

LORD JOHNSTON—On the question of the demand of Mr Nicol (Thow's trustee) to be relieved of his cautionary obligation at the expense of the heritable subjects embraced in the cash-credit bond, I entirely agree with the Lord Ordinary and adopt all that he says in his judgment on this, the only point in the case in which that judgment has been submitted for review. If I add anything, it is merely to say that I think the principles enounced by Lord Eldon in *Craythorne v. Swinburne*, 14 Ves. 160, 9 R.R. 264, are precisely applicable to the present case. The question is, What was the contract? Was it the intention of the Young family to give their property as a co-surety, or only as a surety for the cautioners? The deed must speak for itself. And the terms of the deed are incompatible with anything but one answer, viz., that the property was conveyed in security of the obligation undertaken by the principal debtor and his two cautioners. To hold otherwise would be precisely to reverse the provisions of the deed, and either to make the property conveyed in security the primary cautioner for the principal debtor and to bind his cautioners merely as guarantors of its sufficiency for this primary obligation, or at least to make the property, so to speak, co-cautioner with the cautioners. There is just as much to say for the one contention as for the other, and just as little. I do not, as at present advised, think that any evidence could be admitted so to turn the deed upside down, and at least I should desire to reserve my opinion on that subject. But if it were competent, Mr Thow's trustee has entirely failed to adduce it.

LORD M'LAREN was absent.

The Court adhered.

Counsel for Pursuers and Real Raisers, and Claimants (Respondents) Young and Others—M'Clure, K.C.—Kemp—C. H. Brown. Agents—A. & A. Campbell, W.S.

Counsel for Claimant Nicol (Thow's Trustee) (Reclaimer)—Wilson, K.C.—Lippe. Agents—Henry & Scott, W.S.

Friday, January 28.

FIRST DIVISION.

[Lord Skerrington, Ordinary.]

BOSVILLE v. LORD MACDONALD AND ANOTHER.

Personal Bar—Mora—Res judicata—Service of Heirs—Parent and Child—Legitimation per Subsequens matrimonium—Declarator of Grandfather's Legitimacy.

In an action of declarator of the legitimacy of the pursuer's grandfather, *per subsequens matrimonium* in 1803, raised in 1909, held that, whatever effect there might be upon the *onus* of proof, the pursuer was not barred (1) by *mora*, or (2) by the fact

that a litigation between ancestors of the present parties with regard to the possession of the family estates, involving this question of legitimacy, had been compromised by the parties by a private Act which contained no declaratory statement on the point, but settled the estates in the way they would have gone if illegitimacy had been established, or (3) by a younger brother of the grandfather having in 1833 obtained services to their father, as "eldest lawful son and nearest and lawful heir of tailzie and provision" and as "eldest lawful son and nearest and lawful heir of line," which services had remained unchallenged.

On 1st June 1909 Alexander Wentworth Macdonald Bosville of Thorpe Hall, near Bridlington, Yorkshire, raised an action against the Right Honourable Ronald Archibald (sixth) Lord Macdonald of Slate, in the Peerage of Ireland, residing at Armadale Castle, Isle of Skye, and also against the Honourable Godfrey Evan Hugh Macdonald, also residing at Armadale Castle, Lord Macdonald's *curator bonis*, in which he sought to have it found and declared "that by the marriage of the Honourable Godfrey Macdonald, afterwards third Lord Macdonald, to Louisa Maria La Coast, on or about 29th May 1803, or such other date as our said Lords may determine to have been the true date of such marriage, their eldest son Alexander William Robert Macdonald, afterwards Bosville, the pursuer's grandfather, who was born on or about 12th September 1800, was legitimated *per subsequens matrimonium*, and that the pursuer is the great-grandson and nearest and lawful heir-male of the body of the said Honourable Godfrey Macdonald."

The defenders pleaded—“(1) The pursuer's averments being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed. (2) The pursuer being barred by *mora*, *taciturnitas*, and acquiescence from insisting in the present proceedings, the defenders should be assoilzied. (3) In respect that the questions raised in the present action have been the subject of transaction and adjudication, as condescended on, the pursuer is barred from reopening the same. (4) The pursuer's material averments being unfounded in fact, the defenders are entitled to absolvitor. (5) The said Godfrey, third Lord Macdonald, having been a domiciled Englishman at the date of his marriage in 1803, the pursuer's grandfather was not legitimated *per subsequens matrimonium*, and the defenders should be assoilzied. (6) The decree of service in favour of the father of the defender Lord Macdonald, as eldest lawful son and nearest and lawful heir of the said Godfrey, third Lord Macdonald, standing unreduced, and the same being no longer open to challenge in respect of the Statute 1617, c. 12, the defenders are entitled to absolvitor.”

