CASES

DECIDED IN THE HOUSE OF LORDS,

ON APPEAL FROM THE

COURTS OF SCOTLAND.

1840.

[10*th August* 1840.]

The Countess of DALHOUSIE and others, Appellants.[1] (No. 20.)

[*Sir F. Pollock — Knight Bruce — Burge.*]

JAMES M'DOUALL, Respondent.

[*Attorney General (Campbell) — Lord Advocate (Rutherfurd).*]

Marriage — Legitimation per subsequens matrimonium — Domicile. — A., a domiciled Scotchman, cohabited with M., an unmarried woman, a native of and resident in Scotland; they went to England, and had a son born there. Several years after the birth of J., his parents, A. and M., by a written contract, made at Penrith, acknowledged themselves husband and wife, and soon after went to Scotland, where they cohabited together as husband and wife, and were habit and repute married persons till A.'s death. A. died possessed of entailed estates in Scotland: — Held (affirming the judgment of the Court of Session) that J. was the legitimate son of A., and as such entitled to all the rights and privileges of a child born in lawful wedlock. (See also next case, Munro v. Munro, p. 492.)

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[1] 16 D., B., & M., 6; and Fac. Coll., 15th Nov. 1837.

1st Division.

Lord Ordinary Fullerton.

Statement.

COLONEL ANDREW M'DOUALL of Logan in Wigtonshire, now deceased, was born in Scotland. He possessed the estate of Bankton and others, to which he succeeded as heir of entail. He had always been domiciled in Scotland, when, in September or October 1795, he formed a connexion with Mary Russell, residing in Dumfries. She was then about sixteen years of age, and unmarried, living with her mother, who had separated from her father. She had been born in Scotland; her parents were Scotch, and she had never had any other than a Scotch domicile. Colonel M'Douall took her to his house, where she shared his bed and board. In April 1796 a regiment of fencible cavalry, of which he was in command, received orders to march to Carlisle, and he took Mary Russell along with him. She was then pregnant; and on the 28th of April the overseers of the parish of St. Cuthbert, Carlisle, exacted a bond from Colonel M'Douall, to the amount of 50*l.*, that her child being illegitimate should not become chargeable to the parish.

In October 1796 Mary Russell was delivered at Chester of a son, who was baptized James. During the intervening period of about six months from the time of her having left Scotland Mary Russell had remained in England along with Colonel M'Douall, who was stationed there with his regiment. The regiment was disembodied in 1800, at which time Colonel M'Douall returned to reside in Scotland. During the time of his being stationed in England he had always kept a house in Scotland, and an establishment there suited to his condition in society; and as his father died in 1799, he went on his return to reside at Logan, the family seat. During his whole stay in England Mary Russell had

always accompanied him to the different quarters where he was stationed, and had lived with him; but he now took a house for her in Penrith, where he frequently visited her. Several other children were born of this connexion; one of whom, John Andrew, survives. The expenses of maintaining the house at Penrith and providing for Mary Russell and her children were paid by Colonel M'Douall, who in 1802 purchased the house in which they lived. Mary Russell continued to live at Penrith until 1808, her mother and a brother and sister residing with her. After she left the house in 1808 her mother remained in it till her death, after which her brother occupied the house.

In March 1808 Colonel M'Douall and Mary Russell signed a written contract of marriage at Penrith, accepting each other as spouses, and containing provisions out of Colonel M'Douall's estate, settled on her as his wife in the event of her survivance, in security of which she was soon after infeft. Colonel M'Douall then took her to his house in Scotland in 1808, and publicly declared their marriage. They continued to live together as man and wife in Scotland until Colonel M'Douall's death in 1834, and were habit and repute married persons; they treating their sons as their lawful children. Colonel M'Douall and Mary Russell had never contracted any other marriage. In 1817 Colonel M'Douall made up titles under the entail of Bankton, &c., "in "favour of himself in life-rent and James M'Douall, his "eldest lawful son, in fee."

