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MONTGOMERY, &c. *v.* THE DUKE OF BUCCLEUCH, &c.; AND HYSLOP *v.* THE DUKE OF BUCCLEUCH, &c.

in them, and the magnitude of the questions in point of value, it was necessary to consider them very maturely, and it has till now been quite impossible to give that full consideration which was proper.

"The substance of the question under these two appeals is, that the Court of Session has denied the application of the doctrine of purgation to the leases in dispute.

"Where a reversal of a judgment is moved in this house, it has been usual to state the grounds upon which such reversal is proposed to be made; but where an affirmance is moved, it has not generally been the practice to state the reasons for such affirmance.

"After a most painful and anxious attention to the printed papers in these causes, to the arguments at the bar, which were most able and ingenious, and to all that could be urged in any way, and after having carefully looked at all the authorities referred to, having looked back to the summons, and recollecting what passed formerly in these cases in your Lordships' House, with every feeling for the parties interested, I cannot refrain from stating that I do not see cause to reverse the interlocutor pronounced by the Court of Session."

LORD REDESDALE.—"My Lords, I am under great difficulty to conceive how the questions which have been raised in these cases could be raised. I have looked carefully into all the papers, but I cannot see any sufficient grounds to alter the decision of the Court of Session."

(Judgment of affirmance would then have been given, but there were not Peers enough to make a House without Lord Montague, who was a party. The Lords, therefore, adjourned moving the judgment till Monday).

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THE DUKE OF ROXBURGHE *v.* KER.

The DUKE OF ROXBURGHE, . . *Appellant;*

Lieut.-General KER, . . . *Respondent.*

House of Lords, 3d, 17th and 24th May 1822.

BASTARDY—SASINE—RES JUDICATA—PROOF OF ILLEGITIMACY—MARRIAGE OF ADULTERER WITH ADULTERESS.

In this case several important questions occurred, as, 1st, Whether an action which was, at the request of the pursuer, sought to be withdrawn after defences were lodged, and the Court, of consent, allowed him to withdraw it, and at sametime *assoilzied* the defender, was to be held a *res judicata* in the new action brought? 2d, Whether, where a predecessor

of the Roxburghe family who had committed adultery, and afterwards married the party with whom it was committed, that marriage was lawful, and the issue of it entitled to inherit? 3d, Whether a cadet of the family against whom bastardy was alleged, was to be deemed as such, after an interval of so many years, during which the family dealt with him in their deeds and settlements, and otherwise, as a lawful born son, upon the discovery *de recenti* of a sasine describing him as a *filius carnalis?* 4th, Whether these words, *filius carnalis*, were to be taken and received as proving *per se* his bastardy, and whether they were so interpreted in the law of Scotland, by long usage, although capable of a different interpretation in the language from which they were borrowed. 5th, Whether the pursuer had a title to pursue.— *Vide* Shaw's Appeal Cases, Vol. i., p. 157.

The LORD CHANCELLOR (ELDON) said,

"My Lords,*

"I feel a conviction that your Lordships would consider me rash, were I to propose that you should proceed to judgment in this very difficult and important case, which has occupied five days in the argument, upon any grounds that I could at present offer to your consideration.

"This cause contains many different points. *First*, There is a question upon the summons. Speaking as an English lawyer, I may say, that it is extremely vague, and does not contain sufficient allegations. The addition of a few words would have removed this objection. When I find, however, that the Attorney-General does not *admit* that his client has *no title to pursue;* and that on the other side, it is contemplated that he *has a good title*, I must hesitate in forming a contrary opinion. But I may say, that if it shall be found necessary to remit this cause, I should be inclined to include this point in any remit.

"There is another point which must be dealt with by us, namely, whether we can now go into all the points which we have heard stated to us; or, if we are prevented from entering into them by the *res judicata* of a former judgment. Res Judicata.

"Upon this nothing has been stated in argument here; but this appears to have been much relied on by the Judges in the Court below. Lord Roberston was of opinion that there was a *res judicata* here. Lord Glenlee does not coincide in this, but has difficulty on the point of *noviter repertum*. Lord Craigie thinks there was a *res judicata*. Lord Bannatyne is of a contrary opinion.

