[10*th August* 1840.]

(No. 21.) Miss MARY SEYMOUR MUNRO, Appellant.[1]

[*Pemberton — Sir W. Follett — Buchanan.*]

GEORGE MUNRO and CHARLES MUNRO, Respondents.

[*Knight Bruce — Fleming.*]

Domicile — Proof. — Circumstances regarding the domicile of a party born and having heritable estate in Scotland, in which, held (reversing the judgment of the Court of Session) that the domicile of origin prevailed, because there had been no intention to abandon it, and the party had not animo et facto acquired a new domicile.

Per LORD CHANCELLOR: — "In questions of domicile it is, "I conceive, one of the established principles, that the "domicile of origin must prevail until the party has not "only acquired another, but has manifested and carried "into execution an intention of abandoning his former "domicile and acquiring another as his sole domicile. "Such, after the fullest consideration of the authorities, "was the principle laid down by Lord Alvanley in Som- "merville v. Sommerville (5 Vesey, 787), and from which "I see no reason for dissenting." See p. 606.

Marriage — Legitimation per subsequens matrimonium — Domicile. — H., a domiciled Scotchman, proprietor of entailed estate in Scotland, cohabited with J., an unmarried woman, a native of and resident in England, and had by her a daughter, M., who was born in England. Several years after the birth of M., her parents, H. and J., were married in England: — Held (in concurrence with the opinions of the majority of the Judges of the Court of Session), that M. was the lawful daughter of H. (See preceding case of Countess of Dalhousie v. M'Douall, p. 475.

[1] 16 D., B., & M., 18; Fac. Coll., 15th Nov. 1837.

1st Division.

Lord Ordinary Corehouse.

Statement.

SIR HUGH MUNRO of Fowlis, baronet, was born in Scotland in 1763. On the death of his father, in 1781, he succeeded to the entailed estate of Fowlis in Ross-shire and to certain real estate in England. He was educated chiefly in Scotland, and for some time previous to 1789 he was on foreign travel. From that time until the year 1794 Sir Hugh' resided with his mother at Ardullie, a mansion on the family estate in Ross-shire. Fowlis Castle, the principal seat of the family, was then in disrepair, and Sir Hugh at that time kept no establishment there. The real estate in England to which he had succeeded was before this period sold. In 1794 a misunderstanding arose betwixt Sir Hugh and his mother, in consequence of his proposing that she should give up Ardullie, and go to reside in Edinburgh.

In the same year 1794 Sir Hugh went to London. In August 1795 he became acquainted with Jane Law, then unmarried, who was born and domiciled in England; and this connexion resulted in the birth of a child (the appellant), who was born in London on 15th May 1796. Sir Hugh's usual place of residence was for some years afterwards in Gloucester Place, London, where he had taken a house on lease. In September 1801, Sir Hugh and the mother of the appellant were married in London according to the forms of the English church. In the certificate of marriage the parties were respectively designed as bachelor and spinster, both of the parish of St. Mary-le-bone. In the usual affidavit sworn by Sir Hugh, it was stated that he was of the parish of St. Marylebone, and that his usual place of abode had been in the said parish for the space of four weeks then last past.

In October 1802 Sir Hugh and Lady Munro, with

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their child, went to Scotland; and they resided at Fowlis Castle in family as husband and wife from November 1802 until August 1803, when Lady Munro was drowned whilst bathing.

Sir Hugh and his daughter, the appellant, resided at Fowlis Castle until 1808, when the latter was taken by her father to London for the benefit of education. From that period till 1817 Sir Hugh usually resided in his house in Gloucester Place, London, occasionally going to Scotland. From 1817 till 1820 he was resident entirely in Scotland, and thereafter he chiefly resided in London.

Under an entail executed in 1776 by Sir Hugh's father the estate of Fowlis was destined in favour of a daughter on failure of male issue of Sir Hugh. The next heir, after Sir Hugh and his issue male and female, was George Munro, late of Culrain (respondent). In 1831 Miss Munro, the appellant, raised in the Court of Session an action of declarator of her mother's marriage, her own legitimacy, and her right to succeed to the estate of Fowlis, failing her father Sir Hugh without male issue. The defenders called were Sir Hugh and the other heirs of entail. The conclusions of the summons were "that the deceased Dame Jane "Law, the mother of the pursuer, was the lawful wife "of the said Sir Hugh Munro, defender; that she "cohabited with him as such during several years, "residing with her said husband at his hereditary "mansion-house of Fowlis in the county of Ross in "Scotland, where she was fully acknowledged by him "and by the whole neighbourhood, and by all their "friends and acquaintances and visitors, as holding "lawfully and rightfully the stile and title of Lady

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" Munro, and was in all respects habit and repute the " wife of the defender the said Sir Hugh Munro, the " father of the pursuer, who was reared, brought up, " and acknowledged and educated by him and his wife " as their lawful child, and presented as such to all " their friends, relations, and connexions, and held out " in that character to the public at large. And further " it ought, &c. to be declared, &c. that the pursuer, as " lawful daughter, and at present only lawful child, of " the said Sir Hugh Munro, is entitled, failing her said " father and heirs male of his body, to succeed to the " estate of Fowlis and others, in virtue of the clause " of destination and other clauses in the entail afore- " said, and that she has a vested interest therein and " jus crediti over the same as heir female procreate of " the body of the defender Sir Hugh Munro, designed " in the said entail by the entailer, as ' Hugh Munro " ' my eldest son ;' and the defenders ought to be pro- " hibited, &c. from disputing in time coming the " pursuer's right of succession."

Sir Hugh lodged defences admitting that the action was well founded. George Munro and his son Charles Munro (respondents) gave in defences, and pleaded, 1, That the pursuer having been born illegitimate in England, of an English mother, was not entitled to succeed in a declarator of legitimacy founded upon the subsequent marriage of the alleged parents in England; 2, That upon the supposition that the domicile of Sir Hugh Munro at the period of the pursuer's birth and her mother's marriage were material, that domicile must be held to have been English.

The Lord Ordinary (23d January 1833) allowed to both parties a proof of facts and circumstances, in so

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far as the same tended to instruct the domicile of Sir Hugh Munro. Some of the numerous facts and circumstances adduced in evidence by the parties are subjoined.[1] The material parts of the evidence on the

[1] Early in 1794 Sir Hugh accompanied Dr. Robertson, the clergyman of his parish, to London. In writing to his factor he says, in reference to his return, that it would be in June or July 1794; and in another letter in the same year he says, "At Whitsunday next I "intend taking the management of the estate into my own hands. "Mr. Munro (his law agent in the country) will continue to act for "me until my return to the country, which will be early in summer;" and in that year some furniture, such as clothes presses, &c., was ordered and provided for his own dressing-room in the castle. On the 3d September he wrote to the Lord Lieutenant of Ross-shire, "I shall be very happy to act as your deputy-lieutenant in the district "you mention." In 1795, in his correspondence, he gave directions about the preservation of the lawn of Fowlis Castle from tillage. In September of that year he wrote to his country agent to defer a final settlement "until my own return to Ross-shire, which will be very early "in next summer;" and in a letter about the same time to his factor he says, "At Whitsunday next I intend taking the management of the "estate entirely into my own hands. From that date I shall be my own "factor; an office which I expect, with your assistance, to be able to "execute with more benefit to myself and more real advantage to the "tenants than it has ever yet been;" and in another letter he says, "I "embrace this opportunity of informing you that though I propose being "my own factor, I shall, both in Ross-shire and here, refer the manage-"ment of the estate to you;" and again, "When in the country, as I "wrote you, I shall consider my factor under your directions; when I "am here you will be factor under mine." In November of that year, "in writing to his factor, he says, "From the 20th January 1796 I com-"mence the management of my own affairs, and shall not trouble you to "collect the arrears." In February 1796 he writes to his factor, "The "accounts may now very properly be deferred until my return to Ross-"shire." Sir Hugh at first, on coming to town, lived in lodgings, but in the month of March 1796 took a house in Gloucester Place, London, on lease for seven, fourteen, or twenty-one years, in the lessee's option, and having furnished it went to reside there with the appellant's mother. On the 25th March 1796 he writes to his factor, "The appearance of the "lawn under corn would often disgust me, especially should I live in the "house, (which you know is what I intend, and to have myself supplied "by the tenant in corn, straw, &c. &c.)" In a lease, granted 14th May 1796, of the mains and lawn of Fowlis for seven years, with a break at the end of three, a provision was inserted against ploughing the lawn; and at this time also he directed a cow to be bought for his accommodation. On the 16th May 1796, in a letter to Mr. Kenneth M'Kenzie,

question of Sir Hugh's domicile are stated and commented on in the opinions delivered by the Lord

W. S., his solicitor in Edinburgh, he asked, "What forms, if any, are "necessary to be observed when executing a will, testament, or dis- "position for the disposal of personal property? and whether, by a gene- "ral disposition, land also may not be conveyed." In a letter of the 26th May Sir Hugh alluded to his return to Scotland in July or August, but in October he wrote that unforseen events having obliged him "to "defer his journey," he would be in Ross-shire next year. On the 27th October he thus writes to his factor: "The hens and eggs now paid "in kind are to continue to be so; it is easy, during my absence from the "country, to dispose of them at a price equal to the conversion in the rental, "and when at home I shall have occasion for them." In March 1797 Sir "Hugh wrote to his factor, "I shall be very soon in Ross-shire, and the "mill is not to work after Whitsunday before my return to Ross shire;" and in July he wrote, "I set out in a few days for Edinburgh. Such "letters as you may have occasion to write me after receipt of this are to "be addressed to me, under cover to Kenneth Mackenzie, Esquire, "writer to the signet." On the 18th October he wrote to Mr. Mackenzie, "My stay in the country will be about six weeks, or to the end "of December at the very latest." Addressing the Lord Lieutenant of the county on his elevation to the peerage he says, 24th October, "Expecting every day to be able to pay my respects to your Lordship "in Ross-shire." In November he wrote, "My journey to Ross-shire, "so long and often retarded here by circumstances which I could not "foresee, is now, by the advice of friends here, given up till next "summer." In 1798 he wrote to his factor, 28th March, "I expect "very soon to be able to write to him (Dr. Robertson) the time at which "I propose myself the pleasure of seeing him;" and on 2d May 1798 he says, "I shall be obliged to you to view the house and farm-offices "at Fowlis, the pipes, wells, drains, sunk fences, &c., and inform me of "such repairs as you shall deem absolutely necessary." In 1799 advantage was taken of a break in the lease of the mains, and one of the tenants deponed that the reason given was, that Sir Hugh was coming to reside at Fowlis, and therefore wished to have the mains in his own hands. During that year, and also in 1800, he ordered improvements and repairs in the castle, and transmitted furniture from London; and in the beginning of summer 1801 he writes, inquiring about the height of the rooms, and other particulars. On the 9th December he wrote to his factor to know "the length and breadth of the bedstead in my room;" and on the 16th, that "it is my resolution, please God, to go early next summer "into Scotland. I wish, if possible, to reside at Fowlis while I am in "that country, and I hope I shall, without difficulty, be able to accom- "plish my wish; but be that as it may, nothing but death or violent "sickness shall prevent my affording you an opportunity of seeing me." On the 20th January 1802 he wrote to Mr. Kenneth Mackenzie, "I inti- "mated to him (his factor) in general terms (on the 16th December),

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Chancellor and Lord Brougham in deciding this and the preceding cause of Countess of Dalhousie v. M'Douall. See post, p. 600.

The Lord Ordinary appointed parties to prepare cases on the import of the proof, with which he made

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" that your very short stay in Fernidonald, (the district of country in " which Fowlis Castle is situated) not having permitted you to obtain " all that information on his wood accounts which I deemed necessary, " that I was obliged to defer the final settlement of them until next " summer, when it was my intention to meet him in Ross-shire; that, " therefore, in his factory accounts for 1800," &c. In the same letter he added, " I am anxious during my visit to Ross-shire, which must be very " short, to avoid business as much as I possibly can; and I expect I " shall be able, with your assistance, (which I again solicit,) so to arrange " matters with Aitkin, &c., as to leave nothing for discussion while " there. I have long been among the Benedicts; but meikle man as the " Laird of Fowlis may be among his own fir trees, he is but a little man " in London, and therefore I did not deem it necessary to publish my " marriage; my intended visit to Ross-shire made it, I thought, proper.', On the 25th April he writes to Mr. Aitkin (his factor), " Accounts for " 1799, and the first copy for those of 1800, may now be returned me in " course of post. I have resolved to be at Fowlis as soon as the house, " which is painting and repairing, can be inhabited; but as these things " do not depend on my wishes I cannot fix positively any time. I hope " to be in Edinburgh in July or August. I shall probably have some " few inquiries to make between this time and that; and I take this " opportunity of apologizing for any trouble which they may occasion " you. I consider a journey to Ross-shire and a residence in that coun- " try as likely to involve me in much more trouble than would the tour " of the French Republic." In the beginning of 1802 several ship- ments of furniture were sent from London to Fowlis. On 6th Septem- ber 1802 Sir Hugh wrote to his factor, " The fine season now almost past " makes me wish we were set out on our journey, and I hope it will not " be many days before I am able to fix that of our departure hence. I " shall depend entirely on the Inverness market for what little liquor I " may require, and in a few days I shall trouble you with a note of what " wines, &c. I may wish should be lodged at Fowlis previous to our " arrival." He accordingly ordered twelve dozen of wines and three gallons of spirits to be got from Inverness. The first break in the lease of the house in Gloucester Place occurred at Christmas 1802. Sir Hugh did not avail himself of it; one domestic was left in charge of the house, the others accompanied Sir Hugh to Scotland; the parish rates continued to be paid as for an occupied house. After reaching Scotland Sir Hugh appealed against an assessment on Fowlis Castle, on the ground that it was not inhabited or furnished prior to November 1802.

avizandum, and afterwards (4th December 1834) appointed the parties "to prepare additional mutual cases "on the remaining points of the cause." Both parties lodged additional cases, upon advising which (12th May 1835), the Lord Ordinary reported the cause to the Lords of the First Division, and issued a note in the terms subjoined.[1]

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[1] "*Note.*—The Lord Ordinary has reported this case, because it may "involve various questions of international law of great importance and "difficulty, which have been much agitated of late both in this country "and in England, but which cannot yet be considered as settled on any "certain foundation. These questions of law may possibly be superseded by a question more properly of fact or evidence, namely, the "domicile of Sir Hugh Munro at his daughter's birth and his own "marriage; for, if it shall be held that at both those periods he was "domiciled in England, it seems clear that the defenders must be "assoilzied from the conclusions of this declarator. That question of "evidence is not fit for the consideration of a jury, because it is mixed "up with many points of law of a delicate and complicated nature, and "therefore it is also reported to the Court. At first the Lord Ordinary "thought that the most convenient mode of proceeding was to take up "the question of domicile separately as of a prejudicial nature; and "therefore by his first interlocutor he ordered cases on that point alone. "But on reconsideration it appeared that a hardship might in consequence be imposed upon the pursuer by dividing the cause, and "exposing her to the risk of two appeals; and there is no case in which "dispatch is more desirable than in a question of status, on which "rights, both personal and patrimonial, of the greatest importance, may "depend.

"With regard to the question of domicile, the issue seems to turn "upon the point, where Sir Hugh Munro was domiciled at the time of "his marriage with the pursuer's mother? The defenders have argued, "on the strength of certain dicta in English cases, that the status affixed "by birth in a case of this nature is indelible, although the parents "afterwards take up their abode and are married in a country where "legitimation per subsequens matrimonium is admitted. On principle, "as well as on the highest authorities, it is thought that this proposition "is not maintainable. But there is no occasion to enter upon it here, "because it is clear from the evidence that Sir Hugh's domicile, whether it shall be held to have been in England or in Scotland, was the "same at the date of the pursuer's birth and of his marriage with her "mother.

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The First Division, upon advising the record and cases, pronounced this interlocutor (12th January 1836):

" Assuming his domicile at both these periods to have been in Scot-
" land, it is beyond doubt that the mere fact of the celebration of the
" marriage in England is immaterial; for it is a general rule, that all
" contracts shall have reference to the place where they are to be imple-
" mented; and this is more especially the case as to marriage, by which
" the status of the parties and their offspring is to be determined. On
" this point Huber, Hertius, and all the more recent jurists of name
" are agreed.

" The Lord Ordinary has bestowed much consideration on the evi-
" dence; but having reported the cause, he forbears to express an
" opinion upon its import. Either view presents difficulties, to some of
" which he will very shortly advert.

" Scotland was Sir Hugh Munro's domicile of origin, and it is clear
" that he retained that domicile until his education was finished, and
" till he returned in 1789 from his tour on the continent. Absence
" from home by a youth for the purpose of education or the benefit of
" foreign travel is the example commonly given, in which a change of
" residence confessedly does not operate a change of domicile; and the
" case is the same whether the party is a minor or sui juris.

" From 1789 till the beginning of 1794 Sir Hugh lived with his
" mother at Ardullie in Ross-shire. The house was his property, but
" he had no establishment there distinct from that of his mother. It
" appears that she had a right to occupy the house, but on what footing
" is not explained. Her son during this period, therefore, must he held
" to have been her guest or lodger. But as his domicile was originally
" Scotch, and as he had done nothing to alter it during his stay with his
" mother, he continued a domiciled Scotchman.

" In 1794 a misunderstanding arose between Lady Fowlis and him
" on account of her refusing to give up Ardullie, and he went to London
" to reside. It does not appear that he left servants, horses, or any
" other part of an establishment at Ardullie, and he had never lived at
" Fowlis Castle, the mansion-house of his estate: indeed, it was at that
" time unfit to be inhabited. After being in lodgings in Dover Street
" for some months, he obtained a lease of a house in Gloucester Place
" for a period of seven, fourteen, or twenty-one years from Christmas
" 1795, at the pleasure of the lessee; and at the same time he granted
" a lease of the mains or home farm of Fowlis Castle, with the exception
" of the inner lawn, for seven years, with a power to resume at the
" end of three years. He did not resume possession, but renewed the
" lease.

" From 1794 till September 1801, the date of his marriage, it does
" not appear that he was ever in Scotland.

" It is said by the defenders, that these circumstances indicate an
" English domicile at the periods in question,—1st, because they show

—" Of consent of both counsel, allow the supplementary " cases to be withdrawn, and appoint the parties, on the

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" that London was then Sir Hugh's ordinary abode, and they afford no " grounds to conclude that he intended to leave it at any given time; " and, 2dly, because he had no place of residence or establishment in " Scotland, having removed from his mother's house, and Fowlis Castle, " as is proved by a letter under his hand, being until the year 1802 " neither inhabited nor habitable. This, therefore, is not a competition " between two residences, each of which was occupied in its turn, as in " the case of Lord Sommerville, but between a domicile arising from " the sole residence of a party sui juris for a period of six years and the " forum originis, which without residence, or some other qualified cir- " cumstance, is of no avail.

" Farther, many of the circumstances on which the pursuer relies " seem of little weight. Sir Hugh inherited a landed estate in Scot- " land, and he increased it by a purchase of land in the neighbourhood. " But in the cases[1] of the Earl of Strathmore and of Ross the situation " of the party's estate was held immaterial. As little stress can be laid " on the fact that Sir Hugh took a lively interest in his Scotch pro- " perty, and gave minute directions as to its management. He sold his " estate in England, but that was the result of a transaction of his guar- " dians while he was yet under age; and it does not appear that that " estate was ever contemplated by his father any more than by himself " as a place of residence. It is equally unimportant that he occasionally " acted as a magistrate in Ross-shire, attended public meetings, and " voted at elections, before his removal to London in 1794, and after his " return in 1802, not only because those acts do not fall within the " period in question, but because they naturally or frequently result " from a connection with landed property altogether independent of " domicile. It was so laid down in the House of Lords in both the " cases which have just been mentioned. There are instances given in " the proof of Sir Hugh sending furniture and wine to Fowlis Castle " during this period; but this might have been done though he meditated " only occasional and short visits to Scotland, such as repeatedly occurred " in the cases of Lord Strathmore and Ross.

" But there is one circumstance of very great weight in favour of the " pursuer's claim, namely, that Sir Hugh did remove to Scotland after " his marriage in September 1801, and resided there exclusively for " many years. For, although his domicile after his marriage is im- " material in itself, it may afford evidence of what his views and intentions " were during the preceding period of his life. Accordingly, it is ably " founded on in the pursuer's case, to show that, although it was not " convenient for him to put Fowlis Castle in repair or to furnish it, he

[1] See post, p. 586.

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" first box-day in the ensuing spring vacation, to put in " mutual additional cases on the question of legitimacy; " said cases to be revised, printed, and boxed, along " with the other printed papers in the cause, to the " whole Court, with a view of obtaining the opinion " of the Lords of the Second Division and of the " permanent Lords Ordinary on the questions therein " argued."

The printed papers were thereafter submitted to the other Judges, and the following opinions, in writing, were returned.

Opinion of Court.

Lords Justice Clerk (Boyle), Meadowbank, Fullerton, Jeffrey, and Cuninghame.—" We are of opinion that " the pursuer has not established her right to the " character of the legitimate daughter of Sir Hugh " Munro of Fowlis, and that the defenders are there- " fore entitled to be assoilzied from this action.

" We are of this opinion, because we are satisfied " that Sir Hugh was truly domiciled in England both " at the birth of the pursuer in 1796 and when, in " September 1801, he there married her mother, who " had never had any other domicile. We do not think " it necessary to consider how the case of the pursuer

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" had always regarded Gloucester Place as a temporary abode, or a " lodging to be occupied when, like other young men of fortune, he " resorted to the metropolis; yet he never lost sight of his paternal " mansion as his proper and only home, resorting to it permanently as " soon as his status was fixed by marriage.

" What effect is to be given to a suggestion of the defenders, that Sir " Hugh might have been induced to return to Scotland with a view to " legitimate the pursuer, is left for the consideration of the Court. The " Lord Ordinary can discover no trace of evidence that he was influenced " by that motive."

" 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 conti-
" nued to reside for upwards of a year after that mar-
" riage,—if Sir Hugh himself had, up to the time of
" the marriage, been incontestably a domiciled Scotch-
" man. Even upon this supposition, however, we think
" the pursuer must have had difficulties to encounter,
" which have not yet been resolved by any clear autho-
" rity in the law of either country. Some of the dicta
" in the ultimate decision of the cases[1] of Sheddan,
" Strathmore, and Ross seem to point to a conclusion
" against her; while others, of the very highest autho-
" rity, in the more recent case[1] of Sir George Warren-
" der, have rather a contrary bearing. But holding,
" as we do, that the domicile of the husband was also
" English, we humbly conceive that there is no authority
" on which the claim of the pursuer can be supported.

" We do not think it clear, that at the time of the
" marriage Scotland was exclusively or immediately
" contemplated as the future home of the parties, or
" the country in which their conjugal rights and duties
" were to be claimed and performed, though we rather
" incline to think that it should be so held. But then
" we are of opinion that this is a consideration truly
" irrelevant and extrinsic to the present question. The
" law of the country to which the contracting parties
" looked at entering into the contract, and in which

[1] See post, p. 585.

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" they intended that it should be carried into execution, " may very properly be referred to (in preference to " that of the place of celebration, and perhaps even of " domicile) for the measure of their rights and obliga- " tions; because these, and no others, were truly the " rights and obligations for which they must be held in " substance to have mutually stipulated and engaged. " But the legitimation of their previous offspring is not " a matter for which they could contract or stipulate, " or which can now be given or withheld according to " what might be proved or inferred as to their purposes " or understanding. It is, on the contrary, the gift or " legal result of the law, as applicable to certain facts " and circumstances; the value and effect of which must " be judged of by the law alone, independent altogether " of the intentions or expectations of the parents. The " law, therefore, under which they themselves intended " to live as married persons, may very well be allowed " to settle the extent of their rights and duties as with " each other, but cannot affect the condition of children " previously born, which we think must be determined " by the law of the country where the parents were " domiciled at the birth and the marriage. If the " domicile was not the same for both parents at these " two periods, we should hold that that of the father " at the time of the marriage should give the rule. " But as they were the same in this case, the question " does not arise.

