APPENDIX

TO THE CASES OF

COUNTESS OF DALHOUSIE *v.* M'DOUALL

AND

MUNRO *v.* MUNRO.

[10*th August* 1840.]

DOE, dem. JOHN BIRTWHISTLE, Plaintiff in Error.

[*Attorney General* (*Campbell*).]

AGNES VARDILL, Defendant in Error.

[*Dampier.*]

Marriage. — *Legitimation per subsequens matrimonium* — *Lex loci rei sitæ.* — A. went from England to Scotland, and resided and was domiciled there, and so continued for many years till the time of his death: A. cohabited with M., an unmarried woman, during the whole period of his residence in Scotland, and had by her a son B., who was born in Scotland: Several years after the birth of B., who was the only son, A. and M. were married in Scotland according to the laws of that country: A. died seised of real estate in England, and intestate; — Held, upon consulting the Judges (affirming the judgment in K. B.), that B. was not entitled to such property as heir of A.

DOE, dem. BIRTWHISTLE, *v.* VARDILL. — 10th Aug. 1840. — Statement.

JOHN BIRTWHISTLE was born in Scotland. His father, although a native of England, had gone to Scotland twenty years before his death, and during the whole of that time was domiciled there. The mother was a native of Scotland, and also domiciled there. The parents, some years after the birth of their son, were married in Scotland. The father died seised in fee of certain estates in England, and intestate, and the son claimed as heir. The case was tried on ejectment at York in 1825, the law of Scotland as to the marriage being proved by Scotch counsel. A special verdict was returned, it being found, among other things, that the claimant was "legitimate," in consequence of the marriage

DOE, dem. BIRTWHISTLE, v. VARDILL.

10th Aug. 1840.

Statement.

of his parents. The Court of King's Bench held that John Birtwhistle was not entitled to take land in England as the heir of his father; and upon a writ of error heard in presence of Judges in the House of Lords in 1830, the judgment of the King's Bench was approved by the Judges in the opinion delivered by Lord Chief Baron Alexander.—See report in Bligh, N. R., volume 9th.

The cause having stood over, it was appointed to be re-argued by one counsel of a side, in presence of the Judges, and counsel having been fully heard, in the session of 1839, the following observations were made at the close of the argument, on proposing the question to the Judges:—

Ld. Chancellor's Speech.

LORD CHANCELLOR.—My Lords. Your Lordships have had the advantage of having had this case, raising certainly a very important question, argued with the utmost learning and ability, and it will be for your Lordships now to consider in what way the question is to be submitted to the learned Judges, in order to call their attention to the point to be decided. Upon looking at the question put to the learned Judges in 1830, it seems to me very accurately to state the facts of the case necessary to be submitted to the learned Judges, and it does not appear to me that it can be done better by putting it in other words. That question was in these words: "A. went from England to Scotland, and re-"sided and was domiciled there, and so continued for many "years till the time of his death. A. cohabited with M., an "unmarried woman, during the whole period of his resi-"dence in Scotland, and had by her a son B., who was born "in Scotland. Several years after the birth of B., who was "the only son, A. and M. were married in Scotland accord-"ing to the laws of that country. By the laws of Scotland, "if the marriage of the mother of a child with the father of "such child takes place in Scotland, such child born in "Scotland before the marriage is equally legitimate with "children born after the marriage for the purpose of taking "land, and for every other purpose. A. died seised of real "estate in England, and intestate. Is B. entitled to such "property as the heir of A.?" That, therefore, is the

question I shall propose to your Lordships to submit to the learned Judges upon this occasion.

DOE, dem. BIRTWHISTLE, *v.* VARDILL.

10th Aug. 1840.

Ld. Brougham's Speech.

Lord Brougham.— My Lords. I entirely agree with my noble and learned friend that the question of 1830 is much better than any other which can be put. It raises the point upon the facts stated in the special verdict. That verdict did unfortunately not find particularly in every respect what the law of Scotland is upon this subject, consequently the argument of the learned counsel for the plaintiff in error pro tanto is damnified. It would have been better if it had been put as the learned counsel, Mr. Murray, stated it, whose evidence[1] was believed by the Judge and the jury, namely, that the marriage is supposed to have been antecedent to the birth by fiction; but the legitimacy, as contradistinguished from legitimation, is sufficiently put for the purpose of the argument, and with the assistance of the authorities it can leave very little doubt upon the minds of the learned Judges. Yet I cannot help expressing my regret at the length of time during which this suit has been pending. It was tried at York as long ago as 1825, and I very well recollect the trial. The delay of fourteen years certainly is a very great misfortune; it has been owing in part to the changes in the custody of the Great Seal. In 1830 the appeal was certainly prosecuted, but it was not decided, and it was not till 1835 that we were aware of it being still depending. If I had ever known, whilst I held the Great Seal, that it was undetermined, I should have called the attention of the House to it, and then there would have only been the delay from 1825 to 1830. It was not noticed, until another case brought it to your Lordships knowledge, that it was not disposed of. Some laches, too, probably, may be imputed to the parties. If they had reminded the House of it, no doubt the cause would have been heard; but I suppose there is something in the state of the property that did not make it very necessary, else they would have taken some means of obtaining an earlier judgment. My Lords, I am desirous that the atten-

[1] The law of Scotland, as to marriage, was proved by Scotch counsel.

DOE, dem. BIRTWHISTLE, *v.* VARDILL.

10th Aug. 1840.