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* Taken by Mr Robertson.

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The Lord Justice-Clerk again inclines to the opinion of *res judicata*. Thus four out of five of the judges appear to favour the opinion of *res judicata*.

Noviter Repertum.

"On the point of *noviter repertum*, treating this as a question of Scots law, I should say that if there be a *res judicata* here, it would be difficult to get rid of this by an allegation that this instrument of sasine, which was always in the possession of the pursuer, could be held as *noviter repertum*. But this matter is involved in another question, namely, Whether the former action was not withdrawn in such a way as to preclude the giving the character of *res judicata* to the former decree.

"Another point occurs with regard to the meaning of the word *earldom* in the summons. Reading this as an ignorant man would read it, the word would be held to mean the Peerage; but in this jurisdiction the peerage is not to be dealt with.

"I have no conception that the judges of the Court of Session meant in any way to deal with the Peerage in this case. Whether or not it will be necessary to take any notice of this, I do not say at present. But when we come to decide this case, it will not be duly considered, if we do not at same time keep in mind that while we are deciding only as to the estate, still, from the nature of the evidence, it will be very difficult to prevent the right of succession in this title from being affected in some way by our decision.

"Whatever is done as to this, it must be clearly and distinctly understood, that nothing that we do in this case is to decide anything in regard to the Peerage.

Sasine with words "*filius carnalis.*"

"There are other three points, 1st, The question upon the sasine of 1499; and it appears to me that that sasine, on certain principles, whether the charter be produced or not, may be held as evidence that Mark Ker was termed "*filius carnalis*" of Walter Ker.

"What was the meaning of this term, is a more difficult point. The Court has thought that this was an ambiguous term, and has held that unless it could be shown that the term had a fixed sense, its meaning here must be decided upon other circumstances.

Import of these words.

"I put a case to the Attorney-General upon this subject. Supposing this word to have occurred in this deed only after it had received an interpretation in the civil law writers which have been stated to us, must it not have been held that the meaning was, as these writers had laid down? It is true there might have been a subsequent usage to alter this.

How that import was to be ascertained.

"If the expression be ambiguous, we must let in evidence of all kinds to show its meaning; the reputation of this person in his family; other instruments in which the same expression occurred, and great variety of topics, which were stated at the bar, and many more which might be suggested.

"It becomes a question of evidence at last. And when we are called on to say on whom the burden of proof lies, I have not much difficulty as to this; deciding here as a judge of the Court of Session, or as a juryman, I conceive, I must decide upon the facts *appearing* before me. These facts it will be necessary for a person to weigh calmly in his closet, before being ready to decide thereon.

"If we shall come to the conclusion, that this sasine proves Mark Ker to have been a bastard, then we shall get to an end of the cause, but if not, then we shall have two other questions to consider.

"One of these is, Whether John Ker, the son of Sir John Ker, was legitimate or not? Certain of the facts on which this question depends are not in dispute; Sir John Ker, the father, was divorced from his lady, for adultery with the wife of a certain gentleman; and this gentleman having also divorced his wife, the adulterous persons afterwards intermarried.

"It is said that this was an unlawful marriage in this sense, that it was null and void *ab initio*. If unlawful in any other sense, it might not affect the legitimacy of the issue.

"This question depends on the canon law, the civil law, the decretals of the popes (which, I see, it was the fashion to abuse), but more especially on the Act of Parliament of Scotland of 1592. If this was an unlawful marriage as being null and void, then nothing else will remain for discussion; but, if otherwise, there will be a question, if John Ker, the son, was to be held a lawful son of the marriage, or not. If the marriage was lawful, I think it will be extremely difficult to hold in regard to this person, considering all the documents which are before us, that he was an unlawful son.

"As I have said, it will be necessary to consider all the matters fairly and calmly. I trust I have not troubled your Lordships at present too much at length. When we are ready to proceed, further notice of this will be given to the agents on both sides."

Case Resumed 17*th May* 1822.