" From what has now been said, it will be under- " stood that we do not adopt the doctrine maintained " in some parts of the defender's case, as to the absolute " indelibility of the bastardy which attaches to a child

" born under any circumstances out of lawful wed-
" lock in England. Expressions calculated to coun-
" tenance such a doctrine appear, no doubt, to have
" been used by some of the noble and learned persons
" who disposed of the cases of Sheddan and Strathmore
" in the House of Lords.[1] But as in both these cases
" the domicile of both parents, as well as the place of
" marriage and the after home of all the parties, was
" indisputably within the territory of the law of Eng-
" land, we cannot but consider them as having been
" used with reference to those admitted circumstances,
" and as truly importing no more than that the law to
" which alone the parents were subject at the time of
" the birth and of the marriage must then have attached
" upon the child, and fixed its condition as a bastard so
" irrevocably as to admit of no change by any subse-
" quent acquisition either of domicile or of patrimonial
" interest in another country. To this extent we con-
" ceive these decisions to be of binding authority; and
" the opinion we have expressed is in entire conformity
" to them. But we do not think they went farther;
" and we accordingly observe, that in the last case in
" which a question of this kind was submitted to the
" Court of Review, we mean that of Ross of Cromarty,
" the Lord Chancellor (Lyndhurst), in moving the
" judgment of the Lords against the legitimacy of the
" claimant, expressly declined giving any opinion on
" the general indelibility of an English bastardy, and
" rested his judgment entirely on the English domicile
" of both the parents at the period of the marriage.

[1] See post, p. 586.

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" We have understood also, that the Lord Chancellor " (Eldon) maintained the same reserve in the earlier " case of Strathmore, and gave his opinion against the " legitimacy on the English domicile and marriage " alone; while, in the case of Sheddan, those decisive " circumstances were combined with the additional dis- " qualification of alienage on the part of the claimant. " In short, while there has confessedly been no judg- " ment any where denying the right of legitimation " per subsequens matrimonium to the children of Scot- " tish parents, having no other than a Scottish domicile " at the time either of the birth or the subsequent mar- " riage, on the single ground of those children or some " of them happening to be born during an occasional " visit of the mother in England, we must hold that it " cannot have been intended to prejudge such a ques- " tion by any dicta delivered in cases where it was not " raised or argued, and that whenever it is so raised it " will be dealt with at all events as an open question.

" As to the evidence upon which we have felt our- " selves constrained to hold that Sir Hugh Munro was " a domiciled Englishman at and previous to his mar- " riage with the mother of the pursuer in September " 1801, we do not think it necessary to go into any " details. On the whole, it appears to us clear that in " 1794 Sir Hugh removed his residence to London " with a view to a long and settled, though indefinite, " abode; and that in the course of that residence he " had lost his former Scottish domicile and acquired a " new one in England, long before the period of his " marriage in 1801. He had lived by that time more " than seven years continuously in the metropolis. In

" 1795, a year before the birth of the pursuer, he " had taken the lease of a house there for a period of " twenty-one years, with a break at the end of seven " years, of which he did not avail himself. He had all " this time no adequately furnished house for his accom- " modation and no domestic establishment in Scotland; " and in 1795 he had let the mains or home farm " around his Scottish castle for seven years, with a " power, which he did not exercise, of resuming it at " the end of three.

" We are not of opinion that the ultimate judgment " in the case of Lord Sommerville [1] affords any coun- " tenance to the notion that Sir Hugh Munro never " lost his Scottish domicile. The question in that case " was, where Lord Sommerville was domiciled at the " period of his death? And the state of the fact being, " that for many years previous to that event he had " an establishment and domestic residence in both " countries, and divided his time pretty equally between " them, it was held reasonable to infer that the original " domicile of nativity, which could not be lost by mere " absence from Scotland on public employment, was " that which he preferred and meant to perpetuate " during this period of voluntary but divided residence. " The question here, however, is not, where Sir Hugh " was domiciled at his death, or when he regained that " of his nativity after his return to Scotland in 1802, " but what was his domicile at the time of the pursuer's " birth and his marriage with her mother?

" We cannot think that a settled voluntary residence " for upwards of seven years in one and the same

[1] See post, p. 593.

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" house in London, held on a lease entered into at the " very beginning of such residence, can be barred of its " natural effect of establishing an English domicile for " the resident by such expressions as occur during this " period in the correspondence of Sir Hugh. It is no " doubt true, as the pursuer observes, that he appears " always to have cherished the notion of one day return- " ing and taking up his abode in his paternal mansion; " and that he made some small preparations from time " to time for such an ultimate return; but all this we " humbly conceive indicates an intention not to retain " his original domicile, which, as to a man sui juris, " requires residence as well as purpose, but merely to " regain or reassume it at some future period, when the " objects of his long voluntary residence in England " were attained, and he was ready to throw off and " resign the intermediate English domicile he had con- " sequently acquired. Men settling themselves of their " own accord or in the Company's service in India " are held beyond all doubt to lose their native and to " acquire an Indian domicile; and the cases are innu- " merable in which their intestate succession has been " distributed upon this assumption accordingly. Yet " there probably is not one of those persons, especially " of Scottish origin, who has not meditated an ultimate " return to his native land, and in the great majority of " instances made great preparations and outlays with a " view to it. All this, however, only indicates a pur- " pose to change their actual Indian for a future Scot- " tish domicile; and till this purpose is consummated by " their actual return to Scotland animo remanendi, it " is quite settled that their only domicile is in India, " and that it is by the law of that country that their

" rights and condition must be exclusively regulated. " If Sir Hugh Munro had died in London the day " or the year after his marriage, it does not appear to " us to be doubtful that his moveable succession ab " intestato must have been regulated by the law of " England, and, if he was clearly a domiciled English- " man to this effect, we cannot possibly doubt that " he was also in regard to the marriage itself and its " consequences."

Lords Glenlee, Medwyn, Moncreiff, and Cockburn.— " This is a case of great interest to the parties. We " also think it of importance to the law, and we have " accordingly considered it carefully.

" Though the case raised by the declaratory conclu- " sions of the summons is generally upon the personal " status of the pursuer as maintaining herself to be the " legitimate daughter of her father Sir Hugh Munro, it " appears from the form and scope of the summons, and " more especially from the character and position as- " sumed by the defender, that the substantial question " raised between these parties relates to the eventual " succession to the estate of Fowlis in Scotland under " the entail of that estate. The parties in reality join " issue in the question, which of them is at this moment " the presumptive heir of entail?

" Although, therefore, the quæstio statûs to be deter- " mined must be governed by the principles of general " law applicable to all such questions, it is not unim- " portant to keep it in view, that, as that question arises " with a precise relation to the rights of succession to a " landed estate situated in Scotland, it is by the law of " Scotland peculiarly that it must be tried and decided. " The pursuer, in asking it to be declared that she is

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" the legitimate daughter of her father, and as such the " heiress presumptive of entail in the estate of Fowlis, " says, and necessarily must say, that she is thus legiti- " mate according to the rules of the law of Scotland, as " laid down by the authorities in that law and the de- " cisions of the courts having jurisdiction to administer " it. And the defender, in appearing to resist the pur- " suer's demand, and maintaining that she is not legiti- " mate, and therefore that he is the heir presumptive in " the estate of Fowlis, says, and must say, that the " pursuer's illegitimacy and his own consequent right " can be determined only by the law of Scotland.

" We do not mean by this observation to imply, that " facts occurring in other countries, and the laws of " those other countries incidentally operating on those " facts, may not be necessary or material for con- " sideration in resolving the question of status put in " issue. But, as the question raised directly relates to " the succession to an heritable estate in Scotland, and " as the laws of all civilized nations hold that every " such question must be determined by the courts and " the law of the state where the property is situated, all " such facts, and all such applications of the law of " other states, must be judged of with reference to the " fundamental principles of the law of Scotland itself.

" It is an admitted and essential fact in this case, " that the pursuer is the daughter of Sir Hugh Munro " and of Jane Law, who, at the time of her death at " Fowlis, on the 3d of August 1803, was the lawful " married wife of the pursuer's father; and, whatever " other questions may exist concerning the legal domi- " cile of those parties at other periods of their lives, it " is beyond all doubt certain that they were at that

" time, and long before, to all intents and purposes " domiciled in the Castle of Fowlis. If at that time " Sir Hugh had predeceased Lady Munro, assuredly " she would have had all the rights of the widow of a " domiciled Scotch gentleman, and the succession to " his estates real and personal would have been regu- " lated generally by the law of Scotland.

" It has been an established rule and principle of the " law of Scotland for some centuries that, when a man " and a woman are once lawfully married, all the " children born of such parents, whether born before " the public celebration or open declaration of such " marriage or after it, are equally to be esteemed their " legitimate children. It is perhaps not very necessary " to inquire minutely into the principles on which this " rule of law has been established in Scotland, as it has " also been in most of the countries of Europe. It is " generally stated by our authorities to rest on a pre- " sumption or fiction, by which it is held that there was " from the beginning of the intercourse of the parties, " or at the time when the child was begotten, a consent " to matrimonial union interposed, notwithstanding " that the contract was not formally completed or " avowed to the world till a later period; and it has " been thought to be recommended by these considera- " tions of equity and expediency, that it tends to encou- " rage the conversion of what is at first irregular and " injurious to society into the honourable relation of " lawful matrimony, and that it prevents those un- " seemly disorders in families which are produced " where the elder-born children of the same parents " are left under the stain of bastardy, and the younger " enjoy the status of legitimacy.

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" But, whatever may be the principle, and whether " the law may be useful or the reverse, it is undoubt- " edly settled in the law of Scotland. It is indeed " liable to some exceptions. If, at the time when the " child was begotten one or both of the parties were so " situated that they could not lawfully contract marriage " the presumption is excluded, and legitimation cannot " take place. And in like manner questions have been " discussed as to the effect of facts, intervening between " the conception or birth of the child and the marriage, " inconsistent with the retroactive power of the mar- " riage at last established. We think it unnecessary to " enter into such discussions farther than to observe, " that we do not doubt that the presumption may be " contradicted and the operation of the law excluded " by any thing which renders it impossible that the " principle of it could be applied. But, apart from all " such peculiarities, the rule is clear, and is of such " strength and power that, as Craig states it, 'tanta " 'enim vis est matrimonii subsequentis ut de priori " 'delicto inquiri non sinat, et illud omnino tollat et " 'purget.'" Cr. ii. 13. 16.

" Though this doctrine is not to be taken so abso- " lutely as that nothing whatever in the history of the " parents, or connected with the birth of the child, can " be inquired into or considered to control the effect " of the state of matrimony at last established, the pre- " sumption arising from it is at least so strong that, in " a case standing in the first instance on such indisput- " able facts as those which we have hitherto assumed, " it must lie with those who deny effect to the acknow- " ledged law to show some clear ground of exception, " —some distinct and specific cause or impediment,

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" proved in fact and laid down as relevant on sufficient
" authority, in respect of which a child of parents law-
" fully married shall be held illegitimate.

" And we do think it of great importance to observe,
" that, whatever judgment may be ultimately formed
" on the particular grounds of exception maintained in
" the present cause, no case has yet been decided —
" certainly none in the law of Scotland — against the
" legitimacy, in which the same state of facts existed at
" the dissolution of the marriage. In the case of Shed-
" dan v. Patrick [1] the parties were throughout and to
" the end domiciled in America; in Rose v. Ross [1] they
" were all effectually domiciled in England, which legal
" condition was held not to be altered by the run made
" into Scotland for a few weeks; in the case of Strath-
" more [1], though a struggle was made for a Scotch domi-
" cile, Lord Strathmore, dying one day after celebrating
" a marriage with an Englishwoman in London, was
" held to have lived and died domiciled in England.
" However the judgments pronounced or the dicta
" delivered in these cases may bear on the present case
" otherwise, it stands very differently from them all in
" the point to which we are now referring. Sir Hugh
" Munro and Lady Munro were, during a long period
" of time, truly and bonâ fide domiciled as married
" persons at Fowlis in the county of Ross animo rema-
" nendi, when, by unforeseen calamity, the marriage was
" dissolved by the death of the lady. The status of
" their daughter, certainly acknowledged and treated
" by them as their lawful daughter, was then to be
" determined under the force of the laws of Scotland.

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[1] See post, p. 586.

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" If Sir Hugh had died at the same moment there " could have been no conflictus legum in the direct or " proper sense. Dying the proprietor of a Scotch " entailed estate and a native and domiciled Scotchman " in the castle of his ancestors, having no real property " anywhere else, he must have left his succession, " equally in heritage and in personal estate, to be ruled " by the law of the country where he drew his first and " his last breath, and had held through life the centre " of his affairs. If his wife had survived him her status " and consequent rights must have been at once estab- " lished by her undoubted possession of that status, and " the open cohabitation of the parties as husband and " wife, without necessity for any inquiry into the time, " place, or manner in which any formal celebration of " marriage had taken place between them. There was " here no disguised or colourable proceeding. The " domiciliation in the place undoubtedly most suitable " for the proprietor of such an estate, and the chief of " such a family, was fair, honest, and real in all " respects; and the question which thus arises in the " front of the case is one which has not occurred in any " of the other agitated cases, — whether the rule of the " law of Scotland, which holds all the children of " married persons to be legitimate, will admit of being " controverted, by inquiry into the circumstances of the " child's birth, or the local residence of the parents at " the time when they either celebrated a form of mar- " riage or legally declared themselves to be married " persons? We do not say, that it has been positively " decided that such inquiry is inadmissible, though the " text in Craig comes very near to that point. But at " least we know of no case in which the same facts

" have occurred, except indeed the depending case of " M'Douall of Logan, in which a great majority of the " Court hold the legitimacy to be established.

" Although, therefore, the present cause involves " other questions of great delicacy and importance, " and though we are sensible that it cannot be ex- " hausted, and will not be generally thought to admit " of being decided on this ground alone, we still think " it of importance that the peculiar circumstances " under which the legal presumption is in this case " sought to be overcome should be kept in view.

" The defender has put on record two pleas, in " respect of which he maintains that the law which " establishes a child's legitimacy by the marriage of its " parents is excluded in this case. These pleas are,— " ' 1st. The pursuer, having been born illegitimate in " ' England of an English mother, is not entitled to " ' succeed in a declarator of legitimacy, founded upon " ' the subsequent marriage of her alleged parents in " ' England.

" ' 2d. Upon the supposition that the domicile of " ' Sir Hugh Munro at the period of the pursuer's " ' birth and her mother's marriage were material, " ' that domicile must be held to have been English.'

" These pleas are, no doubt, skilfully drawn as the " pleading of a party; but they are not expressed " with the precision which we think necessary for judg- " ment. The first combines and blends two points " together which are in themselves distinct. It cannot " be gathered from it, whether it is meant to be laid " down that the pursuer must be legally illegitimate, " simply because her birth took place locally in Eng- " land before the marriage of her parents, though this " seems to be maintained in argument; or, whether it is

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" only intended, that a person so born in England " cannot become legitimate by a subsequent marriage " celebrated in England, leaving the question open " whether a Scotch marriage might not have that " effect. Again, it is made to appearance a necessary " element in the plea that the mother was English, " leaving an implication that the case might be diffe- " rent if the mother were a Scotchwoman. And still " farther, this first plea is stated abstractly, without " reference to the domiciliation of the father or mother. " On the other hand, the second plea states hypothe- " tically, that, supposing the domicile of Sir Hugh " Munro at the pursuer's birth and at her mother's " marriage to be material, that domicile must be held " to have been in England. It does not plead dis- " tinctly the precise effect ascribed to such domicile, " not indicating which of the two points of time is " taken as the ruling point; whether, if the place of " birth alone will not settle the question, the domicile " at the date of the birth will determine it; whether " there must be superadded to that the place of the " marriage and the domicile at the date of it; or " whether the place of the marriage alone, with the " domicile at the date of it, will admit or exclude " legitimacy; or whether, finally, the place of birth and " the place of marriage must be combined, and the " domicile at the date of marriage added to them.

" It is obvious that cases may be easily figured " coming within the scope of these pleas, in which the " application of them would be exceedingly perplex- " ing. The defender in his argument does not hold " himself to be bound to make out all the assumptions " on which they rest, but strives to sustain his case " by various hypotheses put forward alternatively. We

" think it of importance that the points should be " kept distinct. The first question, and in our opinion " by far the most important, is that which relates to the " domicile of Sir Hugh Munro. When that shall be " ascertained, it may then be applied to the birth and " to the marriage; and if it should be found that at " the date of the marriage he was domiciled in Scot- " land, it may then be a question, whether the locality " of the marriage can prevent the effect of it to render " the pursuer legitimate; or, if it should be found that " the locality of the marriage will not avail against the " law of the Scotch domicile, it may then be inquired " whether the place of the birth by itself or combined " with the place of the marriage will produce that " effect, assuming the domicile to have been Scotch at " the date of it. A separate question has been sug- " gested, though not distinctly in the pleas, on the " supposition that Sir Hugh Munro was a domiciled " Scotchman, as to the effect of the domicile of the " mother at the birth or before the marriage.

" We proceed to consider the question, what was " the legal domicile of Sir Hugh Munro at the time " of the pursuer's birth, and more particularly at the " time of the marriage of her parents. And we are of " opinion, upon a careful consideration of all the facts " of the case, that Sir Hugh Munro had at the first " his domicile of origin in Scotland, and that he had " not lost that domicile either at the date of the birth " or at the date of the marriage.

" We consider this to be a question of very grave " and serious magnitude; for, while it appears to us " that the facts do not warrant the conclusion that Sir " Hugh ever lost his Scotch domicile, according to the " fundamental principles of the law of domicile, we

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" apprehend that, upon the grounds on which it is " maintained that he did lose it, many individual " Scotchmen may be found to have lost their domicile " of origin, without any intention of abandoning it, or " the slightest contemplation of establishing a domicile " elsewhere, and so to have lived and died under the " operation of laws to which they never looked for " regulating the most important interests of themselves " and their families.

" Certain facts, in the case appear to us to be free " from all doubt. Sir Harry Munro, the father of Sir " Hugh, was a native of Scotland, and undoubtedly " domiciled there all his life. Sir Hugh Munro was " born in Scotland, in 1763; he spent his infancy " and received part of his education in Scotland. He " was afterwards sent to England for education. His " father died in 1781, and Sir Hugh was in Scotland " that year. He afterwards went on foreign travel for " some years. He came of age in 1784, and was vari- " ously in England, Scotland, and on the Continent till " 1789, having been occasionally in Scotland in 1785, " 1786, and 1787; and having returned from the Conti- " nent in 1789, he came to reside with his mother in one " of the family mansions of the estate, and was constantly " resident there till 1794. We hold it to be quite an " indisputable matter of fact and law, that, down to " this period of his life, he had at all times and wherever " resident continued, as he was at first, a domiciled " Scotchman; for it is scarcely necessary to observe, " that a boy sent into England for education does not " lose his domicile of origin; and that neither does a " young gentleman, travelling into foreign parts for his " improvement, or living occasionally in the metropolis " of England for his amusement, make any change

" thereby on his legal status as a Scotchman. There is
" no evidence, nor indeed any averment, that Sir Hugh
" had in any part of this time established himself in any
" permanent residence in England or elsewhere animo
" remanendi: on the contrary, he had in the mean-
" time sold the only real estate which he possessed in
" England. His constant residence at Ardullie from
" 1789 till 1794 would indeed have effectually fixed his
" domicile at the end of that period. But the more
" material view is, that then, at the age of thirty-one,
" he had never ceased for a moment to be a domiciled
" Scotchman. On this fundamental fact we apprehend
" there can be no difference of opinion in the Court.

" So far as we discover from this record, Sir Hugh
" Munro, being the heir of such a family, was not bred
" to any profession. At any rate, having succeeded to
" his father in 1781, he entered into no profession; and
" it is clear from all the evidence in this cause that
" throughout his life he never had any subject of care
" or business other than the management of his estate
" of Fowlis, the education of his daughter, and the
" literary pursuits to which he might voluntarily addict
" himself. The extent in which he engaged in the
" active superintendence of the most minute affairs of
" his estate is largely detailed in the evidence and com-
" mented on by the parties. It is not of a common
" nature, but appears to have gone far beyond the
" ordinary attention of gentlemen of his rank and con-
" dition to their estates. But though we think it of
" very great importance, as marking his attachment to
" his estate and to his native country, and his anxiety
" for improving his paternal inheritance, manifestly in
" contemplation of a permanent residence, we do not feel
" it to be necessary to enter into the particulars so fully

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" brought out in the evidence and correspondence. " The important impression left is, that the legal pre- " sumption for the continuance of the domicile of origin " in all cases is in this instance greatly strengthened by " all the circumstances in the actings and proceedings " of Sir Hugh Munro. We can attach no importance " to the fact of some of the old furniture in the house " of Fowlis having been removed to Ardullie at an early " period, when it is observed that Sir Hugh's intention " then was to fix his residence at Ardully, at least for a " time, and it is besides apparent that from the nature " of Fowlis Castle, and the amount of debt left by his " father, that Sir Hugh was not in a situation either to " repair the house itself, or to furnish it in a manner " which he would have thought suitable. Such things " are far more, than outweighed by his active care of " the estate during a constant residence of four or five " years after his return from travel, and the fact of his " having actually sold the only real estate which could " have connected him with England.

" Indeed, when we reflect on the condition of Sir " Hugh Munro at this time,—the proprietor of such an " estate, in which he took so deep an interest,—a gen- " tleman of rank and influence, and the acknowledged " chief of his clan, engaged in no profession, and " having no mercantile or other employments to draw " him away permanently, or to lead him to abandon " the land and domicile of his fathers and establish " himself in a foreign domicile animo remanendi, we " think that the improbability that any such intention " could enter into his mind is so very great that " nothing but the strongest and clearest evidence of the " fact could lead us to come to the conclusion that he " ever had such an intention.

" But in looking to what did take place in 1794
" and the following years, it is most essential to remem-
" ber that the question is not, whether what Sir Hugh
" did might have been sufficient to create for him an
" English domicile for some purposes,—not, whether if
" he had been a mere wanderer, with no previous fixed
" domicile, whose domicile of origin was unknown, and
" who had the sum of his fortunes and affairs centred
" in no known locality of the earth; a person without
" a home, or any fixed seat of his family interests,
" family honours, family affections,—that which he did
" in England might have stamped on him the character
" of a domiciled Englishman? This is not at all the
" case to be resolved. In the case of Lord Somerville
" it was clear, and was assumed as unquestionable, that
" he had an English domicile fully established; but as
" in a question of succession there can be but one
" domicile to govern (and the rule is the same in a
" quæstio statûs), the point to be determined was, not
" whether he had an English domicile to some effects,
" but whether he had deliberately abandoned and lost
" his domicile of origin in Scotland as the predominant
" guide in the succession to his property? And the
" question is the same here, whether, holding it to
" be clearly established that previous to Sir Hugh
" Munro's departure from Fowlis in 1794 he was and
" had never ceased to be a domiciled Scotchman, he
" abandoned and lost that domicile, so as to render it
" inoperative in any question of status which might
" arise? To judge of this correctly, we apprehend
" that it cannot be determined by any isolated facts,
" but that all that he had done before, all that he did or
" wrote during his residence in England, and all that

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" he did after the material point of time, must be taken " into view.

" For it is now necessary to advert to the leading " principles by which such a question must be governed. " One rule is, that a change of such a domicile once " established is not easily to be presumed:—' Non tamen " ' in dubio præsumenda facile domicilii mutatio; sic ut " ' eam alligans tanquam rem facti probare teneatur;' " Voet, 5. 1. 99. ' Sic enim in dubio in loco originis " ' et domicilio paterno quemque præsumi continuasse " ' domicilium jam ante dictum;' ibid. No. 97. And " on these principles as it is a settled rule in the con- " stitution of a domicile, that it is not formed or proved " by the mere fact of residence, however long conti- " nued, without the animus or purpose of permanent " domiciliation, much more (where the question is, " whether a man at the age of thirty-one has changed " his domicile, abandoning that which he had held from " his birth,) must there be proof, not only of the fact of " residence elsewhere for a given time, but of an inten- " tion to constitute a new domicile in exclusion of the " old. The question is one partly of fact, but still " more of intention; and unless both be proved, either " directly or as matter of necessary inference, the change " of domicile cannot be presumed to have taken place.

