

1776. *December 13.* JOHNSTON *against* CRAWFORD and MASON.

No. 4.

This case, shortly mentioned No. 81. p. 4544, *voce* FOREIGN, relative to a decree arbitral pronounced in Holland, will be found detailed at large, APPENDIX, Part I. *voce* ARBITRATION, No. 4.

1797. *January 20.* Ross and Others *against* AGLIANBY.

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This case, which is No. 120. p. 4631. was appealed.

The House of Lords, 15th December 1797, ORDERED and ADJUDGED, that the interlocutor of the Lord Ordinary of the 15th of February 1796, in so far as it finds, that in respect Mrs. Lowthian has accepted of a provision of an estate in England, that she is not entitled to claim a terce out of the lands in Scotland; and the interlocutor of the Lord Ordinary, of the 21st of May 1796, in so far as it finds, that in respect it is not alleged by the defender, that any other person is in possession of that estate, or competing with her for it, or that she herself is not in possession of it, in terms of her husband's settlement; and in respect that she does not offer to convey her right to that estate in favour of the pursuers, or even to repudiate her husband's settlement thereof, therefore that she is not entitled to claim a terce out of the lands in Scotland; and the interlocutor of the Lords of Session of the 20th of January and 9th of February 1797, in so far as they adhere to the parts of Lord Ordinary's interlocutor above mentioned, be Reversed: And it is hereby declared, that the appellant Mrs. Lowthian is not bound to give up the benefit of the devise to her by the will of the 12th of October 1782, and codicil thereof, of her husband, before she can be admitted to the possession of her terce out of the lands in Scotland: And it is further ordered and adjudged, that the rest of the said several interlocutors complained of in the said appeal be affirmed.

1803. *July 1.* SHEDDAN *against* PATRICK.

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

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One whose
parents were
afterward
married in a
country
where legiti-
mation *per*
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is not recog-

No. 6.
nised, does
not succeed
to a landed
estate in this
country *ab in-*
testato, as a
lawful child.

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

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

Pleaded : Marriage, when celebrated according to the solemnities of the law of the country where it is contracted, is valid and effectual all the world over ; Erskine B. 3. T. 2. § 40. This rule is applicable only to the validity of the contract ; for as to its legal effects, these must be determined by the law of the country where execution is demanded ; and a contract may have an effect in its execution in a foreign country different from what it would have in the country where it was entered into ; Kinloch against Fullerton and Company, 10th July 1739, No. 22. p. 4456 ; Wood, 24th June 1779, No. 77. p. 4532. Now the marriage by the laws of America, was legal, and no power could dissolve it ; and all the effects, rights, and privileges, which the different countries bestow upon married persons, or on their children, must follow from it. These depend upon the particular laws of that country where effect is to be given to it ; more especially when the point at issue respects the right to a real estate ; for every question of this kind must be decided by the law of the country where the real estate is situate. Now, by the law of Scotland, when a man marries the mother of a child born before marriage, this legitimates the child, and confers upon him all the rights and privileges which he would have inherited if his parents had been previously married ; Craig, lib. 2. dieg. 13. § 16. Ersk. B. 1. T. 6. § 52. Bank B. 1. T. 5. § 54. This rule existed in the civil law, and prevailed in every country where that law was received ; Voet. lib. 25. T. 7. § 6. A contrary practice is confined, it is believed, to England alone, and its dependencies. If, then, the legal effects of the marriage are to be decided by the law of Scotland, the children are to be held legitimate, although by the law of America their situation may be different.

Answered : The *status* or legitimacy of the child must be decided by the law of America, where his parents were domiciled, where he was born, and where the marriage was entered into. By that law, marriage has not the effect of legitimating children antecedently born. No other jurisdiction has power to judge of the state of a citizen born within its territories, and whose parents were subject to its laws. Having once ascertained his *status* in life, by the law of the only country to whose jurisdiction he was subject, the *status* thus fixed must be received in every country which he may have occasion to visit, or in which he may afterward acquire property. The question is not concerning the *status* of the *parents*, or the effects of that *status*, but concerning the *status* of the child ; and before we can determine as to the legal effects of his *status*, the previous question is, Whether the *status* of a lawful child has been constituted?

The rule, then, of ascertaining this personal quality by the law of his own country, not only is consistent with the general principles of jurisprudence, but is also highly expedient; for nothing could be more absurd than for a person to be a bastard in one country, and lawful in another, merely by passing a river, or crossing a mountain, the boundary of their respective territories.

If at the time of the marriage the father had no real estate in Scotland, it is admitted that the child would have been a bastard; but if he afterward purchased an estate, or obtained an heritable bond from one of his debtors, or adjudged his estate, would these operations affect the filiation of his children, and make them legitimate in this country? If, again, a real estate in this country devolved to the father, or through him to his next heir *designatioè*, but after his death, could the child claim this upon the plea of being legitimate, when he ought to begin with proving that he is so? *Macculloch against Macculloch*, 10th February 1759, No. 102. p. 4391.

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

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

Lord Ordinary, *Polkonnat*.

Agent, *Arch. Miller, W. S.*

Agent, *Ed. Lothian, W. S.*

For Sheddan, *H. Erskine, Fletcher*.

Alt. Solicitor-General *Blair, Cathcart*.

Clerk, *Ferrier*.

F.

Fac. Coll. No. 116: p. 259.

* * This case was appealed. The House of Lords (2d March 1808) ORDERED and ADJUDGED, that the appeal be dismissed, and that the interlocutor therein complained of be affirmed.

1805. June 7. BLACK and KNOX *against* ELLIS and SONS.

JAMES GOW, merchant in Arbroath, having become indebted to Ellis and Sons, merchants in London, they obtained a decree against him, and recovered payment (26th August 1802) by a pouding of his effects.

Black and Knox (14th September 1802) also raised an action against Ellis and Sons, and their attorney, in whose name the previous proceedings had taken place, in order to communicate the proportion of the price of the pouded effects, in virtue of statute 33d Geo. III. C. 74. § 6. Arrestments on the dependence were used in the hands of the attorney for Ellis and Sons, as well as in the hands of their law-agent, to whom the money had been paid by the messenger.

In this situation, Ellis and Sons

Pleaded: The action is altogether void, because, being foreigners, they have not been regularly cited. No arrestment *jurisdictionis fundandæ causâ* has been

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No arrestment *jurisdictionis fundandæ causâ* necessary, where a foreign creditor, and his attorney, having recovered his debt by pouding, is summoned under the bankrupt-act, in order to contribute the statutory proportion of