SHEDDEN, ... APPELLANT.

PATRICK ET AL., ... RESPONDENTS.

1854.
28th Feb.
2nd, 6th, 7th, 9th, 10th, 24th, 27th, 28th, 30th, and 31st March.
3rd, 4th, 6th, 10th, and 27th April.
4th, 5th, 8th and 9th May.

Where a judgment has been obtained by fraud, and more especially by the collusion of both parties—such judgment, although confirmed by the House of Lords, may, even in an inferior tribunal, be treated as a nullity.

But the allegations of fraud and collusion must be specific, pointed, and relevant; otherwise they cannot be admitted to proof.

To set aside a judgment had by fraud, the proper course, when such judgment has been confirmed by the House of Lords, is to apply to the House for direction.

Hence it is wrong to ask the Court below, upon proof of the fraud or collusion, to set aside a judgment confirmed by the House.

Whether the House in such a case can direct an issue? *Quære.*

By the law of Scotland, legitimation *per subsequens matrimonium* operates only from the time of the marriage, not from the time of the birth.

Semble—That the ancient fiction which supposed an interchange of matrimonial consent at the moment of conception, is not sanctioned by the law of Scotland.

Semble—That the doctrine of mid-impediments is also without foundation in the law of Scotland.

Semble—That by the law of Scotland, if the mother of a bastard, instead of marrying the father of the bastard, marries another man who dies,—she can afterwards, by marrying the father of the bastard, render the bastard legitimate from the date of her second marriage, but not from the date of the bastard's birth.

Semble—Kerr v. *Malcolm*, approved of by the House—*sed quære*—see the remarks of Lord St. Leonards, *infrà*.

A child born a bastard in a foreign country not recognising

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the doctrine of legitimation *per subsequens matrimonium*, is an alien, although his putative father was a Scotchman domiciled all his life in Scotland, and although such putative father afterwards married the mother of the bastard for the express purpose of rendering the bastard legitimate.

The children of natural born subjects, who under the 4 Geo. 2, c. 21, are to be considered natural born subjects of this kingdom, must have been legitimate from their birth, and not rendered so by the subsequent marriage of their parents.

To be within the Act the child must be born of a British father; but a bastard, *filius nullius*, can have no father.

Remarks by the Law Peers on the danger which arises from the assumption by professional persons of duties which conflict with each other.

IN the year 1764, William Shedden, then a lad of seventeen, left Scotland for Virginia, where he became a clerk in a mercantile house.

In 1768 he returned to Scotland; but went again to Virginia in 1769.

In 1770 his father died, leaving him the family estate of Roughwood in Ayrshire; and about the same time he became a partner in the American business. He continued in Virginia till 1777, when he repaired to New York, and was there engaged constantly in merchandize for the remainder of his life, with the exception of a short interval spent by him in Bermuda, in 1778.

William Shedden died at New York in November, 1798; having a week before his death married a Miss Wilson, by whom he had had two children, a son (the Appellant) and a daughter.

The Appellant was born in 1793, and in 1800 was sent to Scotland for education.

On the assumption that the Appellant was illegitimate, Robert Patrick, nephew of William Shedden,

claimed the estate of Roughwood, and in October, 1799, was served heir in special to his uncle.

But the Court of Session having appointed a factor *loco tutoris* for the Appellant in respect of his minority, that officer instituted a suit for the purpose of establishing his rights. And of this proceeding we have the following account in the regular reports of the period (*a*):

JULY 1, 1803.

SHEDDAN AGAINST PATRICK.

FOREIGN.—*One whose parents were afterwards married in a country where legitimation* per subsequens matrimonium *is not recognised, does not succeed to a landed estate in this country* ab intestato, *as a lawful child.*

William Sheddan, of the city of New York in America, entered into a regular marriage (7th November, 1798), according to the law of America, with a woman who had previously borne to him two children, William and Jean. He died a few days afterwards, having executed a settlement of his American property, in favour of his children, without taking any notice of the estate of Rughwood, in Ayrshire, in which he had some time before succeeded to his father.

Dr. Robert Patrick was served heir in special (October, 1799) to his uncle, William Sheddan, in the lands of Rughwood, upon this footing, that as by the laws of America the marriage had not the effect of legitimating children antecedently born, he was nearest lawful heir.

A reduction of this service was brought by a factor *loco tutoris* appointed to William Sheddan, who, in support of his right as a legitimate son, entitled to take landed and moveable property in Scotland by descent,

Pleaded: Marriage, when celebrated according to the solemnities of the law of the country where it is contracted, is valid and effectual all the world over: Erskine, b. iii. tit. 2. § 40. This rule is applicable only to the validity of the contract; for as to its legal effects, these must be determined by the law of the country where execution is demanded; and a contract may have an effect in its execution in a foreign country, different from what it would have in the country where it was entered into; *Kinloch* against *Fullerton*

(*a*) See Fac. Coll., 1st July, 1803, by J. H. Forbes and John Jardine, Esquires, Advocates. The above report appears, from the initial F. at the end, to have been by Mr. Forbes, afterwards a judge, Lord Medwyn.

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and Company, 10th July, 1739, Clerk Home; *Wood* against *Grainger*, 24th June, 1749. Now the marriage, by the laws of America, was legal, and no power could dissolve it; and all the effects, rights, and privileges, which the different countries bestow upon married persons, or on their children, must follow from it. These depend upon the particular laws of that country where effect is to be given to it; more especially when the point at issue respects the right to a real estate: for every question of this kind must be decided by the law of the country where the real estate is situated. Now, by the law of Scotland, when a man marries the mother of a child born before marriage, *this* legitimates the child, and confers upon him all the rights and privileges which he would have inherited if his parents had been previously married; Craig, lib. 2. dieg. 13. § 16; Erskine, b. 1. tit. 6. § 52.; Bankton, b. i. tit. 5. § 54. This rule existed in the civil law, and prevailed in every country where that law was received; Voet, lib. xxv. tit. 7. § 6. A contrary practice is confined, it is believed, to England alone, and its dependencies. If, then, the legal effects of the marriage are to be decided by the law of Scotland, the children of it are to be held legitimate, although by the law of America their situation may be different.

Answered: The *status* or legitimacy of the child must be decided by the law of America, where his parents were domiciled, where he was born, and where the marriage was entered into. By that law marriage has not the effect of legitimating children antecedently born. No other jurisdiction has power to judge of the state of a citizen born within its territories, and whose parents were subject to its laws. Having once ascertained his *status* in life, by the law of the only country to whose jurisdiction he was subject, the *status* thus fixed must be received in every country which he may have occasion to visit, or in which he may afterwards acquire property. The question is not concerning the *status* of the *parents*, or the effects of that *status*, but concerning the *status* of the child; and before we can determine as to the legal effects of his *status*, the previous question is, Whether the *status* of a lawful child has been constituted? The rule, then, of ascertaining this personal quality by the law of his own country, not only is consistent with the general principles of jurisprudence, but is also highly expedient; for nothing could be more absurd than for a person to be a bastard in one country, and lawful in another, merely by passing a river, or crossing a mountain, the boundary of their respective territories.

If at the time of the marriage the father had had no real estates in Scotland, it is admitted that the child would have been a bastard; but if he afterwards purchased an estate, or obtained an heritable bond from one of his debtors, or adjudged his estate, would these operations affect the filiation of his children, and make them legiti-

mate in this country? If, again, a real estate in this country devolved to the father, or through him to his next heir *designativé*, but after his death, could the child claim this upon the plea of being legitimate, when he ought to begin with proving that he is so? *Macculloch* against *Macculloch*, 10th February, 1759.

The question was reported to the Court by the Lord Ordinary upon informations; upon advising which, and after a hearing in presence,

The Court repelled the reasons of reduction, with one dissentient voice.

Lord Ordinary, *Polkemmet*.

For Sheddan, *H. Erskine, Fletcher*.

Alt. *Solicitor-General Blair, Cathcart*.

Clerk, *Ferrier*.

From this decision the Factor, on behalf of the minor, appealed to the House of Lords; and printed cases were deposited in the usual way.

The case for the Appellant was prepared by Lord Brougham, then Henry Brougham, of the Scotch Bar, about the year 1804 (*a*); and was as follows:—

In the House of Lords.

WILLIAM SHEDDEN, only lawful son of the deceased WILLIAM SHEDDEN, of Rughwood, in the County of Ayr, some time Merchant in New York; and HUGH CRAWFURD, Esq., Merchant in Greenock, his Factor *loco tutoris* } *Appellants.*

DOCTOR ROBERT PATRICK, of Trearne, in the County of Ayr } *Respondent.*

CASE OF THE APPELLANTS.

John Shedden, of Rughwood, in the county of Ayr, had two children, who survived him; Marion, the Respondent's mother, and William, the Appellant's father. He died in 1770, and was succeeded by his son, who, being then settled as a merchant in New York, left the management of his Scotch estate to his brother-in-law, the Respondent's father.

The Appellant Mr. Shedden's father succeeds to a Scotch land estate.

William Shedden had formed a connexion with a lady of the name of Ann Wilson, by whom he had two children, viz. the

Birth of the Appellant, and subsequent marriage of his parents.

(*a*) I have it from his lordship that this was the only appeal case he ever drew. It will be read now with more curiosity than when it was composed.

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Appellant William, an infant, and Jean. Several years after the birth of these children, he entered into a regular marriage with their mother. It was celebrated according to all the forms and solemnities prescribed by the laws of the United States; and its validity has never been called in question.

Death of the Appellant's father.

Soon after his marriage, Mr. Shedden died, having previously executed a settlement of his American property in favour of the two children by his wife, and of Anabella, a daughter by a different mother. This settlement makes no mention of the land estate in Scotland; and the American property was found insufficient to pay Mr. Shedden's debts.

His settlement.

In the settlement, Mr. Shedden directs his executors to send the Appellant, his only son, to Scotland, and appoints, as his sole guardian, Mr. William Patrick, the Respondent's brother. The boy has since arrived in Scotland, and been sent to school at Dunfermline. But Mr. Patrick, finding that his brother meant to claim the estate, from motives of delicacy declined accepting the guardianship, and requested the executors to name some person, unconnected with the Respondent, to manage the Appellant's interest, and support his claim to the estate. This the executors refused to do, stating that they had no funds to defray the necessary expense; and, at Mr. Patrick's desire, the Appellant's other relations in Scotland, having held a meeting to consider of his affairs, prevailed on one of their number, the Appellant, Mr. Hugh Crawfurd, merchant in Greenock, to become his *factor loco tutoris*. A factory in favour of Mr. Crawfurd was accordingly obtained from the Court of Session.

Appointment of a *factor loco tutoris.*

The Respondent causes himself to be served heir, and the Appellant brings a reduction of the service.

After the death of the Appellant's father, the Respondent caused himself to be served heir-at-law, in special, to the deceased. The *factor loco tutoris*, in the name of the Appellant, brought an action for the reduction of this service, upon the ground that the Appellant, being the lawful son and heir of the last proprietor, was himself entitled to succeed to his father's heritable property in Scotland, to the exclusion of the Respondent and of every other person.

Proceedings in the reduction.

After the usual preliminary steps were taken, the action came before the Lord *Polkemmet*, as *Lord Ordinary*. His Lordship heard counsel at the bar, and appointed the cause to be stated in mutual memorials. Upon advising these, he made *avizandum* to the Court, and appointed both parties to give in printed informations.

Respondent's argument.

The Respondent grounded his claim to the succession upon the alleged illegitimacy of the Appellant. He maintained that the question at issue was a question of *status*, and must be decided by the law of the person's domicile; that the Appellant was born in America, and that his father was domiciled there; that the law of the United States does not recognise legitimation by the marriage

of parents, subsequent to the birth of the child; that being a bastard by this law, the Appellant is therefore a bastard all the world over, and cannot claim a Scotch estate, as heir *ab intestato*, any more than he can claim an estate in America.

Appellant's argument.

The Appellant contended, that the whole question related to a land estate in Scotland, and that the succession to such an estate must be regulated by the law of Scotland; that whatever may be the rule of deciding with respect to personal property, real property must always follow the laws of the country where it is situated; that no principle of Scottish law is more clearly established than the legitimation of children by the subsequent marriage of the parents; that the marriage of the Appellant's parents being perfectly valid in America, the *locus contractûs* must be valid all the world over, and must fix upon him the character of legitimacy, which the Scotch law recognises in children whose parents were legally married; that he is therefore the *lawful son* of the late William Shedden, according to the only sense in which the words can be understood in a question regarding Scotch landed property, and, as such, has a right to be served heir in preference to the Respondent.

July 1, 1803. Interlocutor of the Lords of Session appealed from.

The Court having advised the informations, and ordered a hearing in presence, pronounced the following interlocutor: "On report of Lord *Polkemmet*, and having considered the mutual informations for the parties, and heard their counsel in presence,—They repel the reasons of reduction, assoilzie the Defender, and decern; but supersede extract till the third sederunt day in November next."

The Appellants conceiving themselves aggrieved by this judgment, have appealed from it to your Lordships, and hope it will be reversed, altered, or amended, for the following, among other

REASONS.

I. The marriage of the Appellant's parents must be deemed valid, whether it is judged of according to the law of the place where it was contracted, or according to the law of the husband's own country, viz. Scotland, where the question regarding its effect has arisen. The cohabitation of the parties, the certificate by the clergyman who performed the ceremony, and the acknowledgment of marriage in Mr. Shedden's will, constitute more evidence than the law of Scotland requires to establish the nuptial contract. Its validity by the law of the United States, if the *lex loci* is to be followed, has been sufficiently proved in the documents produced by the Respondent himself, and has all along been admitted by him.

Erskine, b. I. tit. VI. § 3, 4, 5, and 6. Stair, b. I. tit. IV. § 6.

II. There are certain principles, of extensive application, adopted in the jurisprudence of every nation, different from, and often quite repugnant to, the principles upon which the laws of other nations decide the same general questions. The law of some

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countries recognises a right of property over men, almost as unlimited as over cattle. In other countries, a similar right is admitted, but under greater limitations. In many countries the law does not consider human beings as liable to the rights of property under any limitations. Thus the fundamental principles of law with respect to the qualities, the conditions, or the *status* (as it is called) of persons, are radically different in these different countries. The law of each views these qualities in a peculiar way. In one it is a general fundamental doctrine, that a man may be sold or bequeathed like a horse; in another, the doctrine is, that a man can only be sold with the land to which he is attached; in a third, the doctrine is, that a man cannot be the subject of commerce at all; that he can neither be attached to land, nor possessed as a separate property. In like manner, the nature of marriage is variously laid down in various systems of jurisprudence. The law of some countries views it as a contract which may be entered into by more than two persons. The law of other countries considers a plurality, whether of husbands or of wives, as inconsistent with the nature of the nuptial contract. Certain other pactions, too, of a nature merely personal, are supported by the laws of one country, and reprobated by those of another. Not to mention the statutory enactments against usury, it is believed that a contract of concubinage, which the common law of this country would condemn *funditus*, is admitted in the jurisprudence of some foreign states as a fit object of legal protection.—Now, in considering cases of this description, where the legal systems of different nations have set out upon fundamental principles quite irreconcilable, it is evident that the judicatures of each nation must be guided by an appeal to those general doctrines which its jurisprudence acknowledges, and not by any reference to the opposite doctrines of foreign law. If a Russian landholder comes into an English Court of Justice, and demands the restitution of his vassal, who has escaped from his domain, he is met by the answer, that villenage is unknown to our law. A West Indian planter was stopped by the same principle, when he claimed a slave, to whom he had an undoubted right in the country where the contract took place which gave rise to his action: he was told that personal slavery is unknown to the laws of this island. Had the *essentials* of his contract been such as those laws permitted, he would have been allowed to try its *formalities* by the laws and customs of the country where it was entered into; but the *substance* of the agreement was contrary to the principles of both English and Scotch law, and accordingly the judicatures of both countries refused to give it effect, after very ample discussion; the Court of Session, in the case of *Wedderburn* v. *Knight*; and the Court of King's Bench, in that of *Sommerset*.

1769. 1772.

Thus, too, the judicatures of this country support marriages between British subjects abroad, although solemnised according to the forms and ceremonies of the place where the parties were resident; because the use of the form is to afford evidence of the consent of the parties. But if an Englishman were to marry two wives in Turkey, the second would in vain assert her claim in this country, upon the ground that the two marriages were equally valid in the place where they were contracted. She would be told, that our laws do not contemplate the possibility of a person contracting a second marriage during the subsistence of the first. In like manner, as was observed by Mr. Justice *Wilmot*, on the case of *Robinson* v. *Bland*, a contract of prostitution may hold good in some countries, and still be void here at common law, though condemned by no statute.—And yet all these are, in the strictest sense of the word, questions of *status:* nevertheless, they are decided, not by the law of the country where the persons have their domicile, or where the contract that gave rise to them was made, but by the law of the country where execution of the contract is demanded, and an acknowledgment of the *status* claimed—in so far as the laws of the two countries proceed upon opposite fundamental principles. It seems impossible to assign any reason for excepting from this class the question of legitimacy. Upon no point do the laws of different countries vary more widely, and to no description of personal qualities, or *status*, have more important consequences been annexed. In so far as legitimacy is connected with the nuptial contract, it must be differently constituted in the countries of which the laws define that contract differently. The system of jurisprudence which allows polygamy, views, in the very same light, the children of the first and of all the subsequent marriages. But suppose a British subject in Turkey marries two wives, according to all the solemnities of the country; will his children, by the woman whom he marries last, be entitled to contend for their legitimacy in a British Court of Justice? Unquestionably not. The law of the country where the *status* is claimed holds these children to be bastards, the marriage of whose parents is null and void according to its fundamental principles. Again, in England, and its dependencies, those children only are legitimate who are born in wedlock. In some countries, the description of legitimacy is confined to children begotten as well as born in wedlock; but in Scotland, and all countries which have adopted the civil law, this description is extended to all children whose parents have been lawfully married at any time. Equal differences in the *details* of this subject may be perceived among the doctrines of those systems which have in general received the principle of legitimation by subsequent marriage. Thus, the Roman law holds that children born of a common

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prostitute can no more be legitimated by the subsequent marriage of their parents, than children born in adultery. The law of Scotland makes no distinction between the children of a prostitute and of a concubine. Now these are all radical differences of principle, and must affect the determination of the question of legitimacy whenever it arises. If by the law of England a child is not held to be legitimate, merely because he was legitimate in a country where polygamy is allowed; so neither can a child be deemed legitimate in England, merely because his parents after his birth were married in Scotland. This kind of legitimacy is as much unknown to the law of England, as the kind of marriage authorised by the Turkish law. But still less is there any ground for maintaining that the law of Scotland should refuse to acknowledge the legitimacy of a child whose parents were regularly married, merely because he was a bastard in a country where children born out of wedlock cannot be legitimated. This is a kind of bastardy as much unknown to the law of Scotland as legitimation *per subsequens matrimonium* is foreign to the principles of English and American law.—And if the general rule is to be stretched either way, it should doubtless be in favour of legitimacy. The law of Scotland recognises only one kind of bastardy, in children whose parents have been married at any time subsequent to their birth, viz. that of children whose parents could not have contracted lawful marriage previous to their birth. All others are held to have never been bastards, or, in the language of the civil law, they are deemed "*ab initio legitimi, non legitimati.*"

III. It appears, then, that the argument which considers this case as a question of *status*, is altogether favourable to the Appellant. But his advantage must be still more apparent, when the discussion is put upon the proper ground: for he submits, that it is a question upon the *effects* due to a contract *ex vi legis*. It has already been stated, that different systems of jurisprudence apply very opposite principles to determine the validity or define the nature of contracts. A difference still more remarkable may be perceived in the effects which different systems attribute to the same contract. In some countries, personal arrest for debt is unknown to the law. If a debt incurred there is sued for and established in England or Scotland, will it be a sufficient objection to the creditor's privilege of using personal diligence, that by the *lex loci contractûs*, no such diligence is allowed? Or will an English creditor be permitted, by the judicatures of a country where personal arrest for debt is unknown, to imprison his debtor upon the ground that the law of England allows it? Undoubtedly not. The *constitution* of the claim will be judged of in both cases by the law of the country where the contract was made, provided there is nothing in it essentially repugnant to the general doctrines of the law under

which the action is brought; and the same *effects* will be given to the contract which it would have been by the *lex loci*, only in so far as those effects are not repugnant to any fundamental principles laid down by the law which is required to enforce it. A variety of illustrations might be added of the same position. By the civil law, those tutors and curators who married their wards, either to themselves or their sons, were deemed infamous; and this principle has been adopted, with certain limitations, in countries where the Roman law prevails. It cannot be maintained that the testimony of such guardians would be refused in the Courts of this country. In some states, the *patria potestas* extends to the infliction of capital punishments. Would an Englishman, who had a son born in Japan, be permitted to defend himself here, or in the Courts of Calcutta, from the charge of child-murder, by appealing to the laws of the country where the child was born and his marriage contracted? It is scarcely necessary to show that these principles, which must be acknowledged by the practice of all countries, are supported by the decisions of the Scotch judicatures. Nuncupative settlements are as valid in England as written testaments; in Scotland, they are only good to convey a certain trifling amount of moveable property. But a nuncupative will made in England, was found not to carry moveables in Scotland, although it is a general rule that "*mobilia sequuntur personam;*" and a bastard's will made in England was found to have no effect upon moveables in Scotland; because, by the Scottish law, bastards have not the power of making wills. In determining the prescription (or limitation) of obligations entered into in foreign countries, with foreigners, the judicature of Scotland has decided according to the prescription known in Scotch law, in a variety of cases; and in the late case of *Hogg* v. *Lashley*, a contract of marriage entered into in England between an Englishwoman and a Scotchman, whose domicile was in London, received its effect *quoad* the personal property of the husband, by the law of Scotland, where he died and where action was brought. The very same principles apply to the effects of the marriage-contract upon the *status* of the children. These must be determined by the law of the country where the children claim legitimacy. The marriage of the Appellant's parents was good in America, and had nothing in its substance repugnant to the principles of Scotch law regarding the nuptial contract; a Scotch judicature will therefore support it, and give it the effects prescribed by the law of Scotland within the Scotch territory; of all these effects the legitimation of the children is the most constant and undoubted. In Turkey, the children of concubines are received by the law as in all respects on the same footing with those of married persons. But in a question arising before an English or Scotch judicature, between those two descriptions of children, the effect

L. 7. Cod. de Interd. Mat.—Huber. Præl. Pars II. lib. III. tit. II. § 2—Puffend. lib. VI. cap. II.

Jan. 19, 1665. Shaw.

Oct. 1, 1611. Purves.

New Coll. vol. I. p. 156. Also Randall *v.* Innes, *July* 13, 1768; Ker *v.* E. Home, *Feb.* 20, 1771; and Barret *v.* E. Home, 1772.

Puffend. lib. VI. cap. II. § ult.

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of bastardy will be given to the contract of concubinage, and the issue of the marriage will be treated as legitimate *quoad* the rights, subject to the jurisdiction of the Court.

