to was the correct judgment; consequently the advice that I should humbly tender to your Lordships is, that it should be affirmed. I quite agree with what has been said by Mr. Anderson, that it is the duty of your Lordships to decide these cases, whether they relate to small matters or to large matters, simply and singly upon the view of what is the correct law, and what are the real rights of the parties. We have no right to say, because we feel that repugnance which every one must feel when such little matters are brought into litigation, that we ought to stretch the law upon the one side or the other in the least, and we are bound to look at it just as if it were £800,000 instead of £8 10*s*. But be that as it may, acting upon that principle, nevertheless I must say, that I rather rejoice at coming to the conclusion that this appeal should fail, because it is really a matter of scandal that appeals upon such trifling matters, which are hardly worth the journey of the agent to London, should, so often as they do, encumber your Lordships' House.

Interlocutors affirmed with costs.

Maitland and Graham, *Appellants' Solicitors.*—Richardson, Loch, and Maclaurin, *Respondent's Solicitors.*

MAY 15, 1854.

W. P. R. SHEDDEN, *Appellant*, v. R. S. PATRICK, W. C. PATRICK, and W. PATRICK, *Respondents.*

Alien—Naturalization—Marriage—Legitimation—Service—Res Judicata—Reduction of Judgment of House of Lords—Process—Statutes 7 Anne, c. 5; 4 Geo. II., c. 21—*A man born in Scotland, and who afterwards succeeded to an estate there, went to America in* 1763, *where, with the exception of a short visit to Scotland in* 1769, *he remained till his death in* 1798. *On deathbed he solemnized a marriage with a female with whom he had had illicit intercourse, and who had borne him several children in New York, among others a son, born about* 1794. *A nephew in Scotland, who, failing legitimate issue of the deceased, (who left no settlement of Scotch heritage,) was heir to the Scotch estate, was duly served and retoured to it in* 1799. *The son and his factor* loco tutoris *brought a reduction in the Court of Session, in* 1801, *of the service, on the ground that, having been legitimated by the marriage of his parents, he was the nearest heir; but the Court of Session, in* 1803, *dismissed the case, and the House of Lords (on the ground, as alleged, that the pursuer was an alien,) affirmed the judgment in* 1808. *In* 1848 *the son within three days of the elapse of* 40 *years subsequent to the date of the judgment of the House of Lords, again brought a reduction of the service, &c., and of the judgments of the Court of Session and House of Lords, partly on the ground that they had been obtained by fraud and collusion of the factor* loco tutoris *and others, and partly on the ground of* res noviter, *to the effect that it was lately discovered that his father was a domiciled Scotsman, and that the pursuer, being legitimated, was entitled to his succession.*

HELD *that, even supposing the pursuer to have been legitimated* per subsequens matrimonium, *yet, being born illegitimate, (that is, having at his birth no father, in the eye of the law,) out of the allegiance of the Crown of Great Britain, he did not come within the scope of the statutes as to naturalization; that he was therefore not entitled to sue in this country; and that such was the substance of the previous judgment in the House of Lords.*[1]

The late William Shedden of Roughwood, father of the pursuer, and uncle of the defender William Patrick, in 1763, when about fifteen years of age, left Scotland for America, where, with the exception of a short visit to Scotland in 1769, he remained, carrying on business as a merchant till 1799, when, the war of independence having broken out, he retired to Bermuda. On the conclusion of the peace in 1783, he returned to New York, and there formed a connection with a person named Anne Wilson, of which were born the pursuer and a daughter. He continued to reside in New York till 13th November 1798, when he died, having solemnized a marriage with Wilson on the 7th of the same month. He left a deed of settlement appointing certain parties in America (of whom John Patrick, William's brother, was one) his executors, and conveying his property to his children in equal portions. The deed made no mention of the heritable property in Scotland. William Shedden also left a letter, dated 12th November 1798, addressed to the defender William Patrick, stating that he had married Anne Wilson; that one of his children was a boy; "I have ordered my executors to send him to you." The letter contained a remit-

[1] See previous report 11 D. 1333D: 12. 696; 14 D. 721; 22 Sc. Jur. 318; 24 Sc. Jur. 331. S. C. 1 Macq. Ap. 535: 26 Sc. Jur. 420.

tance of £400, which the deceased desired, with "such farther sum or sums of money, may be appropriated for the purpose of maintaining and educating him genteelly, not exceeding £500, without the consent of my executors, of whom you are to be totally independent in this business."

The parties named executors, including John Patrick, who subsequently died without issue, accepted the appointment, and proceeded to act upon it.

On receipt of the intelligence of his uncle's death, William Patrick wrote his brother John, on 9th February, and again on 31st May 1799, to get the opinion of American counsel as to the status of the pursuer. An opinion was returned to the effect that the marriage of his parents was good, but had not the effect, by the law of America, of rendering the children legitimate.

Thereafter, in October 1779, William Patrick, as commissioner for his elder brother Dr. Robert, who was then abroad, had him served heir *cum beneficio inventarii* to William Shedden in the estate of Roughwood. Dr. Robert, at a subsequent period, sold the estate to William.

On 8th April 1800, William Patrick wrote Shedden's executors a letter to the effect that he could not accept of the appointment of guardian to the pursuer, but, if the pursuer were sent home, he would see him properly educated and taken care of.

The pursuer left America in May 1800, and arrived in Scotland in the course of the same year. He was sent to school by William Patrick, and remained in this country till 1811, when he entered the navy, and subsequently went to India, where he remained, with the exception of a short visit to this country, till 1833, when he returned to it permanently.

On 18th September 1800, Mr. Patrick wrote the executors proposing that an action should be raised to have the question of the pursuer's legitimacy in Scotland judicially settled. Of the same date, William Patrick wrote his brother John, with an additional memorial to be laid before counsel, on which, however, it did not appear that any opinion of counsel was ever obtained.

The executors having declined to take any steps in the matter, an application was made to the Court by certain relatives of William Shedden, to have Mr. Hugh Crawfurd appointed factor *loco tutoris* to the pursuer. The appointment having been made, Mr. Crawfurd raised a reduction of Dr. Patrick's service, on the ground that the pursuer, having been legitimated, was his father's heir. On 1st July 1803, the Court decided against the pursuer's legitimacy, and this decision was affirmed by the House of Lords on 3rd March 1808.

In 1848, the pursuer raised a summons of reduction and declarator against William Patrick, and Robert Shedden Patrick, grandson and representative of Dr. Robert, and his tutors, concluding for reduction of the retour in favour of Dr. Robert, and of the decrees of the Court of Session and House of Lords in the previous reduction, on the ground that the same had been obtained through fraudulent concealment or misrepresentation of the fact, that the pursuer's father was, at the time of his death, a domiciled Scotsman. In supplement to this, the pursuer subsequently raised a second summons. The defenders lodged preliminary defences, of which the first was, that the second summons fell to be dismissed, as not being "a proper supplementary summons." The Lord Ordinary having repelled the objection, and sustained the second as a good supplementary summons, the defenders reclaimed. The Court adhered.

The summonses set forth various circumstances in reference to William Shedden's departure for, and residence in, America, and contained long quotations from his correspondence, with the view of shewing that he "never had any permanent residence in America,—that he never abandoned or relinquished, for any period whatever, his intention of returning to his native country, and that during his whole life, he firmly believed he was a domiciled Scotsman,—and" that "he never, in fact, acquired the privileges of an American citizen." And the statement proceeded—That all these facts were known to the defender William Patrick, and his brothers John and Robert: That on 7th November 1798, the pursuer's father married Anne Wilson, for the express purpose of legitimating the children whom he had previously had by her: That the Patricks "were perfectly aware that the pursuer was entitled to succeed to the Scotch estate:" That they "conspired together for the purpose of defeating the right of the pursuer," and of acquiring the estate "to themselves or one or other of them:" That it was with this view that William Patrick proposed to take the opinion of American counsel, and the opinion returned was unfavourable to the pursuer's legitimacy, in consequence of the concealment, in the statement laid before counsel under William Patrick's direction, of the fact that the pursuer's father was a domiciled Scotsman: That at the same time, William Patrick proceeded to get his brother Robert served heir to William Shedden: "That at the date of these proceedings, William Patrick had resolved to accept the guardianship of the pursuer, and had, in fact, taken steps in regard to the custody and management of the pursuer under the appointment: That notwithstanding this, and notwithstanding that he was aware that the said William Shedden was a domiciled Scotchman, and that the pursuer had been rendered legitimate by the above libelled marriage, or at least that there existed strong grounds for maintaining that the pursuer was legitimate, the defender concealed the fact of the said William Shedden's marriage, and took no steps to protect his interests in the said proceedings, but concealed the fact that the pursuer had any claim whatever to his father's estate, and, indeed, concealed the fact of his existence, both

from the Court under the said petition, and from the inquest at Ayr:" That Dr. Robert Patrick, on returning to this country, "ratified and confirmed the whole of the said fraudulent and collusive proceedings, adopted by the said William Patrick in his name:" That thereafter, William Patrick being "apprehensive that the said fraudulent proceedings might at some future period be challenged by the pursuer, and being aware, that there existed good grounds for holding that the pursuer was legitimate, formed the fraudulent design of having the said question tried collusively, and on a false statement of fact:" That he accordingly, with Dr. Robert's concurrence, finding that the American executors would not try the question, "in pursuance of the foresaid fraudulent scheme," got Mr. Crawfurd appointed factor *loco tutoris*, "who was an intimate friend, and completely under his control, and all the instructions, which he received in regard to the subject matter of the tutory, were received from the said defender:" That all these proceedings were taken by William Patrick in collusion and concert with Dr. Robert, "and for the fraudulent purpose above mentioned; and that throughout the said proceedings, the whole facts and circumstances relative to the domicile of the pursuer's father, upon which the question of his legitimacy was known to depend, were purposely misrepresented, or stated falsely, or concealed: That it was falsely stated in the pleadings in the said cause, both for the pursuer and by the defender therein, that the pursuer's father was a domiciled American—that he had gone to that country *animo remanendi*—that he was an American citizen at the time of his death—and that the pursuer himself was an alien, incapable of inheriting real property."

Statements were then quoted from Dr. Robert's pleadings, to the effect that William Shedden was a domiciled American at the time of his death; and the summons proceeded—"That the statements so made were made under the direct instructions of the said William Patrick, and the same were well known, both to him and to the said Dr. Robert Patrick, to be utterly false and without foundation: That both the said parties were well aware that the said William Shedden never resided in America *animo remanendi*, that he never became an American citizen, or ceased to be subject to the allegiance of Great Britain, and that he never lost his Scotch domicile: That the said Hugh Crawfurd, acting under the instructions of the said William Patrick, or the said William Patrick in the name of the said Hugh Crawfurd, as factor *loco tutoris* for the pursuer, never denied the above false and fraudulent statements in regard to the domicile of the said William Shedden; but, on the contrary, in the pleadings lodged for the pursuer, under the pretence of maintaining the claims of the pursuer, admitted the whole of the foresaid statements, and permitted the case to be argued and decided on the assumption that these statements were true, and that the pursuer's father was truly domiciled in America."

On the case returning to the Outer House, the Lord Ordinary conjoined the summonses, and appointed a record to be made up on the preliminary defences.

Thereafter the pursuer was allowed to amend his summons by a statement, which the defenders denied, to the effect that his parents were married previous to his birth, inasmuch as they had cohabited with each other, and been held, habit and repute, as such, which by the law of America he averred constituted marriage.

The pursuer's condescendence contained merely an amplification of the statements in the summonses. His leading pleas were—"1. The retour and titles sought to be reduced were and are inept and invalid, and the judgments and other proceedings complained of were and are erroneous and contrary to law, in respect that the pursuer was at their dates, and is, the legitimate son of William Shedden, and as such entitled to succeed to the lands of Roughwood. 2. The pursuer is legitimate by the law of America, in respect that, at the date of his birth, his father and mother were married persons; and separately, even if the pursuer had not been legitimate by the law of America, he became so by the subsequent marriage of his parents, in respect that his father was a domiciled Scotsman at the date of his public marriage, and had been so throughout. 3. The foresaid retour and titles having been expede, and the foresaid proceedings having been taken, and judgments obtained in furtherance of a fraudulent conspiracy between the said William Patrick and Dr. Robert Patrick and the said John Patrick, to deprive the pursuer of his rights; and the judgments in question having been obtained by the said parties acting in collusion with Hugh Crawfurd, in consequence of the fraudulent concealment of material facts known to them, and the false and fraudulent statement or admission by them of facts which they knew to be false, —said proceedings and judgments are *funditus* null, and the defenders are barred from founding upon them to any effect whatever."

The leading pleas for the defenders were—1. The pursuer had no title, in respect he was not the lawful son and heir of William Shedden. 2. Being an alien, he could not succeed to land in Scotland, and had therefore no interest to insist in the action. 3. All challenge of Dr. Patrick's retour was barred by the vicennial prescription. 4. The statements were irrelevant to support the conclusions for reduction.

The Court by the interlocutor of 10th March 1852, sustained the defences pleaded against the relevancy of the summons, dismissed the actions, and assoilzied the defenders with expenses.

