it was in the power of the Marquis to enforce it; but he did not—attempting to substitute another penalty as inferrible from the deed of entail, though not directly expressed. The Act 1685 authorizes the owners of estates to entail them, under such provisions and conditions as they shall think fit. The simple and true question in this, as in similar cases, is, Did the deed impose such a condition as that attempted to be imposed? The deed prohibits certain acts, and imposes a certain penalty on contravention. The conclusion is, that the entailer did not think fit to impose any other; and therefore a Court is not at liberty to do so, nor to add a syllable to the deed which is not to be found in it.

Suppose an entail to contain the strictest prohibition to alienate or burden the estate, but not followed up by irritant and resolutive clauses;—the entailer has, by the deed, given to his disponee the power to exercise every act of ownership; and, with the same breath, prohibited him from doing so in certain respects. In contempt of the prohibition, the disponee or heir sells the estate or encumbers it. The purchaser or creditor is confessedly safe; but the substitute heirs allege they are injured, and their loss must be repaired. The contravener answers, 'How can I be subjected to damages for doing what, 'as owner, the law allowed me to do, and which the deed by which I 'took the estate laid me under no penalty for doing?' The substitute says, 'You were under an implied obligation: You have done an 'immoral or improper act.' To which it must be sufficient to answer, 'There is no room for implication; and, granting what I have done to 'be improper, or, if you please, dishonourable or immoral, where is 'the law that subjects me to pecuniary damages? In what Court 'am I to be tried for the alleged crime? and what Court has right to 'direct how the money is to be disposed of or distributed, if I were 'found liable?' As no law can be pointed out, nor any course which is not merely arbitrary can be pursued, it follows, that the substitutes are without remedy: In short, that the substitutes can have no redress against the onerous deeds of the heir in possession, if the entail does not contain irritant and resolutive clauses, in terms of the Act 1685. If the right of ownership remains, the deeds of the owner must stand.

No. III.

OPINIONS of the COMMISSARIES in ROSE *v.* ROSS; referred to at p. 290.

MR COMMISSARY TOD.—The present case embraces two points,—a question of fact and a question of law. The question of fact, respecting the filiation of the defender, George Ross, has been already investigated, and disposed of by a final interlocutor of this Court, finding that the defender is the son of the late George Ross of Cromarty and Elizabeth Woodman. It remains now to consider the legal question, How far he is the lawful son of those persons? This point is argued in the memorials now before the Court.

The circumstances from which the cause has arisen, and the judicial proceedings which have already taken place, are fully detailed in the

pleadings of the parties; but it seems to be unnecessary at present to recapitulate them. It will be sufficient to observe, that, in so far as not admitted, or assumed for the present argument, the material facts have, in the course of the judicial procedure, been either instructed by evidence, or ascertained by the judgment of the Court.

In arguing the case, the pursuers admit the validity of the marriage of the defender's parents in Scotland; but they deny its retrospective effects in legitimating the defender according to the known principles of the law of Scotland, on the ground, that, being born a bastard in England, of parents, as they allege, legally and permanently domiciled there, the law of England, which does not admit of legitimation by subsequent marriage, must regulate the legal quality of the defender's status.

The defenders, on the other hand, maintain, that the intermarriage of the parents of the defender in Scotland, his father being a native of that kingdom, inheriting a paternal estate, and also proprietor of an entailed estate in Scotland, which he occasionally visited, must have the effect of rendering him legitimate, even admitting he was born illegitimate in England, and his parents had their principal domicile there. The law of Scotland, it is argued, must exclusively govern the question of legitimacy, which cannot in any respect be controlled by the law of England.

It may be observed, in the commencement, there are many circumstances in the present case, which seem to connect it very closely with Scotland. Thus the pursuers of the action have chosen a Scottish forum to try it in,—their title to sue is a Scottish deed of entail,—their ultimate object is to acquire a landed estate in Scotland,—and, to attain this object, they call in question the ordinary legal effects of a Scottish post-marriage, contracted by a person connected with Scotland by birth and property. All these circumstances, which mark the Scottish features of the case, and which, whatever rule of judgment may be ultimately applied, shew at least the competency of this Court, in point of jurisdiction, to entertain the action, will no doubt be allowed their due weight in the ultimate decision of it, as standing opposed to those circumstances by which alone the case can be characterized as English, namely, the alleged domicile of the defender's parents in England, and his own illegitimate birth in that kingdom.

In proceeding to consider the immediate merits of the question, it appears to me to be the natural course, and the readiest way to arrive at a just conclusion, to begin with examining the legal grounds on which the defender's right to the status and character of legitimacy is founded, and then to consider the grounds in law on which his claim to that character is challenged.

This claim to legitimacy rests upon the well known principle of the law of Scotland, by which children, though born out of marriage, become, upon the marriage of the parents, legitimate children, and are so viewed in every question of status and succession.

It is believed, that, with the exception of England, wherever the civil and canon law have been received in Europe, this doctrine of the legitimation of children born before marriage, by the subsequent marriage of their parents, has been recognized. In Scotland, according to all our systematic writers, it has for many centuries formed part of the undoubted law of the country. It is quite unnecessary to take up time by any particular examination of it, because the doctrine itself, as well as the principle on which it rests, are perfectly well understood.

To support the doctrine, the law supposes by a fiction the parents to have been married at the time of the child's conception. 'Consequently (says Mr Erskine) no children can be thus legitimated but 'those who are procreated of a mother whom the father at the time 'might have lawfully married. If, therefore, either the father or the 'mother were at that period married to another, such child is incapable 'of legitimation.' The doctrine then rests upon the legal fiction, that the parents of the child might have lawfully intermarried at the period of conception; in other words, that they were not at that time prevented from marrying by any known disability, either canonical or civil. Hence it would appear, that, wherever there is room for the fiction, there the doctrine will apply. There then exists no mid-impediment, as it is technically called, and legitimation of the children will ensue. But, on the other hand, wherever the ground of the fiction fails, there the doctrine will fail also. If the parents, at the time of the conception, could not have lawfully married—if they then laboured under any legal disability, their union in that case is held to be meretricious, and the children begotten of it are considered to have been begotten in adultery. A mid-impediment then intervenes, which is fatal to the application of the doctrine, and no legitimation can follow upon the subsequent marriage of the parents.

