1859.

MRS. ANNE FENTON, ... APPELLANT.
ALEXANDER LIVINGSTONE, ... RESPONDENT.

June 9th, 10th, 15th, 16th, & 17th, and July 15th.

Marriage with deceased Wife's Sister.—A person born of an English marriage with the deceased wife's sister, held not legitimate in Scotland as to the succession to real estate.

A person born in England prior to the 5 & 6 Will. 4. c. 54. of a marriage voidable, but unchallenged in the lifetime of his parents, was held by the Scotch Court to be legitimate according to the law of England, and therefore to be legitimate according to the law of Scotland, and entitled as such to succeed to real estate there, in accordance with the rule of comity. Reversal by the House.

Comity in general allowed.—Per Lord Brougham: 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; p. 531.

Exceptions to Comity.—When a foreign rule is repugnant to the fundamental principles of the *lex fori*, or when it is contrary to religion, or sound morality, the doctrine of comity ought not to be followed.

Per Lord Wensleydale: If the adoption of the law of the domicile would occasion a prejudice to the rights of other states and their citizens, or if it would contravene a prohibitory enactment, the comity of nations would not require its adoption; p. 550.

Per Lord Wensleydale: If the marriage, though good according to the law of the domicile, were, nevertheless, contrary to the religious or moral notions of other states, it would be impossible to contend that they ought to be adopted by them; p. 550.

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Per Lord Brougham: If comity were always to prevail, a foreign marriage between uncle and niece under papal dispensation must be held valid; and the 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 punished; p. 534.

Void and voidable.—Per Lord Brougham: The marriage was voidable, because it was void; p. 533.

Per Lord Chelmsford: There is a well-known maxim of our law: *Quod ab initio non valet, in tractu temporis non convalescet;* p. 555.

Per Lord Brougham: Although prior to Lord Lyndhurst's Act, a marriage with the deceased wife's sister could not be questioned after the death of both or either of the parties, it was illegal nevertheless, and if questioned while both parties were alive, it must have been declared void *ab initio*; p. 533.

Per Lord Brougham: The circumstance of one party to the marriage having died, did not make the marriage legal, though it precluded the possibility of setting it aside; p. 533.

Consanguinity and Affinity. — Per Lord Brougham: There is by our law no difference whatever between consanguinity and affinity as regards the forbidden degrees; p. 534.

Scotch Law as to the forbidden Degrees. — Per Lord Brougham: The Scotch law is much more stringent on this subject than the English; for it holds all marriages within the forbidden degrees, not only to be incestuous, but severely punishable, even capitally; p. 534.

Per Lord Chelmsford: The marriage is to be regarded as having been not only void, but as a criminal act in Scotland; p. 555.

Land Right.—Per Lord Brougham: In deciding 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 to take a real estate by inheritance elsewhere ; p. 532.

Per Lord Wensleydale : In respect to immoveable property the rule is, that the law of the country in which it is situated governs the tenure, the title, and the descent ; p. 549.

Per Lord Chelmsford : The question of legitimacy having relation to real estate is a question which each country will answer for itself ; p. 556.

Special Limitation.—Per Lord Chelmsford : The title of the Respondent depends on his answering a description relating to real property in Scotland ; namely, "*heir male lawfully procreate ;*" p. 555.

Per Lord Brougham : The Respondent cannot be held the *heir male lawfully procreate* by parties whose marriage was an offence severely punishable by the law of Scotland ; p. 535.

Per Lord Cranworth : Is the Respondent the heir male lawfully procreate ? That is the point to be established ; p. 540.

Per Lord Wensleydale : The question is not merely is the Respondent a lawful child, but also was he lawfully procreated, and entitled to succeed as heir by virtue of the tailzie ? p. 545.

SIR THOMAS LIVINGSTONE, of Bedlormie, in the county of Stirling, died a bachelor, in April 1853.

The family estate had been possessed by him under an entail of 1702, whereby the then owner limited it "in favour of himself, and the heirs male lawfully " procreate of his body ; whom failing, in favour of " his other heirs or assignees whatsoever."

On the death of Sir Thomas, two competitors appeared to claim the succession ; namely, Alexander Livingstone, the son of his younger brother, and Anne Livingstone Fenton, widow, a sister of Sir Thomas.

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The rival claimants proceeded under the 10 & 11 Vict. c. 47, by petitions to the Sheriff in Chancery.

The petition of Alexander Livingstone claimed to be served "as nearest and lawful heir *male* of tailzie and provision."

The petition of Mrs. Fenton claimed to be served " as nearest and lawful heir of tailzie and provision," she alleging the failure of heirs male. The petitions were conjoined by the Sheriff, and a proof was allowed; Mrs. Fenton asserting her right on the allegation, that Alexander Livingstone was the issue of an incestuous connexion on the part of his father with his deceased wife's sister.

Mrs. Fenton further raised an action of declarator of bastardy against Alexander Livingstone, to which action he put in a defence, stating "1st, That the subject-matter of the action being involved in the process of competition, the action was excluded on the ground of *lis alibi pendens* and *accumulatio actionum;* and 2nd, That the action was incompetent, in respect that the general question of his status and legitimacy could not be competently raised in any other forum than that of his domicile; that the Court had no jurisdiction, he having been born and domiciled in England."

At the close of the proof, full arguments took place before the *Lord Ordinary* (*a*), who, on the 15th of January 1856, pronounced the following Interlocutor in the action of declarator :—

" The *Lord Ordinary*, having heard Counsel, &c., for the reasons explained in the annexed Note, finds that the Defender (Alexander Livingstone) was born in England, the offspring of a marriage celebrated in England, between parties domiciled in England at the

(*a*) Lord Ardmillan.

date, and during the subsistence of the marriage: Finds, as matter of fact, that the Defender is legitimate according to the law of England: Finds that his legitimacy ought to be recognized by the Scottish Court; therefore assoilzies the Defender, and finds the Pursuer liable in expenses."

The following learned and elaborate Note, was was issued by the *Lord Ordinary* in explanation of his judgment, to which it was annexed. It states the material facts.

Lord Ordinary's opinion.

The doctrine of the Reformed Churches is, that marriage shall be as free as the law of God has left it; and the Divine law, as contained in the eighteenth chapter of Leviticus is imported into the Scottish Statute of 1567, c. 14, and is referred to in the next Statute of 1567, c. 15. All connections "expressly prohibited" by the Divine law in this eighteenth chapter of Leviticus are declared by the statute law of Scotland (1567, c. 14.) to be incestuous, and punishable with death. To find the express prohibition against marriage with the sister of a deceased wife, it is necessary not only to examine the Scriptures, but more particularly to construe the eighteenth chapter of Leviticus; and if there is no express prohibition there, the connection is not incestuous.

The institutional writers on Scottish law concur in stating that, in so far as regards the validity of marriage, the same degrees which are prohibited in consanguinity are prohibited in affinity. (Stair, i. 4, 6; Erskine, i. 6, 9; Mackenzie, i. 6, 5; Bankton, i. 5, 47; Bell's Prin. s. 1527.) It is, however, to be noticed, that Mr. Erskine. whose authority on the precise point here raised is very clear and decided, deduces his opinion, not from the fourteenth, but from the fifteenth chapter of the Act 1567, and states that the connection is "virtually prohibited" by the law of Moses. He does not say "expressly prohibited," which is required by the fourteenth chapter. In the Confession of Faith, ratified by Act of Parliament in 1690, it is expressly stated, that "the man may not marry any of his wife's kindred nearer in blood than he may of his own, nor the woman of her husband's kindred nearer in blood than of her own." (Confession of Faith, c. 24, s. 4.) This declaration may be taken as an authoritative construction of the Divine law by the Presbyterian Church; for the Confession of Faith is "the public and avowed Confession of the Church of Scotland," and was ratified as such; and it is, in subordination to Scripture, the standard of faith to all Presbyterian bodies. But it has been seriously doubted by high authority whether, in construing the

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statute 1567, c. 14, which creates a capital crime, anything short of express prohibition by Divine law can be received as sufficient. (Hume on Crimes, vol. i. p. 447, 449.) The statute creates no crime, but that which consists in the breach of an express prohibition of the Divine law, and the only canon of construction is the eighteenth chapter of Leviticus. It is a highly penal statute, and must be rigidly interpreted. (Hume, vol. i. p. 447.) The capital sentence which it attaches to the crime which it creates cannot rest on inference, implication, or analogy. The propriety, perhaps the validity, of such a marriage may rest on more general views, but its character as a crime under this statute can rest only on express prohibition by the law of God. Even if it were ascertained, from the weight of concurring authority, from the Parliamentary ratification of the Confession of Faith, from considerations of social expediency, and from general practice and consuetudinary recognition, that a marriage with the sister of a deceased wife is contrary to Scottish law, that will not necessarily bring it within the scope of this penal statute, nor make it amount to incest, punishable with death. Connection with a wife's sister during the life of the wife has been frequently punished as incest; and it has been very recently found to be incestuous, and has been followed by a sentence of transportation. (Hume, vol. i. p. 450; Alison's Prin. p. 564; Case of Oman, 14th April 1855; Irvine's Just. Rep. vol. ii. p. 146.) But the Judges who decided that point reserved their opinions on the question of the legality of a marriage after the wife's death, and also on the question, whether such a marriage, if illegal, would be incestuous; and there is no decision of modern days upon either point.