The facts giving rise to the action are narrated in the opinion (*infra*) of the Lord Ordinary (SKERRINGTON), who on

10th December 1909 pronounced the following interlocutor—"Dismisses the action as incompetent in so far as it concludes to have it found and declared that the pursuer is the great-grandson and nearest and lawful heir-male of the body of the Honourable Godfrey Macdonald (afterwards the third Lord Macdonald), and decerns: *Quoad ultra* repels the first, second, third, and sixth pleas-in-law for the defenders; allows the parties a proof of their averments as to the legitimacy of Alexander William Robert Bosville, eldest son of the said Godfrey, third Lord Macdonald, and to the pursuer a conjunct probation, and appoints said proof to proceed on a day to be afterwards fixed."

Opinion.—" . . . [After narrating the conclusions of the summons] . . . The pursuer and the defender are admittedly descended from a common ancestor, the said Godfrey, third Lord Macdonald. Alexander, the eldest son of this Godfrey, was born before the marriage of his parents and was the grandfather of the pursuer. The younger son, Godfrey, afterwards the fourth Lord Macdonald, was born after the marriage of his parents and was the father of the defender, the sixth Lord Macdonald. The legitimacy of the eldest son Alexander depends upon whether his father was a domiciled Scotsman when he married Alexander's mother in 1803. The defender's *curator bonis* naturally objects to entering on an inquiry which can be of no advantage to his ward, and which involves a proof as to the domicile of the third Lord Macdonald at the time of his marriage upwards of one hundred years ago. He further points out that about the year 1843 this very question was the subject of litigation between Alexander, the eldest son of the third Lord, and his younger brother Godfrey, the fourth Lord. After some years of litigation the parties came to the conclusion that the domicile of the third Lord Macdonald at the date of his marriage in 1803 'cannot at this distance of time be satisfactorily ascertained, and it will become from time to time more difficult to prove the same.' They accordingly petitioned for a private Act of Parliament in order that their respective rights and titles to certain estates in Yorkshire and in Scotland respectively 'should be declared and fixed as they have hitherto been and now are possessed or enjoyed by them respectively.' These quotations are taken from the preamble of the Act, which contains a full history of the whole matter. The Act is entitled 'An Act to vest certain estates in the County of York in England in Alexander William Robert Bosville and Godfrey Wentworth Bayard Bosville, and in Skye and North Uist in Scotland in the Right Honourable Godfrey William Wentworth, Lord Macdonald, and to enable the said Lord Macdonald to sell parts of the said estates in Scotland for the payment of debts and for other purposes.' The Royal Assent was given on 22nd July 1847.

"The Yorkshire estates above referred to were at the date of the Act vested in

the testamentary trustees of William Bosville, who died in 1813, and who was a maternal uncle of the third Lord Macdonald. They were held to the use of the testator's nephew (afterwards the third Lord) during his life, and after his decease to the use of his eldest son Alexander, and his issue, and in default of such issue, to the use of the other sons of the third Lord severally and successively, according to their respective seniorities in tail. The second codicil contained a shifting clause to the effect that if the said Alexander should become actually entitled to the possession of the estates in Scotland above referred to, the English estates should devolve upon the next younger son of the third Lord as if Alexander and his issue had all died. The Scottish estates consisted of the lands and barony of Macdonald, which were strictly entailed, and of certain other lands held in fee-simple.

"The third Lord Macdonald succeeded to the peerage and to the Scottish estates in 1824, and possessed them along with the English estates until his death in 1832. Thereupon the peerage devolved according to Irish law upon Godfrey, as the eldest son who was born after the marriage of his parents. Alexander, who was in fact the eldest son, entered into possession of the English estates, which he could do only on the footing that he was illegitimate, according to the law of Scotland, and therefore incapable of succeeding to the Scottish estates. He also assumed the name of Bosville. The younger brother, Godfrey, the fourth Lord Macdonald, served as eldest lawful son and nearest and lawful heir of line, and also of tailzie and provision to his father, the third Lord, and made up titles to the Scottish estates, and possessed them on the footing that he was the eldest legitimate son of his father. The explanation of all this is to be found in the following passage of the preamble, which I regard as the joint statement of both brothers:—'And whereas the said Alexander William Robert Bosville and Godfrey William Wentworth, Lord Macdonald, in so far as aforesaid, respectively taking up their succession to, and possession of, the said respective estates in the county of York and in Scotland, did so on the footing that the domicile of the said Godfrey, Lord Macdonald, at the time of his marriage with the said Louisa Maria La Coast, was in England, in consequence whereof the said Godfrey William Wentworth, Lord Macdonald, was his eldest lawful son, and as such entitled to succeed to the said settled or entailed estates, and also the said fee-simple or unentailed estates in Scotland, and the event did not happen on which the shifting clause in the said second codicil was to take effect, and ever since such marriage it has always been considered that the said Godfrey, Lord Macdonald's domicile at the date thereof was in England, and the rights and interests of all parties concerned in the said several estates respectively have been regulated on that footing, but doubts have lately, for the first time, been suggested, as to the

domicile of the said Godfrey Lord Macdonald, at the time of his aforesaid marriage, and the same cannot at this distance of time be satisfactorily ascertained, and it will become from time to time more difficult to prove the same.'