The law of legitimation, and the principle which supports it, being thus clear, there seems to be little difficulty in applying it to the case of the defender. The validity of the marriage of the defender's parents in Scotland is not disputed, neither is it seriously alleged that either of them could not have lawfully intermarried at the period of conception. It is not alleged that they were prevented from doing so by any incapacity whatever recognized by our law. And hence, there does not appear to be any mid-impediment (at least in the view of the law of Scotland) of such a nature as to defeat the fiction on which the doctrine of legitimation is supported.

The pursuers have, indeed, made a faint attempt to shew, that the ground of the fiction is inapplicable to a case where both the parents being permanently domiciled in England at the time of the procreation, they could not, it is said, by law, have intermarried without a regular celebration in facie ecclesiæ. But this can create no mid-impediment in the eye of our law, which holds the place where the parents may have been to be of no consideration, provided only they could have legally intermarried at the required period. If, in short, the parents of the defender could have lawfully intermarried at the time of conception, it is indifferent where they happened to be—whether in England or in Scotland. The possibility of a matrimonial union at the period of conception is all that the law of Scotland requires; and the possibility existed in the present instance.

Such being the legal grounds on which the defender's claim to the status of legitimacy rests, I proceed next to consider the grounds on which his right to that character is challenged.

The law of England, as it is well known, does not recognize the doctrine of legitimation by subsequent marriage, as received in this country. The general object, therefore, of the pursuers, in bringing the present action, is, by the aid of that law, to subvert the acknowledged principles of the law of Scotland, as otherwise applicable to this case; and, by introducing those of the law of England, in this way at once to bastardize the defender, and supersede the natural operation of the law of this country. The question, thus viewed, becomes undoubtedly one of very general interest and importance,—not merely as affect-

ing the parties, but the community at large; as the discussion of it necessarily leads to the investigation of those general principles of jurisprudence by which the most valuable rights of society are governed. It has been brought for trial in a competent forum, accustomed, however, to decide according to the rules of Scottish law. These may, no doubt, in a certain degree, be displaced, in particular cases, by the conflictory rule of a foreign law: But it is at least incumbent on those who plead for such a construction, to prove the necessity and justice of it, in opposition to the known law of the forum where the suit is instituted.

The basis on which the pursuers rest their argument is the fact which they find it necessary to assume, that the defender's father, the late Alexander Ross, was exclusively domiciled in England. It is admitted, that his mother Elizabeth Woodman was born and domiciled there. It is also admitted, that the defender himself was born in that territory. But, little stress seems to be laid on either of these circumstances: The whole argument is placed upon the assumed fact, that the late Alexander Ross, though born and married in Scotland, and proprietor of a landed estate there, was nevertheless exclusively domiciled in England. The question, they say, is just the same as if two English persons, having no domicile in this country, were to come to Scotland with the view of going through the ceremony of marriage, for the purpose of legitimating their children born in a state of bastardy in England, and thus to disappoint their lawful heirs.

Assuming this to be the state of the fact, the pursuers then proceed to argue, upon general principles, that the law of the domicile should govern this case; which, they endeavour to shew, differs essentially from the important cases of divorce, which some time ago so much occupied the attention of this Court and of the Court of Session. They contend, that neither the decisions in those cases, nor the principles on which they were determined, can be held to extend to the case which they have assumed to be the case now before the Court. On the contrary they assert, there were various doctrines laid down, and generally acceded to by the Judges in those cases, which go far to support the proposition which they maintain, namely, that the status of a person, with regard to legitimacy, depends on the law of the place where his parents were domiciled at the time of his birth.

Upon a careful review of this argument, I feel inclined to be of opinion, that the pursuers are mistaken, not only in the premises on which the general superstructure of their reasoning is raised, but in the legal conclusions which they deduce from them.

In the first place, I cannot assent to the proposition which they find it so necessary to assume, that the late Alexander Ross was exclusively domiciled in England. It appears to me, that Alexander Ross was not exclusively domiciled in England, in the sense, and to the effect contended for by the pursuers,—but, that he had a separate and independent connexion with Scotland,—where he was born,—where he inherited a paternal estate, and possessed also a valuable entailed estate, which he was in the habit of occasionally visiting,—and where, finally, he was married. Although, therefore, England appears to have been the country of his fixed abode, yet he was still connected with Scotland, as well ratio originis as rei sitæ et contractus. It does not always follow, that the first of these domiciles must of necessity exclude the other, or that the latter must necessarily be lost and absorbed in the former. Though a person can have but one kind of domicile for the distribution of his intestate per-

sonal succession, he may at the same time, very consistently, have two or more domiciles for other purposes,—totally independent of each other,—of different descriptions, and applicable to different legal interests. Accordingly it appears to me, that Alexander Ross, though permanently domiciled in England, never lost his Scottish domicile,—being always connected with Scotland as his birth-place,—the seat of his real property,—and the place where he contracted marriage.