The question whether, on a comprehensive review of the whole revealed will of God, obligatory on Christians, such a marriage is forbidden or permitted, is one which has been for centuries the subject of controversy among learned and pious men; and although on the question of the validity of such a marriage according to the law of Scotland, the great weight of institutional authority is against the marriage, yet contrary opinions have been expressed by scholars and lawyers of distinguished reputation.

In the view which the Lord Ordinary takes of the present case, it is not necessary for him to express any opinion on the validity of the marriage by Scottish law. It may, for the sake of the argument, be assumed that, if such a marriage occurred in Scotland, it would not be valid; and certainly no Presbyterian clergyman could knowingly celebrate it without a breach of duty, and the risk of deprivation of office. But it does not follow that the Defender, Alexander Livingstone, is to be declared a bastard, and refused the inheritance, because the marriage of his parents would have been unlawful if it had occurred in Scotland.

The father and mother of the Defender were regularly married in England on the 7th of August 1808, and the Defender was born in England on the 13th of June 1809. The marriage was dissolved by the death of Mrs. Livingstone, the mother of the Defender, who died in England in August 1832. Thurstanus Livingstone, the father of the Defender, died in England in December 1839. Sir Thomas Livingstone died in Scotland in April 1853; and the competing petitions for service were presented on 4th June and 4th July 1853.

The point directly and primarily involved in this case is not the marriage of Thurstanus, but the legitimacy of Alexander Livingstone.

This question of legitimacy is a question of personal status; and, as a general rule, apart from the specialty to be afterwards noticed, it must be decided according to the *lex loci contractûs*, if that be the domicile of the father at the date of the marriage.

This is the rule laid down by all the most eminent jurists. Where the law of the contract and that of the domicile differ, nice questions may arise; but if a marriage is celebrated in the place of the husband's domicile, and a child is born in the same place, the legitimacy of the issue of the marriage will be regulated by the law of that country. (Story's Conflict of Laws, sect. 51, 105, 113; Kent's Com. vol. ii. p. 91; Burge's Com. vol. i. 184; Lord Stowell's opinion in *Dalrymple* v. *Dalrymple*, 2 Hag. Cons. Rep. p. 54.) In the present case the *locus* of the marriage from which the Defender sprung was in England, and it is necessary to ascertain what was the domicile of the Defender's father at that time.

At the date of the marriage in 1808 the domicile of Thurstanus Livingstone was in England.

After careful consideration of the evidence, the Lord Ordinary has formed a decided opinion on this point. It is true that Thurstanus was born in Scotland, but he quitted his native country at a very early age, and he never again returned to reside in Scotland, but died in England in 1839, and is said to have been seventy years of age. His first marriage was in October 1797. He is designed in the certificate of that marriage as of the parish of St. Matthew, Bethnal Green, and he was married "by banns," so that the certificate is proof of residence; and evidence to the contrary in a suit touching the validity of the marriage is incompetent. (Starkie's Law of Evidence, vol. ii. p. 702; 26 Geo. 2. c. 33. s. 10; and 4 Geo. 4. c. 76. s. 26.) But there is sufficient parole evidence in support of the certificate to leave no doubt on the point. After his first marriage he and his wife lived in London, and not in mere lodgings, but in houses taken for themselves. He was indeed frequently from home; for, being a seafaring man, he was often and for considerable periods at sea. But he left his

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wife in London in a house which was to both spouses a home, and to which he returned when he came on shore. He had no home in Scotland. London was the "*locus ubi larem suum posuit, sedemque fortunarum suarum, unde cum proficiscitur, peregrinari videtur, quo cum revertitur, redire domum.*" His absence in his vocation does not deprive this house of the character of a home and a domicile. We have no *lares et penates*. But the *placens uxor* is the tutelary genius of a man's house; and though it may be said of a sailor, that "his home is on the deep," yet that must be his true domicile where his wife trims the lamp of his home on shore, and maintains the domestic altar for the worship of Him who is at once the household God and the Guardian of the distant wanderer. His first wife died in 1806; he returned from sea soon after, and there is evidence that, when not at sea, he continued to live in London, while there is no evidence or indication of any other home. He more than once stated that Catherine Ann Dupuis was married to Ticehurst "out of his house," (Advocator's proof, p. 12, B.), and it appears from the certificate (No. 200 of Process, p. 87 of Advocator's proof), that on 18th September 1803, he was in London present as a witness of that marriage. In August 1808 he married a second time, and this marriage was regularly celebrated in the parish of St. John, Hackney, in the county of Middlesex, the marriage being again "by banns," and he being then resident in that parish, as is clearly proved, not only by the certificate (Appendix to Record, p. 4), but by the parole evidence. Under these circumstances, it is really scarcely possible to doubt that, at the date of this second marriage in 1808, of which the Defender is the offspring, the true domicile of Thurstanus Livingstone was in England, where it continued to be at the date of the Defender's birth in 1809, and down to the death of Thurstanus in 1839. The fact that England was the place of the matrimonial domicile, as well as the place of the contract and the place of the Defender's birth, is most important; because, in that case, it is clear that the law of England regulates the personal status of the Defender, and the next question is what is the personal status of the Defender according to the law of England.

The Defender is legitimate according to the law of England. He is the offspring of a marriage not challenged in any suit during the life of the parties. His mother died in 1832. The Act of 5 & 6 Will. 4. c. 54, commonly called Lord Lyndhurst's Act, passed in 1835.

The Scottish Court ought, on the principles of international law, to recognize the legitimacy of Alexander Livingstone. The status of legitimacy is a personal quality, and, when once impressed by the law of appropriate jurisdiction, *qualitas personam sicut umbra sequitur.*

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From a marriage now beyond all challenge in England, the Defender has derived a legitimacy which, *ex comitate*, ought to be recognized in this country. If he brings this personal status to Scotland, and it is here challenged, the question is—not what was the quality of the marriage from which he sprang, but, is his legitimacy to be recognized?

If the parties to such a marriage had thereafter come to reside in Scotland, and if the marriage were valid by the law of the country where it was celebrated, but unlawful by the law of Scotland, and if any question had arisen here as to the rights of the spouses, then the Scottish Court would be called on to deal with the marriage, and to recognize or to repudiate it, and would be under the necessity of considering—first, whether the marriage is unlawful; and, secondly, whether the quality and degree of its unlawfulness is such as to prevent its recognition, and to require the repudiation of its validity. But, in the present case, it is not alleged that there has been any breach of Scottish law within Scotland, for the married parties were never in Scotland, and therefore the Scottish Court, when asked to recognize the Defender's legitimacy, is not called on to deal with the marriage, or to pronounce any opinion on its validity according to Scottish law, but may assume the legitimacy as a fact.

If the quality of the marriage can be here examined, and assuming its invalidity if it had occurred in Scotland, there arises a question on which the Lord Ordinary feels it to be his duty to state his opinion (*a*). Is it an incestuous connection, amounting to a capital crime, under the statute 1567, c. 14? It is only on the assumption that the quality of the marriage is examinable here that this question arises; but, on that assumption, it cannot be escaped, because, while mere invalidity will not exclude recognition *per comitatem* of a foreign marriage, an incestuous marriage is in a different position. (Story's Conflict of Laws, s. 114; Kent's Com. vol. ii. p. 81.)

There has been no such series of decisions, no such solemn deliverance, and no such settled judicial practice, as to amount to an authoritative construction of the statute, and relieve the Court from the necessity of construing it by the canon of the eighteenth chapter of Leviticus. Then, the declaration in the Confession of Faith, and the Parliamentary ratification of that Confession, though binding on the Presbyterian Church, and though, perhaps, binding on the State of a Presbyterian country to civil effects, is not binding as a legislative construction of the prohibitions of the

(*a*) The Inner House did not agree with the Lord Ordinary as to the law of Scotland on this point; neither did the House of Lords.

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Divine law, to the effect of creating a capital crime. The question, What says the statute? throws us back on the other question, What is "expressly prohibited" in the eighteenth chapter of Leviticus? Nothing less than an express prohibition can be sufficient. With great diffidence, and with unfeigned respect for the many learned and excellent persons who have arrived at an opposite conclusion, the Lord Ordinary ventures to express his opinion, that there is in the Divine law, and more especially in the eighteenth chapter of Leviticus, no such "express prohibition" of this marriage as to make it incestuous under the Statute.

But if it be not an incestuous connection in Scotland, then there is no ground for refusing to recognize here the legitimacy which the law of England has conferred on the Defender. Story, concurring with all the leading authorities on international law, after stating that "no Christian country can recognize incestuous marriages," proceeds to say—"But when we speak of incestuous marriages, care must be taken to confine the doctrine to such cases as, by the general consent of Christendom, are deemed incestuous." (Story, s. 114, 115.)

In the last place, the fact that the Defender is claiming a Scottish estate affords no reason for refusing to recognize his legitimacy.

The decision in the well-known case of *Birtwhistle* v. *Vardell* has been referred to as an authority against the recognition of the Defender's legitimacy in a question of succession to Scottish heritable estate. That decision, however, when carefully analysed, will be found to be not a judgment on the question of status, or on the question of international law, but a judgment exclusively on a question of the transmissibility of English landed estate. The ground and foundation of the judgment was the Statute of Merton, a rule of positive law annexed to land, and qualifying the right to inherit land in England. Had it not been for this peculiar rule of positive law, the legitimacy would have been recognized in the case of Birtwhistle to all effects, and the rule founded on the Statute of Merton was only applied to the effect of regulating the succession to the English real estate.

