No. IV.

OPINIONS of the JUDGES in the COURT OF SESSION; referred to at p. 290.

LORD PRESIDENT.—In considering the very difficult and important question which occurs in this cause, extreme cases may be put, which are very revolting to one's feelings; and therefore it is the more necessary to endeavour to discover some clear principle which will solve the question. On the one hand, if we suppose a Scotsman and Scotswoman, both domiciled in Scotland, to have connexion, in the course of which the woman becomes with child, but is delivered of that child in the course of a temporary jaunt or visit in England, it does seem to be very revolting to say that such child shall not be legitimated by the subsequent marriage of the parents in Scotland. E contra—If we suppose an Englishman and woman, both domiciled in England, to have an illicit connexion, the fruit of which is a child born in England, and the parties continue to be domiciled in England for thirty or forty years, during all which time the child is illegitimate, it does seem to be equally revolting to say, that the parents, by stepping across the border, and marrying in Scotland, should thereby legitimate that child. But I think there is a clear principle of the law of Scotland applicable to this case, whatever may be said of the above extreme cases, or of others which may be put.

I hold the facts in this case, as applicable to the status of the parties in other respects, to be clear:—1*mo*, The defender was born and domiciled in England down to the marriage of his parents; 2*do*, His mother, his only legal parent, was as certainly a born and domiciled Englishwoman at the date of her child's birth, and at the date of her subsequent marriage; and she has continued to be domiciled in England ever since; 3*tio*, As to Alexander Ross, the father of the defender, he was born a Scotsman; and, by inheriting and succeeding to heritable property in Scotland, he became subject to the jurisdiction of its Courts of law, though it required a particular form of citation to bring him into Court. But in every other respect he was a domiciled Englishman. He had resided there, and there only, for forty or fifty years: His visits to Scotland were not frequent, and of very short duration; and it does not appear that he had any establishment of servants in Scotland: He carried on a great business in England. In short, to every effect whatever (unless the present case shall be held to be an exception) he was domiciled in England at the birth of the child,—at his marriage,—and from that time to his death. These are the circumstances of this case, in reference to the personal condition of the three principal parties; and, by the law of the domicile of all of them, the bastardy of the defender was indelible and irreversible.

Now it appears to me that this directly points at a principle of the law of Scotland sufficient to rule this case. For whenever, by the law of Scotland, bastardy is indelibly fixed on a child, the subsequent marriage of the parents does not legitimate it. This is unquestionably the case if the child be born in adultery, whether of the father or mother. I hold it also to be the case, though some lawyers doubt it, if the father or mother have entered into an intermediate marriage with a third person. But as to the first case, of an adulterous bastard, it is quite fixed that such bastardy is indelible and irreversible, and that the subsequent marriage of the parents does not legitimate such

child. Now it appears to me, that, by the comitas gentium, we are bound to give the same effect to indelible bastardy by the law of England, that we do to the same state by the law of Scotland. The first question we ask in Scotland is, Was the child born under such circumstances as to be in a capacity to be legitimated per subsequens matrimonium? If the answer be in the negative, then legitimacy will not follow. And I am of opinion, that if the same question be put as to a child born in England, and the answer be also in the negative, (as it must be in the circumstances of this case), that the result ought to be the same.

I have carefully considered all the authorities produced on both sides. Many of them push their argument too far; and many of them are founded on metaphysical subtleties; and none of them, except one, touch this identical case. But there is one which is directly in point, and which is grounded on the principle I have laid down. It is the opinion of Boullenois, who is said to be a French lawyer of eminence, in which country legitimation per subsequens matrimonium is recognized as amply, or I believe even more so, than in Scotland. He says, vol. i. p. 62.—' J'applique, encore, cette décision à un enfant Anglois ' né en Angleterre d'un concubinage, et dont les pere et mere Anglois ' seroient venus demeurer en France, et y auroient été maries sans ' s'y être fait naturaliser, parce qu'etant veritablement etrangers, et ' comme tels soumis aux loix d'Angleterre, leur enfant ne peut être, ' suivant ces loix, batard en Angleterre de naissance, et etre regardé ' comme legitime en France, parce qu'il porte partout l'etat et la ' condition dont il est par les loix de sa nation.' This is the very case; and it appears to me to be solved on the only principle which will carry us through this case, and even through the extreme cases which I have above supposed.

I cannot lay any stress on the circumstance, that Alexander Ross, the father, was proprietor of a landed estate in Scotland; because the very same question might have occurred in a case of moveable succession, or even as to a landed estate of a third party, to which Alexander Ross and the heirs of his body were substitutes, and the succession to which had not opened till after his death. And I hold it to be quite clear—at least it is my decided opinion—that a different decision could not be given in those cases from what must be given in this.

If this defender be legitimated by the law of Scotland, he must be so to every purpose, and must take every right to which a legitimate child is entitled by our law. He cannot take the estate of his father, and not that of a third party, to which he may be equally heir; and he cannot take a landed estate, and not be equally entitled to moveable property.

LORD CRINGLETIE.—I accede to the above, so far as it goes. My own opinion is founded on the reasons in it, and some others in addition and explanation of the above.

It is unnecessary to prefix any statement of the facts out of which this question arises. These will be well known to those to whom the following is offered. On the merits of this case, I have bestowed all the attention the novelty and importance of it certainly deserve; and the following are my ideas:—

We have one point completely fixed by the cases of Shedden and the Earl of Strathmore, that a man domiciled in England or in America, having an illegitimate child by an English or an American

woman, marrying in either of these countries, and dying domiciled there, does not by such marriage legitimate the child.

The only difference, then, in this case is, that the late Mr Ross, who, being domiciled in England, had an illegitimate son by an Englishwoman domiciled there, came to Scotland, and married the woman there. And, therefore, the only question seems to me to be, whether the place where the marriage was celebrated can make any difference on the rights of the child? I think that jurists have gone too far when they say, that the law of domicile impresses on the subject qualities which are inherent to, and never quit him, in whatever place he may go to. But still it appears to me to be quite clear, that the law of the domicile rules this case.

1. I am of opinion, that the locus originis is a mere circumstance, and has no other effect than to cast the balance where other circumstances are equally weighty. A man born in Scotland going to England, and being domiciled there, derives no right nor privilege whatever from his birth, and vice versa with an Englishman. Of this we have a decided instance in the above-mentioned cases of Shedden and Strathmore, in which it was ruled that a man, domiciled where English law prevails, having natural children by a woman whom he afterwards marries in the same country, cannot thereby legitimate the children. 2. If either of these persons marry in Scotland, or in England, or in France, he derives no right whatever from the locus contractus. The forms of the country where the marriage is celebrated must be observed in order to constitute a marriage, but that is all; when they return home, the law of the domicile will govern all the effects of the marriage. An English couple marrying at Gretna Green, and returning to England, obtain none of the privileges of Scotland because they happen to marry there. On the contrary, suppose a domiciled Scotchman and woman, having natural children, to take a jaunt to England, merely as a trip for pleasure, and to marry there, I cannot for a moment doubt that such marriage would legitimate the children; because it would only call forth, or produce a consequence belonging to the man, and woman, and children, from the law of their domicile, which was dormant, and required only an actus solemnis to promulgate and give it birth; and this seems to have been the principle on which the French case of Conti was decided by the French courts. In the same way, imagine that an English man and woman, domiciled in England, and having natural children, come to Scotland, marry there, and return directly to England—I have not a conception, and indeed I have not heard it pleaded, that by such a marriage these persons could legitimate their offspring. From these premises I draw these conclusions:—1*st*, That the locus originis in a question like the present is of no importance; 2*d*, That the place of the marriage is of no importance; and, 3*d*, That it is the law of the domicile that must govern all the consequences arising from marriage; and that the law of the domicile of the mother must regulate the status and privileges of her natural children. Now I consider it to be admitted, that the late Alexander Ross, though born in Scotland, went to England at an early period,—that he became domiciled there,—that he continued to be so during his whole life,—and that he died domiciled there. In that situation, his being born a Scotchman is of no consequence,—his having an estate here is of as little, farther than to constitute jurisdiction of Scotch Courts over him to the extent of the value of that estate; but it did not make him a domiciled Scotchman. His having an estate here did not constitute Scotland as the spot 'ubi larem,

'penates, rerum ac fortunarum suarum sedem constituit, unde non sit 'discessurus, si nihil avocet; unde cum profectus est, peregrinari 'videtur, quod si rediit peregrinari jam destitit.'* I hold this to be the true definition of a domicile. I hold that England was the seat of Mr Ross's fortunes; and that, when he came to Scotland, he was travelling for a certain purpose, 'peregrinari visus est;' and when he returned to England, 'peregrinari destitit.'

But, farther, an idea occurs to me which was not mentioned at the pleading; and it is this, that natural children do not belong to the reputed father, nor do they take their domicile from him. They belong to the mother, whose domicile is theirs, and whose settlement, in case of poverty, is theirs. Now, the defender in this action was born in England, of an Englishwoman domiciled there, and acquiring all his rights and all his disqualifications from her. By the law of England he had no right to be legitimated by the subsequent marriage of his mother to his reputed father; and, consequently, the origin of Mr Ross, or his having an estate in Scotland, is nothing to the purpose in a question of status of the defender, who is English by birth and by domicile; in proof of which it must be conceded, that, if the marriage had taken place in England, it would have had no effect in legitimating the defender. That is a point not to be disputed after the cases of Shedden and Lord Strathmore, who were both Scotchmen. What difference, then, can it make that the marriage was in Scotland, when the woman and her child brought with them the disqualifications attending on their domicile? The defender asks two things, viz. 1*st*, That he is to enter Scotland as an Englishman, and to become a Scotchman; 2*d*, To become a legitimate Scotchman. Put the case that the defender had been born of a French woman domiciled in France, in which case the child would have been a Frenchman; is it possible to allow that the reputed father could have brought the mother to Scotland, and, by marrying her, legitimate the child, to the effect of enabling him to succeed to Scotch landed property? No; he could not have done so; for although, by the law of France, legitimation per subsequens matrimonium is allowed, yet the stain of alien to Britain would have adhered to the boy from his birth. And, in the same way, though the defender was born a British subject, yet the disqualification to be legitimated, attached to him at his birth, cannot be removed. I think that Lord Redesdale's idea in the case of Shedden is correct, and equally applies to this one—that the law of England touched the defender at his birth, and the retrospective character of the law of Scotland could not alter his status. I think that it is a decided point, that the defender could not have been legitimated by his reputed father marrying his mother in England; that the place of celebrating a marriage is of no importance whatever in governing the effects of that marriage; and consequently nothing appears to me to be clearer, than that the circumstance of the late Alexander Ross having married in Scotland, can have no other effect than if the marriage had been celebrated in England. We see that legitimatio per subsequens matrimonium is part of the law of France. The late Mr Ross might have gone there and married; but would that have any more effect than if he had married in England? I think it would not.

The law of legitimation per subsequens matrimonium is certainly part of the law of Scotland; and it is no part of my province to alter

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* Cod. Lib. 7. De Incolis.

it; but, in cases of difficulty, I do not think that an institution encouraging loose morals is entitled to any favour leading to a liberal interpretation.

Lords Mackenzie and Medwyn.—In this case, brieves have been purchased from Chancery, both by the pursuer and the defender, to take up the succession to the estate of Cromarty. But as the pursuer can be entitled to succeed only in case the defender be incapable of succession, as being a bastard, the parties have stopped short to try that question under the present declarator of bastardy at Mrs Rose's instance, in the Commissary Court, which appears the proper form for doing so. The points of law agitated in this case are new, and attended with difficulty, as well as importance. But, on the whole, we are of opinion, that the judgment of the Commissaries ought to be sustained, by dismissing the advocation.

The principal grounds of this opinion we shall endeavour to express briefly, without resuming at length the circumstances of a case in which there is not much dispute regarding the facts, and on which many opinions are to be given.—We think it clear that legitimation per subsequens matrimonium is a general rule of the law of Scotland;* and, therefore, that the defender must be held to be legitimatized by the marriage of his father and mother, which took place in Scotland, unless sufficient reasons can be assigned why his case shall be taken out of that general rule. We have then to consider the grounds attempted to be maintained to this effect by the pursuer of the declarator of bastardy.