The pursuer appealed against the interlocutors of the Court of Session, maintaining in his *printed case*, that they ought to be reversed—"1. Because the appellant has relevantly alleged

that the proceedings sought to be reduced were fraudulently taken by the respondent William Patrick, and his brother Robert, (now represented by the other respondents,) in the knowledge that the appellant's parents had been married prior to his birth, and consequently that the appellant was the lawful son and heir at law of his father, and entitled to be served as such to the lands of Roughwood.—*Alden* v. *Gregory*, 2 Eden, 285. *Cotterill* v. *Purchase*, Forrest. 61. *Irvine* v. *Kirkpatrick*, 7 Bell's App. Cases, 186. *Manaton* v. *Molesworthy*, 1 Eden, 18. *Kennedy* v. *Daly*, 1 Scho. & Lef. 375; Kent's Com., vol. ii., pp. 86—8. 2. Because the appellant's action, as laid on fraud, even if viewed independently of the marriage between his father and mother prior to his birth, is competently libelled, and is sufficiently supported by facts and circumstances relevantly averred, and the truth of which he is entitled to an opportunity of proving in ordinary form.—*Ross* v. *Hutton and another*, June 15, 1830, F.C. *Bruce* v. *Bruce*, 6 Bro. P.C. 566. *Somerville* v. *Somerville*, 5 Ves. 750. *Dalhousie* v. *M'Dowall*, 7 Cl. & F. 817. *Monro* v. *Monros*, *ibid.*, p. 842-3. 3. Because, even although the averments of the appellant did not amount to a relevant case of fraud, it would, notwithstanding, be relevant to the appellant to establish his legitimacy and title, and to set aside the productions called for in the action of reduction.—*Fullarton* v. *Hamilton*, 1 W. S. 410. 4. Because the interlocutor of Lord Wood, of 15th July 1851, appealed against, and the other interlocutor of the First Division, also appealed against, were erroneous,—having regard to the particular stage of the cause at which they were pronounced, and keeping in view that the appellant had not had the usual means or opportunity afforded him of setting out his full case on its merits.—Act of Sederunt, 11th July 1828, § 36. *Officers of State* v. *Magistrates of Brechin*, 5 S. 672. 5. Because the interlocutor of the Court (10th March 1852) is erroneous, inasmuch as it proceeds on a partial consideration of a few documents, not only to the exclusion of others in process, but also as if the appellant neither desired nor had it in his power to adduce any other or additional evidence in support of his action. 6. Because the interlocutor (of 10th March 1852) is erroneous, in respect it entirely assoilzied the respondents from the conclusions of the action, in place of merely dismissing the action if it were thought to be irrelevant.—(Shand's Practice of the Court of Session, vol. i., p. 345. 6 Geo. IV., c. 120, § 5.)"

The *respondents*, R. S. Patrick and W. C. Patrick, in their *printed case* supported the interlocutors of the Court of Session, on the following grounds :—"1. Because the appellant was born an alien, and that character cannot be removed by the circumstance of his reputed father having been married to his (the appellant's) mother several years after the appellant's birth.—(7 Anne, c. 5; 4 Geo. II., c. 21. *Kerr* v. *Martin*, March 6, 1840. F.C.; 2 D. 752. 4 Geo. II., c. 21, § 2. *Strathmore Peerage case*, App. 4 W.S. 94. *Rose* v. *Ross*, 4 W.S. Appx. 57. *Cunningham* v. *Cunningham*, 2 Dow, 510. 2. Because the action is barred by the vicennial prescription of retours, and no relevant averments of fraud against the respondent's grandfather, Dr. Robert Patrick, have been stated, in respect of which the retour obtained by him in 1799 ought to be reduced.—(Act 1617, c. 13. Erskine, B. iii. t. 7, s. 45.) 3. Because no relevant or sufficient grounds have been libelled for reducing the judgment of the Court below in 1803, by which the retour was sustained; nor for reducing the judgment of the House of Lords in 1808, by which that judgment was affirmed.—(Story's Conflict of Laws, p. 50. *Bruce* v. *Bruce*, Mor. 4617. *The Harmony*, 2 Rob. Ad. 324. *Rose* v. *Ross*, 4 W. S. 289. *Munro* v. *Munro*, 16 S. 18. Kaimes' Principles of Equity, vol. ii., p. 324. *M'Doual* v. *Dalhousie*, 16 S. 6.)"

The respondent William Patrick maintained, in support of the judgments appealed against, that—"1. The appellant being an alien, and it having been so adjudicated in 1808, he cannot succeed to heritable estate in Scotland, and he has consequently no title to sue. 2. The action is barred, and the retour of the service expede by Dr. Patrick in 1799, and titles following thereon, are protected from challenge by the provisions of the Statute 1617, c. 13, regulating the vicennial prescription of retours. 3. The appellant has failed to set forth any grounds relevant either in fact or in law to set aside that retour, or to open up the judgments now sought to be reduced."

LORD CHANCELLOR CRANWORTH stated, that it had been suggested by one of their Lordships, whether, in a case like the present, where the object of the action in the Court below was evidently to set aside a decree of the House in 1808, it was competent for the Court of Session to entertain such an action. Counsel were therefore directed, in the first instance, to confine themselves exclusively to the question of competency or jurisdiction in the Court below.

Sir F. Kelly, for the appellant.—Assuming the allegations of the summons and condescendence to be true, we contend that it was competent for the appellant to raise the present action in the Court of Session. The law of Scotland did not differ substantially from the law of England on this subject. In Scotland, where a right was claimed, against which a judgment, or deed, or instrument was set up in bar to the claim, it was necessary to bring a formal action of reduction, in the first instance, to reduce or set aside such judgment or deed, or, at least, to join the action of reduction with the action of declarator—2 Shand's Prac. 654. In England no formal reduction might be necessary, the same result being obtained by either party setting up fraud as a defence, and by way of exception, when the decree or deed was put forward. But whether the *actor* or *reus* set up the fraud was immaterial, that being merely a question of procedure. In both

countries the real substantial object of the suit would be this:—The appellant would pray the Court to declare him the legitimate son and heir at law of his father, and when the decrees of 1803 and 1808 should be set up as a defence, then he would be entitled to reply that such decrees were obtained by fraud; that they were null and void, and therefore ought to be no obstacle to his obtaining relief. This was what was done in the present case. The appellant did not seek directly to reverse or set aside the judgment of the Court below or of this House, but merely claimed the privilege of replying fraud, and thus incidentally treating those judgments as null on that ground. In general, no Court had the power (except where an appeal was competent) directly to reverse or set aside the judgment of another Court of competent jurisdiction; but, in the mode above explained, every Court had, and must necessarily have, the power of incidentally treating as null such judgments of other Courts as were tainted with fraud. A Court would abdicate its functions if it did not so deal with fraudulent judgments set up in bar, and in that way even the pettiest Courts in the kingdom might decide, and would be bound to decide, whether a judgment of any superior Court, even of this House, had not been fraudulently obtained. All Courts alike were subject to be imposed upon, and this House was itself defrauded in a recent case from Ireland of *Tommey* v. *White*, 1853, 4 H. L. Cas. 313. But there it was not the Court below which had been defrauded, but merely the House; and this was the reason why the application for redress there was made in the first instance to the House, because in that way complete relief could be obtained. But, in the present case, complete redress could only be granted by an original suit in the Court below. The above views are supported by a series of authorities from Lord Coke to the present time. In *Fermor's case*, 3 Coke's Rep. 78, other cases were referred to, all shewing that it was proper to reply fraud to a judgment set up in bar. So in *Brownsword* v. *Edwards*, 2 Ves. Sen. 242. But the clearest authority is the *Duchess of Kingston's case*, 20 Howell's St. Tr. 355, and 2 Smith's L. C. 423, where a fraudulent decree of nullity of marriage had been obtained in a Court of competent jurisdiction, and yet the Duchess was indicted for bigamy; and when she set up the decree of nullity as a bar, that decree was proved to have been a fraud, and was treated as null and void. This House was then sitting as the Lord High Steward's Court, and had no appellate jurisdiction to reverse the sentence of the Ecclesiastical Court, but acting on the general principle applicable to all Courts, it incidentally treated that sentence as a nullity. That case is identical with the present. The reason given, as put by Mr. Wedderburn in his argument, was this—That in a fraudulent suit there is in reality no real dispute; the parties are not real parties, but the whole proceeding was a mere stage play—*Fabula non judicium agitur*. So in the present case, the parties in 1803 were not real parties. The appellant was an infant, entirely ignorant of the proceedings, and his pretended guardian was in collusion with the other side. The same principle is recognized in *Meadowcroft* v. *Huguenin*, 4 Moore Pr. C. C., 386; *Robson* v. *Eaton*, 1 T. R. 62; *Lloyd* v. *Mansell*, 2 P. Wms. 73. In *Price* v. *Dewhurst*, 8 Simon, 279, V.-C. Shadwell said it made no difference whatever in what Court a fraudulent judgment was given—it was a nullity. In the *Earl of Bandon* v. *Beecher*, 3 Cl. & Fin. 479, it was held that in a Court of equity the party might, either as *actor* or *reus*, treat a fraudulent judgment of the Court of Exchequer as null.

[LORD ST. LEONARDS.—But these are all cases where the alleged fraudulent judgment was that of an inferior Court. The question is—Could the appellant go in the Court of Session for relief in the face of a decree of this House?]

We can see no possible distinction between this Court and any other Court.

[LORD BROUGHAM.—Technically speaking, it is rather an appeal to Parliament than to this House, and the judgment given is that of the Parliament.]

Call it the judgment of Parliament or anything else, this House must sit as a Court of Justice. Even if it were considered a judgment of Parliament, Blackstone says (2 Bl. Com. 346) that even a private act may be relieved against when obtained on fraudulent suggestions; and he cites *Richardson* v. *Hamilton*, 8th Jan. 1733, and *Mackenzie* v. *Stewart*, 13th March 1754. See also 5 Cruise's Digest, 23, "Private Act." Lord Eldon says in *Stewart* v. *Vans Agnew*, 1 Sh. Ap. 434, "where a fraud is practised upon the House, and the party, by the operation of that fraud, obtains the judgment of the House, a judgment so obtained by fraud upon your Lordships is no more than the judgment of any other Court obtained by fraud, and is an absolute nullity." In *Bowen* v. *Evans*, 2 H. L. Cas. 257, Lord Cottenham said, whatever be the contrivances resorted to, fraud would be relieved against. The same principle seemed to prevail in Scotland. *Macpherson* v. *Tytler*, 1 D. 718. It is said in *Imrie* v. *Magnay*, 11 M. & W. 267, that it does not depend on the dignity of the Court, that its judgment is set aside. So in *Phillipson* v. *Earl of Egremont*, 6 Q.B. 587. Then we come to the question—If we have chosen a wrong remedy, what is the right one?

[LORD BROUGHAM.—Have you any instance of an inferior Court setting aside a judgment of a superior Court, to which superior Court an appeal lay from the inferior—as, for instance, of the Queen's Bench setting aside a judgment of the Exchequer Chamber?]

No, we have no case exactly of that kind; but on what principle can there be any difference? This House has no original jurisdiction; it has merely a jurisdiction of appeal, and all the relief

it can give must be in some way incidental to, and arising out of, some appeal. What machinery has this House to enable it to investigate a complicated question of fraud, where documents must be examined and witnesses confronted? It cannot even set aside its own judgment, as Lord Eldon says in *Stewart* v. *V. Agnew*. But even assuming it could set aside its judgment, what power would it have to remit to the Court of Session to inquire into the facts?

[LORD ST. LEONARDS.—This House can direct an issue to be tried, or it may take its own way of satisfying itself. How can you say its want of jurisdiction depends on the fact of some inferior Court also being defrauded, from which there was an appeal?]

Suppose the House were *in hoc statu* to suspend this suit, and to send an issue to the Court of Session, so as to investigate the facts, still this House has no authority over lands in Scotland, and could not order the possession of the estate here to be delivered up to the appellant. What would be the next step? It was thus beyond the power of the House to give complete redress.

R. Palmer Q.C. (with him, *Anderson* Q.C., and *Dr. R. J. Phillimore*), same side. — There are only three grounds on which a remedy may be sought against an improper judgment, viz.—1. Where there is some error in the judgment. 2. Where there is *res noviter veniens ad notitiam*; and, 3. Where there has been fraud used in obtaining the judgment. In the first case, the remedy is by appeal to a higher court—the parties being limited to the record as it stands. In the second case, the discovery of new matter is a ground of review, and you must apply to the same Court in which the original suit was heard, for leave to supplement the record with such new materials, and obtain a rehearing. In Scotland no leave seems to be necessary in order to do this. In both these two cases the parties are estopped or conclusively bound by the judgment. But the third case, that of fraud in the judgment, stands on a different footing. Fraud is no ground for rehearing, for it vitiates the judgment entirely, which, therefore, is to be treated as a mere nullity; and the proper course is, not to apply to the same Court, but to proceed by an original suit. This is more especially true of representative suits where one of the parties is a minor. The doctrine is in such cases, that there has in reality been no real or *bonâ fide* contention at all, no real suit, and no real parties, and therefore the party defrauded is no more bound than if nothing had ever happened. This distinction between cases of fraud and others, such as *res noviter*, is stated in Mitford's Eq. Plead., 83, 92–3 (4th ed.), and runs through a variety of cases, — *Lloyd* v. *Mansell*, 2 P. Wms. 73; *Richmond* v. *Tayleur*, 1 P. Wms. 734; *Bradish* v. *Gee*, Ambl. 229; *Wortley* v. *Berkhead*, 3 Atk. 810; *Wortley* v. *Molesworth*, 1 Eden, 18; *Sheldon* v. *Fortescue Aland*, 3 P. Wms. 104; *Mussell* v. *Morgan*, 3 Br. Ch. 74. In this last case the analogy is perfect, and shews that, when the decree is obtained by fraud, you must proceed by original bill, as if the decree was an entire nullity, just as in this case the appellant proceeded in the Court below by the original suit, and did not apply to this House. Then, does it make any difference that the decree of 1803 was affirmed by this House? It was the same fraud, only confirmed by a higher authority, and therefore, if possible, a reason all the more cogent for the course here followed. See further as to fraud in the judgment of another Court, —*Perry* v. *Meadowcroft*, 10 Beav. 122; *Harrison* v. *Corporation of Southampton*, 22 L. J. Ch. 722. *Rajundernarain* v. *Sing*, 1 Moore, Pr. C. C. 117; *Gifford* v. *Hort*, 1 Sch. & Lef. 386.