But there is no Scottish Statute of Merton, no rule of positive law annexed to land which can interpose to prevent or limit the full recognition of the status of legitimacy. In Scotland, the right to succeed to land depends simply on propinquity, and on the status of legitimacy. The converse of the case of Birtwhistle cannot occur.

The decision of the *Lord Ordinary* was adhered to by the Inner House (First Division) of the Court below, on the 27th May 1856, with this qualification,

that the Inner House, while agreeing with the *Lord Ordinary* in his conclusion, did not entirely adopt the reasoning stated in his Note. They, especially, for the purposes of the discussion, assumed the marriage to have been incestuous and void by the law of Scotland; but they did not hold this conclusively; still less did they adjudge it; so that this important question of Scotch law was left by them an open one. The judgment of the Inner House in terms was as follows:—

"27th May 1857. The Lords having considered, &c., "ordain the words, '*for the reasons explained* in the "'annexed Note,' to be deleted from the Interlocutor "of the *Lord Ordinary* reclaimed against: Adhere "to the said Interlocutor as now altered, and refuse "the desire of the note: Find the Pursuer (Mrs. "Fenton) liable in additional expenses," &c.

On the 15th of January 1856, the *Lord Ordinary* disposed of the rival petitions for service. His Lordship's Interlocutor was as follows:—

"In respect that, on the assumption of the legitimacy of Alexander Livingstone, no relevant plea to exclude his right to obtain service, as craved, has been proponed by the Petitioner, Mrs. Fenton: Finds that the Petitioner, Alexander Livingstone, is entitled to be served nearest and lawful heir of tailzie and provision in special of Sir Thomas Livingstone; conform to his petition remits to the Sheriff in Chancery to serve him accordingly, and to dismiss the petition for the service of Mrs. Fenton, and decerns: Finds the Petitioner, Alexander Livingstone, entitled to expenses."

To this Interlocutor the same Lords of the Inner House, on the same 27th May 1856, "adhered,"

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without any qualification; and on the 13th November 1856, they pronounced an Interlocutor charging Mrs. Fenton with costs.

The general result of the Scotch decision is thus summed up in the Rubric of the Court of Session Cases (*a*):—

Held, by the Lord Ordinary (Ardmillan):—1. That in substance and effect the claimant had, by the law of his father's domicile at the time of his birth, the status of legitimacy derived from marriage; 2. That such marriage *not being incestuous and criminal* by the law of Scotland, the issue of it, being legitimate by the law of the English domicile, must be held as legitimate by the law of Scotland.

In the Inner House, the Court (with the view of avoiding the discussion of the question as to the validity of a marriage with the sister of a deceased wife by the Scotch law) requested the parties to take the argument upon the opposite footing from that on which the Lord Ordinary decided the case; and it was accordingly agreed that the basis of the argument should be, that the marriage of the parents was regarded by the law of Scotland as incestuous, contrary to Holy Writ, and such as would render both liable to the punishment of death for incest if they came to Scotland;

Held, on this assumption by the First Division (altering the judgment of the Lord Ordinary in part, and adhering *quoad ultra* upon different grounds):—1. That the claimant was "lawfully procreate," and this, although his bastardy might have been declared at any time between his birth in 1809 and the dissolution of the marriage in 1832; seeing that, by the Common Law Courts of England, at the time when this suit was instituted, all inquiry as to his bastardy was forbidden; and that, as these Common Law Courts would not allow the Ecclesiastical Courts to make inquiry into the actual fact of bastardy,—and legitimacy was therefore presumed,—the Scotch Courts stood in the same position as the latter Courts, and would make no inquiry into the truth, but accept the status of legitimacy resulting from the operation of the English rule.

Held (2), That although the marriage of the parents was, by the law of Scotland, incestuous and criminal, and therefore such as would not be recognized by the Scotch law, though valid by the law of contract, yet the Scotch Courts would not inquire into, or take the nature of the marriage into consideration, in any

(*a*) 18 Second Series, 888.

question as to the legitimacy of the offspring of such marriage; but finding him possessed of a status of legitimacy by the foreign law, the law of Scotland, though it would punish the parents, and repudiate the marriage for incest, would recognize the child as legitimate, and therefore entitled to succeed, as "lawfully procreate," to real estate in Scotland.

What follows is an abridgment of the opinions delivered by the Judges of the Inner House.

Lord President's opinion.

The *Lord President:* In every point of view the Defender Alexander Livingstone is an Englishman. He was born in England, and has lived nowhere else. He was born of parents who were married in England, and had their domicile in England at the time of their marriage, as well as at the time of his birth.

The next point for consideration is, whether Alexander Livingstone is or is not legitimate in his own country, that is, in England. That question must be decided by the law of England, and we can only take that law as matter of fact from the evidence before us, the witnesses and authorities referred to. It does not appear to me that there is any conflict of authority on that point. The question is raised on the assumption or allegation that the first and second wives of Thurstanus were sisters, and, without expressing at present any opinion on the matter of fact, I must say that the printed evidence taken "before answer" is at least sufficient to show that the allegation is made *bonâ fide*, and is not a mere device to obtain a judgment of the Court on an imaginary or fictitious case. The contention of the Pursuer is, that according to the law of England, rightly understood, Alexander Livingstone, by reason of the alleged relationship between the first and second wives of Thurstanus, was not lawfully procreated of the marriage between his parents, that the marriage was not a lawful marriage, and that he is not in any proper sense legitimate, even by the law of England, although in England such questions can only be inquired into in the Ecclesiastical Court, and by a rule of procedure the Ecclesiastical Court is precluded from inquiring after the dissolution of the marriage by the death of either of the parties. But the legal result, however arrived at, appears from the evidence to be, that in the case which here occurs, namely, the case of no challenge anterior to the dissolution of the marriage in 1832, the marriage is unchallengeable on the ground alleged, and the offspring are legitimate to all effects. The allegation that the wives were sisters, be it true or false, is in such a case irrelevant to affect the status of the children. The law of England holds them to be legitimate, as much so as any other children. The last answer given by the very eminent counsel who was examined on the part

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of Mrs. Fenton is quite explicit on that point. The evidence of the learned counsel examined on the part of Alexander Livingstone is also quite explicit. There is nothing contradictory in the evidence as to the status of Alexander Livingstone.

The next question is, whether the law of Scotland will recognize the status of legitimacy so enjoyed by Alexander Livingstone, or will refuse to recognize it.

Here is an Englishman born in wedlock; legitimate in his own country. He has no connection with Scotland or its laws, except that he claims to be heir to a Scotch estate, for I hold the original domicile of his father to have been lost, and to be of no more consequence in this case than the original domicile of his grandfather. We are asked to pronounce in regard to that Englishman a declarator of bastardy, and to hold that, by reason of bastardy, he is incapable of succeeding to a Scotch estate. That is an appeal to the law of Scotland, and we, pronouncing the law, must give the answer. In my judgment, the answer of the law of Scotland to this appeal is, that it recognizes the status of legitimacy which belongs to Alexander Livingstone in England.

It was argued that Alexander Livingstone, if legitimate in England, was so only because inquiry into the facts connected with his birth is excluded by a rule of procedure applicable to the Courts of that country, a sort of rule of limitation which does not exist in this country, and which, it was said, belongs rather to the remedy than to the substance, and therefore should not be regarded by us, or allowed to shut out inquiry here. That is an ingenious way of stating the case, but I do not think it is satisfactory or sound. Alexander Livingstone is legitimate in England. Such is his status there, and such it must continue to be, according to the law of that country in which his parents had their domicile, and were married, and he was born and bred. Whatever speculations may be entertained as to the theory of the law of England in regard to this matter, and whatever may be said as to the voidability of such marriages in England, they have at least this important legal quality and effect, that if allowed to run their course without challenge, they give to the children the full status of legitimacy, of which they can never afterwards be deprived.

It was also argued, with much force, that if such marriages are by the law of Scotland illegal, and even incestuous, struck at by the Act 1567, we ought not (from mere *comitas*) to recognize them, or to abstain from inquiring into the facts; that if the parents had resorted to this country, the laws of this country would not have tolerated their cohabition, but would have subjected them to criminal prosecution; and that to recognize as legitimate the offspring of a connection which can be proved to have been of that character, would be in effect to recognize such marriages, and such criminality. That part of the argument, though forcibly put, was

not to my mind convincing. The question we are trying, the only question we can decide, is a question of personal status, the status of the Defender Alexander Livingstone, who has not violated our laws, and whose parents even are not said to have violated the laws of Scotland, however much we may be disposed to reprobate the conduct imputed to them. It does not follow that, because the offspring of such connection, if had in Scotland, would not have been legitimate, we are to deny to the Defender the status of legitimacy which he, an Englishman, possesses in his own country, by virtue of the law which prevails in that part of the empire. The recognition of that status does not necessarily import an approval of the connection, or even a recognition of the marriage of which he was the offspring. The status of legitimacy is not by our law confined to the offspring of a lawful and valid marriage, even in the case of domiciled Scotchmen. On the contrary, it is conceded to the offspring of connections which, if rigidly dealt with according to their real character, would be reprobated by the law, the religion, and the morality of the country. To pronounce a declarator of bastardy in regard to a man who in England, his own country, is not a bastard, but, on the contrary, is by law in full possession of the entire and unchallengeable status of legitimacy, would be to introduce a new conflict between the laws of the sister kingdoms, not forced upon us, I think, by any principle of the law of Scotland.