Ld. Brougham's Speech.

tion of the learned Judges should be directed to that, which, moved by the anxiety I felt upon the subject, I stated as the opinion I entertained in 1835, and to the arguments I then delivered. They have been printed, and will be furnished to the learned Judges. I do not know that they throw any great light upon the question, but they state the points, and refer to the authorities as well as to the principles. [*Mr. Attorney General.*—It is printed, my Lord, in the ninth volume of Bligh.] *Lord Brougham.*—Very well. My Lords, I entirely agree that this is a question of very great importance, and of very considerable difficulty. I quite agree with the Attorney General that it is of peculiar importance as affecting the law of Scotland, the question being whether the lex loci domicilii, the lex loci contractus et nativitatis, or also the lex loci rei sitæ, should prevail in this case; — from the time of Stair downwards, — from the time indeed when the distinction between real property and personal arose,— the law governing the one being the lex loci rei sitæ, and the law governing the other being the lex loci domicilii et contractus. I feel great anxiety that this case should be well considered, for another reason; I mean out of regard for the credit of our English Courts. I concur very much in the statement of the Attorney General, that if what has been laid down in this case be law, the bounds of that law are very narrow. If it is law any where, it prevails assuredly only as the law within the bounds of Westminster Hall. I know wherever I go in Europe it is boldly denied to be the law; I know the opinion of Dr. Story and other American jurists is also against us; and I do not think I could overstate the degree in which all those jurists dissent from the judgment in Doe v. Vardill. Moreover, if there is any reason to be given for the judgment, that reason is not in any one place. A considerable argument against it is to be gathered from the total diversity of the grounds upon which the judgment has at different times been maintained. It is first rested on one ground in the Court of King's Bench, then upon another and very different ground at the bar,—here, in 1830, again, upon a third ground, which I think must be admitted on all hands to be untenable, the ground stated by Lord

Chief Baron Alexander in giving the opinion of the Judges to this House, — and lastly, upon a different ground from all the three former, by the counsel to-day at your bar. And if the Judges are to give their opinions upon some fifth ground, the discrepancy may support the judgment better in their minds than it will support the judgment or give weight to it in the eyes of any other person; for assuredly a decision supported upon so many different grounds will be likely to sink low in the estimation of those who come to a calm consideration of its merits. I cannot help feeling the greatest regret that these questions should be raised here, so frequently as they have lately been. Dispose of this as you may, we shall have no end to such cases, unless we adopt the only satisfactory mode that can be devised for settling such controversies and doubts, namely, by some legislative measure to relieve the law of this country from the opprobrium which now rests upon it in the eyes of all mankind. That there should be a set of questions incalculably important, perhaps the most important, to the interest and feelings of individuals which can ever arise in courts of justice, and that these questions should be left surrounded with doubt, and incapable of decision, for want of some statutory enactment regarding these subject matters, is truly lamentable, and not a little opprobrious to our jurisprudence. Can any thing be more opprobrious to the law of a civilized country than that it should be extremely difficult to tell in this country whether a man is married or not? — nay, what is worse, whether a woman is married or a concubine; that it should be still more difficult to tell whether a person, the issue of an unquestioned marriage, is a bastard or legitimate; and that, owing to the conflict of law, or the discrepancy of the law, it should be declared in one part of the country that a man is a bastard, and in another that he is legitimate; in one part that a woman is married and in another that she is a concubine; in one part that divorce has taken place dissolving a prior marriage, and if that person afterwards crosses the Tweed, and intermarries with another woman, he is deemed not to be in the honourable and comfortable state of wedlock, but in a state of felony, and, having committed bigamy, he may be

DOE, dem. BIRTWHISTLE, *v.* VARDILL.

10th Aug. 1840.

Ld. Brougham's Speech.

transported to Botany Bay, which actually has happened; and still more, that if the same party had intermarried again, in Scotland, he would be held to be in the honourable state of matrimony, and not of felony; but if he had English estates the question would arise, though the children were legitimate in Scotland, their birth-place, yet the law of the country where the property is situated declared them bastards; nay, that in only one Court in England they were treated as bastard, and in all other Courts acknowledged to be legitimate. There are peers sitting in this House affected by this question, the issue of noble families, their parents having been married in Scotland after previous divorces, they themselves being of the most spotless character and of the brightest honour, possessing the most magnificent estates, and the highest titles. It is just that question which is raised here, which was assumed to be so clear at the bar, — though I interrupted the counsel to show it was any thing but clear, — that the current of decisions set it in the opposite direction — and that the law would, if taken to be as so misstated, make these parties bastards who are now going about as legitimate children. It is a very horrid state of things affecting the feelings and the character as well as property of individuals, that there should be this uncertain state of the law. It is still worse to think, that all the learning and skill in Westminster Hall, if you were to consult it, and all the Scotch law in the Parliament House of Edinburgh, would not make you sure of getting two opinions to agree upon such questions as these. I hope this state of things will be put an end to. It never can be done satisfactorily without an act of parliament. You might say that a marriage should be good or bad in Scotland. If bad, of course the issue should be bastards all the world over. You might say that a divorce in Scotland was good and valid, provided it was not fictitiously obtained, and in fraud of the law of England. Some wise, wholesome, and really salutary provision of that kind is absolutely necessary. I have agreed all along with what has been said upon the law of England and Scotland, thinking the law of Scotland respecting the marriage contract exceedingly objectionable compared to ours. If a di-

vorce is obtained there by parties bonâ fide, it might be made good universally. If it is done in fraudem legis Anglicanæ, whereby it is also in fraud of the rights of others, you might enact that it should be void universally, and then a man would know whether he was married or not, and a woman whether she was a concubine or a matron, and the child whether he was a bastard or legitimate. If the Judges decide the present question, or any of those questions of status, one way, ever so satisfactorily, it does not follow that they will be settled. The difficulty just now suggested will arise, and you will have another series of doubts and difficulties which will not be removed, because they cannot be anticipated: I would remind your Lordships more particularly of one point. We all say, that marriage is governed by the law of the contract; that is, the canon upon the subject; it depends upon the lex loci contractus; that is to say, a marriage good by that law in the country where celebrated is also good all the world over. A divorce takes place. We do not go so far as to say, — though generally speaking the rule of law is, unumquodque dissolvitur eodem modo quo colligatur,—yet we do not go so far as to say that an English marriage may be validly dissolved by a Scotch divorce, though English parties may contract a Scotch marriage in Scotland which shall be good all the world over; we do not say, that the same law which is applicable to the constitution of the contract applies also to its dissolution. But there is a conflict, and a real conflict of laws. The Scotch lawyers say, that the Scotch divorce is good to dissolve an English marriage, and that a man so divorced may enter into marriage again; but this divorce by our English decisions is null, if he comes to England. The Scotch Courts maintain the efficiency of divorce, and consequently the validity of the second marriage, and they will maintain this to the end of time. All the Scotch lawyers and Judges without any exception say, that the second marriage is good in Scotland. I do say, that this conflict of law seems to involve an absurdity, which no judicial decisions can reconcile to itself. It is self repugnant, and nothing but an act of the legislature can reconcile it upon sound principles. A man comes here with his Scotch

DOE, dem. BIRTWHISTLE, v. VARDILL.

