jointly. The goods were booked in their name—invoiced in their joint name—and the bill drawn on them jointly. All these circumstances show that the decision pronounced by the House of Lords, in that case, cannot apply to the present, except in so far as it furnishes grounds of affirmance of the interlocutors complained of.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed, with £80 costs.

For Appellant, *Wm. Adam, J. A. Park.*

For Respondents, *Wm. Alexander, M. Nolan, Thomas H. Baird.*

[Mor. App. 1. Foreign No. 6.]

WM. SHEDDEN, only Son of the deceased William Shedden of Rughwood, in the County of Ayr, sometime Merchant in New York; and HUGH CRAWFORD, Merchant in Greenock, his Factor *loco tutoris*, — *Appellants*:

DR. ROBERT PATRICK of Trearne, in the County of Ayr, ... — *Respondent.*

House of Lords, 3d March 1808.

LEGITIMATION PER SUBSEQUENS MATRIMONIUM—FOREIGN—ALIEN—NATURALIZATION ACTS.—A Scotchman had settled as a merchant in New York, and had become domiciled in that country. In 1770 an heritable estate devolved on him in Scotland, but, on this event, he did not return to Scotland. Ann Wilson lived with him in America; and the result of this connection was, the birth of two children, of whom the appellant, William Shedden, was one. In 1798, when on deathbed, he married their mother in America, by a regular marriage, performed by a clergyman; and the questions raised in a reduction were, 1st. Whether this marriage, celebrated in a country which did not recognize the law of legitimation by the subsequent marriage of the parents, was nevertheless good to legitimate the child, claiming heritable estate in Scotland, where that law was recognized? or, Whether the status of legitimacy was to be decided according to the law of America, where he was born, and his parents resided, or according to the law of Scotland? 2d. Whether, being born out of the allegiance of the King

of Great Britain, the appellant came within the protection and exceptions created by 7th Anne, c. 5, and 4th Geo. II. c. 21, § 1, or any other act which naturalizes the children of British parents, born out of the ligeance of the Crown of Great Britain? Held such a person not entitled to succeed to heritable estate in Scotland. Affirmed in the House of Lords.

William Shedden, the appellant's father, was the only son of John Shedden of Rughwood, who died in 1770. At this time, William Shedden, the appellant's father, had been settled in New York as a merchant, having gone to America in 1763; and when this Scotch estate devolved on him, it was under the management of the respondent's father.

William Shedden had formed a connexion with a woman of the name of Ann Wilson, by whom he had two children, William, the appellant, and Jean, an infant. Several years thereafter, and when it was alleged he was on deathbed, he entered into a regular marriage with their mother, which was celebrated according to all the forms and solemnities prescribed by the laws of the United States.

Nov. 1798.

A few days after the marriage Mr. Shedden died, having executed a settlement of his American property in favour of the two children of this marriage, and of a child by another mother. Nothing was mentioned in the deed of the landed estate in Scotland. But, in the settlement, Mr. Shedden directs his executors to send the appellant, his only son, to Scotland, and he appointed as his sole guardian Mr. William Patrick, the respondent's brother.

The appellant arrived in Scotland accordingly, and was put to school at Dunfermline. In the meantime, Mr. Wm. Patrick, finding that his brother, the respondent, meant to claim the property, declined to accept the guardianship of the boy. The American property was insufficient to pay the deceased's debts. There was a difficulty therefore in furnishing funds to support his claim to the estate; but these got over, Mr. Hugh Crawford was appointed his factor *loco tutoris*.

An action of reduction was then brought in the name of William Shedden and his factor *loco tutoris*, to set aside the service of the respondent (who, after the appellant's father's death had got himself served heir at law in special to the deceased), on the ground that, being the lawful son and heir of the last proprietor, he was the only party entitled to succeed to his father's estate in Scotland.

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The Lord Ordinary made avizandum to the Court on memorials.