The question, then, in this view, comes to be, which kind of domicile should obtain in a case of status, in preference to another? or, how far, in such a case, one sort of domicile should be controlled by another?—The pursuers argue, that the domicile of residence should exclusively prevail. But I humbly think otherwise. The domicile of residence no doubt governs the distribution of intestate succession,—but upon principles which demonstrate, that it should not be exclusively the guide in a question of status. It rests upon a fiction, that mobilia non habent situm, and that in the absence of a declaration of will, the law presumes that the place of a man's residence is the best interpreter of his will. But this cannot avail here. There is no secret as to Alexander Ross's intentions to legitimate his son. He declared his will to do so, as well publicly by his marriage in Scotland, as privately in his settlements. Therefore, if this question were to be affected at all by domicile, in the sense taken of it by the pursuers, and exclusive of that sort of local residence which is necessary to found jurisdiction and citation, in my opinion it should be the Scottish domicile, and not the English domicile of mere residence that should obtain. According to a distinction taken by the Roman law, Alexder Ross was a civis of Scotland by birth and real property, and an incola of England merely by residence. His connexion, therefore, with Scotland, should be held to be greater than his connexion with England; because the character of incola, which arises from domicile, is less permanent and indelible than the character of civis, which arises from an original capacity of honours, and an original liability to perform public functions. Potentius esse jus originis quam incolatus, si de honoribus eodem tempore, in duabus civitatibus questio sit: Voet. lib. 5. D. tit. 1. In short, the opinion I entertain upon this point is, that the domicile which arises from the combined sources of birth and extraction, of res sita, and of contract, should prevail in competition with the domicile of residence exclusively so considered, in so far at least as regards the privilege of legitimating children by a marriage in Scotland subsequent to their birth.

But, in the next place, admitting, for the sake of the pursuers' argument, that the late Alexander Ross was exclusively domiciled in England, it appears to me that they are mistaken in the legal conclusion which they deduce from that circumstance. The status of a person, with regard to legitimacy or illegitimacy, does not, according to the views recently taken of our law, depend upon the law of the place where his parents were domiciled at his birth, or indeed upon any principle of domicile whatever, further than that which is necessary to found jurisdiction to entertain the cause. A question of this nature must be determined by a totally different principle, namely, by the rule of law which prevails in the forum where the suit is entertained. At least, apparently, so it was determined in those important cases of conjugal status which have been already alluded to. And although this case, in point of circumstances, is not precisely similar, yet, in point of legal principle, the analogy betwixt them appears to me to be so

close and intimate, that I should conceive we are bound to decide it by a strict adherence to the rule prescribed to us by the Supreme Court in those cases. In this view, it may be perhaps unnecessary to enlarge upon topics, which, having been so fully canvassed upon recent occasions, must be familiar to the Court. But as the subject, in its present aspect, presents itself in a new, and (as far as I know) in a hitherto untried form, it may not be improper to advert generally to those general principles by which questions of personal status are at present thought to be regulated.

The principle of Comitas, or rather of utility, by which concession is made to the law of a foreign state, must necessarily be received with much limitation; otherwise, by the too promiscuous introduction of an imported system of jurisprudence, the administration of justice, if not rendered altogether inextricable, would, at all events, be greatly impeded and obstructed. Accordingly it would appear, that foreign municipal rules are permitted to operate extra territorium only in that class of laws which relates to forms and solemnities. These are not of the essence of an act which constitutes or dissolves a right. They are received as evidence merely of the will or consent on which the right depends, but by no means as a recognition of the law of a foreign state.

The principle which acknowledges foreign law, seems to go no further than this. In general, whatever is of the essence of legal rights is carefully excluded from all interference of foreign municipal rules of law. For instance, they have no place in the extensive class of positive laws which directly attach on property, whether moveable or immoveable, with an exception, however, as to moveables, which, by a fiction, are held to be in the place where the owner resides, and the law of that place in many cases affects them, though in point of fact they are in a different territory. In like manner, foreign rules of law are utterly excluded from cases of Crime, and, in general, from the whole of the large and important branch of jurisprudence which comprises the jus publicum of a state, under which are comprehended all those laws which impress upon individuals personal quality or status, whatever that may be, or however derived. These, and all laws of a similar description, pertaining to the administration of that department of internal jurisprudence which operates directly upon public morals and domestic manners, exclusively belong to the municipal system of the country where they happen to be administered. They are deemed too important, and are too much incorporated with the general frame and constitution of society, to be suffered, in the remotest degree, to yield or give way to the dictates of foreign law.

The question, by what law personal status should be determined, has, no doubt, been the subject of much controversy among the civilians. According to one theory, statuta personalia, whether constituted by the act of the law, or by the positive agreement of parties, were held to operate universally extra territorium; so that every quality of status impressed on an individual in the place of his birth or domicile, was esteemed to be indelible, and accompanied him wherever he went. But the erroneous views on which this doctrine of the indelibility of status is founded, have been long ago exposed and confuted in the most satisfactory manner by many authors, particularly by Voet, the most judicious of all the commentators, who shews, with much ability, from general principles, that personal statutes can no more be suffered to operate extra territorium than real ones; and who proves, by conclusive reasoning, that the opposite rule for the universality of status,

could not be applied without the utmost inconsistency and absurdity. The idea, indeed, of indelibility or unchangeableness of personal status, is too subtle and refined to be applied to the practical purposes of law, which, to be useful, always requires something tangible to operate upon. Such, accordingly, appear to have been the principles which were found to govern the cases of conjugal status so often alluded to. The jurisdiction having been sustained in those cases, and the cases themselves supposed to be cleared of the legal suspicion of collusion, this Court, in obedience to the instructions of the Supreme Court, recognized in the first instance this relation of husband and wife as a relation universally acknowledged jure gentium; and this, not from any supposed deference to the law of England, but on the ordinary rules of our own law, as affording evidence of the consent of the parties to bind themselves in a relation which has a just claim to universal protection and regard.