"More than ten years after the death of the third Lord Macdonald it occurred to the fourth Lord Macdonald, or to his creditors, that it would be for their interest to prove that Alexander Bosville was legitimated by the marriage of his parents in 1803, in which event the fourth Lord Macdonald would have to denude of the Scottish estates in favour of his elder brother, but, on the other hand, would be entitled to the estates in England. Probably counsel had advised that the English estates could be made available for payment of debt more easily than the Scottish estates. Accordingly in 1843 an action was brought in England in name of the fourth Lord Macdonald for the purpose of ejecting Alexander Bosville from the possession of the English estates. In 1844 a further suit was commenced in Chancery between the said parties, in which a declaration was sought that the third Lord Macdonald was a domiciled Scotsman at the date of his marriage. Both actions were opposed by Alexander Bosville, the pursuer's grandfather. The position was a strange one, as Alexander Bosville was practically asserting his own illegitimacy. After some years of litigation the parties seem to have thought that it was not for the interest of either to prosecute the actions to a final judgment, and that the best course for both was that each should for the future continue to enjoy the estates which he had possessed since the death of their father in 1832. If the younger brother had been the unfettered owner of the estates in Scotland, and the elder of the estates in England, they could have settled their dispute for themselves without the help of Parliament. But the Scottish estates were held under the fetters of a strict entail, while the English estates were vested in trustees for behoof of a series of tenants in tail. It was therefore necessary to obtain a private Act in order to secure that the agreement between the two brothers should not be open to challenge at the instance of remoter heirs. The parties at the same time took advantage of the opportunity to obtain Parliamentary sanction for certain subsidiary arrangements, such as the re-settlement of the English estates upon Alexander Bosville and his family. As regards the entailed estates in Scotland, the Act gave power to sell or borrow for payment of debt. It also authorised an entail of the lands held in fee-simple.

"Only two sections of the statute need be referred to. By section 1 it was enacted that the English estates should from and after the passing of the Act be vested in a trustee for behoof of Alexander Bosville and his family, free from any claim or demand at the instance of Lord Macdonald or his heirs, or the heirs of entail succeeding to the lands and barony of Macdonald

under, or on account of, the shifting clause contained in William Bosville's second codicil, or on any other account or pretence whatever, and also discharged of all the uses and trusts of the said William Bosville's will and codicils. By section 2 it was enacted that the lands and barony of Macdonald, and also the unentailed estates, were vested in Lord Macdonald under and in virtue of the entail, charter, seisins and other title-deeds of the same respectively, free from any claim or demand at the instance of Alexander Bosville and his son or either of them or their respective heirs on any account or pretence whatever. The statute contains no enactment as to the legitimacy of Alexander Bosville, nor does it purport to decide what was the domicile of the third Lord Macdonald in 1803. The defender alleges that 'it was intended and the parties desired to include in the Bill a declaration that the said Godfrey third Lord Macdonald was a domiciled Englishman, but owing to technical difficulties, which prevented the introduction of such a declaration into the Bill, this was departed from.' This averment, if true, is in my opinion irrelevant."

"The pursuer states that he makes no claim to the Scottish estates settled by the said Act or to the Irish peerage. But he adds that he 'desires to have the legitimacy of his grandfather declared and to vindicate such other rights as may have descended to him as the great-grandson and nearest and lawful heir-male of the body of the said Godfrey third Lord Macdonald.' Accordingly, if the present process were a petition for service, the pursuer would be in much the same position as the petitioner in the case of *Moncreiff v. Moncreiff*, 1904, 6 F. 1021, who was held entitled to prosecute a petition for service as heir-male in general to a person who died in 1570, although, to use the words of Lord Kinnear, he did not disclose 'any particular interest to obtain it excepting such interest, whatever it may be, as may be involved in the establishment of the *jus sanguinis*.'

"The pursuer's counsel moved for a proof as to the domicile of the third Lord Macdonald at the time of his marriage in 1803. Counsel for the defender maintained that the pursuer was barred on various grounds from suing the action, and he also argued, although there is no plea to that effect, that the action was incompetent. As regards the conclusion for declarator that the pursuer's grandfather was legitimated, I agree with the defender's counsel that one who seeks to establish the legitimacy of some other person is bound to show some interest entitling him to bring such an action. In my opinion the pursuer has an interest to establish the legitimacy of his grandfather, in order to clear the way for serving as heir-male to a remoter ancestor. Possibly the legitimacy question might be determined incidentally by the Sheriff of Chancery, but the present action is, in my opinion, a competent and convenient way of trying the question. On the other hand, I am of opinion that

the pursuer is not entitled to ask the Court of Session to declare that he is the nearest and lawful heir-male of the body of his great-grandfather, but that the proper judge to pronounce such a decree is the Sheriff of Chancery. No doubt, where a finding or declarator of heirship is necessary in order to enable the Court of Session to decide some other question which is competently before it, the Court is entitled, if it sees fit, to try the question of heirship without requiring the production of a service. Thus, in the recent competition for the office of Hereditary Standard Bearer of Scotland—*Lauderdale v. Wedderburn*, 1908 S. C. 1227—their Lordships of the First Division gave the defender an opportunity to prove, if he could, that he was the heir-male of a person who died about three hundred years ago, and did not require him to produce a service. In the present case, on the other hand, there is no question before the Court which makes it necessary to decide whether the pursuer does or does not possess the character of heir which he claims. I accordingly dismiss this conclusion as incompetent.