1. It has not, we think, been argued as a reason why legitimation per subsequens matrimonium should be denied to children conceived in England, that the concubinage and marriage must be taken together as one course of action, constitutive of legitimate filiation, and of which the whole must take place under the law of Scotland. And we do not think this could have been argued with any effect. For such an argument must rest on the idea that the law of Scotland regards concubinage with some favour or toleration more than the law of England does, and holds out, as an inducement to parties for forming such a connexion, the possibility of afterwards legitimatizing any issue they may have. But we think this is certainly not the view of the law of Scotland. The law of Scotland regards concubinage as immoral and irreligious, and even criminal, and has no view whatever of favouring or tolerating it. But as this law is unable wholly to prevent concubinage, it allows legitimation per subsequens matrimonium, with the view, among others, of drawing the parties out of that state. In this respect the law of Scotland is the same, we conceive, with the canon law, from which it appears to have been derived, and similar, indeed, even to the Roman law, in which legitimation per subsequens matrimonium was originally introduced by Constantine, the first Christian Emperor, as a temporary law applicable to past concubinage only, and to children born before the date of the law only; and in which, even when legitimation was afterwards extended so as to include every case of concubinage, it was never allowed with any view of favouring or acknowledging concubinage as a legal or semi-legal state. It is the state of marriage, and not of concubinage, that is favoured:—'Tanta enim est vis matrimonii subsequentis,' says the canon law, 'ut

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* Balfour, p. 239. Craig, B. ii. tit. 18. sect. 9. Argument in the case of Lord Pitsligo, 23d July 1630.

'de priori delicto inquiri non sinat, et illud omnino tollat et purget.'* Setting this view aside, then, we see no reason why, in order to legitimation per subsequens matrimonium, the conception or birth of the child should be in Scotland, so far as relates to the interest or right of the father or mother. It seems sufficient that they stand in the illegal relation of father and mother of a child born without marriage, and are proper subjects of the law of Scotland, in order that this law may offer them the inducement to change this illegal relation into a legal one per subsequens matrimonium.

2. It is said that the legitimation of bastards in Scotland, per subsequens matrimonium, is founded on, and limited by, a fictio juris, viz. that the parents were actually married at the date of the birth, or rather conception, and that, when the parents were resident in England at the time of the conception and birth, this fiction cannot be admitted. We doubt whether the rule of legitimation by subsequent marriage was substantially founded on any fiction of that kind, or whether it be possible to limit the rule precisely by means of any such fiction. We doubt very much whether such fiction can be admitted to any greater extent than this, that when such circumstances have existed as would infer not only nullity, but even criminality, by the law of Scotland, in a marriage between the parents, if it be supposed to have taken place before the conception of the child, then legitimation is excluded. Thus if, at the conception, either father or mother stood already married to another person, legitimation per subsequens matrimonium is excluded. But we doubt whether any other circumstance, inferring simply incapacity of the parties then to marry, would bar legitimation,—as, for instance, the insanity of one of the parents at the time of conception. Without determining that question, we hold it to be quite plain, that at least the circumstances must be such, that, in case the father and mother had married at the time of conception of the child, the marriage would have been void. Now what circumstance of that kind exists in the present case? The presence of the parties in England surely is not such circumstance. Could they not have married in England, if they pleased, at the time this child was begot? Could they not have come to Scotland, and married at that time as well as after? In the present case, we are not able to see the shadow of difficulty in the application of the fiction, taking it in the utmost force that can be imputed to it.

3. It has been argued, that this mode of legitimation in Scotland is excluded by the unchangeable nature of the personal status of bastardy, which the bastard has acquired by his conception and birth in England, and brings with him into Scotland. It does not appear to us possible to adopt that argument. We do not think that an English bastard coming into Scotland could bring the English law of bastardy with him, any more than an English lawful son coming into Scotland would bring the English law of legitimate filial relation with him,—or an English father and mother, married or unmarried, could bring with them the English law applicable to their respective conditions,—or any more than a Scotch bastard, or lawful child, or Scotch father and mother, going to England, would import with them into England a portion of the Scotch law for the regulation of their own rights. An English bastard coming into Scotland will be a bastard here, because his parents are not married; but his status here must, we think, be that of a Scotch bastard, not of an English one. On

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* Craig. B. ii. tit. 13. sect. 16.

this point, the decisions in the late divorce cases apply a fortiori. For, in these cases, the argument was, that the indissolubility of the English marriage must continue in Scotland, not only because personal status generally continued when the person passed into another country, but, a fortiori, because the status of marriage was constituted by express contract, made under the law of England, and specially fixing this indissolubility; and that this status could not be changed in this respect without violation of that contract. Yet this Court unanimously held that argument not to be good. After these decisions, we think it is impossible to receive the maxim, status personalis, ubique circumferri, without such qualifications as will entirely exclude it from having any effect in this question.

4. It is said that the parties concerned here were not domiciled in Scotland at the time of the marriage, or after it; and, therefore, the law of Scotland ought not to be held to have affected their rights. Now, if this meant, and consistently with the facts of the case could mean, that the parties had no such connexion with Scotland as made their persons properly subject to its law, we think the reason would be good why their personal status should not be affected by that law. But it is impossible, in this case, to make such a statement consistently with truth. Alexander Ross was a native Scotchman, who had gone to England in order to carry on business there—not in all probability meaning to end his days there—but continued to hold in Scotland a landed estate—continued to visit Scotland occasionally, and to exercise the rights of a Scotch proprietor and citizen; in particular, remaining liable to the jurisdiction of the Scotch Courts; so that, at any time, decree could have passed against him, and there was no occasion to cite him as a foreigner is cited. When this person came to Scotland, bringing with him his son, and the mother of his son, for the manifest purpose of subjecting himself and them fully to the law of his native land, in order that, under that law, he might marry the mother, and legitimatize the son, so that the son might succeed as a Scotch heir to the Scotch landed estate; and when, for this purpose, he did marry the mother, after the regular form of the Scotch law, and acknowledge the son as his lawful heir, and did stay in Scotland for some months,—it does seem to us impossible to hold that he was not a proper subject of the law of Scotland. We cannot comprehend on what grounds he could pretend to say, or any body else to say, that, after all this had happened, this native Scotchman was still to be viewed as a stranger, on whom the law of Scotland ought not to attach,—who was to live here as if he had been a prisoner of war, or had been cast on our shore from a foreign vessel to-day, and was to sail away in another to-morrow. We think he was as much a subject of the law of Scotland, to all intents and purposes, as any man in that kingdom. Then, if he was so, his wife, who came there to marry him, and did there marry him, and there lived with him for some time after her marriage, must also have become a subject of Scotland; and her son, who also came to Scotland with her, and staid there in order to this very effect, must equally have been so. Suppose that, on the day Alexander Ross left Scotland, his affections had changed, and he had disowned this son, and the present defender had brought a declarator of legitimacy against him, could he have pleaded that he was a stranger, on whom the law of Scotland did not attach, and, therefore, that though he had married the mother of his son, this son was not legitimated per subsequens matrimonium? Could such a defence have been sustained? It would not, we think, have

been easy to sustain it; and yet, if that could not have been done, the plea of want of domicile can just as little be sustained now: For legitimacy, once existing, cannot be lost. It is said, that if Alexander Ross had died, then his domicile for intestate succession in mobilibus would have been held to have been in England. Perhaps it would. Intestate succession in mobilibus appears to be allowed to be regulated by one law, without division; and so the law of the country with which the defunct was most connected is wholly preferred, however much the defunct may also have been connected with any other country. And that appears to be on the principle, that he, dying intestate, may reasonably be presumed to have contemplated and intended that his moveable (or personal) property should descend by the law with which he was best acquainted, and the law of the country of which he probably considered himself as chiefly an inhabitant and citizen. It may be that, in regard to Alexander Ross, that country was England; and so his moveable succession, in case of intestacy, would have fallen under that law. But this can form no reason for denying that he was a person subject to the law of Scotland, so that, having married there, his marriage should affect him agreeably to that law. It is competent to any, even a native Scotchman, to settle his affairs, so that his principal domicile for intestate moveable succession may be in any foreign country, though he lives one-half of every year in Scotland. But it would be strange indeed to hold, that, during these residences, he was to be considered here as an absolute stranger, not subject at all to the law of Scotland, but encircled with a legal atmosphere of personal status brought with him from abroad.

We need hardly observe, that one topic which has been urged in some cases is entirely inapplicable here, viz. that the actus legitimus was done in Scotland in fraudem of the law of England. Assuredly Alexander Ross had no view of defrauding the law of England. His object evidently was to give right to his son as in Scotland; and there can be no doubt he bona fide intended to do all that the law of Scotland required for that purpose.

Lord Craigie.—So far as the Commissaries have decided in this case, in reference to the first branch of the summons, that 'the defender is the son of Alexander Ross and Elizabeth Woodman,' and that 'a marriage between these parties was regularly celebrated in 1815,' they appear to have exercised the jurisdiction committed to them; and the result of these two findings by the general law of Scotland would be, that the defender was the nearest and lawful heir of these parties, if not within the prohibited degrees of kindred according to the law of Scotland, and if nothing had intervened between the birth of the defender and the subsequent marriage, which could prevent such a union.

But, so far as the Commissaries proceed, in reference to the last conclusion of the libel, and to the brieve taken out by the defender for serving himself heir of tailzie and provision in the entailed estate of Cromarty, to inquire, 'whether the defender is incapable of lawful succession, and has no title to any of the civil rights competent to lawful children,' the Commissaries have, in my opinion, exceeded the bounds of the jurisdiction committed to them.

Such a conclusion would have been imperfect and inadequate in a competition for the personal estate or executry of the defender's father, and where each of the parties claims the office of executor qua nearest in kin. Until a confirmation had been obtained, no right would have vested in the successful party. But, in relation to the entailed

estate of Cromarty, or to landed or heritable property situated in Scotland or elsewhere, the Commissaries appear to have no authority. The only question cognizable by them was, bastardy or not? Whether the pursuer, by preparing her summons in this unusual way, expected to derive some aid from the late determinations as to intestate succession in personal property, which is now held to be regulated by the law of the ancestor's permanent domicile at the time of his death, it is not easy to say. But, if she did so, it is only necessary to examine those determinations, to see that they are truly adverse to her claims.

In this view of the case, the proper course would appear to be, to make a remit to the Commissaries, instructing them to dismiss the summons, so far as relates to the point already noticed; and to proceed farther in the cause as shall be thought just. But, if we are in hoc statu called upon, and authorized to decide upon the rights and claims of the parties in relation to the lands and property of Cromarty, which at present is the only subject of competition or argument, I am humbly of opinion that the defender ought to prevail.

There is no longer any dispute as to the defender's filiation, nor as to the legality of the marriage between his father and mother, which was not collusive or simulate, but true and regular in all respects, and followed out in every possible way by the acts and deeds of the parties interested, and in all questions of status, so far as relates to the married pair. The question is, whether the defender's right, as the eldest son and heir of his father by the law of Scotland, is to be defeated by the law of England, if (what is not very clearly ascertained) his father had his general residence in England at the time of his death. In some part of the argument, the pursuer laid some stress upon the circumstance that the defender had been born in England; but that seems to have been given up, and rightly—the defender, before the marriage between the parties, being in the eye of law nullius filius, and having no interest in their status or domicile, while they had as little in his, except for the purpose of relieving the parochial funds of the expense of his maintenance.

It humbly appears to me, that, in such a case, there can be no just or solid ground of distinction between the authority of the law of England, and that of any other kingdom or country in Europe in which the defender's father or mother might have their residence at any particular period. By the treaty which united the two separate and independent kingdoms of England and Scotland, no such distinction was established, or meant to be established; on the contrary, while the laws respecting the general government and revenues of the United Empire were as much as possible to be assimilated, it was an express condition of the treaty, and from the state of the legislative body as then constituted, it was most just that no alteration should be made on the law of Scotland, even by the Legislature, (and most assuredly not by the Courts of law in either country), in matters of private right, unless for the evident utility of the people in Scotland. We are, therefore, to decide the point at issue as if the two kingdoms were still separate from each other, or as if it had occurred immediately after the accession of James the VI. of Scotland to the English throne; and if at that time the law of the ancestor's domicile, (in the meaning lately affixed to this expression, that is, the domicile of choice, in opposition to those of origin or birth, or that which is attended to in ordinary questions of jurisdiction), would not in the smallest degree affect the succession to his landed estates in Scotland, it ought to have as little influence at the present time.

