words are, "the power of sinking and driving within the said whole grounds for the conveniency of his or their other works, in so far as the same can be done without incommoding or interrupting." That is very rational if that reservation, in so far as it can be done, is confined to the sinking and driving, because that is an act that is done, and the words are applicable to that; and it was necessary to make such a reservation where the parties were authorized to sink and drive in other lands than those in which their own mines were situated. Upon the whole, therefore, my Lords, I entirely concur with my noble and learned friend in thinking that this appeal ought to be dismissed, and dismissed with costs.

LORD WENSLEYDALE.—My Lords, I took no part in the hearing of this case since the first part of it was disposed of, and therefore I ought not to give any opinion upon it; and I should not have risen except to advert to the circumstance, that my noble and learned friend on the woolsack has cited the case of *Chasemore* v. *Richards* as if it had been finally decided,—it yet remains for the decision of your Lordships upon the opinion of the learned Judges.

Interlocutors affirmed, and appeal dismissed, with costs.

Gibson Graig, Dalziel, and Brodie, W.S. *Appellants' Agents.*—Sang and Adam, S.S.C. *Respondents' Agents.*

JULY 15, 1859.

Mrs. ANNE LIVINGSTONE or FENTON and Husband, *Appellants*, *v.* ALEX. LIVINGSTONE, *Respondent.*

Legitimacy—Marriage—Deceased Wife's Sister—Domicile—Parent and Child—Foreign—Stat. 5 & 6 Will. IV. c. 54.—*A Scotchman by birth, having acquired an English domicile, was regularly married in England to the sister of his deceased wife. The second wife died in England in* 1832, *and during her life no challenge was made of her marriage. She left a son. In* 1835 *the Act* 5 & 6 *Will. IV. c.* 54, *was passed, by which marriage with a deceased wife's sister was declared to be void, but it saved from challenge all such marriages as had not been challenged, and which had been dissolved by the death of the wife before the date of the act. In* 1853 *the succession to an heritable estate in Scotland opened to the son of the second marriage on the supposition that he was to be held legitimate by the law of Scotland. Evidence was laid before the Court of Session to the effect that, by the law of England, he was to be held as legitimate in that country since the date of his mother's death.*

HELD (reversing judgment), (1) *That the Court was not bound to recognize the law of England, if it conflicted with the policy of the law of Scotland, or the notions of morality and religion there prevalent.* (2) *That even if English law were regarded, then such a marriage was, by that law, deemed void, though no proceeding to declare it void was allowed in England after the death of one of the married persons.*[1]

The late Alexander Livingstone of Bedlormie executed a bond of tailzie in 1702, by which he obliged himself to dispone his lands and barony of Bedlormie and others, in the county of Linlithgow, to himself in liferent, and to his eldest son George Livingstone, and the heirs of his body; whom failing, to his sons Alexander, James, William, and Thomas, and the heirs of their bodies successively; whom failing, to any persons he should nominate; whom failing, to his heirs male whatsoever; whom failing, to his other heirs and assignees whatsoever, the eldest heir female succeeding without division.

The last heir vested under the entail was Sir Thomas Livingstone, a direct descendant of Robert Livingstone, the sixth son of the entailer. Sir Thomas died on 1st April 1853, without issue. He had several brothers, all of whom predeceased him, and was survived by the pursuer, his only sister, who is entitled to the estate, failing her brothers and their issue.

One of the brothers of Sir Thomas Livingstone was named Thurstanus. He was born about the year 1771 or 1772, in Scotland—his father, Sir Alexander Livingstone, being a domiciled Scotchman.

On the 5th of October 1797 Thurstanus married, in London, Susannah Dupuis or Brown, a widow, who was of French extraction. Upon her death, he was regularly married, also in London, on the 7th August 1808, to her sister Catherine, or Catherine Ann Dupuis. The defender Alexander Livingstone, born in 1809, is the offspring of the said second marriage, and, if legitimate, is entitled to succeed to the estate before his aunt, the pursuer.

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[1] See previous reports 18 D. 865: 28 Sc. Jur. 393. S.C. 3 Macq. Ap. 497: 31 Sc. Jur. 578.

The pursuer and the defender, upon the death of Sir Thomas, each presented a petition for service, which applications were advocated to the Court, and are now pending.

The pursuer raised the present action, concluding for declarator of bastardy against the defender, on the averment that his mother was the sister of his father's first wife; and that Thurstanus never lost his Scottish domicile of origin, having been all his life a sailor, visiting London only for brief periods, and having no settled home.

The defender averred that his father had acquired an English domicile, having never been in Scotland after he first went to sea, at a very early age; that he had had several successive houses in London, where, when on shore, he lived with his family; that the defender's mother was a domiciled Englishwoman, and that the marriage of his parents was regularly solemnized in the English Church; that, assuming the two wives of Thurstanus to have been sisters, the validity of his second marriage could not now, by the law of England, be disputed, as, by the Act 5 & 6 Will. IV. c. 54, such marriages were not void, but only voidable by means of a suit instituted during the lifetime of both parties, and that, by the death of the mother without any suit being instituted, he was therefore legitimate by the law of England. He pleaded—(1.) That the law of Scotland must hold him legitimate, in respect that the validity and legal effects of his parents' marriage must be tried by the law of England, which held him to be legitimate; (2.) That his own domicile, in respect of birth and residence, being in England, his *status* must be determined by the law of that country; (3.) That even assuming the case to depend upon the law of Scotland, he was legitimate, in respect that, by that law, the successive marriage of sisters was not unlawful; and, (4.) That, at all events, the *onus* of proving the relationship of the two wives of Thurstanus, which was not admitted to be that of sisters, lay on the pursuer.

The defender also pleaded *in limine*, that the action was excluded on the ground of *lis alibi pendens*, and *accumulatio actionum*, in respect of the competition of services; and also that he was not subject to the jurisdiction of the Scottish Courts, in respect that he was domiciled in England. These pleas had been repelled by the Lord Ordinary, and his judgment adhered to by the Court on the 1st June 1854. It was arranged, of consent, that the result of the present action should regulate that of the advocation of services.

A proof was then taken in reference to the domicile of Thurstanus Livingstone, the relationship of his first and second wives, the fact of the marriage, and the results of that marriage, according to the law of England.

The proof was voluminous, but its results, on the general facts of the case, will be easily gathered from the argument. The following is an abstract of the evidence of Messrs. Roundell Palmer Q.C., and Mr. Charles Clark barrister, who were examined on the English law applicable to marriage with a deceased wife's sister.

"By the law of England, marriage with a deceased wife's sister is, and has been since before the Reformation, within the prohibited degrees of affinity. In the year 1835 an act was passed, 5 & 6 Will. IV. c. 54, commonly called Lord Lyndhurst's Act, which effected certain changes. Prior to the act all marriages did not stand on the same footing. Some were good in all respects, and some were invalid on various grounds. Of these grounds of invalidity some were of temporal as well as of spiritual cognizance, and some of spiritual cognizance only; those of temporal cognizance were such as, where the provisions of the marriage acts had not been complied with, cases of bigamy, and cases of physical compulsion. In these the marriage was held *ipso facto* void by the temporal courts, on proof before them of the facts, without any previous ecclesiastical sentence.

"Those of spiritual cognizance were cases of incest, impotency, and the like, which having been originally derived into the law from the ecclesiastical laws, were held capable of being inquired into by the ecclesiastical courts only; and, in these cases, a marriage solemnized *in facie ecclesiæ* was presumed to be valid, by the temporal law, until the facts shewing its invalidity had been inquired into, and ascertained by a declaratory sentence of the Ecclesiastical Court, which could only be done during the lifetime of the parties; and after such sentence, such a marriage was held in all the courts to have been invalid *ab initio* to all intents and purposes. Such ecclesiastical sentence was necessary in all cases of incest. All marriages within the prohibited degrees were incestuous, and the law made no distinction between them. The offspring of a marriage with a man's own sister, without sentence of the Ecclesiastical Court during the lifetime of both parents, would have been legitimate. The law made no distinction between marriage with a deceased wife's sister, and with a brother's widow, a wife's mother or daughter, or a man's own sister. The necessity of a sentence of the Ecclesiastical Court was founded on the division of legal jurisdiction, according to which, just as the fact of murder could only be inquired into by a court of common law, so the fact of incest could only be inquired into by the Ecclesiastical Court. The effect of such sentence was retrospective, by the express terms of the 99th Canon of 1603, which only re-enacted the previous law. Every such marriage was to be adjudged to have been void from the beginning. In strict law, therefore, such marriages were void, the office of the Ecclesiastical Court being to pronounce a true sentence, and its sentence being declaratory that such marriage was, and had been void from the beginning; that sentence was