“As regards the defender’s pleas in bar of the action, I begin with the third, viz. —‘In respect that the questions raised in the present action have been the subject of transaction and adjudication as condescended on, the pursuer is barred from reopening the same.’ It is inaccurate to suggest that the legitimacy of Alexander Bosville was ever the subject of ‘adjudication.’ On the contrary, he and his younger brother deliberately refrained from obtaining a judgment. It may, however, be said that there was a transaction or compromise between the brothers. Although the Act simply perpetuated the state of possession which existed when the fourth Lord Macdonald began the litigation, each brother gave up something, viz., a possible claim to the other’s estate, and obtained in return a new and statutory title to the estates which he was actually enjoying at the time. I am of opinion that the transaction or agreement between the brothers had reference to the enjoyment of the estates and to nothing else. In a sense, it is true that the statute proceeded on the footing that Alexander Bosville was illegitimate, because it settled the English and the Scottish estates respectively in the same manner as the law would have settled them if it had been decided in the litigation that he was illegitimate. I cannot, however, accept the suggestion that by the operation of personal bar Alexander Bosville was, and his descendants are, in the same position as if he had gone on with the litigation and had won his case, or as if he had admitted that he was illegitimate and a clause to that effect had been inserted in the statute. The defender’s counsel did not maintain that Alexander Bosville and his heirs were for ever debarred from proving his legitimacy if that should be necessary for the purpose of vindicating his or their right to property not in the contemplation of parties at the time when they petitioned for the Act. He argued, however, that the

pursuer was barred from reopening the question of legitimacy, seeing that no change of circumstances had taken place since 1847, and that the pursuer had no interest to obtain a decision in favour of the legitimacy which was not possessed in a higher degree by Alexander Bosville himself. I admit that either brother would have had a just cause of complaint against the other if immediately on the Bill becoming law the other had insisted on obtaining a judgment as to Alexander’s legitimacy. Such conduct would have been contrary to the representation which I find in the preamble, and for which both brothers were equally responsible, to the effect that it was not intended to go on with the litigation. But a representation of intention as distinguished from a representation of an existing fact, does not give rise to a plea of bar. I accordingly repel the defender’s third plea on the understanding that the facts which give rise to it are admitted. Neither party asked for a proof with reference to it.

“The defender’s second plea-in-law depends upon the same series of facts, and is as follows:—‘The pursuer being barred by *mora*, *taciturnitas*, and acquiescence, from insisting in the present proceedings, the defenders should be assolizied.’ If this were an ordinary action it would, I think, be conclusive that sixty years ago the same question had been litigated between the proper parties, and that they had deliberately decided not to take a judgment. In the present case, however, as I have already indicated, the declarator of legitimacy is incidental to the pursuer’s right to establish his *jus sanguinis* by means of a service. Upon the principle that *juri sanguinis nunquam prescribitur*, I am of opinion that, unless some other person has been served as nearest and lawful heir-male of the body of the third Lord Macdonald, the pursuer is entitled to take the appropriate steps to establish his propinquity. In repelling this plea I decide nothing as to the effect which ought to be given to *mora* and *taciturnitas* in weighing the evidence as to Alexander Bosville’s legitimacy.

“The defender’s fourth and fifth pleas-in-law go to the merits, but the sixth is one of bar and is founded upon three special retours obtained by the fourth Lord Macdonald in 1833 as ‘eldest lawful son and nearest and lawful heir of tailzie and provision,’ and also as ‘eldest lawful son and nearest and lawful heir of line’ to his father respectively. This plea refers to the Act 1617, cap. 13, but it is unnecessary to consider the effect of this statute, seeing that counsel on both sides agreed that these retours, having stood for more than twenty years, are now unchallengeable. The only question is whether they would debar the pursuer from being served as nearest and lawful heir-male of the body of the third Lord Macdonald. If that question were answered in the affirmative, I should dismiss the action upon the ground that the pursuer would in that case have no interest to establish the legitimacy of his grandfather.