The LORD CHANCELLOR (ELDON) said

"My Lords,*

"This case, which is between James, Duke of Roxburghe, and Lieutenant-General Walter Ker, comes before the House upon two appeals, in each of which James, Duke of Roxburghe was the appellant, and Lieutenant-General Ker was the respondent. Upon the *first* of these appeals very little was stated at your Lordships' bar; and I shall have occasion to mention what the substance of that appeal was, and then I shall represent the substance of

* From Mr Gurney's short hand notes.

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the second appeal, and what is the view I take of this case. I believe I shall entirely act within your Lordships' rules, which in some instances may make it more prudent and discreet, and a better judicial mode of proceeding, if I were simply to state in one word my opinion of the case; but I do not think I can do justice to a case of this sort, without calling a very short portion of these proceedings to your Lordships' attention.

Describes the circumstances of the case.

"My Lords, you will find, from what is stated in the case of the respondent, that upon the death of William, Duke of Roxburghe, in 1805, Lieut.-General Ker, as your Lordships well recollect, laid claim to the honours of that family in a competition that took place at your Lordships' bar, for nearly the whole of one session. It was opposed, and ultimately successfully opposed, by the appellant, the Duke of Roxburghe. The appellant was descended from one of the grand-daughters of Robert, first Earl of Roxburghe, who died in 1650. The respondent claimed in the character of heir male of the Earl and of Harry, Lord Ker, his son. Sometime before the death of William, Duke of Roxburghe, the respondent, in order to establish his title to insist for the registration of the entails of the Roxburghe estates, had been served heir male of Robert, first Earl of Roxburghe, and of Harry Lord Ker. After the competition arose on Duke William's death, the appellant, then Sir James Norcliffe Innes, in December 1805, brought an action of reduction for setting aside those services. In the case for the respondent now before your Lordships, it is stated that the appellant very anxiously protracted the proceedings, and retarded the decision;—that in February 1811, the cause was ordered by the Lord Ordinary to be submitted to the Court, against which interlocutor the appellant gave in a representation and then a petition, both of which, according to the statement of the respondent, were refused without answers. A memorial was then given in by the respondent, in which he repeated and corroborated the evidence which had formerly been submitted to the jury, and had formed the ground of his services. It states what the evidence consisted of, and it is represented in both cases, that is, in the respondent's case in the second appeal, and in the appellant's case in the first appeal, that the appellant presented a petition praying for leave to withdraw the action, the Court did not refuse this, but pronounced this interlocutor:—'Having heard 'this petition, in respect the petitioner has desired to withdraw 'this action, allow him to do so, and assoilzie the defender and 'decern: Find the defender entitled to his expenses.' My Lords, the Duke of Roxburghe was advised to bring a new action, or to take some steps with respect to this interlocutor; and the way in which he states it in his first appeal, is precisely in the terms in which I have stated it, namely, in these words (here the above interlocutor was read). And by that interlocutor they also found

that the defender was entitled to his expenses, and they allow an account to be given in, and remit to the auditor to tax the same and report. That account was accordingly given in. Then there is another interlocutor likewise appealed from, to this effect:— 'The Lords having advised this account of the expenses, with the 'auditor's report thereon, approve of the said report, and in terms 'thereof, modify the account to the foresaid sum of L.273, 13s. 8d. 'sterling, and decern for that sum with the full dues of extract;' and then the appellant states, as in the case laid upon your Lordships' table, that he was advised in 1811, that the said interlocutor of the Lords of the First Division of the 11th December 1811, in so far as it went further than to grant the prayer of the petition for leave to withdraw his action of reduction *simpliciter*, and assoilzied the defender, and found him entitled to expenses, and the said other interlocutor of the Lords of the same Division, of the 10th of March 1812, founded thereon, were erroneous; but he did not conceive this to be matter of much importance. Afterwards, however, the appellant discovered that there existed no other person who could or did pretend to be heir of entail of the estate of Roxburghe, except the respondent, and he brought a new action of reduction of the services. I should mention that this new action of reduction was brought before the petitioner's son came into existence, and I mention the circumstance with a view to this observation in this second appeal, at the time the second action was brought, in as much as if he could make out that Walter Ker was not the heir male of the family, he would then be the last heir of entail to the Roxburghe estates, in fee simple. Then he brings a new action, but conceiving that from the manner in which the Court of Session had expressed the interlocutor, it might be considered as a *res judicata*, his complaint is, that the Court ought to have done nothing but to have allowed the action to be withdrawn, and undoubtedly, as it is stated in the notes upon the table, in the observations which are made upon this case, this is an extraordinary interlocutor, and one hardly knows how to deal with it. · It was an action of reduction to reduce the services of Walter Ker. The Duke of Roxburghe was disposed to withdraw the action altogether; and he applies to withdraw the action; and then they give a judgment which one does not know how to apply to the species of application. The action being withdrawn, the Court goes on to assoilzie the defender, and to give the expenses, which seems to amount to this, that there shall be no action, because the Duke of Roxburghe desires to withdraw it, yet there shall be an action out of which the defender is to be assoilzied, and his expenses to be paid.