recognized to all intents and purposes by the temporal courts; but a distinction had been established, in point of legal phraseology, between these marriages, the invalidity of which could not be noticed by the temporal courts without such a sentence, and those which were invalid for reasons of temporal cognizance. According to that distinction, the former class were called voidable by sentence, and the latter *ipso facto* void. Lord Lyndhurst's Act did not apply at all to marriages dissolved by death before its date. It took away the power of going to the Ecclesiastical Court in the case of marriages within prohibited degrees of affinity, which had been previously solemnized. This effect extended to all the prohibited degrees of affinity, including that with a deceased wife's sister, but not to those of consanguinity. It abolished the former forensic distinction, and the necessity for a declaratory sentence of the Ecclesiastical Court, and made all such marriages *ipso facto* void. The prospective provisions of the act were in entire confirmation of the previous law, only making it more efficient in practice. The law considered the offspring of a marriage within the prohibited degrees, contracted since the date of the said act, incestuous. Assuming the law of Scotland to hold a marriage with a deceased wife's sister a good marriage, the issue of such marriage between domiciled Scotch persons could not succeed to real estate in England, *ex comitate*, at the present time; if the marriage, however, had been solemnized in Scotland, the question might admit of controversy, and had not been settled by any authority. Prior to the passing of Lord Lyndhurst's Act, the temporal courts would have prohibited the Ecclesiastical Court from proceeding to pass a declaratory sentence of nullity of a marriage contracted by parties within the prohibited degrees either of affinity or of consanguinity, in any matrimonial cause commenced after the death of such parties, or either of them. The offspring of a marriage within the prohibited degrees would have been deemed, by the temporal courts, legitimate, prior to Lord Lyndhurst's Act, unless such marriage had been declared void by the Ecclesiastical Court. Assuming that A was married to B, and that after her death he married her sister C, and that D was the son of the second marriage, and that C died in 1832, and A in 1839, D would, by the law of England, be legitimate immediately on his mother's death."

The Court of Session held, that, even assuming that if the marriage of his parents had taken place in Scotland, it would be void in Scotland, yet the law of Scotland was bound to recognize the *status* of legitimacy acquired in England, and consequently that he was entitled to succeed to the estate.

Mrs. Fenton appealed, maintaining, in her *printed case*, on the grounds stated below, that the judgment of the Court of Session should be reversed. "1. The respondent is the issue of a marriage between his father Thurstanus Livingstone, and his mother Catharine Ann Dupuis, entered into on 7th August 1808; but Thurstanus Livingstone, the respondent's father, had been previously married, on 25th October 1797, to Susannah Dupuis, the *sister* of the said Catharine Ann Dupuis, and which marriage with Susannah Dupuis was dissolved by her death in April 1806. 2. The domicile of Thurstanus Livingstone, at the date of his marriage with Catharine Ann Dupuis or Ticehurst, on 7th August 1808, and at the date of the birth of the respondent, on 13th June 1809, was in Scotland; and, therefore, the question of the legitimacy of the respondent must be determined by the Scotch law. 3. On the assumption that the domicile of Thurstanus Livingstone at the date of his marriage in 1808, and at the date of the respondent's birth in 1809, was in England, yet the respondent is not entitled to be served heir of entail to a Scotch real estate under a destination to heirs 'lawfully procreated.' These terms must be construed according to the law of the *situs;* and according to the Scotch law, the respondent would not be lawfully procreated, seeing that *de facto* he was the offspring of an invalid marriage. And the law of Scotland is not barred, in a question of succession to real estate, by any forensic rule of the English Courts, from making inquiry as to the fact of the respondent being born of an invalid marriage, but is entitled to make inquiry, and decide, not according to a fiction or presumption, but the truth. 4. On the assumption that by virtue of the rule of the English law, which bars inquiry (where there is issue) after the death of either spouse as to the validity of the marriage, the marriage of the respondent's parents, though originally void, must be held to have been valid, yet the law of Scotland is not bound to recognize the *status* of the respondent, because he is the offspring of an incestuous, and therefore a criminal, connexion by the law of Scotland."

The respondent, in his *printed case*, supported the judgment on the following grounds:—"1. At the date of the action and of the death of Sir Thos. Livingstone, the respondent was, both by birth and residence, a domiciled Englishman; was born of parents who were married in England and had their domicile in England, both at the date and during the subsistence of the marriage, and the legality and validity of whose marriage was not challenged during their lives; and because he is legitimate by the law of England. 2. The respondent being legitimate in the country of his birth and domicile, the Courts of law in Scotland were bound to recognize his legitimacy; and no sufficient grounds were alleged or existed for refusing effect in Scotland to the *status* of legitimacy which the respondent enjoyed by the law of his own country."

R. Palmer Q.C., and *Anderson* Q.C., for the appellants.—There are two disputed facts in

this case, viz., 1. Whether the domicile of Thurstanus Livingstone, at the time of the marriage and the birth of the respondent, was Scotch or English ; 2. Whether his mother was actually the sister of a previous wife of Thurstanus. We allege the domicile to have been Scotch, which the respondent denies ; and the respondent alleges his mother was not the sister of the deceased wife, which we deny.

[LORD CHANCELLOR CHELMSFORD.—We have looked into the facts and evidence stated on both sides, and we are satisfied that the domicile of Thurstanus was English, and that the respondent's mother was in fact the deceased wife's sister.]

Then assuming the domicile to be English, it does not follow that the English law will furnish the rule to determine the legitimacy of a person entitled to succeed to Scotch heritage. The description of the heir in the deed of entail ought first to be looked to, and there the person entitled to succeed must be lawfully procreated ; if therefore the law of Scotland treats the marriage with a deceased wife's sister incestuous and void, as we must assume at present, how can this heir be said to be lawfully procreated? Besides, independent of that description in the deed, it is a well established rule that real property is exclusively subject to the law of the country where it is locally situated, both as regards succession and the mode of transfer—Story's Conflict, §§ 430, 431, 483 ; *Doe dem. Birtwhistle* v. *Vardell*, 5 B. & C. 438 ; 7 Cl. & F. 895 ; *Munro* v. *Munro*, 16 S. 29. The *lex rei sitæ*, therefore, must point out according to its own rule who is the heir. Thus the common law of England, which requires an heir to real estate situated in England to have been born legitimate, rejected a person born in Scotland illegitimate, but who was, by a fiction of the law of Scotland, afterwards made legitimate *per subsequens matrimonium—Doe dem. Birtwhistle* v. *Vardell*, 7 Cl. & F. 895 ; *Re Don's estate*, 4 Drewr. 197 ; *Shedden* v. *Patrick*, 1 Macq. Ap. 535 ; *ante*, *p.* 332. Hence, though a person may in a question of moveable succession be deemed legitimate, yet, in a question of heritable succession, he may be deemed illegitimate by reason of the above rule.

The Court of Session ought, therefore, in this case to have looked to its own law exclusively in ascertaining who was the heir, and ought to have entirely disregarded the law of England. But even assuming that the Court might inquire into who would be heir according to the law of England, and give effect to that law, then it has mistaken the law of England. By the law of England a marriage with a deceased wife's sister, even before Lord Lyndhurst's Act, 5 and 6 Will. IV. cap. 54, was *ab initio* null and void. That statute introduced no new principle, but merely declared what the law was, and that, in future, these marriages should be void, though not questioned during the lives of the parties—*R.* v. *Chadwick*, 11 Q. B. 173 ; 2 Burn's Eccles. Law, 440, and authorities there referred to. It had been said that marriages were, previously to that act, voidable only, and not void ; but that distinction arose from this, that the Courts of common law, having no jurisdiction over the subject matter, could not treat a marriage as void, which had not been declared by the competent Ecclesiastical Court to be void. No other Court but the Ecclesiastical Court could declare a marriage void ; and it declared a marriage void, because such a marriage was *ab initio* void—See per Lord Lyndhurst in *R.* v. *Millis*, 10 Cl. & Fin. 534 ; *Ray* v. *Sherwood*, 1 Curt. 188 ; 1 Moo. P.C. 353. The distinction of voidable and void came to be used in the Ecclesiastical Court, owing to the Common Law Courts interfering to prevent the former from bastardizing the issue by entertaining the declaratory suit after the death of one of the parties, or from inquiring, after that event, into the validity of the marriage. That, however, was merely a technical and forensic rule, and did not enter into the substance of the law itself, nor bound anybody beyond the territory of England. The law was, in substance, that such marriages were *ab initio* null and void ; and hence, when the object of the Spiritual Court was not to bastardize the issue, but to punish the surviving party for incest, it was not prohibited from inquiring into the validity of the marriage—Per Sir H. Jenner in *Ray* v. *Sherwood*, 1 Curt. 199 ; *Harris* v. *Hicks*, 2 Salk. 548 ; *Brownsword* v. *Edwards*, 2 Ves. Sr. 242.