Sol.-Gen. Sir R. Bethell for the respondents.—We do not dispute most of what has been said about decrees tainted with fraud being mere nullities; the real strength of our case being, that there was no fraud at all. But assuming, as this part of the argument requires us to do, that there was fraud, then the question is—Where was the proper place to seek redress for that fraud? *Primâ facie*, a judgment of this House has, as between the parties, the force of an act of parliament, and is not reversible except by an act of parliament.—Sugden's Real Prop., Preface; 2 Smith's L. C., as to *Duchess of Kingston's case*, 423; Coke's Inst., Part I. 352 a. *Tommey* v. *White*, 1 H. L. Cas. 49, and 4 H. L. Cas. 313. Accordingly, when it is desired by a party to set aside such a judgment, the only course is to make application for an act of parliament. The House will then take all the circumstances into consideration, and has ample machinery for doing complete justice. Thus it may appoint a committee of inquiry, or even, as one of your Lordships suggested, may direct an issue.

[LORD CHANCELLOR.—Can you shew us any precedent for that?]

Lord Redesdale seems to say so, in *Stewart* v. *Vans Agnew*, 1 Sh. Ap. 421. Lord Truro also said, in *Tommey* v. *White*, he remembered one instance. It was a general rule, with regard to all judgments obtained by fraud, that the jurisdiction to set aside the judgment so obtained is in the tribunal itself which was defrauded. There might be some qualification to this rule as regarded Courts of Law which took a more limited view of fraud, but it applied to all Courts of Equity which recognize the doctrine of constructive frauds. The distinction, however, is unnecessary here, for this House is a Court of both Law and Equity. According, therefore, to the general rule, the application here should have been to this House in the first instance. What Lord Eldon said in *Stewart* v. *Agnew*, referred merely to this House. He meant only that a judgment of the House, obtained by fraud, would be treated by the House itself as a nullity. There is a direct authority in *Prudham* v. *Phillips*, Amb. 763, where "Willes, C.J., took a distinction between the case of a stranger who cannot come in and reverse the judgment, and

therefore must be permitted to aver that it is fraudulent, and the case of one who is party to the proceedings. If he plead the judgment was fraudulent, he cannot give evidence of it, but must apply to the Court which pronounced the sentence to vacate the judgment." See also Mitford's Eq. Pl. 258 (4th ed.). There is good sense in this, because the fraud may consist in an abuse of the rules and regulations of the Court itself, which therefore could be best known to that Court. This general principle is also established in Scotland; and it was made the subject of an express statutory enactment, 1587, c. 39, which lays down the principle, that the judgment of a superior Court shall not be questioned by any inferior tribunal.

[LORD ST. LEONARDS.—My recollection of that statute is, that you will find it explained in the text-books.]

It is referred to in Stair, 4, 1, 39, and 4, 52, 7; also by Lord Eldon in *Stewart* v. *V. Agnew*, 1 Sh. Ap. 437. It is a law which equally prevails in England, that inferior tribunals are not to be allowed to challenge the judgments of superior Courts.—2 Smith's L.C. 434; *Barbon* v. *Searle*, 1 Vern. 416. In a somewhat similar case to the present, viz., *Blake* v. *Foster*, Macq. Pr. 448, the Lord Chancellor of Ireland refused to proceed with such a suit without the authority of this House, and on appeal against his refusal the House held he was right. Besides, in this case, how could the Court of Session know on what grounds the House proceeded in 1808, especially as it was the fashion at that period to affirm the judgment of the Court below without any reason given?

The Dean of Faculty (*Inglis*,) (with him *Rolt* Q.C., and *Mure*,) same side.—It is no doubt true that the Court of Session may incidentally decide, or make inquiries into matters over which it has no original jurisdiction. Thus, it might occur in the course of a suit that the Court may inquire whether a party is a peer of the realm, or, before the abolition of the Consistorial Court, whether a woman was married, or whether a party was legitimate. But then, in such cases, the Court is never asked to give a remedy which does not belong to its proper jurisdiction. Here, however, the validity of the decree of this House in 1808 does not arise incidentally; it is the main object of the action directly to set it aside, for until that decree is reduced the appellant cannot advance a step. It is clearly incompetent in the Court of Session, whatever it may be in England, to reply nullity to a plea of *res judicata*.—Stair, 4, 40, 16. An action of reduction is in fact the only competent mode, through which the Court of Session acts as a Court of Equity in such circumstances—where the title is rights to land, fraud is not competent by way of exception but by reduction.—Stair, 4, 40, 21. The question then arises—Can a remedy of that kind extend to a decree of this House? It is clear, that in an Inferior Court in Scotland, such as the Sheriff Court, it is incompetent, and a thing unheard of, to plead that a judgment of the Court of Session was obtained by fraud, and yet the appellant must go the length of saying that that may be done. Or take the case of the Exchequer or Teind Court,—there a plea of nullity would be no answer to a judgment of the Court of Session. No other Court than the Court of Session can entertain an action of reduction; and though, in that mode, the Court of Session can reduce a decree of the Sheriff Court, or even of the Court of Exchequer, yet, where the judgment of the Court of Exchequer has been affirmed by this House, there is no authority for saying that in that case an action of reduction could be entertained by the Court of Session.

[LORD ST. LEONARDS.—At the time of the Scottish parliament, the appeal would be from the Exchequer to that parliament, and we succeed that parliament.]

Yes, the Statute of 1587, c. 39, seems conclusive on that point. There is some difference, it is true, between the views of Ersk. 1, 3, 2, and Stair, 4, 1, 39 and 58. The general doctrine, however, seems recognized in *Mackenzie* v. *Scott*, 4 Br. Sup. 282; *Murray* v. *Cockburn*, M. 9041. It was said the decree of 1808 was an absolute nullity, because the appellant was a minor, and the suit was not between the same parties then as now. But though the appellant was then a minor, he was properly represented by the factor *loco tutoris*, and is effectually bound by that decree as *res judicata*.

Sir F. Kelly replied.—The other side have failed to shew any intelligible distinction between a decree of this House and that of any other Court. They chiefly rely on this—that it requires an act of parliament to reverse the decrees of this House. But the very same thing may be said of the meanest Court of the kingdom. This House differs only from other Courts in this—that within a certain period, if an appeal is brought, it may reverse the judgment of the inferior Court. But where no appeal lies, as where, for instance, some statute declares that the decision of two Justices of the Peace is to be final, or where the proper period for bringing the appeal has expired, it requires nothing less than an act of parliament to reverse the decisions of these inferior tribunals. As to the Scots Act 1587, c. 39, it only states what is equally the law of the English parliament, viz., that in general no Inferior Court can question the decrees of the Supreme Court. But it does not apply to cases of fraud. Therefore nothing has been advanced to shew, that it is not competent in any other Court to reply, that a decree of this House was obtained by fraud. When we speak of a decree obtained by fraud, we do not mean a mere stratagem or partial fraud, used by one of the parties in the cause, or at some stage of a *bonâ fide* suit, whereby he gains an advantage, but we mean a case where there was no *bonâ fide* suit or

real contention at all, and where the whole proceeding from beginning to end was concocted in fraud, as was the case here.

[LORD CHANCELLOR.—You say it must be a fraud that goes to the substance of the whole proceedings.]

Yes. Where, for example, one of the parties may have falsely alleged, in the course of the suit, that he had served the other party with a certain notice, and thus may have gained a decree in his favour, we do not contend that such a partial fraud would vitiate the decree; but we admit it must be a fraud running throughout the entire proceedings. As to the argument that a decree must first be reduced before an action can be brought in the Court of Session, that is merely a peculiarity of the procedure. The only effect would be, however, that the suit would be suspended *in hoc statu*, to give time to bring the action of reduction.—Bell's Dict., "Reduction."

At the conclusion of the above arguments the LORD CHANCELLOR intimated, that as, according to the admission of the counsel for the appellant, they were bound to shew that the suit of 1803 was concocted in fraud, so as to bring it within the rule apparently recognized in the *Duchess of Kingston's case*, viz., where *fabula non judicium agitur*, it would therefore be expedient to hear counsel on the facts of the case, and the sufficiency of the allegations of fraud, as disclosed in the summons and condescendence.

Sir F. Kelly and *R. Palmer*, for appellant.—The averments in the summons and condescendence are quite sufficient to fix W. Patrick with fraud. We aver a marriage prior to appellant's birth, which was constituted by cohabitation and acknowledgment in New York, and was therefore valid.—2 Kent's Com., 87. All the circumstances of W. Shedden's life were well known to the respondent, viz., that there were two marriages, and that W. Shedden was a domiciled Scotsman; at least the respondent had the materials in hand which ought to have led him to that conclusion.—*Burroughs* v. *Locke*, 10 Ves. 470. He knew well the domicile of origin, which is always a main ingredient in considering the question of the domicile of an intestate.—*Bruce* v. *Bruce*, 6 Bro. Ch. C. 566; *Somerville* v. *Somerville*, 5 Ves. 750; *Munro* v. *Munro*, and *Macdowall* v. *Countess of Dalhousie*, 7 Cl. & Fin. 817. The principles of the law of domicile were well settled before 1803 by the *case of Somerville*, as appears from the *Strathmore case*.—4 W. S., App. 94, and subsequent cases. The domicile of Shedden, therefore, being Scotch, the appellant was made legitimate by the deathbed marriage, even assuming that the prior marriage could not be established. Being legitimate by the law of Scotland, he was legitimate everywhere.

[LORD ST. LEONARDS.—Surely not for the purpose of succeeding to real estate in England?]

Not in England, perhaps, but at least in Scotland. Then the appellant comes within the saving clause of the Alien Act, 4 Geo. II., c. 21, for his father was a natural born subject. Though the appellant was born illegitimate, yet the subsequent marriage operated to make him legitimate; the *presumptio juris et de jure* being, that the parents were married before the birth. It may be said that the appellant must shew that his father was a natural born subject at the time of his (appellant's) birth; but we say it is enough that he shew this at the time when the benefit of the act was sought. *Lastly*, The Court below was wrong in assoilzieing the defender from the conclusions of the libel; the proper interlocutor should have been one merely dismissing the summons, so that the pursuer might not be prevented from afterwards bringing a fresh action.—1 Shand's Prac. 348.

Sol.-Gen. Bethell and the *Dean of Faculty*, for respondent.—In consequence of the great lapse of time the allegations of fraud must be rigorously exact.—*Per* Lord Brougham in *Irvine* v. *Kirkpatrick*, 7 Bell's Ap. 416. It is a general rule in all Courts that the grounds of action must be sufficiently explicit. *Cornfoot* v. *Fowke*, 6 M. & W. 358; *Fuller* v. *Wilson*, 3 Q.B. 58; *Moens* v. *Hayworth*, 10 M. & W. 147; *Evans* v. *Collins*, 5 Q.B. 804. But here the allegations are so contradictory that no relief can be granted. *Monday* v. *Knight*, 3 Hare, 501. In discussions on the relevancy the sole question is—Whether enough appears on the record to justify the Court in allowing the case to go further? *M'Ewan* v. *Campbell*, 16 D. 117. But the inference deducible from the pursuer's averments is contrary to what he insists upon, for the facts shew that the domicile was not in Scotland.—*Bruce* v. *Bruce*, *supra;* The *Harmony*, 2 Rob. Adm. Rep. 324; The *President*, 5 Rob. Adm. Rep. 277; The *Matchless*, 1 Hagg. 103; *Drei Brüder*, 4 Rob. Adm. Rep. 232; *Forbes* v. *Forbes*, 1 Kay, 341. There is no sufficient averment of the prior marriage constituted by habit and repute; the circumstances set forth not importing that description of marriage. *Cunninghame* v. *Cunninghame*, 2 Dow, 510. Nor do the facts shew any fraud in the retour, for that proceeding is not a litigation at all, and does not prevent another person serving heir.—Stair, 3, 5, 24. Yet after the lapse of 20 years nothing but fraud can get the better of a retour.—*Neilson* v. *Cochrane*, 1 Rob. Ap. 82; *Campbell* v. *Campbell*, 10 D. 461. Assuming even that the domicile of W. Shedden was Scotch, still the appellant must shew that the fact of domicile was not only material, but that W. Patrick wilfully concealed that fact, and that such concealment led to the judgment of the Court of Session and House of Lords in 1808. This we deny, for there is no satisfactory evidence that the case was decided in 1808 on anything except the alienage of the appellant; and the references to that case in the subsequent cases of

the *Strathmore Peerage*, 4 W.S. App. 94, and *Rose* v. *Ross*, 4 W.S. App. 57, confirm this view. That is the simple ground also on which the present case must be decided, for the appellant is clearly an alien. Though the municipal law of Scotland gives a certain effect to the subsequent marriage of the parents of a bastard, it does not follow that a foreign law like that of America will give the same effect to that circumstance.—Huber, 1, 3, 2. The old fiction, that the subsequent marriage operated in the eye of the law as a marriage previous to the birth, is now exploded in Scotland, by *Kerr* v. *Martin*, 2 D. 752. Being therefore born an alien, the appellant could never be divested of that character by the retrospective operation of any foreign law, for alienage was indelibly stamped on him at his birth.—*Rose* v. *Ross*, 4 W.S. App. 52, 55; 1 Boulnois, 55. Hence he is not within the protection of the Alien Act, 4 Geo. II., c. 21, for at the time of his birth the appellant's father was not a natural born subject, the appellant at that time being *filius nullius*, and having no father in the eye of the law. A man cannot at one and the same time be a natural born subject of two countries, and cannot be both a bastard and legitimate. To hold that the Alien Act legitimated the appellant, would be to reverse the judgment in *Doe d. Bartwhistle* v. *Vardell*, 7 Cl. & Fin. 895. *Lastly*, it was quite correct in the Court below to assoilzie the defenders. That was the form observed in *Irvine* v. *Kirkpatrick*, *supra;* and in *Burnes* v. *Pennell*, 6 Bell's Ap. C. 341, the reasons of reduction were repelled, which is to the same effect as an absolvitor.

