9 Geo. 6, c. 44). The Treachery Act, 1940 (3 & 4 Geo. 6, c. 21), s. 4, shows how the legislature has regard to the comity of nations by its careful definition of the persons who can be guilty of offences created by the Act. The only possible application of that Act to an alien is in respect of an offence committed by him while subject to naval, military or air force law. [They referred to Reg. v. Jameson[16]; Macleod v. Attorney-General for New South Wales[17] and Attorney-General for Hong Kong v. Kwok-a-Sing[18].]

On the final points that there was no evidence that the passport ever afforded the appellant any protection and that, if there was such evidence, the issue was one for the jury, even if the resolution of the judges in 1707 were correct, the effect of the ruling of Tucker J., would be to extend it, since none of the prerequisites set out in it were present in the case of the appellant. He left no family or effects in England and the protection which would have been afforded to them if he had bore no relation to the administrative protection alleged to be afforded by a passport. After the outbreak of war the British passport could afford the appellant no protection in Germany and there was no direct evidence that at any material time it remained in his possession. Even assuming that all the previous submissions for the appellant are wrong and that the mere granting of a passport {*356} to an alien imports a duty of allegiance by him to the Crown, even so he must be able to divest himself of the protection which gave rise to the allegiance. It cannot be the law that whatever happens and in all circumstances the alien must continue under that allegiance for the period during which the passport happens to remain in force. Accordingly, it must be a question of fact in each case - it cannot be one of law - by what act and at what date he divested himself of the protection and the corresponding allegiance. The onus was on the Crown to prove that he had not done anything to divest himself of the protection of the passport. Even if the mere fact that he obtained a passport raised a prima facie case and shifted the burden of proof on to him, the question of fact involved must be left to the jury. It was the judge's duty in this case to direct them what the evidence was and to tell them that evidence which was sufficient to call for an answer from the defence was not necessarily enough to satisfy them. In any event the issue must be left to them and here it had not been. Tucker J. directed them as a matter of law that the appellant continued to owe allegiance throughout the currency of his passport. [They referred to Stirland v. Director of Public Prosecutions[19].] As

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[16][1896] 2 Q. B. 425, 430, 431.

[17][1891] A. C. 455, 459.

[18](1873) L. R. 5 P. C. 179, 198, 199.

[19][1944] A. C. 315.

regards R. v. Casement[20] that case is irrelevant to any of the issues raised by this appeal, because Casement was not an alien but a British subject. Moreover. it was, in any event, wrongly decided.]

Sir Hartley Shawcross A.-G. and Gerald Howard for the Crown. The appellant contended that the judges' resolution of January 12, 1707, was the only authority for the Crown. That resolution was made in response to a summons from the sovereign to the judges to give their advice according to recognized legal procedure. However, even putting it aside it is sterile to search for an exact precedent to cover the present case. No branch of the law has been so much subject to judicial construction as that of treason. In this case the inducements to apply, not new principles, but existing principles to new facts are singularly compelling. On the appellant's point as to jurisdiction, there is no principle that no alien is triable in England for offences committed abroad. There is only a rebuttable presumption that statutes are not meant to have extra-territorial effect: see Mortensen v. Peters[21]. In the Treason Act, 1351, the territory specified is {*357} the world at large and there is express reference to treasons committed abroad. The words "a man" embrace any man under a duty of allegiance, whether a British subject or an alien. It would have made no difference if the appellant had been a German subject. The rule as to the locality of crime does rot embrace treason, which is justiciable in this country even when committed abroad: see R. v. Casement[22]. The appellant relied on the comity of nations but only those rules of international law which are generally and fully accepted are imported into our law. There is no rule of international law prohibiting the exercise of the jurisdiction of the court in a case such as this. In the case of R. v. Jameson[23] it was said in terms that the rule there laid down was based on international law. In the case of treason, if there is a duty of allegiance and a crime is committed in breach of that allegiance the question of jurisdiction does not arise. The question is not where treason can be committed, since it can be committed anywhere, but by whom it can be committed. A duty of allegiance on the part of an alien may arise in several ways, by residence, by the taking of an oath, by service under the Crown or by grant of protection to him, as, for instance when he holds a British passport. The real basis of that allegiance is the protection afforded by the Crown and accepted by the subject: Calvin's case[24]; Coke's Institutes, Part I., Book II., s. 199, and Foster's Crown Cases, 1792 ed., pp. 183-5. For the purpose of giving rise to allegiance, the vicarious protection contemplated by the judges' resolution is sufficient. Allegiance ceases when protection ceases. An alien physically present within the realm and under the protection of the Crown owes allegiance and a mere temporary absence from the country does not put an end to it, since it does not terminate residence for the purposes of the Treason Act. Residence means more than mere physical presence, though less than domicile. In the fourteenth century an alien departing from England was likely to go for good but now departure and return are easy. If an alien went out of the realm in a speed boat, committed treason and returned, it could not be denied that there was jurisdiction to try him in England. There can be no doubt that, if Germany had won the war, the appellant would have returned to England, His statement with regard to his acquisition of German nationality is not a thing on which he can rely, for it was not {*358} an admission but an assertion in his own favour. Since he did not choose to go into the witness-box it is not evidence. The passport granted to him in 1933 was for the purpose of holiday touring. The renewals were unqualified and an application for plain renewal of a passport must be presumed to be for the same purpose as the original. A person going abroad for a holiday for a week or a month does not cease to be resident in this country. Moreover, the appellant did not need a British passport merely to leave England nor, if he could establish his American nationality, to enter the United States. One of the uses of a passport is that the country issuing it to any person is, under international conventions, bound to receive him back. Further, the passport was evidence that he was under the protection of the Crown. It was accepted as proof that he was a British subject and as such he acquired his position in Germany. It was the fact that he held himself out as such that made his broadcasts effective. As to the nature of the protection which a passport affords to an alien, it is not the protection of our laws. Originally, when protection depended on the strong arm of the feudal lord, aliens were granted by the Crown an executive protection against our laws, the passport enabling them to pass freely in this country, protected from the ordinary operation of laws which were highly restrictive and penal as regards foreigners. It was a document permitting them to travel within the state's own boundaries: see the article on The Crown and the Alien by E. F. Churchill (1920), 36 Law Quarterly Review, p. 402. There is not really any connexion between such a document

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[20] [1917] 1 K. B. 98.

[21] (1906) 8 F. (J. C.) 93, 100.

[22] [1917] 1 K. B. 98.

[23] [1896] 2 Q. B. 425, 430.