" It is on this clear principle that absence for edu- " cation, — absence on foreign travel, even though the " party may have lingered long in one spot, — absence " on military duty, however long, and with whatever " permanence in particular stations,—and various similar " cases, work no change of the original domicile. The " case of persons entering into the service of the East " India Company, or any similar employment, is essen-

" tially different; and let it not be thought that we
" have lost sight of the settled rule in such a case.
" Though the person who engages in such a course of
" life may have in his mind a constant contemplation
" of returning at some distant and undefined period
" to his native country,—by adopting such a trade or
" profession which indispensably requires a continued
" residence in another, and actually pursuing it for a
" length of time, he forms and evinces that animus
" remanendi which is of the essence of a constituted
" domicile; just as effectually as a man who settles as a
" merchant in London or Hamburgh does, though he
" may have a lingering anticipation that at some time
" or other, when fortune has crowned his labour, he
" may spend the evening of his days on his native soil.
" Such cases, therefore, as Bruce [1], Dr. Munro [1], &c.
" afford no illustration against the fixed principle, that,
" to effect a change of domicile for questions of suc-
" cession or status, there must be the combined force
" of actual residence and the animus remanendi clearly
" evinced. We think that the correct principles of
" those cases have been imperfectly appreciated in the
" opinions which differ from ours in the present case.

" The case before the Court, and others of the same
" kind, such as Sommerville, lie between the two classes
" of cases now adverted to. There is neither, on the
" one hand, a known ostensible object, such as edu-
" cation, military duty, &c., which, by presumption of
" fact and law, excludes the inference of a purpose to
" abandon the domicile already held; nor, on the other
" hand, any profession or metier of a permanent and
" continuing nature taken up, which marks at once the

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[1] See post, p. 600.

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" purpose of removal to another domicile animo remanendi. Still the principle of law must apply with " equal force to such cases, that it is not by the fact " of residence alone, but by such residence with the " animus of permanency evinced that the abandonment " of the original domicile is to be established; and this " must ever depend on a due consideration of all the " facts.

" The general principle on this subject cannot be " better expressed than in the words of Voet, which " correspond with all that is laid down by the other " jurists:—' Illud certum est neque solo animo, neque " ' destinatione patris familias, aut contestatione sola, " ' sine re et facto, domicilium constitui: neque sola " ' domus commoratione in aliqua regione, neque sola " ' habitatione sine proposito illic perpetuo morandi, " ' cum Ulpianus a domicilio habitationem distinguat,' " &c. Voet, 5. 1. 98. And the general definition of " a domicile, as the place where a man ' larem rerum- " ' que ac fortunarum suarum summam constituit, unde " ' rursus not sit discessurus, si nihil avocet, undeque " ' cum profectus est peregrinari videtur,' gives a test, " whereby the question between mere habitation, or re- " sidence de facto, and permanent domiciliation animo " perpetuo morandi, may in most cases be easily " resolved.

", With these principles in view, let the case of Sir " Hugh Munro from 1794 downwards be considered.

" After having been for nearly five years constantly " resident on his estate in the house of Ardullie, life- " rented by his mother, he appears to have formed the " desire of having an independent establishment. It is " in evidence, that with this view, being then unable " at once to repair and furnish Fowlis Castle, he had

" proposed to Lady Munro to remove to a house in " Edinburgh, and that she had at first agreed to the " proposal. This assuredly indicated no intention or " desire to forsake his domicile of Scotland, but directly " the reverse. Lady Munro, however, ultimately de- " clined the proposal. The consequence was, that a " certain degree of coolness was produced between Sir " Hugh and his mother. Whether this was the cause " of his going to London at that time is not precisely " in evidence, though it probably influenced him in " accompanying the Rev. Dr. Robertson, who had occa- " sion to go there; but it does appear that, intent on " his improvements, he lingered, and set out unwillingly " at the moment.

" There is nothing in the proof to show that in this " expedition Sir Hugh had any other object in view " than his amusement, and a natural desire to revisit " the metropolis; perhaps contemplating that he might " be able in the meantime to repair and furnish as " much of Fowlis Castle as might accomplish his pur- " pose of independent residence. In that very year, " 1794, some furniture was ordered and provided for " his own dressing-room in the castle; and it is in evi- " dence, that at that time there was no contemplation " of his being long or permanently absent, but, on the " contrary, a general expectation that he would return " soon, and that preparations were made for his recep- " tion in the following year, when furniture was sent " from Inverness specially for his own use. But appa- " rently the state of his health, or perhaps another " cause, prevented him from realizing his intention of " return at that time. Yet even then, in writing to his " factor, he speaks expressly of 'my own return to

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" ' Ross-shire, which will be very early in next sum-
" ' mer.' Again, he expressly intimates, that ' at Whit-
" ' sunday next I intend taking the management of the
" ' estate into my own hands.' ' Mr. Munro will con-
" ' tinue to act for me until my return to the country,
" ' which will be early in summer.' The same thing is
" said over and over again in other letters, where he
" uses the same words, and speaks expressly of what
" he is to do ' when resident in the country.' The
" letters early in 1796 bear the same words, Sir Hugh
" constantly speaking of his ' return ' to Ross-shire as
" for permanent residence. There is, besides, the
" clearest evidence of the reality of these intimations
" of his mind and intentions in the anxious directions
" which he gives as to the management of the lawn of
" Fowlis, declaring, in express words, that he ' intends
" ' to live in the house.'

" Though the ' return ' was postponed, and the same
" language is continued in the latter part of 1796 and
" the following year, we beg leave to stop here for a
" moment, and to ask these questions:—1. Whether,
" with such evidence before the Court, it can be held
" that when Sir Hugh left Ross-shire, in April 1794,
" he did so with the animus of abandoning his domicile
" in Scotland, or of fixing his residence in London
" animo remanendi? And, 2. Whether, in February
" 1796, when he was making such preparations, and
" writing such determinate intimations of his designs, it
" could, in any consistency with the truth of the case,
" have been predicated as a fact that he had fixed his
" abode and domicile in London animo remanendi?
" We cannot answer either of these questions otherwise
" than decidedly in the negative. And yet Sir Hugh

" had been then absent from Fowlis, and personally
" resident in London for nearly two years. But we
" think it clear that that residence, though inciden-
" tally prolonged, was but the bare habitatio spoken
" of by the authorities, 'sine proposito illic perpetuo
" 'morandi.'

" Hitherto Sir Hugh had resided in hired lodgings.
" We can probably see well enough the main cause
" which almost from day to day protracted the execu-
" tion of his fixed purpose of returning to Scotland.
" He must have become acquainted with the pursuer's
" mother at least as early as the beginning of August
" 1795; probably some time before, as the pursuer was
" born on the 15th May 1796; and although, as far as
" there is faith in written and real evidence, where no
" sinister design could be in view, neither this fact
" nor the consequent pregnancy of the lady made any
" change in Sir Hugh's mind or purpose, it is easy to
" understand how from time to time he might be led
" to delay the execution of it. There can be little
" doubt that it was the consideration of her condition
" which led to that transaction which forms the main
" difficulty, and the main ground of the defender's plea
" in this part of the case. In March 1796 Sir Hugh
" took a lease of a house in Gloucester Place for seven,
" fourteen, or twenty-one years, in the tenant's option,
" in which he with the lady took up their residence.

" We are by no means insensible to the importance
" of this fact; but we are far from thinking that it ought
" to be regarded as conclusive of a permanent change
" of domicile, or that it is not still to be considered in
" connection with all the other facts of the case, in
" order to discover the animus which prevailed through-

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" out. The form of the lease was only the common " form in general or frequent use in London; and it " is not a little remarkable that in the case of Lord " Sommerville he also 'took a lease of a house in Hen- " 'rietta Street, Cavendish Square, for twenty-one " 'years, determinable at the end of seven or fourteen " 'years;' and nevertheless it was found that his domi- " cile for succession was still in Scotland. The cases " may not be the same, in so far as Lord Sommerville " was in fact resident in Scotland during a part of each " year; but they are similar in this point, that the " mere taking of a house on lease is no conclusive proof " of an intention to change the existing domicile. All " the facts must still be looked into, and the real in- " tention ascertained, not by any single circumstance, " but by combining and comparing the whole together.

" Now, it was after having taken that lease that Sir " Hugh wrote the important letter to Mr. Aitken, of " the 25th March 1796, giving directions about the " lawn, and stating expressly his intention to live in " the house of Fowlis; which was followed by a lease, " in conformity to the instructions. By another letter, " of the 18th April 1796, he still intimated his intention " to be in Ross-shire that summer, and spoke of it as " his 'return' to the country; and it appears by other " documents that his return was expected and pre- " pared for. It is impossible that these things could " take place from any thing but a fair and true mean- " ing; for, if Sir Hugh had been then thinking of any " such question as that now before the Court, he had " an instant remedy in his hands, — he had only to " marry the pursuer's mother before the pursuer's birth. " Taking the letters, therefore, to speak the reality of

" his mind, we cannot doubt that he did still seriously
" intend a speedy return to Scotland.

" What may have been his precise view in taking the
" lease it may not be easy to ascertain. One simple
" probability is, that he wished to have the house, and
" could not get it without taking the lease for years.
" But supposing that he had other motives, we think
" that we are bound to adopt some hypothesis which is
" consistent with his declared intention otherwise; and
" there are various ways in which it may be explained,
" in perfect consistency with his firm resolution to re-
" turn to Fowlis, and to adhere to his Scotch domicile.
" He may have intended it as a suitable residence for
" the lady and his daughter, in which he might visit
" them occasionally, though he still settled his own
" residence in the castle of Fowlis. But take it other-
" wise, that he meant it to some effect as a residence
" for himself; what hinders the supposition that he
" intended the very thing which Lord Sommerville did,
" to keep it as a residence during a part of the year,
" while he yet carried into full execution his declared
" purpose of residing principally and permanently at
" Fowlis; or, still more probably, in this last view,
" that he contemplated his marriage, and an arrange-
" ment which might protect him against any appre-
" hended embarrassment? But whatever view he took
" of the lease so entered into, we think that it is clearly
" in evidence that it made no change on his purpose of
" residing at Fowlis. In that he appears to have been
" unshaken; and the delay to execute it must be attri-
" buted to other causes than any change of intention.

" But here we observe a very remarkable document.
" The pursuer was born on the 15th May 1796; and
" on the 16th May Sir Hugh, writing to Mr. Kenneth

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" Mackenzie on other matters, puts in this request:—
" 'I shall be obliged to you to inform me what forms,
" 'if any, are necessary to be observed when executing
" 'a will, testament, or disposition for the disposal of
" 'personal property, and whether by a general dispo-
" 'sition land also may not be conveyed.' This is at
" the very moment of the birth of the pursuer; and
" what does it import? Sir Hugh plainly contemplated
" the execution of some deed affecting his personal
" property, for the safety of the pursuer's mother and
" herself. Did he then imagine himself to be a domi-
" ciled Englishman? If he had so thought, he never
" would have been writing to a Scotch conveyancer for
" a form of settling personal estate. We are aware that
" it is not an impossible thing that a man may by his
" own acts become legally domiciled in a place, without
" his being perfectly in the knowledge of the legal fact.
" But that Sir Hugh Munro (who had held his domicile
" of origin untouched up to the moment of his leaving
" Fowlis in 1794, and, as we think, decidedly retained
" and adhered to it, as far as the constant intention of
" speedily returning could have that effect, till the very
" moment of so writing to Mr. Mackenzie,) should be
" held to have been domiciled in England animo rema-
" nendi, and to have deliberately abandoned his Scotch
" domicile, while he yet believed that all his estates,
" real and personal, were under the power of the law
" of Scotland, is a proposition which we find it very
" hard to receive.

" But farther, after this Sir Hugh went on, on the
" 25th May 1796, still to speak of his 'return' to the
" country, and to repeat the expression of this intention
" in July and August following. He changed his pur-
" pose of going in that year, but wrote, in October,

" that he should be in Ross-shire next year, ' unfore-
" ' seen events having obliged him to defer his journey.'
" And in a remarkable letter he instructed Mr. Aitken
" to reserve the hens and eggs paid in kind, because
" ' when at home I shall have occasion for them.'
" Where was Sir Hugh Munro's home at this time?
" At least, in his own mind, there was no doubt that
" his home was at Fowlis.

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" Throughout the year 1797 Sir Hugh continues to
" speak of his return to Ross-shire. Various things
" were appointed to be done, and a box was sent to be
" placed in the library; and so fixed was his purpose
" that on the 14th July he writes,—' I set out in a few
" ' days for Edinburgh.' From some cause the journey
" was still delayed, but it was not laid aside. So late
" as the 24th October he intimates to the Lord Lieu-
" tenant, that he had expected every day to pay his
" respects to him; and though, when it came to the end
" of the season, he had limited his intention to a short
" residence, and was at last advised, on account of the
" state of the roads, to postpone it, yet there cannot be
" a doubt that throughout the correspondence he had
" never for a moment laid aside the intention of return-
" ing to Fowlis for permanent residence.

" The correspondence recovered in 1798 is not so
" full as in the previous years; but in March of that
" year Sir Hugh writes to Mr. Aitken, still expressing
" his intention of being in Ross-shire, and in May a
" very anxious letter about the observance of the con-
" ditions of the lease of the mains and the state of the
" house and offices at Fowlis, pipes, wells, &c., and the
" repairs necessary.

" In 1799 he writes anxiously about the repairs and

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" furnishings for the castle. In that year he took ad-
" vantage of a break in the lease of the mains; and
" one of the tenants depones, 'that the reason given
" 'for the break being taken advantage of in 1799 was,
" 'that Sir Hugh was coming to reside at Fowlis, and
" 'therefore wished to have the mains in his own
" 'hands.' The power had been reserved for that ex-
" press end, and now it was acted on accordingly.
" There is also very little correspondence in the year
" 1800. Sir Hugh was continuing to order repairs and
" improvements on the castle; and in one letter, in
" November of that year, though he still contemplates
" being in Ross-shire the next season, he anticipates the
" possibility of his being prevented.

" There can be very little doubt that what prevented
" Sir Hugh Munro from executing the intention so
" often declared of returning to Fowlis was, on the one
" hand, an unwillingness to leave the pursuer's mother
" and herself, and, on the other, a doubt or fear in what
" manner they might be received, especially by his own
" mother, when he should have fulfilled his intention
" of marrying the lady. But it seems to be very clear
" that, at least early in the summer of 1801, he had
" made up his mind to the course which he afterwards
" pursued; for we find him writing anxiously about the
" heights of the rooms and various minute particulars,
" implying the design of a speedy residence. By the
" proof it is established that during several years fur-
" niture had been gradually sent to the castle; and in
" the end of 1801 Sir Hugh writes in the most anxious
" terms on the subject of the thorough repair and
" furnishing of it.

" In the meantime the marriage between Sir Hugh

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" and the pursuer's mother was celebrated on the 24th " September 1801. We cannot think it of any con- " sequence that Sir Hugh Munro is in the affidavit " designed by his actual residence in London, because " we believe that by the law of England all parties " before being married must have been resident in some " parish for a certain period, and that there are few " instances of a person married in London, however " clearly his domicile may be elsewhere, being other- " wise designed than by his actual residence there; " and as the parties were undoubtedly unmarried per- " sons previous to that celebration, neither can we " attach any importance to the fact that they are so " designed.

" But after having thus taken the first step, which " was to break through the state of hesitation which " had hitherto restrained him from completing his own " purpose of return, Sir Hugh's anxiety evidently be- " came intense to have the castle of Fowlis put in a " complete state for the residence, not of himself as " a single man, but of his wife and family, according " to his rank and station. On the 9th December 1801 " he writes to know 'the length and breadth of the " 'bedstead in my room;' and on the 16th he writes, " —'It is my resolution, please God, to go early next " 'summer into Scotland. I wish, if possible, to reside " 'at Fowlis while I am in that country, and I hope " 'I shall without difficulty be able to accomplish that " 'wish; but, be that as it may, nothing but death or " 'violent sickness shall prevent my affording you an " 'opportunity of seeing me.' We see here something " of the feeling of distress which Sir Hugh had expe- " rienced under the succession of incidents which had

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" interposed to delay that return to Fowlis which he
" had constantly in his intention and desire, and some-
" thing of the grave determination with which he looked
" to it, now that the probable cause of its postponement
" had been removed. Perhaps we see also some indi-
" cation of what is more pointedly presented in another
" important letter, written to Mr. Mackenzie on the
" 20th January following. Sir Hugh apparently had
" informed Mr. Mackenzie, among his other friends, of
" his marriage, and Mr. Mackenzie had made some
" remark about its not having been put in the news-
" papers; and Sir Hugh, in answer, writes the remark-
" able passage in which, observing that being but a
" little man in London he did not think that necessary,
" he adds,—' My intended visit to Ross-shire made it
" ' (the marriage), I thought, proper.' There is here,
" no doubt, and in a previous part of the letter, where
" he speaks of his visit being short, a kind of prepara-
" tion for a possible result, the fear of which was not
" entirely out of his mind; namely, the possible reception
" which his wife and daughter might meet with from
" his mother especially and his other friends in Scot-
" land, which might eventually render it necessary, for
" his wife's comfort and respectability, after all to de-
" part from that his natural and chosen residence.
" That his real design was to settle there permanently
" is proved by the extent of preparation made and the
" successive ship-loads of handsome furniture sent to
" Fowlis, but still more by the event, in their decided
" and permanent domiciliation in the castle, when all
" doubt on that point had been removed. But the
" important fact established by the letter is, that the
" marriage was entered into expressly in contemplation

" of the parties going to Scotland, as they actually did. " Sir Hugh had throughout looked forward to this, and " now he intimates to his confidential friend, that it was " distinctly with that object and design that the mar- " riage was celebrated. It was a marriage entered into " intuitu of the parties residing in the proper domicile " of the husband.

" There is another fact connected with this, stated " in the defences for Sir Hugh Munro, which, though " not exactly in evidence, is probably correct, and is " at any rate the judicial statement of the pursuer's " father. He states that he took the opinion of English " counsel, and was advised that, ' he being by birth a " ' Scotsman, the representative of an ancient family in " ' that country, and which is his usual place of resi- " ' dence, a marriage celebrated in England or any " ' other place would be effectual ' to render his " daughter legitimate. We do not here speak of the " soundness of this opinion; but it is manifest, from " the way in which the case must have been stated, that " Sir Hugh himself, notwithstanding his protracted " absence, did still, without doubt, hold Scotland to be " his usual place of residence; and that, in entering " into the marriage, he distinctly contemplated that it " was in Scotland that the parties were chiefly to reside, " and in Scotland that all the incidents of the marriage " were to receive their fulfilment.

" The marriage having been concluded with this " character and purpose, and having been intimated to " Sir Hugh's friends in Scotland, he proceeded actively " to make the necessary preparations for executing it " effectually. Besides all the furniture which had been " previously put into the castle, at least two, if not

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" three, ship-loads of furniture were sent in the course " of the early part of that year, 1802, though only one " inventory has been preserved. Various orders were " given for the supply of other goods necessary for " their residence. When all was ready Sir Hugh " broke up completely his establishment in London, " dismissing all the servants except one, left in charge " of the house; and at last, very late in the season, Sir " Hugh, Lady Munro, and the pursuer reached Edin- " burgh in the first days of November 1802, and pro- " ceeded within a few days to Fowlis. The interval " between the marriage and the setting out for Scot- " land was not greater than was necessary for preparing " Fowlis for their reception, and cannot militate against " Sir Hugh's contemporaneous declaration that the " marriage was entered into with the view of his coming " to reside permanently in Scotland.

" It may be observed that the very lateness of the " season when this return to Fowlis took place proves " that all idea of the residence being temporary, if it " ever existed, had by this time been laid aside. " Indeed, by the testimony of Mrs. Sutherland it is " clearly established that the only cause which could " have occasioned any expression of doubt had been at " once removed when his marriage and intention of " residence were known. She depones 'that Lady " 'Munro senior was much delighted with the expec- " 'tation of Sir Hugh and his Lady coming down to " 'Fowlis in 1802,' and expressed satisfaction at the " prospect of seeing the pursuer; and her expectation " was, that they were to reside permanently at Fowlis. " There is also abundance of evidence, to which it is " unnecessary particularly to refer, that there was an

" universal expectation in the country that the family " were coming with the intention of making Fowlis " their constant place of residence.

" It appears, accordingly, that they were cordially " received by Lady Munro senior and the other friends " and relations of the family; and Sir Hugh was so " entirely satisfied with his reception that he settled " himself without doubt or reserve in the castle of " Fowlis, and returned to the active management of his " extensive estate. We think it sufficiently in evidence " that the pursuer was treated and regarded both by " Sir Hugh himself and by the friends and relations of " the family as his lawful daughter. Certainly she " was reared and educated as such.

" After the parties had been thus completely settled " in permanent residence at Fowlis during a long " period the marriage was dissolved by the calamitous " death of Lady Munro in August 1803. That event " made no change on Sir Hugh's resolution to retain " his home and domicile at Fowlis; for, though he " still held the lease of the house in London, having " omitted to avail himself of the first break, he never " went near it, but continued constantly resident in " Ross-shire until September 1808. By that time the " pursuer was twelve years old, and it is abundantly " proved by Lady Mary Ross that Sir Hugh's 'sole " 'object in leaving Fowlis and going to London' at " that time was 'to complete Miss Munro's education; " 'in which step both the deponent and Sir Charles " 'Ross concurred, as both fitting and necessary for a " 'person of Miss Munro's prospects;' while it is " proved also, that it was still the wish and intention of " Sir Hugh to make Fowlis his permanent residence.

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" Sir Hugh had not availed himself of either of the " breaks in the lease of the London house. This cir- " cumstance has been thought to imply that he had no " intention of permanently residing at Fowlis. If this " has reference to the time of the first break of seven " years, it is falsified by the fact that he did reside there " permanently for six entire years. His not giving up " the lease at the expiry of the seven years is easily " explained: he had a feeling of doubt how his lady " might be received by his friends in Scotland. Christ- " mas 1802 was the first break. It required three " months notice; and at the 25th September Sir Hugh " was still in London. He may well be supposed to " have wished to retain the means he already possessed " of provisionally or occasionally residing in London " (as Lord Sommerville did), without at all impeaching " the reality of his 'principal desire and intention.' " The next break occurred at Christmas 1809. Before " that time Sir Hugh had gone to London for the edu- " cation of his daughter, so that he then naturally con- " tinued to hold the lease which he already had.

" We do not think it necessary to trace the evidence " farther. Sir Hugh appears to have been occasionally " in Scotland in the subsequent years, and afterwards " permanently from 1817 to 1820. His actual resi- " dence posterior to that time appears to be of no " materiality to the present question.