In 1831 Colonel M'Douall and his eldest son James raised an action in the Court of Session, directed against the second son, and also against the Countess of Dalhousie and the other heirs of entail of the estates of Bankton, &c.

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The conclusions of the summons were, "that it ought "and should be found and declared by decree, &c. that "the said James M'Douall, pursuer, is the eldest law- "ful son of the said Andrew M'Douall, and as such is "entitled to all the rights and privileges of a child born "in lawful wedlock; and it ought, &c. be found and "declared that the said James M'Douall stands lawfully "vested with the fee of the said lands and others above "described, subject to the life-rent of the said Andrew "M'Douall, pursuer; and it ought, &c. be found and "declared that the said Andrew M'Douall and the said "James M'Douall, for their respective rights of life- "rent and fee, hold and enjoy the said lands and others "above described in fee simple, and free of all the "fetters, restrictions, and limitations intended to be "imposed by the said deed of entail;" and there were further conclusions as to the right of the pursuers to sell the lands, &c.

In defence the Countess of Dalhousie and her son Lord Ramsay, besides the pleas on the merits, stated a preliminary defence, that the action was incompetent, as combining a conclusion for declarator of legitimacy, which is a question purely consistorial, with a declarator relating to real property; which last is competent only to the supreme court.

Supplementary summonses, containing only the first of the above declaratory conclusions as to the pursuer James M'Douall's legitimacy, were accordingly raised by the pursuers; 1st, against the Countess and Earl of Dalhousie and their sons; and, 2dly, against the other heirs of entail; and these actions were conjoined with the original action of declarator.

The defence on the merits was, that "the pursuer, "James M'Douall, is not the lawful son of the pursuer,

" Andrew M'Douall and Mrs. Mary Russell. He was " born in England, while his mother was domiciled in " that country, and before any marriage had taken " place between her and his reputed father. By the " law of England he was born a bastard, and by the law " of that country, which must regulate the status of " persons who are born there, the character of bastardy " is indelible."

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On the death of Andrew M'Douall, in May 1834, the Countess of Dalhousie raised an action of reduction, improbation, and declarator, for the purpose of having her right as next heir of entail to the estate of Bankton, &c. declared. This action was conjoined with the previous actions.

A proof was led by both parties, and, after a debate thereon, cases were ordered by the Lord Ordinary, who made avizandum with the same to the First Division of the Court. Their Lordships (23d December 1836) directed the printed papers to be laid before the whole other Judges for their opinions thereon.

A note was thereafter given in for the parties, suggesting that the opinion of the consulted Judges might be given upon a specific question. The Lords of the First Division pronounced an interlocutor, (25th February 1837,) requesting the opinion in writing of the other Judges,—" Whether the pursuer James M'Douall " is the legitimate son of the late Andrew M'Douall " of Logan ?"

The following opinions in writing were returned by the consulted Judges: — *Lords Justice Clerk (Boyle), Glenlee, Meadowbank, Fullerton, Moncreiff, Jeffrey, Cockburn, and Cuninghame:* — " All the facts which " appear to us to be material for the decision of this

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" cause are, in our opinion, so clearly proved, that we " do not think it necessary to enter into the details of " the evidence regarding them.

" Though there be no evidence that at the time " of the first intercourse between the late Andrew " M'Douall, Esq., of Logan, and Mary Russell, or " before the birth of the pursuer, a matrimonial con- " sent had legally passed between them, it is clearly " established that in the year 1808 they, by a solemn " written contract, acknowledged themselves to be " married persons, husband and wife to one another, " and that they did thereafter constantly live and " cohabit together in Scotland as husband and wife, " and were universally habit and repute married per- " sons from that time till the death of the said " Andrew M'Douall, in the year 1834. We can " entertain no doubt whatever that these facts are " sufficient to establish a completed marriage, indis- " soluble by the will of either or both of the parties, " according to the settled law of Scotland.