[24] 7 Co. Rep. 1a, 5a.

and a modern passport, which is a matter of international practice. In modern practice the State takes under its protection persons who are not British subjects, who have then the status of protected persons and such was the appellant. Inasmuch as this species of protection is not the protection of our laws, even a British subject has no legally enforceable right to the protection of the Crown abroad. It is a prerogative right in the Crown to protect its own subjects abroad by diplomatic means and this was illustrated in 1850 in the incident of Don Pacifico. The exercise of the protective jurisdiction here contended for is well recognized in international law: see Oppenheim on International Law, 5th ed., p. 267; art. 7 of the Draft Convention on Jurisdiction in Respect of Crime (Harvard Research (1935), p. 545) and Borchard on the Diplomatic Protection of Citizens Abroad, pp. 10, 29. The passport is now the method by which the Crown accords{*359} his protection to persons abroad. It is the sovereign's express command to his representatives that protection is to be given and in its normal functioning puts into operation the Crown's protective system. The resident alien shares now in the general protection of all the inhabitants of the realm but the passport holder has the benefit of a protective machinery going much further, even to the point of involving the country in war: see article on International Law in Practice by Sir William Malkin (1933), 49 Law Quarterly Review, p. 489, and Encyclop: dia of the Laws of England, 2nd ed., vol X., p. 585, et seq. This was the nature of the protection which in this case imposed on the appellant the duty of allegiance. Some dicta in the authorities, when divorced from their context, may appear to support the view that the protection to be afforded to produce that result is that of our laws, but the danger of treating dicta in that way is illustrated by Sovfracht (V/O) v. Van Udens Scheepvaart en Agentuur Maatschappij (N. V. Gebr.)[25]. To impose the duty of allegiance it is enough if the State has accorded protection to a person seeking it and is able to give it to the extent recognized by international law. If the appellant's argument were right a subject of a British mandated, or even a British protected, territory, holding, as such a person does, a British passport, would be under no duty of allegiance to the Crown. That could have far-reaching and serious consequences. The appellant enjoyed exactly the same protection, whether it were called protection of law, or protection in fact, as any British subject would have enjoyed in the same circumstances at the same time. Though the right to protection might be in suspense, the duty of allegiance remained. Even in Germany after the outbreak of war the administrative protection was not withdrawn, though direct protection by the Crown's representatives might have come to an end. The Crown continued to exercise protection through the medium of the protecting power and the holder of a British passport might benefit from that. Thus, a British subject could not be called up to serve in the German army. In international law it is not open to a foreign state to disregard a British passport and deny its holder's nationality. It is immaterial that it may have been obtained by a false, or even a fraudulent, representation. The protection conferred continues until the Crown withdraws it. Similarly, just as a British subject can terminate his allegiance by becoming a naturalized {*360} citizen of a foreign state, so the protected person can by some overt act of substance terminate his allegiance, which does not necessarily continue during the whole of the passport's validity. The passport is evidence of the existence of protection and if the appellant had discarded it on a return to England that might make a difference, though his merely handing it back to a British consul in Germany might not justify this country in subsequently refusing to admit him. From the application for the passport and its renewals it must be presumed that the appellant used it for going abroad. That inference is a matter of accepted international law. Having sought the protection of the Crown, the appellant has also the burden of showing that it was not in fact afforded. The applications were the best prima facie evidence that he intended to avail himself of it. It was for him to show that he had by some overt act divested himself of the status he had acquired. Negative averments only in the knowledge of the accused and not of the Crown must be proved by him: Archbold's Criminal Practice (31st ed.) (1943), p. 330. The summing-up satisfied the tests laid down in Stirland v. Director of Public Prosecutions[26] approving R. v. Haddy[27]. Once a man has obtained the general administrative and executive protection of the Crown, there is no principle limiting his allegiance by reference to cases where protection arose simply from the fact of residence. This case will have the important effect of defining the position of all persons who place themselves under the protection of the British Crown. The appellant voluntarily sought the protection which the Crown can give to a British subject travelling abroad. He had made his home in England and enjoyed all the privileges of British citizenship. It would be an unthinkable outrage if it were held that while temporarily absent he was absolved from the reciprocal duty of allegiance and could not be held to have committed treason.

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[25] [1943] A. C. 203.

[26] [1944] A. C. 315, 321.

[27] [1944] K. B. 422.

Slade K.C. in reply. The appellant relies on the following principles: (1.) There is no reported case of an alien convicted of treason for an act committed abroad. (2.) There is no reported case of any court in this country having assumed jurisdiction to try an alien for an offence committed abroad. (3.) The appellant was convicted and his conviction was upheld on the strength of a resolution passed by the judges in 1707, which is contrary to every principle of constitutional law enunciated in the text-books. (4.) His conviction, since there {*361} was no evidence that he left any family or effects behind in England when he went to Germany in 1939, ran counter, not only to the law as it was laid down before that resolution, but also to the resolution itself. The relevant principles laid down by all the masters of the common law are more than dicta and Calvin's case[28], Blackstone's Commentaries and Johnstone v. Pedlar[29] are irreconcilable with that resolution. From R. v. Lindsay[30] and R. v. Gregg[31] it appears that the resolution was designed to satisfy Queen Anne that there was no constitutional difficulty in bringing Valiere and Bara to trial. It was framed when no counsel was present to call attention to Calvin's case(1) which had been unchallenged for a century before or to argue against its unconstitutional nature or the extent of its implications. The same procedure was adopted in 1660 before the trial of the Regicides, when the judges met and passed several resolutions, many of them bad law. Those trials would not have been a safe criterion for any civilized state. Of all the cases which have disfigured our legal history and outraged the common law, treason trials have been the worst. The judges' resolution of 1707 does not bear the imprimatur of the authors who reproduce it in the text-books and who use such phrases as "it is even stated." Moreover, the appellant's conviction and the judgment of the Court of Criminal Appeal are not consistent with the law as stated by Sir Michael Foster (Foster's Crown Cases, 1792 ed., pp. 183-5) and the resolution which he set out is not in accordance with his previous statement of the law; he said that the local allegiance of an alien ceased so soon as he withdrew his person and effects but in the present case the courts below held that this was not so if the alien held a British passport. Foster made it clear that the protection in question was that of our law. He referred (p. 184 n.) to the coronation oath whereby the sovereign undertakes to cause law to be executed. It is this which is the correlative of allegiance. If the gist of the matter is not the protection of the law there was no point in insisting on the necessity for the presence in this country of the alien's family or effects. The effect of this conviction is to contradict that and say that the protection attracting allegiance is not that of our law in the case of a person holding a British passport. But allegiance is derived from status, the status of a subject. A resident alien is a subject and when he ceases to reside he {*362} ceases to be a subject: see Sir John Salmond on Citizenship and Allegiance (1902) 18 Law Quarterly Review, pp. 49, 50. This is quite inconsistent with the judges' resolution of 1707. An alien soldier in the British service could not be tried for treason for an act committed abroad, for his oath of allegiance would not constitute the status of local allegiance. There is no reported case of an alien mercenary being tried for such an act. Before 1940 he would have been tried under s. 4 of the Army Act and since then he would be triable under the Treachery Act, 1940. There is no intermediate status between a British subject and an alien called a "British protected subject." The de facto protection afforded by a British mandate does not beget allegiance. British subjects alone are entitled when abroad to the protection of the Crown against other states: see Sir John Salmond on Citizenship and Allegiance (1901) 17 Law Quarterly Review, pp. 270, 271; Abd-ul-Messih, v. Farim[32]; Markwald v. Attorney-General[33] and R. v. Ketter[34]. Even in the case of British subjects it lies within the Crown's discretion whether or not to take diplomatic action on behalf of one of its nationals: see the article by Sir William Malkin on International Law in Practice (1933) 49 Law Quarterly Review, pp. 489, 498-9, which does not deal with passports at all. It is a fallacy to suggest that any protection is afforded by a passport qua passport; it is only an easy means of identification. An alien who has obtained a British passport, with whatever protection he might get from the belief that he is a British subject, can have no higher degree of protection than a British protected person, and that cannot found allegiance. The Crown admitted that this conviction would have been good in law if the appellant had been a German when he left the country. That would give rise to extraordinary situations, so that if a German spy wished, in obedience to his natural instincts to return to Germany when war with England became imminent and obtained a British passport, since that was