The facts of the case were: Wm. Shedden went to America in 1763, remained until 1769, when he paid a short visit to his friends in Scotland, but returned in a few months to America, and settled there as a merchant, and never again returned to this country. In 1783, when the Independence of America was established, Mr. Shedden went to reside in New York, where he formed a connection with Ann Wilson, a native of America, and had two children by her, namely, the appellant and a daughter. It was admitted that, during the latter period of their connection, they cohabited and resided in the same house together.

In autumn 1798 Mr. Shedden was seized with a consumptive complaint, which threatened to put a speedy termination to his life. He was so weak as scarcely to be able to stir without assistance, and he was so convinced of his dissolution himself, that he caused letters to be written home to Scotland to his friends to that effect. While in this weak situation he was induced, it was alleged, by the solicitation of Ann Wilson, to solemnize a marriage with her, the ceremony being read over to him as he lay in bed. It took place on 7th November, on which day also he executed the settlement above referred to, and he died on the 13th Nov. In a few days afterwards Ann Wilson married Mr. Vincent, the master of a vessel in the employ of Mr. Shedden.

These being the facts of the case, which were not disputed by the parties, the questions arising upon these facts were:—

1. 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?

2. 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, c. 5, and 4th Geo. II. c. 21, § 1, or any other act which naturalizes the children of British parents born out of the ligeance of the Crown of Great Britain?

On these questions, it was argued for the respondent, that the appellant was illegitimate, and that the question being therefore one of *status*, must be decided by the law of the previous domicile; that the appellant was born in America, and that his father was domiciled there;—that the law of the United States does not recognize legitimation by the marriage of the parents subsequent to the birth of the children:—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. 2. Independently, the appellant is an alien, and, as such, incapable of succeeding to heritable estate in Scotland. Nor does he fall within the benefit of the naturalizing statutes of 7th Anne, c. 5, and 4th Geo. II. c. 21. By the words of the first of these acts, it was left doubtful whether the mother as well as the father required to be a natural born subject of Great Britain; or if not, whether the privilege of naturalization did not extend to children born of mothers who were natural born subjects, although the father was an alien. The 4th Geo. II. c. 21, removed these doubts, and confined the privilege to the children of British fathers. The material words are: "That all "children born out of the ligeance of the Crown of Eng-"land 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 cannot be denied that a bastard, as being *nullius filius*, is not a child within the meaning of these acts. But what the appellant contends for cannot hold, that though no bastard has a privilege by these acts, yet they save the rights of children born of a British born subject, in so far as the law operates in legitimizing children by the subsequent marriage of the parents,—the fiction of the law being, that the parents were married at the time he was begotten,—and, therefore, that he was and is, in the sense of the law, a *filius legitimus* from the beginning.

The appellant contended that the whole question related to land estate in Scotland, in regard to which the laws of Scotland must govern, whatever be the rule otherwise in regard to moveable estate. The rights and succession to

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land estate must be decided by the laws of the country where it is situated. And, by the law of Scotland, no rule is more clearly settled than the legitimation of children by the subsequent marriage of the parents; and the rights of a son so legitimated, entitle him to succeed to heritable estate *ab intestato*, just as a lawful son. That the marriage of the parents in America being perfectly valid in the *locus contractus*, must be valid all the world over, and must fix upon him the character of legitimacy, which the Scotch law recognizes in children whose parents were legally married; that he is therefore the *lawful son* of the late William Shedden, and entitled to succeed to him. 2. That the naturalization acts protected him from alienage, because he was the lawful son of a British born father, and, as such, entitled to the privileges thereof.

On reporting the case to the Court, the Lords pronounced this interlocutor: "Repel the reasons of reduction, assoilzie "the defender, and decern."*

July 1, 1803.

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* Opinions of the Judges:—

LORD PRESIDENT CAMPBELL said:—"The defender having already expede a service, as nearest and lawful heir, the pursuer, who challenges that service, and assumes the same character, must make out his title in the same way as if he had taken out a competing brieve.