"My Lords, I have stated this because the other case contains, on the part of General Walter Ker, one defence, that the interlocutor is to be considered as a *res judicata*, and therefore that the

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other action could not be carried on. The ground of that action of reduction is stated in the summons, which I now take the liberty to read to your Lordships.

(Here his Lordship read the summons of reduction; he also read the reasons of reduction as follows) :—

"'*Primo.* The foresaid two services and retour and decree are 'erased and vitiated *in substantialibus*, and the said extracted 'decree disconform to its warrants.

"'*Secundo.* The said services proceeded in absence of any con-'tradictor, and without evidence to prove that the defender was 'at all lawfully connected with the foresaid Robert, Earl of Rox-'burghe, and Harry, Lord Ker, his son.

"'*Tertio.* The defender could not then prove, nor can he now 'prove, that he is in point of fact heir-male of the said Earl Robert 'or Lord Ker, his son.

"'*Quarto.* The decree of absolvitor before mentioned, is irre-'gular and null, and did not proceed upon consideration of any 'evidence of the said Walter Ker's pretended propinquity to the 'said Earl and his son, but upon a petition from the present pur-'suer himself in the foresaid action, praying, for certain reasons, to 'be allowed to withdraw that action, and which did not warrant 'or authorise any decree of absolvitor.

"'*Quinto.* The pursuer had now recovered evidence, which, if 'it were incumbent on him to bring any (which he by no means 'admits), would be sufficient to instruct, that if the said defender 'was at all connected with the said family of Roxburghe or Lord 'Ker, it was by a bastard line.'

"Now, my Lords, your Lordships will observe, that if Sir James Innes Ker is such heir as he states himself to be in this summons, he has an undoubted right to sue in an action; and, I do not presume to say, that this may not be sufficient in Scotch proceedings, though, I confess, I feel myself more distressed in determining upon the proceedings than upon the points in discussion. If this had been a proceeding here, the Court would not have taken the facts of certain instruments for granted, merely because there happened to be a cause at this bar in which we were obliged to travel through them, and to have the particulars entered into. How it is made out that this action of reduction gives to the pursuer the character which he assumes, I pretend not to decide; it, however, is enough to say, that it is matter of litigation between the parties, whether he has a title as a pursuer? And in the case that is laid upon your Lordships' table, there is a difficulty to reconcile the statements of the grounds upon which he founds his right to pursue with regard to that service. Then, your Lordships will observe, it is assumed that all those services, and retours, and decree, ought to be reduced, retreated, rescinded, cassed, annulled, decerned, and declared, by decree of our said

Title to sue.

Lords, to have been from the beginning, to be now, and in all time coming, void and null, and of no avail, force, strength, or effect, with all that has followed or may follow thereon, and to make no faith in judgment or outwith the same; and it ought and should be found and declared, by decree foresaid, that the defender, in his pretended character of heir-male of the said Robert, Earl of Roxburghe, or Harry, Lord Ker, his son, has no claim against the pursuer, or to the earldom and estates of Roxburghe possessed by him. Now, here again, another observation arises that the earldom is no where mentioned before, though the character of the earl is mentioned frequently; therefore, a difficulty arose to know what was meant by this word 'earldom;' but taking it to be clear that it means nothing but a sort of territorial description of property, there is no ground for saying that this was an action on the part of the Duke of Roxburghe, praying the decision of the question whether General Walter Ker had or had not a right to claim the title? It was a mere description of landed property. This being the nature of the pleading; *first*, it is said, that the summons is not sufficient. I believe *that* was more pressed by myself than could be justified upon reflection; for making allowances for the differences in the laws of England and the laws of Scotland (in the one you have pleadings so brought down to the point, that you can tell what it is which the party brings before you, in the other you have them so loosely stated, that you cannot tell what they are until the party tells you what is in dispute),—allowing for that small difference which exists in the mode of English and Scottish pleading, I should be sorry to express a strong opinion upon this case, merely on the ground of any doubt of the sufficiency of the pleadings, where neither counsel nor judge suspected such an objection could be made.