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[28] 7 Co. Rep. 1a.

[29] [1921] 2 A. C. 262.

[30] 14 St. Tr. 787.

[31] 14 St. Tr. 1371, 1375.

[32] (1888) 3 App. Cas. 431, 443.

[33] [1920] 1 Ch. 348, 355.

[34] [1940] 1 K. B. 787, 788.

the only way he could go out of the country, he would be held guilty of treason. As regards jurisdiction, there is no case in which a court in England has assumed jurisdiction to try an alien for an offence committed abroad: see Mortensen v. Peters[35]; Johnstone v. Pedlar[36]; The Fagernes[37]. {*363)

As regards the case of De Jager v. Attorney-General for Natal[38] that was a bad decision: see the discussion of it in Current Noteson International Law (1908) 33 Law Magazine and Review, 4th series, pp. 214-18. In general, it is a singularly sterile process to try to interpret the Treason Act, 1351, by reference to modern concepts of international law, which did not then exist in more than an embryonic state. Confusion has arisen between the intention with which the appellant left England, whether he had any animus revertendi, and the use which he may have made of the passport after he got to Germany. The fact of his joining the German radio organization indicated an intention not to return and a casting off of any protection provided by the passport. He had deserted what he took to be a sinking ship and any intention he may have had of returning was not a return to the Crown's allegiance but with a victorious German army. As regards the passport so far as the evidence goes he might have thrown it overboard during the sea crossing from England. There is no complaint of the judge's summing-up on the facts proved in evidence but he failed to direct the jury on facts about which no evidence had been given but which were for them and on an issue which should have been left to them. Even if it was for the appellant to show what was done with the passport the judge should have directed the jury on that matter. Further, he directed them as a matter of law that the appellant continued to owe allegiance to the Crown at the material times and that was an issue which should have been left to them. It could not be said that a reasonable jury if they had received the directions which were lacking would necessarily have reached the same conclusion. Since the issue was not put to the jury at all the proviso to s, 4, sub-s. 1 of the Criminal Appeal Act, 1907, does not operate.

December 18, 1945.LORD JOWITT L.C. I have come to the conclusion, in common with the majority of your Lordships, that the appeal should be dismissed. I should propose to deliver my reasons at a later date.

LORD MACMILLAN. I agree.

LORD WRIGHT. I also agree.

LORD PORTER. In agreement with all your Lordships, I think that the renewal of his passport, which Joyce obtained {*364} on August 24, 1939, was evidence from which the jury might have inferred that he retained that document for use up to September 18 of that year, when he was proved to have first adhered to the King's enemies, and might, therefore, have inferred that he continued to owe allegiance to the Crown up to that date. As, however, in my view, the question whether he did so retain it was never left to the jury, but they were directed as a matter of law that his duty of allegiance was extended to the later date, and as your Lordships cannot send the case back for retrial, I would myself allow the appeal on that ground.

LORD SIMONDS. I concur in the opinion given by my noble and learned friend on the woolsack.

February 1, 1946. Their Lordships delivered their reasons.

LORD JOWITT L.C. My Lords, on November 7, 1945, the Court of Criminal Appeal dismissed the appeal of the appellant, William Joyce, who had on September 19, 1945, been convicted of high treason at the Central Criminal Court and duly sentenced to death. The Attorney-General certified under s. 1, sub-s. 6, of the Criminal Appeal Act 1907, that the decision of the Court of Criminal Appeal involved a point of law of exceptional public importance and that in his opinion it was desirable in the public interest that a further appeal should be brought. Hence this appeal is brought to your Lordships' House. And though, in accordance with the usual practice, the certificate of the Attorney-General does not specify the point of law raised in the appeal, it is clear that the question for your Lordships' determination is whether an alien who has been resident within the realm can be held guilty and convicted in this country of high treason in respect of acts committed by him

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[35](1906) 8 F. (J. C.) 93.

[36][1921] 2 A. C. 262.

[37][1927] P. 311.

[38][1907] A. C. 326.

outside the realm This is in truth a question of law of far-reaching importance. The appellant was charged at the Central Criminal Court on three counts, upon the third of which only he was convicted. The first and second counts, upon which he was found not guilty, were based upon the assumption that he was at all material times a British subject. This assumption was proved to be incorrect; therefore upon these counts the appellant was rightly acquitted. The Court of Criminal Appeal, as I have already said, dismissed the appeal, and it will be convenient if I deal with the grounds of appeal in the same order as did that court, first considering {*365} the important question of law raised in the second ground.