IV. Hitherto the argument has been stated upon the Appellant's right to be considered as legitimate *in general*, in questions which rise before a Scotch judicature. But it must be remembered, that he only claims the rights of legitimacy in so far as the succession to a Scotch land estate is concerned. The reasons formerly urged to prove that the law of Scotland must be the rule by which his legitimacy is tried, apply with double force when the question only relates to real property. The discrepancy of the principles which different systems of jurisprudence apply to the transmission of real estates, and indeed to all questions arising upon the possession of land, is so great, and the impossibility of execution ever being demanded in any other than the *locus rei sitæ* is so absolute, that inextricable confusion would arise from the judicatures of one country determining such questions by the laws of another. The doctrine, "*mobilia sequuntur personam*," is the foundation of all the argument ever urged to prove, that the law of the place, where a transaction happens, should be the rule for determining the rights claimed from it respecting moveables: and this doctrine has evidently no application to land, which is an integral and inseparable part of the national patrimony. Land has accordingly in all countries been made the object of peculiar regulations, arising from different views of state policy; and it is difficult to conceive a more absurd doctrine than that which would give to the laws of one state the power of forcibly modifying and altering the political system of another. If a Scotchman, having his domicile abroad, marries a foreigner, and dies there, it is clear that his children succeed to his Scotch land estate, according to the law of Scotland. If he makes a will, disposing of his Scotch property, that deed may be valid to the effect of carrying his moveables, provided it is executed according to the forms used in the country where it is made; but it has absolutely no effect whatever upon the transmission of his land, though executed in the very manner in which the laws of his domicile permit real property to be bequeathed. And so every other transaction, affecting his land in Scotland, must receive effect according to the Scotch law. The case of the *Marquis* v. *the Marchioness of Annandale,* in Chancery, shows how strictly this principle applies, and in a question where the consideration of *status* was clearly involved. The Marquis had been declared a lunatic in England, but not in Scotland; and certain moneys had arisen from the sale of a Scotch heritable jurisdiction belonging to him. Lord *Hardwick* held that they must be applied as they would have been by the Court of Session, if the Marquis had been declared fatuous or furious in Scotland.—Nothing can be more a question of *status* than *majority*

July 29, 1751.

and minority, the boundaries of which vary widely in different countries. It cannot be maintained that our law would deprive a Scotch landholder, born and having his domicile abroad, of his *restitutio in integrum* at the age of 22, because 18 might be majority in the country where he lived; nor would our judicatures annul the bargains which he made upon his real property at the age of 28, though he might prove that the *quadriennium utile* begins to run from 25 by the law of his domicile. Both the benefit and the restraint would be interpreted according to the rules clearly established respecting majority and minority in the country where the estate lay. But what would be the consequence of the doctrine maintained by the Respondent? A Scotch landholder marries two wives in Turkey, and dies. According to the Respondent's doctrine, both must have terce of his estate. He has a son by the second marriage before he has any children by the first. According to the Respondent, this son must inherit, to the exclusion of all the children afterwards born of the marriage first contracted. Suppose he marries at home, and has a daughter; then settles in Turkey with his Scotch wife, and marries another, by whom he has a son; this son, and not the daughter, must, by the Respondent's doctrine, inherit all the Scotch estate, for he is legitimate by the law of the country where his father was married and himself born; the daughter is legitimate, by the law of her own country; and equal authority being due to both laws on the point of *status*, the male excludes the female. In like manner, an English nobleman, after living in concubinage all his life, may legitimate his children by marrying their mother in Scotland, and may thus transmit to a bastard all his titles as well as estates in England, even those honours granted by the Sovereign "to the heirs male of his body lawfully begotten;" for this expression means heirs male whom the law acknowledges as legitimate, and is admitted on all hands to include the children begotten before, and born after marriage. It is another consequence of the Respondent's doctrine, that if an Englishman, having daughters by his wife in England, retires to France, or any other country where the mutual consent of parties is a legal ground of divorce, and there marries another woman with his former wife's consent, the son of this marriage will succeed to the English estate, and exclude the daughters of the English marriage. Some countries, copying the Roman law, admit legitimation *per rescriptum principis*, to the effect of giving the bastard right of succession. If the Respondent's argument is good for any thing, it must apply to the *status* thus bestowed, as well as to the *status* acquired by birth; for both are equally creatures of the law. He must therefore maintain that letters of legitimation from a foreign prince may regulate the succession of land, and affect the rights of third parties in Scotland, when the same letters from the Sovereign of

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the country have no other effect whatever than to yield up his share of the bastard's succession.—Again, if the succession to a Scotch land estate depends upon the legitimacy of the claimant, according to the law of the foreign country where he was born, then, in questions regarding the transmission of real property, the judicatures of the country where it lies must consider, not how the law of the land has provided for the actual case, but how the estate would have gone had it been situated in some foreign country, and how the foreign judge would have decided. Now, in what manner is a person served heir in special to his ancestor by the law of Scotland? A jury is impanelled to make certain inquiries; one of these is, Whether the claimant is nearest lawful heir to the deceased? How is the jury to answer this question? The words "*nearest heir*" mean nothing more than *that person whom the law of Scotland points out as heir.* If the claimant was born in a country where the youngest son succeeds to the father's land estate,—in a manner, for example, subject to the custom of Borough English, would it be incumbent on the jury to refuse answering the question in the affirmative, because "*nearest heir*" according to the law of his *forum originis et domicilii,* means not the eldest but the youngest son? If, then, "*nearest heir*" must be taken in the sense given to the words by the law of the country where the land lies, and where the jury are commissioned to institute the inquiry, in what other sense can they take the word "*lawful?*" Surely they are required to examine who is the person designated by the known rules of Scotch law, and they can have no other guide in their inquiries. There is another question of the same kind put to the jury in special services, viz. "Is the claimant of lawful age?" Since the tenure of ward was abolished, this inquiry, being useless, has always been answered of course in the affirmative. But, during the subsistence of ward-holdings, how did juries determine what was meant by "*lawful age?*" If the claimant was born, and had his domicile in a country where 18 was the period of majority, could the jury serve him as of "*lawful age*" provided he was 18 years old? Certainly not. Yet majority and minority is a question of *status* as much as legitimacy; and if the jury are bound to take the words "*lawful age*" in the meaning defined by the law of Scotland, no reason can be possibly assigned why they should not in the same inquiry take the words "*lawful son*" as signifying, "son whom the Scotch law denominates legitimate." The whole question at issue between the Respondent and Appellant has arisen upon the validity of the Respondent's special service, that is, upon the accuracy of the retour (or verdict) of the jury who examined his claim.—It may be farther remarked, that the style of a summons of declarator of bastardy, as given by Stair, brings a strong confirmation of the view just now taken of the case. It expressly

B. IV. tit. XII. § 7.

specifies the marriage of the parents, at any time, as a bar to the sentence of bastardy—"to hear and see it found and declared that he was holden and reputed bastard, and that his mother was *never* lawfully married, or at least *never* lawfully married to his reputed father." Stair adds, that the proper exception to this declarator, is, that the father and mother were lawfully married, or at least were holden and reputed man and wife at the dissolution of the marriage. B. 4. Tit. 12. § 7. Suppose the Crown were to grant a gift of *ultimus hæres* over the Appellant's succession, and that a declarator of bastardy was then brought, how could the action be maintained in the face of the exception which the circumstances of his case would instantly raise, that his reputed father was lawfully married to his mother?

V. Although marriage is a contract depending on the will of the parties, yet its effects upon the *status* of the children are determined by law. But even if the effects of the contract are to be judged of by the presumed will of the parties, in the present case that is clearly in the Appellant's favour. His father knew that he had a land estate in Scotland when he contracted the marriage, and certainly acted with a view to leave his son heir of it; accordingly, he does not mention the estate in his will, which would have been in every respect useless; but allows the succession to be regulated by the law of the country where the land lay—having first taken the steps which the law prescribes for rendering his son capable of succession. If the possession of that estate subjected him to the laws of this country in various respects, it is fair to presume that he always acted with a view to it. Indeed his will appointed a Scotch nephew guardian to his son, and directed that Scotland should be his domicile. In the case of *Sir J. Champaud* v. *Lord Ranelagh*, in Chancery, it was decided, that a bond made in England and sent to the obligee in Ireland, carries Irish rate of interest. Michaelmas Term, 1700.

VI. The Respondent rests his chief argument upon this ground, that if the law of *legitimatio per subsequens matrimonium* were applied to the question, the same person would be legitimate in one country and illegitimate in another; and that in the same country he would be deemed a bastard when he claimed the moveable succession, and a lawful son when he demanded heritage,—which were stated to be absurd consequences. But it should be remembered, that the first of these is the necessary result of diversity of laws; the dispersion of a man's property, and his consequent subjection to various jurisdictions. It is not denied that the same person may be free in one country, and a slave in another; of full age in England, and a minor in Holland. Nay, are not the same subjects moveable in one country, and heritable in another, viz. certain parts of the heirship moveables, as the family seal and arms, which are to all legal intents heritable in

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Erskine, B. III. tit. VIII. § 18.

Scotland, and moveable everywhere else?—With respect to the other consequence, it is not admitted that the judicatures in Scotland are bound to consider the claimant as a bastard, while they determine the application of the moveable funds within their jurisdiction. But although this were admitted, it does not appear absurd to contend, that the real and personal property follow different rules of succession, and that he may be heir of a land estate who is not heir *in mobilibus*. The proposition that the same person is to be held legitimate when he claims heritage, and illegitimate when he claims moveables, means nothing more than that the law of Scotland gives those who are in a certain predicament a right to the one kind of succession, but not to the other. It is just as absurd to say that the same deed is valid when moveables are claimed under it, and void when heritable property is in question; or to denominate bonds, bearing a clause of interest, heritable with respect to the *fisc* and *jus relictæ*, and moveable with respect to succession; or to assert that a man is a peer when he claims exemption from personal arrest from debt, and a commoner when he is imprisoned for crimes. The apparent paradox in all these cases arises from the form of expression; from the method of applying to ideas, created by the arbitrary destinations of law, the language appropriate to the description of natural and abstract relations. Legitimacy is entirely a creature of the law; and by denominating a man bastard, we only state that he belongs to a class of persons whom the municipal laws of a certain country have subjected to particular disqualifications.—The Respondent also argues, that the Appellant is an alien, and that the Naturalisation Act cannot apply to him, because he is *filius nullius*. But this is the very point in dispute. The Naturalisation Act, being a British statute, its benefit is extended to Scotland, and its application to the children of Scotchmen born abroad, must be made according to the principles, not of the English, but of the Scotch law. If the Appellant has not proved his claim to the title of legitimate according to that law, he has certainly no case, and would have none though New York were a British colony.

VII. It does not appear that any question of the same nature with the present has ever come before the Courts of either England or Scotland. But although no direct judgment can be adduced by the Appellant, in support of his plea, he has the authorities most respected in the Scotch law, in favour of the specific case which he maintains, and of the general principles upon which he has presumed to ground it. HUBER lays it down as a general rule, for determining cases where there is a *conflictus legum*, and for defining the extent of the *comitas*: "Rectores imperiorum id comitur agunt ut jura cujusque populi intra terminos ejus exercita

Prælect. pars II. lib. I. lec. III. § 2.

teneant ubique suam vim *quatenus nihil potestati aut juri alterius imperantis ejusque civium prœjudicetur.*" VATELL delivers the same doctrine still more explicitly, in various passages of his work. "The validity of a testament, as to its form, can only be decided by the domestic Judge, whose sentence, delivered in form, ought to be everywhere acknowledged. But without affecting the validity of the testament itself, the bequests contained in it may be disputed before the Judge of the *place where the effects are situated, because those effects can only be disposed of conformably to the laws of the country.*"—"The Defendant's Judge is the Judge of that place where the Defendant has his settled abode, or the Judge of the place where any sudden difficulty arises, *provided it does not relate to an estate in land, or to a right annexed to such an estate.* In this last case, as *property of that kind is to be held according to the laws of the country where it is situated,* and as *the right of granting possession is vested in the Ruler of the country,* disputes relating to such property can only be decided in the state on which it depends."—"The property which a person leaves in a foreign country at his death, ought ultimately to devolve to those who are his heirs according to the laws of the state of which he is a member. But, notwithstanding this general rule, *his immoveable effects are to be disposed of according to the laws of the country where they are situated.*" The opinion of VOET is peculiarly in favour of the very argument maintained by the Appellant, and contains a full refutation of the precise doctrine upon which the Respondent has grounded his plea. "Evictum hactenus existimo, in omnibus statutis, realibus, personalibus, mixtis, aut quacunque alia sive denominatione sive divisione concipiendis, verissimam esse regulam, perdere omnino officium suum statuta extra territorium statuentis; neque judicem alterius regionis, quantum ad res in suo territorio sitas, ex necessitate quadam juris obstrictum esse, ut sequatur probetur leges non suas." This general rule he admits may receive some modification in the case of moveables; but with regard to real rights, its rigour has never, he affirms, been in the smallest degree mitigated. "Quamvis ergo a statutis suis realibus, sensu ante dato, magistratum cujusque loci *circa immobilia ne latum quidem unguem ex comitate rccedere, sed suo mordicus inhœrere juri,* experientia testetur, atque inde *immobilia non alia quam loci situs lege regi* tralatitium sit," &c. He then states the doctrine of the Respondent.—"Urgent tamen: cum enim, inquiunt, ab uno certoque loco statum hominis legem accipere necesse esset; quod absurdum foret, ut, in quot loca quis iter faciens aut navigans delatus fuerit, totidem vicibus ille statum mutaret aut conditionem; ut una eodemque tempore hic sui juris, illic alieni futurus; sit ut uxor simul in potestate viri et extra eandem sit; alio loco quis habeatur prodigus, alio frugi; ac

Law of Nations, b. II. cap. 6, 7, § 85.

Ibid. 18.

Ad Pand. lib. I. tit. IV. Pars II. § 11.

Ibid., § 12.

Ibid., § 11.

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præterea, quod persona certo loco non affigeretur, cum res soli, loco fixæ, citra incommodum ejusdem legibus subjaceant; summa providentia constitutum est, ut a loco domicilii statum ac conditionem induat; illis legislatoribus pro soli sui genio optime omnium compertum habentibus, qua judicii maturitate polleant subditi, ut possint constituere, qui eorum ac quando ad sua tuenda negotia, indigeant auctoritate." This argument Voet then proceeds to refute as follows:—"Sed minus feliciter, cum gratis assumatur, nunquam ratione sat firma probandum, necesse esse, ut ab uno certoque loco status hominis legem accipiat. Quin potius, ut variis ex causis quis potest subjectus esse, vel ratione domicilii, licet bona nulla illic habeat, vel ratione rerum, licet illic, ubi res sitæ, larem non fixerit fortunarum suarum, ut ante dictum; ita nec absurdum fuerit neque injustum, personam eandem pro vario rerum situ, ad disponendum de illis rebus habilem aut inhabilem esse, secundum qualitatem, quam loci cujusque lex personæ propter res ibidem sitas subjectæ, imposuerit aut denegaverit; neque iniquum fuerit, personam ratione domicilii non subjectam, bonorum tamen contemplatione sequi territorii ac magistratus alterius jurisdictionem." And again—"*Neque minus in legitimato*, cum enim legitimati legitimantis fisco quibusdam in locis quandam pendere soleant pecuniæ quantitatem, velut in pensationem juris illius, quod fiscus ratione successionis habuerat in illegitimi bona: Quæ quæso justitiæ ratio aut regula dictabit, unius legislatoris facto, non sine præmio vel pretii quadam in fiscum illatione interposito, damnum sentire loci alterius principem aut fiscum ejus, dum a legitimati, et ita ubique pro legitimo (ut volunt) habiti successione, quantum ad bona in suo territorio, excluderetur in totum, illis præcipue in locis, quibus vel universis est denegata testandi licentia, vel spuriis saltem juxta quorundam opinionem ademtum censetur testamenti condendi jus. Atque ita de personalibus statutis censuerunt. Andr. Gayl. lib. 2. observ. 124—Hugo Grotius; Barry de successionibus; Perezius, tit. cod. de Testamentis. et quotquot in universum censuerunt, nulla statuta cujuscunque conditionis egredi posse territorium statuentis."

AR. FLETCHER.
HENRY BROUGHAM.

The Respondent's case is signed by Sir Samuel Romilly and Mr. Nolan. What follows ought not to remain buried:—

Question in the case.

There is no dispute between the parties concerning the facts of the case; and the sole question arising upon those facts is, whether *William Shedden*, the infant (Appellant), be in point of law a

legitimate son, and entitled in that character to take by descent landed property situated in *Scotland?*

A further question was raised by the Summons in the Court below, namely, Whether he could take moveable property? but the Appellant found himself compelled to abandon that part of his case altogether (*a*).

(*a*) Appellant's information, 12*th November*, 1802, pp. 33, 34.

The Appellant's right to succeed to heritable property depends upon two questions, which are not only new, but of great importance.

1st Point.

The first is, Whether a person who is a bastard by the law of the country where he was born, and where his parents were domiciled, can inherit as a legitimate son in *Scotland*, by reason of the subsequent marriage of those parents, although that marriage had not the effect of legitimating him in his own country, where it took place, and where he can never succeed to any property by descent, or in virtue of personal representation?

2nd Point.

The second question is, Whether the Appellant, being born out of the allegiance of the King of Great Britain, comes within the protection and exceptions created by 7th *Anne*, chap. 5, and 4th *Geo.* II., c. 21, § 1, or any other Act which naturalises the children of British parents born out of the allegiance of the Crown of *Great Britain?*

Appellant's argument on 1st Point. Information for Appellant, p. 5. Erskine, lib. III. tit. II. § 40.

The Appellant argued in the Court of Session, in support of his first point, that marriage, like every other personal contract, when celebrated according to the solemnities of the law of the country where it is contracted, is valid and effectual all the world over. This rule (it was argued) regards the validity of the contract only; its legal effects must depend on the law of the country where execution is demanded. The marriage, therefore, between the Appellant's father and mother being admitted valid by the laws of *America*, is equally valid in *Scotland*. The question there is, not what are the effects, rights, and privileges, which marriage bestows on married persons or on their children by the law of *America*, or whether they differ from those conferred by the law of *Scotland*, but what legal effects such a marriage has by the laws of *Scotland*, where execution is demanded by the Appellant, and where the real estate is situated? And upon this point it is clear, that, by the law of *Scotland*, one of the legal effects of the subsequent marriage of the Appellant's parents is to legitimate all the children procreated between them (whether born before or after the actual marriage), to all intents and purposes, as if the parents had been married when the first child was begotten.

The question, therefore, is, Whether the Appellant's *status* as to legitimacy or illegitimacy is to be decided according to the law of *America*, where he was born, and his parents resided, or according to that of *Scotland*, where he claims to succeed to an inheritance?

In support of the latter position, the authority of Voet, lib. 1,

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tit. 4, par. 2, is cited, where he lays it down, "*quod summo jure, nec personalia, nec realia, nec mixta* (*statuta*), *operantur extra territorium statuentis.*"

Argument for Respondent.

The Respondent does not deny this maxim, which constitutes the essence of an independent state, but he disputes its application. None of the authorities quoted by him assert that the laws of independent states possess a binding force *proprio vigore* beyond the territories of the lawgiver. But it is manifest, that neither this principle of Voet, nor his reasoning upon it, can determine the question of how far the *status* which an individual receives from the *statuta*, or positive laws of his country, accompany him into another dominion. Unless this be so, the *status* of marriage itself, which the Appellant admits to be valid all over the world, must follow his general rule; and if either husband or wife leave the country in which they marry, the journey must operate to divorce the connection, and annihilate the rights and duties consequent upon it.

Principle upon which foreign laws enforced.

The influence which the law of a foreign state obtains in determining the *status* or rights of its subjects in another kingdom, originates in a different principle. It is the necessary intercourse of the subjects of independent governments which gives rise to a sort of compact, that their municipal institutions shall receive a degree of reciprocal efficacy and sanction within their respective dominions. It is not the statutes of one community which extend their controuling power into the territories of another; it is the Sovereign of each who adopts the foreign rule, and applies it to those particular cases in which it is found necessary to protect and cherish the mutual intercourse of his subjects, with those of the country whose law he adopts.

Principle how regulated. Treaty. Practice. (*b*) Information.

In many instances this rule is expressly given by treaty or alliance; in others it is regulated by the ancient practice of nations. Thus it is not true, as asserted by the Appellant (*b*), that the *status* of dignity is confined in all cases to the limits of that country by the supreme power of which it is conferred. The highest and lowest dignities (*i. e.* of a king and a knight) are universally acknowledged throughout Europe. "Therefore, if a king of a foreign nation come into England by the leave of the King of this realm, in this case he shall sue and be sued by the name of a king" (*c*).

(*c*) 7 Co. 15, b.

General Rules.

In all cases where the rule of his conduct is not prescribed by such means, the judge must follow those comprehensive laws of nature and nations, which are founded upon the common feelings, constitution, and interests of mankind. He does so, not only because the thing is consonant to reason and justice, but because, from being so, it is to be presumed, that other countries will act in the same way to the lieges of his own country, under similar circumstances.

Ingenuity may easily put speculative instances, which it will puzzle the judgment to decide, even upon this principle, inasmuch as the effect to be given to the institutions of a foreign government depends, in most cases, upon a minute and intricate combination of circumstances, which give birth to various solid, though subtle, distinctions. But, so far as it appears possible to extract general rules of decision, the following seem to regulate the practice of independent states in most of those which have come under discussion. The thing to be done must not be prejudicial to the interest of the country required to enforce it. It must not be in direct contradiction to the laws of the place in which it is to be done (*d*). The comity should, at least, in substance be reciprocal between the countries (*e*); for to use the words of Valin, if there be no reciprocity, it destroys that equality of justice which states owe to each other (*f*).

(*d*) Hub. Præl. lib. I. tit. III. § 2.

(*e*) Case of Santa Cruz, 1 Robin. Adm. Reps. 63.

(*f*) Valin, lib. III. tit. IX. Art. 10.

These rules, as they operate upon the various circumstances and situations in which mankind are placed, will give rise to a different result. Not only the difference of laws, but that of religion, the habits of national intercourse, the place where the thing is required to be done, the local situation of the parties, with reference to the *forum* applied to, and the temporary allegiance due thereto, may vary the decision. Hence it may well follow, that a foreign power shall pay no regard to the regulations and judgments of another kingdom, respecting the *status* of its subjects in particular respects; such are infamy or dignity; pupilage or majority, and many other instances which might be put, whilst it pays a necessary and strict attention to others, such as marriage, and the relation between parent and child.

To these two last relations all civilised and Christian nations must give efficacy, at least, so far as they are not founded upon principles absolutely repugnant to their own laws; because the *status* being universal among them, although the modes of acquiring it differ, that intercourse, which is the ground and foundation upon which the observance of the laws of another country takes place, could not subsist without it. To this may be added a less general reason, but which is undoubtedly prevalent in various countries, namely, the influence of a common principle of religion.

To these two great and universal relations, which constitute the foundation of society, respect must be paid therefore upon a necessity more cogent than that which has induced the commonwealth of European governments to enforce the contracts of foreigners, or to adopt the law of the owner's domicile in determining the succession of his personal property; and that for the plain and substantial reason, that the rights incident to these conditions are much more dear to the subject, and more important to his natural sovereign. Unless their binding force were to be admitted by

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other governments, all intercourse must cease. No King could permit a subject to depart from his territory; no honest man could quit his country, where it might dissolve a dear connection and superinduce a new *status* upon him, not in consequence of his contract or his will, but of his journey. Although the relation, therefore, in which a man stands to his wife or his child, are adventitious in their commencement, yet when once formed, they become permanent qualities, which must remain affixed to him into whatever country he goes, which respects its intercourse with another state. To the extent of these two relations, therefore, the rule laid down by *Huber*, as an axiom, seems undoubtedly just. *Qualitates personales certo loco alicui jure impressas, ubique circum ferri et personam comitari, cum hoc effectu ut ubivis locorum eo jure, qui talis personæ alibi gaudent vel subjecti sunt fruantur et subjiciantur* (*g*).

(*g*) Hub. Præl. lib. I. tit. III. § 12.

The Appellant indeed admits this position, so far as respects the relation of husband and wife, when he observes, that "by the Law of Nations, marriage, when celebrated according to the solemnities of the law of the country, where it is contracted, is valid and effectual all the world over" (*h*). And when he does so, what reason can there be that a rule, which extends to most contracts or obligations, entered into according to the law of the place, where they are executed (*i*), should not embrace the relation of parent and child, as to legitimacy or otherwise.

(*h*) Appellant's Inf.

(*i*) Erskine, lib. III. tit. II. § 40.

The Appellant, feeling the force of this argument, is anxious to refer his case to another principle. Instead of considering the relation of parent and child, as a positive *status* subsisting between them, he regards it as the mere consequence of the *status* of husband and wife. He labours to maintain, therefore, that the legitimacy of the issue is only an effect of the contract of marriage, and like all other effects of a contract, must be decided by the law where execution of it is demanded.

Even if it be supposed that this, his rule, respecting contracts is universally true, which is by no means the case, still it is misapplied. The *status* of the child is not to be considered as a case of contract. An unborn infant cannot be a party to a contract, and none exists between him and his parent. His *status* as to legitimacy depends upon a different principle. It is a character which the law allows the parents to impress upon their child, as being the immediate sources of its being. Their will to do so is manifested in most countries by the celebration of marriage, but it may be evidenced by other means. It is clear, therefore, that this will of the parents can only be decided by the laws of the country, which concedes to them the power, and which prescribes the means or act by which the effect and consequence is to be manifested and produced. In this particular, it does not differ from any contract, agreement, or

other act of theirs, which has no direct reference to a foreign *forum*, as the place in which it is to be executed. Its validity must be decided by the law of the country which allows of its being done, and according to the forms of which it is done. If it were otherwise, the party would be judged and concluded by laws to which he owed no obedience at the time when he did the act.

But although the condition is not to be considered as a mere consequential effect of the contract of marriage, but as an independent *status*, still policy and morality require that it should be regarded and treated in every respect upon the same footing as the *status* of marriage with which it is so intimately connected. The relation which subsists between a parent and his lawful child are of such high importance, and involve the interest and claims of such various parties and families, that the parent should at least have some previous knowledge, both of the time and act by which he constitutes the relation, and incurs the obligations which attend it. Few have it in their power to obtain information with regard to the laws of any country, but of that where they live. It would be unreasonable in the extreme, therefore, that the *status* of a man's child as to legitimacy or illegitimacy, should depend upon the law and custom of a foreign land, with which he was unacquainted; and still less can it be conceived, that it ever should be the will of the parents to render him legitimate in one place, and illegitimate in another.

Against this position the Appellant insists, that the legitimacy of a child is not the act of the parent, and the consequence of his will, but that it is the effect of the contract of marriage; because no deed or act of the parents, however solemn, could render the child illegitimate, where a marriage has taken place. It might be sufficient to observe, in answer to this remark, that the fact of marriage, upon which legitimacy or illegitimacy depends, is the act of the parents, and depends upon their will; and that having once willed it, most laws do not suffer them to retract what they have thus solemnly declared. But the argument is defective, not only in legal conclusiveness, but in matter of fact. The Appellant's observation is indeed generally true, in countries where Christianity prevails, but it is not so universally. Where that rule obtains, the law prohibits the individual from declaring his will to legitimate by any other means than marriage, which it makes a conclusive and permanent declaration of that will, as to the issue procreated under it. But there are countries where legitimation is not a necessary consequence of marriage. Such is the case of what are vulgarly called left-handed marriages in parts of Germany. There are other states, likewise, in which the law allows of different ways of legitimation besides marriage. In such states, the will to legitimate may be declared by such modes and ceremonies as the laws admit of. The

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general rule, therefore, is, that the fact of legitimating a child depends universally upon the parents' will, just as does his buying, selling, or exchanging his property. But the mode of declaring this will, and carrying it into execution, is defined and limited by the laws and customs of each particular country in which it takes place, and by which it must be ascertained. For, if the laws allow of other modes of legitimation than marriage, it can admit of no dispute, that the extent and validity of the mode is only to be judged of by the laws and customs of the country which admit of it.

The next argument used for the Appellant is, that if the *status* of the child is to be determined by the law of the father's domicile, that of the Appellant's father was not in *America* solely; inasmuch as both *ratione originis*, and from having property in *Scotland*, he was subject to the jurisdiction of the Courts of *Scotland*. It is true, that the father was subject to the jurisdiction of the Scottish Courts, so far as that he might, upon these grounds, have been successfully prosecuted for payment of a debt, by reason of his having an estate in that country. But in what way could any question have been tried, which involved the *status* of himself, his wife, and children, none of whom were either in the country, or had property, by which they might be subject to the jurisdiction of its laws?