10th Aug. 1840.

Ld. Brougham's Speech.

wife, and with issue born in Scotland; that Scotch wife is held to be a concubine for aught I know in England. The decisions go at all events to this extent, that the English law does not, as regards an English marriage, acknowledge the validity of the Scotch divorce. Here then a party may come, and after the Scotch divorce he may intermarry in England, and then there are two wives each claiming this husband. This is the conclusion either way; it is the conclusion from the well-established and well-known principle of allowing the lex loci contractus, — the law of the country where the marriage was contracted, — to prevail universally, and yet not allowing the law of the country where the divorce is had to regulate the dissolution of the contract.

One word more before closing these observations. Being moved by the considerations to which I have adverted, I introduced a bill into parliament in 1835 to cure this evil, and terminate so anomalous a state of things. I have been strongly urged to introduce it again. I own I had rather not do so pending this discussion, because I should hardly be able to accomplish my purpose without prejudicing this question, and I would therefore rather wait till it shall be decided. Now what is the real origin of all this embarrassment? A great deal arises from a country possessing one system of law being connected with a country possessing a different system, like Scotland and England, and these countries being contiguous. But much the greater part of the inconvenience has arisen from another source, and it shows the danger of departing from sound, solid, and uniform principles. If you had held originally that a marriage celebrated in Scotland, not bonâ fide by parties really resident there, but by parties who could not be duly married here, and who went to Scotland in fraudem legis Anglicanæ, to escape the provisions of the English marriage act, was a bad marriage in England, — if you had held, as you ought to have done, by that opinion generally, and declared it was a bad marriage, and that you would not allow parties who could afford to go to Scotland for the purpose of evading the marriage act, and who were really the only people contemplated by that act, to escape its provisions by this Scotch

journey ; if, instead of holding that to be a good proceeding, and giving it effect, you had said, as you have done in most other cases, " This is done in fraudem legis, and shall not " prevail," then nine parts in ten of the difficulties we now labour under would not have arisen. Lord Mansfield always held those marriages to be void in England. Instead of following his opinion, when Crompton v. Bearcroft came into Doctors Commons, it was decided in favour of the Scotch marriage. I have often lamented that we have no account of that important case, except in a passage of Mr. Justice Buller's Nisi Prius. I applied to my late excellent and most learned friend Dr. Swabey, and he gave me a few notes, which showed how the case had arisen, namely, by letters of request from Lincoln, but threw little or no light upon the subject. The case does not seem to have undergone a thorough investigation; nevertheless it may have done so when it came to the Delegates, a Court certainly of the highest authority. There a judgment was pronounced in favour of the marriage, but on what argument or by what judges I know not. Then came Ilderton v. Ilderton, which first brought the question before a court of common law. If you look into that case, as reported in 2d H. Blackstone, you will find that the case of Crompton v. Bearcroft is cited. It was a writ of dower, to which ne unques accouple was pleaded, and there was a replication by the demandant of a marriage in Scotland, to which the tenant demurred. This demurrer was upon two grounds; the first denied the validity of a Scotch marriage in an English suit, and this ground was given up as an untenable point. The party never dreamt of arguing it, but confined the argument to another point, Whether there ought not to have been a place for the venue, and whether the replication ought not to have concluded with an appeal to the bishop's certificate, instead of concluding to the country. The question upon the marriage was then abandoned, and the judgment makes no mention of it. Ever since that time the point has been held to be clear, that a Scotch marriage, however plainly and grossly in fraudem leges Anglicanæ, was a valid marriage. Now the evil arose originally from your having decided that; you went wrong

DOE, dem. BIRTWHISTLE, *v.* VARDILL.

10th Aug. 1840.

Ld. Brougham's Speech.

DOE, dem. BIRTWHISTLE, *v.* VARDILL.

10th Aug. 1840.

Ld. Brougham's Speech.

in so deciding, as many of us think; but having once gone wrong, when other kindred questions arose, as upon the validity of Scotch divorces, you ought either to have retraced your steps so as to get right again, or you should have continued acting upon the same principles; there was no middle course; either come back from your error in Ilderton v. Ilderton, and Crompton v. Bearcroft, or go on upon the same principle; either hold that the going to Scotland in fraud of the English law ought not to avail in any way, or hold that the Scotch proceeding, however fraudulent, does avail, and if it makes the contract valid, that it also validates the dissolution of the contract. But instead of following up your error you chose to hold the marriage good, but the dissolution of the marriage bad,—and see what interminable confusion you have thus got into. Now in Lolly's case the Judges had an opportunity of retracting Ilderton v. Ilderton and Crompton v. Bearcroft, or they might have said, the cases have ruled that the marriage is good, then so must the divorce be. But instead of that they maintained the validity of a Scotch marriage, though in fraud of the English law, and yet they held that a Scotch divorce in the same circumstances is utterly invalid; and hence arise all the difficulties and disagreements by which we are now surrounded. I am sure this is a good reason why judges in deciding important questions should adopt the course, when they have gone wrong, of at once in an open and manly way retracing their steps, rather than persist in their error; but if they do persist in their error they ought to do it out and out, though to the inconvenience of parties, and not, by way of saving their own consistency, impose on the people what is probably the most miserable of all inconveniences, that of vague and uncertain jurisprudence. Instead of having it uncertain, and subjecting people to this annoyance, it may be made at least intelligible by being made consistent, and though the principle were originally wrong, it may be made to tally with itself. At present it is inconsistent with itself; the principles are in one direction upon one ground, and in another direction upon another. I do hope that the result of this inquiry which has taken place will be the settlement