"He states himself to be *legitimus et propinquior hæres lineæ* of his deceased father, and, if he can establish that character, he must prevail; but the answer made to this claim is bastardy, to which it is replied, that there was legitimation by subsequent marriage of his father with his mother. Duplied, that a subsequent marriage cannot, by the law of New York, the place of his own nativity, and of his father's residence, have that effect. Answered. His claim is to the succession of a Scots estate; and the law of Scotland must be the rule. Here the parties join issue on a very important and general question of law.

"One peculiarity attends the pursuer's argument, viz. that he cannot maintain his legitimacy throughout: for he claims only a partial, not a complete state of legitimacy. He admits that he can make no claim to any personal estate, even that which was undisposed of by his father's will, but must allow it to be taken by a more distant relation, as nearest in kin, so that *quoad hoc* he is illegitimate, although he contends that *quoad* the heritable estate, he is legitimate, so that he is partly lawful and partly otherwise. This is a case of which probably there is no other example.

"There are certain personal qualities, which must be inherent in,

Against this interlocutor the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—1. The marriage of the appellant's parents must be deemed valid, whether it is judged of

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and accompany the person every where, and in all circumstances, or not exist at all. Thus, a person must either be married or unmarried, and cannot at one and the same time be both the one and the other, or half the one and half the other. The state of marriage is undivisible; the state of legitimacy, it is presumed, must be the same. Thus also, every person must have a *forum originis, i. e.* he must be born some where, and must be a subject of a bare allegiance to some one country or another, and this character is indelible, unless forfeited upon commission of a crime inferring such forfeiture, in the same way as marriage is indelible till dissolved in a legal manner. The character of a lawful child is equally indelible, when once constituted by a marriage or legitimation, and must be an inherent quality in that person all the world over. This, at least, is the general result of the *jus gentium universally.* If there be any country or place where it is otherwise, this must arise from some particular arbitrary constitution, which cannot bind other countries, being against the fixed principle of general law all over the world.

" The claim, therefore, made in this case, being of a nature inconsistent with itself, and with general principles of the law of nations, which make a part of the system of the general law of every country, must be narrowly examined, before we can admit it as having that legal effect in this country which he contends for.

" The pursuer is *prima facie* an alien to this country, having been born in one of the American States, and he can only take himself out of the situation of alienage, by pleading upon the statute 7th Anne, c. 5, and 4th Geo. II. c. 2.

" These acts can only relate to lawful children, and, before he can take the benefit of them, by succeeding to the land estate here, he must prove that he is a lawful child. He admits that he was for some years in a state of illegitimacy, and, consequently, for some time, he neither could take the benefit of these acts, nor make himself out in a claim of service to be *legitimus et propinquior hæres* of his father; but he maintains, that at an after period he became lawful, by the marriage of his father and mother at New York; and that, being thus constituted a lawful child, he, at his father's death, was entitled to the benefit of the acts of Queen Anne and Geo. II.; and to the right of serving heir, to the effect of taking up an estate in Scotland; such being the legal consequence of that marriage by the law of Scotland, if not by the law of New York.

" But, supposing there had been no estate in Scotland, could the marriage of his father and mother at New York have drawn him out of the state of illegitimacy and of alienage, so as to enable him

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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 it has arisen. The cohabitation of the parties, the certificate by the clergyman

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to maintain any other right here or elsewhere, in the character thus assumed by him? *e. g.* Could he have succeeded to an estate in England, or to a title of peerage? Certainly not. He must have remained illegitimate and an alien to all intents and purposes, here and everywhere else.

"Supposing his father had been a peer of Scotland,—this is a species of right which may be taken up without service. Could he then, with a certificate in his pocket of his reputed father's marriage with the woman who bore him, have come from New York and assumed the title of peerage here, as descending to him by the law of Scotland, though neither at New York nor in England, could he be received in any other character than that of illegitimacy?

"Supposing the father had been both an English and a Scotch peer, and that there had been another son born after marriage, would the one son, of the same father and mother, have been an English peer, and the other a peer of Scotland? Or can there be such a thing as the same man having two sons, both of them his heirs-at-law, contrary to the law of primogeniture, which is the common law both of England and Scotland?