“The argument of the defender’s counsel depended upon three propositions:—(1) a special service includes a general service in the same character; (2) a general service, so long as unreduced, precludes any other person from being served heir in general in the same character to the same ancestor; and (3) a service as ‘nearest and lawful heir of line’ or as ‘heir of tailzie and provision’ by one who is described in the service as the ‘eldest son’ establishes by implication that the party so serving is also the heir-male. In my opinion the first two propositions are sound, but the third is erroneous. Prior to the Conveyancing (Scotland) Act, 1874 (37 and 38 Vict. cap. 94, sec. 11), it was, as a general rule, essential that an heir should serve in his proper character. In exceptional cases, however, where it was apparent on the face of the retour that the heir might if he had chosen have served in the proper character, the Court stretched a point to support the title. See *Haldane v. Haldanes*, 1766, Mor. 14,443. But this case did not decide that a general service as eldest son and heir of line made it incompetent for anyone else to serve as heir-male. In view, however, of the judgment of the House of Lords in the case of *Cathcart v. Cassillis*, 1807, 2 Ross’s Leading Cases, p. 525, I do not think that *Haldane* is good law. Upon that point I respectfully agree with the opinion of Lord M’Laren, as expressed in the note to the third edition of his book on Wills and Succession, vol. i., pp. 565-6. The true view of the services in question is that they prove conclusively that the fourth Lord Macdonald was heir of line and also heir of tailzie and provision to the third lord, but that they do not establish that he was also the eldest lawful son of his father. As Lord Eldon explains in his opinion in *Cathcart v. Cassillis*, the relationship is no part of the verdict itself, but is one of the facts which led the jury to return the verdict.

“I am therefore of opinion that there must be a proof as to the legitimacy of Alexander William Robert Bosville, the eldest son of the third Lord Macdonald; but I hope that the parties will be able to agree on a minute of admissions.”

The defender reclaimed, and at the discussion in the Division the pursuer intimated that he did not insist on the first conclusion of the summons, and to meet a possible difficulty as to want of interest, suggested from the Bench, he amended his record to the extent of averring an interest to vindicate a Scottish baronetcy

Argued for the defender and reclamer—The question of whether pursuer’s grandfather was legitimate depended on whether his father Godfrey was a domiciled Scotsman at the time of his marriage, and the proof allowed was therefore a proof of his domicile. Pursuer was, however, barred from seeking to prove this. The *de quo queritur* of the private Act of Parliament which settled the estates in 1847 was exactly this question of legitimacy and domicile. There was no change of circumstances

since 1848 in the nature of *res noviter*. Suppose pursuer’s grandfather had got the English estates on the footing that he was illegitimate, he could not be heard afterwards in any Court to maintain his legitimacy. Equally would it not be open to pursuer to do so, seeing that he had enjoyed the benefits of his grandfather’s illegitimacy. The plea of *mora* helped this argument—*Assets Company, Limited v. Bain’s Trustees*, March 18, 1904, 6 F. 692, 41 S.L.R. 517, *per* Lord Trayner, p. 739. The present case came under the second and third of Lord Trayner’s requirements, viz., known claim and prejudicial delay, because delay might be very prejudicial and oral evidence impossible—*Rocca v. Catto’s Trustees*, November 2, 1876, 4 R. 70, 14 S.L.R. 40. There must be some explanation as to silence and taciturnity to elide the plea. The pursuer had not qualified a sufficient interest to pursue the action. He might wish to use his decree as an adminicle of evidence in the Court of Chancery, but that Court had already decided the point. The pursuer’s claim was barred by the service of G. W. W. Macdonald in 1833, since the judgment sought by the pursuer ran exactly counter to that. This service was now fortified by the vicennial prescription. The fact that defender’s ancestor was served as eldest lawful son without challenge by his brother helped the plea of *mora*—*Moncreiff v. Moncreiff*, July 20, 1904, 6 F. 1021, 41 S.L.R. 850; *Cathcart v. Cassillis*, 2 Ross’ Leading Cases, 525. It was quite true that service as heir of line did not bar service as eldest heir-male, but the former was obtained in the character of eldest son, though the Lord Ordinary says that was not part of the verdict. Under the Titles to Land (Consolidation) Scotland Act 1868 (31 and 32 Vict. cap. 101), 27 *et seq.*, 33, 35, 41, competing petitions of service might be removed to the Court of Session and tried by jury. But here the Court of Chancery was the exclusive and appropriate *forum*. The test was whether the Court of Session action was a thing by itself or merely an incident to something else. The Court would not try mere questions of sentiment but of patrimonial interest. The pursuer’s ancestor had stood aside and put in no competing petition of service in 1833. Pursuer now sought to destroy the verdict of 1833, because that was the effect of what he sought for. This brought the case very near that of *Rocca, cit. sup.* Accordingly here there was as nearly as possible a perfect case of *mora*, taciturnity, and acquiescence—*Campbell v. Campbell*, July 16, 1867, 5 Maoph. (H.L.) 115, 4 S.L.R. 214. The Lord Ordinary was wrong in saying that the service of 1833 did not establish the character of the relationship. In the case of *Cathcart v. Cassillis, cit. sup.*, the fact of relationship was not *per se* included in the verdict, but was merely something which required to be proved in order to lead up to the verdict. The verdict established heirship but not relationship. In the present case, however, the fact of the relationship was in the verdict. The case could only go to

