United Kingdom House of Lords Decisions

No. 59.

No. VI.

VERDICT AND JUDGMENT of the COURT of KING'S BENCH, and QUESTIONS proposed by the HOUSE of LORDS to the TWELVE JUDGES, in the case Doe on dem. of Birtwhistle v. Vardill,—p. 294.

" THE jurors say, upon their oath, that William Birtwhistle, being seized in his lifetime, in his demesne, of and in one undivided third part, the whole into three equal parts to be divided, of and in the premises in the within declaration contained, on the 12th day of May 1819 died so seized, without leaving any issue of his body: That all the brothers of the said William Birtwhistle have died in the lifetime of the said William, and that they all died unmarried and without issue, save and except Alexander, one of the brothers of the said William, who married and had issue in the manner and at the time particularly herein-after mentioned: That one Mary Purdie was also a person dwelling and remaining in Scotland, domiciled there until the time of his death herein-after mentioned: That the said Alexander Birtwhistle and the said Mary Purdie being so domiciled in Scotland as aforesaid, the said Alexander

Birtwhistle did cohabit with the said Mary Purdie, and did beget upon the said Mary Purdie the within named John Birtwhistle; which said John Birtwhistle was the only son of the said Alexander Birtwhistle and of the said Mary Purdie, and was born in Scotland on the 15th day of May in the year of our

Lord 1799: That after the birth of the said John Birtwhistle, that is to say, on the 6th day of May 1805, the said Alexander Birtwhistle and Mary Purdie were married in Scotland according to the laws of Scotland: That, on the 5th day of February in the year of our Lord 1810, the said Alexander Birtwhistle, the father of the said John Birtwhistle, died in Scotland, seized to him and his heirs of divers lands and tenements there situate, leaving the said John Birtwhistle him surviving, who, after the death of his said father, was duly, according to the law of Scotland, served heir to the said lands and tenements of the said Alexander Birtwhistle, and now holds and enjoys the same in his own right; he, the said John Birtwhistle, having from the time of his birth hitherto dwelt and remained in Scotland, and been domiciled there: That if a 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, by the law of Scotland, with children born after the marriage, for the purpose of taking land and every other purpose: That the said John Birtwhistle, on the 6th day of July, in the fifth year of the reign of our said Lord the now King, did demise the said one undivided third part, the whole into three equal parts to be divided, of and in the said several tenements in the declaration within-mentioned particularly described, to the within named John Doe, to hold the same unto the said John Doe and his assigns, from the fourth day of the same month of July, for the term of twenty-one years thence next ensuing; by virtue whereof the said John Doe entered into the said several tenements, with the appurtenances, and became and was possessed thereof for the term aforesaid; and being so possessed thereof, the said Agnes Vardill afterwards, (that is to say) on the sixth day of the same month of July, with force and arms, entered upon the said several tenements so then being in the possession of the said John Doe, and ejected the said John Doe from the same; but whether or not, upon the whole matter aforesaid, by the jurors aforesaid, in form aforesaid found, the said Agnes is guilty of the trespass and ejectment within specified, the jurors aforesaid are altogether ignorant, and thereupon they pray the advice of the Court of our said Lord the King, before the King himself; and if, upon the whole matter aforesaid, it shall seem to the said Court that the said Agnes is guilty of the said trespass and ejectment, then the jurors aforesaid say, that the said Agnes is guilty thereof, in manner and form as the said John Doe hath within thereof complained against her; and in that case they assess the damages of the said John Doe, on occasion of the trespass and ejectment aforesaid, (besides his costs and charges by him about his suit in this behalf expended), to one shilling, and for those costs and charges to forty shillings; but if,

upon the whole matter aforesaid, it shall seem to the said Court that the said Agnes is not guilty of the trespass and ejectment aforesaid, then the said jurors, upon their oath aforesaid, say, that the said Agnes is not guilty thereof in manner and form as the said John Doe hath within in pleading alleged."

The case was argued in the Court of King's Bench in Easter Term 1826, when judgment of the Court was given in favour of Vardill, on the ground, that Birtwhistle was not legitimate for the purpose of inheriting land situated in England.

The case was then appealed, and the opinions of the Twelve Judges having been taken, the House thereafter proposed to them the following questions,—

1. If the fact of the legitimacy or illegitimacy of a native of Scotland is at issue in the Courts of law in England, is it or is it not a principle of the law of that country, that, in judging whether he was born in justis nuptiis, it withdraws, and leaves that legal question to the exclusive judgment of the law of Scotland,—where his parents are domiciled, where the alleged marriage took place, and where he was born?