of the law; and I cannot speak too highly of the ability with which the argument has been conducted. I entirely agree with my noble and learned friend, that it is impossible to say too much upon that subject; and the question having been thoroughly argued is ripe now for decision. I hope that when it is fully considered we shall have the assistance of the learned Judges in giving our opinions. We shall give our opinions with all due deference to their authority, and all the disposition possible to avail ourselves of their useful aid, but without losing the regard that we conscientiously owe to our own opinions; not forgetting, certainly, the impression which may be made upon us by the opinion of the learned Judges, but coming to a full, calm, and deliberate consideration of a question of such paramount importance. When the law as it now stands has been thus settled, then ultimate steps may be taken, which I apprehend will alone be satisfactory to the people of both countries; I mean the final settlement of the law by an act of parliament, declaratory in some respects, and enacting in other respects; thus laying down what principles of law shall be fitting to be established for the two countries. I have felt it my duty to trouble your Lordships with these observations in the presence of the learned Judges and the parties, and I hope they may tend to the furtherance of justice in this case.

Lord Wynford.—My Lords, I cannot omit troubling your Lordships with one or two observations. Since I have been at the bar, now nearly fifty years, I have never heard a case argued with more ability than this case has been argued to-day. I have heard that ability exerted with great pleasure as to one of my friends, but greater pleasure with respect to the other, a young friend of mine who I have known from his earliest youth; and I am very sorry that the profession at large should not have the advantage of the full extent of his talents, in consequence of the situation he happens to hold in another place. My Lords, I believe I am the only peer now present who was in the House at the time the question was put to the learned Judges upon the former

DOE, dem. BIRTWHISTLE, v. VARDILL.

10th Aug. 1840.

Ld. Wynford's Speech.

occasion. That question was drawn up by Lord Lyndhurst, and submitted to the Judges. I approved of it then, and I approve of it now; I do not think any question can be put that will more effectually elicit the opinions of the learned Judges. My Lords, I have a strong opinion upon this subject, which I have not hesitated to express upon other occasions; but if it should so happen that all the learned Judges agree in their opinion, it would be highly improper in me not to give way to them, as the Judges know I have upon several occasions; but if there is a difference of opinion among them, I shall take the liberty of stating my view of the questions; at present all I shall say is, that I do not object to the question proposed to be submitted to the learned Judges. I wish my noble and learned friend to accomplish his object of reconciling the laws of Scotland and England in similar cases to this, but I am afraid that my noble and learned friend will find very great difficulties in his way. I cannot help thinking that it might be better settled by different decisions as the matters arise, rather than by an act of parliament. I do not think that the legislature is well adapted to take up and settle a very difficult question like this. However, we shall, I hope, have an opportunity of fully considering the various points as we always have in this place, particularly when assisted by the learned Judges, when cases come judicially before us. With respect to the question,— considering the circumstances which my noble friend has alluded to,— the way in which it affects different families in both countries, having large estates and high houses,— it is of the utmost importance it should be settled, and that it should be decided as soon as possible when the Judges have matured their opinion. It is of deep importance, when that matured opinion is come to, that an early period should be fixed for the consideration of the question. It must not be supposed that this is the only case which has stood over for a great length of time. The next case which stands for hearing, I am sorry to say, is a case that was before me in the Court of King's Bench when a judge of that court, now nearly twenty years ago. I hope some mode will be adopted when points of very great importance arise of bringing

them forward, so that the parties may obtain justice as soon as possible.

DOE, dem. BIRTWHISTLE, *v.* VARDILL.

10th Aug. 1840.

The Lord Chancellor again read the question to be proposed to the Judges, and the same was agreed to.

Opinion of the Judges.

On the 20th July 1840 Lord Chief Justice Tindal delivered the opinion of the Judges as follows:—

Lord Chief Justice Tindal.—" My Lords, the facts of the " case upon which your Lordships propose a question to " Her Majesty's Judges are these: A. went from England " to Scotland, and resided and was domiciled there, and so " continued for many years till the time of his death. A. " cohabited with M., an unmarried woman, during the whole " period of his residence in Scotland, and had by her a son, " B., who was born in Scotland. Several years after the birth " of B., who was the only son, A. and M. were married in " Scotland according to the laws of that country. By the laws " of Scotland, if the marriage of the mother of a child with " the father of such child take place in Scotland, such child, " born in Scotland before the marriage, is equally legitimate " with children born after the marriage for the purpose of " taking land and for every other purpose. A. died seised of " real estate in England, and intestate. And your Lordships " found this question upon the foregoing state of facts; viz., " 'Is B. entitled to such property as the heir of A.?' And in " answer to the question so proposed to us, I have the honour " to state to your Lordships that it is the opinion of all the " Judges who heard the argument [1] that B. is not entitled " to such property as the heir of A. We have, indeed, " reason to lament that we have been deprived of the assist- " ance of one of our learned brethren, who heard this case " argued at your Lordships bar, the late Mr. Justice " Vaughan; but as he had expressed a concurrent opinion

[1] Lord Chief Justice Tindal, Mr. Justice Vaughan, Mr. Baron Parke, Mr. Justice Bosanquet, Mr. Justice Patteson, Mr. Baron Gurney, Mr. Justice Williams, Mr. Justice Coleridge, Mr. Justice Coltman, Mr. Justice Maule.

DOE, dem. BIRTWHISTLE, v. VARDILL.

10th Aug. 1840.

Opinion of the Judges.

". upon the case at a meeting held immediately after the " argument, I feel myself justified in adding the authority " of his name to that of the other Judges.

" My Lords, the grounds and foundations upon which our " opinion rests are briefly these: That we hold it to be a " rule or maxim of the law of England with respect to the " descent of land in England from father to son, that the " son must be born after actual marriage between his father " and mother; that this is a rule juris positivi, as are all the " laws which regulate succession to real property, this par- " ticular rule having been framed for the direct purpose of " excluding in the descent of land in England the appli- " cation of the rule of the civil and canon law, by which the " subsequent marriage between the father and mother was " held to make the son born before the marriage legitimate; " and that this rule of descent, being a rule of positive law " annexed to the land itself, cannot be allowed to be broken " in upon or disturbed by the law of the country where the " claimant was born, and which may be allowed to govern " his personal status as to legitimacy upon the supposed " grounds of the comity of nations.