But beyond this concession the Courts here would not advance a step. The relation of marriage was considered not only to rank first in point of importance, but to be in every respect different from all other personal contracts whatever. Although established by positive agreement, it cannot, like other consensual contracts, be dissolved, nor modified, by the will of the related persons. Regardless, therefore, of any supposed quality of indelibility in the status, the effects flowing from it as to the rights and duties of the parties, and the modification as well as the dissolution of the union, were found, upon the principles I have endeavoured to explain, to belong to the exclusive regulation of the law of the country where the remedy for a violation of the contract was applied for, and within whose jurisdiction the parties were found to be legally placed. The question, in this view, was considered to be strictly one of public law, which could never be compromised by an appeal to foreign rules, and foreign doctrines of expediency. In a matter of such vital importance, it was thought to be contrary to all principle to yield to the dictates of a foreign law; or to administer any other redress than that which was consonant to the principles of the law of Scotland. The result accordingly was, that upon proof of adultery committed in Scotland, (though, in a civil remedy, it is plainly indifferent where the crime was committed), the Scottish remedy of divorce a vinculo was pronounced in favour of persons, born, domiciled, and married in England;—and this not only in direct opposition to the law of England, which holds marriage to be indissoluble, but also expressly against their own agreement, as implied in marriage-contracts duly solemnized in their own country.

Such being the result in those cases of matrimonial status, it seems impossible to apply any different principle of decision to a case involving the status of legitimacy. These two important domestic relations are coeval with society itself, of which they are the basis and the support. It is, therefore, most essential towards every thing which relates to the preservation and well-being of society, that the numerous and important rights and obligations incident to them should be regulated by one uniform and consistent rule. To apply different rules to relations so apparently identical, and so much linked together, would be productive of the utmost disorder and confusion. In their essential nature and qualities they are the same: they differ only in their modes of constitution. The relation of husband and wife is a case of contract, which, in so far as regards its constitution, is universal; but in whatever regards its effects, it is neither universal nor permanent. The relation of parent and child, again, is not a case of contract; for

an unborn infant cannot be a party to a contract. The status of legitimacy is a character which the law allows the parents to impress upon the child, as being the immediate sources of its being. But the rights and obligations resulting from the relation, the adjuncts and qualities belonging to it after it is constituted, are no more universal nor permanent than those resulting from the relation of husband and wife. The effects, in short, following from both relations, must be regarded and treated in every respect upon the same footing. They together form a most important part of the public law of Scotland, and therefore, upon the principles already explained, cannot be suffered to give way to the dictate of any foreign law whatever. The pursuers, indeed, do not seem seriously to deny the principle as applied to the case of divorce a vinculo, but, by inference, wish to form an exception to the application of it to the case of legitimacy, upon the grounds that the decision in the cases of divorce was influenced by the existence of a contract of marriage, which does not exist here, and by the supposed absence of collusion in those cases, which, according to their views, does exist in the present case.

As to the exception from the absence of a contract in this case, it appears to me that the inference deduced from that circumstance should just be drawn the other way. It will be observed, these were the principles of decision contended for in those cases of divorce—the laws of the jurisdiction of the contract, and of the domicile. But an union of any two of those principles against the remaining one should add apparent strength to the plea in favour of which they were united, on the one hand,—and weaken, on the other, the remaining contending plea. It happened accordingly, in the divorce cases, that the law of the contract, and that of the domicile, were combined against the law of the jurisdiction. Yet, such was the strength of the latter, that, standing alone, it prevailed over the two former united. As therefore, in the present case, there is no such combination against the law of the jurisdiction, it appears singular that the absence of that circumstance should be used as an argument against it.

But as, on the contrary, the law of the jurisdiction is here united with that of the contract against the domicile, it would seem to follow, that, if singly the law of the jurisdiction prevailed over the other two pleas combined, there is greater reason for its prevailing, when it is assisted, not opposed, by that of the contract. If, in short, the law regulating the status of married persons in the country where the remedy is sought, was found not to yield to the domicile of residence, when aided by the will of the parties, as implied in the most solemn of all engagements, a contract of marriage, and that too indissoluble by the law of the country where contracted, there is apparently much greater reason for their not giving way where the will of the parties does not stand opposed to the law of the country where redress is sought—on the contrary, where their will is clearly consonant with that law.

With regard to the exception founded on the alleged collusion of the defender's parents against the law of their domicile, nothing apparently can be more mistaken than the view taken by the pursuers upon this point. Divorces obtained by collusion were held to be illegal, not because they are so in England, but because they are inconsistent with the law of Scotland. But a charge of collusion and fraud, when applied to the constitution of a marriage in this country, betwixt parties, not only entitled, but invited so to contract, is altogether groundless. Besides, as has been properly observed, local disqualifications do not extend beyond the territory. And accordingly it is held, even in England,

that English minors escape from the disqualifications of the English marriage law, by passing into Scotland and marrying here; nor was it, I believe, ever understood, that a marriage at Gretna Green should be annulled, on the ground that the parties had committed a fraud against the law of their domicile. But whatever view the law of England may take of the subject, it appears to be quite clear, that the law of Scotland will never hold that the late Alexander Ross was guilty of a wrong, in availing himself of the law of his native country, by marrying in it for the purpose of legitimating his son.

It remains briefly to take notice of the decided cases, to which the pursuers have referred in support of their argument. All those to which reference has been made, as relative to the constitution of domicile, have evidently (at least according to the views I have of this case) nothing to do with it. The cases of Shedden and Strathmore are those which approach nearest to the present case; but they both differ from it in a most essential particular, namely, the place where the marriage subsequent to the birth of the children took place,—in neither of them was the marriage celebrated in Scotland.

In Shedden's case the marriage was contracted in America, the law of which country does not recognize legitimation by subsequent marriage. Neither of the parents in that case ever even visited Scotland after entering into the marriage in America; so that in no respect could the marriage in its offspring derive any aid from the law of Scotland.