"There is then another question between the parties, and that is, Whether the pursuer is not barred by a *res judicata*; that is to say, Whether in the former action which he thought proper to withdraw, the judgment given is to be considered as a *res judicata* (and your Lordships will see in a moment why he wished to withdraw). By the interlocutor in that action, the judgment of the Court, in so far as it went to assoilze the defender, and to order expenses, I confess was a judgment that has thrown me into considerable embarrassment; for if a person in this country had desired to withdraw his suit in Chancery, the bill would have been dismissed upon paying costs, but you would not have given a judgment as if the cause had remained. But here leave is given to withdraw the action, and judgment to assoilze the defender. With respect, therefore, to this matter of *res judicata*, if the cause were to be decided upon that point, I think we ought to pause considerably before we said that this was a *res judicata;* for this reason, because, though I do not think it was a *res judicata* (for it was not a

Res Judicata.

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judgment where the Court disposed of the merits of the cause), yet I should feel very great difficulty in not taking more time to consider of it. If the case were to be decided upon that point, for though the judges were unanimous upon the other points, four of them differ upon this, and one after the other seems to have thought that this was a *res judicata*; but whether the summons is good or bad, or whether it is to be considered as a *res judicata*, if there be other grounds on which the judgment of absolvitor in this action can be maintained, then the absolvitor will be right on those grounds; if, on the other hand, it is not good, and this be not a *res judicata*, yet if on other grounds the judgment ought to be affirmed, we need not trouble ourselves whether this be a good or bad summons, or whether it be a *res judicata* or not.

Bastardy of Mark Ker, &c.

"Now, my Lords, having stated this much, the other points in the case are these: The Duke of Roxburghe says that, supposing you make yourself out to be heir male by a pedigree which admitted of no doubt whatever, yet the fact is this, that you cannot be an heir male unless you can show that a person of the name of Mark Ker, who, in this pedigree, is stated as a brother of Sir Robert Ker, and second son of Sir Walter Ker of Cessfurd, was a legitimate child, or if I can show he was *not* a legitimate child; for if he was illegitimate, then your descent is from a bastard, and the consequence is, you cannot be heir male of a person who goes higher up in the line. He says further, if you do show that Mark Ker was legitimate, and if I fail in showing that he was *not* legitimate, yet there is another bar to your character as heir male, namely, that a person lower in the pedigree (Sir John Ker) happened to do *that* in Scotland which seems, at that time, to have been considered as nothing of a very loose or immoral nature,—in short, that Sir John Ker happened to commit adultery with another man's wife, and afterwards married the woman; the issue, it is said, of that marriage being unlawful, therefore all that descended from him, descended from an impure fountain, and were barred from inheriting.

Marriage between adulterer and adulteress illegal, and issue unlawful.

"Now, my Lords, to go through all the learning and learned argument which your Lordships have before you upon the table, and all which you have heard from the bar, or even to attempt to go through the observations that might be called for, if your Lordships were about to reverse the judgment, would occupy more of your time than I should feel disposed to do; without, therefore, going through the whole of the most powerful and learned arguments (for your Lordships have heard four counsels, and I should not do justice if I did not say so of both young and old), the question, I think, may be stated in a very few words, and indeed, according to the practice of your Lordships' House, I ought not to do more.