But even if an English Ecclesiastical Court had been shut out by this forensic rule from inquiring into the validity of the marriage after the death of one of the parties, still a foreign Court was in nowise restrained from making such inquiry. It is now agreed that the *lex fori* does not import the mere rules of evidence and other matters which constitute part of the remedy in the country where the contract was made. Thus the kind of evidence required to prove the ground of remedy on the contract will be that which prevails in the Court which administers the remedy. So it has been held, that the Statute of Limitations is part of this remedy, and that the *lex fori* points out what that Statute is—*Don* v. *Lipman*, 2 Sh. & M'L. 723.

Moreover, it is a rule of international law, that the Courts of one country will not, out of mere comity, give effect to a foreign law, when the latter is contrary to their own policy or prejudicial to their interest—Story's Conflict, §§ 7-23 ; Felix, Droit Internationale Privé, § 12. If, therefore, by the law of Scotland, marriage with a deceased wife's sister is incestuous and criminal, even though by the law of England, where the marriage took place, it had been valid, the Courts of Scotland were bound to treat the marriage as void, because opposed to their own policy and repugnant to their religion—Huber, 1, 3, 8 ; Voet, 1, 4, 18 ; Vattel, 62, 14 ; *per* LORD BROUGHAM

in *Warrender* v. *Warrender*, 2 Sh. & M'L. 199; *Edmonstone* v. *Edmonstone*, Fergus. 384, 418; *Gordon* v. *Pye*, Fergus. 361; 1 Burge Com. 188; Felix, pp. 28, 161, 216; Story's Conflict, p. 186; 4 Cowen's Amer. Rep. 512. That by the law of Scotland such marriages are incestuous, appears from the Confession of Faith, cap. 24, § 4, ratified by Statute 1690, cap. 5; Erskine, 1, 6, 9; and the same view was adopted in *Stewart's case*—2 Broun, 549. On this principle the right of slavery will not be recognized in an English or Scotch Court—*Somerset's case*, Lofft, 1; *Knight* v. *Wedderburn*, M. 14,545. So the law of England will not recognize as valid a marriage with a deceased wife's sister, though celebrated in a country where such marriages are valid—*Brook* v. *Brook*, 3 Sm. & G. 481; see also *Conway* v. *Beasley*, 3 Hagg. 639. In the same manner an English Court, previously to the late Divorce Act, would not have recognized the validity of a divorce of parties married when domiciled in England, because then such divorces were repugnant to its policy; at least no case goes so far as to recognize such a divorce—see *Lolly's case*, R. & R. 237; also *Dolphin* v. *Robins*, pending in House of Lords, 7 H. L. C. 390.

Sir R. Bethell Q.C., *Rolt* Q.C., *Moncreiff* and *Pattison*, for the respondent. The validity of a marriage must be settled by the law of the domicile of the parties at the time, and the legitimacy of a person must be regulated by the domicile of the parents at the birth. If, therefore, the respondent is legitimate according to the law of England, which was the domicile in both instances, he is accepted as legitimate in Scotland also—Huber, 1, 3, 9; 1, 3, 12; *Strathmore* v. *Bowes*, 4 W. S. App. 89; *Rose* v. *Ross*, 4 W. S. 289. It was the duty of the Court of Session, in these circumstances, to ascertain the law of England; and when that law was ascertained, to retire altogether from the field and leave that law to settle the question—*Dalrymple* v. *Dalrymple*, 2 Hagg. 129. By the law of England it was well established, previous to 1835, that if the marriage between such parties was not declared void during their joint lives, it was too late afterwards to attempt to bastardize the issue; and the Court was barred from inquiring into the circumstances of the marriage. If an English Court was barred, so was the Scotch Court, because in such cases the law of Scotland adopts and incorporates into itself the law of England, as regards this point. At all events, this marriage could not be put on a less favourable footing than a putative marriage; and it was the law of Scotland, that the issue of a putative marriage are taken to be legitimate—Liber Officialis Sancti Andre. It is said the law of Scotland treats these marriages, when occurring in Scotland, as incestuous and criminal, and therefore ought not to give effect to them though celebrated abroad; but there is no rule or doctrine laid down in any writer of authority, that the legitimacy of a child depends on the crime of the parents. In *Brook* v. *Brook*, the parties had gone abroad expressly to evade the English law; but here it is admitted the residence of the parties was in England, and their domicile there. It was said that this was not a question of the common law of England, but a question as to the title to real property, which must depend on the law of Scotland, where the property is situated; but there is no trace of any rule in the law of Scotland similar to that on which *Doe dem. Birtwhistle* v. *Vardell* was decided in England.

Mr. Palmer replied. *Cur. adv. vult.*

LORD BROUGHAM.—My Lords, this case arises out of facts which are either admitted on all hands, or are clearly proved in evidence, or are assumed, together with one proposition of law, by the Court below, in disposing of the matter before it,—their judgment being given upon the main question on that assumption; but the evidence in the cause leaves no doubt as to the facts assumed.

The question is raised between the respondent, Alexander Livingstone, claiming, as lawful son of Thurstanus Livingstone, estates in Scotland, to which he asserts his right of succession, as heir of entail, upon the decease of his uncle, Sir Thomas Livingstone, the person last in possession; and the appellant, Anne Fenton, claiming the same estates, as heir of entail upon the decease of Sir Thomas Livingstone, on the ground that all the preceding substitutes and heirs have failed; and this raises the question between her and the respondent, whose title she impeaches, upon the ground of his father's marriage with his mother having been illegal by the law of Scotland, and the issue excluded from inheritance to a Scotch estate.

The facts either admitted or clearly proved are these:—Thurstanus Livingstone married two sisters, one after the other; he was domiciled in England; his two wives were both Englishwomen; and in England the respondent was born. I ought to mention that a great deal of controversy existed upon the question of his domicile, but all your Lordships are clearly of opinion, that he was domiciled in England. His mother died in 1832, and no proceedings were had for the purpose of declaring the marriage void. He contends, therefore, that he is in all respects legitimate. The only objection raised to the marriage of his parents, which took place before his birth, was that their marriage was incestuous; which, as he contends, only made it voidable, and not void, by the law as it stood before the year 1835.

Now, it must be granted that the general rule is, to determine the validity of a marriage by the law of the country where the parties were domiciled; and, in most cases, the legitimacy of a party is to be determined by the law of his birthplace and of his parents' domicile. But to this

application of the *lex loci contractus* there are exceptions, from the nature of the case in which the question arises. Thus, in deciding upon the title to real estate, the *lex loci rei sitæ* must always prevail. So that a person, legitimate by the law of his birthplace and of the place where his parents were married, may not be regarded as legitimate, so as to take a real estate by inheritance elsewhere. This was laid down in *Doe* v. *Vardell*, which, in some of the opinions of the learned Judges below, is supposed to have been decided in consequence of a statutory provision. But the Statute of Merton is only declaratory of the common law, or rather it is a refusal to alter that law. A person legitimated by the marriage of his parents after his birth is, in Scotland and some other countries, legitimate. He is *legitimatus;* that is, *factus legitimus.* As to invalidate is to make invalid, so to legitimate is to make legitimate. And by this *lex loci* the party was legitimate, to all intents and purposes, in Scotland. That was so laid down in the case of *Doe* v. *Vardell.* But when he claimed a real estate in England, he was not held legitimate to that effect, because legitimacy by the English law requires the party to have been born in lawful marriage, while in the law of Scotland no such requisite exists. If the Scotch law had held a person legitimate who, though born in marriage, was the issue of an incestuous marriage, or of a marriage with a second wife living, he would not have been held entitled to take a real estate in England, and, perhaps, have not been held legitimate to any effect, though he might have been, to all intents and purposes, legitimate in the country of his birth and of his parents' domicile and marriage.