The Appellant, who is willing to take the question in its alternative, next observes, that, supposing his legitimacy does not depend upon the domicile of the father, but upon that of the son, further discussion is, even on that supposition, unnecessary; because the Appellant is domiciled in Scotland, where he resides, and where it was desired, by his father's settlement, that he should be educated. It is not easy to see, how an infant, who can have no will of his own, can change his domicile. But if the law were otherwise, this compendious mode of deciding the case only evades the question. The point is not, where he is domiciled now, but what his situation was at the time of his birth, and of his father's death. If he was then a bastard by the law of *America*, the only country which at that time had a right to judge of his situation, even if he should afterwards obtain letters of legitimation in this country, they cannot have the effect of injuring third parties, or of enabling American bastards to succeed to heritage in this country, to the prejudice of the lawful heirs.

Lastly, the Appellant, despairing of success upon the questions of domicile, gets out of humour with them, and boldly takes up the argument in their defiance. He insists, therefore, that, as the succession to moveables, *ab intestato*, is regulated by the law of the deceased's domicile, upon the legal fiction, that, having no permanent *situs*, they are presumed to be in the place of his domicile at

the time of his death ; so, *ex paritate rationis*, his right to the real estate is to be decided by the *lex loci rei sitæ*, since no man has ever denied, that all questions concerning heritable estates must be decided by the laws of the countries where these estates are situated.

The Respondent desires no other supposition to illustrate the error of that principle for which the Appellant contends. The *lex domicilii* is not less extensive in its powers over the defunct's moveables, than the *lex loci rei sitæ* is with reference to his heritable estate. Yet, was it ever supposed, that the law of the parent's domicile is not only to regulate the succession to his moveables, but that it must likewise decide, according to its own rules, upon the legitimacy of his children, under whatever circumstances, and in whatever state, they were born ?

An Italian or Scotsman, in whose countries the law of legitimation, by a post marriage, prevails, has, while dwelling in his native country, children by a woman whom he afterwards marries there. Subsequent to this he becomes domiciled in England, where he acquires personal property, and dies. Is the law of England to decide upon the legitimacy of his children by its own rules, and disinherit them as bastards ? Yet if it does not, how can the *lex loci rei sitæ* decide it as to real property.

The Respondent does not mean to deny, that neither the law of Scotland, nor that of any other country, in which the feudal system prevailed, will suffer its rules respecting heritable or immoveable property to give way to the laws of another state. This rule is founded on that maxim already mentioned, that no state will give effect to the municipal institutions of another country, which are repugnant to its interests and its laws, and which might be enacted for the purpose of binding an independent people in their own territories. If this argument be a gordian knot, it would have been cut at once, under the common law of *Scotland*, because it permitted no alien born to inherit lands situated there, whatever his *status* as to legitimacy might be. But it seems to admit of solution with no great difficulty. For it by no means follows, that because the *lex loci rei sitæ* must be complied with to enable the Appellant to succeed to real property, that the *status* of such an heir must not be as free from stain or imputation by the laws of his native country, as by those by which he is called to inherit. The Appellant is anxious in this, as he has been in all other parts of his argument, to confound the *status* of legitimacy with its legal consequences in another country, when ascertained.

The Appellant's position, so far as it applies to his case, points out the absurdity of the conclusion which he labours to establish. The Summons in the present action contains a conclusion, that the Respondent shall be decreed to hold count and reckoning of the

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rents, mails, and duties, to the Appellant, as heir to the deceased *in mobilibus*, as well as to set aside the service of the Respondent. As the rents are moveables, the Appellant's right to them must be decided by the *lex domicilii*, which was America, where he is held illegitimate. If, therefore, his illegitimacy is to be regulated as to real property by the law of Scotland, where it is situated, this inconsistency must arise, that while the Appellant claims heritable property, he is legitimate, and while he claims moveable property, he is a bastard, and that by the same Court, upon the same day, and in the same cause, judging of the same fact, viz. his birth in America, he will be held both a bastard and a lawful son of his father.

So, if *William Shedden*, the father, had left personal property in *Scotland* at the time of his death, and no real estate, the Appellant would be confessedly both a bastard and an alien. But according to his argument, if a relation of *William*, the father, should die several years subsequent to the father, and the succession to a landed estate should thereby open to the father's heir, the Appellant would by that accident become a natural born subject, and legitimate, although he had continued a bastard and an alien perhaps for twenty years after his father's death. The same rule must apply to the Appellant's son, if the succession had not opened until after the Appellant's death.

In like manner, if the Appellant's father had debts owing to him in *Scotland*, but had possessed no land there, and his attorney, with a view of securing these debts, had the day before the father's death obtained a decreet of adjudication, or taken an heritable bond, of which the father had never heard, still the Appellant would be constituted, by the agent's act, a legitimate son, and a natural born subject, although his father had never known of the proceeding, and the security had been changed with a different view.

These absurd consequences prove to demonstration, that the rule of succession to real property has no connection with the present case. The legitimacy of children is a mere matter of fact, to be determined by the law of the country where the child was born, and his parents domiciled. When that fact is ascertained, the law of succession operates upon it, and takes care that the heir designated by such means shall succeed according to its own rules. But it cannot be conceived, that the law of Scotland treats foreigners with greater courtesy, and puts them in a better situation than if they were at home, and that in a question of succession, it considers children as legitimately born in America, when, by the law of that country, it is demonstrated that they were born bastards.

Respondent's Inf.

No case of the present nature has been solemnly decided in the

Courts of Scotland. One, corresponding in circumstances, excepting that the parents lived and were married in England, occurred some years ago, in which the son, born antecedent to his parents' marriage, withdrew his claim to the Scottish estate. As the parents were of rank and fortune, they could not have done so unless warranted by the clear and decisive opinion of counsel. That case appears to have been considered by Lord *Kaimes*, who gives his opinion without reserve upon it.

His Lordship says, "under the head of covenants, marriage comes celebrated abroad;" and then observes, that a foreign marriage, if celebrated according to the law of the country, would be effectual in *Scotland*. He then says, "According to the doctrine here laid down, a child ought with us to be held legitimate by a subsequent marriage, *provided the marriage ceremony was performed in a country where such is the law: because marriage in such a country must import the will of the father to legitimate his bastard children*. But we cannot justly give the same effect to a marriage celebrated in a country where *the marriage, as in* England, *hath not the effect of legitimation*. The reason is, that marriage in that country is not a proof of the father's will to legitimate" (*i*).

(*i*) Principles of Equity, b. III. tit. VIII. § 1.

The principle likewise upon which legitimation *per subsequens matrimonium* is supported, in the law of *Scotland*, is as hostile to the Appellant's case as the opinion of Lord *Kaimes*. By fiction of law, the marriage is supposed to have been contracted before the child legitimated was begotten (*k*). But this presumption is liable to be rebutted by circumstances in the condition of the parents, which show that they could not have been married at the time of the birth. Thus, if either was married to a third person at the period of conception, although both were free at that of the birth, the legitimation cannot proceed by subsequent marriage (*l*). The principle which prohibits the presumption in that case extends to the present, in as much as by the law of *America*, where the Appellant was born, and his parents domiciled, it could not take place. There is a prohibition in his native country against it, according to whose laws he was born, and must ever continue illegitimate. No marriage could exist there without actual celebration, and this is in itself a complete legal bar to any presumption of an anterior marriage.

(*k*) Ersk. b. I. tit. VI. § 52. Bank, b. I. tit. V. § 54. Cowan *v.* Hart, *Jan.* 20, 1802. Respondent's Inf.

(*l*) Bank, Ibid.

Point II.

But the Respondent humbly submits, that whatever the difficulty of this question may be, it is unnecessary for your Lordships to decide upon it in the present case. The Appellant was born in *America* after the independence of that country had been acknowledged by *Great Britain* in 1783. According to the law as it stood antecedent to the union of the kingdoms of *England* and *Scotland*, he was an alien, born *extra fidem domini regis;* and being the natural born subject of a distinct and independent state, could neither

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enjoy nor succeed to a feudal subject in the country of *Scotland*, to whose Sovereign he owed no allegiance as a duty incident to his birth. It is stated by Mr. *Erskine*, that "as this doctrine has obtained in most countries which have adopted the feudal plan, it may be affirmed, notwithstanding the authority of *Craig*, Lib. I. Dieg. 4, § 7, that it has been also rigorously observed in *Scotland*" (*m*), and "it was unanimously adjudged, Falc. ii. 66 (*n*), that an alien could not succeed to a land estate in *Scotland* without naturalisation by authority of Parliament" (*o*).

The civil law seems to have admitted the same rule (*p*), and it was scrupulously adhered to in *England* (*q*). That this part of the law should correspond in *England* and *Scotland*, is required by the most obvious policy; for, as the privileges and rights of the natives of both countries are equal, the regulations which respect the rights of their offspring born out of the allegiance of the Crown of *Great Britain* should be the same in both. The Lords of Session were principally influenced by the weight of the principle in their decision upon the case of *Leslie* v. *Gordon*, already cited (*r*). It is to be observed also, that the coincidence of their law, so far as it is manifested by judicial decision, is uniform and complete, and that the rights of the children of British parents born in the dominions of a foreign Prince, are regulated in both parts of the kingdom by the same provisions in the same statutes.

(*m*) Ersk. Inst., lib. III. T. X. 735.
(*n*) Reported, Kaimes' remark. Decis. No. 106, Kilk. No. 6, *v.* Foreign, 3, Dict. Decis. 231.
(*o*) Ersk. Inst. *ut supra.*
(*p*) Cod. lib. XI. tit. 55.
(*q*) 7 Co. 2, 1. Black. Comm. B. 1, c. 10, p. 372.
(*r*) 3 Dict. Decis. 231.

It was properly admitted in the Court below (*s*), as a point too clear to be capable of dispute, that the Appellant was an alien, and incapable of succeeding to the estate of *Rughwood* unless he is entitled to the benefit of the naturalising statutes of 7th *Anne*, c. 5, and 4th *Geo.* 2, c. 21.

(*s*) Appellant's Information.

The Respondent does humbly, but with unshaken confidence contend, that he comes neither within the letter nor the spirit of these statutes, but remains an alien born, unnaturalised, and incapable of inheriting real property.

The words of 7th *Anne*, c. 5, are, "that the children of *all natural born subjects, born* out of the ligeance of her Majesty, &c., shall be deemed, adjudged, and taken to be natural born subjects *of this kingdom* to all intents." Some doubts seem to have been entertained whether it was not required by this Act, that the mother should be a natural born subject as well as the father, in order to give their children the benefit of the statute, or, if not, whether the privilege did not extend to children born of mothers who were natural born subjects, although the father was an alien. The 4th *Geo.* 2, c. 21, in conformity to the provision of antecedent Acts upon the subject, confined this privilege to the children of British fathers. The material words are, "That all children born out of the ligeance of the Crown of *England*, or of *Great Britain*, whose fathers were or shall be natural born subjects of the Crown

of *England* or of *Great Britain, at the time of the birth* of such children respectively, shall be adjudged and taken to be, and are hereby declared to be natural born subjects of the Crown of *Great Britain*."

It neither is nor can be denied, that a bastard, as being *nullius filius*, is not a child within the meaning of these Acts, and that such a person, although the offspring of British parents, is, when born out of his Majesty's allegiance, as much an alien by the law as it now stands, as he would have been if these statutes had never passed. But while the Appellant admits this position, he argues that his alienage is taken off by the subsequent marriage of his father and mother; and contends, "That the fiction of law which establishes his legitimacy, supposes his parents to have been married at the time he was begotten, so that he was legitimate from his very birth (*t*);" or, as is expressed in another part of the Appellant's Information, "he is in the sense of law held to be a *filius legitimus* from the beginning (*u*)."

(*t*) Appellant's Information.

(*u*) Ibid. *infra*.

The Respondent humbly contends, in opposition to this argument, that the supposed fiction of law can work no such effect. The statute seems worded so as to anticipate this argument, and guard against the consequences to be deduced from it. It requires that the father should be a natural born subject at *the time of the* CHILD's birth. But it is impossible to say that this child had a father who was a natural born subject at the time of the birth, when in contemplation of law he had no father at that period, either alien or native. This construction is in strict conformity with the ancient law, which held, that the question of alien or natural born subject depended solely upon the fact of birth within the King's ligeance (*x*); and that a person who is an alien at the moment of his birth, never can come under the description of a natural born subject, whose subjection commences with his birth, and from whom natural allegiance is due to the Sovereign within whose dominions, and under whose protection, he came into the world. Thus natural allegiance is defined by Lord Chancellor *Ellesmere*— "*Ligeantia naturalis, absoluta, pura, et indefinita*, is due by nature and birthright, and is called *alta ligeantia*, and he that oweth it is called *subditus natus* (*y*)."

(*x*) 7 Co. 15 A. 18, b, 25 b. 27 a. Craw *v.* Ramsay. Vaugh. 282, 286. Deg. 224.

(*y*) Case of *post nati*, 11 St. Tr. 88.

The Appellant was not a natural born subject of *Great Britain* within this or any other definition of the term known to the law of *England* or *Scotland*, either at the time of his birth, or for six years afterwards. If he had been the reputed son of an Englishman having lands in *England*, no act of his supposed father could enable him to succeed to such lands, or hold them by any species of legal conveyance. Upon what principle, then, can it be contended, that a Scotchman, domiciled in *America*, shall have power, by a subsequent marriage, to confer upon his illegitimate child,

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twenty years after his birth, all the privileges of a natural subject, when an Englishman has no such power. But the argument goes even farther. If the Appellant is held to be a natural born subject, so as to succeed to lands in *Scotland*, he must of course be held a natural born subject in *England*, since, by the Articles of Union, the rights and privileges of the subjects of both countries are declared to be the same. A *Scotsman* has by these means, therefore, a power, not only of legitimating his bastards, and rendering them capable of succeeding to real property in his own country, but in *England* also, and that when no act of an *Englishman* can do it in either. In such an interpretation of the law, there is no principle of reciprocity; and it is in direct contradiction to the 4th Article of the Act of Union, which declares, "That there shall be a communication of all other rights, privileges, and advantages, which do or may belong to the subjects of either kingdom, except when it is otherwise expressly agreed in these articles." It seems impossible to maintain, therefore, that the legislature have by the same words, in the same statutes, conferred such very different privileges on its subjects, according as they are born on this side or beyond the *Tweed*.

Cases have occurred more frequently in *England* upon the subject of alienage than in *Scotland*, owing to its extensive continental dominions, and the consequent fluctuations of conquest and cession of territorial dominions. To the decisions which have occurred in the law of *England* upon the subject, the Respondent appeals; not only as illustrative of what the law of *Scotland* is, but (for the reasons already submitted to your Lordships) as giving the rule upon the common question of alienage to both parts of the empire (*z*).

(*z*) Lord Chancellor Ellesmere seems of opinion that the laws of the two countries correspond on this subject.—See also Leslie *v.* Gordon, 3 Dict. Decis. 231, *voce* Foreign.

By the law of *England* the criterion of natural allegiance, or what constitutes a *subditus natus*, is fixed and determined by the birth alone, and depends upon it. Unless a person owes at that moment natural allegiance to the crown of *Great Britain*, no subsequent circumstance, nor fiction of law, can remove the condition of alienage. If fiction or convenience could alter a rule so wisely inexorable, it is most natural that it should have operated in cases of persons who, not being born under the allegiance of the crown of *England* before the union with *Scotland*, or that of *Great Britain* since, became subjects to the King, either by compact or conquest. But it is held, that persons of this description, called *antenati*, do not possess the right of taking or of inheriting lands, although such as are *postnati* enjoy the privilege. Such a provision would also be made most naturally in favour of alien women, who intermarry with Scottish or English husbands; and yet, by the laws of *England* (*a*), such a woman is not entitled to dower, nor in *Scotland* to her terce (*b*). The cases therefore put by the Appel-

(*a*) Hargr. Co. lib. 31, a. No. 9.
(*b*) Stewart *contra* Hoome, 3 Dict. of Decis. 231.

lant, that the alien husband of a woman having an estate in *Scotland* would be entitled to the benefit of courtesy, and an alien wife to her terce, are not law (*c*).

(*c*) Information for Appellant.

But this point, that no fiction of law can operate to naturalise those who were aliens at the time of their birth, does not rest upon analogy or the inference, that if it existed at all, it must have obtained in cases which seem more strongly to require its application, upon grounds of political and moral expedience. The law has been expressly declared to be so by the first legal authorities; and the reasons which they assign for their opinion go directly to the root of the Appellant's argument.

Thus it is observed by Lord *Bacon*, in arguing the case of the Scottish *postnati*—"If any conceive that the reasons for the *postnati* might serve as well for the *antenati*, he may, by the distribution we have made, plainly perceive his error. For the law looketh not back, and *therefore cannot, by any matter* ex post facto *after birth, alter the state of the birth* (*d*)." The words of Lord Chief Justice *Vaughan*, in the case of *Craw* versus *Ramsay*, which came before the Court of Common Pleas, *Hill*, 21 & 22, *Car.* 2, are more explicit, and seem to meet *in terminis* the case at present before your Lordships. "But then, since all ligeance and subjection are acts and obligations of law (for a man owes no ligeance excluding all civil law), but a man is said to be a *natural subject, because his subjection begins with his birth, that is, as soon as he can be subject;* and a king is said to be a man's natural prince, because his protection begins as soon as the subject can be protected; and in the same sense that a country where a man is born is his natural country, or the language he first speaks is his natural tongue; why should not an act of law, making a man as if he had been born a subject, work the same effect as his being born a subject, which is an effect of law?"

(*d*) 11 St. Tr. 80.

One of the answers which this very learned Judge gives to the doubt raised by him in the latter part of the preceding sentence is decisive of the present question. He says, "No FICTION *can make a natural subject; for he is correlative to a natural Prince,* and cannot have two natural Sovereigns (but may have one Sovereign, as a Queen-Sovereign, and her husband, in two persons), no more than two natural fathers, or two natural mothers. But if a fiction could make a natural subject, he hath two natural Princes, one where he was born, and the other where naturalised" (*e*).

(*e*) Craw *v.* Ramsay, Vaughan, Rep. 279, 280. Ib. 283. 2 Vent. 6. Reported in other books by the name of Collingwood *v.* Pace. Lord Hale's Argument. 1 Vent. 413.

Unless these statutes are held strictly to relate to the actual time of birth of the person who claims to be naturalised under them, and not to admit of retrospect, various questions must arise, which would throw the line of succession into uncertainty and confusion.

Thus suppose the lands of *Rughwood*, instead of descending in fee to the right heir of *William Shedden*, the father, had been

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settled by another person, under a deed of tailzie, upon the eldest son of *William Shedden*, who should be in life at the time of the settler's death, and his heirs-male; and if he should have no sons then living, then upon the eldest son of *John* and *Marion Patrick*, the Respondent's father and mother, as substitute. If the supposed settler had died previous to the marriage of *William Shedden*, the father, with *Ann Wilson*, it seems impossible to deny that the Respondent must have been served heir of entail, and could have made up a lawful title to the estate. But if the Appellant's argument be just, the subsequent marriage of his parents would carry back his legitimation to the time of his birth, and divest the Respondent of his rights.

It may be put as a farther case, that if *William* the Appellant had arrived at the years of legal discretion previous to this marriage, and had purchased lands in *England* and *Scotland,* such estates would have devolved to the Crown; yet, upon the principle which it is contended is to naturalise the Appellant in this case a subsequent marriage of his parents, at any period however remote, would divest the rights of the Sovereign, and vest the lands in the Appellant by a fiction of antedated legitimation.

Neither are the consequences of such a construction confined to civil rights. If the Appellant is entitled under the statutes to all the privileges of a natural born subject from the period of his birth, he is by the same statutes rendered liable to all the pains and penalties incident to a violation of the allegiance and duties of a subject. If war had taken place between *England* and *America* previous to the parents' marriage, and the Appellant had been captured *flagrante bello* by his Majesty's forces, he must have been considered as a prisoner of war. Can it admit of argument, that the subsequent act of his parents, *etiam in articulo mortis*, shall convert this American into a traitor, and subject him to all the penalties and disabilities of high treason?

Such a consequence cannot be sustained upon any sound principle of policy and justice. The relation of natural Prince and natural born subject gives rise to reciprocal and corresponding rights and duties in the several parties. The subject is entitled to protection, even with the whole force of the state, and to enjoy landed property in the country over which the Prince exercises dominion. The Sovereign is entitled to all those duties from his subject which are comprehended in the term allegiance. As nothing can carry back the subjects' duties and allegiance beyond the time at which the act of naturalisation is done to create this relation, nothing short of an express legislative Act can give him prior enjoyment of those privileges and immunities, which are the equivalents conceded by the Sovereign in commutation for such duties. If the one is impossible, the other, which is a correlative right, cannot exist.

Fost. Crown Law, 184.

The obligation between natural born subject and prince is in the nature of a compact, which neither can create or recede from but by mutual consent. *Nemo potest exuere patriam*, is a maxim of the law of *England*, as well as of the civil law; and the relation cannot be created by the party himself, any more than it can be destroyed. But, according to the Appellant's argument, two indifferent persons may, by their voluntary act, interfere in the relation between sovereign and subject, and create or keep back that high connection, which neither subject nor sovereign could do of himself. It concedes to the flagitious parents, as the price and premium for antecedent incontinence, the royal privilege of imposing their offspring upon their prince, as his natural and legitimate subjects.

The law of *Scotland*, prior to the union, admitted of no such consequences, and the statutes enacted since have made no alteration. On the contrary, by the anxious and sedulous use and repetition of the words "natural born," as well as other provisions in the various acts passed on the subject, it is demonstrated that the legislature meant to rest the privilege of naturalisation upon the time of birth. And it is an argument never to be forgotten, that this construction of the words of the statutes, according to their direct and obvious sense, gives that uniformity of operation to the law in *England* and *Scotland*, which upon every principle of reason and justice, as well as in the true spirit of the articles of union, it is most desirable to establish. In the same spirit the legislature has not extended the privileges of naturalisation to the children of naturalised parents born in alienage, while their fathers were aliens. Thus a foreigner may be naturalised by letters of denization, or a particular statute, or if he lives seven years in his Majesty's colonies, by 13 *George* II. cap. 7. A foreign seaman, if he serve two years in the British service in war time, is naturalised under 13 *George* II. cap. 3; and one who serves three years on board English ships employed in the whale fishery, receives the same privilege under 22 *George* II. cap. 45. But their children born abroad before the parent is naturalised are considered as a species of *antenati*, and expressly excluded by the words of the statutes from the privileges attached to native British subjects.

There is as much reason, if not more, that the subsequent condition of the father should be referred back to the antecedent birth of the son, as that the subsequent condition of the child should be carried back to the same period. The legislature having refused it in the former case, is decisive that they intended, in the spirit of the common law, that the condition of the party at the season of his birth should exclusively and conclusively decide whether he was to be a natural born subject or an alien, and that no fiction of

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law; or subsequent act of the party, or his parents, should alter his condition in this respect.

1 *July*, 1803. Interlocutor appealed against.

The Court, of this date, pronounced the following Interlocutor: "On report of Lord *Polkemmet*, and having considered the mutual informations for the parties, and heard their counsel in presence, they repel the reasons of reduction, assoilzie the Defender, and decern: but supersede extract till the third sederunt day in November next."

Against this Interlocutor the Appellants have appealed; but the Respondent hopes that your Lordships will affirm the same, for the following among other

REASONS.

I. Because the legitimacy or illegitimacy of the Appellant must be determined according to the laws of America, where his parents were domiciled and himself born; and by the laws of that country he is illegitimate.

II. Because he does not come within the provisions of 7 *Anne*, cap. 5, and 4 *George* II. cap. 21, by which the children of the King's male subjects are naturalised, although born out of his allegiance, and enabled to succeed to landed property in this kingdom; for the Appellant being clearly illegitimate when born, was not the child of a natural born subject at the time of birth, to which period these statutes alone apply.

SAML. ROMILLY.
M. NOLAN.

The cause was put in the paper for hearing, and was argued on the 22nd, 24th, 26th, and 29th of February, 1808. The counsel for the Appellant were Mr. *Adam* and Mr. *Brougham*. For the Respondent, Sir *Samuel Romilly* and Mr. *Nolan*. The *Lord Chancellor* (Lord *Eldon*) and Lord *Redesdale* attended throughout. There is, however, no report of what passed upon the argument.

On the 3rd of March, 1808, the *Lord Chancellor* (Lord *Eldon*) and Lord *Redesdale* being again present, it was moved and carried that the interlocutor of the Court below should be affirmed. Of this judgment the only record remaining is but the formal entry which appears in the Journals of the House; no note,

taken at the time, of the opinions delivered being now forthcoming (*a*).

The Appellant was fifteen years of age when this judgment was pronounced. He appears soon afterwards to have entered into the naval service of the East India Company; but this employment he relinquished for merchandise, which he prosecuted till 1833, when he finally returned to Great Britain.

On the 28th of February, 1848 (precisely forty years after the judgment of the House of Lords had been pronounced), he commenced fresh proceedings in the Court of Session for the purpose of recovering the Roughwood Estate. To do this it was considered necessary to get rid of the interlocutor of the Court of Session in 1803, and of the judgment pronounced by the House confirming it in 1808.

With this view, the Appellant's summons (one of Reduction and Declarator) was directed against William Patrick, writer to the Signet, and against Robert Shedden Patrick, the heir at law of that Robert Patrick who had been the successful Defendant in the former litigation.

The summons, after asserting the Appellant's legitimacy, and consequent title as the only lawful son of William Shedden aforesaid, proceeded to state as follows :—

> The said William Shedden, father of the Pursuer, was born in Scotland of Scotch parents, his father being proprietor of the said estate of Roughwood, in the county of Ayr. His domicile of origin, therefore, was Scotch, and which Scotch domicile he never either lost or abandoned. He resided for some time in Virginia, in North America, then a British colony, principally engaged in taking charge of British interests, or in the sale of British manufactures, being connected in business with Mr. M'Call of Glasgow. He

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(*a*) That the case, however, excited great interest and attention is clear from the fact that Lord Eldon invited Mr. Brougham to publish an account of it.