"There is found a grant to this Mark Ker, dated 1449, and a

very extraordinary thing it is, that this instrument which is found in the charter-chest at Fleurs never made its appearance till this action of reduction. It is not in the right custody, because it relates to property not enjoyed by that line in whose possession the instrument is found, but by this line. There is reference in it to a charter which is not produced. That a charter existed is demonstrated partly by the instrument itself, and partly by other proofs in the cause; but whether the charter did or did not exactly correspond to the contents of that instrument of 1449, is a thing which we are rather to conjecture, and to believe, than to say it is a proof. It is, however, necessary to read to your Lordships that instrument which is the foundation of the whole of this branch of the case. It is in the following words: 'Per hoc presens publicum 'instrumentum cunctis pateat evidenter et sit notum quod anno,' and then follow a great many Latin words, stating the date of it, which is most material: 'In mei notari publici et testium subscrip-'torem præsentia personalia constitutus nobilis vir Walterus Ker 'de Cessfurd ac dominus terrarum de Borthik schelis,' and there is a great dispute whether those lands are in the possession, or have been in the possession, of this line,—a dispute with which I do not trouble myself. It does not appear they were lands in their possession, 'accessit personaliter ad *hujusmodi* terras et ibi-'dem per terræ et lapidis traditionem ut moris est, statum seisi-'nam et possessionem hereditarium quinque libratarum terrarum 'suarum vulgariter nuncupaturum le Marys et aliarum quinque 'libratarum terrarum suarum dicti dominii de Borthik schelis ex-'cepta una acra.' Then it describes the situation of them, and then come the words: 'Marco Ker suo filio carnali suis que heredibus 'masculis et assignatis in feudo et hereditate in perpetuam, justa 'et secundum suæ certæ formam et tenorem sibi de super confect 'salvo jure cujuslibet tradidit et deliveravit,' that is, this a donation by which Walter Ker, the father, delivered the lands to Mark Ker, as a *filius carnalis.* It is then signed by the Notary Public; but it is an instrument not signed by him who it is said granted these lands to Mark Ker, 'suo filio carnali suisque heredibus mas-'culis et assignatis in feodo hereditate in perpetuam,' etc. This objection was carried so far, together with the sasine being found in the charter-chest at Fleurs, as to say, that it was no evidence; I cannot, however, say this; but it is an observation justified by the fact, that the charter-chest contained no other than this instrument applying to Mark Ker, or any of his descendants. My Lords, it is upon that principle—upon the weight due to this instrument—that your Lordships are called upon, in an especial manner, to say that Mark Ker was illegitimate, and your Lordships have had many able and curious arguments addressed to you with a view to show what is the meaning of the words '*filio carnali.*'

Sasine with the words "*filius carnalis.*"

Import of these words, how to be ascertained.

"My Lords, the opinion I have formed upon this subject is this,

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Presumption of legitimacy, how inferred.

first of all, I think that the presumption is to be made in favour of legitimacy, especially of a person who existed 200 or 300 years ago, if upon looking through the transactions of the family descended from him, and the family connected with him, there has been no cogent evidence to show that one branch of the family did not consider another branch of the family as springing from an illegitimate source; but instead of doing so, took one another as individuals coming from a pure source. I agree, certainly, that if this word '*carnalis*' has necessarily, in the language from which it is borrowed, the sense of illegitimacy,—if 'carnalis' necessarily, in that language, signifies illegitimacy, cadet questio; but if it be, on the other hand, an ambiguous term, which, in some cases, is applied to legitimacy, and in other cases to illegitimacy, then, I say, if you can show, either from the instrument itself, that it is to have the sense of legitimacy, or from other instruments, it is to have that sense, or from other species of proof that it is to have this sense, then, I say (if it is an equivocal word), you ought to give it *that* sense. Now, to try this in this case, suppose this was the first instance in which this word occurred in Scotch deeds, then, my Lords, I undertake to say, that you could not presume that the word '*carnalis*' did mean illegitimacy, unless you could also show that it was used in that sense in the language from which it was borrowed. If you look to the language from which it is borrowed, it by do means imports any such thing; the consequence of that is, that if the word '*carnalis*,' in the first instance, could not be taken to mean illegitimate, because it could not be shown that '*carnalis*,' in the language from whence it was borrowed, meant illegitimate; I do not mean if it is shown to be so by the contents, or by other instruments, that it means illegitimate, or by other proof that it has that meaning, and was so used, (for certainly there might be a great many instruments relative to other property, in which it might be shown that it was necessarily meant to imply, and to denote, illegitimacy),—that it is *not* to be so taken. I feel very great difficulty in determining positively one way or the other that it means legitimacy or illegitimacy; but if, in the language from which it is borrowed, it does not seem to be taken so, then, I say, that there ought to be that course of dealing with the word, by the Scotch conveyancers, as to leave no doubt of the sense in which the word is used. The use of the word seems to have occurred about the 15th century down to the 16th century. It seems to have been employed by conveyancers, many of whom, no doubt, were extremely ignorant. The word might be used for that number of years. To say that a word which did not necessarily mean illegitimacy, is to have its sense totally converted, totally altered with respect to the Scotch law, and is, in Scotch language, to mean illegitimacy, unless it be shown not to mean so in every case in which it is found to occur, does seem to me to be a very danger-