" It does not seem to be denied, and at any rate is " clearly proved, that the pursuer James M'Douall " is the son of the parties who were so united in mar- " riage, born at Chester in England on the 19th " October 1796; and we also think it abundantly " shown in evidence, that he was acknowledged as their " lawful son, at least at all times posterior to the " public declaration of their marriage in 1808.

" We also think it very clear upon the evidence, " that the late Andrew M'Douall, the pursuer's father, " was during his whole life a domiciled Scotchman; " that having been born, brought up, and educated " there, he never for a moment lost his domicile of

" origin, or acquired any other domicile to supersede " it; that, though locally present in England at the " time of the pursuer's birth, he was even then legally " domiciled in Scotland, being only resident in Eng- " land on military duty; and that he was undoubtedly " both legally domiciled (and actually resident in Scot- " land) during all the public cohabitation with the " pursuer's mother as husband and wife, during " twenty-six years after the acknowledgment of their " marriage.

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" We are of opinion, that upon these indisputable " facts, without the necessity of any farther inquiry, " the pursuer is, by the settled rules of the law of " Scotland, the legitimate son of his parents, and is " entitled to have such his status of legitimacy declared " in terms of the conclusions of the summons in this " action; for, though in the absence of all evidence " that at any time previous to his birth, or in parti- " cular at the time of his procreation or conception, a " matrimonial union of his said parents had been " formed by celebration any where or by consent duly " adhibited in Scotland, he could not at the date of his " birth have been declared to be legitimate, the mar- " riage between them thereafter fully constituted by " the law of Scotland had, by the established rule of " that law, the effect of vesting in him all the rights " of a lawful child, as truly as if there were evidence " of a marriage entered into before his birth. The " principle of legitimation per subsequens matrimonium " being firmly rooted in the law of Scotland, and uni- " versally acknowledged and enforced for centuries " past, we need make no reference to authorities to " prove it. And it being so fixed, it is incumbent on

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" any one who denies its application to such a case as " that now before us, to show some ground of exception recognized by that law to exclude it.

" The defenders seem to rest their case for denying " the pursuer's legitimacy on two points:—1. That " the pursuer having been born in England before the " marriage of his parents, and the law of England not " acknowledging the principle of legitimation per subsequens matrimonium, the status of illegitimacy was " stamped on him at his birth, and became indelible; " and, 2. That his mother at his birth or after it was " domiciled in England.

" Unless this last point is in some way to be connected with the first, we do not well understand the " bearing of it; for, if the pursuer had been born in " Scotland, we imagine that it would scarcely be maintained that the circumstance of his mother having " at any time acquired an English domicile could in " any manner obstruct the operation of the principle of " the law of Scotland, after she was married to the " pursuer's father by a Scotch marriage, and fully " domiciled in Scotland. But indeed this point of the " domicile of the pursuer's mother appears to us to be " really immaterial to the question. On every supposition in the state of the evidence, if the time and " circumstances of the pursuer's birth are to be " inquired into, it must be taken as matter of fact " that he was born illegitimate, whether the law of " England or the law of Scotland be considered; and " he would be so equally whether his mother had her " domicile in England or in Scotland. If it is to be " held that the rule of the law of England, which holds " a person born there to be incapable of being legiti-

" mated by the subsequent marriage of his parents, " must control the law of Scotland in regard to the " effects of a Scotch marriage afterwards entered into " with a domiciled Scotchman, as it may regulate the " interests of all persons domiciled in Scotland, that " will of course decide the case. But if that cannot " be held generally, it is not obvious to us how it " could make any difference on that point, though " it could be assumed that the mother had a domicile " in England at the time of the birth. If the law of " Scotland cannot be so controlled in respect of the " place of birth, the domicile of the mother cannot " produce that effect.