Sir F. Kelly replied.—The case of *Kerr* v. *Martin*, 2 D. 752, was decided only by a majority of 8 to 7 of the Judges; and as it is repugnant to common sense, it ought not to be regarded by the House.

LORD CHANCELLOR CRANWORTH.—My Lords, this case has occupied a most unusual length of time at your Lordships' bar, and it might be supposed, therefore, that in making the motion which I propose to make, I should feel it my duty to occupy a considerable portion of your Lordships' time. But such will not be the case, because I have satisfied myself, I may almost say without a particle of doubt—with as little doubt as can ever attend the decision of any judicial question—that this matter lies within the very narrowest compass.

My Lords, the suit was instituted by Mr. Shedden, claiming to be entitled to a Scotch estate called Roughwood, as heir at law to his father William Shedden, who died in the year 1798. He alleges that he is his only legitimate son, and so entitled to that estate. A nephew of W. Shedden, Robert Patrick, was, within a year after the death of W. Shedden, served heir, and he, and those claiming under him, have ever since been in possession of that estate. But Mr. Shedden, the present appellant, says that that was done in fraud. Not only was Robert Patrick served heir, but after he had been served heir, a proceeding was instituted in the name of the present appellant, by his next friend, (as we call him here,) or his *factor loco tutoris*, a gentleman of the name of Hugh Crawfurd, to establish that title which the appellant seeks to establish now, and to have it declared that the service of the uncle as heir, and the consequent passing of the proper documents, to put him in legal seisin of the estate, was a fraud and a contrivance. He instituted that suit—that suit was heard and disposed of by the Court of Session. The Court of Session came to the conclusion that the present appellant, then an infant, suing only by Mr. Crawfurd as his *factor loco tutoris*, was an illegitimate child, and they disposed of that suit accordingly. The persons who managed the affairs of the present appellant, then an infant, were not satisfied with the decision of the Court of Session, but brought the matter, by way of appeal, to your Lordships' House, and in the year 1808 that decision of the Court of Session was here affirmed.

My Lords, under these circumstances, it would of course be an exceedingly difficult matter for the appellant to contend that he had now any right remaining. He did, however, four or five years ago, institute proceedings in the Court of Session, in 1847 or 1848, for the purpose of re-asserting that right, which had been decided against him in the year 1803 in the Court of Session, and by your Lordships in the year 1808, upon the ground that the whole of these proceedings, from the beginning to the end, had been carried on in fraud of his rights—that the retour, in the year 1799, of the nephew of William Shedden, was a fraudulent proceeding, behind the back of the appellant, then an infant only five or six years old, and that the proceedings that were instituted first in the Court of Session, and then brought, by way of appeal, to your Lordships' House, were proceedings not *bonâ fide* carried on, but carried on in furtherance of the original fraud which had been conceived, and in order to give the apparent sanction of a decree of a Court of Justice, and ultimately of a decree of your Lordships' House, to that which was in truth but a fraudulent proceeding from the beginning. As there stood in the way of such a proceeding, amongst other things, the decree of the Court of Session, and the affirmance of that decree by your Lordships' House in 1808, the appellant, the pursuer below, was obliged to frame his summons as a summons of reduction, amongst other things, in order to reduce the decrees of the Court of Session, and of your Lordships' House in 1808; because standing those decrees, his title was absolutely barred.

My Lords, the first objection that was suggested when the matter was opened (suggested, I believe, by one of your Lordships, rather than from the bar) was, that this was a proceeding

under no circumstances competent to the appellant—that inasmuch as it had been decided by the Court of Session, and ultimately upon appeal by your Lordships, that the appellant was not entitled, and it was not even competent to him now to re-open the question—your Lordships thought that a matter of so much difficulty, that you first of all desired the question to be argued as to that point, assuming the facts to be such as the appellant represented them to be. Your Lordships desired it to be argued at the bar, whether, under any circumstances, a party against whom there had been a final decree of your Lordships' House, could call that decree in question by a suit in the Court below, and set aside that judgment, so as to have it declared to be no bar to a new proceeding?

My Lords, that argument opened questions of very great nicety, and very great difficulty, and, without expressing any positive opinion upon that subject, I certainly do not wish it to be understood that I concur, or that I should without further argument concur in the suggestion, that under no circumstances can a decree of your Lordships' House be called in question, if it be established, that that decree was not a decree in a *bonâ fide* suit, but that it was a decree obtained by the fraudulent collusion of both parties to it, in order, either by means of that decree, to defeat the objects of public justice, or to defeat the rights of one of the nominal parties, he being an infant, whose rights were under the guardianship of another. If it could be established that the defenders in a suit in Scotland, or the defendants here, (which would be just the same thing,) had fraudulently induced some one to act as the next friend of an infant, in order to have a pretended suit instituted, in which it should be a part of the common design of the plaintiff and the defendant, that the real rights of the infant should be kept out of sight, so that the Court below, in the first instance, and your Lordships' House afterwards, might be imposed upon, and led to suppose that they were decreeing upon a state of facts which the parties knew was not a true state of facts—I say I wish to have it understood, that I do not mean to express any opinion, that an original suit in the Court below might not be instituted, notwithstanding that fraudulent judgment so obtained. It was decided in the celebrated case of the Duchess of Kingston that that might be done. It was there decided, that a judgment which had been obtained by fraud in that case could not stand in the way of a prosecution in this Court of the Duchess of Kingston for bigamy—that the suit in the Ecclesiastical Court, which was set up, was a contrivance—was, in fact, only one link in the chain of fraud, and that such a judgment was in truth no judgment—in the neat and short way in which it was put by Lord Loughborough, *fabula non judicium agitur*—that it was altogether a mere contrivance, a story, a fable, a play, and not a real proceeding.

My Lords, the case having been thus argued upon the abstract question, your Lordships were of opinion that it would be inexpedient to come to any decision upon that abstract question, until, however long a time the argument might occupy, your Lordships had heard the argument upon the facts in this case, in order to see whether, assuming the doctrine of the *Duchess of Kingston's case* to be applicable to a judgment affirmed by your Lordships in this House, there were facts in this case capable of raising the point—whether, in truth, there had been any such concert and collusion between the parties, who acted for the infant in the Court of Session, and ultimately in your Lordships' House, and the defenders, the persons who were the heirs at law if the child was illegitimate, as to bring this case within the doctrine of the *Duchess of Kingston's case*—I say the *Duchess of Kingston's case*, but there are several other cases besides that of the Duchess of Kingston which will illustrate what I mean.

Now, having heard the matter argued, and attended to it with great anxiety from first to last, I have come to the clear opinion, that there is, with the exception of one matter, to which I will advert presently, one point that puts this question beyond all doubt. I allude to the Statute of Geo. II., under which it appears to me to be clear to demonstration, that (subject to that which I am presently about to say as to a prior marriage,) the present appellant is, to all intents and purposes, an alien, and consequently incapable of succeeding as heir to lands in this country.

My Lords, the case made by the appellant is this:—He says that his father was a Scotchman by birth and origin; that he was the owner of the estate of Roughwood, in Scotland; that his father went to America first in the year 1764; that he returned in 1768 or 1769, for about a year and a half, to this country, and that he went out afterwards to America, and remained there till the end of the year 1798, when he died. But his argument is, that during all that time, although resident in America, he continued a domiciled Scotchman. And unquestionably, it may be, that a party, if he lives for—I was going to say a century, but that is beyond the common lot of our humanity, but if he lives for half a century abroad—if he only lives there as a sojourner, and is only there *animo revertendi*, his home all along remaining here, no length of time, merely *qua* length of time, will necessarily confer a foreign domicile upon him. And what the appellant contends for is, that while his father was residing in America from the year 1764 to the year 1798, when he died (except during the year and a-half when he returned to Scotland, about 1768 or 1769,) that during the whole of that time he was only there for a temporary purpose, and always *animo revertendi*. He contends further, that, that being so, the father having lived with a woman of the name of Ann Wilson, and having had born of that woman a son, himself, about

the year 1794; that he did, a week before his death, marry this woman, and that, by the law of Scotland, which he says was the law that was to regulate him, (Scotland being his domicile, although America was his place of residence,) that marriage legitimated the son, the present appellant, and made him (whether you call him *legitimus* or *legitimatus* is unimportant) a legitimate son, and so capable of succeeding to the estate.

Now, my Lords, that case was endeavoured to be established, in the first place, by an enormous mass of evidence, the object of which was to shew the *animus* of the deceased—that he was residing in America only as a sojourner, and not as treating that country as his home and domicile. And if the question had turned upon whether all these documents and evidence do or do not make out the inference which the appellant contends ought to be drawn from them, very great nicety in examining and in commenting upon them would have been requisite; but for the reason I have already intimated in my opinion, it is totally immaterial, because for the present argument I will assume the appellant to have made out that for which he contends. I will assume that there is ample averment in the summons and in the condescendence, and in the documents incorporated with them, to shew that William Shedden was a domiciled Scotchman while he was living in America. What then? Why, then, he says the consequence is this—that having had a child, viz., the present appellant, born to him of Ann Wilson, with whom he was cohabiting, and having, with the very object of making that child legitimate, six days before his death, gone through a valid form of marriage with Ann Wilson on his deathbed, that that, according to the law of Scotland, would make the son, who had been up to that time illegitimate, legitimate; and that, consequently, that having taken place, and his domicile having been in Scotland, the circumstance of this having happened in America is immaterial to his right.

Now, my Lords, that, again, is a question of very great nicety and difficulty, and I shall express no opinion upon that point. I will, as I have with respect to the fact of domicile, assume that, but, for what I am about to state, it might make him, for some purposes, legitimate; but the question is—Whether, if it does make him legitimate, it makes him a natural born subject of Her Majesty, or of His Majesty, at that time?

Now, my Lords, it appears to me that the negative of that is perfectly clear, upon reference to the statutes. I need not state to your Lordships that, independently of statute, every one born abroad was an alien. I state the proposition perhaps too generally, because the children of ambassadors and some other persons were excepted; but as a general proposition, all persons born abroad were aliens. That was interfered with first by a very early statute—I believe by one of the Henrys—with reference to merchants; but that may be dismissed from our consideration. It was then enacted in the reign of Queen Anne, that persons born out of the allegiance of Her Majesty shall be deemed and judged to be natural born subjects. Then there being a doubt upon the construction of that statute, and it being clear that it went further than was intended, the statute upon which reliance must necessarily be placed, and which is the governing statute upon the subject, the 4 Geo. II., was passed, and that statute enacted, "That all children born out of allegiance to the Crown of England or of Great Britain, or which shall hereafter be born out of such allegiance, whose fathers were or shall be natural born subjects of the Crown of England or of Great Britain at the time of the birth of such children respectively, shall be deemed and judged to be natural born subjects." The language of that statute is very precise. In order to come within its provisions, the party must make out that at the time of his birth his father was a natural born subject.

Now, conceding, for the purpose of the argument, that the appellant's father was domiciled in Scotland, although living in America, and conceding, for the purpose of the argument, that a marriage in America would have had the same operation as a marriage would have had if he had been in Scotland, what then? What this appellant must make out is, that at the time of his birth, his father was a natural born subject. But at the time of his birth Mr. Shedden was not his father. He was a natural son, and he was, in the eye of the law, *filius nullius*. The consequence of that was, that alienage attached upon him, and, in my opinion, attached upon him irreversibly. He was an alien when born, and whatever be the operation of the law in respect of such of her Majesty's subjects of Scotch origin, as contradistinguished from those of English origin, it never can be that incapacities of alienage are taken away. The results would be most anomalous and inconvenient, and there certainly cannot be such a thing as a person an alien in England and not an alien in Scotland. But this person, the moment he was born, was an alien in England—he was not a natural born subject. How can it be that because he is rendered legitimate according to the law of Scotland, he can be made *in invitum* a subject of her Majesty? What strange consequences would follow! This person might, if we were unhappily engaged in war with America, lawfully take up arms against Her Majesty, and yet can it be, that his parents, by choosing to marry, could make him a traitor? But that consequence must inevitably follow. Again, he says that he can succeed to this estate of lands in Scotland. But he is incapable of holding lands in England; and if his father, by his will, had given him lands in England, and left him to succeed to lands in Scotland, upon office found, the Crown would have been entitled to the lands given to him in England. Could that right of the Crown be afterwards divested by

a subsequent marriage? The consequences are so anomalous, that it appears to me to be perfectly clear that it is not the legitimate construction of the statute; and I am not at all clear, that such a case as this might not have been in the contemplation of the legislature when they passed that statute. The first statute was passed immediately after the Union of Scotland. It is in very loose language; it evidently went further than was contemplated; and it may be, that when that statute was set aside, and a new one passed some 20 or 30 years afterwards, one object of it may have been for the very purpose of defeating such a case as is now attempted to be set up. It may be that it was not so, but the language which was used would accurately carry out that intention, if such were the intention of the legislature. Be that as it may, it seems to me, that as your Lordships can only determine this question on the construction of the precise words of this statute, it is quite clear that this gentleman was not, at the time of his birth, the son of a person who was a natural born subject of the Crown of Great Britain; and being so, it is impossible for him to succeed to the estate in question. And therefore, supposing that all this fraud, which is imputed, really existed, it was a fraud utterly immaterial, for it was only to keep out of sight, first from the Court of Session, and then from your Lordships' House, facts that, whether they were kept out of sight or obtruded upon your Lordships, would lead exactly to the same conclusion.

My Lords, that would entirely dispose of the case, were it not for this, that after this suit had been instituted in the Court of Session, first by an original summons, and afterwards by a supplemental summons, that goes at very great length into the case which is shadowed forth more shortly in the original summons, a new statement is introduced by way of amendment, which is in truth the only matter that ever created in my mind, after I came fully to understand this complicated case, any sort of doubt. I allude to this, that although the whole of the two summonses, and the condescendence, and the letters and correspondence printed by way of appendix, all proceeded upon the assumption of this marriage, just before the death, legitimating the child by reason of his Scotch domicile, yet, before the record came to be closed, permission was given to introduce, by way of amendment, an averment of a fact, or alleged fact, scarcely reconcileable with all the other facts of the case, and it is this, that, besides William Shedden's regular marriage, publicly solemnized, as now mentioned, (that is, the deathbed marriage,) the said William Shedden, although he had not acquired a domicile in America, and Miss Wilson had been, according to the law of America, where they resided, married persons, prior to, and at the birth of the pursuer. It goes on to allege, that before the birth of the child there was a prior marriage —a marriage to be proved by cohabitation and acknowledgment.