proof on the footing that it must traverse the verdict of 1833 taken without opposition, and that though the vicennial prescription had made it unassailable—Scots Acts, 1617 (cap. 13). This was not a question of pursuer's status but of the status of somebody else, and the pursuer had averred no sufficient interest to proceed. In *Munro v. Munro*, 10th August 1840, 1 Rob. App. 492, founded on by pursuer, it was a true and proper question of status. If pursuer went the full length you could never have *res judicata* on a question of status. This, however, was not true. *Res judicata* on a question of status would bind not only the parties but all deriving right from them. Parties could settle a dispute as to status so as to bar future claims, and they had done so here. It was not consistent with the good faith of a bargain that parties having got benefits should turn round and repudiate the bargain.

Agued for the pursuer and respondent—The cases of *Countess of Dalhousie v. M'Douall*, August 10, 1840, 1 Rob. App. 475, and *Munro v. Munro, cit. sup.*, settled that if the domicile of the husband was Scotch it did not matter where the marriage was. Following on these cases, it occurred to the fourth Lord Macdonald that he could turn his elder brother out of the English estates. The answer of Alexander to these proceedings was to take up no definite attitude but to sit tight. The private Act did not touch the question of legitimacy or of domicile. But while it was possible to contract as to the patrimonial consequences of status, it was impossible to contract as to status. This was a competent *forum*. Originally questions of status belonged to the Commissary Court, but by 11 Geo. IV and 1 Will. IV, cap. 69, sec. 33, they were transferred to the Court of Session. Prior to that date the Commissary only could deal with legitimacy, just as the Sheriff of Chancery only could deal with service—*Ersk.*, i, 5, 26, and iii, 8, 66; *Macadam v. Walker*, March 4, 1807, Mor. *sub voce* Proof, App. iv; *Fenton v. Livingston*, March 27, 1856, 18 D. 865. In the latter case the plea of *lis alibi* to a declarator of bastardy on account of proceedings in the Court of Chancery was repelled. It was not necessary for pursuer to aver patrimonial interest—*Moncreiff v. Moncreiff, cit. sup.* Pursuer was not asking a return of service, but only a verdict of the old Commissary Court as to legitimacy. He was entitled to a declarator of his own legitimacy, also of his father's. Why not of his grandfather's, the only difference being that the further back he went the greater was the *onus* imposed on him. Technically there was nothing to prevent an action of declarator of descent from William the Conqueror. The interest, however, was less the further back one went. The fact that pursuer averred a desire to vindicate certain rights was sufficient qualification of his interest. Suppose pursuer merely desired to vindicate the Scots baronetcy, no service would be required to vest it in him, and

pursuer's legitimacy would be the only question. There was nothing in the private Act which did not leave the matter open. Status was not *in commercio* and could not be a subject of transaction—*Dunbar v. Sinclair*, Fac. Col., Feb. 2, 1790, Mor. 7395. Domicile of origin could not be destroyed by an Act of the party—*Udny v. Udny*, June 3, 1869, 7 Macph. (H.L.) 89. It was contrary to public policy to make such matters subject of transaction. The Courts were also jealous of any attempt by parents to bastardise their children—*Tennent v. Tennent*, July 4, 1890, 17 R. 1205, 27 S.L.R. 841. Apart from this there was no evidence of any transaction in the private Act except as to the estates. As to the plea of bar by decree of service in 1833, this was an *ex parte* application to Chancery by the defender's author to be served heir in three different characters. He now sought to take these findings and to show that because there was something which was not in the *Cathcart* case, *cit. sup.*, and which had no right to be there, viz. the words 'eldest lawful son,' therefore there was bar,—Duff's Feudal Conveyancing, p. 461. There was nothing to show that defender's ancestor was ever served in the character of nearest lawful heir-male—*Cochrane v. Ramsay*, April 29, 1830, 4 W. & S. 128; *Cathcart v. Cassilis, cit. sup.*; *Campbell v. Campbell*, Jan. 26, 1848, 10 D. 461; *Mar Peerage Case*, 1875, 1 Appl. Cas. 1, *per* Lord Chelmsford, p. 22. As to *mora*, *Rocca's case, cit. sup.*, only applied to special circumstances, otherwise it was not consistent with *Bain v. Assets Company*, June 4, 1905, 7 F. (H.L.) 104, 42 S.L.R. 835. There was no acquiescence on the part of pursuer's ancestor. Delay had no effect on service, and there was abundant authority as to the *jus sanguinis* not prescribing. Delay could only increase the *onus*. It was the *jus sanguinis* which gave the right to a declarator of legitimacy.