" My Lords, to understand the nature and force of this " rule of our law, 'that the heir must be a person born in " 'actual matrimony in order to enable him to take land in " 'England by descent,' and to perceive at the same time " the positive and inflexible quality of this rule, and how " closely it is annexed to the land itself, it will be necessary " to consider the earlier authorities in which that rule is laid " down and discussed, both before and subsequently to the " statute of Merton, and more particularly the legal con- " struction and operation of that statute.

" If we take the definition of heir which Lord Coke adopts " from the ancient text writers, and which is borrowed origi- " nally from the Roman law (Co. Litt. 7. b.), namely, that he " is 'ex justis nuptiis procreatus,' the very description points " at a marriage celebrated according to the rules, requisites, " and rituals of the civil or Roman law. 'Operæ pretium " 'est scire quæ sint justæ nuptiæ,' says Huber (lib. 23. " tit. 2. de ritu nuptium). He adds, 'in promptu est Jus-

" ' tiniani responsa sunt ea quæ secundum precepta legum
" ' contrahuntur.' But to refer to the Mirror of Justices,
" perhaps the very earliest of our text books, it is there laid
" down, in page 70. as an admitted principle, ' that the com-
" ' mon law only taketh him to be a son whom the marriage
" ' proveth to be so.' Glanville, who wrote in the reign of
" Henry the Second, (probably about half a century before
" the passing of the statute of Merton,) in book 7. chap. 13.
" states that ' neither a bastard, nor any person not born in
" ' lawful wedlock, can be, in the legal sense of the term, an
" ' heir; but if any one claims an inheritance in the cha-
" ' racter of heir, and the other party objects to him that he
" ' cannot be heir because he was not born in lawful wed-
" ' lock, then indeed the plea shall cease in the King's Court,
" ' and the archbishop or bishop of the place shall be com-
" ' manded to inquire concerning such marriage, and to
" ' make known his decision either to the king or his jus-
" ' tices.' He then, in chapter 14., gives the form of the
" writ, which will be found not unimportant to the present
" inquiry; namely, ' The king to the archbishop, health.—
" ' W. appearing before me in my court has demanded
" ' against R., his brother, certain land, and in which the
" ' said R. has no right, as W. says, because he is a bastard
" ' born before the marriage of their mother; and since it
" ' does not belong to my court to inquire concerning bas-
" ' tardy, I send these unto you, commanding you that you
" ' do in the court christian that which belongs to you; and
" ' when the suit is brought to its proper end before you,
" ' inform me by your letter what has been done before you
" ' concerning it. Witness, &c.'

" Your Lordships will observe the form of this writ, how
" precisely it puts the objection against the heir's title upon
" the very rule of the English law, that ' he was born before
" ' the marriage of his mother;' by which it is necessarily
" implied that the marriage of the parents had subsequently
" taken place. Now if the question had been put generally on
" the fact whether any marriage had taken place, or upon the
" legality of such marriage as had taken place, to such a ques-
" tion of general bastardy, as it is called, the bishop would

DOE, dem. BIRTWHISTLE, *v.* VARDILL.

10th Aug. 1840.

Opinion of the Judges.

" have found no difficulty in answering, for the answer to
" that question would have been purely and exclusively de-
" terminable by the spiritual law. But as the canon law,
" on the one hand, held that the subsequent marriage of the
" parents made the antenatus legitimate, and as the common
" law of England, on the other hand, held that such ante-
" natus was not legitimate for the purpose of inheriting
" land in England, if the question had gone in the general
" form the answer of the bishop would have certified such
" antenatus to have been legitimate. The law, therefore,
" framed the question in the precise form contained in the
" writ, namely, a question of special bastardy; proving
" thereby how closely, and with how much jealousy, the law
" adhered to the rule of descent before pointed out. Now
" the question so framed did obviously place the bishop in
" extreme difficulty in making answer thereto; a difficulty
" which was very much increased by the constitution of
" Pope Alexander the Third, which had been issued very
" recently before the time when Glanville wrote, viz., in the
" sixth of King Henry the Second; by which constitution
" (in part set out by Lord Coke, 2d Institute, 96.) it was or-
" dained, ' that children born before solemnization of matri-
" ' mony, where matrimony followed, should be as legitimate
" ' to inherit unto their ancestors as those that are born after
" ' matrimony;' and it is upon the subject of this constitution
" that Glanville is commenting in his 15th chapter when he
" says, ' Upon this subject it hath been made a question,
" ' whether if any one was begotten or born before the
" ' father married the mother, such son is the lawful heir if
" ' the father afterwards married his mother. Although, in-
" ' deed, the canons and the Roman laws consider such son
" ' as the lawful heir, yet according to the law and custom
" ' of this realm he shall in no measure be supported as
" ' heir in his claim upon the inheritance, nor can he de-
" ' mand the inheritance by the law of the realm. But yet
" ' if a question should arise whether such son was begotten
" ' or born before the marriage, or after, it should, as we
" ' have observed, be discussed before the ecclesiastical
" ' judge, and of his decision he shall inform the king or his

" ' justices; and thus according to the judgment of the
" ' court christian concerning the marriage, namely, whe-
" ' ther the demandant was born or begotten before mar-
" ' riage contracted or after, the king's court shall supply
" ' that which is necessary in adjudging or refusing the in-
" ' heritance, respecting which the dispute is, so that by its
" ' decision the demandant shall either obtain such inheri-
" ' tance or lose his claim.'