Was the marriage, then, of the respondent's parents, such that the law of Scotland could recognize its validity in dealing with the rights of the issue of it to take real estate by inheritance? First of all, let us consider if it was legal in the country where contracted, and where the parties had their domicile. It was clearly illegal by the law of England. That law treated it as incestuous. By the rules of the ecclesiastical Courts, which alone have cognizance of this objection to a marriage, it could not be questioned except during the lives of both husband and wife. But it was illegal, and, if questioned while both parties were alive, it must have been declared void *ab initio.* And why? Because it was contrary to law. The circumstance of one party to it having died before this dispute arose, and before it was questioned, did not make the marriage legal, though it precluded the possibility of setting it aside; and the son was issue, not of a lawful marriage, but of a marriage which could not be questioned with effect according to the rules of the ecclesiastical Court,—that Court alone having jurisdiction upon the question by the rules which govern the temporal Courts. But these temporal Courts hold the same principles on the subject with the ecclesiastical, and would act with them if they could entertain the question. Indeed, the 5 & 6 Will. IV. c. 54, (commonly called Lord Lyndhurst's Act,) proceeds upon the ground that marriages within the forbidden degrees of affinity are void if questioned—void, because illegal—and enacts, that henceforth they shall be *ipso facto* void, and not merely voidable by any proceedings being taken. And why? Because they are within the forbidden degrees, that is, because prohibited by law, or illegal.

It is unnecessary to inquire whether a marriage so void, if questioned in England before the act, but prevented from being questioned by the course of procedure in the English Courts, could be questioned in Scotland, if the Scotch and English law differed upon the grounds of the objection, because the Scotch law is much more stringent on the subject than the English,—holding all marriages within the forbidden degrees, not only to be incestuous, but severely punishable, even capitally. Some doubt is raised by one of the learned Judges below, whether the acts of 1567, caps. 14 & 15, apply where there is no *express* prohibition in the 18th chapter of Leviticus to make the marriage incestuous. But the Confession of Faith, chapter 24, § 4, prohibits marriage with the wife's kindred as much as with the husband's own kindred, declaring such marriage incestuous. The act of the Scotch parliament of 1690, cap. 5, expressly ratifies all the "heads, articles, and clauses" of the Confession of Faith. The Court of Justiciary proceeded upon this view a few years ago, during the presidency of Lord Justice General Boyle, when the late Lord Justice Clerk Hope, and Lords Mackenzie, Moncreiff, Cockburn, and Wood were upon the bench. They sentenced the prisoners (Stewart and Wallace) to fourteen years' transportation, the Lord Advocate having restricted the libel from the capital part. This was the case of marriage of uncle and niece; but there is by law no difference whatever between consanguinity and affinity in this respect. If the *lex loci contractus* were to prevail absolutely, and a marriage good in a country where it took place, and where the party claiming under it was born, were to make that party inheritable in Scotland, then uncle and niece marrying in a foreign country, with papal dispensation, their issue might claim to take a Scotch estate and Scotch honours, although, had the marriage been contracted in Scotland, the parties might have been capitally convicted, and sentenced to death, or sentenced to transportation with consent of the public prosecutor, as in the *case of Stewart* and Wallace. It is impossible that such can be the law. The claimant might, as in this case, call a marriage—what the law calls a crime—*conjugium vocat: hoc prætexit nomine culpam.* The respondent cannot be held the heir male lawfully procreate by parties whose marriage was an offence severely punishable by the law of Scotland; and "heir male," even without the words "lawfully procreate," must be intended as

if these words were added ; because "heir" means the issue lawfully procreated, and it is wholly impossible to separate the notion of valid marriage from the question of legitimate issue, which the heir must be—valid marriage either before the birth, or, by the Scotch law, it may be after the birth—but valid marriage in either case.

It is contended that marriage, legal in the country where it takes place, must be held valid everywhere, even in countries where, the law being different, the marriage would be invalid. The case is referred to of Scotch marriage between parties coming from England to escape the requirements of the English law ; and it is argued, that their marriage, which would have been illegal in England, is valid for English purposes, because good in Scotland. But, first, the marriage in those cases is not such as the English law prohibits. It is only one requiring in England certain things not necessary to give it validity in Scotland. And, next, the validity of a Scotch marriage, in these circumstances, has never been decided absolutely and without qualification. *Compton* v. *Bearcroft*, originally decided at the Arches, and afterwards before the Delegates, first determined, that Scotch runaway marriages were valid in England, contrary to Lord Mansfield's pretty plainly indicated opinion. And in *Ilderton* v. *Ilderton*, 2 H. Bl. 145, where, in answer to a claim of dower out of an English estate, *ne unques accouple* was pleaded, the discussion arose upon a question of pleading, the case of *Compton* v. *Bearcroft* being taken as having decided the point of the Scotch marriage being valid in England ; and the debate arose on two questions, whether the replication was well in concluding to the contrary, and whether a venue should not have been laid. But it is remarkable that Sir George Hay, who decided *Compton* v. *Bearcroft*, states, in *Harford* v. *Morris*, 2 Haggard's Cons. C. 435-444, that the decision was, "A Scotch marriage is valid in England, if there be nothing in it contrary to the law of England." That is a very material qualification. If the parties had been uncle and niece, and if the law of Scotland, instead of reprobating and punishing such a marriage, had allowed it, like that of many countries acknowledging the power of a papal dispensation, and in which such marriages are of daily occurrence, surely no one can doubt that the decision of Sir George Hay, affirmed by the Delegates, would have been the other way, and that the affirmative issue in *Ilderton* v. *Ilderton*, of *ne unques accouple in loyal matrimonie* would not have been held sustained by the evidence of a marriage which the law of England prohibits, and which could in no sense be called *loyal matrimonie*. And much more clearly must the respondent in Scotland fail, both in the competition of briefs and in his defence to the declaration of bastardy, when he had to prove himself the issue of a lawful marriage, and the marriage is by the law held prohibited, nay, is even severely punishable. It must be observed, that the authorities upon the conflict of laws qualify the admission of a foreign law much as Sir George Hay does in the case of Scotch marriage. Huber, the authority most often cited, adds to the statement of admission, "*quatenus nihil potestati aut juri alterius imperantis ejusque civium præjudicatur;*" and he refers to incest as one example of the admission being excluded. Other writers take the same view, which Mr. Justice Littledale, in *Doe* v. *Vardell*, fully adopts.

There are other cases of marriage prohibited by the law of Scotland. Thus, by the act of 1600, on the dissolution of marriage for adultery, the intermarriage of the adulterer and adulteress is prohibited. Suppose such a marriage contracted in England, where by our law it would not be invalid, can it be doubted that the issue of it claiming an estate in Scotland would be considered illegitimate? This is the very case put in *Edmonstone* v. *Edmonstone*, (Ferguson, p. 444,) by a most learned Judge, a person, too, of very enlarged views upon general subjects as well as law, Lord Glenlee, and he held that the son of such second and prohibited marriage would not exclude a daughter of the first and lawful marriage. Another instance may be given, arising from the difference between the laws of the two countries on the indissolubility of the contract. In England, until very lately, it was impossible to dissolve a marriage, originally valid, by any legal proceeding. An act of parliament alone could have this operation. In Scotland a divorce could be obtained by sentence of the Court. If an English marriage were thus dissolved in Scotland, and one of the parties contracted a second marriage in Scotland during the other's life, it would be perfectly valid in Scotland; but if the issue claimed an English estate, the validity of the divorce would come in question in order to determine the validity of the second marriage, which would probably be held (I do not say that it has ever been held) to be governed by *Lolly's case*.

Great reliance was placed on the respondent's part, and by some of the learned Judges below, upon the position, that status acquired in one country follows a person everywhere ; it is said, "*sicut umbra personam sequitur.*" Now nothing can be more a case of status than liberty and slavery : yet when a man from a country where he was by law held in slavery, comes to England or Scotland, the light of liberty chases away the shadow. He is in all respects free as regards his person, and as regards his property, though in the place he came from he was a mere chattel, and whatever he earned or became possessed of in any way while there belonged to his master. That master could not recover it in our Courts, since the principles which were laid down in *Somerset's case* in England, and in *Knight* v. *Wedderburn*, in Scotland, somewhat earlier. "The rule," says Mr. Justice Littledale, "that a personal status accompanies a man everywhere,

is admitted to have this qualification, that it does not militate against the law of the country where the consequences of that status are sought to be enforced." I therefore humbly move your Lordships to give judgment for the appellant in this case.

LORD CRANWORTH.—My Lords, the question for decision in this case is, Whether Alexander Livingstone, the respondent, is, according to the terms of the deed of entail of the 17th of December 1702, heir male lawfully procreate of the body of Alexander Livingstone, the entailer. It is admitted that he is so, if he is heir male of the body of Thurstanus Livingstone, who died in 1839.

It must be taken as established beyond all controversy, that Thurstanus was for above forty years, prior and up to his decease, domiciled in England; that in 1797, being so domiciled, he married, in England, Susannah Brown, a widow, and that she died in 1806, without leaving any issue by him; that in 1808, Thurstanus married, in England, Catharine Ann Dupuis, an Englishwoman, being a sister of Susannah, his first wife, and by her, who died in 1832, had issue, the respondent, his eldest son, who was born in 1809.