At advising—

LORD PRESIDENT—This is an action of declarator at the instance of Alexander Wentworth Macdonald Bosville in which he seeks to have it found and declared that his grandfather Alexander William Robert Macdonald (afterwards Bosville) was legitimate. The summons also contains a conclusion to have it declared that the pursuer is the great-grandson and nearest lawful heir-male of the body of the Hon. Godfrey Macdonald (afterwards third Lord Macdonald). The action is defended by the present Lord Macdonald and his *curator bonis*.

The Lord Ordinary dismissed the action as incompetent so far as the second conclusion that this Court was, upon that conclusion, asked to perform the duty of effectuating a service, and that the proper tribunal to go to was the Court of the Sheriff of Chancery. That portion of his interlocutor has not been quarrelled before your Lordships. But as regards the other part of the action, the Lord Ordinary has repelled certain pleas for the defender and allowed

the pursuer a proof. The pleas which he has repelled are the first, second, third, and sixth. The first is the general plea of irrelevancy. The second is *mora*. The third is that the questions raised in the present action have been the subject of transaction and adjudication; and the sixth is that a decree of service in favour of the father of the defender Lord Macdonald as eldest lawful son and nearest and lawful heir of Godfrey third Lord Macdonald, standing unreduced, the defenders are entitled to absolvitor.

I have come to the conclusion that the Lord Ordinary's judgment is right, and I shall only deal with these pleas in so far as they are pleas to exclude the action.

Now the history of the matter is, in one sense, somewhat peculiar. The third Lord Macdonald formed a connection with a lady whom he afterwards married, and it is common ground between the parties that the pursuer's grandfather was born before any ceremony of marriage had been performed. The pursuer's case is that his great-grandfather, according to the flesh, having been a domiciled Scotsman, his subsequent marriage legitimated the grandfather. The defender is a son of a child who was born of the marriage after the marriage ceremony had been performed, and being in that position he is the representative of the family if the grandfather, or great-grandfather, as the case may be, namely, the third Lord Macdonald, was not a domiciled Scotsman, it being of course known that the law of the other countries of the United Kingdom is different in that respect from the law of Scotland.

Now there were certain estates, or rather there were two sets of estates in the family. There was an English set of estates and a Scottish set of estates, and there was a shifting clause in the English settlement; and the result of this was that there was a litigation started between the grandfather of the pursuer and the father of the defender Lord Macdonald, which litigation, if it had gone to a conclusion, would necessarily have determined the question now at issue. It did not, however, go to a conclusion, but instead of being prosecuted to a conclusion an Act of Parliament was got by which the succession of the estates was irrevocably regulated. That, of course, cannot be disturbed, and the pursuer does not propose in any way to try to disturb it. But he says that he has got a legitimate interest to maintain the legitimacy of his grandfather. He says he has that legitimate interest, and he also, as is clear by the conclusion of the summons which has been held incompetent, proposes, if he is successful in asserting the legitimacy of his grandfather, to serve himself as heir-male of the third Lord Macdonald.

Now I confess that for myself I think that the case of *Moncreiff*, which was decided in this Court, would be a sufficient authority to show that the pursuer had sufficient interest to make the demand that he does. But any little difficulty upon that matter I think has been put out of the way by the amendment which the

pursuer has now made upon his summons, which shows quite clearly that the result of his success may be to assert his right to a Scottish baronetcy. Accordingly, so far as the plea of irrelevancy is based upon want of interest to prosecute the action, I think it clearly fails.

Now the next plea that I take up in order is the question whether he is barred by the service which has taken place and which stands unreduced. Upon that matter I have nothing to add to the argument of the Lord Ordinary. I think it is quite clear that, as the Lord Ordinary says, the fact that there has been a service by the fourth Lord Macdonald as eldest lawful son and nearest and lawful heir of tailzie and provision and as eldest lawful son and nearest and lawful heir of line to his father does not prevent the present pursuer being served if he can make out his claim as nearest and lawful heir-male of the body of the third Lord Macdonald.

I pass from that to the third plea, which says that the questions raised in the present action have been the subject of transaction and adjudication and that the pursuer is barred from reopening the same. On this matter also I agree with what the Lord Ordinary has said, and I do not think that the Act of Parliament, which is silent upon the one moot question, can be stretched so as to include that moot question. The Act of Parliament can only speak according to its terms. It irrevocably settles the destination of the estates, but more than that it does not seem to me to do.

That leaves only the last plea, of the pursuer being barred by *mora* and *taciturnitas*. Here I feel it exceedingly necessary to accentuate what the Lord Ordinary has done. The plea as stated is a plea in bar, and in bar only, and the Lord Ordinary in repelling the plea has been very careful to say that he decides nothing as to the effect which ought to be given to the plea of *mora* and *taciturnitas* in weighing the evidence as to Alexander Bosville's legitimacy. In that remark I entirely concur, because I can see that this question of delay, and all the questions connected with it, is of the very greatest importance when it comes to the point of whether the pursuer can make out his case. I do not say anything more about that because, as the matter will have to be decided afterwards as upon the evidence, I think it very inadvisable to say very much about it at present. I only say this, that I do think that the lapse of time will put a very heavy *onus* upon the pursuer in this matter, and also that very strong conclusions may be drawn from the action of his grandfather. But so far as being a plea actually in bar, I confess I do not see how the plea can be applied, because a plea of *mora* as bar is personal bar. Now the great *mora* that has here taken place is a *mora* that is represented by years before the pursuer was born; and therefore how exactly a man can be in *mora* because he did not raise an action before he was born it was a little difficult to see. Taciturnity is even

an *a fortiori* example of the same view. On the whole matter, while I have no hesitation in rejecting it as a plea in bar, I wish in terms to reserve my opinion as to what the effect of this long lapse of time will be upon the question, how far the pursuer can make out his case.