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visited Scotland once, or oftener, during his said sojourn in Virginia. He also, during that period, succeeded to the estate of Roughwood, in Scotland, as heir-at-law of his father, the management of which estate he committed to his friends in Scotland, and more particularly, first, to his brother-in-law, John Patrick, Esq., of Trearne, and thereafter to his nephew, the Defender, William Patrick, as commissioners or factors, retaining the property of the estate itself, with a view to his return to Scotland. Upon the breaking out of the American Revolution, he fled to Bermuda, as a British colony and place of safety, together with his cousin and future partner, Mr. Robert Shedden, where he resided until the peace and declaration of independence. Whilst resident at Bermuda, he wrote (as now appears) a long letter to his brother-in-law, John Patrick, dated 19th April, 1783, referring to the preliminary treaty for peace, which had just been concluded, intimating his purpose of going to New York to see his partner, Mr. Robert Shedden; and further stating,—"He is about going home, and I wish to do so too; but can't determine my route till I see him. I earnestly wish to see my native country, and settle there for life. Do look out some cheerful, accomplished, prudent, and agreeable lady for me, by the time I come home, for I think I shall not be long without a wife, if I can meet with one I think I can be happy with, who will have me. But all this in due time." And after a good deal of domestic intelligence, intimating his having sent home presents to his sisters and relations, adding, "I beg you'll do in my affairs what you think best—pay off principal and interest as fast as you can, and leave the lands" (meaning the estate of Roughwood, &c.) "out of tack till I come here, which I hope will not be far distant. Remember me in the most affectionate and kindest manner to all my nephews and nieces —George Shedden and all my relations;—also to J. Cockburn, and let him know his papa, and brothers and sister, are all well. We have no news. We all dislike the peace, which is very humiliating to Great Britain." He left Bermuda and returned to New York, soon after the date of the above letter, for the purpose of winding up his affairs, preparatory to his intended return to Scotland. But owing to various impediments and obstructions, and more especially in consequence of the difficulties encountered by British loyalists in realising their property and effects after the peace, he was detained at New York much longer than he contemplated or intended. During the whole period of his said residence in New York, he adhered to his purpose of returning to Scotland, as his native country. He retained his heritable estate there,—kept up his intercourse with his friends and relations in Scotland,—and, in particular, he abstained from taking any steps for the purpose of naturalising himself as an American citizen. He latterly fell into bad health, whereby his stay in New York was still further pro-

longed. It was during this last temporary residence in New York that he formed an intimacy and connection with Miss Ann Wilson, mother of the Pursuer, William Patrick Ralston Shedden, and of which connection there were born the Pursuer and a daughter. With the special view and avowed purpose of legitimating the Pursuer and his sister, the Pursuer's said father married the said Ann Wilson, the Pursuer's mother, at New York on or about the 7th day of November, 1798. He died at New York on or about the 13th day of November, 1798. At the period of his death, as well as that of his said marriage, he retained, as he had done all along, a fixed purpose and intention of returning to Scotland as his native country. This purpose and intention he avowed and declared, by letters and otherwise, to his friends and relations, and more particularly to the Defender, William Patrick. The Pursuer's father thus never lost or abandoned his Scotch domicile of origin; and he remained, both at the date of his marriage, and at the time of his death, a domiciled Scotsman. Farther, the Defender, William Patrick, was expressly informed that the Pursuer's father had solemnised said marriage with the Pursuer's mother, for the purpose of legitimating the Pursuer and his sister according to the principle of the Scotch law, which admits of legitimation by subsequent marriage. On or about the 9th of November, 1798, Mr. John Patrick, brother of the Defender, William Patrick, wrote to the Defender from New York a long letter, informing the Defender that the Pursuer's father was moribund, and stating, *inter alia*, "every revolving hour threatens a dissolution of his existence —his fate is fixed—he must die—he cannot live. But this is not all. He has, from considerations which he conceived moral, natural, legal, and proper, at the moment when eternity was staring him in the face, united himself in matrimony to the woman who has for many years lived with him in a very different situation. His object in this proceeding was to rescue from a state of bastardy, and introduce into the world, with all the privileges appertaining to those who are born under the influence of the law, two infant children, one a girl about six years old, the other a boy about five" (the Pursuer). "The ceremony took place on the 7th instant," &c. And after various other statements and explanations relative to the general deed of settlement executed by the Pursuer's father, in which the writer was named an executor, and the supposed state of the Pursuer's father's affairs, adding—"And as we have claims, and they, from natural right, are certainly entitled to a priority, I think, in justice to ourselves, they ought not to be overlooked, and on you, as representative of the family, the guardianship of this right will devolve. I mean the dowry left to our mother with interest; the interest on the advances of our father during the war; the commission for his agency in accepting

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and paying bills, &c.; likewise as factor on the estate, on the rents, &c.," (meaning the Scotch estate of Roughwood). "All these are proper and legal claims, and ought not in right to be set aside, and put into the pocket of others. I would act with strict propriety; nor would I swerve one degree from that justice that devolves as a duty on every honest man; but I would carefully watch over those rights that become our inheritance in common with the rest of mankind. These are my ideas, and I know yours will fully co-operate. I am placed in a situation extremely delicate and unpleasant. I have interests of my own to watch over, and I have likewise those in opposition to them, as an executor, to promote. These must be reconciled as much as the nature of the thing will admit, and the sacred duties devolving on me will be fulfilled, as far as I am able, with justice, and a regard to truth and rectitude. Yours is likewise extremely so, as agent for his heirs, and as representative of those who have claims that counteract them; but you must reconcile them to the best of your ability, holding in view the sacred and unerring principle of truth and justice. This is a situation we never could have contemplated; but it is part of that thorny path that we must all encounter through life, and we must meet it with a fortitude proportioned to its magnitude. . . . .

P.S.—The contents of this you will of course only communicate to those who have an interest, or in whom the necessary confidence can be reposed." And to this letter there was made the following addition:—"*November* 11*th*.—In the morning Mr. Shedden gradually approached his end. He has looked into his affairs, and wrote to his friends. He has two important letters to write, and he dies contented. One is to you respecting his children, &c. The boy is to be sent to Scotland. I will be glad if you will keep that part of my letter to yourself which is comprehended within the mark, &c. I may be mistaken. I should be happy was it so." In accordance with the intelligence contained in the above letter, the Pursuer's father wrote to the Defender, William Patrick, the following letter, which was attested by John Mills, the confidential clerk of the Pursuer's father, and which was duly received by the Defender:—"*New York*, 12*th November*, 1798.—My very dear Nephew,—My long and painful illness must apologise for my long silence. I am now going to quit this world. I have married Miss Ann Wilson, which is approved of by my friends here, and which restores her and two fine children I have by her, to honour and credit. I have settled all my affairs, and appointed executors here, who will correspond with you. One of my children is a boy; named William Patrick Shedden; they are charming children, he in particular. I have ordered my executors to send him to you. I now remit first of Griffiths and Warland's exchange, on Messrs. Thomas Daniels and Co., London, dated Barbadoes, 23rd June, at sixty days date, for

326*l.* 15*s.* 8*d.*, and first of B. Farquharson and Co., at Barclay Farquharson, London, dated Martinico, 21st July, at sixty days date, for 91*l.*—together, 417*l.* 15*s.* 8*d.* sterling; and I desire that such further sum or sums of money may be appropriated for the purpose of maintaining and educating him genteelly, and according to his talents and inclination, not exceeding 500*l.* sterling, without the consent of my executors, of whom you are to be totally independent in this business. I can only add, that I remain till death, Dr. William, your affecte. uncle." (Signed) "WILLIAM SHEDDEN." In consequence of the solemn and important trust committed to the Defender, William Patrick, by the Pursuer's said father, in the aforesaid letter and otherwise, it became his duty to assert the legal rights of the Pursuer, and to use every means and exertion in his power for the protection and security of these rights, but this duty was grossly violated by the Defender, inasmuch as he, the Defender, William Patrick, having formed the fraudulent purpose of defeating the lawful rights and interests of the Pursuer, more especially in the said estate of Roughwood, which had belonged to the Pursuer's father, it being the object of the Defender to acquire the said estate, either for himself or for the said Patrick, his brother. The said Defender accordingly proceeded to take steps and use means with the view of carrying this fraudulent purpose into effect. Although aware that the Pursuer's father had died domiciled in Scotland, or at least aware that it was his fixed purpose and intention to return to Scotland, as his native country, he concealed his knowledge as to the Pursuer's father's true domicile, or at least suppressed his knowledge of said purpose and intention. On 7th April, 1800, the Defender, William Patrick, wrote to Messrs. James Farquhar, David J. Hossack, and the said John Patrick, his brother, being the American executors named by the Pursuer's father in his general deed and settlement, as follows:—"Gentlemen—Being at present obliged, as factor and commissioner for my brother, Dr. Robert Patrick at Trearne, the heir-at-law to the late Mr. William Shedden's landed property in Scotland, I cannot accept of the appointment of guardian to William Patrick Shedden, the son born to the late William Shedden by Ann Wilson, nor can I take charge of his affairs in this country, being obliged to attend to the interests of my brother, which may in some respects be considered different from that of the boy. As Mr. Shedden, however, in his settlement, expressed a wish that this boy should be educated under my direction, and for that purpose remitted to me a sum of money before his death, and I being desirous, in so far as lies in my power, to fulfil his intentions, in case you think it advisable to send the boy to Scotland for his education, I shall see him properly educated and taken care of, and shall apply the funds remitted to me by Mr. Shedden (in so far as

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they will go) for that purpose; but with regard to the other affairs of this boy, or any other claims which it may be supposed he has in this country, I can take no concern of them; so if you conceive he has any such, it will be necessary you appoint some other person to attend to his interests. It is only in consequence of my uncle's last request contained in his settlement, and in a letter written to me the day before his death, that I shall endeavour, to the best of my judgment (in case you think it advisable to send the boy to Scotland,) to lay out the money remitted by Mr. Shedden to the best advantage for his board and education; but as to any other interests or concerns of this boy, and particularly as to any claim which, as I have been informed, some hints have been thrown out of an intention to make on his behalf to the landed property in Scotland, I wish you and his other friends in New York explicitly to understand that I can take no charge or direction of them whatsoever. I am," &c. (Signed) "WM. PATRICK." "To James Farquhar, David J. Hossack, and Jno. Patrick, Esqrs., Exrs. of the late Wm. Shedden, Esq., merchant in New York." The Pursuer was sent to Scotland by the American executors of his father some time in the year 1800, consigned and committed to the charge of the Defender, William Patrick. He was immediately thereafter placed by the Defender at School in Dunfermline. But the Defender took no steps with the view of asserting the Pursuer's legal right to the estate of Roughwood, which had belonged to his father, as being the lawful child and heir-at-law of his father in said estate. On the 18th September, 1800, the Defender, William Patrick, wrote to the American executors a long letter, announcing the Pursuer's arrival in Scotland, stating,—"It is impossible for me, situated as I am, to take charge of any claims he has to the landed estate in Scotland." And after setting forth his own brother's rights to the estates, as pretended heir-at-law of the Pursuer's father, and arguing his right thereto, he suggested the institution of a suit, in order to determine the question, and advised the executors to appoint some person to act in said suit on behalf of the Pursuer. The Defender, William Patrick, about the same time wrote various other letters to the said American executors, (as the Pursuer believes and avers,) urging upon them the invalidity of the Pursuer's father's marriage, the Pursuer's consequent illegitimacy, and the preferable right of his own brother, Robert Patrick, to the Scotch heritage, as heir-at-law. The said American executors, misled by the erroneous and deceitful representations and arguments contained in the Defender's said letters, were deterred from taking any steps with the view of asserting or trying the Pursuer's right and claim to the Scotch estates. The Pursuer was thus left in Scotland a mere infant, without any person to assert or protect his legal rights and interests, while the Defender, William Patrick, who stood solemnly charged

with the assertion and maintenance of said rights and interests, had placed himself in a position adverse and hostile to the Pursuer's said rights and interests, inasmuch as he had undertaken the agency of his brother, and had his own private fraudulent purposes to serve. Taking advantage of the Pursuer's situation, the Defender, William Patrick, proceeded to follow out steps for carrying into effect his said fraudulent purpose of defeating the Pursuer's just right to the said estate of Roughwood, and of acquiring the same for himself or for his said brother. So intent was the said Defender upon this, that, as now appears, he, so early as October, 1799, that is to say, after receiving intelligence of the Pursuer's father's death, but before writing the said letter of 7th April and 18th September, 1800, to the American executors, he, the said Defender, William Patrick, expede or obtained the foresaid service in favour of his brother, the said Robert Patrick, whereby the latter was served heir-at-law in special to the said William Shedden, the Pursuer's father, in the said estate of Roughwood, and which service was obtained *ex parte* and without any contradictor, all means of allowing the Pursuer to appear and oppose said service being excluded or prevented by the said Defender, William Patrick. At the time when the Defender expede said service, he was aware that the domicile of the Pursuer's father was, at the time of his death, Scotland, and not America; or at least he was cognizant, through the possession of said letters or otherways, of the Pursuer's father's fixed and continued purpose and intention of returning to Scotland. Following out the said fraudulent scheme, the said Defender, William Patrick, next made, or caused to be made, an *ex parte* application to our said Lords of Council and Session, under which he got the said Hugh Crawford, his own intimate friend and relative, appointed factor *loco tutoris* to the Pursuer, the said Hugh Crawford being now dead; and he likewise got his own intimate friend, the late Archibald Miller, Writer to our Signet, appointed to conduct the case of the Pursuer. In further pursuance of the said fraudulent scheme, and under the special advice of the Defender, William Patrick, the said Hugh Crawford, as factor *loco tutoris* for the Pursuer, was made to raise a certain action of reduction professing to challenge the foresaid service obtained by or in favour of the said Robert Patrick. This action of reduction was defended by the said Robert Patrick, the defence being ostensibly conducted in the name of Edward Lothian, Writer to our Signet, also the intimate friend of the Defender, William Patrick, as agent, although in reality conducted, or mainly directed by the said William Patrick himself, he having advised, or been privy to the whole pleadings and proceedings maintained or taken by the said Hugh Crawford on behalf of the Pursuer: More particularly, the Defender, William Patrick, con-

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cealed from the said Hugh Crawford, and also from our said Lords of Council and Session, as well as from the House of Lords, all knowledge or information in regard to the fact, that the Pursuer's father was, at the time of his death, a domiciled Scotchman, having carefully suppressed the foresaid letters of 19th April, 1783, 9th November and 12th November, 1798, and whole other correspondence and writings in his possession, or known to him, and through which he was cognizant that it was the Pursuer's father's fixed purpose and intention to return to Scotland as his native country, and that he had married the Pursuer's mother for the express and avowed purpose of legitimating the Pursuer and his sister, according to the law of Scotland, it being throughout the said pleadings both before our said Lords, and before the House of Lords, stated and admitted that the Pursuer's said father was, both at the time of his said marriage, and at the period of his death, a domiciled American. It was in consequence of this fraudulent concealment, or fraudulent misrepresentation on the part of the Defender, William Patrick, that our said Lords were induced to pronounce the foresaid decreet, repelling the reasons of reduction of the service in favour of the said Robert Patrick, and that the House of Lords was induced to pronounce the judgment of affirmance of that decreet, being the service, decreet, and judgment herein called for, and now sought to be reduced. At the time when said decreet and judgment of affirmance were obtained, the Pursuer was still in infancy, or at least in minority, and he of course was kept perfectly ignorant of the whole of the foresaid proceedings. Upon leaving college, he, at a very early period of life, went to sea as a midshipman, under the direction of the Defender, William Patrick. After serving as a midshipman for some time, he went to India when he was about twenty-one years of age. He remained in India until about the year 1823, when he returned to Great Britain for a few months on account of ill health, and pursuant to his undertaking, he left Great Britain for India again in April, 1824, where he continued until about the year 1827, when he returned to Great Britain and continued there until about the year 1830, when he again went to India, and stayed there until the year 1833, when he finally returned to Great Britain. On his return, he naturally began to make inquiry in regard to his legal rights relative to the said estate of Roughwood, which he found had belonged to his father, but which estate had, through apparent accomplishment of the foresaid fraudulent scheme, passed into the possession of the Defender, William Patrick, and is now possessed by him. After much inquiry and investigation, the Pursuer has only lately discovered the facts and documents above set forth; and more particularly, he has only lately discovered the fact that his father was, at the time of his marriage and of his death, a domiciled Scotchman, and become

cognizant of the letters of 19th April, 1783, of 9th November, 1798, of 12th November, 1798; and the letters of 7th April and 18th September,1800,—all of which facts and letters were concealed and suppressed by the Defender William Patrick from the said Hugh Crawford—from our said Lords—and from the House of Lords, as above set forth: Farther, the Pursuer now believes, and specially avers, that there exists, or at least did exist, various other letters, writings, or documents, proving that the Pursuer's father was a domiciled Scotchman at the time of his marriage and at the period of his death, and thereby disproving the allegation and admission upon which the said decreet and judgment proceeded:

The summons called upon the Defenders to bring with them into Court, and to produce before the Lords of Council and Session—1st, a retour of service of Robert Patrick aforesaid, as heir-at-law in special to William Shedden aforesaid; 2ndly, the decree of the Court of Session of the 1st of July, 1803; 3rdly, the judgment of the House of Lords of the 3rd of March, 1808; and, 4thly, certain title-deeds of the said Robert Patrick, by virtue of which he stood infeft and seised in the said estate of Roughwood.

The summons then stated the object for which this production of documents was required, namely, that they might be seen and considered by the Court; and that the same, with the whole grounds and warrants thereof, might be reduced, rescinded, cassed, annulled, and declared void, from the being and in all time coming, and that the Appellant might be restored there-against *in integrum*, for the following reasons, namely:—

First: The foresaid service was expede, and the said decreet and judgment were obtained through fraudulent misrepresentation, or fraudulent concealment, on the part of the Defender, William Patrick, acting for his own behoof, or for behoof of his said brother, Robert Patrick, inasmuch as the said Defender set forth to the said Hugh Crawford, the Pursuer's factor *loco tutoris*, and caused it to be set forth to the said Court and House of Lords, that the Pursuer's father was at the time of his marriage, and at the time of his death, domiciled in America, whereas he was a domiciled Scotchman; or

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inasmuch as the said Defender fraudulently concealed from the said Hugh Crawford, and from the said Court and House of Lords, the foresaid facts and letters, and more particularly the fact then known to the Defender, that the Pursuer's father all along retained the fixed purpose and intention of leaving America and returning to Scotland as his native country: Secondly, the said decree and judgment were at least pronounced by the said Court and House of Lords under gross error in fact and in law, inasmuch as neither said Court nor House of Lords were made aware of the fact, that the Pursuer's father was a domiciled Scotchman at the time of his marriage and of his death, or of the documents and facts lately discovered, and which are sufficient to prove that Scotland was the place of his domicile at the time of his marriage, and likewise at the time of his death; and therefore said decree, judgment, and said service itself, are reducible on the ground of *res noviter venientes ad notitiam*, or *instrumenta nova reperta:* Therefore, and for other reasons and causes to be proponed at discussing hereof, the whole said writs, titles, and writings, both those herein specially, with all that has followed, or may be competent to follow thereupon, Ought and Should, be Reduced, Retreated, Rescinded, Cassed, and Annulled, and Decerned and Declared to have been from the beginning, to be now, and in all time coming, void and null, and of no avail, force, strength, or effect in judgment, or outwith the same, and the Pursuer reponed and restored thereagainst. And furthermore, the said writings, being so reduced, it Ought to be Found and Declared, that the Pursuer has the only good right and title to the said estate of Roughwood, &c.

The defence put in to this action was of a preliminary nature. 1. That the Appellant did not possess the status of legitimacy; 2. That the retour of service was unchallengeable by reason of the Act of Parliament of 1617, c. 13; 3. That the action was barred by Res Judicata; 4. That the title sought to be displaced was fortified by prescription. And, 5. that the Appellant was barred by acquiescence.

The judgment of the House of Lords, in 1808, was no otherwise relied upon in the defence than as an ordinary res judicata. The attempt to rescind that judgment in a subordinate tribunal was not treated as an extravagance.

On the 25th April, 1849, the Appellant instituted a

Supplemental Summons against the same Defenders, proceeding on the same grounds, but containing a more expanded statement of particulars, and setting out various letters and other documents at great length, for the purpose mainly of showing that the domicile of William Shedden had always been Scotch, and that the Defenders had fraudulently concealed it.

Besides a multitude of other documents the Supplemental Summons contained the letter of the 12th November, 1798, from William Shedden to William Patrick, saying: "I am now going to quit this world. I have married Miss Ann Wilson—which restores her and two fine children I have by her to honour and credit;" thereby referring to the ceremony performed a week before his death.

But on the 17th January, 1851, the Appellant obtained permission to amend his libel, by putting on record the following allegations which gave the case a new complexion.

That besides his regular marriage, publicly solemnised as now mentioned, the said William Shedden, although he had not acquired a domicile in America, and Miss Wilson had been, according to the law of America, where they resided, married persons prior to and at the birth of the Pursuer, inasmuch as they had, previous to that event, as well as afterwards, lived and cohabited together as man and wife, acknowledged each other as such, and were held and reputed as such by their friends, neighbours, and acquaintances; and the said William Shedden afterwards got his marriage publicly and regularly solemnised, as before mentioned, in order the more certainly to secure and place beyond doubt the legitimacy of the Pursuer and his sister.

That although the fact, that by the law of America, the Pursuer's father and mother were, as before mentioned, married persons at and prior to the birth of the Pursuer, was known to the said William Patrick, as well as to the said Dr. Robert Patrick, during the course of the proceedings which have been now referred to, touching the succession of the Pursuer's father, no notice was taken of that fact in any of these proceedings, but it was, on the contrary, suppressed and concealed, and the proceedings adopted and prosecuted on the footing that no such fact existed.

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Then followed a condescendence and answers in the usual form, but of unprecedented length, made up of recapitulations.

After a hearing before the *Lord Ordinary* (Lord *Wood*), his Lordship, instead of deciding, made a report of the case to the Inner House of the Court of Session. And there, on the 11th of March, 1852, after full argument, the following judgment was pronounced by Lord *Fullerton* on behalf of the Court.

Lord *Fullerton:* This is an action brought on the most clamorous charges of fraud, said to have been practised in certain proceedings which took place in the end of the last and beginning of the present century.

The preliminary defence involved three points. First, the alienage of the Pursuer; secondly, the vicennial prescription of retours; and thirdly, the palpable irrelevancy of these summonses, even assisted as they are by the condescendence.

On the first point, that of the alienage, I should have great difficulty in sustaining it as a conclusive defence at this stage of the procedure.

In considering it, we must assume as true what the Pursuer undertakes to make good, viz., that the subsequent marriage of his parents had, in consequence of the alleged Scottish domicile of his father, the effect of conferring on him the *status* of legitimacy. Even on that assumption the Defenders maintain that the statutes naturalising parties born out of the allegiance of Great Britain would not apply to his case; a point which is said to have been determined by the House of Lords in the former case between these very parties.

If we could be sure of this last statement, of course the objection of alienage would be insurmountable.

But there is no satisfactory evidence on this point. The plea of alienage certainly was not the ground of the judgment in this Court. Indeed it was but slightly mentioned in the written pleadings which are now before us. It no doubt occupied a much more prominent place in the appeal cases to the House of Lords (*a*). But we have no authentic record of the grounds of the final judgment in that tribunal; and though there are incidental references in other cases to this judgment, in which it is stated historically, and that on high authority, that the objection to alienage was given effect to, I have great doubt whether we could,

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(*a*) See *supra*, p. 568.

in a matter of such importance, adopt that as the principle of the decision, and hold the law on this point to be definitively fixed.

Besides, we must keep in view, that independently of the effect of legitimation *per subsequens matrimonium*, through the operation of his alleged Scottish domicile, the Pursuer in the amended summons avers, and undertakes to prove, that there was by the law of New York a good marriage between his parents prior to his birth; a proposition which, if true, would exclude entirely the grounds on which the plea of alienage rests.

But the next ground of defence confines the Pursuer's action to the allegations of fraud and conspiracy, and clearly excludes the consideration of any error, either of fact or law, in the proceedings now brought under challenge. This defence is the vicennial prescription; and upon this we are not prepared to say that it would exclude a relevant and specific charge of fraud, though it might and must exclude all other reasons of reduction. The object of the statute (*a*) seems to us to secure the service from all challenge on the ground of error, from whatever source that error, *qua* error, arose. But we should most certainly hesitate to find that it was intended to apply, and did apply, to the case of that error being induced by the positive fraudulent act of the party benefited by the service, or of any one employed by him.

The defence raises the question which we all must consider as the substantial one, viz., whether there is in these summonses, explained as they are by the condescendence, such a specific and relevant allegation of fraud as can be received by the Court.

And that leads us to consider in what sense the expression *relevant* is here used.

General allegations of fraud are not spared either in these summonses or in the condescendence. And it was said that in discussing the question of relevancy, we must hold those allegations *pro veritate.*

But this is going rather too summarily to work in a matter of this kind.

It is not enough for a party, founding on the head of fraud, to state that fraud has been committed. Fraud is a general term to be inferred from specific acts. The party must state in what the fraud consists, and what the acts are from which the existence of fraud is to be inferred. And if the facts which he does state are clearly insufficient to support such an inference, or, what is worse, are absolutely inconsistent with such an inference, the objection of irrelevancy must be sustained.

It is then to the alleged acts, from which fraud is said by the Pursuer to be necessarily inferred, that we must look in discussing the point of irrelevancy. And when considered in this light, it

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(*a*) The Act of 1617, c. 13.