No proceedings were ever taken in the Ecclesiastical Courts in England to declare void the marriage of Thurstanus with Catharine Ann Dupuis, and the point for decision is, whether, in these circumstances, the respondent, as the eldest son of Thurstanus, is the heir male of his body, and so heir male of the body of Alexander, the entailer in 1702.

The case was considered by the Court of Session, on the assumption that, by the law of Scotland, the marriage of a widower and the sister of his deceased wife is incest under the Scotch Statute of 1567, and that the parties living together in Scotland, as man and wife under such a marriage, would be committing a capital offence, that the marriage would be void, and that the issue of such a connexion would be illegitimate, and so incapable of inheriting as heirs of entail. The argument, at the bar of this House, proceeded on the same hypothesis, it being understood that if, in the judgment of your Lordships, the case should turn on the question, whether the respondent could succeed as heir of the body of the entailer, assuming the law of Scotland to be the law which is to govern the decision, then the case must be remitted back to the Court of Session to be reconsidered by them. Their decision proceeded on the ground that, as the marriage took place in England between parties domiciled there, the law of England must decide whether the marriage was or was not valid; and whether the issue of that marriage was or was not capable of inheriting as heir of the body of his parents lawfully procreate. They came to the conclusion, that, by the law of England, the marriage was valid, and that the respondent was the eldest son of that marriage lawfully procreate; and, therefore, was entitled to succeed to the lands in question.

After giving to this subject my best attention, I have come, though not without some fluctuation of opinion, to the conclusion, that the Court of Session was wrong in treating this marriage as a valid marriage by the law of England, and in treating the respondent as the legitimate son of Thurstanus for the purpose of the Scotch succession.

The Statute 25 Henry VIII. chapter 22, § 4, expressly enacts, *inter alia*, that no man shall marry his wife's sister; and in case of any marriage being contracted in violation of that prohibition, the Ecclesiastical Court, with whom, in this country, jurisdiction on these subjects exclusively rests, would declare any such marriage to be void.

It is true that, by the construction put upon that statute, no inquiry as to the validity of marriage could be instituted by the Ecclesiastical Court, after the marriage itself had come to an end by the death of one of the parties; so that, inasmuch as the temporal Courts had no jurisdiction, the issue would succeed to the estate of a deceased parent as his or her heir, if no proceedings had been taken, in the lifetime of both parents, to declare it void—I say to declare it void—for it must be observed, that the Court had no authority to interfere actively to dissolve any marriage validly contracted, but only to declare what the law was as to the alleged marriage—the marriage *de facto* as it was called—to declare that there never was any marriage—to declare it *fuisse et esse invalidum ab initio*.

That such a result must have followed a proceeding in the Ecclesiastical Court calling in question the second marriage of Thurstanus, is a matter which can admit of no doubt. But, if so, how can the true character of the marriage be altered by the accident of whether any third person did or did not think it worth his while to call it in question? It is not the proceeding in the Ecclesiastical Court which made such a marriage void. No Court in this country could affect by its decree a valid marriage. Its jurisdiction was only of a declaratory nature; that is, to declare the legal invalidity of an act already complete, but which was not what it purported to be, *a marriage*. The ground on which alone such a declaration could be made, was that which must have been equally true, whether such a declaration was or was not made, namely, the original invalidity of the marriage. I therefore think, if the case turns on the mere question whether the second marriage of Thurstanus was a valid marriage by the law of England, that it was not so; and, consequently, that the respondent, on this hypothesis, fails to make out that he is the heir male of the body of the entailer.

But it was urged that the question is not one depending directly on the question of the validity

of the marriage, but on the question of the legitimacy of the respondent; and that, inasmuch as he is certainly legitimate in England, therefore he is so everywhere, that his status of legitimacy is established conclusively all over the world; and therefore in Scotland, by the fact of his legitimacy in England, the place of his domicile. But I think there is a fallacy in this reasoning. The point to be established is, whether he is the heir male lawfully procreate of the body of Alexander, the entailer; and this, as I have already stated, depends on the question, whether he is the lawful son of Thurstanus. If, as I think, the marriage of his parents was not a good marriage in England, where they were domiciled and were married, he could not be their legitimate child in the view of a Scotch Court. The rule of English law, which gives to the child of an invalid marriage the status of legitimacy, unless the marriage is called in question before the Ecclesiastical Court, cannot be binding beyond its own territory. Such a child is in the same position, in point of status, as a child clearly illegitimate born in this country would be, if an act of parliament were passed declaring that he should be deemed to be legitimate to all intents and purposes. The legitimacy so constituted would have no effect beyond the limits of the country so legislating; so far, at all events, as relates to the succession to real estates. In such cases, even supposing the law of the domicile to govern, the question is not, whether the claimant is legitimate in the country of his birth or his domicile, but whether he is legitimate by reason of his being the issue of a lawful marriage.

I have hitherto considered the case on the assumption, that the Scotch Courts ought to be guided by the law of England as to the marriage of Thurstanus. But this is not, as I think, a true view of the case. We must assume, as was assumed by the Court of Session, for the purpose of this case, that the alleged marriage of Thurstanus was by Scotch law a mere nullity; that it was a criminal connexion contrary to the laws of God and the law of the land; and that the parties, if they had been in Scotland, would have been liable to suffer death as the penalty of their offence.

Now, admitting that *primâ facie* in inquiring whether a marriage is or is not valid, we must look to the law of the place where it has been contracted, or where the parties were domiciled, that is a rule which must be received with some qualifications. Where it has been the policy of the law of any country to prohibit marriage in any particular circumstances, the prohibition attaches on the subjects of that country wherever they may go. It was on this principle that the case of the *Sussex Peerage*, 11 Cl. & F. 85, was decided. The marriage there was clearly valid according to the laws of the country where it was contracted, but it was held in this House that the Royal Marriage Act having prescribed certain steps, by which alone the descendants of King George II. could contract marriage, the laws of this country would prevail against the law of the place where the marriage was contracted; and I can conceive no case to which this principle is more clearly applicable than a case where the law makes void marriages of a particular description, as being contrary to the express commands of the Almighty, and punishes capitally those who contract them. It is true that, in the case of the *Sussex Peerage*, the parties who contracted marriage at Rome were domiciled in England, but I do not think that the opinion of the Judges, delivered by Chief Justice Tindal, was affected by that circumstance. The ground of that opinion was, that the prohibition caused a personal disqualification attaching on one of the parties to the contract, and from which he could never free himself, wherever he might be.

The same principle is applicable here. The law of Scotland must be taken as having positively prohibited Thurstanus from marrying Catharine Ann Dupuis, and that prohibition, as I think, was fixed on him absolutely and indelibly, so far as relates to Scotch descent, wherever he might be domiciled.

The present case, though not the same as that of *Doe dem. Birtwhistle* v. *Vardell*, bears a close resemblance to it. There the plaintiff was undoubtedly the legitimate son of his parents in the country where he was born and domiciled, but it was the policy and law of this country, in which he claimed to succeed to a real estate, that no one should be deemed to sustain the character of son and heir, unless he was born after the marriage of his parents; and as the claimant there was born before marriage, he was held to be incapable of inheriting real estate here. The *lex loci rei sitæ* prevailed. So in the present case, the Scotch law expressly enacts that no one shall marry his first wife's sister, and that if he does the marriage is void, and the children are bastards (for this we must in the present case at least assume to be the law of Scotland); and I think that, reasoning by analogy from *Doe* v. *Vardell*, that is a law which must be taken to operate, whatever may be the law of the country where the marriage is contracted, or the parties are domiciled. On these grounds, I concur with my noble and learned friend in thinking that the Court of Session was wrong. And, according to the arrangement made on the argument below, the case must now be remitted back.

LORD WENSLEYDALE.—My Lords, the question which your Lordships have to decide, on appeal from a judgment of the Court of Session, arose on a competition for the succession to the entailed estate of Bedlormie. The entail was made in 1702. The estate descended, according to the terms of that entail, on Sir Thomas Livingstone, who died in 1853, without issue. He had several brothers, all of whom died before him without issue, except one, named Thurstanus,

who left a son, the respondent, and the right of that son to succeed to the estate, as nearest and lawful heir male of tailzie and provision of Sir Thomas Livingstone, is the question in this case.