The House is called upon in the year 1945 to consider the scope and effect of a statute of the year 1351, the twenty-fifth year of the rein of Edward III. That statute, as has been commonly said and as appears from its terms, was itself declaratory of the common law: its language differs little from the statement in Bracton (see De Legibus et Consuetudinibus Angli_ (No. 70 Rolls Series), vol. II., p. 258; Stephen's History of the Criminal Law, vol. II., p. 243). It is proper to set out the material parts. Thus it runs: "Whereas divers opinions have been before this time in what case treason shall be said and in what not; the King, at the request of the Lords and of the Commons hath made a declaration in the manner as hereafter followeth, that is to say;" [amongst other things] "if a man do levy war against our Lord the King in his realm, or be adherent to the King's enemies in his realm giving them aid and comfort in the realm, or elsewhere" then (I depart from the text and use modern terms) he shall be guilty of treason. It is not denied that the appellant has adhered to the King's enemies giving them aid and comfort elsewhere than in the realm. Upon this part of the case the single question is whether, having done so, he can be and in the circumstances of the case is guilty of treason. Your Lordships will observe that the statute is wide enough in its terms to cover any man anywhere, "if a man do levy war," etc. Yet it is clear that some limitation must be placed upon the generality of the language, for the context in the preamble poses the question "in what case treason shall be said and in what not." It is necessary then to prove not only that an act was done but that, being done, it was a treasonable act. This must depend upon one thing only, namely the relation in which the actor stands to the King to whose enemies he adheres. An act that is in one man treasonable, may not be so in another. In the long discussion which your Lordships have heard upon this part of the case attention has necessarily been concentrated on the question of allegiance. The question whether a man can be guilty of treason to the King has been treated as identical with the question whether he owes allegiance to the King. An act, it is said, which is treasonable if the actor owes allegiance, is not treasonable if he does not. As a generalization, this is undoubtedly true and is supported by the language of the indictment, but it leaves undecided the question by whom allegiance is owed and I shall ask your Lordships to look {*366} somewhat more deeply into the principle upon which this statement is founded, for it is by the application of principle to changing circumstances that our law has developed. It is not for His Majesty's judges to create new offences or to extend any penal law and particularly the law of high treason, but new conditions may demand a reconsideration of the scope of the principle. It is not an extension of a penal law to apply its principle to circumstances unforeseen at the time of its enactment, so long as the case is fairly brought within its language.

I have said, my Lords, that the question for consideration is bound up with the question of allegiance. Allegiance is owed to their sovereign Lord the King by his natural born subjects; so it is by those who, being aliens, become his subjects by denization or naturalization (I will call them all "naturalized subjects"); so it is by those who, being aliens, reside within the King's realm. Whether you look to the feudal law for the origin of this conception or find it in the elementary necessities of any political society, it is clear that fundamentally it recognizes the need of the man for protection and of the sovereign lord for service. "Protectio trahit subjectionem et subjectio protectionem." All Who were brought within the King's protection were ad fidem regis: all owed him allegiance. The topic is discussed with much learning in Calvin's case[39]. The natural-born subject owes allegiance from his birth, the naturalized subject from his naturalization, the alien from the day when he comes within the realm. By what means and when can they cast off allegiance? The natural-born subject cannot at common law at any time cast it off. "Nemo potest exuere patriam" is a fundamental maxim of the law from which relief was given only by recent statutes. Nor can the naturalized subjects at common law. It is in regard to the alien resident within the realm that the controversy in this case arises. Admittedly he owes allegiance while he is so resident, but it is argued that his allegiance extends no further. Numerous authorities were cited by the learned counsel for the appellant in which it is stated without any qualification or extension that an alien owes allegiance so long as he is within the realm and it has been argued with great force that the physical presence of the alien actor within the realm is necessary to make his act treasonable. It

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[39] 7 Co. Rep. 1a.

is implicit in this argument that during absence from the realm, however {*367} brief, an alien ordinarily resident within the realm cannot commit treason; he cannot in any circumstances by giving aid and comfort to the King's enemies outside the realm be guilty of a treasonable act. My Lords in my opinion this which is the necessary and logical statement of the appellant's case is not only at variance with the principle of the law, but is inconsistent with authority which your Lordships cannot disregard. I refer first to authority. It is said in Foster's Crown Cases (3rd ed.), p. 183 - "Local allegiance is founded in the protection a foreigner enjoyeth for his person, his family or effects, during his residence here; and it ceaseth, whenever he withdraweth with his family and effects." And then on p. 185 comes the statement of law upon which the passage I have cited is clearly founded "Section 4. And if such alien, seeking the protection of the Crown, and having a family and effects here, should during a war with his native country, go thither, and there adhere to the King's enemies for purposes of hostility, he might be dealt with as a traitor. For he came and settled here under the protection of the Crown; and, though his person was removed for a time, his effects and family continued still under the same protection. This rule was laid down by all the judges assembled at the Queen's command January 12, 1707." The author has a side note against the last line of this passage "MSS. Tracey, Price, Dod and Denton." These manuscripts have not been traced but their authenticity is not questioned. It is indeed impossible to suppose that Sir Michael Foster could have incorporated such a statement except upon the surest grounds and it is to be noted that he accepts equally the fact of the judges' resolution and the validity of its content. This statement has been repeated without challenge by numerous authors of the highest authority - e.g., Hawkins, Pleas of the Crown, 1795 ed., c. II., s. 5, n, (2.); East, Pleas of the Crown, vol. I., p. 52; Chitty on the Prerogatives of the Crown, pp. 12, 13. It may be said that the language of some of these writers is not that of enthusiastic support, but neither in the text books written by the great masters of this branch of the law nor in any judicial utterance has the statement been challenged. Moreover it has been repeated without any criticism in our own times by Sir William Holdsworth whose authority on such a matter is unequalled: see his article in Halsbury's Laws of England (2nd ed.), vol. VI., p. 416 n. (t.), title "Constitutional Law." Your Lordships can give no weight to the fact that in{*368} such cases as Johnstone v. Pedlar[40], the local allegiance of an alien is stated without qualification to be coterminous with his residence within the realm. The qualification that we are now discussing was not relevant to the issue nor brought to the mind of the court. Nor was the judges' resolution referred to nor the meaning of "residence" discussed. In my view therefore it is the law that in the case supposed in the resolution of 1707 an alien may be guilty of treason for an act committed outside the realm. The reason which appears in the resolution is illuminating. The principle governing the rule is established by the exception: "though his person was removed for a lime, his family and effects continued under the same protection," that is, the protection of the Crown. The vicarious protection still afforded to the family, which he had left behind in this country, required of him a continuance of his fidelity. It is thus not true to say that an alien can never in law be guilty of treason to the sovereign of this realm in respect of an act committed outside the realm. My Lords, here no question arises of a vicarious protection There is no evidence that the appellant left a family or effects behind him when he left this realm. I do not for this purpose regard parents or brother or sisters as a family. But though there was no continuing protection for his family or effects, of him too it must be asked, whether there was not such protection still afforded by the sovereign as to require of him the continuance of his allegiance. The principle which runs through feudal law and what I may perhaps call constitutional law requires on the one hand protection, on the other fidelity: a duty of the sovereign lord to protect, a duty of the liege or subject to be faithful. Treason, "trahison," is the betrayal of a trust: to be faithful to the trust is the counterpart of the duty to protect. It serves to illustrate the principle which I have stated that an open enemy who is an alien, notwithstanding his presence in the realm, is not within the protection nor therefore within the allegiance of the Crown. He does not owe allegiance because although he is within the realm he is not under the sovereign's protection.