"The distinction laid down in these papers between the constitution of a status, and the legal effects and consequences of that status, when so constituted, is no doubt well founded; but, in the pursuer's argument, it is misapplied. The *questio status* here, is not, whether the father and mother were married, and what was the result, or consequence of that marriage, so far as the state either of the husband or the wife was concerned? The marriage was certainly a good one, not only by the law of New York, where it was entered into, but all the world over; but the legal rights arising from such marriage, either to the husband or to the wife, might be different in different countries, where implement or execution might be demanded. Thus the husband might be entitled to what is called the courtesy in Scotland, but not in New York or in England, and the wife's dower might be different in these different countries. These are legal results from the state of marriage, which might vary according to the municipal laws of each country; but still the marriage being certain, no doubt could be entertained as to the title of the one party or of the other, to assume the character of husband or of wife, and to make their demands in that character.

"But the question at present before us, does not regard the state either of the husband or the wife, or any demand resulting from that state, either to the one or to the other. It relates to the state of a person said to be their child, and to a demand made on the part

who performed the ceremony, and the acknowlodgment 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

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of that child, of being put in possession of a certain right, which he claims as the result of a certain pre-supposed state assumed by him.

"In other words, he holds the state assumed by him to be already constituted, and then he makes his demand as a necessary consequence of that state. This, however, is begging the whole question; for he must begin with establishing the constitution of his state as a lawful child. If he prevails in so doing, he will, of course, succeed in the conclusion which he draws from it; but if he fails, the reverse must appear.

"Now, the difficulty which meets him in the outsetting is, that he was born a bastard; and he never enjoyed any other state in the country to which he belonged, and where his father lived and died; and nothing was ever done here to put him in any other state, nor is now possible to be done, unless it can be said that the mere opening of a succession in Scotland, which, had he been a lawful child, would have devolved upon him, does *eo ipso* make him lawful?

"Suppose, for example, the estate which is here in question, had never belonged to the father, but had descended from some colateral relation, to whom the father, had he been in life, would have been the nearest lawful heir, but failing him, the succession must, of course, be taken by the next lawful heir, could he have taken out brieves to be served *legitimus et propinquior hœres* to this colateral relation, upon the ground assumed by him, that his legitimacy being pre-supposed, he is the nearest and lawful heir of the deceased relation, in consequence of his being the lawful son of his father? In the case here supposed, he derives nothing from his father. He did not derive his state of legitimacy from him in his own country, he derives no estate from him in this country, which could give him a pretence for claiming to be *legitimus et propinquior hœres* of his father. Any service as heir to his father would be inept, because he can take nothing from him. Yet it is maintained that he may serve, *through his father*, as his lawful son; and, consequently, entitled to the succession of his father's relations, when, in truth, he never enjoyed any other relation to his reputed father but that of illegitimacy. Marriage of the parents does not necessarily establish the legitimacy of children *here*: for, *e. g.* there might be a *medium impedimentum*. The pursuer argues in a circle, when he says, give me the estate, because I am lawful,—and declare me to be lawful, because I have so succeeded."

Lord Hermand.—"The state of legitimacy is a prejudicial question. The pursuer, I think, does not make out his legitimacy."

Lord Craig.—"I have some doubt, where it is a mere question of status, Whether it is not a question of succession, *i. e.* what are

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the *lex loci* is to be followed, has been sufficiently proved by the documents produced by the respondent himself.

2. 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 countries recognize the right of property over *men* almost as unlimited as over cattle; in other countries a similar right is admitted, but under greater limitation. In many countries, a right over human beings as property is totally denied. Thus the fundamental principles of law, with respect to the qualities, the conditions, or the *status* of persons, are different in different countries; and the law of each views these qualities in a way peculiar to itself. In one country, it is a fundamental doctrine that a man may be sold or bequeathed like a horse. In another, that he may 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. If a Russian landholder comes into an English court of justice, and demands the restitution of his

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the rights of the parties? I rather think that the marriage being constituted, both the status and the right of succession to the estate here must follow. Suppose the right of primogenture not the law of that country, must we not follow our own law in that particular?"