Now, if we were reasoning upon the facts, I should have had very little difficulty in coming to the conclusion, that such a case was scarcely possible. But I admit that that is not the function which your Lordships' House has now to exercise. I agree with the way in which it was put by a very learned Judge, Lord Fullerton, who delivered the judgment of the Court below, that what we have to see is—Whether there is such a specific and relevant allegation of fraud as can be received by the Court. Now the way in which I interpret that with reference to the prior marriage is this. I must take an averment, that there was this marriage, incredible as it appears to me, and absolutely irreconcileable, in point of fact, with all the rest of the case; but supposing, as was suggested by the learned counsel for the appellant, that facts from time to time have come out, which may render it not improbable that that might have been proved, still I must look to see, whether, as connected with that marriage, there are what the learned Judge has called relevant allegations of fraud.

Now, let me assume that it is sufficiently averred, that prior to the birth of the child, putting all the questions of Scotch domicile out of the case, and putting out of the question also all the fraud in concealing the domicile, and the subsequent marriage,—supposing none of that ever to have taken place, I will suppose that there is a sufficient averment, as undoubtedly there is, that prior to the birth there had been a marriage, which would undoubtedly, according to the laws of all countries, make the appellant the legitimate son of his father, so as to put the statute of Geo. II. entirely aside. Well, what then? Then, my Lords, in order to get rid of your Lordships' judgment, and of the judgment of the Court of Session, you must have a relevant allegation, that there was a fraudulent combination between the defenders and those who managed the case of the appellant, while an infant, to keep that fact out of sight, so that your Lordships might adjudicate upon a state of facts, keeping that out of sight, whereas in truth, if it had been disclosed, your Lordships must have adjudicated the contrary, as no doubt you must.

My Lords, I have looked in vain through the whole of these proceedings for anything of the sort: indeed, with regard to the question of domicile, the connection of Hugh Crawfurd with any fraud is exceedingly difficult to discover from anything stated on the face of these proceedings, when looked at accurately. It is true that it is said over and over again, that the next friend, Hugh Crawfurd, who was the factor *loco tutoris*, acted in collusion with the defenders. But that of itself is clearly not sufficient. You cannot upset the proceedings upon the ground of fraud, merely by alleging that there was fraudulent collusion. You must shew how, when, where, in what way. Hugh Crawfurd is expressly stated to have known nothing of the facts. What is

said is, that they kept out of sight from him the truth of the case. That was stated in the original summons, and is never controverted afterwards. Therefore, to say that he acted in collusion, is saying nothing at all to the purpose. It is no fraud, that a party, proceeding for an infant, does not bring forward something which he does not know. Beyond that it is said, first of all, that Robert Patrick, who was the defender, and William Patrick, who is now alive, and acted for him, (and who, I will asume, are identified together, though there might be difficulties upon that subject,) it is said that they well knew of this marriage. That is qualified down in the condescendence to saying, "that they were well aware, or had good reason to believe." Now the maxim of our law, that all allegations are to be taken *fortius contra proferentem*, is a maxim founded in good sense, and not, I apprehend, confined to this country only. When a Court is called upon to adjudicate, they have a right to assume that the person bringing forward an allegation states his case in the best way in which it is capable of being stated. Therefore, all that I can take is, that there is an averment that the defender Robert Patrick, and his brother William Patrick, one of the now respondents, had good reason to believe that there had been a prior marriage, and that they had never communicated that to Hugh Crawfurd. What then? Certainly, if we were in a Court of mere morals, it may be that it is not a very honest—certainly your Lordships would have no hesitation in saying that it is not a very honourable—thing in a defendant litigating with another, particularly where that other is an infant, whose cause is protected only by a factor *loco tutoris*,—it may, I say, not be a very honourable thing, not to volunteer to tell him all the strength of his case, and the weakness of your own. But it would be a novelty indeed to say, that a case, having been conducted by a person who did his best for the infant, (for there is nothing to militate against that,) and who, according to the best of his information, conducted the case fairly—it would be a novelty to say, that because the defender did not disclose to him the weakness of his own case, and disclose a fact which he had good reason to believe was true, and which, if investigated upon the part of the pursuer, might have been found to be true, therefore all the proceedings carried on in such a suit are such a fraud, that, although the suit was carried on to judgment, all the proceedings are now, after this great lapse of time, to be treated as a nullity, and to be wholly disregarded.

Upon this part of the case, therefore, the case appears to me to fail, not as it does on the other part of the case by reason of the statute, but it appears to me to fail, because there is not anything in truth which satisfies my mind, amounting to a legitimate averment that Hugh Crawfurd knew of this marriage, and fraudulently kept it out of sight. For it is expressly averred, that William Patrick concealed from Hugh Crawfurd all the facts as to the domicile, and I see nowhere any averment that he ever stated to him anything about the prior marriage. It appears to me that there is no fact whatever, and nothing whatever, shewing that Hugh Crawfurd did not conduct the case fairly, or that there was such a collusion between the two parties as to render it legitimate to say that this was *fabula non judicium*. I believe it, according to the averments here, to have been strictly a *judicium*, after being carried first through the Court of Session, and then ultimately by appeal to your Lordships' House, and that by that decision the interests of justice and of mankind require that all parties should be bound. If there were the prior marriage, which has been discovered, evidently according to the suggestions made on the part of the appellant, not till 50 years after the death of the parent, it is one of those misfortunes against which no human laws are capable of guarding. The case was carried on first in the Court of Session, and ultimately affirmed by your Lordships' House, and in my opinion no fraud is stated rendering it competent to the pursuer to reopen the question. Consequently he has totally failed, and the Court of Session was right in rejecting this application for reduction, and consequently the appeal ought to be dismissed, and I shall accordingly move your Lordships to that effect.

LORD BROUGHAM.—My Lords, the first question which arises in this case is the one which was referred to by my noble and learned friend, as having been argued apart from the rest of the case, and before we entered upon the consideration of the real substance and matter of the case. It was upon the preliminary objection which was taken, (I think taken in this House,) that here was a most novel and extraordinary proceeding—an attempt to set aside, by an action of reduction in the Court of Session, not only the judgment pronounced by that Court in 1803, but the judgment of this House in 1808, affirming the decree of the Court of Session; and it was mooted, whether any proceeding in a Court below—any proceeding other than one in this House—and a doubt was even expressed whether any proceeding in this House, other than an act of parliament, would suffice to set aside a judgment obtained here, in the last resort.

My Lords, it may not be necessary, from the view which I, agreeing with my noble and learned friend, am disposed to take of the rest of this case, to pronounce any opinion upon that preliminary question; because, after hearing it argued, without adjudicating upon it, we entered into the whole consideration of the case. Nevertheless, I go to the full extent of the opinion which has been expressed by my noble and learned friend; and I know not that I am not disposed even to go a step further, and to consider that a judgment, though obtained in this House in the last resort, if proved to the satisfaction of this House—(and in this argument we are upon

the mere averment, and the sufficiency of that averment, and to assume that it can be proved)—I say, if it be proved that there has not been a real suit instituted and appealed, but that there was collusion and fraud between the parties—that there was no real plaintiff and real defendant in real conflict together, upon whose case the Court below had adjudicated, and which adjudication was brought before us, in the last resort, for our adjudication; but that it was, according to the expression cited, I think, from Mr. Wedderburn, afterwards Lord Rosslyn, *fabula agitur non judicium*—that it was no real trial, no real proceeding, and consequently ended in no judgment, but that the Court was imposed upon by the fraud of the parties—that the Court was led to believe that there was a conflict when there was none, and that there was an opposition of parties, when they were really in concert, and leagued for the purpose of deceiving the Court, to serve their own ends—then I am prepared to go even a little beyond my noble and learned friend, and not confining myself to the statement, that it is not certain—that I am not clear, that in that case the judgment of this House must stand, and could not be got rid of—I am prepared to go the full length of saying, that in this House, as in any other Court, a proceeding so instituted, so carried on, and so consummated in a judgment, thus fraudulently, and collusively, and fictitiously obtained, might be treated as a nullity, as would be *ex concessis* on all hands the judgment of any inferior tribunal.

Then, the only question would be, whether or not this course of proceeding which has been taken, namely, calling this judgment in question before an Inferior Court, for the purpose of obtaining there a decree that the judgment here had been collusively obtained, and was a *fabula* and not a *judicium*, and must therefore be set aside; or, in the language of Scotch procedure, reduced—the only question I say is, whether that would be a competent proceeding for dealing with such a judgment? And, for one, I can see no reason to doubt it. The judgment of this House must be dealt with in that Inferior Court before which its merits were brought—that is to say, not the merits of the judgment, but the merits of the parties who had so fraudulently obtained that judgment. And the question there arising would be—Was it a real judgment or not? For that is the question in such cases, and that is the question in this case.

My Lords, the authority of the *Duchess of Kingston's case* upon this subject is, in my opinion, not to be got over, and not to be resisted; for what had we there? This House was sitting as a High Court of Justice, as the Lord Steward's Court, for the trial of a peeress for felony. There was produced before the Court a decree of another Court, of competent jurisdiction to deal with the subject matter—the Consistorial Court; not only competent, but exclusively competent, to deal with questions of marriage and divorce. Other Courts can only deal with them incidentally, but that Court alone has the exclusive jurisdiction of dealing with them as the principal matter. A proceeding had been instituted in that Court of exclusive jurisdiction, to deal with questions of divorce. Upon that proceeding a sentence of divorce—that is to say, of nullity of marriage—had been obtained. To all intents and purposes, therefore, there was an end of that prior marriage, standing that sentence. But it was satisfactorily proved to the High Steward's Court here, upon the trial of the peeress, that the whole proceeding there was fraudulent and collusive, and that there was no real suit and no real sentence. Therefore, the House here disregarded that sentence, and treated it as being as much a nullity as the sentence had treated as a nullity the pretended marriage. Now, in that case that Court was not an Inferior Court. This House, the Lord Steward's Court, was not a Superior Court. The Consistorial Court was supreme as regards the question of divorce. From that Court there lay no appeal to this upon that question. There lay an appeal to another Court—the Court of Delegates—which had not been resorted to. It would have made no sort of difference if, instead of the sentence in the Court below being an unconfirmed sentence, there had been an appeal to the Delegates, (or, as it would now be, to the Judicial Committee of the Privy Council,) if, instead of that unconfirmed sentence, there had been produced a sentence confirmed by the Court of last resort (the Delegates formerly, and, since the year 1832, the Judicial Committee of the Privy Council). It was the sentence of a Court of competent and exclusive jurisdiction, and of co-ordinate jurisdiction with this House. This House had no right to interfere with the sentence of that Court, any more than that Court had to interfere with any sentence pronounced in this House. But it had a right to disregard it upon proof that it was a nullity; and it did so disregard it, although it was a sentence of a Court of competent and exclusive jurisdiction, co-ordinate with itself.

I therefore, my Lords, entertain no doubt whatever upon this point; and the dicta of Lord Eldon, which have been referred to in the argument, though certainly not of equal authority with the decision of the House itself, shew perfectly clearly, that his opinion was that there was no distinction to be taken in respect of decrees or judgments of this House, and those of any other Court in the country. I therefore, my Lords, am satisfied that we did well in going into the whole case, after having heard that preliminary objection fully discussed.

Now, with respect to the case which we are upon, the only fault that I have to find with the very elaborate, and very learned, and very distinct judgment given by my Lord Fullerton, and acceded to by all his brethren in the Court below, is, that I do not think it quite keeps clear and separate the two heads of mere averment, and the substance and subject matter of that averment,

with reference to the question, whether that is sufficiently proved or not? because, undoubtedly, we have no occasion, and the Court below had no occasion, or rather less than no occasion—no right upon this form of proceeding, to enter into the question of probability of the facts averred being true, or to enter into the evidence by which the facts alleged were supposed capable of being made out. It was a mere question of averment—Was there or was there not sufficient averment upon the record to entitle the party to the remedy of reducing the judgment brought before that Court by that proceeding?

My Lords, it is undeniable that that case, which was then called *Crawford* v. *Patrick*, (Mr. Crawford being the pursuer in the case,) underwent great argument in the Court below, and was afterwards fully discussed at the bar here, and disposed of by the judgment of this House affirming the interlocutors of the Court below, and in substance declaring Mr. Shedden, the infant then, the present appellant, to be not legitimated, to the effect of obtaining the Scotch estate, to be not legitimated by the marriage of his parents, contracted subsequently to his birth in America, where the Scotch civil law of legitimation by subsequent matrimony does not prevail.

With respect to the grounds of that decision, I do not think it at all material at present to inquire into them, because we are to be satisfied of two things in this case, not only that certain matters were known to Mr. Patrick, and to the other parties there, and were by them suppressed or concealed from the Court below, and mediately from the Court of Appeal here, but that those things were material, and that the concealment was material, and affected the proceeding and affected the result. Any concealment would not signify unless that concealment was of a material fact. If your Lordships shall be of opinion that the facts alleged to have been concealed (and which we are assuming in this proceeding to have been true) were wholly immaterial—that, for instance, the allegation that Mr. Shedden, the father, was a domiciled Scotsman—that, whichever way it was given, did not affect the substance and the result of the case, if your Lordships shall think that that concealment was a concealment of a fact, with respect to which it did not signify a straw which way it was given, and which way it was believed or disbelieved by the Court below, and here by this House, then, past all doubt, the allegation that the parties combined to deceive the Court, by concealing that fact, or the evidence upon which that conclusion of domicile might be drawn, would not signify for the reduction of the suit.