The question then is how is this principle to be applied to the circumstances of the present case. My Lords, I have already stated the material facts in regard to the appellant's residence in this country, his applications for a passport and the grant of such passport to him and I need not restate them. I do not think it necessary in this case to determine what for the purpose {*369} of the doctrine, whether stated with or without qualification, constitutes for an alien "residence" within the realm. It would, I think, be strangely inconsistent with the robust and vigorous commonsense of the common law to suppose that an alien quitting his residence in this country and temporarily on the high seas beyond territorial waters or at some even distant spot now brought within speedy reach and there adhering and giving aid to the King's enemies could do so with impunity. In the present case the appellant had long resided here and appears to have had many ties with this country,

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[40] [1921] 2 A. C. 262.

but I make no assumption one way or another about his intention to return and I do not attach any importance to the fact that the original passport application and, therefore, presumably the renewals also were for "holiday touring." The material facts are these, that being for long resident here and owing allegiance he applied for and obtained a passport and, leaving the realm, adhered to the King's enemies. It does not matter that he made false representations as to his status, asserting that he was a British subject by birth, a statement that he was afterwards at pains to disprove. It may be that when he first made the statement, he thought it was true. Of this there is no evidence. The essential fact is that he got the passport and I now examine its effect. The actual passport issued to the appellant has not been produced, but its contents have been duly proved. The terms of a passport are familiar. It is thus described by Lord Alverstone C.J., in R. v. Brailsford[41]: "It is a document issued in the name of the sovereign on the responsibility of a minister of the Crown to a named individual, intended to be presented to the governments of foreign nations and to be used for that individual's protection as a British subject in foreign countries." By its terms it requests and requires in the name of His Majesty all those whom it may concern to allow the bearer to pass freely without let or hindrance and to afford him every assistance and protection of which he may stand in need. It is, I think, true that the possession of a passport by a British subject does not increase the sovereign's duty of protection, though it will make his path easier. For him it serves as a voucher and means of identification. But the possession of a passport by one who is not a British subject gives him rights and imposes upon the sovereign obligations which would otherwise not be given or imposed. It is {*370} immaterial that he has obtained it by misrepresentation and that he is not in law a British subject. By the possession of that document he is enabled to obtain in a foreign country the protection extended to British subjects. By his own act he has maintained the bond which while he was within the realm bound him to his sovereign. The question is not whether he obtained British citizenship by obtaining the passport, but whether by its receipt he extended his duty of allegiance beyond the moment when he left the shores of this country. As one owing allegiance to the King he sought and obtained the protection of the King for himself while abroad.

Your Lordships were pressed by counsel for the appellant with a distinction between the protection of the law and the protection of the sovereign, and he cited many passages from the books in which the protection of the law was referred to as the counterpart of the duty of allegiance. Upon this he based the argument that, since the protection of the law could not be given outside the realm to an alien, he could not outside the realm owe any duty. This argument in my opinion has no substance. In the first place reference is made as often to the protection of the Crown or sovereign or lord or government as to the protection of the law, sometimes also to protection of the Crown and the law. In the second place it is historically false to suppose that in olden days the alien within the realm looked to the law for protection except in so far as it was part of the law that the King could by the exercise of his prerogative protect him. It was to the King that the alien looked and to his dispensing power under the prerogative. It is not necessary to trace the gradual process by which the civic rights and duties of a resident alien became assimilated to those of the natural-born subject; they have in fact been assimilated, but to this day there will be found some difference. It is sufficient to say that at the time when the common law established between sovereign lord and resident alien the reciprocal duties of protection and allegiance it was to the personal power of the sovereign rather than to the law of England that the alien looked. It is not, therefore, an answer to the sovereign's claim to fidelity from an alien without the realm who holds a British passport that there cannot be extended to him the protection of the law. What is this protection upon which the claim to fidelity is founded? To me, my Lords, it appears that the Crown in issuing a passport is assuming an onerous burden, and the holder of the passport is acquiring substantial {*371} privileges. A well known writer on international law has said (see Oppenheim, International Law, 5th ed., vol. I., p. 546) that by a universally recognized customary rule of the law of nations every state holds the right of protection over its citizens abroad. This rule thus recognized may be asserted by the holder of a passport which is for him the outward title of his rights. It is true that the measure in which the state will exercise its right lies in its discretion. But with the issue of the passport the first step is taken. Armed with that document the holder may demand from the State's representatives abroad and from the officials of foreign governments that he be treated as a British subject, and even in the territory of a hostile state may claim the intervention of the protecting power. I should make it clear that it is no part of the case for the Crown that the appellant is debarred from alleging that he is not a British subject. The contention is a different one: it is that by the holding of a passport he asserts and maintains the relation in which he formerly stood, claiming the continued protection of the Crown and thereby pledging the continuance of his fidelity. In these circumstances I am clearly of opinion that so long as he holds the passport he is within the meaning of the statute a man who, if he

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[41] [1905] 2 K. B. 730, 745.

is adherent to the King's enemies in the realm or elsewhere commits an act of treason. There is one other aspect of this part of the case with which I must deal. It is said that there is nothing to prevent an alien from withdrawing from his allegiance when he leaves the realm. I do not dissent from this as a general proposition. It is possible that he may do so even though he has obtained a passport. But that is a hypothetical case. Here there was no suggestion that the appellant had surrendered his passport or taken any other overt step to withdraw from his allegiance, unless indeed reliance is placed on the act of treason itself as a withdrawal. That in my opinion he cannot do. For such an act is not inconsistent with his still availing himself of the passport in other countries than Germany and possibly even in Germany itself. It is not to be assumed that the British authorities could immediately advise their representatives abroad or other foreign governments that the appellant, though the holder of a British passport, was not entitled to the protection that it appeared to afford. Moreover the special value to the enemy of the appellant's services as a broadcaster was that he could be represented as speaking as a British subject and his German work book showed that it was in this character that he was {*372} employed, for which his passport was doubtless accepted as the voucher.

The second point of appeal (the first in formal order) was that in any case no English court has jurisdiction to try an alien for a crime committed abroad and your Lordships heard an exhaustive argument upon the construction of penal statutes. There is, I think, a short answer to this point. The statute in question deals with the crime of treason committed within or, as was held in R. v. Casement[42] (1), without the realm: it is general in its terms and I see no reason for limiting its scope except in the way that I indicated earlier in this opinion, viz.: that, since it is declaratory of the crime of treason, it can apply only to those who are capable of committing that crime. No principle of comity demands that a state should ignore the crime of treason committed against it outside its territory. On the contrary a proper regard for its own security requires that all those who commit that crime, whether they commit it within or without the realm should be amenable to its laws. I share to the full the difficulty experienced by the Court of Criminal Appeal in understanding the grounds upon which this submission is based, so soon as it has been held that an alien can commit, and that the appellant did commit, a treasonable act outside the realm. I concur in the conclusion and reasons of that court upon this point.