" Taking this review of the facts in Sir Hugh " Munro's history, we are of opinion that he had not " ceased to be a domiciled Scotchman at the date of the " pursuer's birth or at the date of his marriage to the pur- " suer's mother; that, as that domicile had never been " abandoned, so the marriage was entered into with refer-

" ence to his status as a domiciled Scotchman, and also in
" distinct contemplation of the permanent residence of
" the parties in the mansion house of that domicile.
" That he personally lived in London during six years
" is true; but as the question is, whether he could lose
" the domicile of origin and choice which he previously
" had by the mere fact of his bodily presence in Lon-
" don, without the animus and purpose to abandon that
" domicile and to fix his residence animo remanendi in
" London, so we are of opinion, upon all the evidence,
" not only that he never had such an intention, but
" that his positive intention, belief, and understanding
" were at every point of time the reverse. We do not
" consider this as depending on expressions in his
" letters of an intention to regain his Scotch domicile at
" some undefined period, as if he had first lost it.
" That is not the nature of the correspondence in this
" case. It is clear that at the first he had no intention
" of making any protracted residence in London, and
" year after year there was plainly a bonâ fide present
" intention, definitely expressed, of returning imme-
" diately, or within some short time, to resume the
" management of his estate. That intention was never
" given up; and whatever were the causes which occa-
" sioned the delay, they were not causes which neces-
" sarily implied or required a permanent domiciliation
" in London. Accordingly, as soon as he made up his
" mind to the celebration of the marriage, and the
" cause of detention was thus removed, the resolution
" of returning became determinate, and he did again
" fix himself in permanent residence in the Castle of
" Fowlis. But we farther do not consider this question

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" as to the animus of Sir Hugh when he left Scotland, " or while he sojourned in England, as depending " simply on any mere expressions of intention, clear " though they be. We apprehend that the result in " the actual domiciliation in the Castle of Fowlis, as " soon as it was fully prepared, must be applied back- " wards upon all those expressions of his purpose, " giving reality to the positive intention at all times " declared, and demonstrating the negative of the pro- " position that he ever had the animus necessary to put " an end to his fixed domicile or ever did take up his " abode in England animo remanendi.

" We shall suppose the case of a young gentleman " of family and fortune going to Paris for his amuse- " ment, originally intending a mere excursion for a " short season; that he is by accidents detained, — " perhaps by a protracted suit at law, perhaps by the " difficulties of an honourable suit in a gentler court, " —but that, while he writes constantly of his intention " to return speedily, telling or not telling the cause of " the delay, successive perplexities postpone the time " of it; could it be, that after all was settled, and he " kept his purpose, formed at first, held at all times, " from day to day and year to year, and executed at " last, perhaps by bringing to his own home the lady " whose favour he had so perseveringly sought, — the " law of his own country should declare, that, contrary " to his constantly proclaimed purpose and intention, " any circumstances in the mode of his temporary resi- " dence occasioned by incidents quite extraneous and " opposite to all his own thoughts of domiciliation, he " had abandoned the domicile of his only home, and

" for the time fastened on himself the domicile of his " transient sojournment during long deferred hope? " We should think that it would not be so held.

" Indeed, when we review the case of Sommerville " and the doctrines there delivered, we think that the " principles of it apply in the most distinct manner to " the present case. The cases are not identical in the " facts: no two cases are so; but they are identical " in this, that, though in Lord Sommerville's case there " was a domicile of a certain order held to be estab- " lished in England, the question still was, whether he " was so domiciled with that animus remanendi which " alone could extinguish his domicile of origin, as the " rule for all questions in which there can be only one " governing domicile. And we are of opinion that in " the present case there was no such animus in Sir " Hugh Munro, but, on the contrary, that the evidence " proves that, though there was residence in England " for a time, it was, in the mind and intention of Sir " Hugh Munro, from first to last, of a temporary " character.

" Being thus of opinion that Sir Hugh Munro's " domicile was in Scotland, we come now to apply this " to the question concerning the pursuer's legitimacy. " If any thing depended on the domicile of Sir Hugh " at the date of the pursuer's birth, we have already " observed that there could, in our opinion, be no " doubt of it, and consequently that the pursuer, " though born in England, must be considered as the " acknowledged daughter of a domiciled Scotchman. " We shall afterwards advert to what is said of her " condition, as born in England of an Englishwoman " not then married. But in reality we attach little

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" importance to the force of the domicile as applied to " the time of the pursuer's birth. It is in the forma- " tion of the marriage that the husband's domicile " comes to be of paramount importance; and to that " we shall now direct our attention as the point on " which our opinion of the pursuer's legitimacy rests, " and in which we believe most of our brethren would " concur with us if they were satisfied that the domi- " cile was in Scotland.

" Assuming Sir Hugh Munro to have been a domi- " ciled Scotchman at the date of his marriage to the " pursuer's mother, we are of opinion that that mar- " riage, though celebrated in England, must be con- " sidered as in law a Scotch marriage, in respect of " all the incidents and consequences of marriage. In " general the law of the domicile regulates this matter, " as held in the case of Ross, and laid down by Story, " p. 156, and other writers. Put the simple case of " a Scotchman, about whose domicile there is no doubt, " going into England for a few weeks or months, and " there marrying an English lady, and returning with " her to his residence in Scotland; we believe that no " doubt is or can be entertained that that marriage " must be considered as to all effects a Scotch mar- " riage, as truly as if it had taken place in Scotland; " and that neither the place nor the manner of its " celebration can alter its character. And it cannot, " in our apprehension, be of any consequence, that " before that marriage the lady may have been a " domiciled Englishwoman, who never was in Scotland, " for in the moment and in the act of the marriage " the wife necessarily adopts and becomes attached to " the domicile of the husband; and, therefore, her

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" previous domicile, being thereby sunk in his, can be " of no more importance in the question than if, being " a domiciled Englishwoman, she had been married " within the bounds of Scotland.

" If there could have been any doubt of this legal " doctrine, every such doubt is removed by the late " decision of the Court and the House of Lords in " the case of Warrender against Warrender,[1] which " appears to us to be a case of very great importance " in the present question. By the law of England " marriage once contracted cannot be dissolved except " by act of parliament; and questions have been " agitated in which different opinions have been formed " in the case of persons being English and domiciled in " England, and being married there, when they after- " wards come to Scotland, and having obtained a " domicile there insist for dissolution of the marriage " in the Scotch Courts. But in that case of War- " render, though Sir George had resided a great deal " in England, he was held to be undoubtedly " a domiciled Scotchman. Being so, he married " in London the daughter of Lord Falmouth, born " and educated in England, and who had never been " in Scotland. Sir George insisted against the lady " for divorce in the Scotch Consistorial Court. It was " pleaded in defence that there was no jurisdiction to " dissolve the marriage, in respect that it was a mar- " riage celebrated in England, which by the law of " that country was indissoluble; but it was held that " the competency of the action to that effect must be " sustained; and although other views of great impor-

[1] See post, p. 585.

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" tance were taken of the case, we understand it to " have been distinctly held, by both the eminent Judges[1] " who decided that cause in the House of Lords, that " the domicile of the husband is the domicile of the " wife, and that Sir George Warrender's domicile " having been clearly in Scotland at the time of the " marriage, the marriage must be held and treated, in " regard to all its incidents and consequences, as a " Scotch marriage; and on that ground, independent " of others, that it was competent for Sir George, " being domiciled in Scotland, to insist for dissolution " of that marriage in the Scotch Court. Holding this " to be sound in principle, and ruled in that important " case, we think that the application of it to the " present case is clear and direct.

" For, it being in our opinion sufficiently established " that Sir Hugh Munro's domicile at the time of the " marriage was in Scotland, and the domicile of the " pursuer's parents having undoubtedly been in Scot- " land when that marriage was dissolved, the marriage " must be dealt with as a Scotch marriage; and as it " is one of the incidents of such a marriage, being " Scotch, that the child of the parents so married, at " whatever time born, is legitimate, it follows that the " pursuer was by the effect of the marriage under " the law of the domicile effectually secured in her " right as the legitimate daughter of her father.

" But we cannot leave this point without observing " that if the marriage of the pursuer's parents, regu- " larly celebrated, though in England, were not to be " considered as a Scotch marriage to these effects, the

[1] Lords Lyndhurst and Brougham.

" case would present a most extraordinary result in " the law, and a case of extreme hardship. If Sir " Hugh Munro had celebrated no marriage in Eng- " land, but had simply brought the pursuer's mother " to Scotland, and introduced her to his mother and " his relations as his wife, had written the letters which " he did, designing her as his wife, and had cohabited " with her in the Castle of Fowlis by the distinct " character of Lady Munro, his lawful wife, there " would have been very marriage between these parties " contracted in Scotland and under the law of Scot- " land,—between parties certainly domiciled there,— " as effectual as any celebration of marriage could have " made it; and all the incidents of a Scotch marriage, " including the legitimacy of their acknowledged " daughter, would have followed. This is the case of " Mr. M'Douall of Logan, now before the Court, in " which we, concurring with the great majority of the " Judges, hold the legitimacy to be clearly established. " But it will be a singular case of hardship, if Sir " Hugh Munro, desiring to fulfil his pledges to the " pursuer's mother, and to do justice to the pursuer in " the most unequivocal and legal manner, shall be " found to have placed the pursuer in a worse con- " dition, and actually to have stamped illegitimacy " upon her by the act of celebrating a regular and " lawful marriage according to the forms of the place " where he happened to be for the time. We cannot " reconcile this to the principles of justice. But we " see that the possibility of so strange a result taking " place is at once removed, if we be right in holding " that the marriage in question, though celebrated in " England, is truly to be considered as a Scotch " marriage.

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" There remains, however, a point on which the " defender places great reliance. It is maintained that, " the pursuer having been born in England of an " English woman not married at the time of the birth, " she was born an illegitimate child; that that status of " illegitimacy was indelible by the law of England, and " that the subsequent marriage, even taking it to be " a Scotch marriage, could not legitimate the child, or " wipe off the indelible stain of illegitimacy. We can- " not assent to this proposition; and, with all possible " deference to any different opinions, we know of no " authority for it in the law of Scotland, or among the " jurists and writers on general law, in the application " here attempted to be made of it. We are no doubt " aware of certain dicta thrown out by high authorities " in the law of England in the case of Ross and " another case [1] there referred to; but in the case of " Ross the point was expressly waived by the Lord " Chancellor as not necessary to be decided, and the " judgment went distinctly on the ground that the " parties were both domiciled in England, and that, " though the marriage was formally in Scotland, the " parties had gone there for that purpose only, and " returned immediately to England, their proper domi- " cile; thus affording another example of the principle, " that, though a marriage may be celebrated in one " place, it is in respect of the incidents of marriage to " be regulated by the law of the husband's domicile. " And we have yet seen no case in which this principle " of indelibility has been applied under the law of " Scotland, whether in this Court or in the House " of Lords. Both in Sheddan v. Patrick and in Strath-

[1] Strathmore Peerage.

" more the domicile was held to be the ruling point, " sufficient for judgment.

" To say that the pursuer was born illegitimate " because her parents were not married at the time " of the birth, is to say no more than could be said in " any such case, whether the child were born in Scot- " land or in England. There may be a question, to " which we have already alluded, as to the competency " of inquiring into this in Scotland, where the parents " have been clearly married, and have been domiciled " there, and no impediment recognized by the law of " Scotland can be stated; but, as a matter of fact, it " is true in every case that till the marriage the child " is illegitimate. Such a fact, therefore, does not in " the least advance the argument for the point to be " made out. To say, again, that because the child " was born in England of an English mother the " illegitimacy is indelible,—if this means that it is in- " delible by the law of England, and under the law of " England,—is to say no more than that the law of " England has not adopted the rule of legitimation per " subsequens matrimonium. But if it be meant, that " because the child was born in England it cannot " become legitimate in Scotland by a Scotch marriage, " in a question to be determined by the law of Scot- " land, it is a petitio principii, for which there is no " authority whatever in that law. The presumption on " which the rule of legitimation is generally held to " depend is, that at the time of the child's being be- " gotten there was a consent to marriage, and that the " marriage when it takes place draws back to that time. " But why this presumption should be prevented from " operating in the law of Scotland, merely because it " is not admitted by the law of England, is not at all

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" obvious to us. We are here in a Scotch question " and in a Scotch court, applying a plain rule of our " own law; and, unless that law says that if the child be " born in England it shall not have the benefit of the " rule, we do not see how it is at all material that it " could not enjoy it if the law of England were to be " applied to the case. But we know of no such excep- " tion in the law of Scotland, nor, as far as we are " informed, is there any such exception recognized in " the law of any country which holds the principle of " legitimation per subsequens matrimonium.

" We are not here giving any opinion on a point of " which it does not belong to us to form any judgment. " We are not inquiring what the law of England might " decide, if the pursuer, or any person similarly situated, " were making a claim in an English court of law in " respect of property within their jurisdiction. We " observe that Professor Story has said [1], that ' a person " ' born before wedlock, who in the country of his birth " ' is deemed illegitimate, may not, by a subsequent " ' marriage of his parents in another country where " ' such marriage would make him legitimate, cease to " ' be illegitimate in the country of his birth.' We " may have doubts of the soundness of this doctrine in " international law, if it were meant to be indiscrimi- " nately applied to all cases, which we imagine it is " not; but it is a point with which we have no occa- " sion or competency here to deal. The very state- " ment of it in this form implies that the supposed " indelibility is confined to the country of the birth, " where alone it can operate. Whether such a ques- " tion would be so decided by the courts of England,

[1] Conflict of Laws, p. 99.

" if the pursuer were making any claim in those courts, " we cannot presume to form any opinion. We are " aware that conflicts of law may take place, and there " is no help for it when they do occur. But the ques- " tion before us is a purely Scotch question, to be ruled " by general principles no doubt, but still with refer- " ence to the law of Scotland in the particular point; " and we cannot, in consistency with the established " principles of that law, hold that this pursuer could " not become legitimate by the marriage of her parents, " when or wheresoever she may have been born.

" It appears to us to be very clear that the circum- " stance of the mother being English adds nothing at all " to the supposed difficulty in the place of the pursuer's " birth. She was certainly illegitimate by the law of " England and by the law of Scotland also at the " time of her birth, and she would have been so equally " though her mother had been a Scotchwoman. But " if Sir Hugh Munro was a domiciled Scotchman, " and if the marriage is in consequence to be taken as " a Scotch marriage, the wife adopting the husband's " domicile and becoming a Scotchwoman, and if, again, " the place of the birth by itself creates no indelibility " in the law of Scotland to prevent the marriage from " legitimating the child, we are quite unable to perceive " how such an indelibility can arise from the circum- " stance, that the wife and mother was an Englishwoman " at the time of the birth.

" On the whole, we are of opinion that the pursuer " is entitled to prevail in the conclusions of her de- " clarator."

This cause having been put down by the Lords of the First Division to be advised upon these opinions, along with the preceding case of the Countess of Dalhousie v.

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M'Douall, the following opinions were delivered by their Lordships upon both cases:—

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Lord President.—" In the case of Munro v. Munro " I concur entirely in the opinion of the majority of " the consulted Judges, but I cannot concur with them " in the case of M'Douall.

" To me it appears that there is no material dis- " tinction between the cases, and that the same prin- " ciples must rule both. I will therefore deliver my " opinion in both cases at the same time.

" The case of Munro is even stronger than that of " Ross. In the case of Ross there was, at least, a mar- " riage in Scotland in form, and in validity in one " sense of the word, though it was entered into merely " for the purpose of committing a fraud on the law of " England as to bastardy; but in this case of Munro " the only marriage was in England, and the status of " marriage was by this English marriage indelibly fixed " on the parties, so far as the constitution of the mar- " riage at least was concerned. Whether that could be " dissolved afterwards is a separate question. No doubt " they afterwards cohabited in Scotland, so as to have " made them married persons by habit and repute if " they had never been married before; but previously " they had been firmly, solemnly, and indelibly married " in England, and that marriage could neither be " strengthened nor weakened by any subsequent con- " duct in Scotland.

" But I must go farther, because I am of opinion " that in the whole of this argument too much stress " has been laid on the domicile of the putative father; " and because I think that attention has not been paid " to the difference between the constitution and sub- " sistence of personal status, and the consequences which

" may result from personal status once fully constituted,
" when the parties either had a previous domicile or
" afterwards fixed their residence in a different country.

" 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 tied to his legitimate child
" by the strongest bonds of the law. The connexion
" betwixt them is inseparable and unavoidable. The
" general rule of 'pater est quem nuptiæ demonstrant,'
" is absolute in regard to all children born in wedlock,
" save in a few special exceptions; and therefore the
" domicile and status of the father fix those of the
" legitimate child. But there is no legal tie between a
" bastard and his supposed father; 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 on the child by birth.

" In law the bastard has no father. This is expressly
" laid down by Blackstone as to the law of England,
" where this bastard was born; he says, 'all other chil-
" 'dren have their primary settlement in their father's
" 'parish, but a bastard in the parish where born, for
" 'he hath no father;' and the same is the law of
" Scotland.

" Now the pursuer in this case, Miss Law or Munro,
" was unquestionably an English bastard at her birth.
" Her mother was the only parent recognized by the
" law of England; she never might have been able to
" fix paternity for her child on any man. The mother
" is primarily liable to maintain her bastard, and if she
" cannot it must be maintained by the parish; at least
" this used to be the law of England, before the late
" Poor Law Act. No doubt, in order to relieve the

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" parish, the mother may attempt, and may succeed in " the attempt, to fix on a particular man as the father " of her child; in which case she or the parish could " call upon him to maintain it for a certain period, and " this without any regard to his domicile, or any pecu- " liarity in the law of that domicile to exempt him from " this obligation.

" But this obligation to maintain the child does not " affect its status as a bastard; he remains a bastard as " he was before, without any legal connexion with his " putative father, subject to the same disabilities or pri- " vileges of a bastard in England, whatever they may " be. His only legal parent is his mother, and this " only to the effect of the burden of maintenance in " infancy, for in no other respect does he derive any " right even from his mother. Therefore I cannot see " how the domicile of the supposed father ought to have " the smallest effect on the status of the child, and on " the question whether it is or is not a bastard. Sup- " pose that, by the law of the putative father's domicile, " a bastard were entitled to share more or less with his " lawful children in his succession ab intestato; this " could not alter his status of bastardy, or place him in " any other respect on a footing with the lawful chil- " dren; indeed, he must plead his bastardy even to give " him this particular privilege. Or, suppose that the " law of the father's domicile gave the father a right to " claim and take the child from the mother, and that " the mother in England resisted, he could not succeed. " If he had been found liable in maintenance, perhaps " that might give him some claim to the custody of the " child, though I do not know that it would. But, " certainly, without that specialty he could not take " the child from the mother, merely by alleging that

" the law of his domicile would have allowed him to
" do so.

" In short, I cannot see the smallest connexion
" between the status of the bastard and either the
" previous or the subsequent domicile of his puta-
" tive father. The child in England was born a bas-
" tard; and it cannot make any difference whether
" his putative father was a Scotsman, or a French-
" man, or a Turk. Accordingly, what was the opinion
" of the Judges in the House of Lords, in the very
" analogous case of Strathmore? And I take that case
" as my text, because in deciding it the learned Lords
" laid down the law generally as to the effect of per-
" sonal status. In that case Lord Eldon said, 'he was
" ' born in England of an Englishwoman, who never
" ' had been before in Scotland. The law, there-
" ' fore, which attached at his birth was the law of
" ' England; and if his mother and supposed father had
" ' died within a few years after, unquestionably he was
" ' an illegitimate child, born in England, subject only
" ' to the law of England, and having no character
" ' whatever but that which had been derived from his
" ' mother.' Then the Lord Chancellor Lyndhurst [1],
" after speaking on the supposition of a marriage in
" Scotland, and having that expressly in view, said, 'It
" ' appears to me to be unnecessary to go into that
" ' point. It is sufficient that the child be born in a
" ' country where the illegitimacy is indelible. This
" ' in any country whatever would have the effect of
" ' rendering that child illegitimate.' Then Lord
" Lyndhurst goes on to say, quoting the words of Lord
" Redesdale, 'I do not enter into the question, whe-

[1] In Rose v. Ross.

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" ' ther, if this marriage had been entered into in Scot-
" ' land, it might have had the effect of legitimizing the
" ' child, because I think it is not necessary.' Then
" Lord Lyndhurst himself adds, ' I agree with the
" ' noble and learned Lord. I do not think it neces-
" ' sary; but I must say that I do not conceive how it
" ' could have that effect."[1]

" Nor can I. I cannot conceive how any subsequent
" event whatever, whether by the parents or otherwise,
" can have a retrospective effect to alter a status once
" effectually constituted. But more of this hereafter.
" In the meantime Lord Chancellor Lyndhurst goes
" on thus: — ' The opinion of Lord Redesdale is quite
" ' obvious from what I have stated, and from a sub-
" ' sequent passage, in which he considered the position
" ' of the child at the time of its birth as deciding the
" ' case.' Then Lord Chancellor Lyndhurst proceeds,
" ' Taking the whole of the judgment of the noble Lord
" ' together, I conclude that he is of opinion that if the
" ' child was illegitimate at the time of its birth accord-
" ' ing to the law of the country where it was born, that
" ' character was stamped upon it indelibly. No sub-
" ' sequent marriage could render it legitimate.'

" And this, it will be remarked, is given as their
" opinion without any qualification as to the domicile
" of either parent, or as to the marriage being in one
" country or another. It is generally, that no marriage
" could render the child legitimate. Then Lord
" Wynford said, ' I will merely say, that I entirely
" ' concur in every thing that has fallen from my noble
" ' and learned friends. All jurists agree that the per-
" ' sonal status of a man must be decided by the law of

[1] See post, p. 590.

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" ' the country in which he is born. This person was
" ' born in England a bastard, and by the law of
" ' England bastardy is indelible. He cannot become
" ' legitimated.' And this he gives, without limitation
" or exception as to the means by which the bastardy is
" attempted to be effaced, either by marriage in Scot-
" land, or by reference to the domicile of the putative
" father; and then he cites the opinion of Boullenois,
" in the case of De Conti, to which I referred in my
" opinion in the case of Ross, and which Boullenois
" sums up thus: ' parce qu'il porte partout l'etat et la
" ' condition dont il est par les loix de sa nation.'
" Accordingly, by the law of England a bastard has
" faculties which in Scotland he has not. He has the
" jus testamenti faciendi, which in Scotland he has not,
" and which the domicile of his putative father could
" not affect. But I deem it unnecessary to prosecute
" this point farther, and therefore I shall now proceed
" to consider a point which I think has been overlooked
" on this subject of personal status; id est, the distinc-
" tion between the original constitution and continual
" subsistence of the status once properly acquired, and
" the consequences, pecuniary or otherwise, which may
" result from it in different countries.

" I have already mentioned that a bastard in England
" has the jus testamenti faciendi, which in other coun-
" tries he may not have; and there may be other
" countries, for any thing we know, in which he may
" have more important rights in connexion with legiti-
" mate children.

" This seems to have been the case with Abraham
" and among his descendants. It appears from what
" Sarah said to Abraham (see 21 Genesis, v. 10.), that
" Ishmael would have been heir along with Isaac if

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" Abraham had not cut him out. She said, ' Cast out
" ' this bond woman and her son, for the son of this
" ' bond woman shall not be heir with my son, even
" ' with Isaac.' And Jacob's children by his two con-
" cubines seem to have been exactly on a footing with
" his children by his two wives Leah and Rachel.

" But I do not confine my opinion to the case of the
" status of bastardy. I think the same reasoning and
" the same rules apply to other kinds of personal status,
" in which the status and personal condition of the
" parties are indelibly fixed, though the consequences,
" personal and patrimonial, may vary in different coun-
" tries from which they originally came or to which
" they may afterwards resort. Take the case of mar-
" riage. A man and woman meet in a foreign country,
" and are there married according to the laws and
" ceremonies established there. That marriage is good,
" and will be acknowledged to be so in every civilized
" country. They could not dissolve it by reference to
" the domicile of either party, where by law such rites
" and ceremonies would not have constituted a valid
" marriage. The status of married persons is indelibly
" stamped upon them, and no previous domicile or sub-
" sequent change of domicile could affect it. But the
" personal and patrimonial consequences resulting from
" this status so effectually and indelibly constituted
" may be different in different countries. If they con-
" tinue in the country where they were legally married,
" the husband and wife may have certain personal pre-
" rogatives and privileges and certain rights and powers
" over their respective properties peculiar to that coun-
" try. If they return to their own country, or remove
" into a third country, all these may be totally changed;
" but no consequences of this kind affect the consti-

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" tution and subsistence of the status of marriage originally and legally stamped upon them. Married they were, and married they must remain. No previous domicile or change of domicile can unmarry them; they carry that status with them wherever they go, as Boullenois says; and if they have not settled their rights by a contract, they must take their chance of the effect which change of residence may produce. The same is exactly the case in the status of allegiance. If a person is born subject to allegiance to the Crown of Great Britain, no previous domicile of his father at a remote period and no change of domicile by himself or his father can dissolve his allegiance.