Now, I certainly incline to take the view which has been expressed by my noble and learned friend of the immateriality of that fact, because, supposing it were true—supposing we agreed to the proposition, that a marriage subsequent to the birth of the child, the parents of that child being Scotch parents, and the marriage being therefore a Scotch marriage, that that legitimates the aforeborn issue, to the effect of taking a Scotch estate; nay, even that that legitimates him absolutely, and to all intents and purposes, still the question is—At what time does that subsequent marriage of his parents attach to him the quality of legitimacy, which he had not before that marriage? I presume it cannot really be doubted that he became legitimate only from the date of the marriage, and that it is a most violent presumption to hold that the subsequent marriage of his parents has relation back to the moment of his birth, and makes him to have been at the time of his birth the legitimate son of those parents.

Now, upon the question of alienage everything depends upon the facts that existed at the moment of his birth. Assuming that the effect of the subsequent marriage is legitimation, or conferring the status of legitimacy upon the issue, does it follow from that, that it confers paternity upon the parent? Does it follow that it confers paternity at the moment of the birth? Does it follow, that because the marriage of his parents has made him legitimate, therefore it has made them his parents at the time of the birth? If it does, he is a natural born subject; if it does not, he is an alien. If you cannot predicate paternity as well as legitimacy, he is an alien. If you can predicate paternity as well as legitimacy, he is a natural born subject.

My noble and learned friend has well adverted to the anomalies,—although I can hardly call them by so slight a name as anomalies,—the gross inconsistencies, the self-contradictions, the gross absurdities which must follow from adopting that doctrine. It is sufficient to remind your Lordships of one to which my noble and learned friend has adverted. It would be giving to the parent of the child, the putative father of the child, the power, by marrying his mother, of converting him from an alien or a foreigner into a natural born subject. If he had done that which he had a perfect right to do at the time, namely, to take up arms against the English Crown before the marriage of his parents, it would follow from that doctrine, that that marriage converted him from an alien enemy into a traitor to the Crown of this country; that that marriage made him guilty of high treason, instead of only being taken with arms in his hands, compassing what might be a perfectly innocent and even laudable design on his part.

My Lords, that is one of the many absurdities which would flow from this doctrine. They are too numerous to require any further illustration, and I therefore, upon the whole, take the view which my noble and learned friend has taken of this case, that, if he had even been a domiciled Scotsman, if he even had been in Scotland, and not in America, so that no question could arise upon whether he was in America *animo remanendi* or *animo revertendi*, that even were he admitted on all hands to have been a domiciled Scotsman, it would not have had the effect of

legitimating the son, of creating the relation of parent and child between him and his son at the time of his birth in America, where he was born an alien.

My Lords, this, therefore, disposes of all that part of the case which refers to the fraud and collusion practised upon the Court in respect of the concealment of the domicile; and it leaves only in this case the averment of the previous marriage. And upon that I take exactly the same view which has been taken by my noble and learned friend. I do not think there is in this record any averment upon that head sufficient to call for a reduction of this suit. And I really must say, that although, according to a remark which I made in the outset of these few observations, we are not competent here to enter upon any questions of fact, and to speculate upon how those questions are likely to be disposed of, should we reverse this judgment, and send the case for further inquiry—I must say, I cannot conclude the observations with which I have troubled your Lordships without expressing my opinion that it is a fortunate circumstance that we have come to this result. I can imagine nothing more intolerable than an inquiry would be as to facts that took place considerably above 60 years ago in another hemisphere, where all the witnesses must needs be persons, if any continue to live, of a very advanced age, and where the inquiry into those circumstances would be, in my apprehension, all but absolutely incapable of being conducted with any chance of arriving at a successful conclusion. I heartily lament that so much time has been expended here and elsewhere—that so much anxiety has been undergone by very deserving parties—that so much money has been unhappily expended by those parties; and that so many charges have been brought against individuals who have always occupied not only a respectable station in society, but with a character unimpeached. I cannot help feeling very great sorrow that such things should have taken place. It is not for me to make any remarks upon the conduct of Mr. Patrick, the party principally implicated in these charges. I can only say, that, without intending to whisper one word against that individual, in the respectability of whose character I believe all who have spoken upon the subject—I may even say on all sides—have been inclined to concur—I must say, that I somewhat regret that he should have undertaken, though I have no doubt he did it with the best of motives, the task of acting as guardian to this infant, when the necessary consequence was his placing himself in a situation which was encumbered with somewhat inconsistent and somewhat conflicting duties. I believe it is not a situation peculiar to Mr. Patrick. I believe it is a course too frequently pursued in the northern part of this island, that men of business do not always see not merely the great propriety, but, for their own sakes, and for the sakes of all those who are concerned, the all but necessity of keeping separate functions, as much as possible, separate and distinct.

LORD ST. LEONARDS.—My Lords, this case has been so very fully entered into by my noble and learned friends, that I shall endeavour to compress the observations which I have to address to your Lordships within as short a compass as I possibly can. The first question is with respect to the competency of the Court below. Now, without at all meaning to deny that a judgment even of this House may indirectly be treated as a nullity, where the case shews manifest gross direct fraud, before another Court, it does not appear to me, having looked into all the authorities which are accessible in the journals of this House, that it is very doubtful whether the proceeding in the Court below was in this case competent. It must not be understood that there would be any denial of justice, according to the opinion I express, even if it could be maintained, because the only question is—Whether the party should have gone to the Court below, or have come to this House? Certainly, on going through the cases in the journals, it appears exceedingly doubtful whether the proceeding ought not, in the first instance, to have been in this House. And the result of the case itself, upon examination, shews how proper it would have been to have originated the proceeding in this House, because the Court below really was not competent to ascertain the grounds upon which the judgment of this House proceeded in deciding the case in 1808; whereas the House itself would have been competent, by means of what it could glean from its own judgment, and from its knowledge of the subject, to deal with the case as it was put forth in the new shape in which it was brought before the Court below. I have got a list of all the cases here. But as I think that that is a point which does not now call for your Lordships' decision, I do not propose to enter into it. But the last case, of *Blake* v. *Foster*, well shews the difficulty which exists in such cases, for there, after a decree in Ireland, the parties came to this House, wishing to impeach the judgment of this House, and they were sent to the Court of Chancery in Ireland. The Lord Chancellor of Ireland refused to hear them, and dismissed the proceedings, with liberty to apply to this House, although the matter was sent from this House. And the ground of that decision was this—that he had no means of ascertaining what were the grounds upon which that judgment had been reversed, and therefore could not judge upon the new matter introduced, or upon the new claim set up. There was an appeal from that very decision to this House, and that decision was ultimately affirmed by this House. And there, although it seems to be rather reasoning in a circle, yet it really amounted to this, that the Lord Chancellor in Ireland was perfectly justified in the result in sending the matter in the first instance to this House, where, be it observed, the merits were never entered into. It was merely a question of the competency of the Court in Ireland, and that Court having declared

itself incompetent, it was remitted to this House, and this House held that that was a proper judgment.

Now it so happens, that from the nature of the jurisdiction in Scotland, (it does not happen, generally speaking, in this country, except by way of demurrer, which stands upon different grounds,) preliminary defences are allowed, and therefore, at all events, there has been no great mischief, and certainly no denial of justice, in the course which has been taken in this case, for, if the appellant had come in the first instance to this House, the House would not have entered upon the general merits till they had ascertained whether there was such a case as would entitle the appellant to go into the general matter, with a view to reverse the former decision of this House. The judgments of this House, in the particular cases in which judgments have been given, can never be impeached except by act of parliament, unless some case of gross fraud can be brought forward in order to enable the House itself to set aside the proceedings on that ground. The case of *Tommey* v. *White* is an instance of that. There the fraud was upon the House itself. But the fraud would not be less in this case upon the House itself. There would equally be fraud on this House if there were fraud in the Court below, because the proceedings in this House were carried on in the precise form in which they had been carried on in the Court below, and therefore this House was as much defrauded out of its judgment, if there was a fraud, as the Court below was defrauded out of its judgment. The preliminary defences, which are admitted by the Courts in Scotland, enable the same thing to take place in those Courts. For example, in this very case preliminary defences are taken, the consequence of which is, that after the original summons and the supplemental summons, and the amendments of both in the Court below, setting forth the whole case, which the appellant could make out, and the grounds upon which he claimed relief, and the evidence by which he attempted to support his case, that claim was met by preliminary defences, and the whole proceedings being before the Court below, the question comes immediately to this—Has the appellant made such a *primâ facie* case as would entitle him to the relief which he prays, assuming that the Court has jurisdiction? And the Court below came to the conclusion that he had not made out such a case as would entitle him to any relief. And now the question comes before the House.

I have already stated that it would have been very difficult for the Court below to ascertain upon what grounds the case was decided against the appellant in the year 1808; and in my view that was a very sufficient reason for the Court, if it had done so, to have rejected at once the claim of the appellant, and to have referred it to this House. I have looked with great anxiety to ascertain what was the real ground of the decision in 1808; and certainly it is not very easy to come to a satisfactory conclusion upon that point; but I think I have satisfied myself of two points at least. I am satisfied upon the *first* point, namely, that the case was really decided upon alienage. And the *second* point, upon which I entertain a very strong impression, is this, that if the question of domicile had been brought before the House at that time and established, as the law then stood, this House would have decided the case, with the question of domicile before them. Be it remembered, that although we have now the decision in *Munro* v. *Munro*, that case had not been at that time decided, and that, therefore, what is now law, was not then, at least, known to be the law by any lawyer certainly in this country. Therefore it is my strong impression, looking at the state of the law at that period, that if the domicile had been actually alleged and proved, the decision would have been precisely that at which this House arrived. Now, with regard to the grounds of that decision, it is very material to see how the case was decided; and so far, I must confess that I sympathize with the appellant, that this case having been conducted at very great expense, after the lapse of a great many years, I cannot help feeling a great desire to satisfy him that this case has been very attentively considered, and that the decision of this House has not been arrived at without very great care and caution. From the printed case your Lordships must be aware that the question of domicile was not lost sight of in the case of the appellant, when it was before your Lordships' House in the year 1808. In the printed case your Lordships will find that the appellant contended that the *status* of legitimacy was not dependent upon the will of his father, but it was to be determined by the public law of Scotland, to which his father was subject, and that his father was not an American solely, inasmuch as both by reason of origin, and from having property in Scotland, he was a subject of the jurisdiction of the Courts in Scotland. Then the present appellant relied on the domicile in Scotland, and argued upon the *lex loci* there; and he stated that the law of the parent's domicile must be the only law to regulate the succession to estates, because the law of each country decides according to its own rules, and exercises jurisdiction over all its subjects, under whatever circumstances and in whatever state they were born.

So that I think, in the *first* place, it is quite clear that the question of domicile was not lost sight of. How could it be lost sight of, if you look at the counsel—both the Scotch counsel and the English counsel—who were engaged in that case, and the questions that were raised and elaborately argued? The very first question which the counsel of that day would have asked would have been—Where is the domicile? They knew that he was a Scotchman by birth—they knew that he had a Scotch estate—they knew that the boy had been sent to Scotland; therefore

it is utterly impossible to believe that the learned counsel of that day—counsel of the first eminence—could have prepared the case and argued the question—both the Scotch counsel in the Court below, and the counsel of the English bar before your Lordships' House—they never could have argued this case, without considering the question of domicile as one that ought to be presented to the House.

Upon what grounds the House itself decided, we must collect as well as we can from what has fallen from learned Judges in subsequent cases. In the opinions delivered in the *Strathmore Peerage case*—4 W.S.—Lord Eldon, after stating the circumstances of that case, says :—"Under the circumstances, it does appear to me, attending to the principle which this House meant to maintain in *Shedden* v. *Patrick*, that without deciding at all what would be the consequences of a person married in Scotland before the Union, or persons married in Scotland since the Union, or persons removed from Scotland domiciled elsewhere, and going to Scotland and obtaining a domicile, and marrying in Scotland—without determining those points at all, but recollecting the state and condition of these parties, and the fact that the father was a British Peer, and looking to the effect of the Act of Union, I am bound to tender to your Lordships my humble opinion that this child is not a legitimate child." I am not quite satisfied as to what the noble and learned Lord meant in that case, but I think there can be no doubt that he considered that illegitimacy was a bar in *Shedden* v. *Patrick*. But Lord Redesdale is more distinct, and he says :—"I do not enter into the question, whether if this marriage had been celebrated in Scotland, it might have had the effect of legitimating the child, because I think it is not necessary; but I must say that I cannot conceive how it could have that effect. In the case of *Shedden* v. *Patrick*, it was determined that a child illegitimate in the United States of America was not capable of inheriting in Scotland. It has been stated that that was decided on the ground that he was born an alien. Why was he born an alien?" Lord Redesdale says, it is stated that the decision of this case in the year 1808 was because he was an alien ; and then the noble and learned Lord asks :—"Why was he born an alien? Because the law of America touched him at his birth, and the retrospective effect of the law of Scotland could not alter that character which, at its birth, attached upon him." That was the true reason why he was an alien. Lord Redesdale was a party to that decision. Every one knows how elaborately he considered the cases that came before him ; and here we have a clear and distinct statement of what was the true ground of the decision. I do not apprehend that any serious doubt can be entertained upon the question what the decision was. But your Lordships will find, that in the case of *Rose* v. *Ross*, 4 W. S., 296-7, the same ground is taken. And in the same volume, App. No. 4, p. 57, Lord Cringletie makes this observation in *Rose* v. *Ross* :—"Natural children do not belong to the reputed father, nor do they take their domicile from him. They belong to the mother, whose domicile is theirs, and whose settlement, in case of poverty, is theirs." Then, farther on, he says :—"I think that Lord Redesdale's idea in the case of Shedden is correct, and equally applies to this one, that the law of England touched the defender at his birth, and the retrospective character of the law of Scotland could not alter *status*." The case of *Rose* v. *Ross* was originally before Commissaries, who gave some very learned judgments, which are to be found in 4 W. S. App. No. 3. In p. 41, Mr. Commissary Tod says :—"In Shedden's case the marriage was contracted in America, the law of which country does not recognize legitimation by subsequent marriage." And Mr. Commissary Ferguson gives an opinion to the same effect.