This question was raised on a petition presented by the respondent, Alexander Livingstone, to the Sheriff of Chancery; another petition was presented by Mrs. Fenton, the eldest surviving sister, under the Statute 10 and 11 Vict. cap. 47. The cause was advocated into the Court of Session; and afterwards Mrs. Fenton brought an action of declarator of bastardy against the respondent, which raised the question not merely of his being the lawful child of Thurstanus, but also that he was not lawfully procreated, and was not entitled to succeed as heir to Sir Thomas Livingstone by virtue of the tailzie.

The case on the part of the respondent was, that he was born in England in 1809; that his father, Thurstanus, was domiciled in that kingdom; married there in August 1808, when so domiciled, to his mother; and died in December 1839. She died in 1832.

On the part of the appellant it was alleged, that Thurstanus had, previously to the marriage with the respondent's mother, married her sister, who died in 1806; and it was contended that this second marriage was incestuous and void, and the issue therefore illegitimate, and incapable of succession to a Scotch estate.

Proof was gone into by both parties at great length: on the part of the respondent to prove the domicile of Thurstanus in England at the time of his marriage, and his own birth; on the part of the appellant, to establish the fact, that the mother of the respondent was the sister of Thurstanus' first wife. The Lord Ordinary was satisfied that both the domicile and relationship were established.

On the hearing of this appeal, both these questions were again brought forward, particularly that of domicile, at some length; but your Lordships have already intimated an opinion that the evidence of both were quite satisfactory, and it is unnecessary to say anything more as to the facts of the case. The question of law which arises upon them is most important.

The Lord Ordinary was of opinion that the legitimacy of the respondent was to be decided according to the law of his domicile; that by the law of England (his domicile) his legitimacy could not be disputed; and his interlocutor referred to an annexed note, in which his reasons are very fully and ably stated, and amongst them he intimates a doubt whether the marriage with a wife's sister was expressly prohibited by Divine law, so as to be capitally punishable under the Scotch law, (Statute 1567, chapter 14,) if it had taken place in Scotland.

Upon a reclaiming note to the First Division of the Court of Session, the Court adhered to the interlocutor, but deleted the part which referred to the reasons; and the Judges of the Court of Session, in delivering their opinions, proceeded upon the assumption, that such a marriage, entered into between parties domiciled in Scotland, would, according to the law of that country, be struck at by the Statute 1567, caps. 14 and 15, and that the issue of that marriage would be illegitimate. But they all were of opinion that the question of illegitimacy was to be determined by the law of the country of his domicile, and that by the law of England he would be held to be legitimate.

My Lords, I have fully considered the very able arguments of the learned Judges, and those that were urged at your Lordships' bar; and, with the greatest respect for the Judges, I am satisfied that they have come to a wrong conclusion, and therefore advise your Lordships to reverse the judgment of the Court of Session.

In order to decide the very important question in this case, we must inquire, first—assuming the marriage of the claimant's parents to have been lawful, and himself to have been legitimate by the law of England—Whether he is entitled to succeed to this Scotch estate? Secondly, if the question is to be decided by the law of the domicile, (England,) was the marriage legal so as to make the issue of it legitimate?

It must be considered as established, that the law of a man's domicile regulates his rights to personal property wherever situated, on the acknowledged principle of *mobilia sequuntur personam*, and therefore the succession to his effects takes place according to the law of the place where he is domiciled at the time of his death, in the cases of intestacy or testacy. It is now fully and perfectly settled by our law, that the law of the domicile regulates the distribution of personal estate in the former case, and the form of the will in the latter. The law of the domicile regulates also the personal qualities which take effect from birth, such as legitimacy or illegitimacy, or absolutely as to the succession of personal property, (Story on the Conflict of Laws, 481,) but subject to a qualification as to realty, to be afterwards explained, or the qualities which arise after birth, such as majority and minority. The laws of the state affecting the personal status of its subjects travel with them wherever they go, and attach to them in whatever country they are resident (Wheaton, chap. 11th, p. 122).

I do not stop to inquire whether the expression, that the laws of foreign countries, where they have an extra-territorial operation, are said to owe it to the comity of nations, is the best mode of expression. It certainly is in common use, and is perfectly intelligible.

Story, in § 38, says, "There is not only no impropriety in the use of the phrase 'comity of nations,' but it is the most appropriate phrase to express the true foundation and extent of the

obligation of the laws of one nation within the territories of another. It is derived altogether from the voluntary consent of the latter, and is inadmissible where it is contrary to its known policy or prejudicial to its interests." The principle is well explained by Huber in his 3d proposition on the subject of the Conflict of Laws. To the same effect President Bohier expresses himself in his "Observations sur la Coutume de Bourgogne," cap. 23, §§ 62 & 63, p. 457. Wheaton, cap. 2, p. 115, "This effect given to foreign laws is founded on a kind of comity of the law of nations, by which different people have tacitly agreed that they shall apply, whenever it is required by equity and common utility, provided they do not contravene any prohibitory enactment."

But in respect to immoveable property the rule is different, though there have been questions, perhaps not difficult to decide, as to the capacity to convey and the form of conveyance. Where the country of the domicile and that of the estate differ, it is fully established that the law of the country in which the property is situated governs exclusively as to the tenure, the title, and descent of such property—(Wheaton's Elements of International Law, part 2, chapter 2, p. 116; 4 Burge, 581). Therefore, lands in each country descend to those who are heirs by the laws of that country,—to all children equally where the custom of gavelkind prevails; or, as it is in France, where all share equally a certain part; or, in Austria, where all share the whole in certain proportions;—that rule must prevail, though a different rule regulates the descent in the country of the domicile of the deceased owner. If, in the country where the lands are situate, the youngest son takes, it matters not that the eldest is entitled in the country of the domicile. If the eldest legitimate son, or the eldest son lawfully procreated, is to succeed by the *lex loci rei sitæ*, he alone can succeed who is legitimate or lawfully procreated according to the law of that place. But, when the claimant is not a native of that place, the law gives effect by the comity of nations to the law of his domicile where he was born; and, if legitimate and born of a lawful marriage there, he would be legitimate according to the *lex loci*, with the qualification afterwards noticed. If not legitimate according to the law of his domicile he could not succeed, even though he would, under the same circumstances, be legitimate and entitled to succeed if born in the country *rei sitæ;* as appears by the case of *Strathmore Peerage*, noticed in the judgment of Chief Justice Tindal in *Doe* v. *Vardell*, 6 Bing. N. C. 385, and even though legitimate by the law of his domicile, when born before marriage, he could not succeed to real estates if illegitimate by the law of the place where the land is situated, as was decided in that case after the most deliberate consideration.

It matters not whether that law was by a special statute or the common law of the land. There is no doubt, however, that the law forbidding the *ante-natus* to succeed in England was part of the common law, and the Statute of Merton was in affirmance of it; or, more correctly speaking, a refusal to vary it. The reasoning in that case applies in every respect to this,—a claimant, born after a marriage valid according to the law of the domicile, would be *primâ facie* entitled to succeed to the estate. As to the fact of the marriage, Lord Stowell says,—"It is the established principle that every marriage is to be universally recognized which is valid according to the law of the place where it was, whatever that law may be"—*Herbert* v. *Herbert*, 2 Consist. R. 263. But if, using the language of Huber, the adoption of the law of the domicile would occasion a prejudice to the rights of other states and their citizens; or if, using the language of Bohier, they contravene a prohibitory enactment, the comity of nations would not require or authorize their adoption. If such a marriage, good according to the law of domicile, were contrary to their notions of religion and morality, it would be impossible to contend that it ought to be adopted by them, and the issue of that marriage deemed legitimate for the purpose of succession to real estate. Supposing the law of the domicile considered the eldest natural son to be legitimate, and to be entitled to his father's property, real and personal, it could not for a moment be contended that he could succeed to a Scotch estate; or, suppose polygamy was permitted in the country of domicile, it could not be contended that the son of a second wife should be heir in Scotland to real property after the death of the first without children. Such a marriage would be contrary to the moral and religious and political institutions of that country, and is forbidden by the law of Scotland; in Scotland itself under severe sanctions,—the confiscation of goods, the piercing the tongue, and infamy (Statute 1551, cap. 19). Is there not precisely the same objection, or rather more, to this marriage of which the claimant is the issue, as being contrary to the moral and religious institutions of the Scotch, for it is characterized by the law as "vile, filthy, and abominable in the presence of God;" it is forbidden by much more severe sanctions, and, if it had taken place in Scotland, would be punishable by death according to the Statute 1567, § 14. The case is precisely the same as to its legality as if, instead of being the marriage of a husband with his deceased wife's sister, it was a marriage in a foreign country by a man with his sister, daughter, or mother; and can any one doubt that such a marriage would never be tolerated, and that the issue would not be deemed legitimate? Mr. Justice Story, in § 114, states that marriages involving polygamy and incest could not be recognized in any Christian country; but he distinguishes in the case of incest, confining the doctrine to such marriages as are, by the general consent of all Christendom, incestuous. This distinction has

been disapproved of with reason by Sir Cresswell Cresswell, in the recent case of *Brook* v. *Brook*, 3 Sm. & G. 481. One cannot see how any country can be called on to give effect to a marriage, as to real estate, within the jurisdiction of its Courts, which is, by its own law, deemed incestuous and void.