" If he conspires against the life of the Sovereign or is found in arms against him, he is guilty of treason, and he cannot plead the old domicile of his father or any change by himself as a defence.

" But this status of allegiance may have very different effects and consequences, either advantageous or otherwise, in other countries. But these arise out of the existence of the status as validly established; and, so far from abrogating it, they presuppose it a continued and indelible existence.

" The Scots had till lately certain privileges in Holland, and there was an officer, as your Lordships know, called the Conservator of the Scotch privileges at Campvere, whose duty it was to guard those privileges and to settle disputes between Scotch merchants settled there. And in old times, during the alliance between the Crowns of Scotland and France, the Scots had certain privileges in that kingdom. Among others, they were exempted from the droit d'aubain.

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" In like manner, after the union of the two Crowns " under our James VI., the post nati, as they were " called, had privileges in England which the ante " nati had not. In other countries, again, being born " subject to the allegiance of Scotland or any other " country may subject a person to burdens and inca- " pacities from which natives of those countries are " exempted. But nothing of all this affects or touches " the status itself, which remains fixed and indelible. " Born a bastard or a Scotsman, or legally married, " those characters remain stamped on him for ever, " wherever he goes or chooses to domicile himself. " These principles I apprehend to be quite indisput- " able; and they go directly to prove that the original " status of bastardy cannot be affected by any conduct " or operation of the putative father.

M'Douall's Case.

" All these principles applicable to the case of " Munro apply also to this case, unless there be any " facts and circumstances in it which render these prin- " ciples not applicable.

" Now what are the facts in this case?

" Mary Russell, the pursuer's mother, was domiciled " in Scotland ratione originis only, and in no other way. " She never had selected that country for her domicile " by having a house of her own. She lived with her " father, in his family and under his protection.

" But the domicilium originis is the weakest of all, as " having been induced without any consent on the part " of the child.

" Now in 1796 she voluntarily left her father's family " and forisfamiliated herself. She chose to form an

" unlawful connexion with Colonel M'Douall, and for
" a short time resided under his protection at Culgroat.
" Then, when his regiment was ordered to England,
" she voluntarily accompanied or followed him there.
" She was not under any obligation to do so. She was
" not his wife — she was not his servant. She might
" have left him at any moment, and without his consent;
" but she did not do so. She voluntarily continued in
" England, and at Chester was delivered of the pursuer.
" Unquestionably, therefore, the pursuer was born a
" bastard in England; and unless something happened
" afterwards to alter his condition, that condition was
" indelible bastardy; and so it must be admitted to
" have continued for at least twelve years, down to the
" acknowledgment of marriage in 1808.

" In the case of Ross I stated in my opinion that I
" would not take the law from such an extreme case as
" that of a woman taken suddenly, and perhaps pre-
" maturely, in labour, while travelling in England with
" or without her paramour, and brought to bed of a
" bastard there, and then returning with it on her
" recovery to Scotland. That is an extreme case, and
" what might be the law as to it we must endeavour to
" settle when such a case occurs. But this is not Mary
" Russell's case. She was not in England on a mere
" jaunt, or for some obviously temporary purpose. On
" the contrary, it is plain that she contemplated a
" much more protracted residence in that country, and,
" as it afterwards appeared, a permanent residence.
" At any rate she was there at the time of the birth by
" her own free will and choice, and she so continued
" there. She had it completely in her power, if she
" had so chosen, to return with her child to Scotland as

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" soon as she recovered from her confinement. Colonel " M'Douall could not have prevented her. But she " chose to remain in England. If it be said that she " remained there merely on account of her connexion " with the Colonel, the answer is, that it was her own " free choice to do so. But, in point of fact, it was not " the case. The Colonel's regiment was disbanded in " 1799 or 1800, when he returned to Scotland. But she " did not follow him, nor return to her father's house, " nor to any other place in Scotland; she fixed her " abode in Penrith, in a house which the Colonel pro- " vided for her. But it was her own free choice to " remain there. She did remain there, and I am per- " suaded would have continued there if the subsequent " marriage in 1808 had not taken place. It is plain, " if it were of any consequence, that even the Colonel " himself originally had no intention that she should " return to Scotland; and it is equally plain, that till " the marriage she herself had not the least intention of " returning there and resuming her domicilium originis. " On the contrary, she showed evidently that it was her " intention to remain in Penrith; for she brought up " her mother and sister and then her brother to live " with her; and there she remained in all appearance " permanently domiciled till 1808. But in order to " constitute domicile it is not necessary that the party " should have a fixed and determined purpose to " remain in his or her present residence for ever. It is " enough if they have resided for such a length of time " as to show that they had chosen that place as their " only and proper home for that time; and no vague " and floating intention which they may have expressed " of returning to their country at some future time can

" alter the domicile so acquired by long residence. " Nay, in the case of Bruce[1], who was actually on his " return to Scotland from India, but died on the " passage, it was held and found by the House of Lords " that India was to be held as his domicile; and his " succession was regulated by the law of England, and " not of Scotland, to which he was returning. In short, " from the birth of the child in 1796 till the marriage " in 1808, no less than twelve years, she was a domiciled " Englishwoman. Therefore, if the residence and do- " micile of the mother at the time of the birth of her " child and for years thereafter be of material con- " sequence, then her residence and chosen domicile for " twelve years fixes the status of the child to be that of " indelible bastardy.

" It does not appear to me to be of any consequence " that the house in Penrith was not her own property, " but the colonel's, and that he allowed her to live in it " rent free. Still it was her own voluntary residence, " and constituted an English domicile as much as if she " had bought or hired it; and she had no inducement " under her loss of character to return to Scotland, and " never showed the least intention of doing so, or that " she was not in England animo remanendi; and that " this animus, in all human probability, never would " have been altered but for the event of the marriage, " which she could not foresee, and probably little ex- " pected. Therefore, on the whole, I am of opinion " that all the principles applicable to the case of Munro " apply to this case of M'Douall, and that none of the " facts and circumstances lead me to form a different

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[1] See post, p. 600.

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" opinion. I may add, in regard to the Warrender " case, that it appears to me that the effect of the judg- " ment there has been misunderstood. Sir George " Warrender was married in England, though it is of " no consequence where the ceremony took place, since " he was legally married according to the forms re- " quired by the English marriage law, and therefore " his domicile became that of his wife. But it is a " different thing where the parties are not married, for " the domicile of the paramour is not necessarily that " of his mistress, there being no connexion between " them which the law recognizes. Sir George War- " render, however, being legally married in England, " and being found to be a domiciled Scotsman, his " wife's domicile, in the eye of the law, was likewise " Scotch, and an action might competently be brought " against her in Scotland. Accordingly all that was " found by the decision was, to hold the action of " divorce to be legally brought against her in Scotland, " because she might be held as a domiciled Scotch- " woman. The effect which this finding will have upon " the decision on the merits of the case we do not as " yet know, the only thing fixed being, that the right " of action against her lay in the Scotch courts. This " might be very important to Sir George Warrender " in other respects, for he might have to bring actions " against her of another nature. She might have ac- " quired separate property, in regard to which it might " be necessary for him to sue her; and she could not " have validly pleaded in defence that she was domi- " ciled in France. However, the status of marriage has " been indelibly fixed by the English celebration, and " by this decision her domicile, as a married woman,

" has been held to be that of her husband; and this is
" all the length to which the judgment in this case of
" Warrender goes."

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Lord Gillies.—" I have listened with great attention
" to the opinion which has now been so ably stated, but
" I must own that it has not altered the opinion which
" I had previously formed. I shall not be sorry, how-
" ever, if it makes a stronger impression in another
" quarter. We have two cases before us, both of great
" importance, and both of them attended with extreme,
" I might almost say unprecedented, difficulty. I do
" not mean to trouble your Lordships with the reasons
" in detail which lead me, agreeably to my original
" opinion, to concur with the majority in the case of
" M'Douall. In the other case I must own that the
" opinion which I had at first formed is changed, and
" I am now inclined, though with some hesitation, to
" concur with the minority in the case of Munro. I
" shall not attempt to explain my reasons, as they are
" most distinctly detailed in the opinion. Nothing is
" more certain than this, that a man or woman having
" appeared before a clergyman and been regularly
" married, that marriage ceremony not only constitutes
" them married persons, but in the eye of the law
" converts the putative father into the actual father of
" the children previously born; or, at least, he ceases to
" be the putative father, and becomes undoubtedly the
" legal father. That is undoubtedly the law of Scot-
" land. But then in the case of Ross you have the
" marriage in Scotland, and a child previously born in
" England. The child was acknowledged both by the
" man and the woman, but it was found that the child
" was not legitimated, although the marriage was un-

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" questionably a good marriage. The child, it was " ultimately found, was and continued to be a bastard. " On what principle was this held? It was a judg- " ment pronounced, as I understand the case, on this " ground, that the domicile of Ross was not in Scot- " land, but in England; in short, that he was a domi- " ciled Englishman, and, because domiciled in England, " they held that the marriage in Scotland could not " have the effect allowed to it by the Scotch law, of " making legitimate the child. Now, if a domicile in " England prevents a Scotch marriage from legitimizing " the children, why, it seems to follow that a domicile " if in Scotland must render the children legitimate " by means of an English marriage. If the domicile " hinders the legitimacy in the one case, it should be " sufficient to accomplish it in the other. After all the " consideration I have been able to bestow on the cases " referred to, the true criterion as settled by them, and " particularly by the case of Cromarty or Ross, for " deciding this point is this, — was the putative father " domiciled in Scotland at the period of the marriage, " or was he domiciled in England? It is of no con- " sequence where the marriage is celebrated. It was " found in the case of Ross that the place of marriage " had no effect. It therefore brings every question " about the status of legitimacy to a question of fact of " the most difficult nature; depending not only on facts, " but on the inferences from facts. This doctrine like- " wise leads to this odd result, that when parties obtain " a licence from the Archbishop of Canterbury to be " married, he grants it, not only to the effect of making " them married persons, but to the effect of making " perhaps half a dozen bastards legitimate children.

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" That seems the consequence that must follow from " the law as laid down in the case of Ross, that the " country where the marriage is contracted is of no " consequence, and that the domicile of the father alone " is to be looked to. If that be the law the question " here is, just whether Mr. M'Douall, the father, was " resident in Scotland or England, and whether he " continued a domiciled Scotchman. I am of opinion " that he continued to be domiciled in Scotland, and " that decides the question; and, although with some " difficulty, I likewise am of opinion that Sir Hugh " Munro was also domiciled in Scotland. That being " the case, I concur with the majority in the case of " M'Douall, and with the minority, I mean the four " Judges who signed the opinion, in the case of Munro.

Lord Mackenzie.—" I concur in the opinion just " delivered. I have been of the same opinion always, " and I do not yet see sufficient grounds to alter it. " In the case of Munro I concur with the opinion of " Lord Moncreiff and the other Judges who go along " with him. Concurring with them, it is not necessary " to resume the reasons for doing so, as that opinion " contains a full statement of the grounds of judgment; " but I may shortly refer to two points which I think " of importance. The first is the general question, " whether a Scotch marriage can legitimate an Eng- " lish bastard? I think that it may, for the reasons " stated in the opinion signed by me in the case of " Ross.[1] It is true that the House of Lords did not " sustain the legitimacy of Ross's child; but from the " speeches made on that occasion, I see they did not

[1] See post, p. 585.

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" reverse on the general point, but because they held " that the marriage was not to be regarded as a Scotch, " but an English marriage. It was upon that view the " decision went, thus saving and avoiding the general " point. I do not, therefore, think myself precluded " by the decision of the House of Lords from retain- " ing the opinion I had then, and have still, that a " Scotch marriage may legitimate an English bastard. " I cannot help entertaining doubt, whether the indeli- " bility of English bastardy has any meaning beyond " this, that an English bastard is not legitimated by an " English marriage. I doubt whether indelibility is " not rather a quality in the marriage than in the " bastardy. Otherwise, why does an English marriage " not legitimate a Scotch bastard? If the question " rested solely on the quality of the bastardy, then a " Scotch bastard ought to be rendered legitimate by " the marriage of his parents in England or in any " country. But suppose it were true that English " bastardy is indelible, not only against a marriage in " England, but against a marriage all the world " over;—I say, supposing there was produced a statute " providing and declaring that an English bastard born " in England should remain a bastard all the world " over, notwithstanding any thing that could be done " in any country,—I ask, could we give it effect? " Could we acknowledge the authority of such a " statute? I think we would be bound to say, that " the English parliament might rule the fate of bastards " in England, but that its laws were not entitled to " extend to other countries, and that there was no " principle of the law of nations which could give effect " to such a statute. The second question is, whether

" the marriage in this case was a Scotch marriage, " which is certainly attended with difficulty; but on " the whole my opinion is, that the marriage must " be considered as a Scotch marriage; and for two " reasons:—First, I think, on the whole, though not " without doubt, that the domicile of Sir Hugh " Munro at the time of his marriage was in Scotland; " and, secondly, that the marriage was contracted by " the parties with a view that they should live in Scot- " land, and not in England. That those two cir- " cumstances taken together must have the effect of " making the marriage be regarded as a Scotch mar- " riage there are many authorities; but I think it " unnecessary to go beyond two, both decisions of the " House of Lords. The first is the case of Ross, and " the other that of Warrender. In the case of Ross " the marriage took place in Scotland. The parties " came on purpose to make it a Scotch marriage; " they stayed a considerable time to insure its being a " Scotch marriage; yet, the opinion of the House of " Lords was that Ross, not being truly domiciled in " Scotland, but in England, in which he contemplated " living with his wife, this marriage, although con- " tracted in Scotland, clearly with a view to legiti- " mating the children, must be held an English " marriage, and for that reason could not have the " effect of legitimating the children. It fixed the " point, that a marriage may be contracted in Scotland " under the forms of the church of Scotland, but that " the party being a domiciled Englishman, and having " contracted it with the design of living in England, " it is in law an English marriage. And the case of " Warrender is the counterpart of this decision. Sir " George Warrender was married in England, by the

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" forms of the English church, to an English lady who " had never been in Scotland. It was held that that " marriage must be considered as a Scotch marriage, " because Sir George was a domiciled Scotchman, and " the marriage was contracted with the view of the " parties living in Scotland. For these reasons, it was " held a Scotch marriage, and for these reasons the " action of divorce, which was brought in Scotland, " was held not incompetent. With these two decisions " before me, I am clear that if in point of fact it is " made out that Sir Hugh Munro was domiciled in " Scotland, and that at the time he contracted the " marriage his intention was to come to live in Scot- " land, the marriage must be regarded, notwithstanding " the form of it, as being a Scotch marriage. The " chief difficulty was to make out satisfactorily from the " evidence that these two circumstances did exist; " but on the whole I am satisfied that they did, " and therefore I hold the marriage of Sir Hugh " Munro to be a Scotch marriage. Holding this, I " also hold that it was sufficient to produce the legiti- " macy of his daughter, although the bastardy was an " English bastardy.

" I think the case of M'Douall attended with less " difficulty. In that case I am not satisfied that the " bastardy was an English bastardy. The bastard, " although conceived in Scotland, happened to be born " in England; but I think, although a great deal has " been said on this point, that it ought to be viewed as " a Scotch bastard. But it is not necessary to go " into that, for, supposing it were held as an English " bastard, I still think legitimation would take place; " for there is no question that the marriage in this " case was a Scotch marriage, and in my opinion,

" therefore, must have the effect of conferring legiti-
" mation on the child. In that case, therefore, I agree
" with the opinion of the whole (consulted) Judges."

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Lord Corehouse.[1]—" My Lord President, when this
" cause (Munro v. Munro) was reported, I issued a
" note explaining generally the views which I enter-
" tained of the law as applicable to it. But in conse-
" quence of the discussion which has subsequently
" taken place, the opinions which have been returned
" by the consulted Judges, and what I have heard to-
" day from your Lordships, I feel it incumbent upon
" me to enter a little more fully both into the law and
" the facts of the case.

" Various questions have been raised at the bar, and
" argued with great minuteness and ability; but it
" appears to me that the decision must rest on the
" circumstance where Sir Hugh Munro was domiciled
" at the date, not of the pursuer's birth, but of his
" marriage to her mother.

" It is admitted on both sides that the pursuer was
" born illegitimate, whether her parents were then
" domiciled in Scotland or in England. By the law
" of both countries a child born out of wedlock must
" necessarily be so at its birth. It is needless to advert
" to an exception or supposed exception to that rule
" in the law of Scotland, I mean as to the issue of a
" putative marriage, because it has no connexion with
" this case.

" The status impressed on a party by the law of his
" domicile continues when his domicile is transferred;
" but after it is transferred his status falls under the
" control of the law of the new domicile, and becomes

[1] Lord Corehouse had taken his seat in the First Division since the date of reporting the cause as Lord Ordinary.

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" subject to its operation. Whatever would change the " status of a person born or domiciled in Scotland, must " change the status of one born and domiciled else- " where, but who afterwards acquires a domicile in " Scotland. Were it otherwise, a person would import " into his new domicile not only the status which he " held in his previous domicile, but the law which regu- " lated that status, which would lead to inextricable " confusion.

" It has been argued at the bar, that if a person is " born illegitimate in England, his illegitimacy is inde- " lible, though he should remove his domicile else- " where. I am of opinion that that position cannot " be maintained; and I do not think that any of the " consulted Judges have held it to be tenable. In an " analogous case, the doctrine of a marriage being " indissoluble here because it was contracted in Eng- " land has been uniformly and, as I think, rightly " rejected by our Courts; and a single decision in " England to the contrary is, I believe, now viewed " in that country by the highest authorities in the " same light in which it has always been viewed here.[1] " As there can be no marriage, wherever contracted, " which is indissoluble in Scotland, on the same prin- " ciple there can be no illegitimacy necessarily inde- " lible. On this point I concur entirely with Lord " Gillies and Lord Mackenzie, and I conceive that " nothing turns in this case on the status either of the " pursuer or her parents at the period of her birth.

" At the period of Sir Hugh Munro's marriage he " was either domiciled in Scotland, or he was not. If " he was domiciled in Scotland at that time, his mar- " riage in England, celebrated according to the laws of

[1] Lolly's case. See observations by Lord Brougham, post, p. 617.

" that country, must have had the same effect as if it " had been legally celebrated in this country, and as if " parties had actually been resident here. ' Quando " ' lex in personam dirigitur respiciendum est ad leges " ' illius civitatis quæ personam habet subjectam, id " ' est, leges domicilii.'[1] ' Laws purely personal,' says " Boullenois, ' whether universal or particular, extend " ' themselves everywhere; that is to say, a man is " ' everywhere deemed in the same state, whether " ' universal or particular, by which he is affected by " ' the law of his domicile.' This aphorism is uni- " versally received. The same author says, ' that " ' the whole world acknowledges that the status of a " ' person depends upon his actual domicile.'

" The apparent exceptions to the rule arise in cases " in which the question of status is complicated with " other questions respecting the destination of landed " property, inheritance ab intestato, foreign contracts, " &c., to one of which I shall afterwards have occasion " to refer.

" It follows therefore, I conceive, that if Sir Hugh " Munro was domiciled in Scotland at the time of his " marriage in England, the pursuer would be legiti- " mated by that marriage.

" I observe that a doubt has been started, whether " this effect would have taken place, on the ground " that Lady Munro was domiciled in England at that " period, because the only recognized parent of an " illegitimate child is the mother. I do not think that " there is any room for that doubt. By the nuptial " benediction Sir Hugh's Scotch domicile, in the case

[1] Hertius de Confl. leg. p. 123.

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" supposed, would eo ipso have become the domicile " of his wife and his child, and the child would " simultaneously have acquired her father's domicile, " and the benefit of the Scotch law of legitimation.

" I think it is unnecessary to quote a series of autho- " rities in support of these propositions. I hold them " to be elementary principles of international law, and " they are not called in question by a great majority of " the consulted Judges and of your Lordships.

" But, on the other hand, let it be assumed that Sir " Hugh was domiciled in England at the time of his " marriage, and, in my humble apprehension, it follows " as clearly that the opposite result must take place.

" The pursuer was not legitimated by the English " marriage in that case, because, by the law of England " attaching on all the subjects of that country, legiti- " matio per subsequens matrimonium does not obtain. " Notwithstanding their marriage, therefore, and sub- " sequent to it, the pursuer remained illegitimate, and, " according to the aphorism already quoted, she was " illegitimate not only in England, but all the world " over.

" According to the same maxim, when her parents " and she removed to Scotland, and acquired a new " domicile there, she came with the status of illegiti- " macy affixed to her, and the mere change of domicile " per se could have no effect upon her status. Then " how could she be legitimated afterwards? Not by " the marriage of her parents, for they were married " before she came, and could not be married a second " time. The mere repetition of the ceremony, sup- " posing it had been repeated, which it was not, could " not operate upon her status any more than it could

" operate upon their status. It would have been a vain " and idle form. But there is no other mode of legiti- " mation known in Scotland (I lay out of view the " interference of the legislature). Therefore, if she was " not legitimated per subsequens matrimonium before " she left England, she must have remained illegitimate " after her domicile was removed to Scotland.

" It seems to be argued, though not very confidently, " that a different rule should be applied to this case, " because the question is involved, whether the pursuer " shall succeed as heiress of entail to a Scotch estate; " and consequently the law of legitimation per subse- " quens matrimonium must be applied wherever the " succession to landed property in Scotland is at issue. " I humbly conceive that that circumstance must be " entirely laid out of view, because the pursuer's right " to inherit land in Scotland depends entirely on her " status, and according to every principle of inter- " national law her status cannot be different in Scotland " from what it is in England. Status once impressed " and remaining unchanged must, as already said, be " the same all over the world. The English case of " Birtwhistle[1], which, I presume, is alluded to in the " pursuer's argument, does not, as I understand it, at " all infringe upon this principle. The decision in that " case proceeded on the ground, that by the statute " law of England no one can inherit property of a " certain description there unless he is born in lawful " wedlock. One of the judges says, ' I take it that " ' legitimacy alone is not sufficient to make a person " ' inherit soccage lands. It must be legitimacy sub

[1] Post, Appendix.

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" 'modo; the heir must be a child born after mar-
" 'riage.' By the same argument, if the pursuer
" could say that, in virtue of a Scotch statute, every
" child born of parents married either before or after
" his birth is entitled to succeed as heir under a Scotch
" tailzie, her plea would be irresistible. But there is
" no such statute in the law of Scotland. Her right to
" inherit depends upon her status alone.

" Let us come, then, to what I conceive to be the real
" and only question at issue: Where was Sir Hugh
" Munro domiciled at the date of his marriage? There
" is no doubt that Scotland was the domicile of his
" origin; that he retained this domicile while he was
" in England at his education, and on the continent for
" the benefit of foreign travel; and that he retained it
" after his return from the continent, while he resided
" with his mother at her house of Ardully in Ross-
" shire.

" But what was the domicile of his choice? When
" he returned from the continent he had no house of
" his own, at least no house which was habitable. The
" castle of Fowlis was ruinous, and he did not carry
" on the repairs which his father, Sir Harry Munro,
" had commenced. While he was in Ross-shire at that
" time he was a lodger or boarder with his mother for
" three or four years, and having a misunderstanding
" with her he left this country in 1794, and went to
" London, where he resided for eight years, without
" once setting his foot in Scotland. After living in
" lodgings for a short time he took a lease of a house
" for twenty-one years with two breaks, but of which
" he did not avail himself, and this was his permanent
" abode. It will be particularly observed that he did

" not go to London for the discharge of any temporary
" duty, or in the exercise of any temporary office, or
" for any transient object. He was not in the army,
" the navy, or in parliament. He did not go to enjoy
" the amusements of fashionable life during the fashion-
" able season only, nor to superintend a lawsuit, nor
" to bring any specific piece of business to a conclusion.
" London was his ordinary and sole residence for seven
" years before his marriage; it was so at the date of his
" marriage, and continued to be so at least for one year
" afterwards.