" The bishop being placed in the difficulty of this con-
" flictus legum, by reason of the precise form of the king's
" writ, at length, at the parliament holden at Merton in the
" twentieth of Henry the Third, the statute was framed
" which will be found to have a strong and direct application
" to the present question. That statute has not upon the
" original roll the title prefixed thereto, upon which obser-
" vations were made at your Lordships bar, that it showed
" the intention of the law to have been no more than to
" declare the personal status of those who are described in
" such statute. In the edition of the statutes published
" under the commission from the crown there is no other
" than the general title, ' Provisiones de Merton;' and no
" more argument can justly be built upon the title prefixed
" in some editions of the statutes than upon the marginal
" notes against its different sections. That statute or pro-
" vision of Merton runs thus; viz. ' To the king's writ of
" ' bastardy, whether any one being born before matrimony
" ' may inherit in like manner as he that is born after matri-
" ' mony, all the bishops answered, that they would not nor
" ' could not make answer to that writ, because it was
" ' directly against the common order of the church; and
" ' all the bishops instanted the lords that they would con-
" ' sent that all such as were born before the matrimony
" ' should be legitimate as well as they that be born within
" ' matrimony, as to the succession to inheritance, for as
" ' much as the church accepteth such as legitimate; and all
" ' the earls and barons with one voice answered, that they
" ' would not change the laws of the realm which hitherto
" ' had been used and approved.'

" It is manifest from Bracton, who lived and wrote in the

DOE, dem. BIRTWHISTLE, v. VARDILL.

10th Aug. 1840.

Opinion of the Judges.

" time of Henry the 3d, that shortly after the statute of " Merton this question of special bastardy ceased to be " sent to the bishop, and became the subject of enquiry " and determination in the king's courts. In book 5. c. 19., " after stating the circumstances attending the statute of " Merton, and also a subsequent council holden in the " same year before the king, the archbishop, the bishops, " earls, and barons, whose names he gives, it is ordered, " 'that the words in which the writ shall go to the bishop " 'shall be, whether such a one was born before espousals " 'or marriage, or after; and that the ordinary shall write " 'back to our lord the king in the same words and with- " 'out any evasion or subtlety;' and he then states it " was further ordered at that council, 'that for the reason " 'before given of such common consent it may be in the " 'election of our lord the king, whether he will demand " 'that inquisition to be taken before the ordinary or in " 'his own court, because when the exception is properly " 'taken the answer ought not to be obscure.' And accord- " ingly it will be found by reference to the Year Books, that " from the time of Edward the 3d the distinction became " settled, that general bastardy shall be tried by the ordinary, " special bastardy per pais. (See the various authorities col- " lected in Viner's Abridgment, Title 'Trial,' 'Bastardy.')

" My Lords, the extent of the dominions of the crown at the " time of the passing of the statute of Merton demands par- " ticular attention. Normandy, Aquitaine, and Anjou were " then under the allegiance of the King of England, and had " been so at least from the commencement of the reign of " Henry the First. Many of the nobles and other subjects " of the king had large possessions both in England and " the countries beyond sea. Those born in Normandy, " Aquitaine, or Anjou, (as also in subsequent periods of our " history those born in Calais or Tournay,) whilst under the " actual dominion of the crown, were natural-born sub- " jects, and could inherit land in England. (Calvin's case, " 7th Coke, 20. b.) Many of the very persons who attended " at the coronation of Henry the Third, the occasion on " which the parliament met at Merton and the statute was

" passed, both bishops and earls and barons are known from
" history, and would so appear from their very names and
" titles, to have been of foreign lineage if not of foreign birth,
" and were, at all events, well acquainted with the rule of law
" which was then so strongly contested, yet, notwithstanding
" the rule of the civil and the canon law prevailed both in
" Normandy, Aquitaine, and Anjou, by which the subse-
" quent marriage makes the antenatus legitimate for all
" purposes and to all intents; and notwithstanding the
" precise question then under discussion was, whether this
" rule should govern the descent of land locally situated in
" England, or whether the old law and custom of England
" should still continue as to such land, under which the ante-
" natus was incapable to take land by descent, there is not
" the slighest allusion to any exception in the rule itself as
" to those born in the foreign dominions of the crown, but
" the language of the rule is in its terms general and uni-
" versal as to the succession to land in England. The ques-
" tion is, whether after the declaration made by that statute
" one of the king's subjects born in Normandy, Aquitaine, or
" Anjou, under the circumstances supposed by your Lord-
" ships, could have inherited land in England. It is not so
" much a parallel case with the present,—it is the very case
" itself, and it seems impossible to contend that such would
" have been held to be the law. In the first place, there is
" no other form of any writ to the bishop than the old form
" given in Glanville and Bracton, which raises the express
" point, whether the claimant was born or not before
" espousals and matrimony of his father and mother. And
" if the question was brought before a jury, as afterwards
" became the course of proceeding, then there was no other
" than that precise issue which could be raised upon the
" record. Further, if the question was sent to the bishop,
" it must have been sent to the bishop of the diocese where
" the action was brought, that is, where the land was situate,
" and not that of the bishop of the diocese where the party
" whose legitimacy is disputed was born, (see the book of
" Assisa, 35 fol. 7.) which case seems not obscurely to indi-
" cate that if the birth had been in France the trial would

DOE, dem. BIRTWHISTLE, v. VARDILL.

10th Aug. 1840.

Opinion of the Judges.

" be still before the English bishops; for Skipworth, a Judge
" of Common Pleas, is made to say there, 'you may carry
" 'your proofs before him in what place you please in
" 'England or from France." Again, the contest above
" adverted to was a contest between the ancient law and
" custom of England on the one hand, and the canon law on
" the other, which should prevail as to the hereditary suc-
" cession to land in England. Canon and civil law being
" acknowledged and prevailing in England in all other
" respects, with the single exception of its application to the
" descent of land, the same canon and civil law prevailing
" in the foreign dominions of the crown generally, and with
" out any exception, there seems, therefore, no reasonable or
" probable ground for the surmise of any intentions in the
" lawmakers of that day, that, with the general refusal and
" repudiation of this rule of the civil and canon law as to
" the hereditary succession to land in England, there should
" be a tacit exception in favour of a claimant born beyond
" the seas. Again, the custom would rather seem to be one
" which applies to the land itself, and not to the person only
" of the claimant. According to an observation of Bracton
" in the place above cited, when discussing the very point
" of the exception on the ground of bastardy, he says, 'that
" 'every kingdom hath its own customs differing from those
" 'of others; or there may be one custom in the kingdom
" 'of England, and another in the kingdom of France, as to
" 'succession.' And it would be singular indeed, if any
" such exception existed, that neither Bracton, who wrote
" with so much diffuseness on this very question, at the time
" of this notable refusal of parliament to alter the law, nor
" the author of Fleta, nor any of the other early writers,
" should have left the slightest vestige of an allusion to such
" exception in the rule.