In the case of Strathmore, again, the circumstances were nearly similar—the marriage having been celebrated in England, the law of which country, in like manner with that of America, rejects the doctrine of legitimation. Lord Strathmore, besides, was not even born in Scotland. He was held to be a British baron; and the Lord Chancellor seemed to think, that a British barony could not be claimed contrary to the law of England. At any rate, the marriage was exclusively English, and the parents, subsequent to it, did not even visit Scotland; so that here, likewise, the marriage could derive no support from the law of Scotland.

With regard to the inferences drawn from the speeches of the two learned Lords who delivered opinions upon the case of Lord Strathmore, it is enough to observe, that the first of these eminent Judges, with proper caution, expressly guarded against giving any opinion upon a case not actually before him. And although the other learned Lord may have incidentally thrown out what was the present impression of his mind upon any hypothetical case, yet such an obiter dictum cannot have much influence in the decision of a case which was not under his special consideration.

To conclude, upon the grounds which I have stated at so much length, I am of opinion, that as the defender has been already assoilzied from the first conclusion of the libel, he ought, in like manner, to be assoilzied from the second; which in effect imports, that he is entitled to the status of legitimacy, and to the rights belonging to it.

Mr Commissary Fergusson.—There are some facts in this case, which, when considered in connexion, seem to distinguish it from any other which has been hitherto decided.

Alexander Ross, the defender's father, was a native of Scotland. During his infancy and early youth, he could have no other domicile but that of his parental home in this country. When he entered into the business of life, and became sui juris, he had the choice of his own

domicile, to be fixed and afterwards altered at his pleasure, or as circumstances might dictate. He certainly did then make England the country of his only permanent residence, settlement, and home. That is to say, according to my conception of the legal sense of the term, his sole domicile was English, from the time he chose the profession he was destined to follow through his life. But he did not therefore become an alien in the country of his birth. For England and Scotland had become one kingdom and realm by their union, as to all questions concerning citizenship and allegiance. His son, the defender George Ross, was afterwards born in England of his connexion, then illicit, according to the laws of both countries, with an Englishwoman,—and, being still a minor, could have no other domicile but that of his mother originally, or afterwards that of his father by virtue of their marriage. The defender was not, indeed, on that account, an alien in the native land of his father. On the contrary, both father and son, as to citizenship and allegiance, were neither Scotch nor English, but, in truth, British subjects; and, while no mid-impediment had intervened to prevent his legitimation per subsequens matrimonium, the defender's parents were regularly married in Scotland. But this marriage took place without any change in their domicile, which, as to both parents, and likewise as to the son also, (who, while illegitimate, could have no other domicile but that of his mother), clearly did remain exclusively in England at the date when this marriage was celebrated.

From the facts, according to this summary, the question arises, Whether the character of illegitimacy which affected the defender at his birth, and which, according to the rule of the English law, could not be altered by the subsequent marriage of his parents, if it had taken place in England, has nevertheless been removed from him by their marriage in Scotland, where the municipal rule, on the supposition that it applies to govern his case, would render him legitimate?

The objections, if there be any, which may occur to this manner of constituting the question, supposing it to be open, must arise from other considerations which I am altogether unable to define, except the main and most important plea of res judicata, which, if sustained, must end the debate in this forum.

Jurisdiction, at least to entertain the action, is however constituted here by the act of the pursuers, who call the defender and his tutors in this declarator of bastardy, and by their appearance. It is supported by the great and manifest interests of both parties in the cause. Nor can it be affected by the consideration, that the nomination of the tutors may become void, and that the defender's persona standi in judicio here may eventually be taken from him, if a decree given in terms of the second conclusion against him shall reduce him to the condition of an illegitimate English minor under the guardianship of the Lord Chancellor. For the validity of that conclusion is the very subject of the remaining controversy in this suit.

Accordingly, in order to prepare the case for argument on the merits, by our interlocutor, on the revised condescendence and answers, of the 29th November 1822, we not only disposed of the first conclusion of the summons relative to the defender's filiation, but also in effect, though not in terms, found, on the facts of the case, that, while his mother had always been a domiciled Englishwoman till her marriage, his father's only domicile, from the time he left his native country in early life to enter into business, had likewise been constantly in Eng-

land. Against this part of that interlocutor the pursuers reclaimed, and they could not be prevented from laying open for amendment this point of their own case. Thus, however, it has become impossible now to proceed to give a judgment on the merits of the cause, without first disposing of these preliminary matters of fact anew. Yet upon the evidence in the proof since led, and productions made for the defender, and the most careful re-examination of the whole process, no grounds have been discovered for taking a different view of these matters now, from that which was originally entertained. Therefore, and in order both to complete the record, and at the same time to afford full opportunity of reclaiming, if any error shall be supposed to exist, I humbly conceive that we should now find anew, and in more precise terms, that, according to the facts judicially averred, and either proved, or admitted, or not denied, the domicile of the defender's mother was exclusively English till her marriage; and that the domicile of his father likewise was always in England, during a period of his life commencing long before the date of the connexion between them of which the defender was the offspring, and continuing at, and even long after the date of their marriage.

To prevent misunderstanding it is necessary to add, that the term domicile is always used by me, in this question, in the only sense which I believe it to bear in correct legal language,—namely, as that which a jury would find, if disputed, and by which the disposal of personal succession ab intestato would be governed. For it is a self-evident proposition, that no man, at any given point of time in his life, can have more than one domicile in this sense; nor am I aware that a case has ever occurred in British jurisprudence, where it was found impossible, from perfect equality in the scale of circumstances, to determine what this domicile was. Certainly here, at least, there is no difficulty on that head.