If the question thus presented to us were to be considered as an international one, and to be governed by those rules which are observed between all or the greater number of civilized and independent nations on the footing of mutual comitas, and from the utility of having one common rule in transactions of a certain description, the result does not appear to be at all doubtful. It will be found, and indeed it was admitted by both parties, that while in all the other governments of Europe, legitimation, by a subsequent marriage, was effectual, if there were no legal disability or mid-impediment, the English alone had rejected it. For this an eminent lawyer and judge (Sir William Blackstone) has suggested many reasons, instead of the true one, as given by the English Parliament at the time. But this is of no importance, as Courts of justice must be guided by the law as it stands, and without inquiring into the original causes, or even the expediency or justice of it. In these circumstances there might be room for contending, in an English Court of law, (at least in reference to those individuals whose property in general is situated in other kingdoms), that regard should be paid to what is the general law of Europe in such a case. At any rate, it is not easy to perceive a reason why, besides retaining their own opinions or prejudices in regard to the succession of landed property situated in England, the Judges in that country should attempt, or be held as attempting, to extend them to lands situated in another country, or in all other countries, where a different law has been long established.

But in the transmission of landed estates from the dead to the living, as well as with regard to the modes of constitution of land rights, there is no rule of international law or jus gentium such as has been already described. Instead of this, it seems to be established in all countries where there is a law of succession regarding land estates, or rights, or burdens affecting such estates, that they are transmitted and constituted according to the law of the country where the lands are locally situated. It is unnecessary to quote authorities on this point. The rule holds even in allodial subjects. But in lands held by feudal tenure, it is a necessary and unavoidable consequence from the nature of the right. As the right of succession in such property was a boon from the superior, it depended at first entirely upon his will, as expressed in the feudal grant. Again, when it came to be generally allowed, and if the course of succession was not provided for in the investiture, it was to be indicated by the law of the country, or mos regionis, and most certainly without any regard to the domicile of the vassal, either at the time of his death or at any other period. The will of the vassal, although expressed in direct and positive terms, was not effectual, unless authorized by the superior, and in the forms prescribed by the public law; and least of all was it to be gathered from the law of the place where he might chuse to reside.

In the early feudal ages, individuals held lands in different countries, subject to different superiors; and it was not unusual for the sovereign of one country to be a sub-vassal in another, and without any obligation to reside in any particular place, though all were liable to be called out to attend the superior in the performance of their feudal services. It would have been most extraordinary, therefore, if the vassal's preferring one country to another should entirely govern the course of his succession, in opposition to the general law of the country where the lands were situated. Not more than a century ago, the noble family of Hamilton, besides their Scots estates, held an extensive territory, with the rank of Duke, in France; and it is believed

they also had property in England; but it never was imagined, that the representative of the family at the time, merely by preferring one of these three kingdoms as the place of his general residence, could alter the law of descent, as it was fixed in the other countries.

In a question with regard to the effects of marriage, or of legitimation per subsequens matrimonium, upon intestate succession, it appears to be extremely doubtful how the doctrine of the domicile could be introduced to any extent. In matters entirely dependent on the will of the party, or to regulate the competency of actions in Courts of law, some such rule may be necessary. But where the immediate and permanent interests of parties are involved, and particularly where those interests have become the warranted grounds of action in the Courts of law, it seems quite unreasonable that the domicile of choice, as it is called, that is, the law of the place where the party is at any given time, animo remanendi, should have a decisive influence. And it would lead to the most extraordinary and unjust consequences, if the status of a wife, or of her children, were made dependent on a tenure so precarious. By the marriage, if lawful where entered into, the rights of the man and wife are placed beyond recall by their joint will, whether directly or indirectly announced; and the relations and obligations between the parents and the children are, if possible, still less subject to the controul of any one of them. If, on the day after the marriage, a son previously born, and in the possession of large property in Scotland, dies—could there be a doubt of its descending to his brothers and sisters, born, like him, before the marriage, and, failing them, to any children the father might have had by other marriages, and this entirely without regard to the domicile of the father? In the same manner, might not a son or daughter previously born demand in a Court of law, in every country in Europe except England, aliment as a lawful child? And would it be just that a father's removal to England, whether bona fide or fraudulently, should not only disappoint a just claim while the father remained in England, (if such should be the law there), but that it should be rendered ineffectual where the child was acknowledged as a lawful child? In such a case, would it not be competent to attach any lands that might belong to the father in Scotland? or might not arrestment be used jurisdictionis fundandæ gratia so as to attach his personal estate in Scotland, and so render effectual the claim of the child? And if such are the rights and facilities afforded to children so situated during the life of their parents, are their rights of succession, after their parents' death, to be disappointed or evaded by their father's choice of a residence in a place where there is either no form, or an imperfect one, for giving effect to them?*

A learned Judge (Lord Gillies) put the question, (quid juris), If, after the marriage, the husband had remained long enough in Scotland to create a domicile by residence? and the Counsel for the pursuer admitted that it was a doubtful question. But, as it appears to me, this view of the case ought to be extended a good deal farther. If, by the marriage, certain rights vest ipso jure in all the parties, can

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* If, in virtue of the Cromarty entail, the defender had obtained a decree of irritancy or of devolution against his father, and had completed a feudal title, would it be competent to a son by a subsequent marriage, or any remoter substitute, to insist in a reduction of the decree and infeftment, after the father's death, on the ground that the father's last domicile, animo remanendi, had been in England?

those rights be vacated merely by the husband's removing his person to another country, and the only one in the civilized world where the Courts of law would refuse to interpose? If, in any other matter, a party should enter into an obligation which, though legal where entered into, is ineffectual to produce action in some other country to which he retires, was it ever heard, that the creditor was to be precluded from legal redress or diligence in the country where the contract was entered into, and where the debtor became bound, and might be compelled, in the ordinary course of law, to perform all that was incumbent upon him?

In actions brought in the Courts of law in Scotland, originating in transactions in foreign countries, the rule is, that actor sequitur forum rei. In this way, not only an agreement will be sustained as a ground of action in Scotland, though not authenticated according to the lex loci contractus, if it is agreeable to the Scots form; but one that is not made according to the forms of the law of Scotland, or which is held to be extinguished by the law of Scotland, is altogether disregarded in our Courts, although it may be agreeable to, and still in force by the law of the place where it was entered into. And as to the constitution or transferring of rights of lands situated in Scotland, while no writing will be sustained here unless authenticated according to the law of Scotland, however formal it may be according to the law of the country where it was entered into; so an instrument executed in England, though ineffectual in point of form there, will be sustained in the same manner as if it had been framed in Scotland.*

Thus, according to general principles, the present question ought to be determined in the defender's favour; and the late English decision in the case of Birtwhistle, so far as I have been able to obtain information, very strongly confirms this conclusion. The father was an Englishman, and had landed property in that country; but his residence for many years had been in Scotland, where he had purchased lands, and where also he had formed a connexion with the plaintiff's mother, whom he afterwards married in facie ecclesiæ. In Scotland he had his permanent residence, but he died in England, when his sister, as his heir by the law of England, took possession of the English property, the plaintiff being allowed, without dispute, to succeed to the Scots estates. In an action of ejectment, however, in the English Courts, a decision was given in the defendant's favour, thereby ascertaining, that, in succession to lands, no regard was paid ex comitate to the law of the domicile; and, consequently, where the case is reversed, and the lands in question are situated in Scotland, no regard ought to be paid to the law of England. It seems to be indisputable, that if in England legitimation per subsequens matrimonium is not admitted, even where the marriage had taken place in Scotland, and the parties had their residence in that country; so, with regard to lands in Scotland, where a different law has been established for centuries, the children of such a marriage are entitled to succeed.

It remains to consider the decisions and legal authorities to which reference has been made, as leading to a contrary result.

One class of these decisions relates to intestate succession in personal estate or executry, which, since the determination of Lord Thur-

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* Journal of the House of Lords, Feb. 13. 1740, Fullerton *v.* Kinloch. Feb. 24. 1826, Broughton; (4 S. & D. 496.)

low in 1791,* has been governed by the law of the ancestor's domicile. It has been contended, that the intestate succession in landed property ought to be regulated in the same manner; but, upon this subject, after what has been already said, it is unnecessary to offer any argument. Indeed, upon looking at the different decisions, it will be seen that the distinction between the two cases has been, at all times, most distinctly marked. In the case of Hogg against Hogg, Fac. Coll. June 7. 1791, p. 378. it is expressly admitted, that 'landed property must 'ever remain subject to the law of the territory.' In the case of Balfour against Scott, decided in the House of Lords 11th March 1793, where the question was, whether a person, taking as heir by the law of Scotland, could be required to collate when claiming a share in the personal estate of the ancestor, who had his domicile in England, it was decided in the negative. But by the same rule, if the ancestor had been domiciled in Scotland, the heir could not have taken the moveable effects in England without being liable to collation. And if the ancestor had left nothing but lands situated in Scotland, his succession would have descended, without regard to domicile, according to the law of Scotland.

While on this subject, I may take the liberty of stating, that although, with regard to intestate succession in personal estate, the law must now be considered as fixed, there are individuals who greatly doubt the authority, as well as the expediency, of the rule so established. That it was rested upon international law cannot be asserted, the current of the decisions in Scotland, for a considerable time, having run in an opposite direction: Morris against Wright, January 14. 1783. In its consequences it did most directly alter the established law in Scotland, by compelling the Commissaries to confirm as nearest in kin to a person deceased, his father and mother, and the representatives of deceased nearest in kin, who, by the law of Scotland, were excluded from the succession, and who are not, according to our law, nearest of kin to the deceased. In such a case, the interposition of the Legislature appears to have been necessary to justify such a distribution of the personal estate; but it was also necessary, 1st, To give publicity to the establishment of such a rule; 2d, To point some short and simple form which should be effectual throughout the empire, and by which a party might counteract, in whole or in part, the presumption on which the rule is founded, if it should not be agreeable to his will; and, 3d, To define more clearly the nature and extent of the residence which should govern the succession, it being almost impossible in many cases to discover it; *e. g.* where, from motives of pleasure or profit, a man divides his residence between Scotland and England, or where an individual, after having formed a domicile in one place, has left that place and declared his purpose never to return, but to reside in the place of his nativity or elsewhere.

But however the law may stand as to succession in personal estate, it was never intended in the same manner to regulate the succession in landed property, whether situated in foreign countries or within the ancient kingdom of Scotland, which, in such a question, must be viewed in the same light in which it stood in 1707. Nor could such a decision be given, without violating the conditions of the treaty between the two kingdoms, and at the same time shaking the security of the records respecting landed property in Scotland.

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* See the words of the judgment of the House of Lords.

Inefficient and delusive these records would be, if the validity of the rights and documents there appearing depended on the animus remanendi of the successive proprietors, and upon the state of the law in those countries where they have established their residence, and which, to the Judges in Scotland, as well as to the parties in general, must be altogether unknown.

With regard to the other decisions to which a reference has been made, they do not apply. In the case of Shedden, the parents had been domiciled and naturalized in America, and there they had been married, thus being subjected to the law of England, which, even after the political separation of the two countries, remained in force, unless where expressly recalled. The son, while his parents lived, was a natural son, having no claim as such, while his father and mother, with regard to his property and effects, were similarly situated. And the question truly was, Whether, after the death of his parents, from whom he could take nothing, he was at once to become a lawful child, so as to take lands situated in Scotland, in which he had never been, and where his parents had never formed any matrimonial connexion? On these specialties, as stated by an eminent Counsel in the case of Strathmore, the claim was decided in the House of Lords. Had Shedden's parents come to Scotland, and there entered into the obligations of man and wife, the case, as it appears to me, would have been viewed in a very different light.

Again, in the more recent case of Strathmore, the decision also rested upon special circumstances; and, according to the principles explained in the case of Birtwhistle, 'it might admit of some doubt, whether the claimant could succeed to an English Peerage, although his parents had been married in Scotland. But as to a British Peerage, and still more as to a Scots Peerage, I should greatly doubt whether the same determination could be given. In the case of a British Peerage, that is, a Peerage created since the Union, there must be a collision between the laws of the two countries before the Union; but why, in such a case, there should be such a decided preference given to the law of England, I cannot readily discover. Particularly when the British Peer takes his title from a place in Scotland—and still more where he at the same time holds a Scots Peerage, to which a reference is made in the patent,—it would deserve consideration, whether, in point of construction, the latter Peerage should not be held to descend to the heirs of the more ancient one. With regard to a Scottish Peerage, the point appears to be clear indeed. Scotland never was a conquered kingdom; it was not annexed to England, but united upon equal terms, each country retaining its private and municipal rights in the fullest extent, if not expressly taken away. An individual then, who in Scotland would have been received as a Scots Peer before the Union, must still be admitted to vote, and to sit in Parliament, if elected one of the sixteen Scots Peers. In the case of one born in Scotland out of wedlock, but legitimated by a subsequent marriage in Scotland, to the effect of taking the landed estate of his family, I cannot see upon what ground his right of succession to a Scottish Peerage could be disputed, because by the law of England, and in the case of an English Peerage, a different rule may prevail.