Lord Armadale.—"The whole question is, Whether he be legitimate or not? The question of his status must be resolved by the law of his own country; and *there* legitimation, by subsequent marriage of the parents, does not apply."

Lord Woodhouselee.—"I am of the same opinion. The same person cannot be partly legitimate and partly illegitimate."

Lord Balmuto.—"I am of the same opinion."

Lord Cullen.—"We are bound to give effect to foreign deeds and foreign transactions, but not to a different effect from what is given to them in the country where they were entered into; therefore, as, by the law of New York, the subsequent marriage of the parents did not legitimate the child previously born, it can have no effect here."

Lord Meadowbank.—"Suppose an Englishman comes down and marries at Gretna Green, and then returns. This will not legitimate the children born before marriage in England. It is a question of right not of comitas. The question of propinquity is a question of the law of the country where the party was born and domiciled."

Repel the reasons of reduction.

Lord President Campbell's Session Papers, vol. 110.

vassal, who has escaped from his domain, he is told that villenage is unknown in our law, and that the laws of England will not enforce his claim. A West Indian Planter was stopped, by the same principle, when he claimed a slave, to whom he had undoubted right in the country where the contract took place, which gave rise to his action; but he was told that the laws of this country did not recognize slavery. 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 effect to it,—the Court of Session in the case of Knight *v.* Wedderburn,* and the Court of King's Bench in that of Somerset,† after the most ample discussion. Thus too, the judicatures of this country support marriages between British subjects abroad, although solemnized 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. All these are, in the strictest sense, 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 acknowledgment of the status claimed. It seems therefore impossible to assign any reason for excepting from this class of cases the question of legitimacy.

3. It thence appears, that the argument which considers this case 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 the contract *ex vi legis.* It has been stated, that different sys-

* Knight *v.* Wedderburn, 15th Jan. 1778, Mor. p. 14545.

† Somerset *v.* Stewart, 14th May 1772; Lofft. vol. i. p. 1, King's Bench, Easter Term.

tems of jurisprudence apply very opposite principles to determine the validity, or to define the nature of contracts. In some countries personal arrest is unknown. If a debt incurred abroad, 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 contractus* no such diligence is allowed? Or will an English creditor be permitted, by the judicature 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; but *effect* will only be given to it in so far as such effect is not repugnant to any fundamental principle laid down by the law which is required to enforce it. Here then, in claiming Scotch estate, as the lawful son of William Shedden deceased, the appellant's legitimacy, by the subsequent marriage of his parents, can validly be founded on, because the law of Scotland recognizes that rule; and it is no answer to this to say, that by the laws of America, where the contract of marriage was made, legitimacy *per subsequens matrimonium* of the parents has no place, because, both upon the principle above set forth, and also, because every question connected with land estate in Scotland must be decided by the law of that country, and no other, the law of America cannot be applied. If, therefore, by the law of Scotland, he is to be held a *filius legitimus*; and, if added to this, his father is to be presumed as a domiciled Scotsman, from possessing estate there, and the appellant himself now actually domiciled there, then he is entitled to succeed, and the naturalization acts 7th Anne, c. 5, and 4th Geo. II. c. 21, on the supposition of his being incapacitated, from being an alien, would entirely protect him—his father having been a British born subject.

Pleaded for the Respondent.—1. The first question 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. The respondent contends, that this question must be decided according to the laws of America, where he was born, and where he and his parents were domiciled; and he having been born a bastard, and the subsequent marriage of his parents, according to the law of America, not having the effect of legitimating children previously procreated between

them, he cannot claim the benefit of the laws of Scotland, in order to succeed to inheritance there, just because his status, as fixed by the laws of America, must remain indelible; nor can the laws of a foreign state change that condition or status from that of bastardy to that of legitimacy. The law of Scotland, as to legitimation, cannot travel to America, so as to legitimate a person born there a bastard. And whatever status the law of America affixed to children born before the marriage of their parents, that status must travel with them wherever they go. The case of the slave coming to this country, and being that moment free, arises from a totally different principle altogether, derived from constitutional law, and founded on principles peculiar to the genius of the British constitution. Nor do the cases of foreign decrees, &c. apply, because the principles, in regard to them, proceed from the comitas due to foreign laws. 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 it 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 produced. And the validity must be decided by the law of the country in which this act is done, and according to the forms in 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. Accordingly, assuming there was a mar-