2. If, in the judgment of the law of Scotland, a native of that country is born in justis nuptiis, does or does not the law of England, from that comity established by international law, hold him to be possessed of every right which an Englishman born in justis nuptiis enjoys? And, independent of every view of international law, must or must he not, in law, be deemed to enjoy such rights, under the fourth and twenty-fifth articles of the Union betwixt England and Scotland, approved of and confirmed by the parliaments of the two countries; the former of which provides, "that there be a communication of all rights, privileges and advantages, which do or may belong to the subjects of either kingdom, except where it is otherwise expressly agreed in these articles:" and the latter of which provides, "that all laws and statutes in either kingdom, so far as they are contrary to or inconsistent with the terms of these articles, or any of them, shall from and after the Union cease and become void, and shall be so declared to be by the respective parliaments of the said kingdoms?"

3. A., a native of Scotland, domiciled in that country, where he possessed a landed property, lived with a female, B., by whom he had two sons, C. and D. Some years after the birth of these children, A. went through a ceremony of marriage with B., by which, according to the law of Scotland, C. and D. undoubtedly became legitimate.

At the death of the father A., C. the eldest son, inherited his estates in Scotland, and some years afterwards purchased freehold estates in England. C. afterwards died intestate, leaving no children. His legitimate brother, D., inherited his estates in

Scotland, and was regularly served heir to them. D. also claims the freehold estates in Engand of which his brother died possessed, on the ground that he is the nearest heir to his brother C. It has been, on the other hand, asserted, that D., though the legitimate brother of C., cannot inherit his English estates; because, though the law of Scotland holds that the ceremony of marriage which took place, is only evidence of that consent which constitutes marriage having been given before the birth of C. and D., and therefore regards them as being born in lawful wedlock, the law of England holds, that de facto they were born before the marriage ceremony, and, therefore, though it admits their legitimacy, holds that they cannot inherit.

By the law of England, must or must not this question be decided according to the law of Scotland—where these two children were born, where the marriage ceremony took place, and where the parties were domiciled? And if it is to be decided by the law of Scotland, assuming that the law of that country is here accurately stated, does it not follow, that C. and D. being born in justis nuptiis, according to the law of that country, D. has a right to inherit the lands in England of which his brother C. died possessed?

4. A., a domiciled Scotsman, possessed of estates in that country, cohabited with B., by whom he had a son, C. Some years after which a marriage ceremony passed betwixt him and B., which, according to the law of that country, furnished evidence of that mutual consent having taken place antecedent to the birth of C. which constitutes marriage, and gave to his son C. the status of a son born in lawful wed-lock.

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A., some years after this marriage, retired to England, and acquired a domicile there, where he became possessed of a large personal estate. At the death of A., C. was served heir to the Scotch landed property. Is he or is he not also entitled to the personal estate in England, consisting of leasehold and funded property, of which his father, supposed to be a domiciled Englishman at the time of his death, died possessed?

5. A., an unmarried man, went from England to Scotland, where he acquired landed property, resided, and was domiciled for many years.

Soon after his arrival in that country he formed a connexion with a female, M., with whom he lived, and by whom he had a son, B. Some years after the birth of this child a regular marriage ceremony, according to the forms prescribed by the law of that country, took place betwixt A. and M.

Assuming (as is laid down by all the great authorities who have written on the law of Scotland) that B. in consequence of this ceremony is held to be legitimate, by a

presumption or fiction of law that the marriage had taken place betwixt his parents before he was born; or, in other words, assuming that the ceremony of marriage which so took place is by the law of Scotland regarded as evidence, that before the procreation of B. that mutual consent to marry had passed betwixt A. and M. which the law of that country regards as constituting marriage, and that he is therefore held to have been born in justis nuptiis, and as such was in truth served heir to the landed property in Scotland in which his father died infeft; under such assumption, the learned Judges are requested to say, whether B. is or is not entitled, as the heir of A., to the real estates in England of which A. dying intestate was seised?

6. Is there any case in which, under the law of England, an only son, whose legitimacy is admitted, is nevertheless debarred from inheriting landed property of which his father dying intestate was possessed?

7. If such case or cases exist, the learned Judges are desired to give to this House references to the authorities by whom they are reported, and to state the principles of law on which such judgments proceeded.

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