As to the foreign authorities, they may be dismissed in a few words. In the case of Conti, the marriage had been celebrated in England, and yet the children were held legitimate; while the authority of Boullenois is merely the opinion of an eminent lawyer in a hypothetical case, and that a very special one, from the want of naturalization, in

consequence of which it would appear that Boullenois thought, that, by the law of France, the individual in question, having been born in England, would carry along with him the state and condition in which he stood by the law of England.

Again, in reference to the opinions of the ancient jurists, and the distinction between statuta personalia and realia, and with regard to personal privileges and disabilities, they either confirm the opinion I have formed, or are altogether inapplicable. The law of legitimation, if it had been introduced by positive statute, would, so far as regarded landed property, be considered as falling under the statuta realia. But with us there is no positive law on the subject. The law of legitimation by subsequent marriage is as much part of the common law of Scotland as that of primogeniture,—the succession of males in preference to females, and of full blood to half blood. And to say that it may be disregarded because the last proprietor had his domicile in England at the time of his death, seems to be as unreasonable as if it were proposed that a Scots estate should go to the sovereign, as in Turkey,—or divide equally among all the children, according to the law made in France during the Revolution, because the last proprietor died domiciled there,—or that it should go to the youngest child instead of the eldest, because the ancestor was domiciled in the county of Kent, where that is the rule.

Again, as to the distinction pointed out respecting personal privileges and disabilities, much is to be found in the earlier writers which cannot be reconciled, and which seems to be founded upon no sound principle. It may be true that a privilege strictly personal, such as that of a peerage, cannot be exercised of right except in the territory of the sovereign by whom the dignity is granted; so, if a man is declared, by a sentence in one country, to be infamous, for an act in its own nature not inferring infamy, it will not be attended to in any other country. But the right of legitimacy which follows from marriage, by the law of all the countries in Europe except England, and the colonies now or formerly parts of England, is not a personal privilege in the proper sense of these words. It arises from the general law; it operates not only upon the state of the persons legitimated, but on the rights of their parents and relatives, and for them as well as against them. And as to the disability arising from minority, the period of which is different in different countries, it appears that, as in the case of actions brought in Scotland, a party will be held to be a minor or not according to the rules established in Scotland; so, in services and other proceedings relating to lands or real estates in Scotland, the same rule must be observed, although it may not be a rule in the place where the pursuer resides, or where the ancestor resided. But the inquiry is foreign to the present discussion. The question here truly is, Whether a jury of Scotchmen, and in a Scots Court, ought not to find that the defender, the child of parents who were lawfully married in Scotland, without any restraint in point of propinquity or otherwise, and having no other children, is the nearest and lawful heir of his father in lands situated in Scotland? And to this, I think, there can only be one answer.

Lord Meadowbank.—Although the parties have not agreed altogether in the statements of the facts which they have respectively averred, I concur, nevertheless, with the Judges in the Court below in being of opinion, that the discrepancy between them is so immate-

rial as to render unnecessary any farther investigation as to the accuracy of either.

Thus, it is either proved, admitted, or not seriously denied, that the defender is the reputed and acknowledged child of Alexander Ross and Elizabeth Woodman; that he was born in England, while his parents were there residing in a state of concubinage; and that neither of them, at the period of his conception or of his birth, were married persons, or within the forbidden degrees, or were under any circumstances whatsoever that could have prevented them from solemnizing a marriage betwixt them according to the rules of the law of Scotland; but that both were domiciled in England, and so situated, that, in the event of either having died intestate, their personal succession would have been regulated by the law of that country—Elizabeth Woodman, on the one hand, not only having her only residence in England, but being a native of that kingdom; while Alexander Ross, on the other, although not a native of England but a native of Scotland, had established his more permanent and usual residence in the former country. In like manner it is proved, that, subsequent to the birth of the defender, these his reputed parents, being at the time subjected to the laws of Scotland, were married in and according to the rules and rites prescribed by the municipal and ecclesiastical laws of this country; that, previous to this marriage, Mr Ross had occasionally visited Scotland—had succeeded to two several estates within this kingdom—had been enrolled as a freeholder in more than one Scotch county; and that he and his wife, having come to Scotland a few weeks before the solemnization of their marriage, continued in it for some time afterwards: that the defender accompanied his parents to Scotland—was with them at the time of their marriage being solemnized—and was, from that period, both within Scotland and England, acknowledged to be their lawful child.

I also concur in the opinion on which the proceedings in the Commissary Court must have been founded, that the parties in this case, having purchased brieves from Chancery to take up the succession to the estate of Cromarty, and it being clear that the pursuers can only be entitled to be preferred in that competition, if the defender, as being a bastard, be incapable of succession, they have proceeded in due and proper form in originating the present proceedings before the Consistorial Court, to try the question of the defender's legitimacy.

The terms of the judgment pronounced are also, in my opinion, correct and proper, and in no respect can be understood as determining any matter incompetent for the consideration of that Court. It has only been declared, that the defender is a legitimate child, and 'capable of lawful succession, and having a title to all the rights com-'petent to a lawful child;' and so determining generally, the Commissaries appear to me not to have exceeded the bounds of the jurisdiction committed to them.

I see no ground, therefore, for disturbing the interlocutor under review, either upon the principle of the proceedings being improperly or irregularly instituted, or of the fact being imperfectly ascertained, or the terms of the judgment being incompetent or excessive. And I have at length arrived at the conclusion, after giving the case that consideration which its novelty and importance required, that it ought also to be adhered to as being well founded in point of law. This opinion is altogether independent of the fact of the defender's father having been born in Scotland, and of his having kept up some connexion with this country during his life. I should have viewed the

case in the same light had Mr Ross been born in England, and had no other connexion with Scotland than that arising, first, from his having possessed and left an heritable estate subject to the jurisdiction of the Courts of this country; and, secondly, from his marriage having been contracted in Scotland, when, as a natural-born subject of the Crown of Great Britain, he was, as living within the territory of Scotland, in every respect as amenable to the peculiar provisions of its laws and institutions, and as capable of acquiring rights and qualifications under them, as he would have been amenable to the laws and customs of England, had he chosen to remain in England, and to have contracted marriage within the boundaries of that division of the empire. In short, my judgment depends on this simple view of the case, that the defender's parents having, as natural-born citizens of Great Britain, been in a capacity at the time of their marriage to subject themselves to the peculiar laws and institutions of Scotland, and to the effects and qualifications thence arising, and having so subjected themselves by coming into this country, rendering themselves amenable to its jurisdictions, and solemnizing their marriage according to its laws, customs, and institutions, did thereby contract all the obligations and consequences which by them are attached to the state of marriage; and that one of these consequences being, that children antecedently procreated of such parents as may have afterwards married, and who were under no disability to marry at the time of their conception and birth, shall be thereby legitimated, it must follow, that the defender is to be recognized as a lawful child, and his rights enforced accordingly.

To this, however, it has been objected,—1*st*, That as, by the law of Scotland, whenever bastardy is indelibly fixed on a child, (as in the case of children born of an adulterous connexion), the subsequent marriage of the parents does not legitimate that child; so the defender, having been born in England of parents living in a state of concubinage, where legitimation per subsequens matrimonium is unknown, his bastardy must be held to be indelible, irreversible, and incapable of being removed by the subsequent marriage of his parents. 2*d*, That the parents of the defender, having a domicile in England, by which their personal succession would in the event of their dying intestate have been distributed, both at the period of their marriage and after it took place, the law of Scotland, in matters connected with that event, cannot be held to have affected their rights, or to have governed the effects resulting from the contract: In other words, that it is to be considered as an English marriage, and dealt with accordingly. Neither of these objections seems to me to be well founded.

Objection I.—In considering the first of them, it is important to keep in view, as a matter incontrovertibly established, that the rule admitting of legitimation per subsequens matrimonium is founded upon the principle, that in all such cases the matrimonial consent, presumptione juris et de jure, took place at the period of the carnal communication of the parents, or conception of the child, which is therefore held to have been the true date of the nuptials. It disregards altogether the period of their declaration or solemnization, which is held and deemed to be nothing else but the mere evidence of a marriage having been contracted between the parties. Upon this ground it is, that, there being no room for the operation of the principle on which the doctrine of legitimation per subsequens matrimonium is founded in the case of children born of an adulterous connexion, such children cannot be legitimated by subsequent marriage of their parents; because, whatever a change of circumstances may have en-

abled them to do afterwards, at the time of the birth they could not have legally intermarried.

It may also be material to keep in view, that the general rule itself, and the exception just stated, prove that the law of Scotland admits evidence of the filiation to the father of children born in concubinage, so as to allow of their being legitimated, equally as it recognizes the fact of their being children of the mother. Indeed, without such proof being admissible, there could be no legitimation per subsequens matrimonium at all. It is quite a mistake, therefore, to suppose, as seems to have been taken for granted, that bastards, in contemplation of law, belong any more to their mother than to their father. The difference is, that, in the one case, the fact of the filiation generally requires no proof—in the other it does; and although, for certain purposes, and for a certain time, the mother is allowed the custody of the child, the burden of maintaining it is imposed upon the father whenever the filiation is established. But from neither the one nor the other does it acquire any public status or right whatsoever.

From these propositions it is to be inferred, that when the law of Scotland is called upon to determine any case of legitimacy per subsequens matrimonium, (the marriage within Scotland being admitted), it requires no investigation in point of fact, excepting in two particulars; *first*, the filiation of the child; and, *secondly*, the condition of the parents at the time of its conception and birth—whether they were then free to have intermarried with each other, or whether they were incapable of forming that connexion. If these are established it must follow, that it cannot require, or even permit, any investigation into circumstances connected with the condition of the child; because that would be inconsistent with the principle on which the rule itself is founded, namely, that the parents were married when the child was conceived, and that it was born in wedlock, and came into the world with all the rights of a lawful and legitimate child. If so, to require an investigation into any thing with respect to its condition, would be manifestly absurd; for its condition must in all such cases be dependent upon that of its father; and although, until the solemnization or declaration of the marriage of the parents, it was reputed a bastard, that reputation was incorrect and contrary to the fact. No doubt the child was apparently a bastard, because there was no external evidence of the marriage of the parents. But, fictione juris, the marriage had taken place; and from the hour when that evidence was made manifest by the subsequent marriage, in contemplation of law he was regarded as a legitimate child, with all the rights and privileges belonging to that status.

In this situation, and in a question of this kind, it seems of no importance whatsoever where the child may have been born, provided his parents, at the time of his conception and birth, were natural-born subjects of the Crown, and capable of subjecting themselves to the peculiar institutions of the law of Scotland—could have contracted a marriage—and did afterwards legally declare or solemnize their marriage within its territory. Accordingly I do not find, in any book on the law of Scotland, the slightest authority for giving countenance to the doctrine, that an inquiry can be instituted into the condition or the situation of the child, either at his birth or during his life, or into any thing else but the filiation and the condition of his parents. The capacity of the child to be legitimated never enters into the discussion: It is the capacity of the parents to have intermarried that forms the subject of inquiry. Indeed, I observe it to be expressly laid down in

the notes which I possess of the lectures of one of the highest authorities in the law of Scotland, (Mr Baron Hume), that, if a son born in concubinage shall himself marry, and shall die leaving children before the marriage of his parents, yet, if his parents do afterwards marry, his children will become entitled to all the rights of the lawful descendants of their grandfather, as if their own father had been born in wedlock.* In that case, however, the son born before the marriage of his parents must have lived and died with the reputation of a bastard, and with that character indelibly and irreversibly, as it so happened, stamped upon him during his whole life. Yet the power of the principle upon which legitimation per subsequens matrimonium is founded is so invincible, as in such a case, it would seem, not even to admit of an inquiry as to whether the apparently indelible bastard was living or dead at the time of the marriage of his reputed parents, but simply whether he was their child, and born at a time when they could lawfully have intermarried.