" On the contrary, the observation of Lord Coke, 2 Inst. 98.
" although not made in any case in a court of law, proves in
" a manner which leaves no doubt what would have been
" the opinion of that great lawyer upon the point now under
" discussion if it had arisen in his time. 'Some have
" 'written,' he says, 'that William the Conqueror being

" ' born out of matrimony, Robert his reputed father did
" ' after marry Arlot his mother, and that thereby he had
" ' right by the civil and canon law! but that is contra
" ' legem Angliæ, as here it appeareth.' This is in effect
" saying, although born in Normandy, and legitimate in
" Normandy by the subsequent marriage of his father and
" mother there, so that he could inherit land in Normandy,
" yet as to land in England he could not take it by descent,
" for the same would be the law of descent of a kingdom,
" and of land within it. This is the very case now put to
" the Judges by your Lordships.

" It therefore appears to be the just conclusion from these
" premises, that the rule of descent to English land is that
" the heir must be born after actual marriage of his father
" and mother in order to enable him to inherit, and that this
" is a rule of a positive inflexible nature applying to and
" inherent in the land itself, which is the subject of descent,
" of the same nature and character as that rule which pro-
" hibited the descent of land to any but those who were of
" the whole blood to the last taker, or like the custom of
" gavelkind or borough-English, which cause the land to
" descend in the one case to all the sons together, in the
" other to the younger son alone.

" And if such be, as it appears to us to be, the rule of law
" which governs the descent of land in England, without any
" exception either express or implied therein on the score
" of the place of birth of the claimant, it remains to be con-
" sidered whether by any doctrine of international law or by
" the comity of nations that rule is to be let in by which B.
" being held to be legitimate in his own country for all pur-
" poses must be considered as the heir at law in England.

" The broad proposition concluded for on the part of the
" plaintiff in error is, that legitimacy is a personal status to
" be determined by the law of the country which gives the
" party birth, and that when the law of that country has
" once pronounced him to be legitimate, he is by the comity
" of international law to be considered as legitimate in
" every other country also, and for every purpose; and it is
" then contended, that as by the Scotch law there is a pre-
" sumptio juris et de jure, that under the circumstances

DOE, dem. BIRTWHISTLE, *v.* VARDILL.

10th Aug. 1840.

Opinion of the Judges.

DOE, dem. BIRTWHISTLE, *v.* VARDILL.

10th Aug. 1840.

Opinion of the Judges.

" supposed, the parents of B. were actually married to each " other before the birth of B., so such presumption of the " Scotch law by which his legitimacy is effected must also " be adopted and received to the same extent in the English " Courts of Justice.

" Now, there can be no doubt but that marriage, which " is a personal contract, when entered into according to the " rites of the country where the parties are domiciled and " the marriage celebrated, would be considered and treated " as a perfect and complete marriage throughout the whole " of Christendom.

" But it does not therefore follow, that with the adoption " of the marriage contract the foreign law adopts also all " the conclusions and consequences which hold good in the " country where the marriage was celebrated. That the " marriage in question was not celebrated in fact until after " the birth of B., is to be assumed from the form of the " question. Indeed, except on that supposition, there would " be no question at all. Does it follow then, that because " the Scotch hold a marriage celebrated between the parents " after the birth of a child to be conclusive proof of an " actual marriage before, a foreign country which adopts " the marriage as complete and binding as a contract of " marriage must also adopt this consequence? No authority " has been cited from any jurist or writer on the subject " of the law of nations to that effect; nothing beyond the " general proposition, that a party legitimate in one country " is to be held legitimate all over the world. Indeed the " ground upon which this conclusion of B.'s legitimacy is " made by the Scotch law is not stated to us, and we have " no right to assume any fact not contained in the question " which your Lordships have proposed to us. We may " however observe that, in the course of the argument at " your Lordships bar, the ground has been variously stated " upon which the laws of different countries have arrived " at the same conclusion. It was asserted that, by the law " of Scotland, the subsequent marriage is not to be taken " to be the marriage itself, but only evidence, though con- " clusive in its nature, of the marriage prior to the birth of " B. That the canon law rests the legitimacy of the son

" born before such marriage upon a ground totally different,
" viz. that having been born illegitimate he is made legiti-
" mate—legitimatus—by the subsequent marriage, by a
" positive rule of law, on account of the repentance of his
" parents; whereas by the Scotch law a marriage previous
" to his birth is conclusively presumed, so that he was
" always legitimate, and his parents had nothing to repent
" of. Pothier, on the other hand, (Contrat de Marr. Part V.
" ch. 2. art. 4.) when he speaks of the effect of a subsequent
" marriage in legitimating children born before it, disclaims
" the authority of the canon law, nor does he mention any
" fiction of an antecedent marriage, but rests the effects
" upon the positive law of the country. He first instances
" the custom of Troyes: 'Les enfans nés hors de marriage de
" 'soluto et soluta, puisque le père et la mère s'épousent,
" 'l'un l'autre succèdent et viennent à partage avec les
" 'autres enfans, si aucuns y a;' and then adds, 'that it is a
" 'common right received through the whole kingdom.'