Finally (and these are the third and fourth grounds of appeal to the Court of Criminal Appeal) it was urged on behalf of the appellant that there was no evidence that the renewal of his passport afforded him or was capable of affording him any protection or that he ever availed himself or had any intention of availing himself of any such protection, and if there was any such evidence the issue was one for the jury and the learned judge failed to direct them thereon. Upon these points too, which are eminently matters for the Court of Criminal Appeal, I agree with the observations of that court. The document speaks for itself. It was capable of affording the appellant protection. He applied for it and obtained it, and it was available for his use. Before this House the argument took a slightly different turn. For it was urged that there was no direct evidence that the passport at any material time remained in the physical possession of the appellant and that upon this matter the jury had not been properly directed by the learned judge in that he assumed to determine as a matter of law a {*373} question of fact which it was for them to determine. This point does not in this form at least appear to have been taken before the Court of Criminal Appeal and your Lordships have not the advantage of knowing the views of the experienced judges of that court upon it. Nor, though the importance of keeping separate the several functions of judge and jury in a criminal trial is unquestionable, can I think that this is a question with which your Lordships would have had to deal in this case, if no other issue had been involved. For it is clear that here no question of principle is involved. The narrow point appears to be whether in the course of this protracted and undeniably difficult case the learned judge removed from the jury and himself decided a question of fact which it was for them to decide. This is a matter which can only be determined by a close scrutiny of the whole of the proceedings. My Lords, this is a task which in the circumstances of this case your Lordships have thought fit to undertake. I do not propose to examine in detail the course of the trial and the summing up of the learned judge, though I may perhaps be permitted to say that it was distinguished by conspicuous care and ability on his part. But having read the whole of the proceedings I have come to the clear conclusion that the learned judge's summing up is not open to the charge of misdirection. It may well be that there are passages in it which are open to criticism. But the summing up must be viewed as a whole and upon this view of it I am satisfied that the jury cannot have failed to appreciate and did appreciate that it was for them to consider whether the passport remained at all material times in the possession of the appellant. Upon this question no evidence could be given by the Crown and for obvious reasons no evidence was given by the

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[42][1917] 1 K. B. 98.

appellant. It has not been suggested that the inference could not fairly be drawn from the proved facts if the jury thought fit to draw it and I think that they understood this and did draw the inference when they returned the general verdict of "Guilty." This point therefore also fails.

My Lords, I am asked by my noble and learned friend Lord Simonds to say that he concurs in the opinion which I have just read.

LORD MACMILLAN. My Lords, I have had the advantage of reading in print the opinion which has just been delivered by the Lord Chancellor. I am in entire agreement with it. {*374}

LORD WRIGHT. My Lords, I also have had the same advantage. I fully agree with, and concur in, the opinion which has just been delivered by the Lord Chancellor.

LORD PORTER. My Lords, I have already stated that I agree with your Lordships in thinking that the renewal of William Joyce's passport, obtained on August 24, 1939, was evidence from which a jury might have inferred that he retained that document for use on and after September 18, 1939, when he was proved first to have adhered to the enemy, and therefore I can deal with this part of his appeal very shortly. It is undisputed law that a British subject always, and an alien whilst resident in this country, owe allegiance to the British Crown and therefore can be guilty of treason. The question, however, remains whether an alien who has been resident here, but leaves this country, can whilst abroad, commit an act of treason. The allegiance which he owes whilst resident in this country is recognized in authoritative text books and the relevant cases to be owed because, as Hale (Pleas of the Crown, 1800 ed., vol. I., p. 58) says, "the subject hath his protection from the King and his laws." If then he has protection he owes allegiance, but the quality of the protection required has still to be determined. On behalf of the appellant it was strenuously contended that unless the alien was enjoying the protection of British law he owed no allegiance. My Lords, I think that this is to narrow the obligation too much. Historically the protection of the Crown through its dispensing power was afforded to the alien in this country earlier than the legal protection which came later. Therefore any protection, whether legal or administrative, would in my view be enough to require a corresponding duty of allegiance.

It was said in the second place, however, that in no case could an alien, however long he had been resident here, commit an act of treason whilst he was abroad. This argument again seems to me to limit unduly the extent of his obligation. It is in contradiction of the resolution of the judges in 1707, whereby it was declared that if an alien who has been resident here goes abroad himself but leaves his family and effects here under the same protection, the duty (i.e. of allegiance) still continues. This resolution has been criticized as being merely the opinion of the judges in consultation with prosecuting counsel, and not given as a decision in any case. The criticism is true, but the resolution has been repeated in text book after text book of high {*375} authority, and though not authoritative as a legal decision, it still has the weight of its repetition by great lawyers and the fact that it is nowhere challenged. Foster, East, Hawkins, Chitty and Bacon all set it out. Blackstone alone omits it, but Blackstone was giving a general view of the laws of England, and an omission to set out a particular extension of the general rule is not necessarily a denial of its existence. Equally the fact that many cases also state only the general rule in cases where no more is required is not a denial of the existence of certain modifications or extensions of it. It is true that even in the case with which the resolution deals the alien, though absent himself, is vicariously protected by the laws of this country in the person of his family and effects, but it is still no more than protection. Does then the possession of a passport afford any such protection as that contemplated by the rule? I think it does. Even after war is declared, some protection could be afforded to holders of British passports through the protecting power, and again it would be useful and afford protection in neutral countries. "It will be well to consider what a passport really is," says Lord Alverstone C.J., in R. v. Brailsford[43]. "It is a document issued in the name of the sovereign on the responsibility of a minister of the Crown to a named individual, intended to be presented to the governments of foreign nations and to be used for that individual's protection as a British subject in foreign countries," and the late Sir William Malkin in vol. 49 of the Law Quarterly Review, p. 493, speaks of "the extensive though perhaps somewhat ill-defined, branch of international law which may be called. ... 'the diplomatic protection of citizens abroad'."