It was observed that, in the case of Birtwhistle, the Courts of England excluded from inheritance a party who was legitimate by the law of Scotland, which was, in that case, the law of the domicile. I do not think that the judgment in the case of Birtwhistle is in point. In the first place, it proceeded on the application of an English statute, which had special reference to rights of inheritance in land in that country. Without expressing any opinion of my own as to the reasoning of the judgment by which that statute was held to be conclusive, it is enough for the purpose of the present case to know that the judgment proceeded on that ground. In the second place, even had it been otherwise —had the judgment proceeded on other and broader grounds, I am not prepared to say that the liberality which characterises the law of Scotland in regard to international rights ought to be restricted in a spirit of retributive justice. In a question of doubt, I would rather lean to support than to overthrow the status of legitimacy already acquired, but in this case I entertain no serious doubt.

In the opinion now expressed, I have made no allusion to the statute of Will. 4, which was passed in 1835, because the marriage referred to having been dissolved by the death of one of the parties in 1832, the provisions of that statute were not required to protect it. But I do not say that the statute is immaterial in dealing with this question. It is an important declaration of the

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British Legislature in regard to the state and condition of the children of such marriages. If the marriage referred to in this case had not been dissolved till after the date of the statute, the Defender would have been entitled to claim the protection which the statute affords, and I think we would not have refused to give effect here to the obvious spirit and purpose of the enactment.

Lord Ivory's opinion.

Lord *Ivory:* I am of opinion that, with a slight modification, the Lord Ordinary's Interlocutor should be adhered to, and expressly upon the grounds which are therein specifically set forth.

I do not go into the larger and more general views of the law which are discussed in his Lordship's very able and elaborate Note. - These views involve matter of the very deepest importance; and all the more that there appears to be considerable difference of opinion among jurists of high eminence in regard to them. We were, therefore, prepared to have called in the assistance of our whole brethren, had it been found necessary for a decision of the cause to adjudicate in this sense. But we have thought that this might conveniently and with advantage be avoided; and, accordingly, it was a condition of the present argument that it was to proceed—of course hypothetically—upon the assumption that the marriage, so far as the Court has now occasion to consider it, would, by the law of Scotland, had it taken place in this country, and between parties duly domiciled in it, have been *ab initio* and throughout null and void; and, consequently, that the Defender, as the eldest son of that marriage, would have been illegitimate and a bastard.

But the marriage did not take place in Scotland, nor between parties domiciled at its date in that country. On the contrary, the Lord Ordinary has found, and as I humbly think upon the evidence, rightly found, "that the Defender was born in England, the offspring of a marriage celebrated in England between parties domiciled in England at the date and during the subsistence of the marriage."

Upon these various points of fact no dispute, indeed, was raised, except as to the finding of domicile. But after a careful study of the proof, it does not appear to me that the Lord Ordinary's conclusion in favour of the English domicile can be successfully impeached. I do not waste time by going into the details of the evidence. I am satisfied that, at the date of the second marriage, both Thurstanus Livingstone and the lady whom he married had their domiciles in England; and that the domicile of the marriage, in its contraction, as during its subsistence, was exclusively English. That the Defender was the son of this marriage, himself born in England, and that from the moment of his birth down to the date of the present action, his constant residence and uninterrupted domicile have been in that country—are matters which have not been called in question.

It is with reference to this *species facti* that the Lord Ordinary has found, farther, "as matter of fact, that the Defender is legitimate according to the law of England." And when it is kept in mind that the marriage was dissolved by the death of his mother in 1832, followed by the death also of his father in 1839—while it is in evidence that, by the law of England, no challenge of the legitimacy of any child born in wedlock can be entertained or given effect to, at the instance of whomsoever, from the instant of the decease of any one of his parents—nothing more appears to be necessary to support the Lord Ordinary's proposition. The Defender has in England possessed the status of a child absolutely and unchallengeably legitimate, so far as the English law affects him, ever since the year 1832; and as the succession here in dispute did not open by the death of Sir Thomas Livingstone until the year 1853, it will thus be observed that the Defender had at that time been in the full and recognized possession and exercise of the status of legitimacy for not less than twenty-one years.

Accordingly, I do not understand that, had the present question not brought into operation certain Scots interests, as contradistinguished from English ones, there would have been any controversy as to the Defender being entitled, by force of his undoubted English legitimacy, to all the rights and privileges, whether of succession to his parents or otherwise, appertaining to any other English lawful child.

If his father had died intestate, leaving estates in England, whether real or personal, I take it there can be no question that these, if there was no other surviving child of the marriage, must have descended to the Defender—the first in his character of heir-at-law, the other in that of executor; and *pari ratione*, the Pursuer, though surviving sister of the Defender's father, could not have taken in either of these characters, as against any of the issue (legitimate in England) of her brother's marriage. The same would have been the result as to English honours of inheritance, had such been conferred upon the father of the Defender.

But suppose that the Defender's father had himself, and with his own means, happened to acquire, and had, at his death, held property, heritable or moveable, situate in Scotland, would the Pursuer have been in any more, or the Defender in any less, favourable position in regard to it? Take, in the first instance, moveable funds, to which it might have been necessary in Scotland to make up a title by confirmation; would the Defender, after obtaining letters of administration in England to the English personality, have been excluded from equally making up a title to the Scots moveables? Yet, if thus entitled to succeed as to the moveables, what stronger reason could there be for refusing to allow him to take up his father's heritable succession,—the heri-

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table estate being one, perhaps, which he had acquired subsequent to his wife's death, and after the Defender's English status of legitimacy had thereby become indelible? This, however, may be thought rather to be anticipating.

But, once more, and to reverse in so far the position of parties, suppose that the Defender, as well as his father, had died, and that the Defender, having no issue of his own, had left an English succession, what was there to have prevented the Pursuer, as his nearest heir and next of kin, from taking up that succession, on the footing of the Defender's English legitimacy? She would, in that case, have been the only relation of the defunct entitled to take. Yet if the Defender, though having no issue, had left brothers and sisters of the same marriage bed with himself, these last would have excluded the Pursuer, for the same English legitimacy would, as to all its accruing benefits, have enured in the first instance to them.

I assume, then, as the result of the evidence laid before the Court, that in England, and to all legal effects, *quoad* succession, or otherwise, the Defender is in the most ample measure entitled to the character and status of a lawful child, the offspring of a marriage between his parents; and that, whatever may have been the case before 1832, the year in which the marriage was dissolved by his mother's death, he has, at all events from and since that date, enjoyed all the rights and privileges of such a status; and had, at the date of the challenge brought by the Pursuer, been in full and undisturbed possession of it for twenty-one years.

But the Pursuer says, *esto* he was legitimate in England, still he was a bastard by the law of Scotland. And, accordingly, the main conclusion of her action is directed to the support of this abstract proposition, "that the said Alexander Livingstone is a bastard, and is not the lawful child of the deceased Thurstanus Livingstone."

Now, at the very first blush of such a proposition, it could not but appear to be a very unhappy state of things, should the result really be as the Pursuer contends, that, within the limits of the same united empire, under the same sovereign and legislature, and in a state of society which forms but one national family from one end of the island to the other, the Defender could thus be a bastard in Scotland and a lawful child everywhere else.

It would, indeed, imply contradictions and complications so numberless and extraordinary, and lead to such incalculable confusion in all the relations of life, that nothing short of the clearest and most absolute authority should be received in support of it.

The case of Vardell and Birtwhistle was argued as an authority of this kind; but, with deference, this is entirely to misapprehend the true nature and effect of that case. As I have always been given to understand it, the English Judges did not there proceed

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upon any ground of illegitimacy as against the child of the Scots marriage; they went entirely upon the legal construction of the Statute of Merton, as introducing certain rules of succession in regard to a particular class of English estates of inheritance, whereby no one could succeed who had not been actually born within the bonds of wedlock. It was much the same as if a question had occurred of old in our own Courts, under this statutory enactment, now happily repealed, whereby all papists were declared incapable of succession. In either case, the status of lawful child remained intact, and, to all other effects than that immediately involved in the statutory enactments, was allowed to have its full force. But as in the one case the papist child could not succeed *qua* papist, and the estate thus passed on to the next protestant heir; so, in the other, the child not born within the bonds of actual wedlock, but only rendered legitimate by the retroaction of a subsequent marriage, was held not to fall within the only description of an heir entitled to take by the Statute of Merton. It is a very grave question, whether, even in this sense, the judgment did not do substantial violence to the spirit, while it adhered so rigidly to the mere letter of the law. But if it had been thought to impinge upon the status of legitimacy, it may be doubted whether, even by the Judges who most strenuously took up the statutory grounds, the question might not have been held entitled to a very different consideration.

Be this as it may, the case clearly appears to have no material bearing adverse to the Lord Ordinary's judgment; and I am not aware that there is any other authority which, duly explained, has more.