In the present case, therefore, it humbly appears to me to be of no importance that the defender was born in England, because, if his filiation be admitted, or not seriously denied, or proved, which it is, and there was nothing at the time of his conception and birth to have prevented his parents from legally intermarrying in Scotland, and they did afterwards so intermarry—then, provided there is no principle in the law of nations which could prevent all the consequences of a Scotch marriage from legally attaching to them, no effect would be given to, or inquiry permitted, respecting his apparent condition at the time of, or subsequent to his birth. Fictione juris, the law must hold the true date of the marriage of his parents to have been that of his own conception or birth, and not that of its solemnization or declaration. Although the defender was therefore, no doubt, reputed to have been born a bastard, that reputation was false; for his father and mother, on the contrary, as has been since proved by the ceremony performed by the clergyman, were truly at the time of his birth married persons, and he himself was a legitimate son. In short, the defender (to use the expression of the civil law in such a case) natus erat, et non factus, filius legitimus.

A case was put, that the defender had been born in France of a Frenchwoman living in concubinage with a domiciled Scotsman; in which case it was said he would have been born a Frenchman and an alien, and that, as no subsequent marriage could have taken off the stain of alienage, neither could it have removed the stain of bastardy. But, upon the grounds already stated, I must be humbly of opinion, that, upon any view of the law, the determination of such a case would have been directly the reverse of that which was assumed. For, in the *first* place, The father is supposed to have been a Scotsman, with his domicile in this country; 2*dly*, The child was born under a system of law admitting of legitimation per subsequens matrimonium, and with no indelible stamp of bastardy affixed to him by the law of the place of his birth; 3*dly*, The marriage of the parties was contracted in Scotland.

Now, it seems to have been forgotten, that, from the moment of the marriage, the status of the mother merged in that of the Scotch husband, and her stain of alienage was thereby immediately removed. Accordingly it has never been questioned, that a woman so situated is, in the event of her husband's death, entitled to her terce, and to all

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* To the same purpose see Voet, lib. xxv. tit. 7. § 7.

the other rights competent to a native Scotswoman. And so, in the case of Jankouska against Anderson, November 25. 1791, where the tercer was a foreigner who had been married to a native of Scotland, this right was not disputed. The marriage, and the rights arising under it, were therefore, if questioned in the case supposed, to be considered in the same light as if both the parties had been natural-born subjects of Scotland; and it being an inherent qualification of such a marriage, that the children born before it was solemnized or declared became thereby legitimate, and there was no impediment, from the mother at the time of the child's birth being an alien, to the operation of the presumption that the true date of the marriage was that of the conception of the child, I cannot doubt that a child so situated could no more have been regarded as an alien, than if the parents had been actually married in the face of the Church of Scotland, before its birth within the realm of France.

In short, the whole doctrine of the indelibility of the bastardy of the defender, arising from the fact of his birth having been in England, must be rested upon the principle of there having been something at that period existing in the situation of his parents respectively, and as regarding each other, which would effectually have precluded them from contracting a marriage in Scotland, followed by all the rights and consequences of a Scots marriage. For, if there was no such impediment, the defender, in fact, never was a bastard, and therefore never could have that status indelibly impressed upon him.

II. But as it is not alleged that the late Mr Ross and Elizabeth Woodman were situated, either by their being married persons, or within the forbidden degrees, so as to have rendered their intermarriage in Scotland illegal at the period of the defender's birth; and as it cannot be pretended that their being domiciled in England could have presented a bar to their forming that connexion—it is to be considered, whether there be any solid ground for the second objection stated to the legitimacy of the defender's birth, viz. that, at the time of the declaration or solemnization of their marriage, they, having had such a domicile in England as would have rendered their personal succession liable to distribution under the provisions of that law, were thereby incapacitated from contracting a marriage in Scotland, accompanied with, and drawing after it, those different rights and consequences which, by its principles and policy, are deemed to be inherent in the contract.

But the principles regulating the distribution of personal succession are altogether different from those which apply to questions relating to marriage and the rights flowing from it. In the former cases, the presumed or implied will of the deceased, in the absence of his expressed will, forms the regula regulans for determining all such questions; and from its being held to have been his intention that his personal estate should descend according to the rules of that law, with which, from his residence under it, he is supposed to have been best acquainted, that of his domicile is justly fixed upon as the law by which it is to be distributed.

It is obvious, however, that, even if such questions as the present could be determined by the will of the parties, there would, by its application to them, be a strange inversion of the principle on which alone it is made to operate upon cases of intestate succession: For, in the latter, the implied will of the parties is only had recourse to, when legal evidence of the actual will is awanting or defective; but in such cases as that now under consideration, it cannot be alleged

that there is ever any doubt of the parties having, in a manner sufficiently formal and authoritative, declared their will and intention to have been in direct contradiction to that which, by the supposed implication of the lex domicilii, the Consistorial Court is required to give that effect to. Thus it is, with all deference, in this case impossible to dispute, that, by their leaving their domicile in England—coming into Scotland—solemnizing their nuptials according to the law of Scotland—and by their afterwards acknowledging the defender as their legitimate child,—his parents as expressly declared their will and intention to have their marriage deemed and taken to be a Scotch marriage, and to have it accompanied and followed by all the obligations, rights, and consequences of that contract, as in a case of personal succession could have been afforded by the most regular and formal testamentary deed.

But indeed the rights consequent upon the matrimonial contract are totally independent of the will or intention of the parties. 'Foreign 'courts,' it was observed by the Lord Ordinary in the case of Gordon against Pye, 'are in such cases nowise called upon to inquire after that 'will, or after any municipal law to which it may correspond. They 'are bound to look to their own law; and it is, with all deference, 'thought to be in a particular degree contrary to principle, to make 'that law bend to the dictates of a foreign law in the administration of 'that department of international jurisprudence which operates directly 'on public morals and domestic manners.' And it cannot now, after the judgments in that and similar cases, be doubted, that this is the principle which governs the law of Scotland. But if the intention, or presumed intention, of the parties is altogether excluded in such questions, there has been no legal principle shewn upon which the lex domicilii should be allowed either to controul or to affect them. The principle of personal disability, arising from the particular law of the domicile, to enter into the contract beyond its territory, is disclaimed. Indeed, the notion of personal disabilities so attaching themselves is clearly and obviously untenable. It no doubt was at one time entertained; but the doctrine has long been allowed to be inconsistent and absurd, and is exploded by the best public jurists. At all events, the decisions of this Court in the cases of Gordon against Pye, and others since determined, have fixed, that such a principle is not admitted into the law of Scotland.

The only ground then relied upon for giving effect, in the present case, to the lex domicilii is, that the different obligations of the contract having been intended by the parties to be executed under the law of the place of the fixed and permanent residence, it is by it that its nature and extent must be regulated. But this view, it is obvious, just reverts to the implied intention of the parties (and that, too, in direct opposition to their formally and legally expressed intention) to limit the extent of the contract by that which is to take place after its obligations have been incurred, and those rights, which regard not themselves only, but their issue, fixed beyond the reach of any will of theirs to alter, infringe, or controul them.—Accordingly, there is no book on the law of Scotland which lays it down that such questions are to be determined by the law of the domicile; and it is therefore impossible for me, not only in the absence of all such authority, but in opposition to the principles laid down, after the most solemn consideration, in the cases of divorce brought in this country by parties married in England, and before taken notice of, to rest upon a ground for guiding my judgment, which seems so inapplicable to the nature

of the question, and which would lead to consequences so irreconcileable to justice.

But indeed other cases, besides those just referred to, have occurred, which seem to go a great way in proving that questions of this nature are not regulated by the law of the domicile, either here or in England. Thus, persons in minority cannot, without the consent of their legal guardians, validly contract marriage within England. It is, however, matter of settled law, that if such parties come into Scotland, subject themselves to the law of this country, and contract marriage, such marriages are binding and effectual in England, and all the world over. But I am at a loss to see how such marriages can be acknowledged, without taking along with them all the effects resulting from the law of Scotland, by authority of which they have been entered into, and by the operation of which alone they are held to be binding. For instance, suppose that an English minor, domiciled in England, has a child born in concubinage in Scotland, and thereafter marries in Scotland, retaining his domicile in his native country—on what principle could a Scotch Court refuse to hold that child to be legitimate? Not upon the principle of the child having been born in a state of indelible bastardy, because, being born in Scotland, by the law of its birth, if it carried any thing, it carried along with it the inherent privilege of being capable of legitimation per subsequens matrimonium; and still less upon the principle that the marriage of the parents (considering it as an English marriage, because in England the objects of the contract were to be carried into execution) could not be attended with the effect of rendering it legitimate; for in England there could have been no marriage; and it is impossible to proceed upon a presumption of that having taken place, which never could have taken place. In short, if the law of England had followed the parties, and they had continued subject to that law, upon the principle of their being strangers in Scotland, the result would have been, that the pretended marriage was a nullity altogether. But although the law of their domicile, it not only did not follow them to the effect of preventing, or of affording grounds for dissolving their marriage, but the marriage by it was as valid and effectual as if the parties had been major, and the ceremony performed in England in the face of the Church.

Upon no principle, presumption, or fiction, therefore, could the particular limitations and restrictions of the law of England, as it appears to me, have been appealed to in such a case as that which is here supposed. On the contrary, if it be clear that it could not, in such a case, have affected the marriage itself, it seems impossible to allow it to operate so as to alter the nature of that contract, or to controul its inherent qualifications, which, presumptione juris et de jure, became binding from the moment of the commixtio corporum, and not from the period of the solemnization.

One other illustration may be given of this matter, by putting the case in another point of view.—By the law of Scotland, fornication is a criminal offence, and has been formerly more than once made the ground of criminal prosecution. Now put the case, that an indictment for that offence had been raised against the late Mr Ross and Elizabeth Woodman, who certainly lived for some short time in this country in a state of concubinage, and that after their marriage they had been brought to trial before the Court of Justiciary—can it for a moment be doubted, but that the defence of these parties, founded upon their subsequent marriage, would have been insuperable? and that, if the prosecutor had rested on their domicile as taking off the inherent qua-

lification of the contract, his plea, upon the principles recognized and enforced in the cases of Gordon against Pye, and others of the same description, must have been repelled?* The Court must have held that the crime had never been committed, because the true date of their nuptials was that when the first carnal communication betwixt them took place. Yet this defence would have rested entirely on the principle of the civil contract having the effect which the defender contends for at present; and it would be a strange anomaly to hold, that this view must have been successful in the criminal court, while, in the civil, it is to be altogether laid aside. This, however, I apprehend, is out of the question; and if the defence of the defender's parents in the case supposed must have been sustained, his, in the present, cannot be allowed to suffer a different fate.

But I am inclined to take still another view of this question. The principle of legitimation per subsequens matrimonium, which is admitted and recognized by the law of Scotland, is likewise admitted and recognized by the Canon law, and (it has not in the pleadings been denied) by the laws of every Christian country in Europe, with the exception of the laws of England, the Legislature of which has thought fit, by a local regulation, made even in contradiction to the rules of their own Church, to restrict within their territories the operation and effect of the matrimonial contract. But marriage is a contract juris gentium, to which, by the law of all nations, certain obligations, rights and consequences, are attached; and it would seem that the qualification of this public right now under consideration, may be fairly considered as part of the public law of Europe. Now, although it may be quite competent for England, or for any state, to restrict those obligations, rights, and qualifications, with reference to the contract as entered into within their own territory, I am inclined to be of opinion, that, as personal disabilities do not follow individuals extra territorium, foreign courts (and, above all, such a court as the Consistorial Court of this country, the Curia Christianitatis) cannot hold that, by some kind of implication, not explained, and contradicted by the fact, such restriction is to controul the obligations, consequences, and qualifications of a contract juris gentium, entered into in a territory where no such exception is allowed. If it was, results the most extraordinary and revolting would occur. Thus, in some divisions of Germany, marriages (ad legem morganaticam, or ad salicem) are allowed to be contracted by certain classes, which have all the effects of the most regular matrimonial contract, except that the parents, by an agreement, are entitled to exclude the children nascituri from all right of succession, as legitimate children, at least through their father.† Now put the case, that a Scotsman, having his domicile in any of these countries, is raised or succeeds to a situation where such a privilege would be allowed him—that he marries, and his children nascituri are in legal form excluded from the rights of legitimate children—that children are born of the marriage, which is afterwards dissolved by the death of the mother—a second marriage, without any such limitation, is contracted by the father, and a second family is born—thereafter a competition arises betwixt the eldest sons of the two marriages for an estate tailzied upon the heirs-male of the father, and situated in Scotland—I cannot conceive that there could, in such a case, be the slightest doubt that,

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* Tanta enim est vis matrimonii subsequentis, ut de priori delicto inquiri non sinat, et illud omnino tollat, et purget.—Craig, B. ii. tit. 13. § 16.