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would be difficult to imagine an action put on grounds so vague, so shadowy, and so inconsistent.

The first summons sets out various letters passing between the Defender, William Patrick, and other persons, relative to the Pursuer, at the time when his father died, and the marriage of his parents was communicated to his friends at home.

The supplementary summons, which may be held as the Pursuer's final and conclusive statement of his case, is little more than an amplification of the first. It sets out,—That these parties, *i. e.* William Patrick, John Patrick, and Robert Patrick, knew well that the Pursuer was entitled to succeed to the Scotch estate; and that "these parties accordingly, on their uncle's death, formed and acted on the fraudulent design and intention, and conspired together for the purpose of neutralising the object which their uncle had in entering into the said marriage; and for the said purpose of defeating the right of the Pursuer to succeed to his father as a legitimate son, and of acquiring the estate and property of the said William Shedden to themselves, or one or other of them." Then follows an enumeration of the acts which the Pursuer founds on, as inferring the fraudulent intent. And these consist, in the first place, of various letters passing between the different parties; in particular, the letters of William Patrick, of date 9th February and 31st May, 1799, and 18th December, 1800, addressed to the American executors of Mr. Shedden, and various other letters partially quoted in the summons, and generally referred to, as produced and founded on by the Pursuer.

Now the first thing which must strike every one not absolutely blinded by personal prejudices on reading these letters, is, that as they stand they are absolutely negative of any fraudulent intent whatever. They are the letters of persons who had interests adverse to that of the Pursuer, and of course were lawfully entitled to defend their own interests, but who were at the same time desirous that those of the Pursuer should be fairly protected, and who recommended the steps necessary for that purpose.

No one can read those letters, founded on as they are by the Pursuer in support of a charge of fraud, without feeling that they are the very natural expressions of disappointment at an event for which the parties were unprepared, without the slightest indication of any intention but that of defending their own legitimate rights. Nor was this feeling to be wondered at. Robert Patrick was the recognised heir-at-law of Mr. Shedden in America, who was understood to be unmarried. On his deathbed that gentleman, by his letter dated 12th November, 1798, founded on in the summons, informed his nephew, the Defender, William Patrick, that he had married Miss Ann Wilson, by whom he had two children, a boy and a girl,—an event of which Mr. Patrick had

been previously apprised by a letter from his brother, John Patrick, in New York, dated a few days before.

This might be most natural and proper on the part of Mr. Shedden, but it is certainly not going too far to say, that a deathbed marriage, entered into for the sole purpose of conferring on the wife and children a status and pecuniary rights, which the party withheld from them till he was about to leave this world, approaches very nearly to, and is like to be viewed as a somewhat harsh interference with the rights of those whom, till that moment, he had left in the expectation of his succession.

It is not to be wondered at, then, that the Patricks, and among others the Defender, William Patrick, lost no time in ascertaining how the law of the case stood. And the result was the clear opinion of American counsel, that the marriage was good, but had not the effect, by the law of America, of rendering the children legitimate. In these circumstances it was perfectly natural that William Patrick should have no scruple in taking the steps for carrying through his brother's service. But the statement, repeated both in the summons and in the argument, that this was done while all the time William Patrick was acting as the guardian of the Pursuer, is a striking instance of the incongruity of the general allegations of the summons with the documents founded on it.

It is impossible to conceive any series of writings more utterly and absolutely inconsistent with the charge of fraud which they were brought forward to support.

No doubt the assumption of the fairest motives is often the cloak for designs of a very different character; and, accordingly, the summonses aver that they were all parts of a scheme for defrauding the Pursuer.

When a party founds on letters in evidence of fraud and conspiracy, which, according to their clear and literal meaning, express no such intent, but the reverse, it lies on him, in order to support the relevancy of his statements, to set out the facts from which the conspiracy is to be inferred, and by which a colour is thus to be given to the letters essentially different from that which they present to the uninformed eye of those who peruse them. Now, on all this these summonses, assisted as they are by the condescendence, seem an absolute blank. There is not one fact set forth which bears the slightest resemblance to an act of conspiracy between William Patrick and his brothers, to defeat the rights of the Pursuer. The Pursuer says, indeed, and that loudly enough, that these parties did conspire; but in what the conspiracy consisted, how it was conducted and carried through, is a matter on which, though essential to every relevant charge of fraudulent conspiracy, we have no information whatever.

This defect seems fatal to the allegation of conspiracy; but we

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can gather from the very loose terms of the summonses what the Pursuer really points at. It is said that all these letters were written, and all the steps recommended, on the footing of the late Mr. Shedden having been a domiciled American, while the Defender, Mr. Patrick, and his brothers knew that his domicile at the time of his marriage and death was Scotland.

The various acts charged against the Defenders are free from the slightest element of fraud, except on the assumption that these parties knew that Mr. Shedden was at the time of the marriage a domiciled Scotchman. Their knowledge of that as a fact is the sting of the whole charge of fraud.

When a party states for his own objects a certain matter as a fact, which he knows not to be so, that may constitute legitimately an element of a charge of fraud against him. And if in this case William Patrick and his alleged associates had taken measures on the footing of William Shedden having been married in New York, while they knew that he had all along resided and been married in Scotland, that might have been listened to as an overt act relevant to infer a fraudulent intent.

But that is not the sense in which the expression "knowledge of William Shedden's domicile being Scotland" is used in these summonses. William Shedden had confessedly married in America, where he had *de facto* resided for at least thirty years; and during all that time he had never seen his native land, nor possessed any residence within it. The *gravamen* of the charge, then, when translated into language expressing its real meaning, is, that William Patrick knew, or must be supposed to know, that although William Shedden's *de facto* residence had been New York for thirty years, still his legal or constructive domicile continued to be Scotland, in reference to certain effects of his marriage on the legitimacy of the children previously born. In other words, the ignorance of William Patrick and his brothers of the law on a matter of extreme nicety, and on which there has been a great fluctuation of opinion, is to be imputed to them as an element of a charge of fraud; as if they had been guilty of the misrepresentation of a fact within their own knowledge.

In considering the admitted facts of the case, according to the ordinary apprehension of mankind, the question naturally suggests itself how William Patrick or his brothers, charged with fraudulent concealment or conspiracy, knew that William Shedden, who had lived and died in America, and had not seen his native land for about thirty years, continued to be a domiciled Scotchman till the day of his death. And the affirmative of that question is evidently essential to the Pursuer's case, when put on fraudulent concealment.

Accordingly, the attempt to answer it is founded on certain

letters, tending, as it is said, to show that William Shedden always entertained the intention of returning to Scotland. As this is really the hinging point of the Pursuer's case, and as the fraudulent concealment of those letters is made the subject of a serious charge against the Defender, William Patrick, it is of some importance to consider their terms. The greater part of them are said to have been addressed to John Patrick, the father of the Defender, and of an old date, being as far back as the year 1773. Thus, one letter founded on is that of William Shedden to John Patrick, in 1773, containing these expressions: "I declare upon my honour I would never think of remaining in this country if I could help it. My attachment to my own country and relations is much stronger than to anything here."

Then there is another letter of the 18th March, 1774.

"DEAR SIR,—Pray, do you imagine Thomas Shedden would part with that part of the Windy-Houses which lies betwixt my land and the high road, and runs up from Craig-house to Bogstown, on reasonable terms? I have long had my eye on that land, and could have wished to buy it if I could raise the money; it would make my farm very complete. Could I get it, and raise money to buy it, I don't know that I should stay long here. Pray, might I depend on your friendly assistance in such an affair? If I could, it would be one of the greatest favours you could possibly do me, and you might make the purchase immediately for me if you could. I would readily abide by any bargain you make. It would not be long before I would see if any of the Scotch lasses would have me." (Signed.) "W. S."

As another specimen, for there are many of a similar tenor, we may take that of the 16th April, 1783.

"MY DEAR FRIEND,—I expected long before this to have been in New York, but have been kept here settling old matters; the peace puts a stop to my views of remaining there this season, but I expect to leave this and go there to see Mr. Shedden in ten or fourteen days. He is about going home, and I wish to do so too, but cannot determine my route till I see him. I ardently wish to see my native country, and settle there for life. Do look me out some cheerful, accomplished, prudent, and agreeable lady for me by the time I come home. Tell the dear girls I return them a thousand thanks for their present of shirts. I will write Jeanie when I get to New York. I beg you will do in my affairs what you think best. Pay off principal and interest as fast as you can and leave the lands out of tack till I come home, which I hope will not be far distant."

It is needless to go over more of these letters in detail. They show what was natural enough, that William Shedden, like many of his countrymen, looked with hope and satisfaction to the

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possibility of his return, at one time or another, to his native land; but they certainly show nothing more. And it would be difficult to show that, even according to what the Pursuer considers the improved and matured law of domicile, any case has yet occurred in which such mere expressions of hope and intention to return to his own native country have been held to take off the effect of the *de facto* corporeal residence of the party in a foreign land.

But we do not go into this. In truth, the whole of the argument on the legal point was misplaced. We are not called upon, nor indeed entitled, to determine it at this stage of the procedure. The only question here is the relevancy of the acts charged as overt acts of fraud in the summons. And then the question comes to be, not what was truly the law of the case, but whether the true legal inference as to the domicile of William Shedden was, in the year 1799, so clear and notorious as to subject a set of gentlemen to the imputation of fraud, because they did not produce certain letters by which that legal inference might have been confirmed.

No doubt, if the Pursuer could have founded on letters or extraneous evidence showing that the parties possessed this knowledge, he might have had something like a case. But when he infers the fraud merely from the letters just alluded to, and nothing else, he is evidently inferring fraud from nothing but a misapprehension in law on a point of great nicety and difficulty, on which, I venture to say, nine-tenths of the lawyers of that day, and the whole of the uninitiated, would have, in the most excellent faith, come to the same conclusion.

Mr. William Patrick and his brothers might be right or wrong in that view; but the proposition that, even if ultimately found wrong in the law, their conduct must necessarily be held to be tainted with fraud, is one to which no Court, following the dictates either of law or common sense, could give the slightest countenance. Holding, then, as we must do, from the analysis of the import of these summonses, that the whole charge of fraud rests on this assumption, we can come to no other conclusion than that the statements are utterly irrelevant to support the conclusions of the action.

This would be the necessary result even if the subject of reduction were confined to the service of Robert Patrick. That, as I have already stated, is protected by the vicennial prescription from all ground of challenge, except fraud. If fraud is not relevantly averred, the summonses cannot be sustained.

But the case assumes a still more hopeless aspect for the Pursuer, when we consider what followed on the service—I mean the judgments of this Court, and the House of Lords confirming it.

Here, too, an attempt is made to neutralise the manifest effect of these proceedings, by stating that they were all fraudulent and

collusive; and on this point the averments of the Pursuer have been gradually extended and matured as the exigencies of his case required. The original statement in the first summons was, that the fact of the late Mr. Shedden's Scotch domicile had been fraudulently concealed from Mr. Crawfurd, the factor *loco tutoris*. It afterwards seems to have occurred to the Pursuer that it would be better to make Mr. Crawfurd a party to the fraud. Accordingly, in the supplementary summons it is said, not only that Mr. Crawfurd was an intimate friend of Mr. William Patrick's, and under his control, but that all the instructions he received in the proceedings were given by Mr. William Patrick. And this is further explained in the condescendence, viz., "that the appeal to the House of Lords was, like the action, originally taken under a concert and conspiracy between the said Hugh Crawfurd, William Patrick, and Dr. Patrick, who well knew throughout the whole fraudulent practices used on his behalf, on a false and deceptive statement, for the purpose of adding additional colour to Dr. Patrick's title, and preventing any after challenge." So that, according to the ultimate and finally considered description of his own case, the Pursuer charges the fraud and conspiracy, on which the reductive conclusions are founded, not only against the Patricks, but against Mr. Hugh Crawfurd, the factor *loco tutoris* who was appointed by the Court to defend the interests of the Pursuer, and who, in so far as we can gather *ex facie* of the proceedings, did defend them to the uttermost.

But then see what the case of the Pursuer is really brought to.

Mr. Hugh Crawfurd, a merchant in Greenock, and a connection of the family, was appointed factor *loco tutoris* by the Court, for the very purpose of attending to the Pursuer's interest. The simple fact of that appointment is a sufficient assurance that his general character stood free from all imputation. I presume that, as in other cases, he took the oath *de fideli*. He in fact and in law became the *dominus litis* opposed to Robert Patrick; and as far as we can see, he performed the duties which the situation imposed on him. He brought a reduction of the service of Robert Patrick, being the ordinary measure for bringing the pupil's case before the Court. He employed an agent, against whom no charge is made, and as counsel the Honourable Henry Erskine and Archibald Fletcher, whose names are a sufficient pledge of the zeal, as well as the ability, with which the Pursuer's interests were defended. On the decision against the factor and the Pursuer in this Court, the case was taken to the House of Lords. A most elaborate appeal case for him was prepared by Mr. Fletcher and Lord Brougham, by whom, and the late Lord Chief Commissioner Adam, then at the bar, the case was argued in the House of Lords. And the result was a final judgment affirming that pronounced by the Court of Session.

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Now, it would be difficult to conceive a case in which a more definite and specific averment of conspiracy or collusion was required, than in one of this kind. The object of the appointment of a factor *loco tutoris*, or a curator *ad litem*, or other officer of Court duly intrusted with the interests of the pupil or minor, is not only that those interests shall be defended, but that the other party shall have an opponent, with whom it is safe and conclusive to enter into the contract of *litis-contestation*, so as to obtain a *res judicata* on the matter in dispute.

It may be and is quite competent for the minor or pupil, if really injured, to challenge the fairness of the proceedings taken by the officer of Court appointed to watch over his interests, and to show that those interests have been fraudulently sacrificed. But surely it requires the clearest statement of the nature of that injury to warrant such an action. And the security generally supposed to be afforded by such a course would be absolutely worthless, if it were enough for the party to bring his action charging the officer of the Court with fraudulent collusion, without calling him into Court at all; and that twenty years after his death, and the death of nearly all the parties who can be supposed to possess any information on the subject. I cannot conceive anything more hazardous to the legitimate interests of all parties, forced into litigations with pupils or minors, than a course of this kind, exemplified as it is in the circumstances of this very case.

The single fact from which the Pursuer chooses to infer fraud or collusion, is, that the factor *loco tutoris* and his advisers did not advance a plea or proposition in law, which he, assisted by the new lights lately obtained, thinks would have led to a different judgment. But how can such a charge be listened to, after the case was put under the guidance of eminent counsel? *They* were the parties to determine, on their own professional responsibility, how the case was to be conducted.

But when considered in its true light, the case of the Pursuer will be found not to rest on fraud at all. The fraud lies, and so it is put by the Pursuer himself, in the failure to bring forward a certain legal proposition which is said to have been omitted in the pleadings in the former reduction, and which, according to the Pursuer's view, would now warrant a different conclusion. Even holding that view to be the sound one, what does it come to but this, that the Pursuer, under the cover of a charge of fraud, in itself untenable according to his own summonses, is attempting to obtain a review of the judgment of this Court and the House of Lords, on a matter of law which had not been brought under the notice of either tribunal; a review which, by the force of the vicennial prescription, is entirely incompetent and inadmissible! For if the allegation of fraud is indispensable to get the better of that pre-

scription as applicable to a bare retour, *a fortiori* it is indispensable, when that retour has been confirmed by judgments of this Court and the House of Lords.

In cases of fraud, as in many other cases of litigious warfare, the forms are, to a certain extent, in favour of the assailant. He may make his charges, however offensive, without being called upon to an instant verification, and may keep his adversary so far exposed to public obloquy till the proof is found ineffectual. But then the assailant is not absolutely free from the observance of all rule. He is at least bound to know his own case, and to be able to state it explicitly and consistently. If he avers fraud in general, he must be able to state the overt acts by which the belief of that fraud has been impressed upon him; and above all is he bound to abstain from charging as acts of fraud and conspiracy, facts and documents which, to the ordinary sense of mankind, lead to a conclusion directly opposite.

I would suggest, then, that the objections to the relevancy of those summonses should be sustained and the Defenders assoilzied.

The Court pronounced the following interlocutor:—"Sustain the defences: Dismiss the said actions, and assoilzie the Defenders from the whole conclusions thereof: Find the Defenders entitled to their expenses."

Against this decision of the Court of Session an appeal was forthwith taken to the House of Lords; and the cause stood for hearing on the 2nd of March, 1854.

Sir *Fitzroy Kelly*, Mr. *Roundell Palmer*, Mr. *Anderson*, and Dr. *Phillimore*, for the Appellant.

The *Solicitor-General* (Sir *Richard Bethell*), the *Dean of Faculty* (Mr. *Inglis*), Mr. *Rolt*, and Mr. *Mure*, for the Respondents.

Sir *Fitzroy Kelly* was proceeding to open the case, when the following conversation ensued:—

The LORD CHANCELLOR (*a*): The decision of this House in 1808 established the Appellant's illegitimacy. What you asked in the Court of Session was to obtain a decree inconsistent with that decision. How could

(*a*) Lord Cranworth.

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the Court below do otherwise than say that they were bound by the judgment of this House?

Sir *Fitzroy Kelly*: Our case, my Lords, is that the proceedings in the Court below, and in this House, were begun, continued, and ended in fraud.

The LORD CHANCELLOR: Can the Court of Session decide such a question?

Lord BROUGHAM: You called on the Court of Session to set aside the judgment of this House.

The LORD CHANCELLOR: How *can* the Court of Session do *that?*

Sir *Fitzroy Kelly*: My Lords, the real object of the former suit was to confirm a title obtained fraudulently. The action in the Court below was a mock action; and the appeal to this House was a mock appeal.

The LORD CHANCELLOR: Your application should have been *here*.

Sir *Fitzroy Kelly*: True, my Lords, if the Court below had decided that it was not competent to them to impeach a judgment of this House; but the Court below has not entered into that question.

The LORD CHIEF JUSTICE OF ENGLAND (*a*): The Court below *assumed* that they had jurisdiction; but we are bound to consider whether they were right in this.

Lord BROUGHAM: You must get rid of the judgment of this House. The decree below has become a judgment of the House of Lords, which not only confirms it, but converts it into a judgment of its own.

The LORD CHIEF JUSTICE: Has this ever been done?

Sir *Fitzroy Kelly*: This point not having been adverted to in the Court below, I am not prepared to argue it. Except incidentally, it is not even alluded to in the great volume of papers on your Lordships' table.

Lord ST. LEONARDS: Suppose the Court below had decided the other way, and reversed the judgment of this

(*a*) Lord Campbell.

House; and suppose a contest between that Court and this House by a subsequent reversal of the decree below.

Sir *Fitzroy Kelly*: My Lords, I would humbly ask your Lordships' indulgence, to meet these difficulties.

[After some deliberation as to granting time to Sir *F. Kelly* to prepare on the question of jurisdiction,]

The LORD CHANCELLOR:

This is in substance an action to set aside a judgment of this House; but you might well suppose that the question of jurisdiction would not be raised here, since it was not raised in the Court below. I observe that Lord *Fullerton*, in his long opinion, does not discuss it. We therefore adjourn the further hearing till Monday next, that you may be prepared on this preliminary question; one, perhaps, depending upon principle, and but little touched by authority.

On Monday, the 6th of March, the cause was again in the paper, when the following intimation fell from

The LORD CHANCELLOR: The House will at this stage assume the Appellant's legitimacy. Let the argument, therefore, for the present, be confined to the question of jurisdiction.

Sir *Fitzroy Kelly*, for the Appellant: When a judgment has been obtained by fraud, the party aggrieved must apply to the Court itself to set it aside. This House has no original jurisdiction. It can only deal with the judgments of other Courts, by affirming, reversing, or varying them. This, however, is not an attempt to set aside the judgment, but to be relieved from its operation.

[Lord ST. LEONARDS: It is an attempt to get the land from the person to whom the Court below gave it. The decision of other Courts may be appealed from. The decisions of this House cannot. If the House has

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been misled, the question is whether you ought not to have come here, instead of resorting to the Court below.]

[Lord BROUGHAM: Would not the decree you asked below have had the effect of making the judgment of this House a nullity *in toto*, and not merely relieving the party?]

Where the object is to nullify the judgment entirely, the application must be to the Court that made it. But where the objection arises *incidentally*, any Court may hold the judgment null and void, upon proof of the fraud. The pettiest of all tribunals, the Court of Pie-Poudre, may, and indeed *must*, in such a case disregard a decision even of the highest appellate jurisdiction. All Courts are liable to imposition, and even this House was on a late occasion defrauded of its judgment in *Tommy* v. *White* (*a*). There the fraud was on the House, not on the Court below, and there, consequently, the application was made to the House to set the matter right. But here the fraud was on the Court of Session. Hence a suit in that Court was necessary.

If, instead of annihilation, the object is merely to have a judgment declared void in respect of fraud, the authorities are abundant. Thus, in Lord Coke's Reports, we have *Fermor's Case*, 44 Eliz., where a fine levied with proclamations was held no bar against the party claiming the inheritance, because it appeared that such fine, though among the most solemn of judicial proceedings, was had, in the particular case, by covin (*b*). For the common law so abhors fraud, that all acts tainted with it, as well judicial as others, are void, and bind not. There are many later authorities; but the most weighty of all is the *Duchess of Kingston's case* (*c*); where a sentence of jactitation was proved to have been obtained by the collusion of both parties,

(*a*) 4 House of Lords' Ca. 313.

(*b*) Coke's Rep., part 3, p. 77; and see *Farr's case*, Raym. 276, and 1 Sid. 254.

(*c*) 20 How. State Tr. 355.

and it was consequently treated as a nullity. The argument of Mr. Solicitor-General *Wedderburn* in that case has the following passage:—"A sentence obtained by fraud and collusion is no sentence. What is a sentence? It is not an instrument, with a bit of wax and the seal of a Court put to it; it is not an instrument with the signature of a person calling himself a Registrar; it is not such a quantity of ink bestowed upon such a quantity of stamped paper: a sentence is a judicial determination of a cause agitated between real parties, upon a real interest. In order to make a sentence, there must be a real interest, a real argument, a real prosecution, a real defence, a real decision. Of all these requisites, not one takes place in the case of a fraudulent and collusive suit: there is no Judge, but a person invested with the ensigns of a judicial office, is misemployed in listening to a fictitious cause proposed to him; there is no party litigating, there is no party defendant, no real interest brought into question; and, to use the words of a very sensible civilian, 'fabula, non judicium, hoc est; in scenâ, non in foro, res agitur.'"

So here, my Lords, we say the parties were not real parties. The Appellant was an infant, and his guardian in collusion with the other side; so that the description of Mr. *Wedderburn* thoroughly applied. Even in Mr. Chitty's book on (*a*) Pleading, forms are given which show that the practice of the Courts has made provision for the case of fraudulent judgments, by showing how they were to be met, and how their effect was neutralised the moment it appeared that they had been obtained by fraud.

In *Price* v. *Dewhurst* (*b*), Sir *Launcelot Shadwell* said, "It is of no consequence where a judgment is given, if it appears to have been obtained by fraud: in every

(*a*) *Stockdale* v. *Hansard*, 9 Ad. & El. 1.
(*b*) 8 Sim. 302, 304.

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such case the Court will consider it as a nullity; and it is at liberty to deal with the parties and with the subject it has to administer, just as if the judgment had never taken place." To show the extent to which this doctrine had been carried, he might refer their Lordships to many cases both at law and in equity, such as *Meddowcroft* v. *Huguenin* (*a*), *Robson* v. *Eaton* (*b*), *Lloyd* v. *Mansell* (*c*), and *Bandon* v. *Beecher* (*d*). In this last case, it was held that although the Court of Chancery could not correct a decree of the Court of Exchequer, yet a party affected by it, whether Plaintiff or Defendant, might question its validity on the ground of covin or contrivance; and it was laid down by Lord *Brougham*, that a decree so obtained "should avail nothing for or against the parties affected by it to the prosecution of a claim, or the defence of a right."

[Lord ST. LEONARDS: The question is, do these doctrines extend to a case which has been decided by this House?]

We do not see how a decision by this House can be any exception.

[The LORD CHANCELLOR: The only question to which we directed your attention was that to which Lord *St. Leonards* refers.]

[Lord ST. LEONARDS: In *Tommy* v. *White* could they have proceeded in the Court below notwithstanding the decision of this House?]

That case cannot be assimilated to the present. In *Tommy* v. *White* there was an affirmance of the decree below.

[Lord ST. LEONARDS: So there has been here.]

[Lord BROUGHAM: Suppose a suit in the Ecclesiastical Court for nullity of a marriage; suppose an appeal and an affirmance by the Delegates. You have

(*a*) 4 Moore's P. C. Ca. 386.
(*b*) 1 Term. R. 62.
(*c*) 2 P. Wms. 73.
(*d*) 3 Cla. & Fin. 476.

then a judgment of an exclusive and supreme jurisdiction as much as if it were by this House. That case you say would be the same as this ?]

Precisely. The question has been narrowed to this, whether there is any difference between a decision of this House and that of any other Court. We had not previously supposed that your Lordships had considered the point so plain with regard to those other Courts. The sentence of the Ecclesiastical Court, in the case put by Lord *Brougham,* is as absolute as if it were by the House itself.

[Lord BROUGHAM: But here the appeal in strict constitutional language is to Parliament, this House being the High Court of Parliament, and the judgment given that of the Parliament.]

Still the House is a court of justice, and must act as such. But what does Mr. Justice Blackstone say (*a*)? He affirms that even an act of the whole Legislature may be relieved against on proof of fraud. And he shows that this has been done (*b*). The same principles

(*a*) 2 Comm. 346.