Therefore, holding these matters of fact to be already ascertained under the qualifications now stated; the grounds on which the conclusions of the pursuers appear mainly to rest are, that England, where the law does not admit of legitimation per subsequens matrimonium, was the place of the defender's illegitimate birth. Secondly, That the domicile of both his parents was England, both at the time of his conception and birth, (his mother, in particular, having never had any other domicile), and continued to be English at the date of their marriage. And, thirdly, That although the countries of England and Scotland have become one realm, and the natives of each are citizens of the other; yet, by the terms of the compact of union, the territory and dominion of their several laws remains as entire and distinct as these stood before they became subject to the same legislature;—and therefore, (according to the assumption of the pursuers), it is by the criterion of the domicile of the defender's parents and himself alone, that it is possible to determine which of those laws shall be taken as the rule for judgment, where the personal status of a British citizen is the subject of dispute in any case of collision like the present.

Upon the other side, the circumstances and principles from which the defender's plea seems chiefly to derive support are, in the first place, the favour of the law, which, in all civilized nations, is on the side of legitimacy; and although, by the English rule, this status cannot be conferred upon a natural child by the subsequent marriage of his parents in England, yet the principle of favour to legitimacy, in general, is not less clearly acknowledged in the jurisprudence of England,

than in the codes of the neighbouring nations. For it is understood, that every child born after the marriage of his parents, within the territories of the English law, is legitimate, even although it may be physically impossible that his conception could have taken place after the celebration of that marriage, or that he could otherwise come to be regarded as the offspring of this marriage but by the favourable construction of the law, which must, in all such cases of physical impossibility, stand in violent and manifest opposition to the real state of the fact. Secondly, Our own law of Scotland, in conformity to that of the whole civilized world while under the Roman empire, and to the canon law, and to the rule which still prevails in all the countries of Christendom, except those which are governed by the common law of England, has, for many centuries, held that the status of legitimacy is conferred upon the children born in concubinage per subsequens matrimonium of their parents without mid-impediment. Thirdly, According to all authorities of the Scots municipal law, it decidedly favours that change in the connexion of parents from concubinage to lawful matrimony, which makes better provision, than the illicit connexion could afford, for cultivating those pious affections, and performing those pious duties between parents and children, described in all languages as peculiarly sacred, by an epithet never otherwise correctly applied except with reference to what is divine; and especially by preventing the cruel hardship which the children of the same parents, born illegitimate, must sustain, when they not only forfeit all inheritance of status or property, but also see their younger brothers or sisters born after the legal union of their parents by subsequent marriage without mid-impediment, even when unlawfully begotten like themselves, succeed to their utter exclusion. Lastly, It is urged, and with altogether conclusive effect as to this tribunal, if the plea itself be well founded, that the final decisions of the Superior Court in directing us to proceed in the actions of divorce a vinculo of English marriages betwixt English parties when convened in judicio here, are precedents to govern our judgments also in the present question.

To this last point of the argument, it is therefore evident that the attention must be first, if not exclusively devoted, because there can be no occasion to inquire further, if there be a res judicata which determines the matter. Nay, even although the terms of these judgments, as they stand in the record, should not directly or obviously apply, yet, if the opinions of the majority of the Judges of the Superior Court did clearly establish, that they meant to lay down the rule as applicable in the circumstances of the present case, it is not to be denied that this inferior consistorial judicatory ought also to dispose of it as one entirely of the Scots municipal law; and no duty can remain to be now performed here in this case, but that of mere obedience.

It will, however, be readily granted, that, in such inquiries, no supposed analogy should be adopted as the ground of determination without the greatest caution.

Now, it is from no act or contract of his own that the defender derives his whole plea. That plea rests exclusively upon his filiation as the natural son of Alexander Ross of Cromarty by Elizabeth Woodman, and upon the subsequent marriage of these persons without mid-impediment to his legitimation thereby. The objections are, that he was born illegitimate in England, by the law of which country his status could not become that of a lawful son by the subsequent marriage of his parents;—and that, although his parents' marriage was

celebrated in Scotland, where the rule is different, the locus contractus is unimportant, because the domicile of these parents was England during the whole period of time in which the only transaction that can relate to or affect this claim, took place. To repeat,—in order to prevent all possibility of misapprehension,—the defender's filiation as their natural son, and the marriage of his parents alone, are all he has to found upon in matter of fact; subject to the constructions and qualifications imposed by the several laws of the two countries from relative circumstances.

On the contrary, every case of divorce must take its rise from the obligations of the contract of marriage said to be violated, and from the subsequent acts of the party accused of violating that contract. Consequently, in all cases of divorce, the inquiry must commence at the date of the marriage of the parties themselves. But, in every case of legitimation or bastardy, the inquiry terminates at the date of the marriage of the parents of the party by whom the status is claimed. In the latter, too, the inquiry is exclusively limited to the acts of the parties to the contract themselves. But, even now, this minor defender is not sui juris; and, if he should have the misfortune to succumb in the present action, his father's nomination of tutors to him would fall to the ground, and, as a natural son born in England, he would be placed under the guardianship of the Lord Chancellor there.

Accordingly, the departments in the law to which these several cases belong, have always been regarded by the highest authorities,—indeed, so far as I know, by all authorities, of every system of law,—as distinct, and as governed by different principles.