† Willenbergi Select. Jur. Matrimonial. c. vii. xxxi. xxxiii. &c.

in this country, the child of the first marriage would be preferred, on the short ground, that the qualification competent to such marriage must be confined to the territory by which such qualifications are allowed; and that, being contrary to the general principles of law affecting that contract, they could not be recognized in this country to affect the descent of land estate, where they were utterly unknown.

In like manner, in the present case, where it is attempted to limit the effects of marriage contracted in Scotland by the operation of a special enactment in England, and thereby to determine a question of status, on which the rights of succession to an heritable estate in Scotland must depend, it seems to be contrary to sound principle to admit the operation of such a provision, or to allow it to controul the rights arising under a Scots marriage, and to deprive the child of the late Mr Ross of the power of succeeding to him as heir to that property, which, by the law of Scotland, he might be entitled to take up. Thus, too, it is to the same purpose stated by Blackstone, (vol. i. p. 434. and vol. iii. p. 93.), that even if an incestuous marriage is formed, the issue of that marriage in England will enjoy all the rights of lawful children, if it has not been challenged and avoided during the lives of both the parents. Now put the case, that a party having an estate in Scotland forms such a connexion, and, while domiciled in England, marries in Scotland, and dies in England leaving issue—the legitimacy of that issue could not be challenged, it would seem, in England. It will not, however, I presume, be contended, but that in this country, and in such a case, where an incestuous marriage is held to be void and null, their claims to the status and the rights of lawful children would be at once rejected.

In the preceding judgment, I wish to be understood as giving an opinion confined entirely to the present case, where the parents of the defender were natural-born British subjects, capable of being equally affected by the peculiar institutions of Scotland, when living under them, as they would have been by the institutions of England, when subjected to them. I have no occasion to consider what might be the case of foreigners not born within the allegiance of the Crown, and contracting a marriage while merely passing through the country, when, as in the case of two English citizens marrying in France, mentioned by Boullenois, ‘ y auroient été mariés sans s’y etre fait natura-‘ liser, parce qu’etant veritablement etrangers, et comme tels soumis ‘ aux loix d’Angleterre.’ Neither do I mean at all to question the soundness of the decisions in the cases of Shedden and Strathmore, both of which, I have understood, every lawyer has held to have been rightly determined. But, in both those cases, the parties were subject to the qualifications and limitations of the law of England, and had contracted their marriages within the territory of England or America (where the law of England prevailed), by which the principle of legitimation per subsequens matrimonium is excluded. In these cases, therefore, the status of all parties had been competently fixed within the particular territory in which their marriages were contracted, by a system of law omnipotent within its own boundaries. In particular, the status of the children, as filii aut filiæ nullius, had been finally and irreversibly established by the limitations of that system, and thereby all evidence had even been excluded of their filiation to their supposed parents. In those cases, therefore, there was no ground for holding that a new status should be conferred on the children. On the contrary, the grounds on which I have ventured, in this very difficult and important case, to deliver my judgment, necessarily lead to the con-

clusion, that the children in both those cases could not be legitimated. —It perhaps may be proper also to mention, that I can pay no regard to the report of the case of Birtwhistle, determined in the Courts of law in England; because I am quite aware of my own incapacity, as acquainted with the law of Scotland, to fully comprehend the views and principles by which such questions may be regulated in the Courts in Westminster-Hall. I shall only observe, that in that case, as stated in the pleadings of the parties, no Scots lawyer would have doubted for a moment, that the child claiming as the heir, would, in the Courts of this country, have been recognized as a legitimate son; and that I have understood the judgment proceeded, not upon any general principle applicable to the present case, but upon a technical view of a text in Coke, regarding the character of an heir according to the law of England; and that, had the matter in issue regarded personal estate, the decision would have been different. But, with great submission, the present question has nothing to do with the determination of the Courts of law in England, except it be adduced as establishing, by way of precedent, a general principle; and if the case of Birtwhistle, as it appears to me, has determined any general principle at all, it establishes this, that in all such questions no regard is paid, by the Courts in England, to any other law than their own, which refuses to bend to the dictates of a foreign law, even when the question is one publici juris.

Upon the whole, I am humbly of opinion that the judgment of the Commissaries, finding that the defender is, in Scotland at least, entitled to the status and the rights of the legitimate son of the deceased Alexander Ross, ought to be confirmed by dismissing the advocation.

Lord Gillies.—It appears that the defender's father was a native of Scotland, and his mother a native of England; but these facts seem to me to be of no consequence, as I am humbly of opinion that the lex originis of the parents cannot influence the determination of the present question. I am likewise of opinion, that the domicile of the parents at the time of the conception or birth of the child, is of no consequence.

The fact of the defender having been born in England may be of more importance, and shall afterwards be spoken to.

On full consideration it is also my opinion, that it is of no consequence to ascertain whether, at the period of their marriage, the defender's parents were domiciled in Scotland. The domicile of intestate succession, to which I here allude, and to which Counsel in their argument referred, depends not only on the act, but on the intention of the party. It is not enough that he be resident, but he must be resident animo remanendi in the country by whose laws his intestate succession is regulated. This often makes the question of domicile a difficult one; but the rule in itself appears to be just, and founded on sound principles. The general principle is, that succession should be regulated by the will and intention of the deceased; and, if he fails to express his will, the circumstance of his residing animo remanendi in a particular country, raises a presumption that he wished or intended his succession to be regulated by the laws of that country. Thus, in every case, it is held that succession is regulated by the will (express or presumed) of the deceased. But the intention or will of the party, which is of paramount importance in a question of succession, is of no consequence at all in a question regarding the legitimacy of his children. This must depend on the fact of marriage, to which, no doubt, the consent of the parents is necessary. But, if that consent has been

given, and a marriage has actually taken place, the legal effects of that marriage, quoad the children, cannot be influenced, or at all affected by the will or intention of the parents. The principle, therefore, upon which the domicile of the party is held to be of so much consequence in a question of succession, has no operation in this case; and I humbly think that the judgment to be pronounced in it should not be influenced by the lex domicilii, any more than by the lex originis.

It appears to me, that the merits of this case may be comprised in the two following questions:—1st, On the one hand, is a child born of unmarried parents in England, absolutely incapable of legitimation? Is the quality of bastardy, so stamped upon it at its birth by the law of the country in which it was born, indelible? or, 2d, On the other hand, can the legal effects of a marriage, duly contracted in Scotland, be affected and defeated in compliance with the laws of other countries, in which the persons may have resided, or been domiciled, prior, or subsequent to the marriage?

In considering these questions, it is not very easy to preserve a separation of the argument; and I shall not attempt to do so in the few observations now to be offered.—That an illegitimate child born in England, is incapable of being legitimated in England by the common law of England, may be true; but that goes a very little way in the present question; nor does it by any means follow from an admission that such is the law of England, that the same child may not be legitimated in another country by the marriage of its parents in Scotland, where legitimation per subsequens matrimonium is an acknowledged doctrine of the law.

The proposition which the pursuers maintain, and in my opinion must maintain, in order to prevail in this litigation, viz. that such character of bastardy is indelible, appears at first view rather a startling one—and this impression will not be removed or weakened by attending to the practical consequences to which it may lead. Two persons, natives of, and domiciled in Scotland, but occasionally visiting or residing in England, have a numerous offspring, suppose twelve children, born alternately in Scotland and England, six in each country. The parents finally enter into a marriage in Scotland; and, according to the pursuers' argument, the effect of this marriage is to confer legitimacy on one-half of the family only, while the other half remain bastards. A doctrine can hardly be right, or agreeable to sound principles, which leads to such consequences.

It is not denied, that the legal effect of a marriage in Scotland, is to legitimate all the children previously born of the parties who contract the marriage. As in the Roman law, so by the older writers on the law of Scotland, this doctrine is laid down without qualification, and as subject to no exception. It is true, I believe, that, by the Canon law, it was held that children, born during the subsistence of a prior marriage of either of their parents, could not be so legitimated. This exception seems reasonable, since otherwise the right of the children of the prior marriage might be defeated by the legitimation of the children, older by birth, of the subsequent marriage. There is no decided case, however, by which such an exception is sanctioned, nor is it countenanced by our older writers. But Mr Erskine says, (b. i. tit. 6. sect. 52.) 'The subsequent marriage, by which this sort of legitima-'tion is effected, is, by a fiction of the law, considered to have been 'contracted when the child legitimated was begotten, and, conse-'quently, no children can be thus legitimated, but those who are pro-

'created of a mother whom the father at the time of the procreation 'might have lawfully married. If, therefore, either the father or the 'mother of the child were at that period married to another, such 'child is incapable of legitimation,' &c. A prior marriage, according to this authority, prevents the operation of the fiction, because it incapacitates the parties from marrying, and renders their marriage legally impossible at the period when, by the fiction, it is held to have taken place. But the parties are not incapacitated from marriage, nor is their marriage at the requisite period rendered impossible, by their residence, and the birth of the child, in England.

It will be observed, that Mr Erskine, in stating and approving of the exception which he mentions to the doctrine of legitimation per subsequens matrimonium, rests his opinion entirely on an inference arising from the legal fiction, that the marriage is held to have been contracted when the child was begotten; whereas I could rather wish that he had rested it on those solid grounds of justice which I have mentioned. Fictions of law seem to have been the invention of an early and rude age. They were resorted to in those ages, in order to accommodate new rules to preconceived notions of law; to reconcile an apparent or an imaginary inconsistency betwixt new regulations, introduced on views of equity and expediency, and the system of law as existing before their introduction.

In such cases, and assuredly as it appears to me in the present case, the legal fiction is not the foundation of the rule. The rule is founded on principles of justice or expediency, and the fiction is resorted to merely to explain and reconcile it to the principles or notions of the lawyers of the time. It may, therefore, be doubted, how far it is reasonable in every case to hold, that the rule is to be controlled or defeated in its operation by arguments derived, not from the principle on which it is founded, but from the legal fiction with which it was at its introduction unnecessarily encumbered: I say unnecessarily, because in later times our laws have no reference to any such fictions. Thus, by the Act 1696 it is declared, that certain deeds granted by a person within a period of sixty days prior to his bankruptcy shall be null. If this law had been one or two centuries older, we should probably have been told, that there was a legal fiction by which the person was held to be bankrupt at the date of the deeds so granted by him; and then there might have been room to maintain, that he was not in a situation in which he could have been made bankrupt at that period, and that, therefore, his deeds could not be set aside.

It is the rule of our law, founded on views—and I think they are not mistaken views—of expediency, that natural children shall be legitimated by the subsequent marriage of their parents. But this appearing to be inconsistent with the previous general doctrine, that children born in wedlock only are legitimate, some of our commentators resorted to a fiction to reconcile the inconsistency, and Mr Erskine mentions this fiction as the ground of the exception which he points out. But the exception, if it be one, as I think it is, which the law would recognize, is an exception founded on manifest principles of justice—justice to the children who may be born of the prior marriage; and it therefore ought to be received, and would be received, independent altogether of the legal fiction from which Mr Erskine derives it. Availing himself of this, and looking at the legal fiction alone, the pursuer maintains that it is to have the effect of controlling the rule, and defeating its operation, in a case to which, but for the

arguments derived from the legal fiction alone, the rule would certainly apply. A child born in Scotland of Scots parents in 1815, will undoubtedly be legitimated by their subsequent marriage. But if the same parents happen for an intermediate period to reside, and to be domiciled in England, and a child is there born to them in 1816, the child, according to the present argument, cannot be legitimated, because, by the law of England, there is no room for the fiction that they were married when the child born in the country was procreated. Such, perhaps, are the consequences that may naturally be expected to follow, from permitting the rules of law to be explained and controlled by arguments derived from fictions, resorted to, when the rules were made, to accommodate them to the notions of law prevalent at the time, and to reconcile men more easily to their introduction.