(*b*) See 4 Cruise's Dig. 545, where the cases relied upon by Blackstone are set out. One of them related to an Act of the House of Assembly of Pennsylvania, which was relieved against in Chancery. The other was a Scotch case, *Mackenzie* v. *Stuart,* Dom. Pro. 1754, on appeal from the Court of Session, where it appeared that an Act of Parliament had been obtained to sell an entailed estate for payment of debts upon a false representation of facts. The House of Lords, under the direction of Lord Chancellor Hardwicke, reversed the decision of the Court below, by which relief had been refused. The case is reported in Messrs. Craigie Stewart & Paton's Appeal Cases. From their report it appears that the House held "that the Appellant (an heir of entail) was not barred by his concurrence and agreement, nor by the Act of Parliament, from opening up the whole proceedings." And they add on the authority of Lord Kaimes, "that the Lord Chancellor, in delivering his opinion, expressed a good deal of indignation at the fraudulent means of obtaining the Act, and said that he never would have consented to such private Acts, had he ever entertained a notion that they would be used to cover frauds." See Kaimes' Dictionary, 7445.

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obtain in Scotland, *Macpherson* v. *Tytler* (*a*). But we submit with confidence that the *Duchess of Kingston's case* is of itself conclusive in our favour, and there is an end of all difficulty; unless it can be shown that the judgment here, being by this House, makes a difference. But that proposition cannot be sustained, after what Lord *Eldon* said in *Stewart* v. *Agnew* (*b*), that "where a fraud is practised upon the House and the party by the operation of that fraud obtains the judgment of the House, it is no more than the judgment of any other court obtained by fraud, and is an absolute nullity." Suppose an action brought to recover an estate, and a judgment against the plaintiff pleaded—he can say that that judgment does not bind him because it was obtained by fraud. It has been said, why did we not petition the House in the present case? The answer is complete. The House has no power to do anything effective; for even if it were to revoke its own judgment, it could not set aside the decree of the Court of Session. No original proceedings could have been taken in this House by the wronged heir-at-law. Suppose he had applied as in *Tommy* v. *White*. The House would have had no means —no machinery—to deal with the case, because it was one indispensably requiring the powers and functions peculiar to a tribunal of original jurisdiction.

[Lord BROUGHAM: If the judgment of this House were revoked, you might then proceed below.]

But what power would the House have to remit to the Court below? It could only act in its appellate character. It could only deal with the case as it dealt with it before.

[Lord ST. LEONARDS: The House could direct an issue.]

The House has no jurisdiction over land in Scotland

(*a*) 1 Sec. Ser. 718. (*b*) 1 Sh. App. Ca. 434.

except on appeal. Here nothing wrong has been done so far as the appellate jurisdiction was concerned. The case came up in the regular way. The House cannot recal its own judgment upon matter dehors and extrinsic; and for anything appearing on the record, which is all that the House was entitled to look at, the decision of 1808 was the only decision at which the House could have arrived.

Mr. *Roundell Palmer* (with Sir *F. Kelly*): The question is what is the general law applicable to judgments and estoppels. Judgments may be impeached on three distinct grounds. First of all, they may be impeached by reason of error on the merits; and in such a case, this House, when exercising its reviewing jurisdiction, proceeds on the former evidence, and has no higher function to discharge than that which belongs to other Courts of Appeal. Secondly, judgments may be impeached by reason of newly discovered matter,—what is called in Scotland *res noviter veniens ad notitiam;* and no other Court can relieve but the Court that made the judgment. Redress is then granted in Chancery by Bill of Review as it is called—which has been permitted even after an affirmance of the decree by the House of Lords (*a*). But the leave of the Court to file the bill must be obtained, *Barbon* v. *Stearle* (*b*), *Blake* v. *Foster* (*c*). Both these were cases of review for new matter. They show that even a judgment of this House will not deprive a party of the right of review; the only question being as to asking leave to file the bill—whether that should be here or below. And the giving leave is equivalent to saying there is no estoppel. Such are the rules as to error and new matter. But now we come to the third class of cases

(*a*) Lord Redesdale on Pleading, p. 88.
(*b*) 1 Vern. 416, and see 16 Ves. 89.
(*c*) Macq. H. of Lords, 448.

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where judgments are impeached and resisted on the ground of fraud and collusion perpetrated in the obtaining of them. And doubtless the most striking instance is furnished by the *Duchess of Kingston's case*, where it was held that the effect of a judgment may be avoided by proving that it was procured by fraud and collusion (*a*). Persons properly on the record will be bound if the proceeding is honest. But if the suit is not real, the party can disclaim it, and say the suit was not mine, *Robson* v. *Eaton* (*b*). This is the meaning of what Lord *Brougham* said in *Bandon* v. *Beecher* (*c*). "That you may always object to a decree made in another Court if it was pronounced through fraud, contrivance, or covin, or not in a real suit; or though pronounced in a real suit, yet between parties who were not really in contest with each other." The principle of a Bill of Review, on the ground of new matter, is well distinguished by Lord *Redesdale*, from the principle of a bill to obtain relief against a judgment had by fraud (*d*). A decree enrolled is as binding as a judgment of this House; but upon proof of fraud it will be void as regards those whom the fraud affects, although it may be good in other respects, *Richmond* v. *Tayleur* (*e*), *Sheldon* v. *Fortescue* (*f*). In cases of fraud, no review is necessary. A decree obtained by fraud may be impeached without the leave of the Court (*g*). In *Mussell* v. *Morgan* (*h*), the very thing was done which it is suggested should have been done here. A petition was presented to have a decretal order discharged, as obtained by collusion, but Lord Chancellor *Thurlow* said the thing must be set right in

(*a*) 2 Smith's Lead. Cases, 432, 433, where the authorities are fully gone into.
(*b*) 1 Term R. 62.
(*c*) 3 Cla. & Fin. 471.
(*d*) Mitf. Eq. Pl. 92.
(*e*) 1 Peere Wms. 734, note.
(*f*) 3 Bro. C. C. 73 of P. W.
(*g*) 3 Peere Wms. 111.
(*h*) Mitf. Eq. Pl. 93.

a new suit. The analogy to the present case is perfect. On the record your Lordship's judgment of 1808 was correct. The matter showing fraud must be brought forward in a separate proceeding.

[Lord BROUGHAM: The judgment of this House affirming that below, makes the judgment below a judgment of this House. Then from what time would the limitation run ?]

We believe from the time of the judgment below.

[Lord BROUGHAM: But we have hitherto held the judgment of 1808 to be a judgment of this House, not merely an assent to that below.]

The judgment is the same judgment confirmed by a higher authority. We submit that it is still the judgment of the Court below. The jurisdiction of this House is merely appellate. It can only affirm, reverse, or vary. The House knows nothing but from the record of the Court below. If the judgment be void by matter *dehors* your Lordships cannot interpose. The House may, indeed, correct slips in its own judgments. But it cannot make fundamental alterations(*a*).

The terms of the summons in the present case are sufficient to bring it within the rules we have been citing. The form of pleading is in accordance with the law of Scotland. Bell's Dictionary (*b*), Shand's Practice.

The *Solicitor-General,* for the Respondents: A judgment of this House, having the force of a statute(*c*), has conclusively fixed the status of the Appellant. The only mode of reversing it is by Act of Parliament. If that course had been taken, the House would have had

(*a*) See 1 Moore's P. C. cases ; and Macqueen's H. of L. 445.

(*b*) Title " Exception," 385.

(*c*) Preface to Lord St. Leonards' Real Property Decisions of the House of Lords. Coke's First Inst. B. 352.

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ample means for trying the real merits of the application. An issue might have been directed.

[The LORD CHANCELLOR: Can you show any precedent for that?]

Lord *Redesdale* says it was not uncommon for your Lordships to direct an issue(*a*). But even upon an inquiry at the Bar of the House there would be every facility for investigation.

In *Meadows* v. *The Duchess of Kingston* (*b*), Lord Chancellor *Apsley* laid it down as a general rule that wherever a matter comes to be tried in a collateral way the judgment of any other Court having competent jurisdiction shall be received as conclusive of the matter determined. And in *Prudham* v. *Phillips*(*c*), where a sentence of the Ecclesiastical Court was produced by the plaintiff, the defendant offered to prove that the sentence was obtained by fraud, but *Willes*, C. J., would not permit the evidence to be gone into.

The general principle is the same in Scotland;

(*a*) Macqueen's H. of L. 439. The case cited by Lord Redesdale is that of *Scudamore* v. *Morgan*, 4th March, 1677, where the House, after reversing a Decree, ordered that the Court below (namely, the Court of Chancery), should direct that a trial at law should be had upon this issue,—"Whether the Lord of the Manor of Kenchurch be compellable to renew estates from 99 years to 99 years, and if any difference shall arise about the said issue, the Lord Chancellor to direct a Master to settle the same." This, however, was done on appeal, and there are other instances to the same effect, such as that of the *Duke of Devonshire* v. *Wall*, 4th Feb., 1760, where it was ordered that the "Parties do proceed to a trial at law at the bar of the Court of King's Bench, by a special jury, upon the following issues (settled by the House), and that the Court of Chancery do give all proper directions for carrying this judgment into execution." All this, however, was ordered by the House in the exercise of its appellate jurisdiction. It does not, I think, appear that the House ever directed an issue upon an original, and still less on a legislative proceeding; and even in the cases cited the weight of the operation is thrown on the Court below. (*b*) Ambl. 756.

(*c*) Ambl. 763. See Mitford on Pleading. Smith's Edition, 300.

where, however, it has been fortified by the Act 1587, c. 89, which expressly affirms that the judgment of a Superior Court shall not be impeached in a lower one.

The case of *Blake* v. *Foster* (*a*), cited on the other side, is really in our favour, for the Lord Chancellor of Ireland refused to proceed without the authority of the House; and the course he followed, your Lordships finally by your judgment approved.

But how does it appear in the present case that the judgment sought to be set aside proceeded upon fraud? Who can tell on what points the decision of 1808 went? When a decree was affirmed, it was not then usual to assign reasons. There were a variety of circumstances in the case; and the conclusion of the House might have rested on matter entirely independent of the fraud now alleged. And if so, your Lordships cannot assume that it proceeded upon fraud.

[The LORD CHANCELLOR: You are here as if on demurrer; and you must make out that by no possibility could the judgment have gone on the fraudulent matter.]

The *Dean of Faculty*: A Court may incidentally have to decide matter beyond its ordinary functions; but it cannot grant a remedy out of its jurisdiction. Thus, in Scotland it might become necessary to ascertain whether a party were a peer—although the Court of Session has no jurisdiction to try peerage questions. Or—before the abolition of the Consistory Court—it might have been indispensable incidentally to inquire in a suit whether a woman were married, or whether a man legitimate; both points of jurisdiction being foreign to the Court of Session till the late Act was passed. But, in the present case, the main object of the action was directly and expressly to displace the judgment of this House; and whatever might be the

(*a*) Macqueen's H. of L. 448.

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law of England, the authorities of Scotch law demonstrated that this was a competent and the only proper course of proceeding to effect the end desired (*a*). There is no getting rid of a *res judicata* in Scotland except by an action of reduction; and whether it be by the highest or the lowest jurisdiction, the rule is the same.

The Act of 1587, c. 89, seems conclusive; but the general doctrine of Scotch law is fully recognised in *Mackenzie* v. *Scott* (*b*), *Scarlett* v. *Somerville* (*c*), and *Murray* v. *Cockburn* (*d*).

As to the contention that the suit was not the minor's, the answer is that the minor was legally represented in the proceeding, and by the law of Scotland effectually bound by the acts of his factor *loco tutoris*.

Sir *F. Kelly*, in reply: That a judgment of this House cannot be reversed without an Act of Parliament, —the main point urged on the other side—we do not and need not dispute; because it leaves untouched the question—the only question here—whether, when a judgment of this House is obtained through fraud and collusion, it may not be passed by in another Court as a nullity.

[The LORD CHANCELLOR: Are you able to mention any case of replication on the ground of fraud to a plea of judgment recovered?]

In the second and third volumes of Chitty on Pleadings, the cases are all collected.

[The LORD CHANCELLOR: In the *Duchess of Kingston's case*, the proceeding was by the Crown.]

Plea of *autre fois acquit* may be got over by showing that the judgment was obtained by fraud.

(*a*) Stair B. 4, c. 40, §§ 15, 16, 21. Ersk. B. 1, c. 3, § 2.
(*b*) 4 Bro. Sup. 282. (*c*) Ibid. (*d*) Ibid.

The Scotch cases cited by the *Dean of Faculty* have no application, and the Scotch Act of Parliament, of which we have heard so much, is equally unavailing. It is in truth no more than a general declaration, of what is likewise the law of England, namely, that a subordinate tribunal cannot alter the decrees of a superior one.

The *Solicitor-General* asked your Lordships, how do you know that the House went on fraud in 1808? This supposes that the fraud tainted but a single point, or only a few points, of the case. But we aver that the whole proceeding was concocted and bottomed on fraud, and that the entire mass was permeated and saturated with fraud.

At the close of the argument, on the 10th March, the sentiment of the House was thus expressed by

The LORD CHANCELLOR:

The principle relied upon by the Appellant's counsel is the principle laid down by Chief Justice *De Grey*, on behalf of himself and the other Judges, in the *Duchess of Kingston's case*—namely, that "admitting a sentence of jactitation to be conclusive upon an indictment for bigamy, the counsel for the Crown might nevertheless be admitted to avoid the effect of such sentence by proving the same to have been obtained by fraud or collusion." The question, my Lords, is, does the present case come within that principle? Sir *Fitzroy Kelly* seemed to admit, that in order to render it applicable, it would not be enough to show that somebody had been guilty of fraud in the conduct of the cause. It must appear that the suit itself was actually concocted and conducted in fraud. Now, to judge of this, we must know what the facts of the case are. Of these we are now ignorant. I regret the time which has been consumed—not unnecessarily however, but indispensably. And I see no alternative but that counsel

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be now directed to proceed upon the facts, so as to enable the House to decide whether they are really of such a nature as would, if established, entitle the Appellant to the relief which he prays.

The Lords BROUGHAM and ST. LEONARDS concurred.

Accordingly on the 27th of March, in compliance with the direction of the House, Sir *Fitzroy Kelly* proceeded to lay before their Lordships the facts alleged by the Appellant; contending that those facts brought the case within the principle to which the LORD CHANCELLOR had referred; and, also, that the averments respecting them were relevant and sufficient in point of pleading. Sir *Fitzroy* was followed by Mr. *Roundell Palmer*. The points mainly urged by them were 1. That the domicile of William Shedden, the Appellant's father, had all along been Scotch. 2. That this was well known to the Respondents. 3. That they nevertheless deceived the Court by representing it as a fact that the domicile of William Shedden was not Scotch, but American. 4. That the Appellant, though born in America, was in truth a Scotchman, and a subject of this kingdom. 5. That the marriage of 1798, though had in America, was in the eye of the law a Scotch marriage, *Munro* v. *Munro* (*a*), *Warrender* v. *Warrender* (*b*). 6. That being a Scotch marriage, it rendered the Appellant legitimate from his birth. 7. That the law of Scotland governed, and the law of America did not touch the case. 8. That the Appellant came within the 4 Geo. 2, c. 21, and consequently was not an alien. 9. That even if any doubt could exist as to the retrospective operation of the marriage of 1798, the Appellant's legitimacy would be established by the prior marriage alleged by way of amendment. 10.

(*a*) 7 Cla. & Fin. 842; 1 Rob. App. Ca. 502.
(*b*) 2 Cla. & Fin. 488.

That the parties were before the House as on demurrer; and that, although the Appellant might ultimately fail in his proof, his statement must now be taken to be true. And lastly, even if the Court below had been right in holding that the Appellant's case was unsustainable as it stood, they ought only to have dismissed the action. They ought not to have assoilzied the Defenders.

The *Solicitor-General* and the *Dean of Faculty*, for the Respondents, admitted that if the Appellant could make out that he was born in lawful wedlock, and that the Respondents knew the fact, the case would be serious. But he must show three things. 1. That the natural inference of the Respondents ought to have been in favour of a Scotch domicile. 2. That they must have known that the point of domicile was material to the issue of legitimacy or illegitimacy. And 3. That the impression created in the minds of the Court respecting the domicile, or the facts from which the domicile was inferred, led to the judgment sought to be got rid of. If the Appellant fail in any one of these points, his case falls to the ground. There is no averment that Patrick knew the domicile to be material, although it is averred that it *was* material. The law respecting domicile was said on the other side to have been well known in Scotland at the time of these proceedings; but it was not so, and Lord *Fullerton's* judgment shows this. It was not on domicile that the judgment affirmed in 1808 proceeded.

The maxim pater est quem nuptiæ demonstrant cannot apply here—because when the Appellant was born, his parents were not married. The old fiction that a subsequent marriage legitimates prior born issue from their birth is now exploded in Scotland, *Kerr* v. *Martin* (*a*).

(*a*) See this case, *infrà*, p. 650.

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[The LORD CHANCELLOR: If the Appellant was legitimate, he was not an alien. If he was illegitimate he was an alien.]

[Lord BROUGHAM: The Roman law says the child in such a case is legitimus ab initio, non legitimatus.]

In *Kerr* v. *Martin*, the Court of Session disagreed with the civilians who espoused the doctrine of retrospective relation and the theory of mid-impediments. The Appellant, therefore, was not legitimate at his birth. He was a person who had no father for the first six years of his life.

[Lord BROUGHAM: The opposite doctrine would lead to this:—that the parents, by intermarrying, might convert the son, peradventure a prisoner of war with arms lawfully in his hands, into a person guilty of high treason.]

Then as to the allegation of a prior marriage, introduced by way of amendment at the eleventh hour, it only shows to what daring extremities parties will be carried in prosecuting a desperate litigation. It is a mere after-thought. But even if that bold assertion were established by proof, the case of the Appellant would gain nothing by it, unless fraud were brought home to the Respondents.

The judgment assoilzing the Respondents was well considered in the Court below, and went advisedly beyond a mere dismissal of the action—having regard to the harassing and unprecedented character of the suit.

Sir *Fitzroy Kelly*, in reply: The case of *Kerr* v. *Martin* is unsatisfactory and unintelligible. It was carried apparently by a single vote — the judges in Scotland dividing seven to six. This House can pay no regard to it.

The Appellant desires to go before a jury. The decision below has refused him a trial. This of itself

is enough in common justice to vindicate his claim to a reversal.

JUDGMENT.

The LORD CHANCELLOR:

Lord Chancellor's opinion.

When the cause was opened, one (*a*) of your Lordships suggested that this was a proceeding under no circumstances competent to the Appellant; because it was an attempt to set aside, by the sentence of an inferior Court, a solemn judgment pronounced by this House in the last resort. That preliminary objection your Lordships desired first of all to be argued on the assumption that the facts were such as the Appellant represented them; and the point was, whether, under any circumstances, a party against whom there had been a final judgment of your Lordships' House, could call that judgment in question by a suit in the Court below, and have it declared to be no bar to a new proceeding.

The argument on this preliminary objection opened questions of very great nicety and very great difficulty. Now without expressing any positive opinion, I certainly do not wish it to be understood that I concur, or that I should, without further argument, concur in the suggestion that under no circumstances can a judgment of your Lordships' House be called in question, if it be established that it was not a judgment in a *bonâ fide* suit, but obtained by the fraudulent collusion of both parties, in order, either by means of that judgment, to defeat the objects of public justice, or to defeat the rights of one of the nominal parties, he being an infant, whose rights were under the guardianship of another. If it could be established that the Defenders in a suit in Scotland, or the Defendants here

(*a*) Lord Brougham. "Quære:—Lord Campbell." Per Lord Brougham.

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(which would be just the same thing), had fraudulently induced some one to act as the next friend of an infant, in order to have a pretended suit instituted in which it should be a part of the common design of the Plaintiff and the Defendant that the real rights of the infant should be kept out of sight, so that the Court below, in the first instance, and your Lordships' House afterwards, might be imposed upon and led to imagine that they were decreeing upon a state of facts which the parties knew was not a true state of facts, I wish to be understood as not meaning to express any opinion that an original suit in the Court below might not be instituted, notwithstanding that fraudulent judgment so obtained. It was decided in the celebrated case of the *Duchess of Kingston* that a judgment which had been obtained by fraud would not stand in the way of a prosecution of the duchess for bigamy; that the suit in the Ecclesiastical Court was a contrivance merely—a link in the chain of fraud; and, in truth, no judgment. According to the phrase used by Lord *Loughborough*: "*Fabula, non judicium, hoc est; in scenâ, non in foro, res agitur.*"

My Lords, the case having been thus argued upon the abstract question, your Lordships were of opinion that it would be inexpedient to come to any decision upon that abstract question, until, however long a time the argument might occupy, you had first heard the argument upon the facts in order to see whether, assuming the doctrine of the *Duchess of Kingston's case* to be applicable to a judgment affirmed by your Lordships in this House, there were facts in this case capable of raising the real point—whether, in truth, there had been any such concert and collusion between the parties who acted for the infant and the Defenders (the persons who were the heirs at law, if the infant were illegitimate), as to bring this case within the

doctrine of the *Duchess of Kingston's case*—I say the *Duchess of Kingston's case*, but there are several other authorities, which will illustrate what I mean.

Having heard the whole argument, and having attended to it from first to last with great anxiety, I have come to the clear opinion that there is one point which puts the decision beyond all doubt. I allude to the statute of George II. (*a*), under which it appears clear to demonstration, that (subject to what I am presently to say as to a prior marriage) the Appellant is to all intents and purposes an alien; and, consequently, incapable of succeeding as heir to lands in this country.

My Lords, the case made by the Appellant is this. He says that his father was a Scotchman by birth, that he was the owner of the estate in question called Roughwood, in Scotland; that his father went to America, first in the year 1764; that he returned in 1768, or 1769, for about a year and a half to this country; and that he went out afterwards to America, and remained till the end of the year 1798 when he died there. But his argument is that during all that time, although resident in America, he continued a domiciled Scotchman. And unquestionably it may be that a party, supposing him to live a century abroad, yet if he only lives there as a sojourner, *animo revertendi*, his home all along remaining here, no length of time, merely *qua* length of time, will necessarily confer a foreign domicile upon him. And what the Appellant contends for, is that while his father was residing in America from the year 1764 to the year 1798 when he died, (except during the year and a half when he returned to Scotland, about 1768 or 1769,) during the whole of that time he was only there for a temporary purpose, and always *animo revertendi*. He contends

(*a*) 4 Geo. II. c. 21.

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further that the father having lived with a woman named Ann Wilson, and having had born to him of that woman a son, himself, about the year 1793, did a week before his death marry this woman, and that by the law of Scotland (which he says was the law governing the case, Scotland being his domicile, although America was his place of residence) such marriage legitimated the son, the present Appellant, and so made him (whether you call him *legitimus* or *legitimatus* is unimportant) a legitimate son, and consequently capable of succeeding to the estate.

That case, my Lords, was endeavoured to be established in the first place by an enormous mass of evidence; the object of which was to show the *animus* of the deceased, that he was in America only as a sojourner, and not treating that country as his home and domicile. And if the question had turned upon whether all those documents and evidence did, or did not, make out the inference which the Appellant contends ought to be drawn from them, very great nicety in examining and in commenting upon them would have been requisite. But, for the reason I have already intimated, it is, in my opinion, totally unnecessary to institute this critical examination, because for the present argument I will assume the Appellant to have made out that for which he contends. I will assume that there is ample averment in the summons, and in the condescendence, and in the documents incorporated with them, to show that William Shedden was a domiciled Scotchman, while he was living in America. Why then, he says, the consequence is this —that having had a child, namely the present Appellant, born to him of Ann Wilson, with whom he was cohabiting, and having, with the very object of making that child legitimate, six days before his death gone through a valid form of marriage with Ann Wilson on

his death-bed, according to the law of Scotland the son, who had been up to that time illegitimate, would be legitimate; and, his domicile having been all the time in Scotland, the circumstance of the events having happened in America would be immaterial to his right.

That again is a question of very great nicety and difficulty, and I shall express no opinion upon it. I will assume (as I have with respect to the fact of domicile) that, but for what I am about to state, it might make him for some purposes legitimate. But the question is whether, if it does make him legitimate, it makes him a natural born subject of Her Majesty, or of the King at that time.

Now, my Lords, it appears to me that the negative of that proposition is perfectly clear upon the statutes. I need not state to your Lordships that, independently of statute, every one born abroad is an alien. I state the proposition perhaps too generally, because the children of ambassadors and some other persons were excepted; but as a general proposition, all persons born abroad were aliens. That state of the law was interfered with first by a very early statute, I believe of one of the Henrys (*a*), with reference to merchants, but that may be dismissed from our consideration.

In the reign of Queen Anne it was enacted by a statute passed for "naturalising foreign Protestants," that "the children of all natural-born subjects born out of the ligeance of Her Majesty should be deemed, adjudged, and taken to be natural-born subjects of this kingdom" (*b*). Then, there having arisen a doubt upon the construction of that statute, and it being clear that

(*a*) 14 Hen. VIII. c. 2; and see 21 Hen. VIII. c. 46; 22 Hen. VIII. c. 13; 32 Hen. VIII. c. 16. See also 1 Ric. III. c. 9, which is apparently the early act to which his Lordship refers.

(*b*) 7 Anne, c. 5.

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it went further than was intended, the statute upon which reliance must necessarily be placed, and which is the governing statute upon the subject, the 4th Geo. II. (*a*), was passed, and that statute enacted "that all children born out of the ligeance of the Crown of England, or of Great Britain, or which shall hereafter be born out of such ligeance, whose fathers were or shall be natural-born subjects of the Crown of England, or of Great Britain, at the time of the birth of such children respectively, shall be adjudged and taken to be natural-born subjects of the Crown of Great Britain."

The language of that statute is very precise. In order to come within its provisions, the party must make out that at the time of his birth his father was a natural-born subject of this country.