In those English cases of divorce, marriage was held, in the judgments pronounced, to be a contract juris gentium, which, under whatever law it might be constituted, must receive effect according to the rules that prevail in the country where it comes to be pleaded, either in order to force performance of its obligations, or to seek redress for the violation of them. But, on the other hand, in the case of Shedden against Patrick, where a question of bastardy was incidentally tried, but, in truth, constituted the whole case, and which, being affirmed upon appeal, is universally regarded as a precedent of the very highest authority, the marriage of the parents of Shedden in one of the States of North America, where the rule of the English law prevails, although, in a case of divorce, that marriage would just have had the very same effect here as if it had been celebrated in Scotland, yet it had none whatever to legitimate Shedden, the natural son of the parties to that contract, merely because the lex loci had attached no such consequences to their subsequent marriage. For it must be observed, that the circumstance that the parents were aliens is evidently of no importance to the point now under consideration, since their marriage was not the less, on that account, a contract juris gentium. Such evidently, at least, was the import of the decision in Shedden's case, although his father, like Alexander Ross, was a native-born Scotchman,—inherited a Scotch estate,—and had visited Scotland and his estate here during his residence in America,—but, like Alexander Ross, without changing his domicile anew. If then those actions of divorce, and this action of declarator of bastardy or legitimacy, do really and clearly belong to different categories or departments in the law, it is likewise a circumstance evidently unimportant and irrelevant here, that the decision in Shedden's case bears date before the judgment of the English action of divorce. Unaffected by these, it therefore remains confessedly a good precedent at this day, indeed one of

the very highest authority in the different class and department to which it belongs.

No doubt, in other respects, that precedent, while it sufficiently proves that the present question is open, can supply little to aid us in forming a judgment upon its merits. For, in the case of Shedden, the birth of the natural child, and the subsequent marriage, and also the domicile of the parents, were all foreign, and in a country the law of which does in no case bestow upon natural children the status of legitimacy, as a consequence of the subsequent marriage of their parents. Unfortunately, too, the learned Counsel in this cause have been able to adduce no precedent whatever of legitimation relative to a case where the conception and birth of the natural child took place in a country, the law of which does not admit of legitimation per subsequens matrimonium, and where the chief and permanent domicile of the parents was likewise in that country, although their marriage was celebrated in Scotland.

In the very recent case, indeed, of the Strathmore peerage, the opinions of the Lord Chancellor, and of Lord Redesdale, delivered in the Lords' committee, likewise related to a pure question of legitimation per subsequens matrimonium, where both child and parents were British; and as that case was decided according to those opinions, it is to be regarded as the latest, as well as the highest authority on a question of legitimation per subsequens matrimonium in England, in opposition to English birth and to the English domicile of the parents. In accordance with these opinions, it was there virtually found by the House of Lords, that the claim to legitimacy is not tenable, in a case where both the illegitimate birth of the claimant, and also the subsequent marriage of his parents, have taken place in England. For, it was only through the medium of legitimacy that Mr Bowes, the petitioner in that case, could claim his father's peerage; just as Shedden could only claim to be served heir to his father's estate in Scotland through the medium of his alleged legitimacy. Both cases, therefore, turned entirely upon the point of legitimacy. Indeed, that is the only criterion as to all rights which can be claimed only through the medium of lawful birth, whether these rights be of estates, real or personal, so descendible, or of honours or dignities which can be claimed by such lawful descent alone. Therefore, the sole difference between these cases as good precedents here is, that Shedden's case was tried by judicatories of the Scots law, both in the Court of Session and in the House of Lords: That of Bowes was decided by the House of Peers, as a judicatory neither of the English nor of the Scots law, but common to both, and purely British.

Here again, in this defender's case, the sole circumstance of any relevancy which distinguishes it from those of Shedden and of Mr Bowes is, that Scotland was the place of the marriage of this defender's parents. But by the evidence in the defender's own proof, of Mr Robinson, the agent of his father at the time of that marriage, and now the defender's own agent, and by the depositions of the other witnesses examined, it is not proved that his parents had been in Scotland before they were married, even long enough to found jurisdiction by residence of forty days. From this proof it appears, on the contrary, that 'two or three weeks' was the utmost length of time their visit to this country, on that occasion, had occupied before the date of their marriage. Unquestionably, too, it appears, from the same evidence, that they had come here from their domicile in England; and to that country, as their fixed and permanent home, they

returned after this visit. Even their return to England, as their home, posterior to the marriage, is material; for it clearly shews, that no change of domicile was either then made, or intended by them. On the contrary, (according to the language of the law), while in Scotland peregrinari videntur. Indeed, no allegation even of any such change has ever been made. It is likewise evident, that the defender's case, in point of fact, must close at the date of his parents' marriage. This was, therefore, a marriage of parties domiciled in England; and, although regularly celebrated here, it is not less certain that it was celebrated without any change as to the English domicile of the parties in the actual circumstances of this case, than this fact would have been certain if they had come no further than Gretna Green, and had returned instantly after making any valid declaration of mutual consent to marriage there before witnesses.

Indeed, according to this view of the matter, if the defender's plea is good, all English parents who may stand in the same circumstances as the defender's father and mother did before his last marriage, would have only to enter Scotland when they are about to marry, in order to bestow all rights of legitimacy on their natural children previously born, but affected by no mid-impediment. But the question is, whether their natural children ought, in consequence of such marriage, to be afterwards recognized as legitimate either in England or in Scotland? Now, towards the ascertainment of the principles by which it must be decided, it seems to be of some importance to keep the circumstance in view, that intestate personal succession can only descend to natural children through the medium of legitimacy; and, confessedly, it is governed by the law of the domicile;—therefore, if the law of England regards its own rule, and this defender's father had died intestate, the defender could not have inherited any part of his father's personal estate in England, which appears, from the settlement and will produced by the defender in this action, to have been large. If, again, the opposite rule of the Scots law were to be followed in Scotland, then, upon the same hypothesis of intestacy, the defender would have succeeded ab intestato both to all his father's heritable estate, and also to his personal property in Scotland. But that deed of settlement further shews, that the defender's father had lawful daughters of a former marriage, and married in England. Supposing their father to have died intestate, would his second marriage to the defender's mother, by legitimating him in Scotland as the heir-male, also cut them off from intestate succession in England through him to real property? Or could that marriage bring the defender to share with them in personal property, descendible through his father, as bequeathed generally by other relations to his lawful children surviving at his death, equally and in capita, according to their number, and not named? Innumerable cases of the same kind may be imagined. But such consequences cannot surely be recognized in Scotland and denied in England, in the multitude of similar cases that may daily occur. Therefore, of necessity, some general principles common to the laws of both countries must be found, to ascertain which of them is to be followed as to the effect of the subsequent marriage of the parents in the legitimation of children previously born to them, wherever that marriage may take place; or, the incongruities and conflicts that will arise, must be most pernicious to the consistency and character of these laws, and altogether endless.