The fundamental proposition laid down by the Lord Ordinary, and the only one with which, on the assumption upon which the present argument has proceeded, we have here to deal, is, that the Defender being legitimate by the law of England, "his legitimacy ought to be recognized by the Scots Courts." Or, as his Lordship more largely expresses it in his Note, "The Scottish Court ought, on the principles of international law, to recognize the legitimacy of Alexander Livingstone." "The status of legitimacy is a personal quality, and when once impressed by the law of appropriate jurisdiction, *qualitas personam sicut umbra sequitur*."

I entirely concur with the Lord Ordinary in this broad and simple view of the question. I see no reason, under the *species facti* which here occurs, to make the present case at all an exception to what is undoubtedly the general rule of international law. On the contrary, it humbly occurs to me that sound principle, as well as sound policy, alike concur to place the present case among the most highly favourable examples for the application of the general rule. And when I go to the jurists and doctors, and range over the wide field of their speculative opinions and dicta, while I must fairly own that here, as in almost every international question,

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I find perhaps certain minor inconsistencies and discrepancies in some of the more minute and subtle conclusions at which they incidentally arrive, I am strongly impressed with the conviction that the substantial preponderance of their authority is with the judgment, on the great and leading principle which it involves.

I should have had no hesitation, therefore, in giving effect to the international principle, even if the question had occurred under less favourable circumstances than it here presents itself; that is to say, if the status of legitimacy had been sought to be imported from a country altogether strange to us, with whose social elements we came less into contact, and with all whose habits and feelings we had less immediate sympathy than must necessarily subsist between us and our countrymen on the opposite end of the island, I should still have arrived, and with confidence but little if at all abated, at precisely the same conclusion. But where the question occurs, as here, between members of the same imperial state, and where all the relations of society are so intimately fused together, as in such a country they necessarily must be, it would be, as I humbly conceive, next to monstrous to allow the general international principle to be displaced. No doubt, in the rigorous eye of law, England is in one sense to us but as a foreign country. But it is a foreign country which stands toward us in very peculiar and close bonds. And such being the case, nothing, in my opinion, but express, absolute, and uncontrollable authority (which certainly does not here exist) ought, in a question like the present, to be allowed to introduce an anomaly so unfortunate as would be the declaring a man bastard in one end of the island who is received to all effects as legitimate in the other.

The Pursuer has urged, that to recognize the legitimacy of the Defender in the present case would be to give effect to and acknowledge as lawful a marriage which would in Scotland be repudiated as utterly null and void, because (*ex hypothesi* of the argument) incestuous, and therefore criminal. And it is plausibly argued, that this necessarily implies a flying in the face of what all countries have received as sufficient ground, on exceptional grounds, for denying in a question of conflict of law, effect to such foreign rules or judgments as run counter to the fundamental constitutions, and social and domestic relations, and moral habits and feelings of one's own country.

But, be the force of this argument what it may, it is humbly conceived to have no proper place in the present question. If, indeed, the Defender's father and mother, having formed what the law of Scotland repudiates and condemns as an incestuous connection, and had then come down to Scotland, and there openly lived and obtruded their incest on society, to the scandal and offence of their neighbours, and in defiance of the law under which they had come to reside, then there might have been room for considerations of this kind, and some necessity for not only refusing

to recognize the legality of such a marriage, but even actively interfering to repress a cohabitation within its territory, which the law of that territory held to be *contra bonos mores*, and positively criminal. But here there is no question whatever as to the validity of any marriage, and in this lies the fallacy of the Pursuer's reasoning. The law has not been called in to enforce or give effect, directly or indirectly, to any act which infers either a scandal on society, or a breach of national morals and decency, or the commission of any crime, or aught else, the existence of which alone could give colour or substance to the supposed exceptional considerations. What is here in issue is not the validity of the marriage, but the status of the Defender as a legitimate child. Can this not be given effect to without offence to the law, or the moral and social constitutions of Scotland? The Defender has never been in Scotland, and may never come to Scotland. He is legitimate in the land where he has ever dwelt. He comes into Court clothed with that legitimacy after unbroken enjoyment of it for twenty-one years. It might have been that the flaw now founded on occurred generations, and even centuries back, and that every successive family during all that period had, by the law of the land of which they are the subjects, been recognized and held entitled to succeed as undoubtedly legitimate. What has the law of Scotland to do inquiring farther? And when or where, if such inquiries be entertained, is the objection to stop? In England, it seems to be a rule of sound wisdom, that even there, where the original *vitiam* of the marriage, and where the necessary investigation as to matters connected with it, occurring within its own bounds, might be so much more easily carried on, that all challenge shall be foreclosed whenever either of the parents dies. And why is this? because, in a question of bastardizing the children, the law manifestly shields them with its protection under circumstances where the parent, if alive, might possibly have been able to explain all that is defective or *primâ facie* injurious to them in the evidence. Shall the law of Scotland step in and deal out to these same children a harder measure? With submission, this is a conclusion not to be assumed, but on grounds infinitely stronger than any that have been urged, or than it seems possible to urge, in the present case.

It has been justly contended for the Defender, that the issue may sometimes be legitimate, where there can be no doubt that the marriage has been void—nay, where in the result the marriage has been actually annulled. And reference was in illustration made to the case of issue by a putative marriage, where one or both of the parties were at the time in *bonâ fide*. It is no answer, that the only case of this kind which occurred in Scotland did not reach a final judgment. The solemnity with which the question was entertained, and the favourable allusions to the principle

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contained in some of our institutional writers, gave great countenance to the receiving of such a consideration as an element in questions like the present. But whether or not in Scotland, there can be no doubt but that the issues of such putative marriages are received as legitimate in various other countries. For example, in France, Toullier (*a*) treating of a marriage entered into in the *bonâ fide* belief, induced by long absence and supposed death, that a previous marriage of one of the parties had been dissolved, lays it down—1. That on the re-appearance of the former husband or wife no challenge of the second marriage would lie, but at his or her instance. 2. That no length of time, however, could exclude such challenge if he or she chose to bring it; and, 3, which is the important point here, that "si l'époux faisait à son retour annuler le mariage contracté pendant son absence, les enfans qui en seraient issus n'en seraient pas moins legitimes, pourvu que le deux époux ou seulement l'un d'eux fût de bonne foi."

Now, suppose that such a question had actually occurred in the foreign country, and that there while the marriage was annulled, its issue was at the same time declared to be lawful, because of the good faith of both or either of the parents. How ought the international rule to be acted on in Scotland in such a case? If a Scot's succession was in dispute, ought the Scots Court to step in and exclude as bastards the very parties whom the law of their own country had protected against the innocent error of their parents? It is humbly thought that neither policy, principle, law, nor common sense would support such a conclusion.

I have throughout these observations assumed it as proved, that the second marriage was established to have been in point of fact a marriage with the sister of the first wife. And it is after giving the fullest effect to this, as *ex hypothesi* the *species facti*, and that which is most favourable for the Pursuers, that I have arrived at the results which I have stated. If it had been necessary, from taking a different view of the law, to decide expressly that this relationship between the two wives had been actually established, I confess I should have been disposed to make a more rigorous scrutiny of the evidence before coming to a decision. I do not say, that on such further consideration I might not have been satisfied that the fact was sufficiently made out. Nor do I wish it to be understood, that even now I have any very substantial leaning the other way. But certainly the evidence is in various particulars open to observation. And in a question of bastardy such as this, it would fall to receive a very severe examination before depriving a party in the Defender's situation of a status which he had so long possessed undisturbed. According to the aspect in which I have viewed the question, however, and

(*a*) Toullier, sect. 486. p. 410.

seeing that the Court have arrived at the same conclusion with the Lord Ordinary, even on the impossible assumption that the relation was as alleged, it is of no consequence that we should go deeper into this branch of the question.

Lord Curriehill's opinion.

Lord *Curriehill:* The Pursuer maintains, that even although the Defender's status be that of legitimacy according to the law of England, the country of his domicile, he should not be recognized as legitimate in Scotland, because, by the law of Scotland, a marriage of a man to the sister of his deceased wife not only is *ipso jure* null and void, as being within the forbidden degrees, but is criminal, and is so heinous a crime, that the committers are punishable by death; and according to the *jus gentium*, the law of this country should not give effect to a foreign connection of this kind, which is contrary to its policy, and to the loyal, moral, and religious sentiments of the people of Scotland.