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riage in this case, subsequent to the birth of the appellant, the latter's legitimacy can only be judged of according to the laws of America, which do not admit of legitimation *per subsequens matrimonium.*

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, and must be held as domiciled there. It is true, that the father was subject to the jurisdiction of the Scottish courts, so far as that might be necessary to constitute any claim against him; and, upon these grounds, he might 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, and his wife and children, none of whom were either in the country, or had property, by which they might be subjected 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, this character must remain with him; and 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 question 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 permament *situs,* they are pro-

sumed 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 country they were born?

An Italian or Scotsman, in whose countries the law of legitimation, by the subsequent marriage of the parents, 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 the maxim already mentioned, that no state will give due 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.

2. 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 two 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 enjoy nor succeed to a feudal subject in the country

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of Scotland, to whose sovereign he owed no allegiance, as a duty incident to his birth. It was admitted in the Court below, 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 was entitled to the benefit of the naturalizing statutes of 7th Anne, c. 5, and 4th Geo. II. c. 21. The respondent contends, that he comes neither within the letter nor the spirit of these statutes, but remains an alien born, unnaturalized, and incapable of inheriting real property. The words of the 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 having arisen whether it was required by this act that the mother should be a natural born subject as well as the father; or 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. II. c. 21, was passed, the words of which are: "That all "children born out of the ligeance of the Crown of *Eng-* "*land*, or 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 child- "ren respectively, shall be adjudged and taken to be natu- "ral 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 the appellant argues, that, by the subsequent marriage of his father and mother, that alienage was taken off, upon the fiction of law, which supposes his parents to have been married at the time he was begotten, so that he was legitimate from his very birth; but the respondent contends, that this fiction of law can work no such effect. The statute 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 the contemplation of law, he had no father at that period, either alien or native.

After hearing counsel,

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The LORD CHANCELLOR ELDON,

In moving the judgment in this cause, stated, "that he had consulted with the learned peer who had attended the hearing of this appeal, (Lord Redesdale, who was not then in the House), and whose opinion on the subject coincided with his own; and that, as it was not usual to state any reasons for affirming the judgment of the Court below, he should merely observe, that the decision in this case would not be a precedent for any other which was not precisely the same in all its circumstances." He then moved that the judgment of the Court of Session should be affirmed, which was accordingly ordered.

It was therefore ordered and adjudged that the interlocutors be, and the same are hereby affirmed.

For the Appellants, *Andrew Fletcher, Henry Brougham.*
For the Respondent, *Sir Samuel Romilly, M. Nolan.*

NOTE.—The question in the above case was again revived many years thereafter, by Mr. Shedden seeking to reduce the decree formerly pronounced, on the ground of fraud; but the Court of Session, after much discussion, dismissed the action; and this judgment was affirmed on appeal. There is an interesting report of the case, as decided in the House of Lords, in Mr. Macqueen's House of Lords' Reports, vol. i. At p. 568, in alluding to the above case, he says, '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 furthcoming.' This is incorrect, in so far as it supposes that any opinions could be delivered, in judgments of affirmance, at that time, the rule of the House then being, to state no reasons where the judgment of the Court below was to be affirmed. He is also wrong in stating Lord Redesdale was present at moving judgment. His Lordship had been present at the hearing, and had even been present in the House that day, but was absent when judgment was given.

The ground on which the judgment was given in the House of Lords, in the above case, it is stated upon the authority of Lord Redesdale and Lord Brougham, 'was, that the child was born an alien.'—Vide Mr. Macqueen's Reports, p. 632.