Conceding, then, for the purpose of the argument, that the Appellant's father was domiciled in Scotland, although living in America; and conceding, for the purpose of the argument, that a marriage in America would have had the same operation as a marriage would have had if he had been in Scotland; what this Appellant must make out is that at the time of his birth his father was a natural-born subject. But at the time of his birth, Mr. Shedden was not his father. He had no father. He was a natural son, and in the eye of the law, *filius nullius*. The consequence was that alienage attached upon him, and, in my opinion, attached upon him irreversibly. He was an alien when born. Whatever may be the operation of the law in respect of such of Her Majesty's subjects of Scotch origin, as contradistinguished from those of English origin, it never can be that the incapacities of alienage are taken away. The results would be most anomalous and inconvenient; and there certainly cannot be such a thing as a person an alien in England and not an alien

(*a*) C. 21.

in Scotland. But this Appellant, the moment he was born, was an alien in England—he was not a natural-born subject. How can it be that, because he is rendered legitimate according to the law of Scotland, he can be made *in invitum* a subject of Her Majesty? What strange consequences would follow! This person might, if we were unhappily engaged in war with America, lawfully take up arms against Her Majesty; and yet, can it be that his parents, by choosing to marry, could make him a traitor? But that consequence must inevitably follow. Again, he says that he can succeed to this estate of land in Scotland. But he is incapable of holding land in England; and if his father by his will had given him land in England, and left him to succeed to land in Scotland, the Crown, upon office found (*a*), would have been entitled to the land given to him in England. Could that right of the Crown be afterwards divested by subsequent marriage? The consequences are so anomalous that it appears to me to be clear that such is not the legitimate construction of the statute; and I am not at all satisfied that such a case as this might not have been in the contemplation of the Legislature, when they passed the statute. The first statute was passed immediately after the union with Scotland. It is in very loose language, and it evidently went further than was meant. When that act was set aside, and a new statute passed, some twenty or thirty years afterwards, one object of it may have been to defeat such a case as is now attempted to be set up. It may be that it was not so; but the language used would accurately carry out that intention, if such were the intention of the Legislature. Be that as it may, it seems to me that as your Lordships can only determine this question on the

(*a*) Office found is where an inquisition is made of a thing to the use of the Crown.

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construction of the precise words of this statute, it is quite clear that this gentleman was not at the time of his birth the son of a natural-born subject of the Crown of Great Britain; and, therefore, it is impossible for him to succeed to the estate in question.

Such being the case, even if we were to assume the fraud imputed, it was a fraud utterly immaterial; for it was only to keep out of sight, first from the Court of Session, and then from your Lordships' House, facts that, whether they were suppressed or obtruded, would lead exactly to the same result.

Upon this principle, I apprehend the case might be entirely disposed of, were it not that after the suit had been instituted in the Court of Session, first by an Original Summons, and afterwards by a supplemental one, a new statement was introduced by way of amendment, which is, in truth, the only matter that has ever created any sort of doubt in my mind, after I came fully to understand this complicated case. I allude to this; that although the two Summonses and the Condescendence (occupying 200 closely printed pages) of the case now before your Lordships, and the enormous volume of letters and correspondence which are also printed by way of appendix,—although they all proceeded upon the assumption of this marriage just before the death legitimating the child by reason of his Scotch domicile, yet before the Record came to be closed, permission was given to introduce, by way of amendment (*a*), an averment of a fact, or alleged fact, scarcely reconcileable with all the other facts of the case; namely, that besides William Shedden's death-bed marriage, "the said William Shedden and Miss Wilson had been, according to the law of America, where they resided, married persons prior to and at the birth of the pursuer." The amendment goes on to allege, that there

(*a*) *Suprà*, p. 579.

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was a marriage before the birth of the child; a prior marriage, to be proved by cohabitation and acknowledgment.

Now, if we were reasoning upon the facts, I should have had very little difficulty in coming to the conclusion that such a case was scarcely possible. But I agree with the way in which this matter was put by Lord *Fullerton* (*a*), who delivered the judgment of the Court below, namely, that what we have to see is whether there is such a specific and relevant allegation of fraud as can be received by the Court. I must take the averment that there was this prior marriage (incredible as it appears to me, and absolutely irreconcileable in point of fact with all the rest of the case); but supposing, as was suggested by the learned Counsel for the Appellant, that facts may from time to time have come out, which may render it not improbable that the prior marriage might have been proved, still I must look to see whether, as connected with that marriage, there are what this very learned Judge has called specific and relevant allegations of fraud.

Now let me assume that it is sufficiently averred that prior to the birth of the child (putting the question of domicile, the fraud in concealing it, and the subsequent marriage, entirely out of the case), let us, I say, suppose that there is a sufficient averment, as there is, that prior to the birth there had been a marriage, which would undoubtedly, according to the laws of all countries, make the Appellant the legitimate son of his father, so as to get over the statute of George II. Still, in order to get rid of the decision of the Court of Session and of your Lordships' judgment, you must have a specific and relevant allegation that there was a fraudulent combination between the Defenders and those who managed the case of the Appellant while an

(*a*) *Suprà*, p. 581.

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infant—to keep that fact out of sight—so that your Lordships might adjudicate upon a state of facts, that element being suppressed, whereas, if it had been disclosed, your Lordships would have given judgment the other way, as no doubt you must.

For such specific and relevant allegations of fraud, I have looked in vain through the whole of these proceedings. Indeed, with regard to the question of domicile, the connection of Hugh Crawford with any fraud is exceedingly difficult to discover from anything stated on the face of the pleadings when looked at accurately. It is true that it is said, over and over again, that the next friend, Hugh Crawford, the *factor loco tutoris*, acted in collusion with the Defenders. But that of itself is clearly not sufficient. You cannot upset the judgment upon the ground of fraud, merely by alleging that there was fraudulent collusion. You must show how, when, where, in what way? Hugh Crawford is expressly stated to have known nothing of the facts. What is said is, that the other parties kept him in ignorance of the real facts of the case. That was stated in the original summons, and is never controverted afterwards. Therefore, to say that he acted in collusion is saying nothing at all to the purpose. It is no fraud that a party proceeding for an infant does not bring forward something which he does not know. It is said, first of all, that Robert Patrick, who was the Defender, and William Patrick, who is now alive, and acted for him (and who, I will assume, are identified together, though there might be difficulties in establishing that proposition), well knew of this marriage. That is qualified down in the Condescendence to saying that "they were well aware, or had good reason to believe." Now, the maxim of our law, that all allegations are to be taken "*fortius contra proferentem*," is a maxim founded in good sense; and not, I apprehend,

confined to this country. When a Court is called upon to adjudicate, they have a right to assume that the person bringing forward an allegation, states his case in the best way in which it is capable of being stated. Therefore, this is no more than an averment that the Defender, Robert Patrick, and his brother, William Patrick, had good reason to believe that there had been a prior marriage, and that they had never communicated their belief to Hugh Crawford. What then? Morally this may not be very honest, or very high-minded, on the part of a defendant litigating with an infant whose interests are protected only by a *factor loco tutoris*. It may, I say, not be a very honourable thing not to volunteer to tell him all the strength of his case and the weakness of your own. But it would be a novelty indeed to say, that a case having been conducted by a person who did his best for the infant (for there is nothing to militate against that), it would, I say, be quite extravagant to hold, that because the Defender did not disclose to him the weakness of his own case, and reveal a fact which he had good reason to believe was true, and which, if investigated upon the part of the Pursuer, might have been found to be true, therefore, all the proceedings carried on in such a suit are such a fraud, that—notwithstanding the consummation of the whole by a final judgment of the last resort—they are now, after this great lapse of time, to be treated as a nullity, and to be wholly disregarded.

There is nothing, therefore, which satisfies my mind amounting to a legitimate averment that Hugh Crawford knew of this private marriage, and fraudulently kept it out of sight. For it is expressly averred that William Patrick concealed from Hugh Crawford all the facts as to the domicile; and I see nowhere any averment that he ever stated to him anything about the prior marriage. It appears to me that there is no

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fact whatever, and nothing whatever showing that Hugh Crawford did not conduct the case fairly; or that there was such a collusion between the two parties as to render it legitimate to say that this was *fabula, non judicium*. I believe it, according to the averments here, to have been strictly a *judicium*; after being carried first through the Court of Session, and then ultimately, by appeal to your Lordships' House; and that by that decision the interests of justice and of mankind require that all parties should be bound. If there were this prior marriage, which, even according to the Appellant's own suggestion, was not discovered till fifty years after the death of the parent, it is one of those misfortunes against which no human laws are capable of guarding. The case was carried on first in the Court of Session, and the decision was ultimately affirmed by your Lordships. In my opinion, no fraud is stated rendering it competent to the Pursuer to reopen the question; consequently he has totally failed; and the Court of Session was right in rejecting the present application for reduction. I shall, therefore, humbly move your Lordships to dismiss this appeal.

The Lord BROUGHAM:

Lord Brougham's opinion.

My Lords, the first question is the one which has been argued apart from the rest of the case, upon the preliminary objection, that here was a novel and extraordinary proceeding, an attempt to set aside, by an action of reduction in the Court of Session, not only the decree of that Court in 1803, but the judgment affirming it pronounced by this House in 1808; the point for our consideration being, whether any proceeding in a Court below, any proceeding other than one in this House, and even in this House other than an Act of Parliament, would suffice to set aside a judgment obtained here in the last resort.

From the view which I am disposed to take of the rest of this case, it may not be necessary for me to pronounce any opinion upon that preliminary objection, because, after hearing it argued, without adjudicating upon it, we entered into the whole consideration of the case. Nevertheless, I go to the full extent of the opinion which has been expressed by my noble and learned friend; and I know not that I am not disposed even to go a step further, and to consider that a judgment, though obtained here in the last resort, if proved to the satisfaction of this House—(and in this argument we are to assume proof, as we are upon the mere averment, and the sufficiency of that averment)—I say, if it be proved that there has not been a real suit instituted and appealed, but that there was collusion and fraud between the parties; that there was no real Plaintiff and real Defendant in real conflict together, upon whose case the Court below and this House had adjudicated; if it appear that there was no real trial, no real proceeding, and consequently no real judgment, but that the Court was imposed upon by the fraud of the parties; that the Court was led to believe that there was a contest when there was none, and that there was an opposition of parties when they were really in concert and leagued for the purpose of deceiving the Court to serve their own ends,—then, my Lords, I say I am prepared to go the full length of holding, that, in this House, as in any other Court, a proceeding so instituted, so carried on, and so consummated in a judgment thus fraudulently and collusively obtained, in a word, a fictitious judgment, may be treated as a nullity, as would be, *ex concessis*, on all hands, the judgment so obtained of any inferior tribunal.

The question is, whether or not the course of proceeding, having for its object to impeach this judgment before an inferior Court, in order to obtain there a

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decree that it was collusively procured, and that it must therefore be disregarded, was a competent proceeding for dealing with such a judgment; and I, for one, my Lords, can see no reason to doubt it. The judgment of this House must be dealt with in that inferior Court before which its merits were brought; that is to say, not the merits of the judgment, but the merits of the parties who had so fraudulently obtained it, the question being, was it a real judgment or not. For that is the only question in such cases, and that is the question in this case.

My Lords, the authority of the *Duchess of Kingston's case* upon the subject is, in my opinion, not to be got over, and not to be resisted—for what had we there? This House was sitting as a High Court of Justice in full Parliament as the Lord Steward's Court, to try a peeress for felony. There was produced before the Court a sentence of another Court of competent jurisdiction to deal with the subject-matter of that sentence —the Consistorial Court—not only competent, but exclusively competent, to deal with questions of marriage and divorce; other Courts can only deal with them incidentally, but that Court alone has the jurisdiction to deal with them as the principal matter. A proceeding had been instituted in that Court of exclusive jurisdiction; and a sentence of nullity had been obtained. To all intents and purposes, therefore, there was an end of the prior marriage, standing that sentence. But it was satisfactorily proved to the High Steward's Court here, upon the trial of the peeress, that the whole proceeding there was fraudulent and collusive. Therefore, the House disregarded that sentence, and treated it as being as much a nullity as the sentence itself had treated as a nullity the first marriage. Now, the Court which had pronounced the sentence was not an inferior Court. This House, the Lord Steward's Court,

was not a superior Court. The Consistorial Court was supreme as regarded the question of nullity. From that Court there lay no appeal to this House. There lay indeed an appeal to another Court, the Court of Delegates, which had not been resorted to. But it would have made no sort of difference, if, instead of the sentence being one unconfirmed upon appeal, there had been produced a sentence confirmed by the Court of the last resort in ecclesiastical matters, the Delegates formerly, and since the year 1832, the Judicial Committee of the Privy Council. The sentence of the Consistorial Court was the sentence of a court of competent and exclusive jurisdiction. This House had no right to interfere with the sentence of that Court any more than that Court had to interfere with any sentence pronounced in this House. But it had a right to disregard it, and it did disregard it, upon proof that it was a nullity.

I, therefore, entertain no doubt whatever upon this point; and the dicta of Lord *Eldon* which have been referred to in the argument, though certainly not of equal authority with the decision of the House itself, show clearly that his opinion was that, in this respect, there was no distinction to be taken between the judgments of this House and those of any other Court in the country.

Accordingly, my Lords, I am satisfied that we did well in going into the whole case, after having heard the preliminary objection fully discussed.

Now, with respect to the case before us, the only fault that I have to find with the very elaborate and learned judgment given by my Lord *Fullerton*, and acceded to by all his brethren, in the Court below, is, that I do not think it quite keeps clear and separate the two heads of mere averment, and the substance and subject-matter of that averment with reference to the question whether it is sufficiently proved or not;

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because, undoubtedly, we have no occasion, and the Court below had no occasion, or rather less than no occasion, no right, upon this form of proceeding to enter into the question of probability of the facts averred being true, or to enter into the evidence by which the facts alleged were supposed capable of being made out. The question they had to decide was a mere question of averment. Was there, or was there not, sufficient averred upon the record to entitle the party to the remedy of reducing the judgment brought before the Court by that proceeding?

My Lords, it is undeniable that the original case, which was then called *Crawford* v. *Patrick*, underwent great argument in the Court below, and was afterwards fully discussed at the bar here, and disposed of by the judgment of this House affirming the interlocutors of the Court below, and, in substance, declaring Mr. Shedden—the infant then—the present Appellant, to be not legitimated to the effect of obtaining the Scotch estate, to be not legitimated by the marriage of his parents contracted subsequently to his birth in America, where the Scotch civil law of legitimation by subsequent matrimony does not prevail.

With respect to the grounds of that decision I do not think it at all material at present to inquire into them; because we are to be satisfied of two things in this case, not only that certain matters were known to Mr. Patrick and to the other parties there, and were by them suppressed or concealed from the Court below, and mediately from the Court of Appeal here, but that those things were material things, and that the concealment was material, affecting the proceeding, and affecting the result.

Any concealment would not signify, unless that concealment was of a material fact.

If, for instance, the allegation that Mr. Shedden, the father, was a domiciled Scotchman did not affect the substance and the result of the case, if the concealment of it was the concealment of a fact with respect to which it did not signify a straw which way it was given, or whether it was believed or disbelieved by the Court below and by this House, then past all doubt he allegation that the parties combined to deceive the Court by concealing that fact, or the evidence of it, would not avail for the reduction of this judgment.

Now I certainly incline to take the view which has been expressed by my noble and learned friend, of the immateriality of that fact, because supposing it were true—supposing we agreed to the proposition that a marriage subsequent to the birth of the child, (the parents of that child being Scotch parents, and the marriage being, therefore, a Scotch marriage,) legitimates the aforeborn issue to the effect of taking a Scotch estate, nay, even legitimates him absolutely, and to all intents and purposes; still, the question would remain, at what time did that subsequent marriage of his parents attach to him the quality of legitimacy, which he had not before? I presume it cannot really be doubted that he became legitimate only from the date of the marriage; for I think it a most violent presumption to hold that the subsequent marriage of his parents has relation back to the moment of his birth, and makes him to have been, at the time of his birth, the legitimate son of those parents.

Now with respect to the question of alienage, everything depends upon the facts that existed at the moment of his birth. Assuming that the effect of the subsequent marriage is legitimation, or conferring the status of legitimacy upon the issue, does it follow that it confers paternity upon the parent? Does it follow

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that it confers paternity at the moment of the birth? Does it follow that because the marriage of his parents has made him legitimate, therefore it has made them his parents at the time of his birth? If it does, he is a natural-born subject; if it does not, he is an alien. If you cannot predicate paternity as well as legitimacy he is an alien. If you can predicate paternity as well as legitimacy he is a natural-born subject.

My noble and learned friend has well adverted to the anomalies—though I can hardly call them by so slight a name as anomalies—the gross inconsistencies, the self-contradictions, the glaring absurdities which must follow from holding that the retrospective doctrine imports paternity as well as legitimacy—supposing for a moment that legitimacy as contended for by the Appellant ensued. It is sufficient to remind your Lordships of one to which my noble and learned friend has adverted,—that it would be giving to the parent of the child, the putative father of the child, the power, by marrying his mother, of converting him from an alien or a foreigner into a natural-born subject. If the child had done that which he had a perfect right to do at the time, namely, taken up arms against the English Crown before the marriage of his parents, it would follow from the doctrine in question that the marriage converted him, from an alien enemy, into a traitor to the crown of this country, thereby making him guilty of high treason, instead of being only a person taken with arms in his hands, compassing what might be, on his part, a perfectly innocent and even laudable design.

My Lords, that is one of the many absurdities which would flow from this doctrine. They are too numerous to require any further illustration. And, therefore, upon the whole, I hold that even if the father had been ever so much a domiciled Scotchman, the circum-

stances would not have had the effect of legitimating the son, and still less of creating the relation of parent and child at the time of his birth in America, where he was born an alien.

My Lords, this therefore disposes of all that part of the case which refers to the fraud and collusion alleged to have been practised upon the Court in respect of the concealment of the domicile; and it leaves only for consideration the averment of the previous marriage. And upon this averment I take exactly the same view as that which has been taken by my noble and learned friend: I do not think there is in the record any averment upon that head sufficient to call for a reduction of the judgment; and although we are not competent here to enter upon any questions of fact, or to speculate upon how those questions would probably be disposed of, supposing we had reversed this judgment and sent the case back for further investigation, I cannot conclude the observations with which I have troubled your Lordships without expressing my opinion that it is a fortunate circumstance that we have come to an opposite result; for I can imagine nothing more intolerable than an inquiry would be as to facts which took place considerably above sixty years ago in another hemisphere, where all the witnesses must needs be persons, if they continue to live, of a very advanced age, and where the inquiry into those circumstances would be in my apprehension all but absolutely incapable of being conducted with any chance of arriving at a successful conclusion. I heartily lament that so much time has been wasted here and elsewhere, that so much anxiety has been undergone by very deserving parties, that so much money has been unhappily expended by those parties, and that so many charges have been brought against individuals who have always occupied a respectable station in society,

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with a character unimpeached;—I say I cannot help feeling very great sorrow that such things should have taken place. It is not for me to make any remarks upon the conduct of Mr. Patrick, the party principally implicated in these charges; I can only say that without intending to whisper one word against that individual, in admitting the respectability of whose character, I believe all who have spoken upon the subject, I may even say on all sides, have been inclined to agree; but I must say that I somewhat regret that he should have undertaken, though I have no doubt with the best of motives, the task of acting as guardian to this infant, when the necessary consequence was to put himself in a situation encumbered with duties inconsistent and somewhat conflicting. I believe it is not a situation peculiar to Mr. Patrick; I believe it is a course too frequently pursued in the northern part of this island, where men of business do not always see the great propriety, and (for their own sake, as well as for the sake of those concerned) the all but necessity which requires that opposing functions should be kept as much as possible separate and distinct.

The Lord ST. LEONARDS:

Lord St. Leonards' opinion.

The first question is with respect to the competency of the Court below. Now, without at all meaning to deny that a judgment, even of this House, may indirectly be treated as a nullity before another tribunal, where the case shows manifest, gross, direct fraud, it does appear to me, having looked into all the authorities, that it is very doubtful whether the proceeding in the Court below was in this case competent.

It must not be understood that there would be any denial of justice according to the opinion I express, even if it could be maintained; because the only question is whether the party should have gone to the

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Court below, or have come to this House. Certainly, on going through the cases in the Journals, it appears exceedingly doubtful whether the proceeding ought not, in the first instance, to have been here; and the result of the case itself, upon examination, shows how proper it would have been to originate the proceeding in this House; because the Court below really was not competent to ascertain the grounds upon which this House had proceeded in deciding the case in 1808; whereas the House itself would have been competent, by means of what it could glean from its own judgment, and from its knowledge of the subject, to deal with the case in its new shape. I have got a list of all the precedents. As, however, I think that the point does not now call for your Lordships' decision, I do not propose to enter into them. But I may observe that *Blake* v. *Forster* (*a*) well shows the difficulty which exists in such cases; for there, after the reversal of a decree made in Ireland, the parties came to this House wishing to impeach the judgment of this House; and they were sent back to the Court of Chancery in Ireland. The Lord Chancellor of Ireland refused to hear them, and dismissed the proceeding, with liberty to apply here, because he had no means of ascertaining what were the grounds upon which that decree had been reversed; and, therefore, could not judge upon the new matter introduced, or upon the new claim set up. There was an appeal from that very decision to this House, and that decision was ultimately affirmed by this House (*b*). So that, in *Blake* v. *Forster*, the Lord Chancellor of Ireland was perfectly justified by the result, in referring the matter, in the first instance, to this House; where, be it observed, the merits were never entered into. It was merely a question as to the competency of the Court in Ireland; and that Court having declared

(*a*) Macq. House of Lords, 448. (*b*) See Journ. 1 June, 1825.

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itself *incompetent*, the matter was remitted to this House; and this House held that the Lord Chancellor of Ireland had made a proper decision.

From the nature of the jurisdiction in Scotland (it does not happen, generally speaking, in this country, except by way of demurrer, which stands upon different grounds,) preliminary defences are allowed; and, therefore, at all events, there has been no great mischief, and certainly no denial of justice in the course which has been taken in this case; for if the Appellant had come in the first instance to this House, the House would not have entered upon the general merits, till they had ascertained whether there was such a case as would entitle the Appellant to go into the general merits, with a view to reverse the former decision. A judgment of this House can never, in the particular case, be impeached, except by Act of Parliament, unless gross fraud can be brought forward, which may enable the House itself to set aside the proceedings on that ground. The case of *Tommey* v. *White* is an instance. There, the fraud was upon the House itself. But the fraud would not be less in this case upon the House itself, if there were fraud in the Court below, because the proceedings in this House were carried on in the precise form in which they had been carried on in the Court below; and, therefore, this House was as much defrauded out of its judgment, if there were a fraud, as the Court below had been defrauded out of its judgment. The preliminary defences which are admitted by the Courts in Scotland enable the same thing to take place in those Courts. For example, in this very case preliminary defences are taken; the consequence of which is, that after the original summons and the supplemental summons, and the amendments of both in the Court below, setting forth the whole case which the Appellant could

make out, and the grounds and evidence upon which he claimed relief, the claim was met by preliminary defences; and the whole proceedings being before the Court below, the question was this—Had the Appellant made out such a *primâ facie* case as would entitle him to the relief which he prayed; assuming that the Court had jurisdiction? The Court below came to the conclusion that he had not made out such a case as would entitle him to any relief.

I have already stated that it would have been very difficult for the Court below to ascertain upon what grounds the case was decided by this House in 1808; and, in my view, that would have been a very sufficient reason for the Court below at once to have rejected the claim of the Appellant, and to have referred it to this House.

My Lords, I have looked with great anxiety to ascertain what was the real ground of the decision in 1808; but it is not very easy to come to a satisfactory conclusion upon that head. I think I have satisfied myself on two points: at least, I am satisfied upon the first; namely, that the case was really decided upon *alienage*. And the second point, upon which I entertain a very strong impression, is this; that if the question of domicile had been brought before the House at that time, and established as the law then stood, this House would have decided the case, with the question of domicile before them, precisely as they did when it was not before them. Be it remembered, that although we have now the decision in *Munro* v. *Munro*, that case had not then been decided; and, therefore, what is now law was not then known to be the law, at all events, by any lawyer in *this* country. Therefore, it is my strong impression, looking at the state of the law at that period, that if the domicile had been actually alleged and proved, the decision would have been precisely that at which this House actually arrived.

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Now, with regard to the grounds of that decision, it is very material to see how the case was decided; and so far, I confess I sympathise with the Appellant, that this case having been conducted at great expense, after the lapse of so many years, I cannot help feeling desirous to satisfy him that this whole question has been very attentively considered, and that the decision of this House has not been arrived at without much care and caution. From the printed Case (*a*), your Lordships must be aware that the question of domicile was not lost sight of on behalf of the Appellant in 1808. Your Lordships will find that the Appellant contended that the *status* of legitimacy was not dependent upon the will of his father, but was to be determined by the public law of Scotland, to which his father was subject; and that his father was not an American solely, inasmuch as, both by reason of origin, and from having property in Scotland, he was subject to the jurisdiction of the Courts in Scotland. The present Appellant, therefore, did rely on the domicile in Scotland, and argued upon the *lex loci* there; and he stated that the law of the parent's domicile must be the only law to regulate the succession to estates; because the law of each country decides according to its own rules, and exercises jurisdiction over all its subjects, under whatever circumstances, and in whatever state they were born. So that, I think, it is quite clear that the question of domicile was kept fully in view. How could it be lost sight of, if you look at the Counsel—both the Scotch Counsel and the English Counsel—who were engaged in that case, and the questions that were raised and elaborately argued? The very first question which the Counsel of that day would ask would have been, Where is the domicile? They knew that the Appellant's father was a Scotchman

(*a*) *Suprà*, p. 539.

by birth;—they knew that he had a Scotch estate;—they knew that the boy had been sent to Scotland. Therefore, it is utterly impossible to believe that the learned counsel of that day—counsel of the first eminence, both the Scotch counsel in the Court below, and the learned counsel of the English Bar before your Lordships—could have prepared and argued the case without considering the question of domicile as one that ought to be presented to the House.