I think, therefore, that this case falls within the exceptions allowed in the rule as to adopting the laws of a foreign state as to the personal status in the question of heirship. If the case is to turn on this point, the respondent ought to have the option, if he thinks fit, to exercise it, of having the case remitted for the purpose of considering whether the assumption as to the law of Scotland forbidding the marriage of the sister of a deceased wife is correct, though I cannot feel any doubt whatever on that question.

The second question for consideration is, Whether, supposing the legitimacy of the claimant is to be decided by the law of domicile only, the marriage was valid, so as to make the issue of it legitimate according to that law? My opinion is, that, by the law of England, the marriage of a widower with his deceased wife's sister was always as illegal and invalid as a marriage with a sister, daughter, or mother was. This appears to be clear by the decision in the well considered cases of *Regina* v. *Chadwick*, and *Regina* v. *Saint Giles*, (11 Q. B. 193, 194,) in which the several statutes and authorities prior to Lord Lyndhurst's Act (Statute 5 & 6 Will. IV. c. 54) are commented upon and considered. It was always deemed as being within the prohibited and Levitical degrees. But, from the peculiarity that the question of the validity of marriage with reference to this objection of being within the Levitical degrees was matter of ecclesiastical cognisance, and cognisable in the Spiritual Court alone, it could not be questioned after the death of either party, for it could not be dissolved by the Court then, as death had already dissolved it, nor could the issue be bastardized, though the survivor might be visited with ecclesiastical censures. But the marriage was still an unlawful and forbidden marriage, and the issue really was born illegitimate, though the validity of the marriage and the legitimacy of the issue could not be questioned in the country of domicile by reason of the rules of the peculiar law which made these matters cognisable in one tribunal only in that country. The marriage would be good in one sense, because it could not be set aside, and the issue would be legitimate in that sense, because there were no means provided by the English law to deprive them of the rights belonging to legitimate issue; but such marriages were all forbidden at the time of contracting them,—all illegal, all capable of being set aside as void *ab initio* on account of their illegality; and the comity of nations cannot require them to be valid in another country where there exists no means of setting them aside.

Suppose the succession had opened in the lifetime of both parents, as it would have done if the estate had been settled on the eldest son of Thurstanus on the death of Sir Thomas Livingstone, and not on Thurstanus himself, and he and his wife were both alive, would that son have been deemed legitimate? If, as Mr. Palmer argued, the Scotch Court had then written to the English Court, requesting them to certify what was the law; or if the law had been proved by English advocates, it would unquestionably have been stated that the marriage was illegal, and might be set aside, because it was *ab initio* void, on the ground of its illegality. And could the Scotch Court, under those circumstances, give effect to that marriage, and allow the issue to be legitimate, and to succeed to a Scotch estate? and could the legitimacy, if it did not exist then, be afterwards created by the omission to set aside the marriage in the lifetime of both parents?

Upon these grounds, I think that the respondent had not any right to the estate, even if his legitimacy was to be determined by the law of the country of his domicile.

LORD CHELMSFORD.—My Lords, the question in this case is, whether the respondent is entitled to be served as nearest and lawful heir male of tailzie and provision in special of Sir Thomas Livingstone in the lands of Bedlormie, or whether, by the failure of heirs male of his body and also of heirs male of Alexander Livingstone the entailer, the appellant is his nearest heir. The respondent is the son of a second marriage of Thurstanus Livingstone with his first wife's sister, and, if legitimate, would be indisputably the nearest son and lawful heir male. The case in the Court of Session was argued and decided upon the assumption, that the marriage, of which the respondent was the issue, if it had taken place in Scotland, would have been incestuous and void, and would have subjected the parties to capital punishment under the statute law of that country. This, however, must not be considered to have been absolutely decided to be the law of Scotland, but merely to have been taken for granted for the purpose of the argument. The only question which was raised and determined was, that the parents of the respondent, being both of them domiciled in England at the time of the respondent's birth, and the marriage, upon the death of the parents, having become irrevocable in England, and consequently the legitimacy of the respondent having been established there for all purposes, this personal status attached upon him as an inseparable incident, and accompanied him wherever he went; and consequently, determined his claim to be regarded in England as heir male lawfully procreated under the deed of tailzie and provision in question.

In considering the case, two circumstances must throughout be borne in mind,—1st, that

the marriage of the parents of the respondent is to be regarded as having been not only void, but as being a criminal act in Scotland; 2nd, that the title of the respondent depends upon his answering a description contained in an instrument relating to real property in that country.

The marriage of the parents of the respondent having taken place prior to 1835, it is necessary to consider what was the law of England with respect to a marriage with a deceased wife's sister before the act of parliament of that year. I think it cannot properly be questioned that such a marriage was void *ab initio*. Now, there is a well known maxim of our law, *quod ab initio non valet in tractu temporis non convalescet*. This rule would have had its full force and operation in these marriages if it had not been for the interference of the temporal Courts with the proceedings of the ecclesiastical Courts after the death of one of the parents. This jurisdiction of the temporal Courts appears to have been exercised in favour of the issue of the marriage, which they had thus protected from being bastardized, by preventing the ecclesiastical Courts from declaring a marriage to have been void, which had been already dissolved by death. For it is to be observed, as my noble and learned friend Lord Cranworth has stated, that, in these cases, the ecclesiastical Courts pronounced no decree of divorce, but merely made a declaration of the nullity of the marriage; and the temporal Courts only restrained the ecclesiastical Courts from making this declaration at a time when it could have no practical effect upon the marriage itself, and when its only operation would be to bastardize the issue. This is not unimportant as shewing that the question of the original validity of the marriage was not at all touched by the temporal Courts; thus disabling the ecclesiastical Courts from pronouncing a declaration respecting it. And that the temporal Courts, by their interposition, did not profess to deal, in any way, with the validity or invalidity of the marriage itself, is shewn by their leaving the ecclesiastical Courts at liberty to proceed to punish the surviving party for incest, a power which, according to the opinion of Sir Herbert Jenner Fust, continues even as to marriages protected by the Act of 1835.

The respondent's condition, therefore, in England was this,—he was the offspring of a marriage which was incestuous and void, but of a marriage which, by the course of events, had become irrevocable. Therefore, by the law of the country of his domicile, his legitimacy was established because it could not be impeached. He had, therefore, a personal status of legitimacy which, by the course of events, had become virtually absolute in this country; and it may be conceded that this would determine his rights in all other countries, if not opposed by any peculiar laws or views of morality or religion, regulating the subjects of marriage and succession in those countries. But I cannot think the status of legitimacy in the country of domicile can be regarded as being more than a condition relative to the laws and institutions of that country, and that it is necessarily of universal efficacy. The case of *Doe* v. *Vardell* is an authority the other way. There was no doubt in that case, that the plaintiff, in the ejectment, was a legitimate child according to the law of Scotland where his parents were domiciled, but the character of legitimacy was not allowed to prevail in England, where he was claiming lands as heir to his father.

It seems to have been assumed throughout this argument before your Lordships, that, if the claim in this case had been to moveable property, the respondent would have succeeded; but I am not disposed, without farther consideration, to concede that. If the marriage is regarded in Scotland as an incestuous marriage, and it had become necessary, in order to make out the title to be next of kin, to prove such a marriage, what result would have followed? It is, however, unnecessary to consider that question, as we are dealing with a different description of property.