It is said, that the character of bastardy in England is indelible; but why is it indelible? Because legitimation per subsequens matrimonium has no place in the law of England; and because, such being the law of England, a subsequent marriage in Scotland cannot have the effect of legitimating a child born in England. Now, let the process of reasoning by which this proposition is supported be attended to: It will then appear, that the only ground for denying such effect to the subsequent marriage in Scotland is, that the law of this country is said to be founded, or to proceed, on a fiction which cannot operate extra territorium. Thus, in whatever way the pursuer may shape his argument, it is manifest that the whole of it is to be traced to the legal fiction. His reasoning consists, not in shewing that our law, in its principles, does not apply to this case, but in endeavouring to shew that its application to this case cannot easily be reconciled to a useless fiction, by which, for the reasons formerly mentioned, I humbly presume to doubt whether the law ought at all to be controlled.

But should those general considerations which I have taken the liberty of suggesting be entirely disregarded, a very important point remains for inquiry, namely, whether Mr Erskine, and the other writers whom he has followed, are right in stating, that by the law of Scotland the doctrine of legitimation per subsequens matrimonium really proceeds on the fiction so often mentioned. Now, in this I apprehend they are quite mistaken. The civil law forms in truth the law of Scotland upon this point. But in the civil law no mention is made of the fiction. This was only resorted to at a later period by the canonists, whose authority with us is of a secondary nature. This, then, is not the case of a fiction, coeval with the rule of law, and on which the rule at its introduction was declared to rest. Here the law, as originally promulgated, stood on its own proper principles of justice and expediency; and the question is, whether this law is to be controlled by a fiction, not countenanced by the civil law, in which the rule originated, and which is in truth our law, but introduced at a later period by the canonists?

It is worthy of remark, that the law of France, if I am rightly informed, has no reference to this fiction; but legitimation per subsequens matrimonium has place in the law of France as well as in the law of Scotland. In both countries the doctrine is confessedly derived from the civil law; and, when it appears that the civil law gives no countenance to this fiction, and that it is not received at all into the French law, it does seem unreasonable to maintain, that it is to regulate or controul the whole of our doctrine on the subject.

But admitting Mr Erskine's doctrine, and the grounds on which he rests it, to be perfectly sound and unexceptionable, it must be carried

a great deal farther, and greatly extended indeed, before it can support the pursuer's plea. Mr Erskine puts the case of a marriage subsisting at the time the child is procreated, which made it legally impossible for its parents then to marry, as forming an insurmountable bar to its legitimation by a subsequent marriage. Here there existed no such legal impossibility. It is said, that the parents were resident and domiciled in England at the time of the defender's procreation. There was nothing, however, to prevent them from entering into a lawful marriage in England at that period.

It is an invariable maxim, that no fiction shall extend to work an injury. But, on the other hand, it may be held as a general maxim, that a fiction shall be so far extended as to accomplish its object, and to work out the rule with a view to which it was adopted. From the marriage of the defender's parents in Scotland, there arises a legal fiction that they were married at the time the pursuer was procreated; and, agreeably to this fiction, it appears to me, that their prior marriage must be feigned to have taken place in Scotland also. The fictitious marriage derives its origin from the actual marriage—the one is the creature of the other; and in whatever country the one took place, the scene of the other must be laid in the same country. The actual marriage was a Scottish marriage—the fiction is a Scottish fiction, necessarily consequent on the marriage; and it is therefore in Scotland that we must hold the fictitious marriage to have been celebrated. It is no doubt asserted—and truly asserted—that the defender's parents, in point of fact, were not in Scotland at that period. But contra fictionem juris non admittitur probatio. If it be a fiction of law that the parties were married in Scotland, it is of no more importance to prove that they were not in Scotland, than to prove that there was no actual marriage.

On the whole, to return to the questions formerly proposed, I state it as my opinion, in answer to the first, that the character of bastardy is not indelible; and, in answer to the second, that the legal effects of a marriage contracted in Scotland, cannot be affected or defeated in compliance with the laws of any foreign country, in which the parties may have been, or continued to be, domiciled. I proceed mainly on the principle that the lex loci contractus must be the governing rule in this case.

Lord Balgray.—The case of Mr Ross is of importance, and is attended with considerable difficulty. The facts are few, and are but little controverted by the parties.—Mr Alexander Ross was a native Scotsman. By inheritance, he was entitled to heritable property in Scotland; and by settlement he became proprietor of a large estate, upon which he had a residence. Occasionally he came to Scotland to visit his friends, and to exercise the rights of a Scots landed proprietor. His more constant residence was in England, where he carried on, to the day of his death, a very extensive business. In June 1815 Mr Alexander Ross came to Scotland with the mother of the defender, evidently with the avowed purpose of celebrating a regular marriage with her, and of thereby legitimating the defender, born in 1811, according to the law of Scotland. A residence followed of some eight or ten weeks at Cromarty-house, the family mansion. Mr Alexander Ross having died in 1820, the question arose as to the legitimacy of the defender, and his right of succession to the estate of Cromarty. Although the facts be not complicated or numerous, yet they do give rise to such views of law as to occasion considerable perplexity. The

question is of that nature, that it is apprehended it cannot be solved or justice done to the parties by resorting to any one single principle. Several principles of law must, it is thought, be admitted in combination, as elements for the decision of the question.

1. This Court must be guided and directed by the laws and customs of Scotland, where they are acknowledged and admitted, however peculiar they may be. At a very early period 'it was ordained, that all 'and sundrie the king's lieges of the realme live and be governed un-'der the king's laws and statutes of the realme allenarlie, and under 'na particular lawes, nor special privileges, nor be no lawes of other 'countries nor realmes.' 1425, c. 48. and 1503, c. 79.; Stair, b. i. tit. 1. sect. 16. The comitas gentium does not authorize the adoption of any other law which is adverse to the usages of the common laws of the realm of Scotland. 2. The question here is in so far a pure question of status; but it has reference, and the claim can only be competent in respect of that reference, to a succession to a landed estate in Scotland; and, of course, the Court is bound to consider the question as in a competition of brieves, and to decide as a Scots Jury, and to find and declare who is the lawful heir to the estate of Cromarty, according to the laws and usages of Scotland. 3. The rights and privileges, which are the adjuncts of heritable property, depend upon the law of the country where it is situated. The peculiarity of constitution of each country mainly depends upon the mode of holding such property, and of its transmission either inter vivos or by succession. Hertius de Collisione Legum, Sectio 4. sect. 9. 'Quilibet advena in 'percipienda hæreditate succedit non secundum suæ personæ, sed 'secundum jura terræ Saxoniæ, etiam cujuscunque terræ sit, sive Ba-'variæ, Franciæ vel Suevicæ nationis.' 4. Mr Alexander Ross was a native born Scotsman, and, as such, entitled to enjoy all the rights and privileges which the law of Scotland can bestow; and if any peculiarities regarding private rights do exist in that law favourable to Scotsmen, of such no Scotch court of justice can deprive him. That character and that right is perfectly indelible; and certain effects of that birthright, even in these times, must be acknowledged by every Scotch lawyer to exist, and did exist at the hour of his death.—The legitimation per subsequens matrimonium is now part of the undoubted law of Scotland. It is a privilege granted by the laws, of which every Scotsman is entitled to avail himself. Had Mr Ross remained in Scotland after his marriage, no doubt could possibly have been entertained about the matter. The pursuer could have pleaded in vain to a Scots court or Scots jury that the character of bastard, stamped in England on the defender at his birth, was indelible. It has been said that the birth in England, when joined with the circumstance that the parents were then domiciled there, stamps an indelible character of bastardy, and which operates as a medium impedimentum, and prevents the legitimatio per subsequens matrimonium. But this is truly a begging of the question. The child is no doubt illegitimate at its birth in England; but so it would have been in Scotland also; and we only make the bastardy indelible by assuming, what is the matter in dispute, that it cannot afterwards be removed by the operation of the law of another country. If this is a just principle of law, then it will necessarily follow, that had Alexander Ross upon his marriage relinquished all connexion with England, settled in Scotland animo remanendi, and continued domiciled there to the day of his death, the child could not have been legitimated: In short, that the domicile of

the father does not regulate the status of his family generally, but only his domicile at the moment of birth. This does not appear to be sound law. The case cannot be rested on such a footing.

6. It is always to be kept in view, that marriage by the law of Scotland is nothing but a civil and consensual contract; and, consequently, in certain respects, it is open to those modifications which apply to other common consensual contracts. In Scotland, Scots people living together as husband and wife will constitute a marriage; but the acting in this manner in another country, where such is not the law, will be no evidence of that tacit consent inferring marriage; and in such a case there could thereby be no legitimation per subsequens matrimonium.

7. The domicile of Mr Alexander Ross was no doubt in England. More properly speaking, it was the domicile of his trade or business. From England being the place of domicile, it seems to be clear that his intestate moveable succession must be regulated by that law. His personal rights and moveables are supposed to be there all concentrated; and it is presumed that it was his intention to destine that species of property according to that law. All this is perfectly consonant to reason, and to the now established principles of law relative to moveable and personal property. But the whole of this totally fails in the case of heritage. Presumed intention no longer exists. The acquirer of heritable property must lay his account with subjecting it to the rules and regulations of the country where it lies; and the law of that country, in that respect, cannot alter with the varying residence of the owner.—Under obvious modifications, there appears to be no inconsistency in two or more domiciles, although it may be necessary to fix on one as deciding the moveable succession. There is no inconsistency in one class of heirs taking the moveable succession by one law, and another class taking the heritage by another law. That is to say, it does not necessarily follow that the law of the domicile is to regulate the succession to heritage. It has been argued, that the opinion of Boullenois determines this matter against the defender, vol. i. p. 62. It is conceived that this is rather an authority in the defender's favour. He states the case of English persons having a child in England, born in concubinage, and coming to remain in France, and being there married; but he adds, 'sans s'y être fait naturaliser;' and of course that qualification makes part of the elements of his opinion; and of course all must agree with him, that these persons were to be held as English people, and subject to their own laws. But it seems necessarily to follow, that if these persons had been naturalized in France, the legitimation would have followed. Now, it may be asked, was not Mr Alexander Ross a Scotsman to every intent and purpose? Did he not come to Scotland for the avowed purpose of celebrating a regular marriage, and with the clear and evident intention of legitimating his son, the defender, and creating to himself a lawful heir according to the laws and forms of his native country? He had no occasion to be naturalized; and the wife became participant of his rights.

8. In the last place, I humbly think, that if the marriage was a lawful marriage, which no one can dispute, all the legal consequences must follow, and that in every other country. The contrary doctrine seems to be extremely anomalous.—Having due consideration to these principles of law, it would now be necessary and proper to shew their application to the circumstances of the present case; but having had an opportunity of seeing the opinions of Lord Gillies, Lord Mackenzie, and Lord Medwyn, and concurring with what has been stated by their

Lordships, I consider such a deduction to be unnecessary and superfluous.

Upon the whole it appears to me, that this case must be determined by taking into view various principles, and that the whole combined must be taken under consideration; and by so doing, the necessary result appears to be, that the defender ought to be held by the law of Scotland as the lawful heir of the late Alexander Ross; and that the judgment of the Honourable Commissaries is right.

LORD ELDIN.—In the declarator of bastardy at the instance of Mrs Rose, and Mr Rose her husband, against George Saunders, the bastard, a minor, and his curators, various proceedings have taken place.

Saunders was born in England, on the 6th February 1811. His mother, Elizabeth Woodman, was a person of disreputable character, who had various illegitimate children to different fathers. For a short time she cohabited with Alexander Ross; but this was some time after the birth of Saunders; and it does not appear that Ross was the father. Ross was a Scotsman by birth, but he had left Scotland and lived in England for fifty years before his death, by which he lost his Scotch domicile. In the month of June 1815, Alexander Ross, with Mrs Woodman and young Saunders, left their place of residence in England, and went to Scotland. It appears that their purpose was to celebrate a marriage in Scotland, and they expected to legitimate young Saunders as the bastard of Mrs Woodman and Alexander Ross. It may be true, that Saunders was begotten on the body of Mrs Woodman; but there is no evidence that he was the son of Alexander Ross. Saunders was one of many bastards begotten on the body of Mrs Woodman; but Ross made no claim to this bastard till several years afterwards, when he found it convenient to pretend that he was the father of the child, although there was no evidence to support his pretension. And nothing could have been more shallow than the grounds for such a pretended legitimation. He was a bastard by the law of England, which reached him both by his father and mother, and completed his bastardy on both sides of the house. It would be in vain to pretend that such a state of bastardy could be removed. Even supposing the parents could marry, and, by that marriage, legitimate the children afterwards born, no legitimation of the bastard already born could take place.