" Now, it would never be contended by any jurist that
" the law of England, with respect to the succession of
" land in England, would be bound to adopt a positive law
" of succession like that which holds in France, the dis-
" tinction being so well known between laws that relate to
" personal status and personal contracts, and those which
" relate to real and immoveable property, for which it is
" unnecessary to make reference to any other authority than
" that of Dr. Story, in his admirable Commentaries on the
" Conflict of Laws (see sections 430 and following, where
" all the authorities are brought together); and if such posi-
" tive law is not upon any principle to be introduced to con-
" trol the English law of descent, what ground is there for
" the introduction into the English law of descents, not only
" of the contract of marriage observed in another country,
" which is admitted to be adopted, but also of a fiction with
" respect to the time of the marriage, that is, in effect, of
" a rule of evidence which the foreign country thinks it
" right to hold?

" But admitting for the sake of argument, and we are
" not called upon to give an opinion on that point, that B.,
" legitimate in Scotland, is to be taken to be legitimate all

DOE, dem. BIRTWHISTLE, *v.* VARDILL.

10th Aug. 1840.

Opinion of the Judges.

DOE, dem. BIRTWHISTLE, v. VARDILL.

10th Aug. 1840.

Opinion of the Judges.

" the world over, the question still recurs whether for the " purpose of constituting an heir to land in England, some- " thing more is not necessary to be proved on his part than " such legitimacy? And if we are right in the grounds on " which we have rested the first point, one other step is neces- " sary, namely, to prove that he was born after an actual mar- " riage between his parents, and if this be so, then upon the " distinction admitted by all the writers on international " law, the lex loci rei sitæ must prevail, and not the law of " the place of birth.

" In the course of the discussion some stress appears to " have been placed on the argument, that if B. had died " before A. the intestate, leaving a child, such child might " have inherited to A., tracing through his legitimate parent; " and then it was asked, if the child might inherit, why not " the parent himself inherit? But the answer to that sup- " posed case appears to be, that if the parent be not " capable of inheriting himself, he has no heritable blood " which he can transmit to his child, so that the child could " not under the assumed facts have inherited, and the ques- " tion, therefore, becomes in truth the same with that " before us. The case supposed would be governed by the " old acknowledged rule of descent, 'Qui doit inheriter al " 'pere doit inheriter al fitz.'

" The two decided cases[1] which have been relied upon in " the course of the argument, that of Sheddan v. Patrick, " and that of the Strathmore Peerage, do not upon con- " sideration create any real difficulty. Those cases decide " no more than that no one can inherit without having the " personal status of legitimacy, a point upon which all " agree, but they are of no force to establish the main " point in dispute in this case, viz. that such personal status " is sufficient of itself to enable the claimant to succeed as " heir to land in England.

" Upon the whole, in reporting to your Lordships as the " opinion of the Judges, 'that B. is not entitled to the real " 'property as the heir of A.,' I am bound at the same time " to state, that although they agree in the result, they are

[1] See ante, p. 586.

" not to be considered as responsible for all the grounds " and reasons on which I have endeavoured to support and " explain such opinion."

DOE, dem. BIRTWHISTLE, v. VARDILL.

10th Aug. 1840.

Lord Chancellor.—The subject upon which your Lordships have had the opinion of the Judges is of so much importance, and the learning contained in that able opinion is of such a description, as in my opinion to require further consideration. I shall, therefore, propose to your Lordships that the further consideration of the case be postponed.

Ld. Chancellor's Speech.

Lord Brougham.—I perfectly agree in opinion with my noble and learned friend. It is quite impossible to express more strongly than I desire to do the obligations which I think your Lordships and the law are under to the learned Judges, for the very able, elaborate, and lucid opinion they have given.

Ld. Brougham's Speech.

It is perhaps enough to say respecting this opinion of the learned Judges, that in a case which has undergone argument in every form for somewhere about twelve years past, both in the sister kingdom and here,—first in the different Courts of Westminster Hall, and next at your Lordships bar —upon which the learned Judges in the Courts below, upon former occasions, in deciding the questions submitted to them, and the learned Judges here in assisting your Lordships—have given their opinions, and discussed the points—nevertheless, at the eleventh hour as it were, and at the very end of this long-continued discussion, very great new light, if I may express it, has been thrown upon the question by the reasonings of the learned Judges, and very important additions have been made by the arguments to-day to those arguments and that learning which had been brought to bear upon that question in its former shape, in your Lordships House, in Westminster Hall, and in the Courts of Scotland.

Under these circumstances, it is not for me to say that the opinion, or rather the leaning of opinion, which it is well known to your Lordships I formerly expressed, is not materially altered by the quite new form in which the argument is now placed. I am by no means prepared to state that I shall not, on reconsidering the reasons of the learned Judges

DOE, dem. BIRTWHISTLE, *v.* VARDILL.

10th Aug. 1840.

Ld. Brougham's Speech.

now submitted, find a sufficient answer to the difficulties which formerly pressed upon me, which I very fully stated to your Lordships, I think, in the year 1835.

Upon these grounds I entirely agree in thinking that the further consideration of this case ought to be postponed. I ought to add, that in the whole of the first part of the reasoning of the learned Judges I was prepared to agree. What I have doubted is the latter part of the reasoning. One thing has struck me, that supposing your Lordships shall ultimately be of opinion that you ought to decide in favour of the defendant in error, and to affirm the judgment of the Court below, it will be absolutely necessary that the legislature should interfere in order to allay the evils which will arise out of the conflict of law, respecting the personal status in the two parts of the kingdom.

Further consideration postponed.

The cause having (10th August 1840) been put down for judgment, Lord Brougham and the Lord Chancellor severally expressed their opinions. (See Mr. West's Reports of English and Irish Causes in the House of Lords, Volume 1st.)

The LORD CHANCELLOR, in moving judgment in favour of the defendant in error, expressed his satisfaction with the grounds upon which the Judges rested their opinion; his Lordship observing, that the question being one which involved the right of succession to real property in England, the decision of it necessarily depended exclusively on the principles which regulate the descent of land in that country.

Judgment.

The House of Lords ordered and adjudged, That the said judgment given in the said Court of King's Bench be and the same is hereby affirmed; and that the record be remitted, to the end such proceeding may be had thereupon as if no such writ of error had been brought into this House.

T. BRIGGS—LAW and TINDAL, Solicitors.