It does not appear to me to be necessary to consider the merits of this argument, because, as I think, it is not applicable to the present question. If Thurstanus Livingstone and his second wife had come to Scotland during the subsistence of their marriage, and an action had been brought for enforcing their conjugal rights or duties, it might have been necessary to have inquired whether or not the law of Scotland would recognize their English status of husband and wife. But, as formerly mentioned, the question which the Court has at present to determine is not what was the status of these parties, or either of them, while their marriage subsisted; but what is the status of the Defender Alexander Livingstone subsequent to the death of both of them, and at the present time. And since he was legitimate in the country of his own domicile long before this action, and still continues to be so, there is nothing contrary either to the public policy of the law of Scotland, or to the loyal, moral, or religious sentiments of the Scottish people, in giving effect here to the status of legitimacy which he holds in his own country. The fallacy in this argument consists in confounding the question whether the law of Scotland of legitimacy will give effect to the status which belongs at the present time to the Defender himself, with the quite different question whether it would have given effect to the status of husband and wife which belonged to his now deceased ancestors? In point of fact, his parents never did come to this country, and never did contravene its laws; and it is after they have long been in their graves their descendant comes into this country to avail himself of a succession which has opened to him in virtue of the status which belongs to him by the laws of his native country, and by giving effect to which no outrage can be inflicted on the public policy of our law, or the sensibilities of the people. Suppose that it had been the Defender's grandfather,

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or great-grandfather, or some more remote ancestor from whom he is descended, who had married a sister of a deceased wife, and that the law of the country in which that ancestor and the intermediate descendants were domiciled refused to sustain any challenge of that marriage, and held the offspring to be legitimate, would the law of Scotland refuse to give effect to the Defender's status of legitimacy, on the ground that, by doing so, the public policy of our law would be violated, or that it would be a public scandal, merely because the marriage of some of his remote ancestors in a foreign country might have been so considered if they had come to this country? I know of no authority, and I can see no good reason for such a doctrine. And, therefore, without stating any opinion upon the merits of the argument to which I have referred, I hold it to be quite inapplicable to the present case.

I say nothing on the subject of Lord Lyndhurst's Act, because, as the parents of the Defender were dead before that Act was passed, it cannot apply to this case.

Lord Deas' opinion.

Lord *Deas:* Holding the domicile to be English, the next question is, what is the status of the claimant, Alexander Livingstone, according to the law of England? This is, of course, to us a question of evidence; and, judging from the evidence, I must hold that his status in England is the status of legitimacy. His parents were domiciled and regularly married in that country. While they were both alive, the marriage might have been voided by a suit in the Ecclesiastical Court; but after the death of either parent, the marriage, and consequently the legitimacy of the children, became absolutely unchallengeable.

No challenge of the marriage was instituted in the lifetime of the parents, and none could now be instituted, even had Lord Lyndhurst's Act not passed, under which all challenge would be excluded, although both the parents had been still alive. In England the claimant, Alexander Livingstone, has thus the status of legitimacy; and in that country, as I understand the law, he is entitled to succeed, as a lawful child, both to real and personal estate.

This being so, the question arises—Why should he not be equally entitled to succeed to real and personal estate in Scotland? The answer made is, that by the law of Scotland—according to the condition and assumption of the argument—the marriage of his parents was not only unlawful, but void and incestuous. The argument, as I understand it, is not rested on the mere fact of the marriage being one contrary to the law of Scotland; for suppose the law of Scotland were to prohibit marriage between cousins-german, or some more distant relatives, on grounds of mere expediency, the effect of that prohibition would certainly not be to prevent the applicability, here, of the rule that children legitimate

by the law of the domicile are legitimate everywhere. But what is said, forcibly, is that the marriage is not merely prohibited by our law, but that (according to the condition of the argument) it is prohibited as contrary to Holy Writ, and to the established religion of the country, and is declared by statute to be incestuous, and the parties contracting it to be punishable with death. This being so, the rule of international law which would lead us to recognize an English marriage, valid and unchallengeable in that country, as equally valid and unchallengeable in this, fails, it is said, in its applicability,—there being a well-known exception to that rule, within which such a case falls,—and, consequently, it is said that, as we would not recognize the husband and wife as lawfully married persons were they living together in this country, but on the contrary, might try and punish them for incest, so we cannot recognize the legitimacy of the offspring of that marriage.

I am disposed to admit the premises, but I demur to the conclusion. I am disposed to admit,—assuming the law of Scotland to be as the argument assumes it,—that we would not have recognized the parents as lawfully married persons, but, on the contrary, that had they been living and cohabiting in this country, they might have been tried and punished for incest. But I do not think it follows that we are, therefore, to refuse to recognize the status of legitimacy which the law of the domicile,—the law of his own country,—gives to the unoffending child of that marriage. The reason why we would not recognize the parents in this country as lawfully married persons is, that our established principles of public policy, morality, and religion (taking these to be as they are assumed to be in the argument) would be thereby scandalized, and the feelings of the community outraged; and upon this ground alone rests the exception to the general rule of international law that the status of the domicile is the status everywhere. But this reason totally fails in its application to the question of legitimacy of children who have been parties to no offence against our law, and the recognition of whose legitimacy is not necessarily a recognition of the morality of the course of life followed by their parents. The proposition we now affirm simply is that the child, being legitimate by the law of the domicile, must be held to be legitimate here. True, his legitimacy depends upon the validity of the marriage of his parents. But all we judicially know of that marriage is that it was regular and valid in the country where it took place. For the purposes of this question of legitimacy we are not called upon to inquire, and are not entitled judicially to know, whether the parents were connected with each other by affinity or not. Into the allegation that they were so connected, all inquiry stands absolutely barred by a rule of the law of England, to which we give effect for the purposes of

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this question of legitimacy, although we might not give effect to it for the purposes of every other question which might have been raised. If we are bound or entitled to acquiesce in and give effect to that rule for the purposes of the present case, then, in deciding this case, we necessarily exclude ourselves from judicially knowing the fact upon which the objection to the marriage rests. The true difficulty is, whether we are right in refusing to inquire into that fact? But, if right, as I think we are, in refusing to inquire into it, then, in recognizing the legitimacy, we can no more be said to recognize the legality of a marriage with a deceased wife's sister than if we had affirmed the legitimacy in respect the claimant had been legitimated by Special Act of Parliament applicable only to his own individual case. In that event, surely, although the statute had been an English statute, we would not have refused to recognize the legitimacy because the marriage had been one of the kind it is said to have been here. There may be legitimacy although there is no marriage; and, when the law of the domicile recognizes the child of the marriage as legitimate, and bars all inquiry into the relative position of the parties who contracted that marriage, I see nothing which scandalizes or outrages public feeling, or the morality and religion of this country (however these may be held to be opposed to such marriages), in recognizing the legitimacy of such children, any more than there would be in recognizing their legitimacy if it depended upon an English statute, barring all inquiry, and declaring them legitimate.

I shall not pretend to say whether we would have arrived at the same result had this question been competently raised before us at a time and under circumstances when inquiry into the validity of the marriage was not barred by the law of England. I shall only say that much, in that case, might have depended upon whether we were, or were not, under the necessity of inquiring into and either approbating or reprobating the marriage in disposing of the question of legitimacy. But the present question arises at a time and under circumstances when all inquiry into the relative position of the married parties at the time of the marriage stands absolutely and irrevocably barred by the English law; and I conceive we are doing no violence to any rule of our own law when we hold such inquiry to be equally barred in this country as it is in England, and consequently give effect to the status of legitimacy as belonging to the claimant Alexander Livingstone, in his own right, and inuring to him in this country equally as in his own.

Against the judgment thus pronounced by the Court of Session, Mrs. Fenton in due time, on the 8th May 1857, tendered her Appeal to the House of Lords.

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Appellant's argument.

Mr. *Roundell Palmer* and Mr. *Andersen* for the Appellant. This case is the converse of *Doe* v. *Vardill* (*a*). It involves the succession to land in Scotland, as *Doe* v. *Vardill* did the right of inheritence to land in England. We do not dispute that the Respondent is to be deemed legitimate in England, any more than it was contested in *Doe* v. *Vardill* that the claimant in that case was legitimate in Scotland. But we say the Respondent here is not the "heir lawfully procreate," so as to answer the description given in the Scottish entail. In Scotland the marriage of his parents was not only incestuous, but constituted by the law of that country a capital offence. The domicile, however, was English. Therefore, the great question is, whether by the law of England the marriage was good and the issue legitimate. The intricate modifications of the law which took place in the reigns of Edward VI., Philip and Mary, and of Mary herself, gave rise to the strange distinction between void and voidable marriages. Dr. *Lushington*, in *Ray* v. *Sherwood* (*b*), speaking of marriage with the deceased wife's sister, lays it down that such a marriage was, before the changes to which we have referred, "not only null and void *ab initio*, but always "continued so. It was the interference of the com-"mon law Courts which prohibited the spiritual "tribunals from bastardizing the issue after the death "of one of the parties (*c*), thereby creating the "unnatural distinction of voidable and void; for

(*a*) 5 Barn. & Cress. 438; 7 Cla. & Finn. 895; 9 Bligh, 32.
(*b*) 1 Curt. 188.
(*c*) It was not thought just to bastardize the issue when the evidence of the parents or one of them was gone. This surely was not absurd. The temporal Courts said: "The marriage "ought not to be called in question after the death of any of "the parties, because *that* would be to bastardize and disinherit "the issue, who could not so well defend the marriage as the "parties both living might themselves have done."