ous principle to adopt in reference to the purity of the descent of families. I am ready to admit that in much the greater number of instances in which this word is used, it is intended to apply to persons who are illegitimate; but, in some of the instances, the term is applied to persons who are legitimate. That again brings the question to this, as it appears to me, that, unless you have more cogent evidence than you have, in this case, to prove that Mark Ker was illegitimate, viewing the whole transactions of his life, the great situation he held, all the connections he formed in life, and every other circumstance attending his status in life, and what is called the status of his family (for I do not agree that there could be merely a status of an individual, but a status from whence the descent has sprung), I cannot think, with these before me, that this word 'carnalis' is sufficient evidence to entitle us to say necessarily this person was illegitimate. I could not go through all the evidence. I do not go through all the instruments here; if I did so, I should have to request of your Lordships to grant me the whole of the remaining part of the session."

"I ought to mention here, that the legitimacy of Scotch families, and the purity of Scotch character, are very much wronged in the question, if we are to resort to some of the arguments urged at your Lordships' bar. They would go to prove that the word 'filius carnalis' applied to illegitimate children; but are you to say, that a term which may apply to legitimacy, or which may apply to illegitimacy, that for that reason you are to contend for the legitimacy, and they are to contend and prove it may mean illegitimacy, because no other words are used to describe a person who was illegitimate. This is not an unimportant observation, for if we look to the instruments found here, these prove that years after the date of this deed of 1449, or 1500, or 1501, or 1502, this man is described as a son, and such a one, in which a man in the ordinary way would be described, and in some of the instruments he and the family stand in limitations before the other branches of the family, who unquestionably were legititmate; and though it is very ingenious to give an answer to this, and to say it may become necessary, and that those connected are bound to take care of the illegitimate children (I do not use the word 'natural,' for it requires some caution to use it, until we come to a judgment upon it in this House);* but it is a very ingenious answer to say, that as these are illegitimate children, therefore the father limits to them before he does to the legitimate children; but those persons who are connected with the family, who have no such feelings towards them, it is, I say, unusual for them, when they portion out their estates, to limit to the illegitimate line before they limit

* Alluding to the case of the Borthwick Peerage.

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to the legitimate line; and we may argue for ever upon all the probabilities, and upon all the improbabilities which may arise out of the transaction; but the principle I go upon is this,—I say, till that instrument, dated 1449, was found in the charter-chest at Fleurs, this objection was not heard of; and, it is to be observed, that no other instrument of a similar description was found there; I say, the whole of them, with the exception I am about to mention, which does not touch the question, had, when in this world, the status of legitimate persons, and you are not to take away that from them unless you possess cogent evidence for doing so. I am therefore of opinion, whatever difficulties may hang about this case, that from the evidence laid before your Lordships, you are not authorised in concluding that Mark Ker was an illegitimate child.

Marriage between adulterer and adulteress, whether lawful in this case.