What I have said as to the weight of these matters in proof applies equally also to the facts which will arise upon what has been called the transaction. There again, although we are repelling the plea as a plea to stop the action, we are far from deciding that the bargain which was arrived at in the Act of Parliament by the persons then alive will not have a most weighty effect in the judgment of the question. Upon the whole matter I think the Lord Ordinary's interlocutor should be affirmed.

LORD KINNEAR—I concur.

LORD JOHNSTON—I also concur.

The Court adhered.

Counsel for Defender and Reclaimer—Blackburn, K.C.—Macmillan—Maconochie. Agents—Dundas & Wilson, W.S.

Counsel for Pursuer and Respondent—Fleming, K.C.—Macphail. Agents—Tods, Murray & Jamieson, W.S.

Tuesday, February 8.

SECOND DIVISION.

[Sheriff Court at Kirkcudbright.

CARSWELL v. SHARPE AND OTHERS.

Master and Servant—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 53), sec. 13—Employer—Workman—Co-Owner of Ship Employed as Master by Managing Owner—Right of Master's Dependants to Recover Compensation from Managing Owner.

A person who owned ten sixty-fourth shares of a trading schooner was employed as master by the managing owner, and met his death while in the course of his employment. *Held*, in the absence of any proof of partnership or joint-adventure in a course of trading, that the master was a 'workman' and his dependants were entitled to recover compensation from the managing owner.

Ellis v. Ellis & Company, [1905] 1 K.B. 324, distinguished.

Question as to whether a partner employed by the partnership would be entitled to claim compensation from the partnership.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 53), sec. 13, enacts—" 'Workman' does not include any person employed otherwise than by way of manual labour whose remuneration exceeds two hundred and fifty pounds a-year . . . but

save as aforesaid means any person who has entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour, clerical work, or otherwise, and whether the contract is expressed or implied, is oral or in writing."

In an arbitration in the Sheriff Court at Kirkcudbright under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 53), between Mrs Robertina Fleming or Sharpe, widow of William M. Sharpe, master mariner, Kippford, Kirkcudbrightshire, and Mrs Janet Aitken or Sharpe, his mother, *pursuers and respondents*, and John Carswell, merchant, Dalbeattie, managing owner of the sailing schooner "Dolphin," *defender and appellant*, the Sheriff-Substitute (NAPIER) found the pursuers entitled to compensation, and at the request of the defender stated a case for appeal.

The following facts were found proved or admitted—" (1) The appellant admits— (a) that the respondents are the sole dependants of the late William Martin Sharpe, and were wholly dependent upon his earnings; (b) that William Martin Sharpe had for fully seven years prior to his death acted as master of the schooner 'Dolphin,' and that his earnings during the three years preceding his death amounted to £234, 16s.; (c) that Sharpe died in Liverpool on 7th January 1909, as the result of injuries sustained by him on board the 'Dolphin' the previous day, and while acting in the course of his employment as master thereof. (2) That the appellant was the managing owner of the 'Dolphin,' and as such managing owner, and on behalf of the part-owners, he employed Sharpe to act as master of that vessel. (3) That Sharpe owned ten sixty-fourth shares of the 'Dolphin,' and that the appellant, who owned thirty-three shares, and one other person, namely, John Tait, master mariner, Kippford, who owned twenty-one shares, were the other part-owners. (4) That the 'Dolphin' was not 'hired out,' that is, was not chartered, but was employed generally in carrying cargoes between Dalbeattie and Liverpool. The appellant generally found the cargo for the voyage from Liverpool to Dalbeattie, which was usually consigned to him for the purpose of the business of grain merchant and miller which he carried on at Dalbeattie, and Sharpe generally found the cargo for the voyage from Dalbeattie to Liverpool. . . . (6) That Sharpe performed all the duties and had all the powers of a master of such a vessel as the 'Dolphin'; that he received a fixed remuneration for his services as master; that in addition thereto, that he, the appellant, and Tait shared the profits and bore the losses made by the 'Dolphin' in proportion to the respective shares which they held."

On these facts the Sheriff held that Sharpe was simply a part-owner and master of the 'Dolphin,' and that Sharpe was not a partner of nor did he enter into a joint-adventure in a course of trading carried on by means of the "Dolphin" with the