In the later case of *Munro* v. *Munro*, in 1840, where the Lord Justice Clerk and four other Judges held the domicile to be in England, they said they did not consider the question, that up to the time of the marriage he was incontestably a domiciled Scotchman. Even upon this supposition, however, they thought the pursuer must have had difficulties to encounter which had not yet been resolved by any clear authority in the law of either country. Some of the dicta in the ultimate decision of the cases of *Shedden*, *Strathmore*, and *Ross*, seemed to point to a conclusion against her, while others of the very highest authority in the more recent case of *Sir George Warrender* had rather a contrary bearing. In the revised case, at p. 74, you will find there the Lord President making these observations :—"As to the domicile of the putative father, I cannot think that either his past, future, or present domicile can, or ought to have, any effect on the state of the bastard. The father is not regarded in law as his father ; therefore nothing in the putative father's domicile can affect the *status* of bastardy impressed upon the child by birth." "In short," the Lord President says, "I cannot see the smallest connection between the *status* of the bastard, and either the previous or the subsequent domicile of his putative father. The child in England was born a bastard, and it cannot make any difference whether his putative father was a Scotchman, a Frenchman, or a Turk." Then he quotes the opinions of Lord Eldon and Lord Redesdale, in the *Strathmore Peerage case*, and says that he entirely agrees with them.

The result, therefore, is to shew, (*Munro* v. *Munro* not having then been decided,) that not only at the time that this case was decided in this House in 1808, but in much later cases, until *Munro* v. *Munro*, it was still considered by very learned persons that the domicile of the

putative father could not affect the *status* of the child. Now, that would be at once a defence as regards what is called the concealment of the domicile; for if this case was decided irrespectively of the domicile, then *cadit quæstio*. And supposing it were not so, and that great doubts were entertained upon that question, then to say that a gentleman in the situation of Mr. William Patrick was to know what the law was, and the importance of the question of domicile, when none of the learned lawyers who were consulted upon the case had found it out—when there was no pretence for concealment—when all the private letters which are now brought forward between him and Robert Patrick, and between him and John Patrick—letters which were never intended to see the light—shew that he really believed the boy to be illegitimate—how can it be said that there was fraud in the concealment of the domicile?

Now, before I consider the question of alienage, let us look a little at the question of domicile. Every act proved in the case as regards domicile is against the Scotch domicile. If a Scotch domicile existed, it was not from any act that he ever did, but from something passing in his own mind which he has communicated so as to be able to impress every Court of Justice with the belief of his intention to return to his native country. For what are his acts? Look at the whole of his life. He goes to America. No doubt he meant originally to return; but after all his troubles in America, which are entered into in these papers in very needless and expensive detail, and which have not the slightest bearing upon the case, he goes to Bermuda, and it is said that he returned to America only to wind up his affairs. But look at his acts. What does he do? Instead of returning to Scotland after he has wound up his affairs, he resides for a great number of years in America. He has there an establishment. He has two families, in point of fact, by different women, for he had a girl by another woman, that girl being several years older than the children by the lady whom he subsequently married. These are acts which at best shew something like an intention to remain where he was. What any one act did he ever do shewing an absolute intention to return to this country? In the first place, the mere possession of the landed estate in Scotland was no act of his. It descended to him, and that is really of no importance. His father's house does not seem to have been upon the estate, and that was sold very soon after the father died. He himself had been in Scotland for a year and a half on one occasion in his father's lifetime, but he never returned to Scotland after he became himself the owner of the estate. That does not look like an intention to settle in Scotland. He was not a very young man. He had no house in Scotland, at any one period of time, to which he could have returned. The house which his father occupied in his lifetime did not descend to him. He never took any step to obtain a house. Therefore, if Mr. William Patrick, as a man of the world, had formed his judgment from all the circumstances as far as Mr. Shedden's acts went, he would have decided against the domicile. Look at the last act of Mr. Shedden himself. Look at his acts on his deathbed. How does he describe himself in his will? He describes himself simply and only of New York. Is that the way in which a man would describe himself, who considered that the tie between himself and Scotland had never been rent—who meant to die with love of country and thoughts of home? What does he do? It is true that he desires that the boy, his son, shall be sent to Scotland. Why? Certainly not because of his domicile being there, but because Mr. William Patrick, to whom he meant to intrust him, was resident in Scotland, and for no other reasons. He does not insist upon his wife going there: he has no anxiety upon that account. He does not say to his wife—"Go to Scotland, and there you will find a home. I have an estate there. Go, and live there with your boy." He says no such thing. He takes from her the whole care and guardianship of his boy. He sends him to Scotland, it is true, but leaves his wife, whom he had just married, in America. He had never made her very fond of Scotland; for she is so little impressed with any desire to go to Scotland, that, within some two or three months she is married again to a gentleman, who, I believe, was in the naval service of America, and who was certainly not a very likely person to go and settle in Scotland. But then, further, he does not even dispose of, or even advert to, his estate in Scotland. And it is a most remarkable circumstance, that, while he does by his will dispose of the property that he had acquired in New York, he leaves this property to take its chance, according to its destination, without attempting to exercise any right of ownership over it, and without shewing a disposition to fix his own domicile, or to refer in any manner to his domicile as being in Scotland. I think, therefore, that if it were now a question upon the evidence before the House, whether the domicile was in Scotland or in America, the strong impression on my mind would be, that it was an American domicile and not a Scotch one. Some expressions in letters have been relied upon, but they are not sufficient. Nobody can doubt that this gentleman had, from his long residence there, acquired a domicile in America. Whether that was his sole domicile or not is the question, and I am strongly inclined to think that it was.

It appears to me, therefore, that there was no fraud whatever on the part of Mr. William Patrick in concealing the domicile. I believe his impression was that it was an American domicile. Look at this circumstance. Mr. Shedden had made three gentlemen in New York executors under his will—gentlemen moving in different stations in life. One of them a

physician, another a merchant, and his own nephew, also a merchant—all of them resident in New York. There was also Mr. Colden, an American lawyer, whose opinion is set forth in this case. He had lived in New York, and was a friend of Mr. Shedden's, and he must be supposed to have known something about the domicile as well as about the prior marriage. And he was a witness to the will. We know how conversant American lawyers are with questions of domicile. Is it possible that this gentleman must not have known what the fact was, in the sort of general way in which I am now looking at it; not with the scrutiny of a lawyer, but in order to see whether fraud can be fixed on Mr. William Patrick? Must not these circumstances have been generally known to Mr. Colden, who was resident in New York? Does any one suppose that this gentleman's domicile could have been established as a Scotch domicile after he had been residing in America for 35 years, and had never been in the habit of expressing a wish to return to his native country? But supposing that his domicile was in Scotland, while he was a resident in America for 35 years, without expressing an earnest desire and intention of returning to his native country, I think, nevertheless, that may be left entirely out of the question.

Now, assuming the House to have decided this case on the question of alienage, my very clear opinion is, that they decided it properly on that point alone. I entertain as clear an opinion as I ever did upon any point, that this gentleman, the appellant, is an alien by birth. The only question is—whether he is saved by the Statute of Geo. II. operating by means of the marriage? Now, when you come to contrast the Statute of Anne with the Statute of Geo. II., you will see in what very opposite directions they went. The Statute of Anne desired to add to the population of the country, and let in a flood of persons as natural born subjects, stating that the wealth of the country depended on its population. That was found to be exceedingly inconvenient, and then came the Act of Geo. II., which is a restrictive act as regards the benefits conferred upon the children of natural born subjects, who would otherwise be aliens. It is important to observe the alteration in the language. The Statute of Anne speaks of parents generally—both of them; but the Statute of Geo. II. confines it to the father, and says nothing whatever about the mother. Therefore you are forced to look at the status of the father without reference to that of the mother. Then the words are free from all ambiguity of any sort or kind, that the child, in order to have the benefits of a natural born subject, must, at the time of his birth, be the child of a natural born subject. Now that clearly was not accidental, for it happens that there are several provisoes in this statute providing for different events, and that in every single instance the same term is used. I think in subsequent parts of the statute the time of the birth of the child is referred to no less than seven times with reference to different objects of the statute, and it is utterly impossible, as a matter of law, to read the words, upon which reliance has been placed by my noble and learned friend, in any other sense than that in which they must be read in the subsequent passages. If you were not to give the same sense—that is, the literal sense—to them in the subsequent passages, you would render the whole act of parliament an absurdity and a nullity, so that you might strike it out of the Statute-Book as being simply an absurdity. Now observe what it says. After having declared, that in order to enable an alien to be treated as a natural born subject, he must, at the time of his birth, although a foreigner born, be the son of a father who was a natural born subject, it goes on to say, "Provided always, that nothing in the said recited act of the 7th year of Her said late Majesty's reign, or in this present act contained, did, doth, or shall extend, or ought to be construed, adjudged, or taken to extend to make any children born or to be born out of the liegiance of the Crown of England or of the Crown of Great Britain to be natural born subjects of the Crown of England or of Great Britain, whose fathers, at the time of the birth of such children respectively, were or shall be attainted of high treason by judgment," and so on. There are many other provisions, which it is not necessary to enter into, but those words are repeated no less than seven times in subsequent passages. Now take that one case. You cannot possibly give anything but a literal meaning to these words. If, at the time of the birth of the child, the father had been adjudged guilty of high treason, the child was not to be a natural born subject. Nothing could be more reasonable than that. You must take the words as you find them, and you must read them exactly in the sense in which they strike the eye at first; and that, I apprehend, is exactly the sense in which the Legislature meant they should be read.

Consider what would be the effect as regards a legitimate and illegitimate child. Nobody will dispute that under that act a legitimate child, the child of a natural born subject, becomes a natural born subject from the moment of his birth—that is beyond all doubt. Supposing his father at the time to have been guilty of high treason, then he remains an alien. That is the case of a legitimate child. Now look at the case of an illegitimate child. If you strike out the words "at the time of the birth," and you look to the time of the subsequent marriage, you then place him upon a different footing from the moment of his birth; for although his father at the time should have been guilty of high treason, the child would not lose the right which the statute gave him; and therefore, if at any subsequent period the father married the mother of the child, so that, by the effect of the law of Scotland acting retrospectively, the child became legitimate, he would gain the benefit given by the act. This does not rest upon fiction—it is substance. It

is material to the safety of the realm that you should not have aliens become natural born subjects whose fathers may have been traitors to their country. Here is an express exclusion from great benefits given by the mother country to the children of natural born subjects. But in the case of an illegitimate child, if you do not give the same construction to the words, you are driven at once to the necessity of saying, that a subsequent marriage would give to the illegitimate child of a father who was a traitor at the time of the birth of his child, a benefit which no legitimate child would ever take. Does anybody imagine that the legislature meant to give to an illegitimate child a higher privilege than belongs to legitimate children, or that any distinction was taken between them? You must remember that the case for which the act of parliament intended to provide is this :—The child is born an alien, and an alien he would remain to the hour of his death, as regards this country, but for that act. Before he can take the benefit of that act, you must shew that his father was a natural born subject. And if he has no father, then, of course, he is not entitled to the benefit of the act of parliament. He cannot predicate of himself that he had a father who at the time of his birth was a natural born subject. Upon this part of the case the Dean of Faculty raised a difficulty, with respect to which I must confess I do not quite follow him. He said, that if we were to put this interpretation upon it, then a man marrying a woman would adopt all her illegitimate children, supposing she had several by different men. I do not go that length, because that involves the question of recognition and acknowledgment. That is a difficulty which I do not feel, and I cannot understand how, under this act of parliament, it is possible to give to an illegitimate child, who at the time of his birth was considered to have no father, the benefit of this law.

Now, as regards the question of the operation of the Scotch law, I think the case which was cited at the bar certainly decides this. It had always been supposed, when you carried back, or when you were supposed to carry back, the legitimation to the birth of the child, a subsequent marriage, that is, a marriage subsequent to the birth of a third person, would prevent the operation of that rule. So it must have been. The legitimation only takes place from the time of the marriage. Therefore, so far as that authority goes, it does shew that here there could be no relation back to the time of the birth.

Upon the question, therefore, of authority, as well as upon the question of domicile, I think the case of the appellant entirely fails; and I think that, upon the facts of the case, there is not any pretence for the charge of fraud against Mr. William Patrick upon the question of domicile. My strong impression is, that the House decided this case upon the question of alienage, and upon that question alone, and that it would have come to the same decision if the domicile had been alleged and proved to have been in Scotland. And having made these observations upon the questions which have been raised in this case, I should have saved your Lordships any further trouble, if it had not been for the very strong charges of fraud which have been made against Mr. Patrick. When I was myself at the bar, and had occasion, as counsel often have occasion under their instructions, to animadvert severely upon individuals, I often expressed the satisfaction that I felt, that if, by obeying my instructions, I had gone beyond what the case justified, I knew the Court would set the party right when it came to pronounce the judgment. And if the Court were not to take that trouble, it would, in cases where persons have had serious charges made against them which have been without foundation, have left those parties, with the benefit of the decision of the Court in their favour certainly, but with a slur upon their character which few people can well bear, and which they ought not to be subjected to.