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" So far as the point may be thought material, we " are of opinion that it has by no means been made " out that the pursuer's mother was domiciled in Eng- " land at the time of the birth. She was a native of " Scotland, completely domiciled there, and never out " of it till she went with Colonel M'Douall into Eng- " land, in April 1796, after the pursuer's conception. " It is evident to us that she must be regarded as " having been then in the capacity of a companion or " servant to Colonel M'Douall; a part of his esta- " blishment, whose movements were entirely guided by " his; and that, if it be clear that he was not in Eng- " land animo remanendi, so as to lose his Scotch " domicile, as little was she. The effect of what " happened afterwards may be more doubtful. But " up to the time when the pursuer was born at Chester, " his mother was entirely guided in her residence and " movements by the residence and movements of his " father. It does not appear that she had then esta- " blished any domicile of her own, either at Chester or

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" any where else in England; and if she had died in " the child-birth leaving personal property, we appre- " hend that the succession to it would have been " regulated by the law of Scotland.

" We farther think it not at all clear that the lady " afterwards acquired a domicile in England, or resided " there in the proper sense animo remanendi, as she " always occupied a house held by Colonel M'Douall, " supported by him, and subject to his control; and " there seems to be no reason to believe that she ever " intended to abandon her Scotch domicile. If she " did so, it was not at Chester that she was so domi- " ciled. But supposing that by a mode of residence " in England, taken up some time after the birth and " continued till 1808, she became legally domiciled " in England, we are of opinion that such her " domicile cannot in any manner affect the present " question.

" On the first point above mentioned, the supposed " indelibility of the status of illegitimacy because " of the locality of the birth and the rule of the " law of England on the subject, we are, with all " deference to any other views which may be taken " of it, of opinion that it is not sanctioned by any " authority in the law of Scotland, or by the principles " delivered by the best writers on general law. We do " not here speak of what might be the effect of any " positive conflict of the laws of Scotland and those " of England. We must presume that the courts " of England, if called upon in a matter belonging " to their jurisdiction, would decide on sound prin- " ciples according to their own views. But the question " here is, what shall be the effect of a Scotch marriage,

" contracted between persons domiciled in Scotland, " and who continued to be thereafter domiciled in the " paternal mansion-house of the husband till his death? " What shall be the effect of such a marriage on the " status of the child of such parents, claiming that " status in a Scotch court, and in regard to important " interests on which it belongs to those courts alone to " decide? And in this state of the question, we are " bound to state our decided opinion that the place " of the pursuer's birth, or the law of that place " which would be applied to an English marriage " and a domiciled English husband, can form no bar " to the operation of the settled rule of the law of " Scotland in relation to such a case as that now " before us.

" We say this with the most perfect deference and " respect for certain dicta, which appear to have been " seriously suggested by persons of the highest emi- " nence as authorities in the law. But all the cases " in which these suggestions of opinion occurred " appear to us to have been clearly decided and to " rest firmly on other grounds. In all the three cases[1] " of Sheddan v. Patrick, Strathmore, and Ross the " judgments mainly proceeded on the domicile of " the parties; and in the last especially the point " of indelibility from the place of birth was expressly " waived by the Lord Chancellor Lyndhurst. Judg- " ing, therefore, by all the light which we possess on " the subject, our deliberate opinion is that above " expressed."

Lord Medwyn.—" I concur in the foregoing opinion: " at the same time I wish to bring more prominently

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[1] See post, p. 586.

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" into view the features of the case which chiefly affect " my mind.

" The late Colonel M'Douall of Logan was in " 1795 employed to raise a regiment of fencible " cavalry. It was embodied at Dumfries, and he " marched with it into England on 9th April 1796. " It was not and cannot be disputed that at this " time Colonel M'Douall was a domiciled Scotsman, " and that this domicile could not be affected by his " absence on military duty.

" Some time in the course of the year 1795 Mary " Russell went to reside with Colonel M'Douall at " Dumfries and elsewhere in Scotland, and she became " pregnant. She continued to reside with him, and " accompanied him into England when he went there " with the regiment in April 1796. She was a Scotch- " woman, and till then never had been out of Scot- " land. She was at this time visibly with child, so that " the overseers of the poor of Carlisle obliged Colonel " M'Douall to grant a bond, dated 28th April 1796, " that her child should not become a burden on the " parish.