Upon what grounds the House itself decided, we must collect as well as we can from what has fallen from learned Judges in subsequent cases. Thus, in the *Strathmore Peerage case,* Lord *Eldon* says (*a*) :—"Under the circumstances, it does appear to me, attending to the principle which this House meant to maintain in *Shedden* v. *Patrick,* that without deciding at all what would be the consequences of a person married in Scotland before the Union, or persons married in Scotland since the Union, or persons removed from Scotland domiciled elsewhere, and going to Scotland and obtaining a domicile and marrying in Scotland; without determining those points at all, but recollecting the state and condition of these parties, and the fact that the father was a British Peer, and looking to the effect of the Act of Union, I am bound to tender to your Lordships my humble opinion that this child is not a legitimate child." I am not quite satisfied as to what the noble and learned Lord meant in the *Strathmore Peerage case,* but I think there can be no doubt that in *Shedden* v. *Patrick* he considered that illegitimacy was a bar. But Lord *Redesdale* is more distinct. He says (*b*) :—"I do not enter into the question whether if this marriage had been celebrated in Scotland it might have had the effect of legitimating the child, because I think it is not necessary, but I

(*a*) 4 Wils. & Sh. App. No. 5, p. 90. (*b*) *Ib.* p. 94.

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must say that I cannot conceive how it could have that effect. In the case of *Shedden* v. *Patrick*, it was determined that a child illegitimate in the United States of America was not capable of inheriting in Scotland. It has been stated that that was decided on the ground that he was born an alien.". Lord *Redesdale* says it is stated that the decision of this case in the year 1808 was because the child was born an alien;—and then the noble and learned Lord proceeds to ask, "Why was he born an alien? Because the law of America touched him at his birth; and the retrospective effect of the law of Scotland could not alter that character which, at his birth, attached upon him." That was the true reason why he was an alien. Lord *Redesdale* was a party to that decision. Every one knows how elaborately he considered the cases that came before him; and here we have a clear and distinct statement from him of the true ground of the decision. But your Lordships will find that in the case of *Rose* v. *Ross* (*a*), the same ground is taken; for there Lord *Cringletie* makes this observation:—"Natural children do not belong to the reputed father, nor do they take their domicile from him. They belong to the mother; whose domicile is theirs, and whose settlement, in case of property, is theirs." Then, further on, he says:—"I think that Lord *Redesdale's* idea in the case of *Shedden* is correct, and equally applies to this one; that the law of America touched the Defender at his birth; and the retrospective character of the law of Scotland could not alter his *stqtus*." The case of *Rose* v. *Ross* was originally before Commissaries, who gave some very learned judgments, which are to be found in Wilson & Shaw (*b*). Says Mr. Commissary Todd:—"In *Shedden's case* the marriage was contracted in America, the law of which

(*a*) 4 Wils. & Sh. 296-7, App. No. 4, p. 57.
(*b*) Vol. iv. App. No. 3, p. 41.

country does not recognise legitimation by subsequent marriage." And Mr. Commissary Fergusson gives an opinion to the same effect.

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In the later case of *Munro* v. *Munro*, where the *Lord Justice-Clerk*, and four other Judges, held the domicile to be in England, they said:—"We do not think it necessary to consider how the case of the Pursuer might have been affected by the English domicile of the mother alone—taken along with the fact that she herself was born in that part of the United Kingdom, and that it was the place where the marriage was subsequently celebrated, and where all parties continued to reside for upward of a year after that marriage—if Sir Hugh himself had, up to the time of the marriage, been incontestably a domiciled Scotchman. Even upon this supposition, however, we think the Pursuer must have had difficulties to encounter, which have not yet been resolved by any clear authority in the law of either country. Some of the dicta in the ultimate decision of the cases of *Shedden*, *Strathmore*, and *Ross*, seem to point to a conclusion against her; while others, of the very highest authority in the more recent case of *Sir George Warrender*, have rather a contrary bearing." In the same case, you will find the *Lord President* making these observations (*a*):—"As to the domicile of the putative father, I cannot think that either his past, future, or present domicile can, or ought to, have any effect on the status of the bastard. The father is not regarded in law as his father; therefore nothing in the putative father's domicile can affect the status of bastardy impressed upon the child by birth." "In short," the *Lord President* says (*b*), "I cannot see the smallest connection between the status of the bastard, and either the previous or the subsequent domicile of his putative father. The child in England was born a

(*a*) 1 Rob. App. Ca. 551. (*b*) *Ib.* 553.

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bastard; and it cannot make any difference whether his putative father was a Scotchman, or a Frenchman, or a Turk." Then, he quotes the opinion of Lord *Eldon* and Lord *Redesdale*, in the *Strathmore Peerage case*, and says that he entirely agrees with them.

The result, therefore, is to show (*Munro* v. *Munro* not having then been decided), that not only in 1808, but down to a much later period, it was still considered by very learned persons, that the domicile of the putative father could not affect the status of the child. Now that would be at once a defence as regards what is called the concealment of the domicile; for if this case were decided irrespectively of the domicile, then *cadet quæstio*. But supposing it were not so—supposing that great doubts were entertained upon the question of domicile—is it reasonable to hold that a gentleman in the situation of Mr. William Patrick was to know what the law was, and the importance of the question of domicile, when none of the learned lawyers, who were consulted upon the case, had found it out? And when all the private letters, which are now brought forward between him and Robert Patrick, and between him and John Patrick (letters which were never intended to see the light), show that he really believed the boy to be illegitimate, how can it be said that there was fraud in the concealment of the domicile?

Every act proved in this case as regards domicile is against the Scotch domicile. If a Scotch domicile existed, it was not from any act that the father ever did, but from something passing in his own mind, which he has communicated, so as to be able to impress every Court of Justice with the belief of his intention to return to his native country. For what are his acts? Look at the whole of his life: he goes to America; no doubt he meant, originally, to return; but after all his troubles in America (which are entered into in these

papers in very needless and expensive detail, and which have not the slightest bearing upon the case), he goes to Bermuda; and it is said that he returned to America only to wind up his affairs. But instead of returning to Scotland after he had wound up his affairs, he resided for a great number of years in America. He had there an establishment,—he had two families in point of fact by different women; for he had a girl by another woman, that girl being several years older than the children by the lady whom he subsequently married; those are acts which, at least, show something like an intention to remain where he was. What single act did he ever do showing an absolute intention to return to this country? In the first place the mere possession of the landed estate in Scotland was no act of his—it descended to him. His father's house does not seem to have been upon the estate, and that was sold very soon after the father died. He himself had been in Scotland for a year and a half on one occasion, in his father's life-time, but he never returned to Scotland after he became himself the owner of the estate. That does not look like an intention to settle in Scotland. He was not a very young man; he had no house in Scotland at any one period of time, to which he could have returned. The house which his father occupied in his life-time did not descend to him. He never took any step to obtain a house. Therefore, if Mr. William Patrick, as a man of the world, had formed his judgment from all the circumstances, as far as Mr. Shedden's acts went, he would have decided against the domicile being Scotch. Look at the last acts of Mr. Shedden himself,—at his acts on his death-bed. How does he describe himself in his will? Simply and only as *of New York*. Is that the way in which a man would describe himself, who considered that the tie between himself and Scotland had never

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been rent; who meant to die impressed with the love of his original country, and the thoughts of home? It is true that he desires the boy, his son, shall be sent to Scotland. Why? Certainly not because of his domicile being there, but because Mr. William Patrick, to whom he meant to entrust him, was resident in Scotland. He does not insist upon his wife going thither; he does not say to her, "Go to Scotland, and there you will find a home. I leave an estate there; go, and live there with your boy." He takes from her the whole care and guardianship of his boy. He sends him to Scotland; but leaves his wife, whom he had just married, in America. He had not made her very fond of Scotland; for she had so little desire to go thither, that, within some two or three months, she was married again to a gentleman, who, I believe, was in the naval service of America; and who was certainly not a very likely person to go and settle in Scotland. Then, further, Mr. Shedden does not dispose of, or even advert to, his estate in Scotland; and it is a remarkable circumstance that while he does by his will dispose of the property that he had acquired in New York, he leaves this Scotch estate to take its chance, according to its destination, without attempting to exercise any right of ownership over it. I think, therefore, that if it were now a question upon the evidence before the House, whether the domicile was in Scotland, or in America, the strong impression on my mind would be that it was an American domicile, and not a Scotch one. Some expressions in letters have been relied upon as tending to a contrary conclusion; but they are not sufficient. Nobody can doubt that this gentleman had, from his long residence there, acquired a domicile in America. Whether that was his *sole* domicile, or not, is the question; and I am strongly inclined to think that it was.

It appears to me, therefore, that there was no fraud whatever on the part of Mr. William Patrick in concealing the domicile. I believe his impression was, that it was an American domicile. Mr. Shedden had made three gentlemen in New-York executors under his will,—gentlemen moving in different stations of life; one of them a physician, another a merchant, and his own nephew, also a merchant; all of them resident in New York. There was, also, Mr. Colden, an American lawyer, whose opinion is set forth in this case. He had lived in New York, and was a friend of Mr. Shedden, and must be supposed to have known something about the domicile, as well as about the prior marriage; and he was a witness to the will. We know how conversant American lawyers are with questions of domicile. Is it possible that this gentleman should not have known what the fact was, in the sort of general way in which I am now looking at it, not with the scrutiny of a lawyer, but in order to see whether fraud can be fixed on Mr. William Patrick?

Now assuming the House to have decided this case on the question of alienage, my very clear opinion is that they decided it properly upon that point alone. I entertain as clear an opinion as I ever did upon any point, that this gentleman, the Appellant, is an alien by birth. The only question is, whether he is saved by the statute of George II. operating by means of the marriage. Now when you come to contrast the statute of Anne with the statute of George II., you will see in what very opposite directions they went. The statute of Anne desired to add to the people of the country, and let in a flood of persons as natural-born subjects; stating that the wealth of the country depended on its population. That was found to be exceedingly inconvenient; and then came the Act of George II., which is a restrictive Act as regards the

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benefits conferred upon the children of natural-born subjects, who would otherwise be aliens. It is important to observe the alteration in the language. The statute of Anne speaks of parents generally—both of them; but the statute of George II. is confined to the *father*, and says nothing whatever about the mother. Therefore you are forced to look at the status of the father, without reference to that of the mother; and the words are free from all ambiguity. The child, in order to have the benefits of a natural-born subject, must, at the time of his birth, be the child of a father who was a natural-born subject. That clearly was not accidental; for it happens that there are several provisoes in this statute providing for different events, and in every single instance, the same term is used; I think in subsequent parts of the statute the time of the birth of the child is referred to no less than seven times with reference to different objects of the statute; and it is utterly impossible, as a matter of law, to read the words, upon which reliance has been placed by my noble and learned friend, in any other sense than that in which they must be read in the subsequent passages. If you were not to give the same sense, that is the literal sense, to them in the subsequent passages, you would render the whole Act of Parliament an absurdity and a nullity. Now observe what it says. After having declared that in order to entitle an alien to be treated as a natural-born subject, he must at the time of his birth, although a foreigner born, be the son of a father who was a natural-born subject, it goes on to say: "Provided always, that nothing in the said recited Act of the seventh year of Her said late Majesty's reign, or in this present Act contained, did, doth, or shall extend or ought to be construed, adjudged, or taken to extend, to make any children born, or to be born, out of the legiance of the Crown of England or

of the Crown of Great Britain to be natural-born subjects of the Crown of England or of Great Britain, whose fathers, at the time of the birth of such children respectively, were or shall be attainted of high treason by judgment," and so on. There are many other provisions which it is not necessary to enter into; but those words are repeated no less than seven times over in subsequent passages. Now take that one case. You cannot possibly give anything but a literal meaning to those words: If at the time of the birth of the child, the father had been adjudged guilty of high treason, the child was not to be a natural-born subject. Nothing could be more reasonable than that. You must take the words as you find them; and you must read them exactly in the sense in which they strike the eye at first; and that, I apprehend, is exactly the sense in which the Legislature meant they should be read.

Consider what would otherwise be the effect as regards a legitimate and an illegitimate child. Nobody will dispute that under that Act a legitimate child, the child of a natural-born subject, becomes a natural-born subject from the moment of his birth; that is beyond all doubt. Supposing his father at the time to have been guilty of high treason, then he remains an alien. That is the case of a legitimate child. Now look at the case of an illegitimate child. If you strike out the words "at the time of the birth," and if you look to the time of the subsequent marriage, you then place him upon a different footing from that at the moment of his birth; for, although his father at the time should have been guilty of high treason, the child would not lose the right which the statute gave him; and, therefore, if at any subsequent period the father married the mother of the child, so that by the effect of the law of Scotland, acting retrospectively, the child became legitimate, he

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would gain the benefit given by the Act. This does not rest upon fiction. This is substance. It is material to the safety of the realm that aliens should not become natural-born subjects, whose fathers were traitors to their country. Here is an express exclusion from great benefits given by the mother country to the children of natural-born subjects. But in the case of an illegitimate child, if you do not give the same construction to the words, you are driven at once to the necessity of saying that a subsequent marriage would give to the illegitimate child of a father, who was a traitor at the time of the birth of his child, a benefit which no legitimate child could ever take. Does anybody imagine that the Legislature meant to give to an illegitimate child a higher privilege than belongs to a legitimate one? You must remember that the case for which the Act of Parliament intended to provide is this: the child is born an alien and an alien he would remain to the hour of his death as regards this country, but for that Act. Before he can take the benefit of that Act, you must show that his father was a natural-born subject. And if he have no father, then of course he is not entitled to the benefit of the statute.

Upon this part of the case the *Dean of Faculty* raised a difficulty with respect to which, I must confess, I do not quite follow him. He said that if we were to put this interpretation upon it, then a man marrying a woman would adopt all her illegitimate children, even if she had several, and by different men. I do not go that length, because it involves the question of recognition and acknowledgment. That is a difficulty which I do not feel; and I cannot understand how, under this Act of Parliament, it is possible to give to an illegitimate child, who at the time of his birth was considered to have no father, the benefit of this law.

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As regards the operation of the Scotch law, I think the case (*a*), which was cited at the bar, negatives the doctrine of retrospective relation. It had always been supposed when you carried back, or when you were supposed to carry back, the legitimation to the birth of the child, that an intermediate marriage with a third person would prevent the operation of that rule. But the case shows that the legitimation only takes place from the time of the marriage. Therefore, so far as that authority goes, it proves that there could be no relation back to the time of the birth.

Upon the question, therefore, of authority, as well as upon the question of domicile, I think the case of the Appellant entirely fails. And, having regard to the facts, I apprehend that there is not any pretence for the charge of fraud against Mr. William Patrick as to the domicile. My strong impression is, that the House decided this case upon the question of alienage, and upon that question alone; and that it would have come to the same decision if the domicile had been alleged and proved to have been in Scotland.

Having made these observations, I should have saved your Lordships any further trouble, if it had not been for the very strong charges of fraud which have been advanced against Mr. Patrick. When I was myself at the bar, and had occasion, as counsel, to animadvert severely upon individuals, I often expressed the satisfaction I felt from knowing, that if, by obeying my instructions, I had gone beyond what the case justified, the Court would set the party right when it pronounced its judgment. And if the Court were not to take that trouble it would, in cases where persons have had serious charges made against them without foundation, have left those parties with the benefit of the decision of the Court in their favour

(*a*) *Kerr* v. *Martin*. See this case, *infrà*, p. 650.

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certainly, but with a slur upon their character, which few people can well bear.

Now, a great many charges of fraud have been made against Mr. Patrick. I am bound to say at once; that having read all the evidence most carefully, I cannot see the slightest reason for saying that there is any charge of fraud made out. There was a little contrivance, if you will. The parties appear to have intended, in case the boy had acquired the estate, to charge it with sums of money which they never meant to bring against Mr. William Shedden himself, if he had lived. I admit it would have been as well if that had not been so; but that is not a fraud committed against the Appellant, although they did intend to have opened an account if they could, and to have charged interest, commission, and so on, in order, in some measure, to indemnify themselves against the loss of the estate.

One grave charge of fraud which has been made is, that there had been a forgery committed of a bond for 4000*l.* I will not go into the circumstances; for it is perfectly clear that there was no fraud at all, and that there was not the slightest foundation for this accusation.

In the next place, a charge of fraud is founded upon the proceedings with reference to the retour. Now, if the boy was not the heir, Mr. Robert Patrick was; and without entering into any discussion as to whether he was or not, or whether it was necessary that there should be a retour (which has been disputed by very learned persons at the bar), it is clear that the retour did no harm,—you do not find any trace in any one of these proceedings of that retour having been set up against the right of the infant to discuss the merits of the question. There was no attempt on the part of Mr. William Patrick to set up that retour as a bar

upon the question which was believed to be the only one to be tried. I think, therefore, that that charge was introduced into the case without any sufficient ground.

Then it is said that there was a fraud as regards Mr. Hugh Crawford, and it certainly was represented throughout as if Mr. William Patrick had not only pulled the strings, but that he had actually appointed him as his nominee. But how is the fact? We see by the documents that nothing could have been more regularly carried into execution than the appointment of Mr. Crawford by a considerable number of the relations, irrespective of Mr. William Patrick; and that Mr. Crawford himself was one of the near relations. Not a particle of fraud can attach to Mr. Crawford. Be it remembered, too, that this is a charge of fraud against Mr. William Patrick, who was merely an agent at the time himself, not entitled to the estate; and although, no doubt, an agent may be guilty of fraud, and desirous to give to his principal the benefit of that fraud, yet it is not in the ordinary course of things that a fraud should be committed by an agent, simply for the benefit of those for whom he acts. This charge likewise, I think, falls wholly to the ground.

Again, it is said (and I was very much surprised to hear it stated) that the letter which was written by Mr. Shedden on his death-bed, in the year 1798, was a forgery. Now, that is a most serious charge. Remember that Mr. William Patrick is now alive. I have not the honour of knowing him, or of having had the slightest communication with him; but he must be a gentleman far advanced in life; his character must be dear to him; a more grave charge was never brought against any person at the bar of your Lordships' House than this charge against Mr. William Patrick, that he

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had forged a letter from his uncle with the view of defrauding that uncle's son of an estate belonging to him in Scotland.

Now, of course, it cannot fail to strike every one who reads these papers what an extraordinary charge this is; because the original Summons founded itself upon that very letter in so many words, and it was charged in the original Summons that Mr. William Patrick had suppressed that letter. When we come to the Supplemental Summons, the same letter is there again founded upon; and it is not until you arrive at the Condescendence that you find an indirect suggestion that this letter had never been written, and could not be relied upon. Nothing can be more clear than that this charge in the Condescendence was not justified by the interlocutor, which did not, in any manner, authorise the introduction of a charge of fraud as regards that letter. There never was a charge more unfounded. That letter was the only letter that gave an account of the transmission of the 400*l.*; and it was acted upon by the receipt and application of the money. Mr. John Patrick, in writing, tells you that Mr. William Shedden has written that letter (which is produced) to his nephew. Mrs. Vincent herself, in her letter, in 1799, refers to the letter which was written by Mr. William Shedden, her late husband, upon his death-bed, to Mr. William Patrick. That letter was also in duplicate and triplicate. And the mere absence of the original, after so great a length of time, amounts to nothing. Indeed, it is stated by Mr. William Patrick in his Answer to the Condescendence, that he delivered it with others in 1823, or 1824, to the Appellant himself. If I were upon a jury, and asked to pronounce upon the evidence before me whether that letter was proved, I should hold it to be most abundantly proved, and not open to the slightest doubt whatever;

much less to its being the foundation of a charge of forgery.

Another ground of fraud which has been alleged is, that Mr. William Patrick having received the 400*l.*, which was to be applied for the boy, withheld it, in order that his right might not be tried. Now, how does that stand? The sum was sent by Mr. William Shedden on his death-bed, and received after his death by Mr. William Patrick, for the education of the boy. It was demanded by the mother, who married again within a few months; and who never, as far as it appears, had the slightest communication with her son afterwards. I do not say that she had not, but it does not appear that she had. She seems to have left him to his fate. Therefore, how was that money applied? Of course, according to its destination; and nobody can doubt but that a great deal more was so applied. It is clear that Mr. William Patrick applied more money towards the education of the Appellant, and towards starting him in life, and providing him with outfits. Nobody can believe that the 400*l.* could have furnished all that was required. He says in one of his private letters, which were never intended to see the light, "We must do all we can for the boy." There can be no doubt that they had good intentions towards the child;—but at the same time it is equally clear that, being vexed and disappointed at the marriage which was consummated just before this gentleman's death, in order to make it quite sure that the boy would be the heir to the Scotch estate, they were desirous, and perhaps eager to assert their rights as far as they could.

The only other question that is worth referring to respects the prior marriage. And I think that a clearer case in point of fact upon the evidence never came before a Court of Justice. The prior marriage was

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never heard of until the year 1799, when Mrs. Vincent, who had married again, writes a letter (with the assistance of an attorney, probably,) to Mr. William Patrick; and in that letter, it is most extraordinary that she does not say a word as to the prior marriage, but she speaks of the marriage which was solemnised; and if you wanted evidence to show that there had been no prior marriage, you can have none better than her own letter. If you want to see what Mr. William Shedden himself thought of that marriage, you have only to look at his will and his letter, in which he tells you that he has just married, and that his friends approved. But there is not a word about a prior marriage. The marriage is solemnised with whom? With Ann Wilson—not with Mrs. Shedden—not with any declaration that the object was to place her better than the former marriage had done; but for the express purpose of giving to her the rights of a married woman by that act alone. Now look at it as regards the question of probability. This is said to have been by the law of New York a good and valid marriage;—that is, they having cohabited together as man and wife, and Mr. Shedden having acknowledged her as his wife, it was a valid marriage. Is it not very odd that none of his friends was aware of this? He has three trustees, all residing at New York; one of them a physician, the other two merchants. And one of the witnesses to his will was a lawyer in New York, who had been intimate with him, and was well acquainted with his affairs. It never occurred to any one of them during the years that this gentleman was living in intimacy with them that he had acknowledged this lady as his wife. If you say that the physician and the others were not likely to know what the law was, I say it was precisely the very thing that everybody would know. It is impossible to live in a place like New York and not to know

that cohabitation and acknowledgment will amount to marriage. It is impossible for such a thing not to be universally known. Mothers would tell their sons of it, for fear that they should be entangled into disadvantageous alliances. It is just that precise point of law which every one would be sure, more or less, to be familiar with. Then there was Mr. Colden, an American lawyer, practising in New York. Would he not at once have said, Why do not you set up the prior marriage; every one knows of it? But nothing is said about it, until this lady sends over the two affidavits, which were not worth the paper on which they were written. Of course they were not evidence at all; and she herself, by the very letter which she writes accompanying these documents, negatives the very claim which she sets up, by stating that the marriage was solemnised, and the will was properly executed. There is no foundation for the statement that there had been a prior marriage. But suppose there had been some colour, observe what took place. These affidavits were sent over in 1799. From that moment it was not a secret. There was nothing confided to the breast of Mr. William Patrick—these affidavits were sent to her solicitors in Scotland, men of high reputation, whom she had selected to assert her claim. As far as these documents went, all Scotland would know at once of the claim. Then it was said, Yes, but she desired that the 400*l.* might be given to her. Why, the most indifferent stranger in the street might have equally claimed it; might have walked into Mr. William Patrick's office, and asked for the 400*l.* It would have been perfectly absurd for him to have given up that sum of money to her;—he must have paid every shilling of it again. She was the last person to whom he could have entrusted it,—she was not the person who could have conducted the case of her son,—she was not the

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person to whom the father had entrusted his son,—he did not leave her the custody of his son.

My Lords, there is one other point upon which a good deal has been said. It is well to clear up these things, and I do not think I am going out of my way in doing so. I feel bound, as far as the circumstances justify it, to put the character of Mr. William Patrick, which has been very strongly reflected upon, in what appears to me the proper light. The point is with respect to the guardianship. Now upon this subject you have only to read the letter of 1800; and I may observe that we have here an advantage which is seldom possessed in such a litigation. We have not only the public acts of the parties, but their private letters are brought forward; and those letters show, conclusively, that while Mr. William Patrick did injudiciously I acknowledge (for that is all that I can admit) take the boy under his guardianship—having already had another trust reposed in him, which was to some extent inconsistent with this guardianship—he did distinctly announce to the parties that he could not undertake the prosecution of his claim; but that he should maintain the claim of his brother. He was perfectly justified in doing so. By thus taking the boy he embarrassed himself, and he has led to this vast and protracted litigation, in which your Lordships will recollect that, but for the charges of fraud which have been brought, not proved, against this gentleman, the law of Scotland has long since barred every possible remedy of the Appellant; and it is only by a case of fraud being established, that the Appellant could for a moment be heard.

I agree, therefore, with my two noble and learned friends in thinking that this Appeal should be dismissed; and considering the charges of fraud which have been so gravely brought forward and not made out, I submit to

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your Lordships that the Appeal should be dismissed with costs.

Sir *Fitzroy Kelly:* Will your Lordships permit me, on the part of the Appellant, to ask that he may be allowed an opportunity, if he shall be so advised, of applying to your Lordships with reference to the form in which the judgment of this House shall be ultimately entered up.

Lord ST. LEONARDS: I omitted to make an observation upon that; but it is not for want of having formed an opinion. I think it is quite right to assoilzie the Defendant. I have shown to your Lordships that the result is the same as would have taken place if the application had been first made to this House; for if the House had, upon the preliminary defence, denied the right to go on, it is quite clear that it would have made an Order to put an end to the case altogether.

Lord CHANCELLOR: I am much obliged to my noble and learned friend for mentioning this, which I had omitted to notice. My opinion entirely concurs. The charge of fraud failing, the case is concluded.

Interlocutors affirmed, with Costs.

(*See the next case.*)

MAITLAND & GRAHAM—
RICHARDSON, LOCH, & M'LAURIN.