It must be remembered that the matter to be determined is not whether the appellant took upon himself a new allegiance, but whether he continued an allegiance which he had owed for some twenty-four

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[43] [1905] 2 K. B. 730, 745.

years, and a lesser amount of evidence may be required in the latter than the former case. I cannot think that such a resident can in war time pass to and fro from this country to a foreign jurisdiction and be permitted by our laws to adhere to the enemy there without being amenable to the law of treason. I agree with your Lordships also in thinking that if an alien is under British protection he occupies the same position when abroad as he would occupy if he were a British subject. Each of them owes allegiance, and in so doing each is {*376} subject to the jurisdiction of the British Crown. "The law of nations," says Oppenheim, International Law, vol. I., p. 266 (5th ed.), "does not prevent a state from exercising jurisdiction within its own territory over its subjects travelling or residing abroad, since they remain under its personal supremacy." Moreover, in R. v. Casement[44], the point was directly decided in the case of a British subject who committed the act of adhering to the King's enemies abroad, and the decision was not seriously controverted before your Lordships. But my Lords, though the renewing of a passport might in a proper case lead to the conclusion that the possessor, though absent from the country, continued to owe allegiance to the British Crown, yet in my view the question whether that duty was still in existence depends upon the circumstances of the individual case and is a matter for the jury to determine. In the present case, as I understand him, the learned judge ruled that in law the duty of allegiance continued until the protection given by the passport came to an end - i.e. in a year's time - or at any rate until after the first act of adhering to the enemy, which I take to be the date of the appellant's employment as broadcaster by the German State on September 18, 1939. The Court of Criminal Appeal take, I think, the same view, but since your Lordships, as I understand, think otherwise, I must set out the facts as I see them. The appellant, admittedly an American subject, but resident within this realm for some twenty-four years, applied for and obtained a passport, as a British subject, in 1933. This document continued to be effective for five years, and was renewed in 1938 and again on August 24, 1939. Extensions are normally granted for one year, and that given to the appellant followed the normal course. It would, I think, not be an unnatural inference that he used it in leaving England and entering Germany, but in fact nothing further was proved as to the appellant's movements, save that his appointment as broadcaster by the German State, dated September 18, 1939, was found in his possession when he was captured, and that at any rate by December 10, he had given his first broadcast. Nothing is known as to the passport after its issue, and it has not since been found.

My Lords, for the purpose of establishing what the learned judge's ruling was, I think it necessary to quote his own words to the representatives of the Crown and of the prisoner before they addressed the jury. They are as follows[45]: "I shall direct {*377} "the jury on count 3" (the only material count) "that on August 24, 1939, when the passport was applied for, the prisoner beyond a shadow of doubt owed allegiance to the Crown of this country and that on the evidence given, if they accept it, nothing happened at the material time thereafter to put an end to the allegiance that he then owed. It will remain for the jury, and for the jury alone, as to whether or not at the relevant dates he adhered to the King's enemies with intent to assist the King's enemies. If both or either of you desire to address the jury on that issue, of course, now is your opportunity." After that ruling both counsel proceeded to address the jury, the defence submitting that the appellant had not adhered to the King's enemies, the Attorney-General that he had. No other topic was touched upon by either of them, and in particular no argument was addressed to the question whether the appellant still had the passport in his possession and retained it for use or whether he still owed allegiance to the British Crown.

After counsel's address to the jury the learned judge summed up, and again I think I must quote some passages from his observations. One such is[46]: "Under that count [i.e. count 3] there are two matters which have got to be established by the prosecution. ... beyond all reasonable doubt. ... The first thing that the prosecution have to establish is that at the material time the prisoner, William Joyce, was a person owing allegiance to our Lord the King. Now, in my view, I have already intimated. ... the conclusion that have reached as a matter of law is, if you as a jury accept the facts which have been proved in this case beyond contradiction - of course you are entitled to disbelieve anything if you wish - if you accept the facts which have been proved and not denied in this case, then at the time in question, as a matter of law, this man William Joyce did owe allegiance to our Lord the King, notwithstanding the fact that he was not a British subject at the material time. Now, members of the jury, although that is a matter for me entirely and not for you, I think it will be convenient if I explain quite shortly the reasons by which I have arrived at that view, partly for your

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[44] [1917] 1 K. B. 98.

[45] Notable British Trials, Trial of William Joyce, p. 204.

[46] Notable British Trials, Trial of William Joyce, pp. 214, 215.

assistance, explanation, and perhaps for consideration hereafter in the event of this case possibly going to a higher court." Again, he says[47]: "None the less I think it is the law that if a {*378} man who owes allegiance by having made his home here, having come to live here permanently, thereby acquiring allegiance, as he undoubtedly does, if he then steps out of this realm armed with the protection which is normally afforded to a British subject - improperly obtained, it may be, but none the less obtained - . ... using and availing himself of the protection of the Crown in an executive capacity which covers him while he is abroad, then in my view he has not thereby divested himself of the allegiance which he already owed." Later, he says[48]: "So between August 24 and September 18, 1939, armed with a British passport, he had somehow or another entered Germany. Now, members of the jury, thereafter up until the 2nd July, 1940, when his passport ran out, he remained under such protection as that passport could afford him during his stay in Europe." Once again, he says(2): I do not think that I am in any way extending the principles of the law in saying that a man who in this way adopts and uses the protection of the sovereign to whom he has already acquired an allegiance remains under that allegiance and is guilty of treason if he adheres to the King's enemies. Members of the jury, I accordingly pass from that aspect of the matter; that is my responsibility. I may be wrong; if I am I can be corrected. My duty is to tell you what I believe to be the law on the subject and that you have to accept from me, provided you believe those facts about the passport, going abroad and so forth. If you do not believe that you are entitled to reject it and say so, because you are not bound to believe everything, but if you accept the uncontradicted evidence that has been given, then in my view that shows that this man at the material time owed allegiance to the British Crown. Now, if that is so, then the matter passes into your hands, and from now onwards I am dealing with matters which are your concern and your concern alone, with which I have got nothing to do; they are matters of fact, and the onus of proving those facts is upon the prosecution from first to last, and it never shifts. Now what have they got to prove? They have got to prove that during this period, as I have already indicated, this man adhered to the King's enemies without the realm, namely, in Germany." The learned judge then refers to a broadcast, of {*379} which there was uncontradicted evidence that it had been made before December 10, 1939, to the prisoner's engagement as a German broadcaster to Britain, and to the prisoner's statement which was put in evidence by the Crown and from which I need only quote the words: "Realizing, however, that at this critical juncture I had declined to serve Britain, I drew the logical conclusion that I should have no moral right to return to that country of my own free will and that it would be best to apply for German citizenship and make my permanent home in Germany." After reading the statement the learned judge added[49]: "I think that is the whole of the very short material upon which you have to come to the conclusion as to whether or not it is proved to your satisfaction beyond all reasonable doubt that during the period in question this man adhered to the King's enemies, comforted and aided them with intent to assist them and that he did so voluntarily. Those are the matters which you have to consider."