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" voidable is void *ab initio.*" Originally the distinction was unknown. The ecclesiastical Courts had no jurisdiction to determine the rights of the children, although they could deal with the question of incest. In the great case of *The Queen* v. *Millis* (*a*), it became necessary to examine the general law on this subject. The opinion of Lord Chancellor *Lyndhurst* went into it fully. In *Harris* v. *Hicks* (*b*) the suit was for incest in marrying the deceased wife's sister. On a suggestion that the second wife was dead, a prohibition issued; but the temporal Court said, " they may proceed to punish the incest." And in *Brownsword* v. *Edwards* (*c*) Lord *Hardwicke* thus expressed himself: " I have always understood that " the ecclesiastical Court cannot proceed to pronounce " sentence of nullity after the death of one of the " parties, especially where there is issue; but there is " no rule to protect either of the parties from punish- " ment after the death of the other." The conclusion is that the distinction between void and voidable was merely technical and forensic. But the Scotch Court, in inquiring into the validity of this English marriage were, on the principle of comity, to look at the substance and real merits of the question. They were not to regard the English curial rules or the English forensic divisions. The peculiar conventional arrangements of judicial administration in England the Scotch Courts could not judge of. Thus, in England, the cognizance of marriage was exclusively of ecclesiastical jurisdiction. If, however, a question of civil right arose depending on the legitimacy of the issue, that question would belong to the temporal Courts, which prohibited the ecclesiastical Courts from examining the validity of the marriage after the death of both or one of the parties. When, therefore, an incestuous marriage

(*a*) 10 Cla. & Finn. 534. (*b*) 2 Salk. 548.
(*c*) 2 Ves. sen. 242.

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resulted in the birth of children, the validity of it could not be investigated after a given event. This gave rise to the peculiar distinction between void and voidable marriages, a distinction purely conventional. If competent proceedings were adopted during the lives of the parties, the ecclesiastical Court would treat the incestuous marriage as void, and would so pronounce it. In judging of the validity of that marriage the law of England was clear and unequivocal. The principle of that law was that an incestuous marriage was absolutely null and void, though by a rule of evidence, of equity, of convenience, or of expediency, the Court was debarred from investigation after the death of either party. The marriage was not allowed to be impeached, but if the prohibition had not prevented the exercise of jurisdiction, the principle of law would have applied, and upon proof of the incest, the contract would have been pronounced a nullity, that is to say, not merely voidable, but absolutely void. In the eye of law, therefore, the distinction between void and voidable did not, and does not, exist, though in the exercise of jurisdiction the distinction was attended to till the passing of Lord Lyndhurst's Act, the 5 & 6 Will. 4. c. 54. Ever since the case of *Don* v. *Lippman* (*a*), decided by this House, it has been quite settled that comity does not extend to rules of limitation, or rules of evidence. The *lex fori* takes no notice of these while acting upon comity, because it recognizes nothing but the *substance* of the foreign law. In ancient times the temporal Courts applied to the ecclesiastical Courts for a certificate of marriage. They waited for the judgment of the ecclesiastical Court. If the certificate had been asked while both parties to the second marriage were alive, the answer would unquestionably have been that the

(*a*) 5 Cla. & Finn. 1; 2 Sh. & M'L. 273.

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marriage was bad. Suppose, therefore, that the Scotch Courts had in the lifetime of Thurstanus and his second wife asked a certificate from the English Court Spiritual, the return would have been against the second marriage, beyond all controversy. Then can it be gravely argued that a validity would be imparted to a marriage originally null by the mere neglect to institute proceedings before the death of one or both of the parents (*a*). This seems impossible.

But, secondly, we maintain that even had this marriage been originally valid under the law of England, it could not be recognized by the law of Scotland, because a marriage with the deceased wife's sister is abhorrent to the genius of the Scotch law, and in such a case no comity requires its recognition. The rule of comity holds only where it is not opposed to the religion, morality, or fundamental municipal institutions of the country in which it is sought to be applied. This qualification is sanctioned not only by the law of Scotland but by the greatest authorities in the Civil, French, English, and American jurisprudence(*b*).

(*a*) The ecclesiastical Court before sending its certificate would have had an investigation of the first marriage, and of the relationship of the successive wives. The first marriage might have been pronounced bad, or the successive wives might have been found strangers, in either of which cases the certificate might be in favour of the second marriage. For of the first marriage there was no issue to be bastardized or disinherited; and, consequently, as it would seem, no ground for the operation of the prohibitory rule to prevent investigation.

(*b*) Huber, i. 3, 8.; Voet. lib. i. t. 4, pars. ii. s. 18; Vattel, p. 62, sects. 14 and 16.; 2 Sh. & M'L. 199; Fergusson's Divorce Cases, 90, 137, 314, 361, 396, 399, 404, 411, 418; 5 B. & C. 455; 1 Burge, Com., For., & Col. Law, 188; Felix, p. 28, 161, 162, 216; De Chassal, Traité des Statuts; Soloman, Condition juridique des Etrangers, 33, 50; Story's Conflict of Laws, 186; 4 Cowen's Reports, 512; 11 State Trials (Hardgrave's ed.) 340; 1 Black. Com. 424, 425, Christian, note; *Knight* v. *Wedderburn*, Mor. Dict. 14545; Hailes, 776.

Appellant's argument.

Thirdly, we say this is a question of right to a landed estate under an entail limiting the succession to a series of heirs, who are required to have been "lawfully procreated," according to the law of Scotland. The Court below has overlooked this point. Yet is it established on the surest foundation; for Lord Chief Justice *Abbott*, in *Doe* v. *Vardill* (*b*), lays it down (*a*) that "the right of inheritance must follow the law of the country where the lands lie." Story, the great jurist, is to the same effect expressing himself as follows: "The descent and heirship of real estate are exclusively governed by the law of the country within which it is situate; and no person can take, except those who are recognized as legitimate heirs by the laws of that country" (*b*). The definition of heirship by Glanville and other ancient text-writers (including Lord Coke) was, *Hæres est qui ex justis nuptiis procreatus*, nearly the words of the Bedlormie entail. We submit (*c*) that this, our third point, is of itself enough to carry the Appeal.

Respondent's arguments.

Sir *Richard Bethell*, Mr. *Rolt*, and Mr. *Pattison* for the Respondent (*d*). After the dissolution of the marriage by the hand of God, its validity could not have been made the subject of judicial investigation. It ceased to be voidable, and its effects were the same as if it had had no original infirmity. Hence, the issue was, by a logical necessity, legitimate, and entitled to enjoy all the benefits which the status of legitimacy implies.

(*a*) 5 B. & C. 438. (*b*) Conf. 819, 821.

(*c*) The question of domicile was argued at the bar; it was held by the House to have been English.

(*d*) The late Lord Advocate (now the Lord Justice-Clerk of Scotland) and the present Lord Advocate (then Dean of Faculty) appeared also at the bar of the Lords' House for the Respondent; but in consequence of the change of Ministry (June 1859), and the change of their positions respectively, neither of them assisted in the argument.

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[Lord BROUGHAM: After six years a debt cannot be enforced. The debt, nevertheless, exists. The circumstance that you cannot impeach the marriage does not prove that it is good, any more than that you cannot bring an action on the debt shows that the debt is extinguished (*a*).]

A great deal of ingenuity exhibited on the other side has been thrown away. They cannot get rid of the law of England, the law of the domicile. A departure from this principle would prove serious indeed. The question was not one of marriage, but of legitimacy. Is the Appellant legitimate? If he is so by the law of England, he must be so by the law of Scotland, otherwise the doctrine of international comity will be violated or frittered away by refinements, and jurisprudence will cease to be a science. We would respectfully direct the attention of the House to the reasoning of the learned Judges of the Court below, and more especially to the following striking remark of the *Lord President*; "To pronounce," says his Lordship, "a declarator of bastardy in regard to a man who in England, his own country, is not a bastard, but, on the contrary, is by law in full possession of the unchallengeable status of legitimacy, would be to introduce a new conflict (*b*) between the laws of the sister kingdoms, not forced upon us, I think, by any principle of the law of Scotland."

The Court below has not overlooked any one of the

(*a*) It was at this stage that Lord Brougham asked, "Is there any Counsel here for the Appellant?" Being answered in the negative, his Lordship said, "This is not the proper way of treating the House of Lords." Counsel engaged in this high tribunal should remember that all other business must give place to the business of the House of Lords, where the Queen "sits highest in Her royal estate." See Macq. H. of L. 212.

(*b*) In *Doe* v. *Vardill* the claimant was simply excluded from the land in England as an *ante natus*.

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arguments advanced on the other side, but has overruled them on a just view of social benefit. The quality of legitimacy is annexed to the Respondent by the law of his domicile; and it must be accepted wherever he goes. This is the true, rational, short, and intelligible principle on which the decision rests, a decision which, having regard to the many serious considerations involved, we believe your Lordships will be slow to disturb.

As to the argument that here is an entail requiring the claimant to have been "lawfully procreated," the answer is, he is legitimate under a law which interdicts all inquiry into the circumstances of the marriage, and which therefore presumes and establishes that he was lawfully procreated. The issue of what are called putative marriages (*a*) are in Scotland deemed legitimate. In Scotland the delinquency of the parents is not, without necessity, to bastardize the innocent progeny. The Courts there lean to legitimacy. If the English Court was excluded from investigation, still more readily does the Scotch Court hold itself excluded; because, by adopting the rule of English law, it accomplishes a purpose which it favours. There is no trace or indication in the law of Scotland of any rule requiring that those who succeed to land in that country shall have been "procreated" in strict and precise conformity with Scotch law. As little is there anything in reason to recommend that rule; for why should one sort of legitimacy be received as to personalty, and another as to realty? The law of Scotland has no such distinction.

The principle of *Doe* v. *Vardill*, so much vaunted on the other side, is a principle of English law. It is

(*a*) As to putative marriages, see Lord Ivory's opinion, *suprà*, pp. 517, 518.