" Here then is a continued residence, a fixed abode,
" for a long period of years. I do not say that resi-
" dence of itself constitutes a domicile, but it is a main
" ingredient in constituting the domicile of choice.

" There is another and still more important ingre-
" dient. It was in London where he had his establish-
" ment, and his sole establishment. The Code Civile of
" France [1] declares, that the domicile of every French-
" man is the place where he has his principal establish-
" ment. That is not an arbitrary rule of French law;
" it is drawn from a careful collation of all their writers
" on this subject; and in consequence of that kingdom
" being at one time divided into various states, in some
" of which the Roman and in others a consuetudinary
" law prevailed, this branch of jurisprudence was culti-
" vated at an earlier period, and more successfully, than
" in any other country in Europe.

" Now, as has just been said, Sir Hugh Munro had
" no establishment before he went to London in 1794.
" It was in London where his family and his servants

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[1] Liv. 1. tit. 3. s. 102.

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" were then placed, and where they continued to reside.
" There were his carriages, his furniture, his plate, his
" pictures, his library, his wines, every article of use or
" enjoyment in life according to the way in which he
" chose to live. So far as domicile, therefore, is con-
" stituted by fact, that is, by residence and establish-
" ment, the proof of Sir Hugh Munro's domicile is
" complete.

" But I am aware that domicile is not constituted by
" fact alone, but facto et animo, and it is on the question
" of intention that the pursuer takes her stand.

" It appears to me that the circumstances in which
" Sir Hugh Munro fixed his residence in London and
" formed an establishment there lead to the inference
" that he meant to make it his fixed abode. When he
" left the Castle of Fowlis in a ruinous state, and
" stopped the repairs which his father had commenced,
" he plainly did not mean to reside there. It was not
" a fit abode for a Highland chief, or indeed for any
" gentleman of his station and fortune. He rendered
" it still more unfit for that purpose by letting off the
" home farm and part of the lawn. In 1796 a lease of
" the farm and lawn was granted for seven years with
" a break at the end of three; but in 1799 the break
" was discharged and the lease rendered absolute for
" seven years. On the contrary, the lease of his house
" in London was of a length that clearly indicated the
" intention of permanent residence, coupled with the
" circumstance that his whole establishment was there.

" It is said that Scotland being Sir Hugh Munro's
" domicile of origin the presumption of law is that he
" did not mean to change it. That rule may hold in
" the general case, but here there are presumptions

" much more than sufficient to outweigh it. Sir Hugh " Munro was a gentleman of fortune, of talents, and " acquirements; he was educated from his youth in " England; when his education was finished he resided " eight years constantly abroad or in the metropolis. " He lived in the fashionable world in Paris and in " London, and that at the period of life when habits " and tastes are formed. Whether is it presumable, in " these circumstances, that at the age of thirty-one he " would fix his residence in London, or in a ruined " castle in the far north of Scotland, where he had no " employment or occupation, and where he could never " hope to enjoy the polished society to which, from his " youth upwards, he had been accustomed? I think " that the presumption is in favour of the London resi- " dence. Politics and agriculture, the motives which " most frequently induce gentlemen to reside on their " estates in the country, did not operate in his case. " He may have given his vote at an election, but he " never took any part as a candidate or active partizan. " As for farming again, we have seen that he let the " ground round his mansion upon a lease up to the very " door. Take these circumstances in connexion with " the fact that he did reside in London uninterruptedly " for eight years down to the period of his marriage, " and a year afterwards, there cannot, I conceive, be a " question that at that period his domicile was in " England, in so far as intention can be inferred.

" But there is a voluminous correspondence pro- " duced, and much reliance is placed on certain expres- " sions in his letters from London, bearing that he is to " return to Scotland, and to live at Fowlis. But do " those expressions, when read in connexion with the

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" context, import that he was to return to Scotland " with a view to settle permanently there, and to live " at the Castle of Fowlis during the rest of his life? " The very reverse is manifest. Every year during " these eight years he meditated a visit to Scotland, " and every year, for some reason or another, it was " put off. It is in allusion to these visits that he says " he is to return, and it is during these visits that he " expresses a wish to reside at Fowlis. Thus in 1797 he " writes to his factor,—" the mill is not to work before " ' my return to Ross-shire;' and certain articles will be " paid ' when I return to Ross-shire.' In a letter to the " same he writes that certain papers ' are to be sealed " ' up, not to be opened till my return to Ross-shire.'

" But in other letters, at that very time, and relating " to this intended visit, he says,—' I am not yet quite " ' decided on my jaunt to Scotland.' He orders job- " horses to be hired during his stay in Scotland; and " in a letter to his agent, Mr. Mackenzie, dated the " 13th October 1797, he says expressly,—' my stay in " ' the country will be about six weeks, or to the end " ' of December at the very latest.' Again, as to living " at Fowlis Castle, he writes,—' It is my resolution, " ' please God, to go early next summer into Scotland. " ' I wish, if possible, to reside at Fowlis while I am in " ' that country.'

" Then it is said that he expresses an intention of " taking the management of his affairs in Scotland, and " acting as his own factor, which is represented to infer " an intention of constant residence in this country. " But there is satisfactory proof in the very same letter " that this was not his intention. It appears that he " did take the management of his whole estate to a cer-

" tain extent from the year 1795 downwards, and gave
" special directions in writing about every matter, how-
" ever important or however trivial, from the letting of
" leases and levying rents down to the custody of the
" key of the meal chest and the disposal of empty packing
" boxes. But all these directions were given year after
" year for seven years, during which he was never
" absent from London. With regard to the phrase
" of being his own factor, observe how it is limited.
" Writing to Mr. David Aitken in 1795, he says,—
" ' When in the country, as I wrote you, I shall con-
" ' sider myself as factor under your directions; when
" ' I am here you will be factor under mine.' And in
" another letter to the same person he says,—' I em-
" ' brace this opportunity of informing you, that though
" ' I propose being my own factor I shall, both when
" ' in Ross-shire and here, refer the management of the
" ' estate to you.'

" Occasionally he sent articles of furniture from Lon-
" don to Fowlis Castle, but such articles must have been
" requisite for the accommodation of himself and his
" family, though he had contemplated a jaunt for six
" weeks only, as he did in 1797.

" I may observe also, that the facility with which all
" his projected annual visits for seven years were aban-
" doned shows how much he was attached to a London
" life.

" Even after his marriage, and after Lady Fowlis's
" death, it may be remarked that he stayed only a few
" years in Scotland, after which he returned to Lon-
" don, retaining during the whole intermediate time his
" house in Gloucester Place, which proves that even
" then he had no intention of abandoning his London
" domicile.

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" He revisited Scotland in 1817, and spent two or " three years in Ross-shire, when he finally left this " country, and hastened back to the scene which he " was fitted by his education, his habits and pursuits, " to enjoy, and where since that time (excepting some " short visits to the continent,) he has uniformly re- " mained. From the year 1794 then, when he first " established his domicile in London, to the present " day, he has, with the exceptions mentioned, been " constantly resident there, being a period of no less " than forty-three years, and there he continues. I " do not think there can be more conclusive evi- " dence to establish a domicile of choice, facto et " animo.

" The pursuer founds on a citation from the com- " mentator John Voet, and she says the general prin- " ciple of law cannot be better expressed than in his " words[1]:—' Illud certum est neque solo animo neque " ' destinatione patrisfamilias, aut contestatione sola, " ' sine re et facto, domicilium constitui: neque sola " ' domus commoratione in aliqua regione; neque sola " ' habitatione sine proposito illic perpetuo morandi, " ' cum Ulpianus a domicilio habitationem distinguat.' " But although Vattel has expressed himself to nearly " the same purpose, I have no hesitation in saying, " that if at any time that was the rule of international " law, it is not so at present. The correct principle is " laid down by Professor Story in his excellent work " on the Conflict of Laws.[2]—' Vattel has defined domi- " ' cile to be fixed residence in any place with an " ' intention of always staying there. But this is not " ' an accurate statement. It would be more correct

[1] Voet, 5, 393.

[2] Page 42.

" ' to say, that that place is properly the domicile of " ' a person, in which his habitation is fixed, without " ' any present intention of removing therefrom.' It " is possible that Sir Hugh Munro, besides his inten- " tion of making short visits to Scotland, may have " contemplated at some future and indefinite period of " life, to take up his abode in Ross-shire. But that is " not enough. The same author observes [1], that ' if a " ' person has actually removed to another place, with " ' an intention of remaining there for an indefinite " ' time, and as a place of present domicile, it becomes " ' his place of domicile, notwithstanding he may enter- " ' tain a floating intention to return at some future " ' period.' Can it be maintained that Sir Hugh " Munro at the time of his marriage, or at any " other time during the last forty-three years, is proved " to have had more than ' a floating intention ' to " settle himself permanently in Scotland?

" Two cases have been cited for the pursuer; that of " the Earl of Strathmore's son in the House of Lords, " and that of Lord Sommerville's succession in the Court " of Chancery. The case of Strathmore does not bear " upon this question at all; for it was admitted on both " sides, from the outset, that Lord Strathmore's domi- " cile was in England. Lord Sommerville's case agrees " with this case in two particulars. Lord Sommerville as " well as Sir Hugh Munro had a Scotch domicile of " origin, and both had houses in Scotland and in Lon- " don. But in every other circumstance the cases are " exactly opposed to each other. Lord Sommerville's " time was equally divided between Scotland and Eng- " land. He lived one half of the year in London, and

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[1] Page 45.

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" the other half in Mid-Lothian. In Scotland his " establishment and style of living were suitable to his " rank and fortune. In London he had only one or " two female servants, and brought two men servants " from Scotland, taking them back with him when he " returned, and using job horses in London occasion- " ally. In his manner of living in London he was very " private; seeing no company, dining usually at a club, " and keeping his servants on board wages. His house " in London was out of repair. On the contrary, Sir " Hugh Munro at the time of his marriage, being the " period in question, did not divide his time between " Scotland and England, but spent the whole year in " London. He kept up a constant establishment in " London; in Scotland he had no establishment what- " ever. In England Sir Hugh Munro's style of living " was suitable to his rank and fortune; in Scotland he " had only two female servants to take care of his " house. When he contemplated a visit to Scotland " every year for eight years, he intended to take his " own servants with him, and to bring them back to " England, and to use job horses occasionally in Scot- " land. When he did visit Scotland, but after the " period in question, he lived very privately, seeing " little company; and his house was, as it always had " been, out of repair.

" On these grounds I have come to the conclusion " that, Sir Hugh being domiciled in England at the " date of his marriage with Lady Munro, the pursuer " remains illegitimate. My opinion, in point of law, is " the same with that of Lord Gillies and Lord Mac- " kenzie. On the fact, I agree with the majority of the " consulted Judges.

" With regard to the case of M'Douall, it is ad-

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" mitted that the domicile of Colonel M'Douall was in " Scotland. He went to England with his regiment; and " it is laid down in all the books, that a person absent " on military service retains his previous domicile. " Further, I am inclined to think, that the lady whom " he married in England retained her Scotch domicile. " She went with the Colonel to England, and while " there had illegitimate children born to him, whom " he wished to have educated in England. The " Colonel took a house for them at Penrith for that " purpose; and I consider the lady as a part of his " family, and acting as the governess or superintendant " of his children while there. It is laid down in the " Roman law, that men-servants and maid servants " (famuli et ancillæ) follow the domicile of their mas- " ter; and on that account I think this lady, as the " governess of Colonel M'Douall's children, retained " her Scotch domicile. But at the same time, in my " opinion, Mrs. M'Douall's domicile, at the period of " her marriage, is a matter of no consequence what- " ever. On the principle stated in the preceding case " of Munro, I conceive that the moment the marriage " took place Colonel M'Douall's domicile became the " domicile of the lady and her children; and at the " same moment the children had the benefit of the " Scotch law of legitimation."

Lord President.—" Bruce [1] was held domiciled else- " where, although actually on his passage home."

Lord Corehouse.—" Persons going to the East or " West Indies from this country, with the view of " making a fortune, have for the most part a fixed " intention of returning home when their fortune is

[1] Bruce v. Bruce, post, p. 600.

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" made. I know but of one instance of a gentleman " who realized a large fortune, and who had retired " from the public service, but who resolved to end his " days on the banks of the Ganges. There is a series " of decisions, both in our own and the English books, " among the rest that of Bruce, to which your Lordship " alludes, in which persons in the civil service in India, " though they had expressed a decided intention to " return to Britain, and had taken steps for that " purpose, were held to have had an Indian domicile."

Judgment of Court. 15th Nov. 1837.

Thereupon their Lordships, 15th November 1837, pronounced the following interlocutor:—" The Lords " of the First Division having resumed consideration of " the pleadings, and whole procedure in this case, " and heard counsel, and having also considered the " opinions of the consulted Judges, in consequence " thereof, sustain the defences, assoilzie the defenders " from the conclusions of the action, and decern; find " no expenses due to either party."

The pursuer appealed.

The preceding case of the Countess of Dalhousie v. M'Douall and the present case were, successively, heard before the House. Both cases were disposed of by one judgment of their Lordships, and the arguments in both cases on the general questions involved were similar.

Argument for Legitimacy.

Appellant in Munro v. Munro, and Respondent in Countess of Dalhousie v. M'Douall.—Legitimation per subsequens matrimonium is a settled rule of positive law in Scotland. It is of general application, and is so stated without qualification or restriction. According to that rule " the bairnis gottin or born befoir the completing

"of the marriage ar legitimat and maid lauchful, and "thairfore may succede as richteous air to their pa- "rentis."[1] The only requisite to the retroactive operation of the rule is, that the child shall be born of a mother whom the father at the time of procreation and birth might lawfully have married.[2] It confers a status which the child cannot repudiate, for even if the child predecease the marriage of the parents, but leave issue, the right of legitimacy will enure to the grandchild.[3] All parties subject to the law of Scotland, and having the privileges of domiciled Scotchmen, are alike entitled to claim the benefit of this rule. Such is the effect given to it over the greater portion of the civilized world where legitimatio per subsequens matrimonium prevails.[4] As the legitimacy of the child is a right derived through the marriage of the parents, the proper subject of inquiry, in case of doubt, is, what are the rights as regards domicile of the parents so marrying? If the husband have a Scotch domicile, that of the wife must also be held to be Scotch[5]; hence the matrimonial domicile, that is, the domicile of the husband, becomes the true test in such a question.

Argument for Legitimacy.

The matrimonial domicile is not necessarily to be

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[1] Balfour's Practicks, p. 239; Craig, Jus Feud. lib. 2. dieg. 13. s. 16.

[2] Stair, b. iii. tit. 3. s. 42; Erskine, b. i. tit. 6. s. 52; Bankton, b. i. tit. 5. s. 54; Spottiswoode, 27; Vinnius ad Instit. lib. i. tit. 10. s. 13; 3 Pothier, 327; Lord Robertson in Edmonstone v. Edmonstone, 1st June 1816, Fac. Coll.; Lords M'Kenzie and Medwyn in Rose v. Ross, 5 Shaw & Dunlop, 579, (new edition,) and 4 Wilson & Shaw's Appeals, App. p. 59.

[3] 3 Poth. 328; Bank. b. i. tit. 5. s. 58; Lord Meadowbank (citing his notes of Baron Hume's Lectures), 5 S. & D., 594; Voet, b. xxv. tit. 7. s. 7.

[4] 1 Burge, Com. on Foreign and Colonial Laws, p. 101.

[5] Warrender v. Warrender, 2 Shaw & M'Lean, 154; Lord Eldon, cited in Robertson on Personal Succession, 428.

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held as being in the country where the celebration or declaration of the marriage takes place, and therefore the locality of the marriage is not decisive, although, if it be a good marriage in the place of celebration, effect will be given to it elsewhere.[1] On the contrary, it has been held, that although the marriage take place in Scotland, England may be the matrimonial domicile [2]; or, the marriage may be in England, and yet Scotland, as the domicile of the husband, drawing with it that of the wife, be held to be the domicile of the marriage, communicating all the rights and incidents of a Scotch marriage.[3] So far has this principle been sanctioned, that it has been held that the condition of parties marrying in England, and removing into Scotland, and becoming domiciled there, must be governed in all respects by the law of Scotland.[4] On the same ground the cases of Sheddan v. Patrick [5] and the Strathmore Peerage [6] were determined; the matrimonial domicile being respectively in America, and in England, and not in Scotland; and therefore in neither case was the marriage held to be Scotch, so as to entitle the parties, though claiming rights of property in Scotland, to the benefit of the Scotch rule of law. The effect of the matrimonial domicile, as sanctioned by the laws of

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[1] Lord C. Lyndhurst, in Rose v. Ross, 4 Wilson & Shaw, 299; 1 Boullenois, Traité de la Personalité et de la Realité des Loix, 62; King v. Inhabitants of Brampton, 10 East, 282.

[2] Rose v. Ross, ut sup.

[3] Warrender, ut sup.

[4] Hog v. Lashley, 7th June 1792, Bell's Cases, 491, and in Robertson's Per. Suc. 449; Vattel, b. ii. tit. 8. s. 14, p. 175, 4th edit.; Story's Conflict of Laws, ch. vi. s. 193, 194; Edmonstone v. Edmonstone, ut sup.; Warrender, 2 S. & M. 154. 220. 234. 239.

[5] 1st July 1803, Fac. Coll.; Mor. voce Foreign, App. No. 6. Affirmed, 3d March 1808, Lords Journals, xlvi. 464.

[6] 5th March 1821, 4 W. & S. App. n. 5, p. 89.

other countries, is illustrated by the case of Comté du Quesnoy.[1]

The locality of the child's birth in a question of legitimation is unimportant. The status conferred on antenati by the marriage of the parents being the matter for determination, the accident of the place of birth does not exclude a child born illegitimate from having communicated to it a right, which the law, by the force of the subsequent marriage of the parents, imparts generally to children previously begotten by the parents. This principle of the marriage drawing back to a period prior to the birth is one of municipal as well as of international law, and is recognized by legal writers as an universal consequence of the subsequent marriage.[2]

Argument for Legitimacy.

Indelibility of status, whether founded on alienage, or status fixed at birth,—even if that were the law in England,—cannot impede the operation of Scotch law in a case purely Scotch. The doctrine of allegiance does not exclude the attainment of rights in another country by native-born subjects. No doubt, the place of birth de-

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[1] Mr. Burge (vol. 1. p. 106.) thus notices the above case as reported in the *Journal des Principales Audiences du Parlement.* Guessiere, tom. 2. liv. 7. c. 7. "Jeanne Perrone Dumay, a native of Flanders, had a son by "the Comté du Quesnoy, a native of Picardy. After the birth of this "child the parents went to England, and were there married, and the "question was, Whether the son was to be considered legitimate by the "law of France, and entitled to succeed to the property of his deceased "father in that country?—It was decided, on appeal, that he retained his "original status or capacity to become legitimated by the subsequent "marriage of his father and mother, and that the place in which that "marriage took place was material only as regarded the solemnities which "constituted its validity; but with respect to its civil effects, the laws and "customs of the domicile of the contracting parties were alone to be "considered."

[2] Boullenois, p. 62; Merlin, Repertoire, tit. Legitim., sect. 2. s. 11. p 865.

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termines the question of allegiance, and there may be allegiance sub modo to different Crowns; but if the laws of a country not that of the child's birth, but of its paternal domicile, give to it certain privileges, the allegiance due to the land of its nativity does no where enjoin the rejection or denial of the privileges so acquired. Indelibility of status can only mean that the law of England does not recognize legitimation per subsequens matrimonium. The English law may hold by the doctrine of indelibility for its own purposes, without sanctioning in the least the extension of its own rule to other countries. Nay, in England, indelibility has no place as a fixed rule of permanent exclusion; as, for instance, it has always been law in England, though not till recently [1] in Scotland, that a bastard may make a will; also that a bastard may benefit by the rule, as to bastard eigné and mulier puisné. Besides, while it holds that there is an incapacity by one born before actual marriage to take, by descent, land in England, it recognizes, in the same individual, the status of personal legitimacy, as conferred by the subsequent marriage of its parents while domiciled in Scotland; such being the opinion of Judges in Birtwhistle v. Vardill.[2]

Indelible illegitimacy is as repugnant to the law of Scotland as is indissoluble marriage, and there is no authority to support it. When the case of the Strathmore Peerage [3] was decided in this House, Lord Redesdale, with reference to the case of Sheddan v. Patrick [3], and on the supposition that the marriage in it had taken

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[1] 6 W. 4. c. 22.

[2] Opinion of Alexander, C. B., and Judges, in 5 Barn. & Cress. 438; and see also result of that opinion confirmed by opinion of Judges, delivered by Tindal, C. J., on 20th July 1840, Appendix, postea.

[3] Ante, p. 586.

place in Scotland, asked whether that would have legitimated the issue? His Lordship said[1] he thought it was not necessary to go into that question, but added, "But I must say that I cannot conceive how it could have that effect." If his Lordship referred to the mere act of celebration of the marriage, it is difficult to conceive how the celebration taking place in Scotland should create any difference in the result. Assuming the domicile of the husband to have been still in America or England, and that such foreign country was the contemplated domicile in which the contract was to receive implement, although the validity of the marriage, in so far as regarded its form, would be determined by the law of Scotland, its qualities and incidents would be regulated entirely by the law of the domicile; or, in other words, though solemnized in Scotland, it would be deemed an English or an American marriage, as the case might be, and would possess only the qualities and incidents of such marriage. Consequently, legitimation of issue previously born not being an effect allowed to marriage by the laws of these countries, it is clear that there would be as little room for maintaining that the issue was legitimate in such case, as where the solemnization had been within their proper territory; the locus of solemnization, except as to the forms of the contract, being, per se, of no consequence. On the same assumption of the father's domicile being in America, or England, the issue could not by the marriage acquire a Scotch domicile, so as to become subject to the operation of the law of Scotland. Their status would thus necessarily continue to be judged of by the law of the country

[1] 4 W. & S., App. p. 94.

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in which they remained domiciled, and according to that law their illegitimacy was indelible. In this view the observation of the learned Lord is strictly accurate; but its meaning is not, that even if the father had been domiciled in Scotland, and had married there with a view to permanent residence in that country, the case would not in any degree have been different from that which actually occurred in the causes of Sheddan and of Strathmore. No such opinion on an unargued point could have been intended to be given; and it is of importance to remark that Lord Lyndhurst, when moving the judgment in the case of Rose v. Ross, referring to this dictum of Lord Redesdale, while he expresses[1] his concurrence in the observation of that noble and learned Lord, "that it was not necessary" to go into the question of what the effect would have been had the marriage taken place in Scotland, avoids extending that expression of concurrence to the concluding portion of the sentence, "but I must say that I do not conceive how it could "have that effect." The Lord President[2], in delivering his opinion (in Munro v. Munro), has fallen into the mistake of supposing that this remark was Lord Lyndhurst's own observation. His Lordship, after mentioning Lord Lyndhurst's quotation from Lord Redesdale's speech, proceeds, "Then Lord Lyndhurst himself adds, "'I agree with the noble and learned Lord. I do not "'think it necessary, but I must say I do not conceive "'how it could have that effect.'" Now, in truth, Lord Lyndhurst pauses in his quotation, to express his agreement with the opinion, that it was not necessary to decide the question, and then goes on with the quo-

[1] 4 W. & S. 296–7.

[2] Ante, p. 554.

tation, "but I must say," &c., evincing in the most marked manner that the expression of his concurrence was limited to the opinion, that it was not necessary to decide the question. This is perfectly obvious from the passage referred to, which is as follows[1]: "These are the "observations the noble and learned Lord makes, 'I "'do not enter into the question whether, if this mar-"'riage had been celebrated in Scotland it might have "'had the effect of legitimating the child, because I "'think it is not necessary;'—I agree with the noble "and learned Lord—I do not think it necessary,—'but "'I must say that I cannot conceive how it could have "'that effect.'" His Lordship adds no concurrence to this part of the opinion.