My Lords, I have read and re-read the summing up as a whole and I think I have quoted all the material passages from it. Whether I pay regard to its general import or confine myself to the particular passages set out above, I cannot read the words of the learned judge as doing other than ruling that in law the appellant continued to owe allegiance to His Majesty on September 18, 1939, on December 10, 1939, and indeed until July 2, 1940, and leaving to the jury only the question whether during this period the appellant adhered to the King's enemies. The passage in the summing up containing the words "provided you believe those facts about the passport, going abroad and so forth" in my opinion merely instructed the jury that they had to be satisfied that the accused man did obtain a renewal of his passport, did go abroad, and did make a statement, but that if they were so satisfied, then in law the prisoner continued to owe allegiance at all material times after he left this country. If it means more than this, I should regard it as a totally inadequate direction as to what must be proved in order to show that the allegiance continued after he left this country. But I do not think it does mean more than I have indicated. As I have stated, the renewal of the passport on August 24, 1939, was, in my view, evidence from which a jury might infer the continuance of the duty of allegiance. What the prosecution have to show is that that duty continued at least {*380} until September 18. The learned judge, as I see it, regards the renewal as proving conclusively that the duty continued until the passport ceased to be valid, unless some action on the part of the Crown or the appellant was proved which would put an end to its protection. The Court

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[47] Ibid. 222, 223.

[48] Notable British Trials, Trial of William Joyce, p. 219.

[49] Notable British Trials, Trial of William Joyce, p. 225.

of Criminal Appeal, in my opinion, took the same view. Their words are[50]: "We have to look at the evidence in this case, and upon that evidence to decide whether the trial judge was right or wrong in holding as a matter of law that on September 18, 1939, and between that date and July 2, 1940, this appellant did owe allegiance to the King. We agree with Tucker J. that the proper way of approaching that question is to see whether anything had happened between August 24 and September 18 to divest the appellant of that duty of allegiance which he unquestionably owed at the earlier of those dates." This ruling, as I see it, can only mean that the appellant's duty of allegiance remained in force until July 2, 1940, unless it was shown by him or on his behalf that something had occurred to put an end to that duty. It puts the onus on him to show some action terminating that obligation. The passport was never found again, and he may have used it only to gain admittance to Germany and may then have discarded it. Indeed, his statement, if believed, indicates that this was his object, and the mere fact that the renewal was for a year proves nothing, since, as was proved in evidence, that is the normal period of extension. There is no evidence that he kept it for use on or after September 18. If I thought that the obtaining of the passport on July 2 proved in law that the appellant retained it for use at least until September 18, unless he was shown to have withdrawn his allegiance, I should accept this ruling. But I do not think it correct. It could only be supported on the ground that allegiance continues until the appellant shows that it is. terminated. The Attorney-General supported this contention by a reference to Archbold's Criminal Practice (31st ed.) (1943), p.330, where it is stated that if a matter be within the knowledge of the accused and unknown to the Crown the onus of proof is cast upon the former. For this proposition the case of R. v. Turner[51], is said to be an authority. But that case has been explained as dependent upon the special provisions of the game laws and as being, therefore, not of general application. The true principle is, I think, set out in Phipson on Evidence (8th ed.), p. 34, and Best on Evidence (12th ed.), p. 252, and is {*381} explained by Holroyd J. (himself a party to the judgment in R. v. Turner[52]), in R. v. Burdett[53]: The rule in question, he says, "is not allowed to supply the want of necessary proof, whether direct or presumptive, against a defendant of the crime with which he is charged; but when such proof has been given it is a rule to be applied in considering the weight of evidence against him, whether direct or presumptive, when it is unopposed, unrebutted, or not weakened by contrary evidence which it would be in the defendant's power to produce, if the fact directly or presumptively proved were not true." If this be the true principle, the failure of the prisoner to give evidence as to his dealing with the passport goes to increase the weight of the evidence against him, but does not make the evidence of his applying for and receiving it proof conclusive in law that he continued to retain it for use or at all. That he received it may be some proof to go to the jury that he retained it, but it is no more; it is not a matter upon which a court is entitled to rule that a jury must draw the inference that he retained his allegiance. Indeed at one point in his argument the Attorney-General used language which, in my view, accepted this as the true principle when he said: "I put the passport merely as evidence of the existence of protection. If he" (i.e., the accused) "discarded it on his return that might make a difference." To this observation I would merely add that the renewal of the passport was at best but some evidence from which a jury might infer that the duty of allegiance was still in existence. Unless, however, the accused man continued to retain it for use as a potential protection, the duty of allegiance would cease, and it was for the jury to pronounce upon this matter.

I do not understand your Lordships to rely upon the proviso to s. 4 of the Criminal Appeal Act, nor do I think it could be said that no substantial miscarriage of justice had occurred, if I am right in considering that the matter should have been left to the jury. The test has been laid down by your Lordships' House to be whether a reasonable jury properly directed must have come to the same conclusion. In the present case a reasonable jury properly directed might have considered that the allegiance had been terminated. Against the mere receipt of the passport there must be set the fact that its possession was at least desirable if not necessary to enable the accused man to proceed to Germany from this country, the fact that it was not {*382} found in his possession again nor anything further known of it, his statement as to his intention of becoming naturalized in Germany and his acceptance of a post from the German State. At any rate these were matters for a jury properly directed to consider. They were not directed on them and, as I have stated in my view they were told that the matter was one of law and not for them.

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[50](1945) 173 L. T. 377, 382.

[51](1816) 5 M. & S. 206.

[52](1816) 5 M. & S. 206.

[53](1820) 4 B. & Ald. 95, 140.

My Lords, the question of the extent to which an alien long resident in this country continues to owe allegiance after he has left it and whether the request for an acceptance of a passport makes the duty of allegiance still owed until the protection of that passport ceases by effluxion of time or at least for some period after its issue is, and has been certified to be, a point of law of exceptional public importance. One matter to be decided in solving that question is the boundary line between the functions of a judge and those of a jury. Apart from this, the principle that questions which are rightly for the jury should be left to them and that a proper direction should be given is, as I think, also of great public importance. The one matter concerns this country only in the exigencies of war, though then no doubt it is of vital importance: the other is a necessary element in the true administration of the law in all times of peace and war. If the safety of the realm in war time requires action outside the ordinary rule of law, it can be secured by appropriate measures such as a Defence of the Realm Act, but the protection of subject or foreigner afforded through trial by jury and the due submission to the jury of matters proper for their consideration is important always, but never more important than when the charge of treason is in question. For these reasons I would myself have allowed the appeal.

Appeal dismissed.

Solicitors for appellant: Ludlow & Co.</T>

Solicitor for the Crown: Director of Public Prosecutions.