"Then there is another point, my Lords, namely, Whether this marriage that took place between this adulterer and adulteress was a lawful marriage? If there was nothing to be seen in the case except the judgment of what may be called the Consistorial Court of Scotland—if there were nothing except that proceeding, in which, it is stated, to have been a collusive case, I certainly should have felt extreme difficulty in saying that the Act of 1592, or that proceeding in the Consistorial Court, did not lead one to the conclusion, that it was an illegal marriage; and that the offspring were not descended from a pure source. But upon looking at the proceedings which are here printed, and to that dispute, which existed between the parties on that subject, it does not appear to me that the judgment can be considered as a judgment of any considerable weight, as proving the legality or illegality of the marriage; but when I look to what has passed since—when I look to the charters—to the services of the persons descended from that marriage—when I look to the description of those persons in the subsequent charters,—and when I read the Act of Parliament of 1600, I say *that* is of more weight than all this judgment in the Consistorial Court of Scotland put together (for this Act of Parliament has more weight than any argument that can be brought from these judgments, and from the former Act 1592); because, when the Scottish Parliament say they enact that all marriages thereafter contracted under certain circumstances, shall be null and void, it does appear to me to be a most difficult thing to say that all marriages of a similar kind which were before contracted, were null and void. I am therefore of opinion, that what is stated upon this part of the case is also right.

"Your Lordships know, likewise, it is to be considered that the Act 1600 is a material Act in another point of view; for it not merely enacts that marriages between such persons are null and void, but that it must be declared by the sentence of the Court to be a nullity before the marriage can be held to be null and void,

A gentleman of great experience at the Scotch bar, I mean Mr Clerk, informed your Lordships what seemed to amount to this, that this Act might well be out of the Statute-Book altogether, because in Scotland they contrive that the adultery shall be so cleverly committed, that the Consistorial Court cannot get at it, and the man marries the woman. Now, if it requires that sentence shall follow to make that marriage null and void, it would be a strong thing to say, because the marriages after the passing of the Act were to be null and void, that the marriages before this Act passed shall also be null and void, without this particular character to give them nullity.

"Upon these grounds, my opinion is, that this judgment ought to be affirmed. Indeed, Mr Attorney-General, who argued this case, as he does every other, most ably, seemed to think that the utmost he could ask your Lordships to do, would be to send it back to the Court of Session again. I do not think this is a sort of case to remit for the purpose of ascertaining the meaning of the words, '*filius carnalis*.' It need not, I think, be discussed over again; and if the reason be right which I have stated, as founded upon the Act of 1600, I think your Lordships would not be acting usefully in further drawing into suspicion that legitimacy, not a single word of which was heard of until within a very few years, that is entitled to any sort of credit, because the words '*filius carnalis*,' occur in an instrument found in a place where it ought, strictly speaking, not to have been, and where there is no other instrument to the same purport—no other document relating to this family, which speaks the same thing that *that* instrument is said to purport.

Under these circumstances, I move your Lordships that this judgment ought to be affirmed. In what terms it would be best to settle it, may be arranged before your Lordships meet again, which probably will be Wednesday next; Monday being the last day of term, I must ask your Lordships not to hear any causes on that day.

24th May 1822.

LORD CHANCELLOR ELDON said,

"My Lords,

"In the case of the Duke of Roxburghe *v.* Ker, having seen the agents, I understood that the first of those appeals is to be withdrawn.* Taking it for granted that this will be done, I have in the next place to move your Lordships to find, in the second appeal case, in which it has been insisted on the part of the respondent, among other matters, that the appellant is barred by

* There was an appeal brought in each of the actions described at p. 825.

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the plea of *res judicata*, that it is not necessary to determine whether he is so barred; but assuming that he is not so barred, that the several interlocutors complained of ought to be affirmed, and that this House doth order and adjudge that the same be affirmed.

"In this case, the controversy at your Lordships' bar, must undoubtedly have been attended with very heavy expense, but considering the nature of the questions which have been to be determined between the parties, it does not appear to me that it is at all according to your Lordships' usages, to grant any costs. Are the agents attending?"

Mr Robertson and Mr Richardson appeared at the bar.

LORD CHANCELLOR.—"The House understood that you agree to withdraw that appeal."

Mr ROBERTSON.—"Yes, my Lord."

LORD CHANCELLOR.—"Then I move your Lordships to adjudge in the terms I have just stated."

It was accordingly ordered.