This is a question juris gentium, and the opinions of foreign jurists are conformable with those of the majority of the Judges on the abstract point of legitimation.[2] Boullenois[3], in the case of foreign parties coming to France, and becoming naturalized, equivalent to gaining a domicile in that country, says, that whether the marriage takes place before, or after the migration of the family into France, the children by the force of naturalization become legitimate in France. By naturalization "ils sont rendus participants de tous les "droits ordinaires et de droit commun de la nation," and legitimation per subsequens matrimonium being "un droit admis dans nos mœurs par la jurisprudence," it is one "dont les etrangers naturalizés doivent jouir "ainsi que touts les autres sujets du roi."

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[1] 4 W. & S. 297.

[2] Huber. de confl. leg., lib. i. tit. 3. s. 13; Story, c. 4. s. 57, citing Boullen.; Pothier, Cout. d'Orleans, c. 1. art. 1. s. 12 & 13; Story, c. 4. s. 64, 65, 69, 70; ibid. c. 7, s. 224; ibid. c. 2. s. 22.

[3] 1 Boullen., 62.

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Besides, the Scotch Court is bound to enforce the lex fori rei sitæ, a question of succession to Scotch heritage being at issue.[1]

Sir F. Pollock (in M'Douall's case) objected to this argument, — that a question of personal status, and purely consistorial, was alone raised by summons.

The Lord Advocate, in answer. — The original summons on which a record was made up contains conclusions as to the right of the party as heir of entail, and the appellant in her case in the Court below (p. 23, Appellant's Case) asks the Court to find "that the succession to the entailed estates of Bankton, &c. has opened to her."

Sir F. Pollock. — The pursuer may, under a proper form of action, make out his right to the Scotch estate by virtue of some municipal rule affecting heritage in Scotland, and nevertheless fail now in establishing general legitimacy. As in Birtwhistle v. Vardill there was general legitimacy with a particular incapacity to take, so here, it is contended, that there is general illegitimacy coupled, it may be, with a particular capacity to take. [*Lord Chancellor.* — The Court only dispose of the conclusions as to the pursuer being the legitimate son of his father.]

Mr. Pemberton and *Sir W. Follett* (in Munro v. Munro) adverted to the conclusions of the summons, as differing from those in the preceding case, and as asking declaratory findings on matters of fact decisive of the appellant's right to succeed. These facts being so established, there is the most conclusive authority afforded by the analogy of Birtwhistle v. Vardill that

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[1] 1 Burge. 109, 110.

that the particular law of the country where the land is situated must prevail.

Supposing the place of birth had been important, then (in M'Douall's case) the period of conception would be important, as fixing the place and time to which the subsequent marriage would draw back.[1] Tempus nativitatis referred to in the adverse authorities is not put in opposition to time of procreation; for where it is for the benefit of the child, its status beyond the period of birth is looked to.

Argument for Legitimacy.

The domicile of the mother anterior to the marriage was also irrelevant. Even if it were otherwise, (in M'Douall's case) the domicile of the mother being Scotch was, according to the adverse argument, communicated to the child, and thus the child's domicile of birth was transferred, as that of a minor may be, by consent of the mother, to Scotland.[2]

The domicile of the husband being thus the important question, the state of the fact clearly supports the legitimacy, the domicile of Scottish origin continuing in both cases.[3] There was absence from Scotland without the intention of abandoning the old, or acquiring a new domicile. There was no departure sine animo revertendi, "sans esprit de retours." Where there is merely residence out of Scotland, whether from public duty, or temporary detention, the animus remanendi does not arise. The cases put adversely are those of parties giving up a Scotch domicile of origin

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[1] Cod. lib. v. tit. 27. l. 11; Dig. lib. 6. tit. 5. c. 5. s. 2; Ersk. 1. 6. 52; Erskine's Principles, p. 505; Bankton, b. 1. t. 5. § 3. n. 57. and b. 3. t. 3. § 4. n. 97; rule in (Le Marchant's) Gardner Peerage; 1 Burge, 94, 95, and authorities there cited.

[2] Potinger v. Wightman, 3 Meriv. 67.

[3] Lord Alvanley, M. R., in Sommerville v. Sommerville, 5 Vesey, 754.

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and acquiring by choice a new domicile. The mistake of the majority of the Judges (in Munro v. Munro) was, in supposing that the same circumstances are necessary in retaining, as in gaining a domicile; residence is not necessary to retain a domicile, so long as there is an intention to return; a person may travel for any length of time without losing his domicile. But residence, however short, and intention, are necessary to acquire a new domicile; there must be "le concours de la volonté " et du fait," and it cannot be acquired by residence, however long, without that intention.[1]

Argument against Legitimacy.

The Respondent in Munro v. Munro, and Appellant in Countess of Dalhousie v. M'Douall.—Legitimation per subsequens matrimonium being a rule of questionable policy, it ought not to be extended so as to reach circumstances which have never yet been made subject to its application, but ought to be strictly limited to cases where the children claiming legitimacy are the previous offspring born in Scotland, of Scotch parties subsequently marrying in that country. The true principle of the law of Scotland, in reference to the rule in question, renders it impossible to apply that rule, where the material incidents relative to the connexion between the parents of the child sought to be legitimated have taken place in England. The admitted exceptions, where the parties are not free to marry at the birth of the child, or where the parties are within forbidden

[1] 1 Burge, 41, citing Pothier, Introd. Gen. aux Cout. p. 4; D'Argentré Cout. art. 449; Toullier, liv. 1. tit. iii. n. 371; Dig. lib. 50. tit. 1. c. 20. See also 1 Burge, 54, citing Voet, lib. 5. t. 1. de Jud., § 98; Zanger. de Except., par. 2. c. 1. n. 12. et seq.; Menoch. de arbit. Jud., lib. 2. cent. 1. cas. 86. n. 5. et seq.; Resp. Jurisc. Holland, par. 3. v. 2. cons. 317.

degrees, or, till recently [1], the existence of an intervening marriage, prove the rule not to be of universal application.

The rule or custom of legitimation by subsequent marriage is neither of very ancient origin in Scotland, nor is there any case to be found on the records of the Commissary Court in that country, where a child born in England of parents afterwards married in England was held legitimate.

Argument against Legitimacy.

The status of the child is the proper subject of inquiry; the right, or privilége, or disability of birth, whatever it may be, is not that of the parents, and cannot be altered by any act of volition on their part. The domicile of the parents, whether at the birth or marriage, cannot affect the position of the child, which is fixed by the law of the country where it was born. The application of the law of domicile is attended with difficulty. Status may be held to be governed by domicile absolutely, or by the domicile of the party whose status is disputed at particular periods of his life. Questions as to the legitimacy or illegitimacy of an individual should be resolved by the rule that the status, once fixed, shall not be subject to capricious change. If legitimacy should be capable of being acquired, lost, and regained by every change of residence, the child's actual condition would be ascertained with difficulty, and its position remain doubtful. The rule of determining status by the law of the place of birth is of easy and certain application. There is no reason for preferring the matrimonial domicile. It may operate a change of the original domicile of the child,

[1] Kerr v. Martin, 6th March 1840, F. C.

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or it may not. If it do not so operate, it can have no effect on status; if it do, then future changes should have just as much influence. Legitimation of offspring is wholly independent of intention. If it were dependent on the wish of the parents at the time of the marriage, the fact of the marriage being in England would seem to prove that legitimation was not the object. No English child born out of marriage can be legitimate; if there be a subsequent English marriage, no legitimation can be produced, and so the legitimation of English-born bastards by subsequent marriage of the parents is beyond the presumption of Scotch law. Two certain tests in the application of legitimation by subsequent marriage would be afforded, either by resorting to the law of the country where the marriage actually takes place, or the law of the country where the child is born, and all conflict by the unequal application of the rule to native-born subjects of England would be obviated. The domicile of the father at the marriage, or matrimonial domicile, can only be preferable to the lex loci contractus of the marriage, as it affects the patrimonial rights and interests of the contracting parties, and the effect of the marriage upon the status of antenati is not necessarily dependent on the domicile of the father.[1] But clearly, the domicile of the mother of an illegitimate child, drawing along with it the domicile of the offspring, is exclusive of the application of a rule of law which is repugnant to the lex domicilii of both mother and child.

By international law, as the domicile of nativity must govern, the domicile of the child's birth forms the only

[1] Story, ch. 6. s. 125; Huber. lib. iii. 9; Hertius de Coll. Leg. s. 10.

proper subject of inquiry. For the qualities impressed upon a party by origin follow him every where.[1] The passages implying a contrary position, cited from Boullenois and Hertius, in the opinion of one of the Judges (in Munro v. Munro)[2] do not relate to universal status, but the capacity for particular acts.

The status of the child in both these cases was that of a native-born subject of England. So far as regards Scotland they are aliens to whom the law of England permanently became attached from the period of birth.[3] There cannot be a double allegiance; and the disabilities or burdens imposed by native allegiance cannot be removed or transferred by virtue of the law of another country, the subjects of which are not exposed to corresponding disabilities or burdens. The question must be viewed now, just as if it had occurred before the union of the Crowns, or in the reign of Elizabeth. Indelibility of status as regards bastardy being an admitted principle in England, the Scotch law cannot reach the case of children born under the jurisdiction of England. The principle which makes the status of a child to be fixed by the place of its birth, and the law of the country then affecting it, as to its condition of legitimacy or illegitimacy, and as to its capacity for legitimation, has been recognized in three successive cases before the House, viz. Sheddan v. Patrick, the Strathmore Peerage, and Rose v. Ross. Although it has been said that the precise point was not necessary to be de-

[1] Bartholus ad cunctos populos Cod. de Sanct. Trin.; Louet Arrets, Nov. c. 42; Huber. de confl. leg., prel. pars 2. l. 1. tit. 3; Bouhier, Observ. sur la Cout. de Bourg. p. 418, s. 6; Boullen. Tr. de la Pers. 10; ibid. i. 53; Merlin, Repert. voce Legitim; Story, c. 4. s. 93; 1 Burge, 3.

[2] Lord Corchouse, see ante, p. 571.

[3] Blackst. b. i. tit. 16. s. 2. p. 454.

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cided, still the opinions then expressed claim that consideration, which the conclusiveness of the reasoning contained in them entitles them to. In the Strathmore Peerage, Lord Redesdale held, that where a child is born in a country where the illegitimacy is indelible, that in any country would have the effect of rendering such child illegitimate. In the case of Rose v. Ross, Lord Lyndhurst, Chancellor, in proposing judgment, said [1], "It is sufficient that the child be born in a "country where the illegitimacy is indelible; that in "any country whatever would have the effect of ren- "dering the child illegitimate. I collect that opinion "to have been expressed in the case of Sheddan v. "Patrick. I collect this also from the judgment of "Lord Redesdale in the Strathmore Peerage, where "the noble and learned Lord commented upon the "case of Sheddan v. Patrick; and I believe at the time "when Sheddan v. Patrick was decided in this House "that noble and learned Lord was a member of it." And again, "Taking the whole of the judgment of the "noble Lord together, I should conclude that he was "of opinion that if the child was illegitimate at the "time of his birth, and according to the law of the "country where it was born, that character was stamped "upon it indelibly. No subsequent marriage could "render him legitimate." Lord Eldon apparently concurred, and Lord Wynford coincided, with Lord Lyndhurst.

And if the place of birth be so important, the alleged conception of the child in a country that does sanction legitimation by a subsequent marriage would not avail

[1] 4 W. & S. 296.

the party. For the place of conception is immaterial, except in cases of liberty or slavery; and there is no case to show that the fact of procreation in England of a child born abroad affects its status. The best authorities show, that the tempus nativitatis, and not of conception, is looked to[1]; and that a woman being pregnant in England, yet if her child be born abroad it is an alien.[2]

In ascertaining a disputed domicile, the admission that a party may be absent from his native country on public duty, or on foreign travel, is not conclusive against the possibility of the fact so being, that the party going abroad,—not having had any fixed house or residence, but settling afterwards for years in the land of his new residence and choice,—may be presumed as intending to acquire, as he has in fact established, a new abode or domicile. It is not essential to the constituting a domicile that there shall be a positive resolution or intention to abandon for life the old, and to live constantly in the new residence. The acquiring a new domicile in England by constant and fixed residence for years there, and by being occupied in business or other pursuits, which can alone be prosecuted as an occupation in the new domicile, is perfectly compatible with the occasional exercise, by correspondence or otherwise, of the rights of proprietorship in another country, which has been long abandoned as a domicile. More especially is this true, where the new place of abode has become the principal and only residence, while a house in the old domicile is

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[1] Sanchez, de Matr. obs. 141, p. 582; 6 Christinæus, Decis. 82; Dig. lib. i. tit. 5. l. 7.; lib. xxv. t. 4. l. 1. § 1.; lib. xxxv. t. 2. l. 9. § 1.; Warnkœnig, Juris Rom. privati, Com. 178. Cod. de Natural, lib. 5. t. 7. l. 10.; Novel. 12. c. 4. Novel. 89. c. 8.; Stryk. Diss. c. 2. § 51.; Merlin, tit. Legitim., sec. 2. § 3.

[2] 1 Ventr. 427. (Lord Hale's Arg.); Comyn, Dig. vo. Alien.

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merely fitted up for a short and uncertain visit. The purpose which actually may detain the party in his new residence may not have emerged at the time of leaving the former abode, and yet that purpose may become a settled plan, put all intention of returning out of the question, and lead to a fixed domicile, adopted by the free will of the party. Sir William Scott in the case of the Harmony [1] said, "If the purpose be of such a nature "that it may probably, and does actually, detain the "person for a great length of time, I cannot but "think that a general residence might grow upon the "special purpose." The mere "floating intention" to return is not sufficient in any case, and, in a question of evidence, it would be held to be counterbalanced by proof of actual residence in the new domicile by a party capable and free to act for himself, and whose actions are the best interpreters of his intention.'

Judgment deferred.

The following opinions were delivered in the cases of Munro v. Munro, and Countess of Dalhousie v. M'Douall, which were put down for judgment together:—

Ld. Chancellor's Speech.

LORD CHANCELLOR.—My Lords. In these cases the first point to be considered, is the rule of law in Scot-

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1 4 Domat. 424; Code Civil, § 102–3; Bruce v. Bruce, 15th April 1790, (affirmed) Bell's Ca. 519, Mor. 4617, and in Rob. Pers. Suc. 119. 183; Ommaney v. Douglas, March 1796, ibid. 152. 470, 471; S. C. in 6 Bro. Ca. in Parl. 550; Bempde v. Johnstone, and Graham v. Johnstone, (Annandale case,) 3 Ves. 198; Lord Stowell in case of Harmony, 2 Robinson, Adm. Rep. 322; Stanley v. Berners, 3 Hagg. 476–7; Munro v. Douglas, 5 Madd. 379; Voet, ad Pand. lib. v. t. 1. l. 98; Putnam v. Johnstone, 10 Massachusset Reps. 501; Story, c. 3. s. 46. p. 45.; Dig. lib. l. tit. 1. l. 4.; Balfour v. Scott, 6 Bro. Ca. in Parl. 550.

Note.—See further, as to the application of Lord Alvanley's rule in regard to domicile, the recent case at common law of Attorney General v. Dunn, 6 Mees. & Wels. 511; and De Boneval v. De Boneval, 1 Curteis, 856, in the Ecclesiastical Court.

land as to the effect of a subsequent marriage of a domiciled Scotchman upon the issue of the parties born before the marriage, when the birth of such issue, and the ceremony of marriage, took place out of Scotland. Not that all those circumstances occur in the case of Lady Dalhousie v. M'Douall, but as they do in the case of Munro v. Munro, it will be convenient to consider the whole of the proposition.

To whatever principle the law of legitimation per subsequens matrimonium be attributed, there can be no doubt of the generality of the rule, where the parents were capable of contracting marriage at the birth or conception of the child. Wherever, therefore, a marriage follows the birth of children procreated of the parties to the marriage, the requisites concur which are required by the terms in which the rule is laid down, —assuming always that the circumstances are such as to bring the case within the operation of the law of Scotland. And, as the laws of every country generally affect all those who have their domicile in such country, it would appear, that in order to bring any particular case within the rule of the law of Scotland, it would only be necessary to show that the domicile of the parents was Scotch.

This consideration is of much importance in a case in which it is said that no precedent can be found in which the particular facts of this case occurred; because if the case falls within the terms of the general rule, such general rule must govern it, unless it can be shown that there is principle and authority for making it an exception to the general rule, and withdrawing it from its operation.

The two circumstances relied upon for that purpose

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are, first, that the child was born out of Scotland, and, secondly, that the marriage took place out of Scotland. If it should appear that neither of these circumstances would, by itself, take the case out of the general rule, then, the union of the two cannot have that effect.

It was hardly contended that the country in which the marriage took place was material. It is considered as immaterial by the writers upon civil law. In Comté de Quesnoy's case, the marriage, although it took place in England, conferred legitimacy on a child whose domicile of origin was in France.[1] The law of the country where the marriage is celebrated ascertains its validity. The law of the country of the domicile regulates its civil consequences.

But, if the place of marriage be not material, still less can the place of the birth be so. The law of Scotland assumes that what in that country is considered equivalent to a marriage took place before the birth or conception of the child. If that be assumed, how can it be material in what country the child was born? This assumption is formed for the purpose of legitimatizing the issue. Why is it to be abandoned when it is peculiarly necessary for that purpose? If a domiciled Scotchman be in the habit, for business or pleasure, of passing part of his time across the border, and some of his children are born within and some without the limits of Scotland, — can it be the law that a subsequent marriage should legitimatize some only of his children? It has been assumed, in argument, that any of such children born in a country which allowed legitimation per subsequens matrimonium would be legi-

[1] 1 Burge, 106.

timate if born in Scotland, but not legitimate if born in England, or in any other country which did not recognize such legitimation.

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This argument is founded upon the supposed indelibility of bastardy, and seems to have its origin in some expressions of very learned persons; but it appears to me that this idea, as applicable to a Scotch marriage, has arisen from those learned persons having used expressions applicable to English law upon a question of purely Scotch law. If English parents have a child born in another country, could the legitimacy of such child in England be affected by any law of such country? The effect of a Scotch marriage must be judged of with reference to Scotch law, and that law not only does not admit the doctrine of the indelibility of bastardy, but, on the contrary, holds that no bastardy is indelible unless the parents were at the time of the birth incapable of marrying. If, therefore, the law of England be imported into the consideration of the question, the effect of the Scotch marriage is judged of, not by the law of Scotland, but by the law of England.

In this view of the law of Scotland all the learned Judges of the Court of Session concurred, with the single exception of the Lord President, who founded his dissent upon this rule of the law of England as to the indelibility of bastardy, and upon expressions of English lawyers; but he adds, "In the case of Ross I "stated in my opinion that I would not take the law "from such an extreme case as that of a woman taken "suddenly, and perhaps prematurely, in labour, whilst "travelling in England with or without her paramour, "and brought to bed of a bastard there, and then "returning with it on her recovery to Scotland. That

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" is an extreme case, and what might be the law as to " it we must endeavour to settle when the case occurs.[1] " Beyond all doubt a child so born would be affected with indelible bastardy in England, and if that is to regulate his status in Scotland the peculiar circumstances referred to would not make an exception in his favour.

For these reasons, and upon these authorities, if the question were to be decided upon the general principles of the civil law, or upon the law as established in Scotland, there would not, I think, be any difficulty in coming to the conclusion that the child of a Scotchman, though born in England, would become legitimate for all civil purposes in Scotland by a subsequent marriage of the parents in England, if the domicile of the father was and continued throughout to be Scotch. It remains to be inquired whether there are any authorities against such a conclusion.

In Sheddan v. Patrick[2] the question did not arise, because the father was domiciled in America. In that case, therefore, there was wanting that only circumstance, upon which rests the title of the child to claim the benefit of the law of Scotland.

In the Strathmore Peerage case[3], if it was not assumed that the domicile of the father was English, it certainly does not appear to have been proved to be Scotch,—Lord Eldon saying the domicile was principally in England; but the decision seems to have turned upon this, that the claim was to a British peerage. Whatever expressions may have fallen from Lord Redesdale, —for none can be found as coming from Lord Eldon,—

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[1] Ante, p. 559.

[2] 1st July 1803, Mor. ut ante.

[3] 4 W. & S. App. p. 89.

the decision of that case cannot be cited as an authority in a case respecting Scotch property, in which the domicile of the father was Scotch.

In Rose v. Ross[1] the domicile of the father was English. Lord Lyndhurst stated that as the ground of his opinion; and although the marriage was in Scotland, it was a marriage of persons having an English domicile, and coming into Scotland for the purpose of the marriage only. If that case proves any thing bearing upon the present, it is, that it is not the place of the marriage, but the domicile of the parties married, which regulates the civil consequences of the marriage.

For the same purpose, and for that only, the case of Warrender v. Warrender[2] has application to the present, because in that case it was assumed, and I think correctly, that for civil purposes in Scotland, a marriage in England of a domiciled Scotchman was to be considered as a Scotch marriage.

These decisions, therefore, do not establish any principle or lay down any rule inconsistent with the proposition, that the child of a Scotchman, though born in England, becomes legitimate for all civil purposes in Scotland by the subsequent marriage of the parents in England, if the domicile of the father was, and continued throughout to be Scotch.

If this be the rule of law in Scotland, it embraces the case of Munro v. Munro, and therefore includes that of Lady Dalhousie v. M'Douall, and renders it unnecessary to consider some of the minor points discussed in the latter case, such as, whether the mother had or

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[1] 16th July 1830, 4 W. & S. 289.

[2] Ante, p. 585.

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had not lost her Scotch domicile? and, whether the fact of the conception having been in Scotland, might not of itself have led to a decision in favour of the legitimacy.

In both cases the question of fact remains to be considered, namely, what was the domicile of the father? In both cases, the domicile of the father was originally Scotch; and the question is,—whether he had at the time of the marriage lost this domicile of origin?—Questions of domicile are frequently attended with great difficulty; and as the circumstances which give rise to such questions are necessarily very various, it is of the utmost importance, not to depart from any principles which have been established relative to such questions, particularly if such principles be adopted, not only by the laws of England, but generally, by the laws of other countries. It is, I conceive, one of those principles, that the domicile of origin must prevail, until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicile, and acquiring another as his sole domicile. Such, after the fullest consideration of the authorities, was the principle laid down by Lord Alvanley in Sommerville v. Sommerville [1], and from which I see no reason for dissenting. So firmly, indeed, did the civil law consider the domicile of origin to adhere, that it holds that if it be actually abandoned, and a new domicile acquired, but that again abandoned, and no new one acquired in its place, the domicile of origin revives. To effect this abandonment of the domicile of origin, and substitute another in its place, it required

[1] 5 Ves. 787.

" le concours de la volonté et du fait," " animo et facto ;" that is, by actual residence in the place, with the intention that the place then chosen should be the principal and permanent residence, " larem rerumque ac " fortunarum suarum." There must be residence and intention ; residence alone has no effect per se, although it may be most important as a ground from which to infer intention. Mr. Burge, in his excellent work [1], cites many authorities from the civilians to establish this proposition. " It is not," he says, " by purchasing and " occupying a house or furnishing it, or vesting a part " of his capital there, nor by residence alone, but it " must be residence with the intention that it should be " permanent." In all questions depending upon intention, difficulties may arise in coming to a conclusion upon the facts of any particular case, but those difficulties will be much diminished, by keeping steadily in view the principle which ought to guide the decision as to the application of the facts.

If, then, it be the rule of the law of Scotland that the domicile of origin must prevail, unless it be proved that the party has acquired another by residence, coupled with an intention of making that his sole residence, and abandoning his domicile of origin, I cannot think that there will be much difficulty in coming to a satisfactory conclusion, upon examining the evidence in these cases, with reference to this rule. In the case of Lady Dalhousie v. M'Douall there is really no difficulty at all; there is nothing in that case which can raise a question as to the father having abandoned the Scotch domicile. In the case of Munro v. Munro the difficulty is appa-

[1] 1 Burge, For. & Col. Law, 54.