" James M'Douall, the pursuer, was born at Chester " on 19th October 1796, and of course the period of " his conception took place when both his parents were " in Scotland, and where they were both domiciled.

" Colonel M'Douall and Mary Russell executed, at " Penrith in Cumberland, on 9th March 1808, a mar- " riage contract in the Scotch form, by which they " accept each other as lawful spouses, and by which " he settled upon her, if she should survive him, an " annuity of 400*l.*, payable from his entailed estates. " Immediately after this, Colonel M'Douall returned " with Mary Russell as his wife to Scotland, and

" sasine is taken on this contract on 12th April in
" favour of ' Mrs. Mary Russell, now spouse of Lieu-
" ' tenant Colonel Andrew M'Douall of Logan ;' and
" they continued to live as man and wife constantly in
" Scotland, and were so known and recognized from
" that period till the dissolution of the marriage in
" 1834. The marriage was thus constituted by decla-
" ration and open cohabitation alone in Scotland, and
" no ceremony of marriage took place either in England
" or in this country.

" Upon these facts the question arises, whether the
" circumstance of the pursuer's birth having taken place
" in England will prevent the operation of the law of
" legitimation per subsequens matrimonium, which cer-
" tainly would have taken place if Colonel M'Douall
" and the regiment had been allowed to remain in
" Scotland till after October 1796.

" Now this question relates solely to the effect of a
" Scotch marriage between Scotch parties, and affects
" the succession to a Scotch estate; and I cannot under-
" stand how the law of any other country can form an
" element in the determination of such a question. In
" considering the application to such a case of the doc-
" trine of our law, that legitimation per subsequens
" matrimonium takes effect in the case of children
" already born, Scotch Judges, whether in the Court
" of Session or the Court of Review, can only consider
" the provisions of that law.

" Now I know of no limitation of the doctrine but
" that which is laid down by Erskine, b. 1. t. 6. sec. 52.:
" the doctrine is not noticed by Stair: — ' The sub-
" ' sequent marriage by which this sort of legitimation
" ' is effected, is by a fiction of the law considered to

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" ' have been contracted when the child legitimated was
" ' begotten; and consequently no children can be
" ' thus legitimated but those who are procreated of a
" ' mother whom the father at the time of the pro-
" ' creation might have lawfully married.' The rule,
" as given by Bankton, fixes on the same period,
" b. 1. t. 5. sec. 54.:—' Because the law, by a fiction with
" ' respect to legitimation by subsequent marriage, sup-
" ' poses the parties to have been married at the time
" ' of the child's conception.' And again, in explain-
" ing that the marriage, though it take place after the
" death of a bastard child, leaving a lawful child, will
" make that child the lawful heir of his grandfather,
" says, ' because it is held the same as if it had pre-
" ' ceded the conception of the child,' (sec. 58.) This
" was the rule also of the civil law, from which, more
" especially as sanctioned by the canon law (though
" upon a different principle), we adopted it along with
" all the other countries in Christian Europe, with the
" exception of England:—' Quia nuptiæ per jus fingun-
" ' tur retro cum concubinâ contractæ eo tempore quo
" ' illa primitus in concubinam assumpta fuit, atque ita
" ' filius quoque retro legitimus fingitur.'[1] The words
" of Boehmer[2], commenting on this rule of the civil
" law, are, " Inde factum est, ut interpretes commu-
" ' niter ad fictionem juris confugere, atque docere sole-
" ' ant subsequens matrimonium retrotrahendum atque
" ' per fictionem supponendum a tempore concubitus
" ' jam adfuisse inter eos, qui postea in legitimum
" ' matrimonium consentiunt, justas nuptias;' and he
" adds, ' si tempore conceptionis adfuit impedimentum,

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[1] Voet, lib. 25. t. 7. s. 6. [2] Jus Eccles. Protest. lib. 4. t. 17. s. 10.