The Scotch marriage would have legitimated all the children afterwards born of that marriage; but it is another question, whether the marriage in Scotland was effectual to legitimate the bastard born in England four or five years before the marriage took place. It does not appear that any thing has been attempted, by which a difficulty so manifest can be counteracted. The question is, whether a notorious bastard, settled and fixed in that state without any remedy that can be suggested, is a person that can be legitimated and relieved from the stain of bastardy? There are no doubt cases in which legitimation per subsequens matrimonium is allowed, and the parties are relieved by the lenity of the law. But, on the other hand, the law is, in many cases, enforced with much rigour, and to the effect of fixing the bastardy upon the individual for his life, and without the least hope of remedy.

But farther, it is necessary to attend to the situation of the parents. The mother was an Englishwoman, and a stranger; the assumed father was not supposed a real or true father; and the man, woman, and child,

returned to England after the lapse of a few weeks. It is evident that they had obtained no link or hold of the country, and still less had they obtained a status authorizing them to use the privilege of their marriage one jot beyond the act of living together as man and wife from the time of their marriage, which left the bastardy untouched; and the stain of many years bastardy remained with them both, as an interminable bond and disgrace which nothing could remove. So far is this case from resembling other cases, in which a marriage, though it is celebrated at the distance of twenty years after the birth of a bastard, may yet be legitimated by the circumstances which often occur to give such an advantage, although, in many other cases, no such benefit can be had.

It has been pretended, that the marriage between Ross and Mrs Woodman had the effect to put an end to all the difficulties arising from the circumstances of the case. But this is a very gross error. Ross and Mrs Woodman made a marriage, and they obtained all the legal privileges which belonged to that marriage. But it is a great mistake to suppose, that the parties gained any thing more by their marriage than the privilege of living as man and wife, dated from the period of the marriage, and without any retrospect to events which had previously happened. It would be in vain to say, that George Saunders did not remain a bastard, subject to all the disabilities which necessarily followed his bastardy. Alexander Ross pretended to be the father of the bastard; but who can say that Saunders was the legitimate son of Mr Ross and Mrs Woodman? The bastardy, arising from the previous follies of Mrs Woodman, was altogether indelible.

But this is not the worst that must follow the crimes of Alexander Ross and his wife. There are disabilities in law for such cases, to prevent the parties from forming other connexions. No doubt it may happen, that a long continued bastardy, in Scotland, is removed by the circumstances of a favourable case. For example, if the parents have always been domiciled in Scotland, the children may be legitimated by a Scotch marriage. But the present is a different case. Saunders is exposed to numerous entanglements of the law of England, from which, to all appearance, there are no means to make him free. He is under the necessity of grappling with these difficulties; and, if he cannot get rid of them, the law of Scotland will avail him nothing.

If it should be possible to get rid of these questions, there is another, which it is not so easy to encounter when it occurs. It has been laid down as law, by two decisions of the House of Lords, that a man domiciled in England, or in America, having an illegitimate child by an English or an American woman, does not by marrying the woman legitimate the child. What other hardships may attend his situation may be uncertain. There is no question as to the marriage of a bastard or bastards. The question is, whether Mr Ross and Mrs Woodman were in a capacity to celebrate a legitimacy of their own bastard, or the bastard of Mrs Woodman? It is not easy to say how all these difficulties can be avoided.

It might have been practicable to make a marriage for young Saunders, when he came of age. But this is not the difficulty to be combated. It is easy to make a marriage between two persons, both of whom are at liberty to marry. But it is not so easy to unravel the frauds and fallacies, and the whole of the conduct of Ross and Mrs Woodman, sheltered in a long series of years by every contrivance that occurred to them.

It is evident, that this is a case which depends entirely upon the law

of England: Apparently, the law of Scotland has no concern with it. Mrs Woodman, with her bastard, and Ross, were all of them equally domiciled in England, and were subject to all the laws of that country. Under these circumstances, it is quite in vain to pretend that the parties, or any of them, had power to escape from the evident difficulties that surrounded them, in their attempts to avoid the English law.

LORD JUSTICE-CLERK.—It appears to me extremely important, in judging of this case, to observe how it has arisen. In the summons it is set forth that the pursuer was about to claim the estate of Cromarty, when she was opposed by a brieve of service obtained by the defender as lawful son of Alexander Ross, which she denies him to be. The course of procedure adopted by the Commissaries was perfectly regular, and is sustained as far back as Balfour, who, at p. 239. observes: —'Gif ony persoun, as heir, claims ony heritage fra ane uther, and 'the defender alledgis that the pursuar is bastard and not gottin in 'lauchful marriage, this clame of heritage intented befoir the tempo-'ral Judge sall ceis and sleip untill the questioun of bastardie be de-'cided befoir the spiritual Judge, and quhill it be certainlie knawin 'quidder the pursuar is bastard or lauchfullie begottin; for it pertenis 'not to the temporal Judge to decide in the action and cause of bastar-'die.' There is therefore no objection in point of form, and I am authorized to state, that a doubt expressed in Lord Craigie's opinion as to that has now been removed. The pursuer bottoms her right to insist in the action on her being heir of entail in the Cromarty estate; so that virtually what we have to decide is, a competition as to who is the heir of entail of Cromarty, a Scotch estate. The question, therefore, is to be decided according to the principles of the law of Scotland. It is now finally settled, that the defender is the son of Alexander Ross; and as there is no evidence of any existing impediment to his marriage with Miss Woodman, (as by Miss Woodman being a married woman), we must throw out of view the plea at one time set up, that the defender was not Alexander Ross's son. The other ground is, that the defender is not legitimated by the marriage of the parents. In judging of this, we are bound to take into view the whole facts of the case, and I hold them to be these:—Alexander Ross was born in Scotland—he inherited a paternal estate there. In 1786 he succeeded as substitute in the entail of the Cromarty estate, and became a freeholder in two counties. From that period he exercised the privileges of a freeholder—attended elections—managed his estate by a factor—and had all along a substantial hold of the estates till the day of his death. In 1777 he married, and had several daughters; and after the death of his wife he formed a connexion with Miss Woodman, by whom he had this son, whom we must hold as from the first acknowledged to be his son. Professedly for the purpose of availing himself of the privilege of the Scotch law, he came to Scotland in 1815 with Miss Woodman and his son, and in three weeks afterwards was publicly and regularly married by the minister of the parish. Shortly thereafter he went to Cromarty, where he introduced her as his wife, and the boy as his son, and then returned to London, where he resided till the day of his death, and where undoubtedly he was domiciled, to the effect of the distribution of his moveable estate. Then, on these facts, can we listen to the objection made to the effect of this marriage? It is necessary to keep in view, that this was not the ordinary case of two persons living in England all their lives, and, having a distant prospect of succession to a Scotch estate, coming to Scotland for

a day to legitimate their children; for we have here the father's constant and close connexion with Scotland; and I am not moved by the cases put, of parties coming to evade the law of England, as this was a fair bona fide proceeding according to the law of Scotland. The distinction is illustrated by the fact, that the widow is now in full possession of her legal rights, without dispute or challenge; so that, in regard to one important consequence, effect has not been denied to this marriage. It is impossible to think that this case is to be determined by inquiring into the origin of the principle of legitimation per subsequens matrimonium, or whether it arises from the adoption of the fiction, that a marriage took place before conception; but even if we adopt the fiction, where is the impossibility that the parents came down to Gretna Green? There is no impossibility in this; and I deny that the fiction cannot apply. Neither is it on the dicta of foreign jurists that we can decide this case. It was admitted at the bar, that they could not push the doctrine of indelibility of status so far as the jurists do, and that it must be received with innumerable qualifications. Take the case of slavery, or the very strong one of English marriages, which may be dissolved in Scotland if there is bona fides and no collusion, although by the English law they are indissoluble except by an Act of the Legislature. I cannot, therefore, go on the doctrine of indelibility; and the case is therefore brought to this, whether the connection of the parents and the birth of the child, having taken place in England, are a bar to subsequent legitimation? I can see no authority for holding that the place of birth has any thing to do with legitimation. I cannot suppose that it has, otherwise our institutional writers would not have overlooked it if there was any such bar. On the contrary, Lord Bankton, at p. 121. lays down the rule generally, without qualification and without reference to the law of England, that marriage legitimates the previously born children of the parents. There are only two cases referred to—those of Shedden and Strathmore. Now, in looking over the case of Shedden, is it possible to say that it is a precedent for this? The marriage there was entirely in America. Shedden was no doubt a Scotchman by birth; but he kept up no connexion with Scotland, and at that time had no property there. It was therefore entirely different from this case, although I entertain no doubt of the propriety of the judgment pronounced in it. In the same way in Strathmore, the father was born in England. He had Scotch estates no doubt, and was a Scotch Peer, and as such attended elections, &c.; but he did not come to Scotland—marry there—and take his wife to Glammis Castle. He married in England, and claimed a British Peerage; and although there had been no qualification by the learned persons who delivered their opinions in the House of Lords in that case, I could not hold it a precedent here; but the very learned person who then presided in that House used words expressly to exclude its being supposed that he decided such a case as the present. I am therefore of opinion that the bill of advocation must be refused.

Lord Glenlee.—As to the facts, the parties are in a great measure agreed. If the parties had never been out of Scotland, there could be no doubt but that the defender was legitimated. The pursuer, however, rests greatly on this, that foreign jurists lay down the law, that personal status, once imbibed, follows a man wherever he goes. I rather think that this is a mistaken view of their opinions; they only say, that if no actus legitimus intervenes to alter the status, it adheres to the person. It is nowhere said, that if a particular sta-

tus is acquired, which the law of the country says is indelible, it cannot be altered by an act in a country where such status is not indelible. Even Boullenois' opinion, in reference to the case assumed by him, goes on the circumstance of the parties not being naturalized in France, so as to entitle them to the benefit of the French law; and it implies, that, if they were naturalized, the consequences would follow. We know that all the subjects of the united kingdom are naturalized in every part of it, so that this defect cannot apply to the present case. But I think, at any rate, the foreign jurists go too far, as their opinions will not apply to our principle, that a slave cannot touch British ground; and the pursuer suffers by the maxim, that statuta personalia do not follow, for she wishes to introduce a rule of English law not known in any other Christian or civilized state. In the case of Shedden no act was done to alter the status; for we must give to marriage the effect of the law of the country where it takes place; and therefore in Shedden's case it was impossible, even in accordance with the opinion of foreign jurists, that legitimation should take place, when that was not the effect of marriage in America. As to the fictitious cases put of English parties coming across the border to marry, with the view of legitimating their children, and immediately returning, I would reserve my opinion till they occur. If parties came here, having no estate, but only coming to get decree of legitimacy, to be effectual in England, I would dismiss the process, although I could not find that the defender was not legitimate. We have, however, nothing to do with that here. The only question is, whether the defender has been legitimated to the effect of succeeding to a Scotch estate? for the pursuer could bring no declarator of bastardy except to that effect; and I have no difficulty in concurring with your Lordship.

LORD PITMILLY.—I cannot bring my mind to detain the Court with delivering an opinion at length; for although in my notes I have followed a different arrangement, yet every thing which occurred to me has been stated in the printed opinions, or those now delivered; and I shall merely say, that I entirely concur with your Lordship and Lord Glenlee.

LORD ALLOWAY.—I stand precisely in the same situation with Lord Pitmilly. I have prepared very full notes; but your Lordship has expressed so well my opinion, that I shall not repeat it.

No. V.

SPEECHES of LORD CHANCELLOR ELDON and LORD REDESDALE, in delivering their Opinions in the Committee of Privileges of the House of Lords, on the Claims to the STRATHMORE PEERAGE.—March 1821.

LORD CHANCELLOR.—My Lords, your Lordships at length are called to the duty of expressing your opinion upon this case. Very early after the death of the Earl of Strathmore, who sustained the characters both of a British Peer and of that which, in the discussion before your Lordships, has been called a Scotch Peer, questions arose which rendered it my duty to suggest, that it was desirable