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not a principle of Scotch law; still less is it a principle of universal jurisprudence. Professor Story does not assent to it (*a*).

Mr. *Palmer* replied. The question is, who is heir of entail "lawfully procreate?" To answer this question, the law of Scotland must be looked to and satisfied. The attempt to distinguish between the cause and the effect, the marriage and the issue, cannot be sustained. In this reasoning the two are inseparable. The rule as to comity is subject to important qualifications and exceptions. Thus a *malum in se* would lead to its rejection. Suppose a marriage were allowed in England between uncle and niece: the Scotch Courts would not recognize it.

[Lord BROUGHAM: Not to touch on anything that could by possibility occur in our own day, suppose the infamous Pope Alexander VI. to have granted a licence to his son, Cæsar Borgia, to marry his daughter Lucretia (*b*), would this marriage of the brother and sister be sustained in Scotland by force of comity?]

Lord Brougham's opinion.

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

(*a*) Story's Conf., 2nd ed., 111–124.

(*b*) The beautiful divorced Lucretia, daughter of Pope Alexander VI., was "reputed" to have been the mistress of her father and of her two brothers. Therefore the case put above is not extravagant. Lord Brougham said that no pope could now grant such a dispensation. But in the days of Alexander VI. the Scotch Courts would have obeyed the pope. Besides, the Pope's children were all bastards, and, in the eye of law, had no father.

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 I believe all their 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

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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 contractûs* 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 to take a real estate by inheritance elsewhere. This was laid down in *Doe* v. *Vardill* (*a*), 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. *Vardill*. 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 the first, he would not have been held entitled to take a real estate in England, perhaps have not been held legitimate to any effect, though he might have been to all

(*a*) 7 Cla. & Finn. 895.

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 estates 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 this subject with the ecclesiastical, and would act upon them if they could entertain the question. Indeed, the 5 & 6 William 4. 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 voidable by any proceedings. And why? Because they are within the forbidden degrees, that is, because prohibited by law, or illegal.

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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 (*a*), whether the Acts of 1567, chapters 14 and 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, section 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, chapter 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 (*b*), during the presidency of Lord Justice-General *Boyle*, when the late *Lord Justice-Clerk*, and Lords *Mackenzie*, *Moncrieff*, *Cockburn*, and *Wood* were upon the bench. They sentenced the prisoners (Stewart and Wallace) to 14 years' transportation, the *Lord Advocate* having restricted the libel from the capital part. This was the case of uncle and niece; but there is by law no difference whatever between affinity and consanguinity in this respect. If the *lex loci contractûs* 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

(*a*) Lord Ardmillan. (*b*) Brown's Justiciary Rep. 549.

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 marriages 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

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without qualification. *Compton* v. *Bearcroft* (*a*), 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* (*b*), where, in answer to a claim of dower out of an English estate, *ne unques accouplé* 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 country, 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* (*c*), 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 accouplé 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

(*a*) 2 Hagg. Con. 444. (*b*) 2 H. Black. 145.

(*c*) 2 Hagg. Con. 430, 444. The precise words of Sir George Hay, according to the report, are: "Marriage in Scotland, if not contrary to the law of England, is good, and it has been so determined."

more clearly must the Respondent in Scotland fail, both in the competition of brieves and in his defence to the declarator 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 conflict of laws qualify the admission of a foreign law, as much as Sir *George Hay* does in the case of Scotch marriages. Huber, the authority most often cited, adds to the statement of admission, "*quatenus nihil potestati aut juri alterius imperantis ejusque civium præjudicetur;*" 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. *Vardill* (*a*), 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 inter-marriage of the adulterer and the 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* (*b*), by a most learned Judge, a person too of very enlarged views upon general subjects as well as law, Lord *Glenlee*,—who 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 (*c*), it was impossible to dissolve a marriage originally valid by any legal proceeding. An Act of Parliament alone could have this operation. In Scot-

(*a*) 5 Barn. & Cress. 455. (*b* Ferguson's Div. Ca. 404.
(*c*) *i.e.*, until the passing of the Divorce Act of 1857.

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land 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 (*a*).

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 (*b*) in England, and in *Knight* v. *Wedderburn* (*c*), somewhat earlier in Scotland. "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 (*d*)." I therefore humbly move your Lordships to give judgment for the Appellant in this case.

(*a*) Russ. & Ry. C. C. 237.
(*b*) 11 State Tr. 340; Lofft. 1.
(*c*) Morr. 14545.
(*d*) 5 Barn. & Cress. 455.

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Lord Cranworth's opinion.

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 Catherine 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 who was born in 1809.

No proceedings were ever taken in the ecclesiastical Courts in England to declare void the marriage of Thurstanus with Catherine Ann Dupuis; and the point for decision is, whether in these circumstances the Respondent, as the eldest son of Thurstanus, is 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; 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

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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 Hen. 8. c. 22. s. 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 on 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

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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 the marriage 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

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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 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 this 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.

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We must assume, as was assumed by the Court of Session for the purpose of this case, that by the law of Scotland 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 for 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 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 the Second 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 command 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

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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 Catherine Anne Dupuis (*a*), 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 bears a close resemblance to *Doe* d. *Birtwhistle* v. *Vardill.* 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. *Vardill,* 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.

(*a*) The second wife.

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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 & 11 Vict. c. 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 whether he was lawfully procreated, and was 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

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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's 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, c. 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

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Scotland, would, according to the law of that country, be struck at by the Statute 1567, chapters 14 and 15, and that the issue of that marriage would be illegitimate ; but they all were of opinion that the question of legitimacy 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 this 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 a 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

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absolutely as to the succession of personal property (*a*), but subject to a qualification as to realty to be afterwards explained, and 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 (*b*).

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 section 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 when it is contrary to its known policy or prejudicial to its interests." The principle is well explained by Huber, in his third 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" (*c*): "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

(*a*) Story on the Conflict of Laws, 481.
(*b*) Wheaton, chap. xi. p. 122.
(*c*) C. xxiii. s. 62 and 63, p. 457; Wheaton, c. ii. p. 115.

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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 the descent of such property (*a*). Therefore, lands in each country descend to those who are heirs by the law 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 *Ross* v. *Ross*, noticed in the judgment of Chief Justice *Tindal* in *Doe* v. *Vardill*; and even though legitimate by the law of his domicile, when born before marriage, he could not succeed to real estate if illegitimate by the

(*a*) Wheaton's Elements of International Law, pt. 2, c. ii. p. 116; 4 Burg. 581.

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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 nati* 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 had, whatever that law may be" (*a*). 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 that polygamy was

(*a*) *Herbert* v. *Herbert*, 2 Cons. Rep. 271.

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permitted in the country of domicile, it could not be 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 (*a*). 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, section 14. The case is precisely the same as to its legality; as if, instead of being the marriage of a husband with a 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 section 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* (*b*). One cannot see how any country can be called on to give effect to a marriage as to real estates

(*a*) Stat. 1551, c. 19.

(*b*) 3 Smale & Giff. 481.

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within 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 case of *Reg.* v. *Chadwick*, and *Reg.* v. *Saint Giles* (*a*), in which the several statutes and authorities prior to Lord Lyndhurst's Act (Statute 5 & 6 Will. 4. 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 cognizance, and cognizable in the spiritual Court alone, it could not be questioned after the death of either party, for it could not be dissolved then by the Court,

(*a*) 11 Q. B. Rep. 193, 194.

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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 cognizable in that country in one tribunal only. 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 held 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,—could 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 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

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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 in the English Ecclesiastical Court? 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.

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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 marriage, and also at the time of the Respondent's birth, and the marriage having, upon the death of one of the parents, 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. First, 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; second, 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 (*a*). I think it cannot properly be questioned that such 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 operation on 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 prohibiting 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

(*a*) Lord Lyndhurst's Act.

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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 showing 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 do not profess to deal in any way with the validity or invalidity of the marriage itself, is shown 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 condi-

tion relative to the laws and institutions of that country, and that it is necessarily of universal efficacy. The case of *Doe* v. *Vardill* 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 the 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 further 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, that 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* jugdment in *Dalrymple* v. *Dalrymple*. 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

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per verba de præsenti 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.

Mr. Justice Story, in considering the cases where marriages celebrated according to the *lex loci* 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 (section 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 the 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 it. 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. *Vardill*. 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.

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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 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 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 that 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 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 brieves,

competing brieves. The Respondent has been served. That is now reversed; and if the Court of Session hold that according to Scotch law the same results would follow, then the 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 Lordships' judgment.

Lord CRANWORTH: Sir John Lefevre will take care that that is made quite clear.

JUDGMENT.

It is *Ordered* and *Adjudged*, That the said Interlocutors of the 15th of January, the 27th of May, and the 13th of November 1856, be, and the same are hereby reversed; and that the expenses decerned for under the Interlocutor of the 13th of November 1856, or so much thereof as have been paid under the same, be refunded or paid back to the Appellant. And it is further *Ordered*, That

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the cause be remitted back to the Court of Session in Scotland, to proceed and do therein as shall be just; and that the Court of Session do give such directions as are necessary for giving effect to the order hereby made for refunding or paying to the said Appellant the expenses aforesaid.

DODDS AND GREIG—ROBERTSON AND SIMSON.