" ' lex non potuerit fingere eo tempore contractum
" ' fuisse matrimonium.' The rule then is, ' In his qui
" ' jure contracto matrimonio nascuntur conceptionis
" ' tempus spectatur;' and it is only when it is more
" favourable for the child that ' tempus editionis est
" ' respiciendum.' This rule was finally settled in the
" Roman code by the following law of Justinian: ' Et
" ' generaliter definimus, et quod super hujusmodi casi-
" ' bus variabatur definitione certâ concludimus: ut
" ' semper in hujusmodi quæstionibus in quibus de
" ' statu liberorum est dubitatio, non conceptionis sed
" ' partûs tempus inspiciatur: et hoc favore facimus
" ' liberorum, ut editionis tempus statuamus esse inspi-
" ' ciendum, exceptis his tantummodo casibus in quibus
" ' conceptionem magis approbari infantum utilitas
" ' expostulat, L. 11., C. de Nat. Lib.'

" As an illustration of this rule, I refer to the follow-
" ing law of the Pandects on a kindred matter: — ' In-
" ' genui sunt qui ex matre liberâ nati sunt: sufficit
" ' enim liberam fuisse eo tempore quo nascitur, licet
" ' ancilla conceperit: et è contrario, si libera conce-
" ' perit, deinde ancilla pariat, placuit eum qui nascitur
" ' liberum nasci, L. 5. § 2., de Statu Hom.'

" If the subsequent marriage is to have a retroactive
" effect, so far as regards the status of a child previously
" born, by a fiction which carries back the marriage to
" a prior date, the natural course is to carry it back to
" the period of the conception. Accordingly, we have
" seen that this principle has been adopted in our law,
" and it must be held to apply in the present case.
" Even then, if the accidental circumstance of the
" mother living in the temporary residence of his father
" in England, as a part of his family or establishment

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" (he being at the time in the eye of law a domi-
" ciled Scotsman), could be supposed to affect the
" domicile of the mother at the period of the pursuer's
" birth or the decision of this case, which I think it
" could not, there seems to me to be no room whatever
" for the consideration of the place of the birth in dis-
" posing of the question of the pursuer's legitimacy.
" For at the time of conception, when, by the fiction of
" law, the marriage of the parents took place, they were
" both in Scotland, and there is not a pretence for
" holding that they had at that time any other than a
" Scots domicile, or that there was any impediment to
" marriage then taking place. And I can discover no
" circumstance which can prevent the effect of the sub-
" sequent marriage on the status of the child thus be-
" gotten; for it would not place him in a more favour-
" able situation, but it might be the reverse, to look to
" the place of his birth instead of the place of con-
" ception; and it is only when it is more favourable for
" the child that attention is to be paid to the place of
" the birth. Most clearly in the present case we can
" regard the time and place of conception only.

" Upon these grounds I am of opinion that the
" pursuer is entitled to succeed in this declarator."

The cause was put down for judgment upon the foregoing opinions at the same time as the immediately following case of Munro v. Munro, when the Lords of the First Division delivered opinions upon both cases. See the report of the latter case, *post*, p. 492.

Judgment of Court, 15th Nov. 1837.

The following judgment was pronounced by their Lordships (15th November 1837):—" Find it proved
" and established that the pursuer James M'Douall is
" the legitimate son of the said late Andrew M'Douall

" of Logan: therefore find and declare in terms of the " original and supplementary summons of declarator in " so far as respects the question of the said James " M'Douall's legitimacy: Quoad ultra, remit to the " Lord Ordinary to proceed further as shall be just in " respect to the other conclusions of the said conjoined " actions."

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Judgment of Court.

The defenders appealed.

[*See the arguments, and the opinions delivered by the Lord Chancellor and Lord Brougham, in the next case of Munro v. Munro.*]

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutor therein complained of be and the same is hereby affirmed: And it is further ordered, That the appellants do pay or cause to be paid to the said respondent the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is also further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

SPOTTISWOODE and ROBERTSON — RICHARDSON and CONNELL, Solicitors.