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rently greater, because there was a residence in England of many years; but the only period to be considered is from the father's quitting Scotland in 1794 to the time of the marriage in 1801. There was a sufficient reason, independently of any intention of changing his domicile, for his leaving Scotland in 1794; his family house was not in a fit state for residence, and he had failed in effecting a proposed arrangement with his mother, by which he wished to obtain for his own use the house in which she lived. There is no ground for supposing that he, at that time, intended to abandon Scotland; the reverse is proved by the first letter he wrote after his arrival in London (3d September 1794), in which he gives directions about keeping some land in grass,—"the only farming" he takes "pleasure in;" and about clothes presses for his dressing-room at Fowlis. In November 1794 he accepted the office of deputy lieutenant for Ross-shire. In 1795 (9th February) he gave directions for the preparation of a will in the Scotch form; and in a letter of the 14th June he states his intention of being in Ross-shire at the end of the month; which, by subsequent letters, it appears he was prevented doing by an attack of illness. He, in a letter of 1st September 1795, expresses his regret at having been prevented going to Scotland; and in a letter of the 14th September he says he shall be there early next summer; and in a letter of the 18th he says he shall, after Whitsunday next, take the management of his estate entirely into his own hands. Similar expressions occur in many letters of 1795 and 1796; he says, "I "shall be in Ross-shire next year,"—"and should un- "foreseen events oblige me to defer my journey" &c.; and in a letter of the 27th October he directs the payment

in kind of hens and eggs to be continued, saying, " when at home I shall have occasion for them." Many letters in 1797 speak of his intended journey to Scotland, and in one of the 25th November 1797 he says, " My journey to Ross-shire, so long and often retarded " by circumstances which I could not foresee, is now, " by the advice of my friends there, given up till next " summer."

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It appears that before this time, that is, in 1794 or 1795, the connexion between the appellant's father and mother had been formed, and she was born in 1796, which may well account for the continued postponement of his journey to Scotland; but he does not appear ever to have abandoned the intention, for in a letter of the 28th March 1798, to his factor in Scotland, he says that he expects very soon to be able to write to another person the time at which he proposed himself the pleasure of seeing him. In 1799, 1800, and 1801 he gave directions for the fitting up of his family residence in Scotland, and for that purpose sends large quantities of furniture from London. In September 1801 he marries the appellant's mother, and by a letter of the same year speaks of his intention of coming to Scotland. In a letter of the 25th April 1802 he says, " I have resolved to be at " Fowlis as soon as the house, which is painting and " papering, can be inhabited; but as these things do " not depend on my wishes, I cannot fix positively any " time. I hope to be in Edinburgh in July or August." He accordingly went to Scotland in that year with his family, and resided in his family house at Fowlis, and there continued till 1808; the appellant's mother having died there in 1803.

Lord Corehouse, who entered much into this part of

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the case, in commenting upon the correspondence, asks[1], "Do these expressions, when read in connexion with "the context, import that he was to return to Scotland "with a view to settle permanently there, and to live at "the castle of Fowlis during the rest of his life? The "very reverse is manifest." And then he observes upon expressions used indicating that the promised visit to Scotland would be short. Those observations would be highly important if the question was, whether by his subsequent residence in Scotland he had acquired a new domicile there; but they do not appear to me to touch the question, whether he had abandoned his domicile of origin in that country; a question which can only be affected by evidence of an intention to do so. If he ever formed such an intention, to what period is the adopting that resolution to be referred? To be of any effect upon the present question it should be at some time prior to September 1801, the date of the marriage.

That he took a lease of the house in Gloucester Place, and formed an establishment there, has been much relied upon, and in the absence of better evidence of intention as to his future domicile, that might be important as affording evidence of such intention; but cannot be of any avail, when, from the correspondence, the best means are afforded of ascertaining what his real intentions were. The having a house and establishment in London is perfectly consistent with a domicile in Scotland. This fact existed in Sommerville v. Sommerville and Warrender v. Warrender. Taking, therefore, the rule of law as to the domicile of origin to be what I have before stated, and applying the evidence to that rule, I do not

[1] Ante, pp. 577, 578.

find it proved that the appellant's father acquired a new domicile in England, with the intention of making that his sole residence, and abandoning his domicile of origin in Scotland.

If that be a correct conclusion from the evidence, it follows that the appellant in Munro v. Munro, being the child of a domiciled Scotchman, had, at the moment of her birth, a capacity of being legitimatized by the subsequent marriage of her parents for all civil purposes in Scotland, and that she accordingly, by their subsequent marriage in 1801, became legitimate, and as such capable of succeeding to the property in question.

Ld. Chancellor's Speech.

The consequences of the opinions I have expressed are, that I propose that your Lordships do affirm the interlocutor appealed from in Lady Dalhousie v. M'Douall, with costs; and reverse the interlocutor appealed from in Munro v. Munro, and remit that cause back to the Court of Session, with a declaration that the pursuer (appellant) is the lawful daughter of Sir Hugh Munro.

Ld. Brougham's Speech.

LORD BROUGHAM.—My Lords, I had not the good fortune to be present when these two cases were argued, and therefore were the question one of an ordinary kind I should not have expressed any opinion whatever. Nevertheless, from the part I have so frequently taken in cases of this kind, — a reference to which has been made in disposing of the present cases, both in the Court below and by my noble and learned friend in delivering judgment here,—I think it right that I should not suffer the decision of the House to be come to without saying a few words.

There are two questions for the consideration of your

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Lordships, as there were for the consideration of the Court below. The first is,—Whether, supposing the domicile of the parties at the time of the marriage to have been in Scotland, that marriage had the effect of legitimatizing issue born in England before the marriage, with reference to the question raised before the Scotch Court, as to the title of the party to be considered an heiress of tailzie to a Scotch heritable estate, quasi an estate tail, as one of the children of the heir of entail then in possession of that estate? The next question is,— Whether the domicile was English or Scotch?

On the first of these two questions, it is no doubt fit to observe, that it is at present for the first time undergoing decision. It has frequently been mooted in argument by text writers,—in discussions at the bar,—and occasionally by learned Judges arguing on the bench; but up to this time no decision has ever been made, either in Scotland or here, upon the point, namely, whether legitimization is effected by the subsequent marriage of the parents of a child born out of wedlock, that child being born in a country where no such law holds,— but the parties although living in that country, yet of course, at the time of the marriage, domiciled in Scotland, where the question arises touching the succession to real estates in Scotland. The question is now to be decided for the first time one way, having been disposed of in Scotland, upon the fact only, the other way; because as I shall presently observe, and it is with great satisfaction I state it, the great majority of the learned Judges in the Court below who dealt with the question of law came to the same conclusion as that to which I trust your Lordships, on the recommendation

of my noble and learned friend, are now about to come; but they did not feel themselves called upon to decide the case on that point. It is needless to add, that this decision does not run counter to the whole of the previous authorities, but, as far as any decision approaches the present case, all the weight of authority is in favour of the judgment, for the current of authority sets in clearly in that direction.

I have now to remind your Lordships of the weight of judicial authority in the Court below upon this question, in order that it may be by no means supposed, that because your Lordships are reversing the judgment, you are laying down principles of law contrary to the opinion of the learned Judges, from whose decision the appeal comes.

The five learned Judges who formed the majority of the consulted Judges, and whose decision you are about to reverse,—but to reverse on the ground of fact,—those five learned Judges in the first part of their statement seem rather to save the question. They seem not to dispose of the question, but give afterwards a very plain opinion in the affirmative. They state in the first place, on the supposition of Sir Hugh being a domiciled Scotchman: "Even upon this supposition, "however, we think the pursuer must have had diffi- "culties to encounter which have not yet been resolved "by any clear authority in the law of either country. "Some of the data in the ultimate decision of the "cases of Sheddan, 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. But holding as we do, that the domicile

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" of the husband was also English, we humbly con-
" ceive that there is no authority on which the claim
" of the pursuer can be supported."[1] Had it stopped there, I should have said as I did some time ago, that their Lordships being of opinion that the fact of the Scotch domicile was not established, they had no occasion to dispose of the question of law at all, as the question of law did not arise unless the fact of the Scotch domicile was proved. But what follows seems clearly to intimate that those learned Judges were of the same opinion upon the point of law with the minority, although they differed from them in point of fact; for they say[2]: " The law therefore, under which
" they themselves intended to live as married persons,
" may very well be allowed to settle the extent of their
" rights and duties as with each other, but cannot affect
" the condition of the children previously born, which
" we think must be determined by the law of the coun-
" try, where the parents were domiciled at the birth
" and the marriage. If the domicile were not the
" same for both parents at these two periods, we should
" hold that that of the father at the time of the mar-
" riage should give the rule; but as they were the
" same in this case, the question does not arise."
Agreeing clearly upon the point of law with the majority of the learned Judges, although they differed in point of fact, the Judges of the First Division all agreed, with the exception of the learned Lord President. Lord Corehouse, who differed upon the question of fact, delivered a very clear judgment upon the point of law; but, with the exception of the learned

[1] Ante, p. 503.

[2] Page 504.

Lord President, all the Judges of the Court below agreed that the subsequent marriage of the parents would render legitimate the issue before marriage, provided the parties were domiciled at the time of the marriage in a country, the law of which recognizes legitimation per subsequens matrimonium.

The learned Lord President has given a very able and, in my opinion, striking judgment; striking rather from that manly straightforwardness which characterizes all the judgments of that right honourable and learned Judge. He has applied himself to the question, and has entered into an argument which had a very considerable effect on my mind when I first came to read it; and if I had not looked very carefully into the authorities to which he refers, I should have found great difficulty in differing from him in the conclusion at which he arrives. But, when I look at those cases which have been shortly referred to by my noble and learned friend, Sheddan v. Patrick, the Strathmore Peerage case, and Rose v. Ross, I really cannot see how they are to be taken, as laying down the rule upon which the Lord President founded his judgment; namely, a status indelible through life being affixed upon the party by the law of the country where that party was born, and affixing that character upon him even if domiciled in Scotland; the law of England being against legitimation by subsequent marriage. My noble and learned friend (Lord Lyndhurst), who unfortunately is not now present, who bore a principal part in the last of those cases, Rose v. Ross, expressly saves that question with respect to the domicile, and says that he gives no opinion upon that part of the case; and the result of what he says plainly is to show that

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he did not mean to say how it would have been if the domicile had been Scotch, the domicile in that case plainly being English; and the question, therefore, no more arose there than it would have arisen here had the fact of a Scotch domicile failed the pursuer; but the majority of the consulted Judges were agreed, in the early part of their opinion, that it did not arise at all. I am, upon the whole, of opinion that the case is not governed by the authority of those cases, or the dicta in these cases. It is chiefly, perhaps, what is said by Lord Redesdale, — which may not be very accurately reported, and which after all is only a dictum, and not necessary for the decision of the case, — it is chiefly on one or two dicta or supposed dicta of that noble and most learned Judge, — to whose dicta the greatest possible respect is due, — and not certainly upon any thing decided, that the Lord President founds his arguments.

My Lords, with respect to the case of Warrender v. Warrender [1], undoubtedly, as far as that case goes, it is in favour of the present decision, because the domicile of the parties there was clearly held to be Scotch. An attempt was made to show that Lady Warrender's domicile was not Scotch, with a view to another branch of the argument; but we all agreed here that her domicile was the domicile of her husband, and that both parties had a Scotch domicile, and we held the marriage in terms, and certainly in substance, to be in the nature of a Scotch marriage, although locally contracted in England. But although the case of Warrender v. Warrender might have rested entirely, and in my opinion safely, upon that position of the parties having

[1] Ante, p. 585.

a Scotch domicile, yet that case, properly speaking, did not depend entirely upon the Scotch domicile as regarded the nature of the marriage whether dissoluble or indissoluble. Upon the Scotch domicile, as regarded the jurisdiction of the Court, no doubt it must have rested; in order to give jurisdiction there must have been a domicile, although it might have been only temporary; but as regarded the domicile at the time of the marriage, that case did not rest entirely, or any thing like entirely, on the domicile of the parties being Scotch, or on its being, if you will, a Scotch marriage; because both myself and my noble and learned friend (Lord Lyndhurst), who concurred in that decision with me, clearly held, that although the parties had been domiciled in England,—that although it had been precisely Lolly's case, namely, an English marriage between English parties who never before in their lives had crossed the Tweed,—and although in that case, by the rule in Lolly's case, a divorce in Scotland of that marriage would have been impotent to dissolve it for all English purposes, including the right of the parties after the supposed dissolution to re-marry, for they would have been guilty of bigamy in England,—yet that in Scotland, for Scotch purposes, the divorce would have been valid to dissolve, to break the vinculum of the English marriage, as far as regarded all Scotch rights and all Scotch considerations. That was the clear opinion both of Lord Lyndhurst and myself. The only difference between our opinions was that I went a step further, and held that Lolly's case was wrongly decided even with respect to England. But neither he nor I entertained any doubt that Lolly's case did not and could not affect the law of Scotland, and

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that the decision we were then affirming in Warrender v. Warrender was good under the law of Scotland, independently of, and in spite of, the decision in Lolly's case, and without at all by possibility breaking in upon Lolly's case, any more than Lolly's case could break in upon it; in short, that in the case of Warrender v. Warrender, although the parties had held an English domicile, and had never before crossed the Tweed, there was a jurisdiction in the Scotch Court to deal with the question of marriage, and that the decree by that Court would have been valid notwithstanding the English domicile. And if your Lordships will only attend to the manner in which my noble and learned friend dealt with the whole of that question, which he went very elaborately through, you will see that there cannot be the least doubt upon what the effect of the decision was.

I have here, in passing, to make an observation, which I am sorry to say is somewhat in the nature of a complaint. Lord Eldon used often to complain in like manner. I do not go quite so far as he did, when he said that no Court was treated in such a way as this Court, the highest of all, was; but he certainly had a good right to complain of the manner in which what passed in this Court was taken, not always from the most accurate report of what was said. In the course of this session I have had occasion more than once to observe this, but I have never seen it so strikingly as in the present instance; because here are what are called the speeches of Lord Lyndhurst and myself in the Warrender case, given and printed in the appeal case for the appellant in Munro v. Munro before your Lordships from an extremely inaccurate note. I do not mean that the short-hand writer is not accurate; quite the

reverse; but I mean that in his note on the occasion referred to, as must needs sometimes happen when a person takes a note of a judgment when it is read, and when it is much more rapidly delivered than when it is spoken, there are very considerable inaccuracies either in taking the note, or having it transcribed. Those inaccuracies are perfectly evident to any person who reads the sentences in which they occur; the words are not sense in many instances, in other instances there are wrong dates and wrong statements, — statements very much the reverse of what were made, and in one or two instances affecting the substance and the import of the judgment. Now, what I complain of is, not at all that parties are very impatient to get a report of what passes here in their causes; that is very natural, and they may get it where they please, and get it more or less accurate; but what I complain of is, that after the lapse of a couple of years they should have printed those short-hand writers notes in these causes, and that then, after the lapse of a year or two, those short-hand notes should be made the foundation of remarks and of arguments in the Court below, when a perfectly accurate and corrected report compared with the original had been printed and published by the professional gentlemen in their authorized reports [1] of the decisions of this House. One should have thought the natural course was to have taken the decision of the case from the authentic report of the decision, as authorized by this House, and not from the note which, from some cause, contained these inaccuracies; but, instead of that, the Court below act upon the note which is printed, and

[1] 2 Sh. & M'L. p. 154.

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which is inaccurate, and then in your Lordships House that note is served up as part of the appendix, and not the note as taken (which it might have been very easily) from Shaw and M'Lean, who were at that time the appointed reporters of the decisions of your Lordships House.

Nevertheless, I find here that Lord Lyndhurst says, "It is a connexion (marriage) recognized in all Christian "countries, and they say (the Courts below, the Scotch "Courts, say), and I think they say with propriety, "we are not prevented from pronouncing sentence of "divorce a vinculo matrimonii in this country if the "parties are domiciled here, merely because a remedy "to the same extent is not given in other countries, "particularly where the marriage is celebrated." That is, as to the question of the dissoluble or indissoluble nature of the marriage. And then he goes on to remark upon the whole of the cases throughout, the regular succession of the cases in the Scotch courts, and to show that the Scotch Courts have uniformly, until the time of Lolly's case, (which is a fact,) exercised this jurisdiction, and dissolved English marriages, — marriages between English parties having no Scotch domicile or pretence of a Scotch domicile,—and that then a doubt for the first time existing, that doubt influenced the decision in Edmonstone v. Edmonstone[1], and afterwards the whole fifteen Judges differing from the Commissaries, who had been influenced by the decision in Lolly's case, set that matter right by reversing the decision of the Commissaries, and held that which has been the law ever since,—that without reference to domicile at all, the Scotch Courts

[1] Ante, p. 555.

have right to dissolve an English marriage between English parties, where the parties never had any domicile whatever in Scotland, and that in Scotland to all intents and purposes that divorce is good and valid.

This much I thought it right to say, in consequence of one or two observations that have been made upon the case of Warrender v. Warrender, not denying that so far as that case goes it is a decision at once in favour of the principle upon which the point in the present case turns, although certainly it cannot be said to be a decision, or anything like a decision, upon the point in question.

The other question is one of fact, namely, with respect to the domicile of the parties at the time of the marriage. I have not had the advantage which my noble and learned friend enjoyed of hearing that question argued at the bar. I have, nevertheless, gone through the whole of this case, which appears to lie in a much less narrow compass as regards facts than might be supposed, in consequence of the introduction of a good deal of matter, which does not appear quite irrelevant, and of a great deal of other discussion that perhaps was not perfectly essential to the case, although very able. But nevertheless there is abundant evidence to settle this question fully, in my humble apprehension, and to settle it against the decision of the Court below.

The whole question appears to me to turn upon what took place between the year 1794 and the year 1801, when the marriage took place. The party, Sir Hugh Munro, left Scotland, where it is not denied he had resided previous to that time. In the year 1794 he left Scotland, in consequence of some difference with his mother, and came to London. He there formed a

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connexion which ended in a marriage in September 1801; but previously to that marriage, namely, on the 16th May 1796, the pursuer (appellant) was born,—the child of that connexion. Now, up to 1794, it is perfectly clear that the domicile was Scotch; and it appears to be agreed on all hands that the rules which Lord Alvanley, then Master of the Rolls, extracted as he said from various decisions, — the Annandale case, Bruce v. Bruce, and other cases, to all of which your Lordships have been referred (ante, p. 600.),—were correct rules.

The third of those rules which he extracted from those decisions is very material to the present instance, and seems undeniable as the rule of the Scotch as well as of the English courts, — and I apprehend it is the rule universally, — that where a domicile has once been constituted, the proof of the change of domicile is thrown upon the party who disputes it, and that you must show distinctly that there has been the animus as well as the fact of leaving the place of residence in order to alter the former domicile and to acquire a new one. Now, looking at the facts here, I do not think that they amount to anything sufficient to support the conclusion of a change of domicile. The mere taking of the lease, as some of the learned Judges well observed in the Court below, is explained, and much that otherwise would not be so well understood, is explained by the same circumstance,—I mean by the connexion which the party had formed with the mother of the appellant. That he had a constant intention of returning is certain, and I do not go mostly upon the words he uses in the correspondence when he talks of returning, because that might only mean going back to the place from which he had come; but it is the whole disposition of his

mind which appears to run through this correspondence, which shows that it was the fixed intention of Sir Hugh Munro to consider Scotland still as the place of his residence, and that his being in London or any part of England was occasional rather than permanent.

For the reason which I have given, namely, that I had not the advantage of being present during the argument, I shall not enter into the consideration of the question of fact, further than to say, that upon looking at the whole of this case with very great care, under the pressure of that anxiety which one naturally feels, not only upon a question of such great importance to the parties, but upon a question where it was likely that the inclination of one's opinion should be against the judgment of the Court below, I certainly have come to the same conclusion with my noble and learned friend. Admitting that there may be some doubt,—admitting that there may be some conflict in the circumstantial evidence upon which that case must rest,—admitting that there is considerable force in several of the arguments of the learned Judge (Lord Corehouse), who agreed with the majority of the Judges, and differs from my noble and learned friend and myself on the question of domicile, yet still those observations are, in my opinion, sufficiently answered, and those doubts sufficiently explained, by the considerations which arise from the rest of the evidence, and from the peculiarity of the circumstances in which these parties were placed; and I think that upon the whole, your Lordships are entitled, or rather are called upon, to consider that at the period of the marriage the Scotch domicile had not been changed, and that the parties were domiciled as Scotch parties at the time when the contract took place. The conse-

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quences of this will be, that if your Lordships adopt the opinion of my noble and learned friend upon the subject upon these two points, you will concur in the question of law with almost the whole of the learned Judges; that you will upon that question give a decision which is in concurrence with the principles of those former cases which approach the nearest to the present; and that you will give a judgment, in my humble apprehension, which is consistent with all the principles of the law governing such matters; and upon the question of fact, upon which alone you are called upon to differ from the Judges of the Court below; differing also, it may be observed, from a very narrow majority of the Judges, for whereas six were of opinion that the domicile was Scotch, seven were of opinion it was not. Agreeing, as I have said, with almost the whole of them upon the question of law, and upon the question of fact differing with these Judges in the very narrow majority of one, your Lordships will, I trust, agree with my noble and learned friend in a decision reversing the decision of the Court below in Munro v. Munro. I apprehend that the decision to be given upon this case is not a judgment absolutely and generally finding that the party is legitimate; but it is a judgment finding according to the conclusions of the libel, which proceeds upon the statement of facts, that she ought to be found and declared, as lawful daughter, entitled to succeed under the entail as next heir. It is rather a finding of her having the right as heir of entail, quasi lawful daughter, than in terms or in fact a distinct judgment affirming the legitimacy; it is rather a judgment that she is heir of entail, notwithstanding what happened as to her being born before the marriage, than a distinct judgment that

she is legitimate, and taking into account that in construing the Scotch law, "legitimate" may mean per subsequens matrimonium.

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Judgment.

The House of Lords ordered and adjudged, That the said interlocutor complained of in the said appeal be and the same is hereby reversed: And it is declared, That the pursuer, the said Mary Seymour Munro, is the lawful daughter of Sir Hugh Munro, in terms of the conclusions of her summons: And with this declaration it is further ordered, That the cause be remitted back to the Court of Session in Scotland, to do therein as shall be just, and consistent with this judgment and declaration.

W. S. GRUBBE—WILLIAM WITHAM, Solicitors.

NOTE.

The cause of Birtwhistle v. Vardill having been finally determined by the House of Lords on the same day as the two important causes of Lady Dalhousie v. M'Douall and Munro v. Munro, and the question decided in the first-mentioned case being,—whether a party, born in Scotland, and on whom the personal status of legitimacy had been conferred by the marriage, subsequent to his birth, of his parents, who were domiciled in Scotland, could take, as heir, land in England of which his father died seized and intestate? —it has been deemed proper to add, as an Appendix, the opinion of the Judges upon which the judgment of the House in Birtwhistle v. Vardill proceeded. The observations made by noble and learned Lords upon the occasion of proposing the question to be answered by the Judges, and when their opinion was delivered by Lord Chief Justice Tindal, have also been appended. For the report of the judgment of the House of Lords, reference may be had to the full report of the case by Mr. West.

The above question was answered in the negative, and the judgment of the House was thus in favour of the defendant in error,—but for reasons which in no degree interfere with, but which, on the contrary, stand well with the rule as settled by the two Scotch causes on the same day. The Judges in Birtwhistle v. Vardill held that the party could not take land by descent in England, because it is a fixed rule or maxim of the law of England, with respect to the descent of land from father to son, that the son must be born after actual marriage between his father and mother. That rule had been framed for the direct purpose of excluding, in the descent of land in that country, the application of the rule of the civil and canon law, by which the subsequent marriage between the father and mother is held to make the son born before the marriage legitimate. The personal status of legitimacy conferred by the laws of another country, however clearly and universally recognized on the ground of the comity of nations, could not therefore be allowed to disturb an inflexible principle in the lex fori rei sitæ.