The respondent, however, contends, that although this is a case of real property and of lawful issue generally, or of lawful issue according to a particular description in a deed of tailzie, yet that the status of legitimacy being established by the indissolubility of the marriage in England, the law of Scotland will not go back and inquire into the circumstances of the marriage; but, having ascertained that it cannot now be impeached according to the *lex loci contractus*, it will retire and put no further questions. This is grounded on Sir William Scott's judgment in *Dalrymple* v. *Dalrymple*, 2 Hagg. Cons. 129. That was a suit for the restitution of conjugal rights, in which a question was raised in answer, as to the validity of a marriage in Scotland *per verba de presenti* without religious celebration. This, however, like every other contract, was to be determined by the *lex loci*. But suppose the contract of marriage in that case had been one which the law of England repudiated on the ground of immorality, I apprehend the English Court would not have accepted the response of the Scotch law, and submissively acquiesced in it by sanctioning such a contract. This is clearly the opinion of Mr. Justice Cresswell, and also of Vice Chancellor Stuart, in the case of *Brook* v. *Brook*, with which I agree.[1]

Mr. Justice Story, in considering the cases where marriage, celebrated according to the *lex loci*,

[1] This case was afterwards taken by appeal and decided by the House of Lords, *Brook* v. *Brook*, 9 H. L. C. 193.

will be recognized in other countries, admits the exception of marriages positively prohibited by the public law of a country, from motives of policy, or from considerations of morality or religion. But when he comes to the question of incestuous marriages, he says, (as my noble and learned friend opposite has mentioned,) § 114, "Care must be taken to confine the doctrine to such cases as, by the general consent of all Christendom, are deemed incestuous." But surely this must be incorrect. No country can be bound in a case of this kind to wait and collect the opinions of all Christendom before it can act upon its own views of morality or religion. An incestuous marriage is one which, in the eyes of the nation which regards it in that light, is an offence against the laws of God as well as against its own laws; and it cannot be expected to tolerate such a marriage when it becomes the proper subject of its jurisdiction, whatever views may be entertained upon it by other countries, as to which it ought not to permit itself to inquire. Nor can it in such a case pay any deference to the rules of proceeding of another country, which, upon views of convenience or forbearance of its own, will not permit, after a certain event, a marriage, which even that country holds to be void in its nature and essence, to be avoided. If the Scotch Courts were to put any question to the English Courts in this case, it would be this: What do you hold as to the original validity of such a marriage? The question cannot properly be regarded as it now stands when time and accident have rendered that which was essentially bad virtually good, by protecting it from being assailed. But the question is—What answer would the Courts of England have returned immediately upon the marriage, or upon the birth of the respondent, or, it may be added, at any time during the lives of both parents? The answer to that question would not have been, that the marriage was good and valid until it was impeached, but that it was void, and liable to be proved to be so during the lives of the parties to it. But it appears to me to be a mistake to suppose, that in this case the Scotch Courts will put any question at all to the English Courts. The question of legitimacy having relation to real estate, is a question which each country will answer for itself, and will not ask the aid of another country to determine. That this is the rule of all countries, with respect to the title to real property, appears from the passages in the Jurists cited in the course of the argument, and is established by the case to which such frequent reference has been made—that of *Doe* v. *Vardell*. The Court of Session, therefore, ought in this case to have refused to hear the English law declaring a person legitimate whom, from being the offspring of an incestuous and criminal marriage, they would of themselves have pronounced to be illegitimate; and upon the assumption on which the argument proceeded, they ought to have held that the respondent was not the lawful heir male of tailzie and provision of Sir Thomas Livingstone.

My Lords, on these grounds I agree with my noble and learned friends, that the Court of Session was wrong, and that the interlocutor must be reversed.

The question was put that the case be remitted back to the Court of Session.

LORD WENSLEYDALE.—We all agree in opinion as to the status of the respondent,—that he is illegitimate according to the Scotch law. It is unnecessary, therefore, to send the case back to the Scotch Court. We reverse the decision of that Court; and, in our view of the case, there is no necessity for any inquiry as to the Scotch law.

LORD CHELMSFORD.—As I understand it, the argument in the Court below proceeded upon the assumption that the law of Scotland was, that a marriage of this kind was incestuous and invalid; but it was not to be taken for granted that that was the law of Scotland,—that was a matter to be reserved.

LORD WENSLEYDALE.—That becomes quite immaterial now. The Court of Session decided this case upon their view of the law of England. They said we must decide it, not by the Scotch law, but by the English law, by the law of the domicile, and by that law this marriage was a good marriage, and the child was legitimate. Now, we are of opinion that, according to the English law, the marriage was a bad marriage, and the child was illegitimate. It becomes, therefore, unnecessary to make any further inquiry.

LORD CRANWORTH.—If this case turned upon the English law entirely, and not upon the Scotch law, then it might become unnecessary to remit it back; but suppose the Court of Session should come to the conclusion that, by the law of Scotland, it is a perfectly valid marriage, then the respondent might succeed.

LORD WENSLEYDALE.—They are bound to go by the English law, and by the English law it is an invalid marriage. The Court of Session have said that it is only a voidable marriage, and that the issue would be legitimate. We say that they were wrong in that. We all agree in our opinion, and it becomes, therefore, unnecessary to consider what the Scotch law is.

LORD CHELMSFORD.—It appears to me that the question that we have determined is this, that it is not the law of the domicile which is to decide in this matter, but the *lex loci rei sitæ*, because it is a question of real property. Therefore, supposing that, by the law of Scotland, this was a good marriage, although it might have been an invalid marriage in England, the Courts in Scotland will not ask anything about it, but will determine it according to their own law.

LORD WENSLEYDALE.—Undoubtedly.

Mr. Anderson.—I do not know whether your Lordships will make any declaration in the remit to guide the Court of Session. The proceedings are very peculiar. The first is an advocation of two briefs—competing briefs. The respondent has been served. That is now reversed; but if your Lordships' judgment is right, or if the Court of Session hold that, according to Scotch law, the same results would follow, then the appellant, who is the son and heir-at-law of the original appellant, will be declared entitled to be served in the advocation.

Lord Advocate.—It is impossible to do so in the shape in which the case stands.

LORD CRANWORTH.—The Court of Session will know best how to proceed. There can be no possible mistake about it. The case was argued upon the assumption that it was to be remitted back to the Court, and we must take care that we do not run the risk of doing something which we do not intend.

Mr. Anderson.—We were found liable in costs below, and we have paid them, shall we get them back?

LORD CRANWORTH.—You must get back any costs you have wrongly paid.

LORD CHELMSFORD.—I suppose, Lord Advocate, that follows as a matter of course?

Lord Advocate.—Yes, my Lord.

Mr. Anderson.—It is always an order in your Lordship's judgment.

LORD CRANWORTH.—Sir John Lefevre will take care that that is made quite clear.

Interlocutors reversed. Cause remitted with direction as to repayment of costs.

Appellants' Agent, William Waddell, W.S.—*Respondent's Agent*, James Somerville, S.S.C.

JULY 15, 1859.

JOHN KIRKLAND & SON, &c., *Appellants*, *v.* NISBET & COMPANY, *Respondents.*

Proof—Correspondence—Witness's construction of document—Parole.—*At a jury trial in a question as to the extent of an order for goods given by the defenders to the pursuers, which mainly depended on the construction of correspondence, a witness was asked what an employer "would be entitled to expect" on receipt of a particular letter in the correspondence. The defenders claimed that they were entitled to put the question, so as to prove that no mercantile usage qualified the clear terms of the letter, seeing that the pursuers had averred and founded on such usage.*

HELD (affirming judgment), *That the question was incompetent, 1. Because it was not so put as to relate to mercantile usage, but really asked the witness to construe the writ, which was the province of the Court and jury; and, 2. Because it was asking the witness to construe an isolated letter without shewing him the whole correspondence.*[1]

The defenders appealed to the House of Lords, maintaining (in their *printed case*) that the judgment of the Court of Session should be reversed:—"1. Because the said question to the witness Kaeracouse was a competent question, and ought not to have been disallowed by the Lord President at the trial. 2. Because the exception taken to the ruling of the Lord President disallowing the said question, ought to have been sustained." *Smith* v. *Wilson*, 3 B. & Ad. 728; *Shore* v. *Wilson*, 9 Cl. & F. 355.

The respondents supported the judgment, maintaining (in their *printed case*):—"1. As a general rule, the construction of written documents is for the Court, and there was nothing in the case to take it out of that rule, or to entitle the appellant to put the question which was objected to. 2. The question was irrelevant to the issue. 3. Having regard to the terms of the question, and the circumstances under which, and the time when it was put to the witness, it was unintelligible and inadmissible." *Calder* v. *Aitchison* 5 W.S. 40.

Lord Advocate Moncreiff, and *Rolt* Q.C., for the appellants. The question was competent. We wanted to prove that 600 tons of the sugar had been actually sold to us by the respondents, and that this was the meaning of the word "contracted" in the letter of 11th Dec. 1850. We produced a witness to prove the mercantile usage, and asked him that question.

[LORD CHANCELLOR.—If you had asked the witness about the mercantile usage, that might have been well, but how could you ask him such a question as this: "What would the employer be entitled to expect from that letter?" That was asking the witness to explain or construe a written document. It was asking him the meaning of the document.]

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[1] See previous reports 21 D. 1; 31 Sc. Jur. 3. S. C. 3 Macq. Ap. 796: 31 Sc. Jur. 641.