Now, a great many charges of fraud have been made against Mr. Patrick. I am bound to say at once, having read all the evidence most carefully, I cannot see the slightest reason for saying that there is any charge of fraud made out. They appear to have intended, in case the boy had acquired the estate, to charge that estate with sums of money which they never meant to bring against Mr. William Shedden himself, if he had lived. But that is not a fraud committed against the appellant, although they did intend to have opened an account if they could, and to have charged interest, commission, and so on, in order in some measure to indemnify themselves against the loss of the estate. One grave charge of fraud which has been made, for which there is not the slightest foundation, is, that there had been a forgery committed of a bond for £4000. There is clearly no foundation for that. I will not go into the circumstances, but it is perfectly clear that there was no fraud at all as regarded the bond for the £4000. In the next place, a charge of fraud is founded upon the proceedings with reference to the retour. Now, if the boy was not the heir, Mr. Robert Patrick was; and without entering into any discussion as to whether he was or was not, or whether it was necessary that there should be a retour, (which has been disputed by very learned persons at the bar,) it is clear that retour did no harm. You do not find any trace in any one of these proceedings of that retour having been set up against the right of the infant to discuss the merits of the question. There was no attempt on the part of Mr. William Patrick to set up that retour as a bar to the right claimed by the infant upon the question which was believed to be the only one to be tried. I think, therefore, that it is introduced into the case without sufficient ground. Then it is said that there was a fraud as regards Mr. Hugh Crawfurd; and it certainly was represented throughout as if Mr. William Patrick had

appointed Hugh Crawfurd—that he had not only pulled the strings, but that he had actually appointed him as his nominee. How is the fact? We see by the documents in the last appendix, that nothing could have been more regularly carried into execution than the appointment of Mr. Crawfurd, by a considerable number of the relations irrespective of Mr. William Patrick, and that Mr. Crawfurd himself was one of the near relations. Not a particle of fraud can attach to Mr. Crawfurd. Be it remembered also, that this is a charge of fraud against Mr. William Patrick, who was merely an agent at the time, himself not entitled to the estate—not a principal; and although, no doubt, an agent may be guilty of fraud, and desirous to give to his principal the benefit of that fraud, yet it is not the ordinary course of things that a fraud should be committed by an agent simply for the benefit of his principal. Mr. Crawfurd was properly and regularly appointed, and that charge, I think, wholly falls to the ground. Then it is said, and I was very much surprised to hear it stated, that the letter which was written by Mr. Shedden on his deathbed was a forgery. It was argued with very great zeal that that letter, written by him on his deathbed in the year 1798, was a forgery. Now that is a most serious charge. Remember that Mr. William Patrick is now alive. I have not the honour of knowing him, or of having had the slightest communication with him. I did not know that such a person was in existence, but he must be a gentleman very advanced in life. As a lawyer, his character must be very dear to him; and a more grave charge was never brought against any person at the bar of your Lordships' House, than this charge against Mr. William Patrick, that he had forged a letter from his uncle, with the view of defrauding that uncle's son of an estate belonging to him in Scotland. Now, of course, it cannot fail to strike every one who reads these papers what an extraordinary charge that is, because the original summons in the Court in Scotland founded itself upon that letter in so many words, and for this reason, because that letter stated that the object of the marriage was to place the mother well in society; and in order to shew what the intention of the testator was, that letter was set out at length, besides which it was charged. Now, observe the difference of this charge. It was actually charged in the original summons, that Mr. William Patrick has suppressed that letter. When we come to the supplemental summons it is there charged again, and relied upon; and it is not until you come to the condescendence that you find an indirect charge that this letter had never been written, and could not be relied upon. Now, nothing can be more clear than this, that that charge in the condescendence was not justified by the interlocutor upon which it was founded. If you look at the interlocutor, you find it only goes upon the prior marriage, and does not in any manner authorize the party to introduce any charge of fraud as regards that letter of 1798. There never was a charge more unfounded than that. It is proved by everything that that letter was the only letter that gave an account of the transmission of the £400, and that letter was acted upon by the receipt and application of the money. Mr. John Patrick, in writing, tells you that Mr. William Shedden has written a letter (which is produced) to his nephew. Mrs. Vincent herself, in her letter in 1799, refers to the letter which was written by Mr. William Shedden, her late husband, upon his deathbed, to Mr. William Patrick. That letter was also in duplicate and triplicate. And the mere absence of that letter after so great a length of time amounts to nothing. Indeed, it is stated by Mr. William Patrick in his answers to the condescendence, that he delivered that letter, with others, in 1823 or 1824, to the appellant himself. If I were upon a jury, and asked to pronounce upon the evidence before me whether that letter was proved, I should hold it to be most abundantly proved, and not open to the slightest doubt whatever, much less to its being the foundation of a charge of forgery. Another ground of fraud which has been alleged is, that Mr. William Patrick having received the £400 which was to be applied for the boy, that was withheld, in order that his right might not be tried. Now, how does that stand? The money was sent by Mr. William Shedden on his deathbed, and received, after his death, by Mr. William Patrick. Upon what terms was it received? It was received for the education of the boy. How could he part with it? Who demanded it? The mother demanded it, who married again within a few months, and who never, as far as it appears, had had the slightest communication with her son afterwards. I do not say that she had not, but it does not appear that she had. She appears to have left him to his fate. Therefore, how was that money applied? Not only, of course, according to its destination, but nobody can doubt but that a great deal more money was so applied. Nobody can doubt that Mr. William Patrick applied more money towards the education of the appellant, and starting him in life, and providing him with outfits. Nobody can believe that the £400 could furnish all that—there must have been more money advanced. He says in one of his private letters, which were never intended to see the light,—"We must do all we can for the boy." There can be no doubt whatever that they had good intentions towards the child; but at the same time it is equally clear, that, believing themselves to be entitled, as heirs,—being vexed and annoyed at the marriage, which was consummated just before this gentleman's death, in order to make it quite sure that the boy would be the heir to the Scotch estate—they were no doubt disappointed, and therefore desired to assert their rights so far as they could.

The only other question that is worth referring to is with regard to the prior marriage. Now, upon that point, I think that a clearer case in point of fact, upon the evidence, never came before a

Court of Justice than this. The prior marriage was never heard of until the year 1799, when Mrs. Vincent, who had married again, writes a letter (with the assistance of an attorney probably) to Mr. William Patrick; and in that letter it is a most extraordinary thing that she does not set forth a prior marriage. She does no such thing, but she speaks of the marriage which was solemnized; and if you wanted evidence to shew that there had been no prior marriage, you can have none better than her own letter. If you want to see what Mr. William Shedden himself thought of that marriage, you have only to look at his will, and there you see that he tells you, that he has just married; and in his letters he says that he has just married, and that his friends approve of it. But there is not a word about a prior marriage. The marriage is solemnized—with whom? With Ann Wilson—not with Mrs. Shedden—not with any declaration that it was done with a view to place her better than the former marriage had done, but for the express purpose of giving to her the rights of a married woman by that act alone. Now look at it as regards the question of probability. This is said to have been, by the law of New York, a good and valid marriage—that is, that, they having cohabited together as man and wife, and Mr. Shedden having acknowledged her as his wife, that was a valid marriage. Is it not very odd that none of his friends were aware of this? He has three trustees all residing at New York—one of them a physician, the other two merchants—and one of the witnesses to his will is a lawyer in New York, who had been intimate with him, and was well acquainted with his affairs. It never seems to any one of them during the years that this gentleman was living in intimacy with them, that he had acknowledged this lady as his wife. If you say that the physician and the others were not likely to know what the law was, I say it was precisely the very thing that everybody does know. It is impossible to live in a place like New York, and not to know that cohabitation and acknowledgment will amount to marriage. It is impossible for such a thing not to be universally known. Mothers would tell their sons of it, for fear that they should be entrapped into a marriage. It is just that precise point of law that every one would be sure to know. Then there was Mr. Colden, an American lawyer, practising in New York. Must he not at once have said—Why do you not set up the prior marriage? it is universally known: every one knows of it. But nothing is said about it until this lady sends over the two affidavits, which were not worth the paper on which they were written. Of course they were no evidence at all, and she herself, by the very letter which she writes accompanying these documents, negatives the very claim which she sets up, by stating that the marriage was solemnized and the will was properly executed. There is no foundation for the statement that there had been a prior marriage. But supposing there had been, observe what took place. These affidavits were sent over in 1799. From that moment it was not a secret. There was nothing confined to the breast of Mr. William Patrick. These affidavits were sent to her solicitors in Scotland—men of high reputation. As far as these documents went, all Scotland would know at once of the claim. It was not confined to the knowledge of Mr. William Patrick, but it was known to the parties whom she selected to assert her claim. Then it was said—"Yes, but she desired that the £400 might be given to her." Why, the most indifferent stranger in the street might have equally claimed it—might have walked into Mr. William Patrick's office, and asked for the £400. It would have been perfectly nonsensical and absurd for him to have given up that sum of money to her—he must have paid every shilling of it again. She was the last person to whom he could have intrusted it. She was not the person who could have conducted the case of her son—she was not the person to whom the father had intrusted his son—he did not leave her the custody of his son.

My Lords, there is only one other point on which a good deal has been said. It is well to clear up those things, and I do not think I am going out of my way in doing so. I feel bound, as far as the circumstances justify, to put the character of Mr. William Patrick, which has been very strongly reflected upon by the observations that have been made upon it, in what appears to me to be the proper view. The only other point is with respect to the guardianship. Now, upon this subject you have only to read the letter of the year 1800, and I may observe that we have here an advantage which is seldom possessed in such litigations. We have not only the public acts of the parties, but their private letters are brought forward, and those letters show most conclusively that, while Mr. William Patrick did, perhaps, as my noble and learned friend has observed, most injudiciously (for that is all that I can admit) take the boy under his guardianship, having already had another trust reposed in him, which was to some extent inconsistent with this duty, he did distinctly announce to the parties that he could not undertake the prosecution of his claim, but that he should maintain the claim of his brother. He was perfectly justified in doing so. By so taking the boy he embarrassed himself, and he has led to this vast and protracted litigation; in which your Lordships will recollect that, but for the charges of fraud which have been brought, not proved, against this gentleman, the law of Scotland has long since barred every possible remedy of the appellant, and it is only by a case of fraud being established that the appellant could for a moment be heard.

I agree, therefore, with my two noble and learned friends in thinking, that this appeal should be dismissed; and, considering the charges of fraud, which have been so gravely brought

forward and not made out, I submit to your Lordships that the appeal should be dismissed with costs.

Sir F. Kelly.—Will your Lordships permit me, on the part of the appellant, to ask that he may be allowed an opportunity, if he should be so advised, of applying to your Lordships with reference to the form in which the judgment of this House shall be ultimately drawn up?

LORD ST. LEONARDS.—I omitted to make an observation upon that, but it is not for want of having formed an opinion upon it. I think it is quite right to assoilzie the defendant. It was upon preliminary defences; and I have already shewn to your Lordships that the result is the same as would have taken place in this House, if the appeal had been first made to this House. If this House had, upon your preliminary case, denied your right to go on, it is quite clear that the House would have made an order to put an end to your case altogether.

LORD CHANCELLOR.—I am much obliged to my noble and learned friend for mentioning this, which I had omitted to notice. My opinion is, that it is entirely right, because, the charge of fraud failing, that entirely concludes the case.

Interlocutors affirmed, with costs.

Spottiswoode and Robertson, *Appellant's Solicitors.*—Richardson, Loch and Maclaurin, *Solicitors for Respondent* William Patrick.—Dean and Rogers, *Solicitors for Respondents* Robert Shedden Patrick and William Cochran Patrick.

MAY 26, 1854.

THE SENATUS ACADEMICUS OF THE UNIVERSITY OF EDINBURGH, *Appellants*, *v.* THE LORD PROVOST, MAGISTRATES, AND TOWN COUNCIL OF THE CITY OF EDINBURGH, *Respondents.*

Royal Charter—Stat. 1621, c. 79—Clause—Construction—Res Judicata—Edinburgh Town Council—Edinburgh University—*In a question between the Magistrates and the Senatus Academicus of the University of Edinburgh, as to the rights and powers of the Magistrates, as patrons, in regulating the course of study of candidates for medical degrees:*

Held (affirming judgment), *that the Magistrates, as patrons, are entitled to prescribe conditions for the course of study qualifying for degrees in the University.*[1]

In the year 1566, Queen Mary granted a charter whereby she annulled a purchase of certain church lands made by the Town Council of Edinburgh with the view of founding a College; and of new granted all the church lands of Edinburgh to the Magistrates, for the endowment of an hospital and school.

In 1582, King James the Sixth granted a charter to the Provost, Bailies, Council, and Community of Edinburgh, whereby he confirmed the charter of 1566, and made over to them of new the whole subjects of conveyance. The charter of 1582 bore—"Ideo nos enixe cupientes ut in honorem dei et commune bonum nostri regni literatura in dies augeatur volumus et concedimus quod licebit præfatis præposito consulibus et eorum successoribus ædificare et reparare sufficientes domos et loca pro receptione habitatione et tractatione professorum scholarum grammaticalium humanitatis et linguarum philosophiæ theologiæ medicinæ et jurium, aut quarumcunque aliarum liberalium scientiarum quod declaramus nullam fore rapturam prædictæ mortificationis; ac etiam præfati præpositus, ballivi et consules ac eorum successores cum avisamento tamen eorum ministrorum pro perpetuo in posterum plenam habeant libertatem personas ad dictas professiones edocendas maxime idoneas uti magis convenienter poterint eligendi cum potestate imponendi et removendi ipsos sicuti expediverit; Ac inhibendo omnibus aliis, ne dictas scientias intra dicti nostri burgi libertatem profiteantur aut doceant nisi per præfatos præpositum ballivos et consules eorumque successores admissi fuerint."

A College was accordingly built, and a Principal and Professors were appointed by the Town Council.

By statute 1621, c. 79, entitled, "Ratification of divers infeftments granted to the Town of Edinburgh for sustentation of College ministers and hospitals," the grants previously made were confirmed and ratified, and the act proceeded—"Lyckas his Majestie, off his princelie and Royal favour, and for gude service done to him be the saidis Provost, Bailzies, Counsel, and Communitie

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[1] See previous report 14 D. 74; 24 Sc. Jur. 33. S. C. 1 Macq. Ap. 485: 26 Sc. Jur. 520.