Still, however, the circumstance that the locus contractus of his parents' marriage was in Scotland, does distinguish the defender's

case from that of the claimant of the Strathmore Peerage, as well as from the case of Shedden. For, in the first of these other cases, England was the place of the claimant's birth, and also of his parents' marriage, and likewise of their domicile, both at the date of his birth and at the date of their marriage. In all of these respects, too, Shedden was a foreigner to Scotland. Here, on the contrary, the marriage of the defender's parents took place in this country, although their domicile, and his conception and birth, were in England;—and we have the highest authority of the law for holding, that the question, whether, in these circumstances, the law of the place of the child's birth, and of his parents' domicile, or that of the place of their marriage, should govern, is open, and hitherto undecided.

From foreign jurisprudence a single precedent has been found in the practice of France, in the case of Christophe de Conti, dated the 21st of June 1668,* by the judgment in which, a child born illegitimate in France, of French parents, who afterwards resided in England, was found to be legitimated by the subsequent marriage of his parents in England,—as producing that effect according to the law of France, though contrary to the rule of England. But, in this foreign case, the place of birth was the criterion adopted. Neither does it appear, that the effect of the domicile of the parents in England had been there considered. The import, according to Le Brun,† was, that the marriage was regarded as a contract juris gentium, when its effect came to be considered as to a native of France, and succession to property in that kingdom. In the present case, it is the law of the place of the parents' marriage, not that of the child's birth, which favours the legitimacy; and it is here opposed by the law of the place of birth, and of the parents' domicile.

No other situation occurs so similar to that of the laws of England and Scotland since the Union, as the relative position of the pays coutumiers and pays du droit ecrit in France, before the revolution. Perhaps, too, in no other country have the principles which ought to guide, when the municipal laws in different parts of the same realm come into collision, been more successfully investigated than in France.

Pothier, as usual, expresses most clearly the results; and it is only necessary to refer to the 6th, 7th, 8th, 9th, 10th, of the 1st chapter of his 'Introduction aux Coutumes d'Orleans,' for the following definitions, with the brief explanations with which these are accompanied. 'On appelle,' he says, 'statuts personnels, les dispositions coutumiers 'qui ont pour objet principal de regler l'etat des personnes;—les sta- 'tuts personnels n'ont lieu qu'à l'egard des personnes qui y sont su- 'jettis par le domicile qu'elles ont.'‡

In Germany, where the independence of the several states, although connected federally and politically in the Empire, may have somewhat diminished the international authority of their several laws which regard personal status, the rule nevertheless appears to have been similar. Muller, in his Promptuarium Juris, voce Domicilium, sect. 72. says, 'Actus perfecti ubique valent mutato licet domicilio;—im- 'perfecti et futuri ex legibus novi domicilii æstimantur.' He also, in the same passage, applies this rule directly to questions of personal

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* Guessiere, Journal des Audiences, Nom. 3. p. 283.
† Le Brun, Trials de Succession, Ed. 1714. p. 23.
‡ Pothier, Coutume d'Orleans, cap. 1. § 1. p. 3.

status, and in particular to that of majority or minority, in cases where the rules of different states are at variance. Still higher authorities might be adduced, and at greater length; but that which has been quoted seems peculiarly apposite to the present case. For here the actus, from which the defender's status of legitimacy or illegitimacy arose, was complete and finished (perfecti), beyond all doubt, in the English domicile.

Beyer, in the continuation of the same work, V. Statutum, sect. 10. after mentioning that there are three kinds, namely, real, personal, and mixed, observes in particular as to the second,—'Personalia quæ 'se etiam extendunt extra territorium, adeoque secundum D. D. 'comitari dicuntur personam ubique locorum ut tamen respiciant sub- 'ditos, non exertos, aut peregrinos, qui ab alieno territorio nullam 'qualitatem accipiunt.'

According to this maxim, the minor defender has carried with him into Scotland the status of illegitimacy impressed upon him by the law of his parents' domicile, which determined the construction of all the acts by which his status can be affected, and which was likewise that which must become his own domicile of origin, as derived from his parents, when he shall attain the age of majority; although instead of it he may then acquire a new and different domicile for himself, at his own choice, and by his own acts.

Without pursuing the inquiry as to the rules in other systems of jurisprudence from which the jus gentium upon this head may be inferred, it seems to me at least abundantly clear, that the law of the domicile, if adopted, would prevent all conflict in cases of personal status: Because, from the birth to the death of every individual, it would furnish the criterion by which the rule of decision must be chosen, without derogating from the independence or sovereignty of the law of any country in which a question of this description may arise,—a consequence which perhaps can only be avoided by adhering to this common principle as one of universal obligation.

Upon the whole, then, is not the present case of the defender, when considered, as it must be, in a strictly legal view, just the same as that of any other native of England born there illegitimate of English parents, who maintains that the status of legitimacy has been obtained for him by the single and solitary circumstance that the marriage of his parents took place within the bounds of this country? From the deduction which has been stated, and which at least has been examined with much anxiety, and followed out with no slight degree of reluctance, it seems to be impossible to draw any other conclusion. But if this be the just inference, the sovereignty of the Scots law, within the bounds of its own jurisdiction, cannot be impeached by supposing that its principles are liberal and correct. The effects of the decision which that law requires to be given, upon the interests of morality, are matter for the consideration of the Legislature, not of any Court of Justice. And without entering upon these at all, if an opinion must, according to the principles of this law, be formed against the defender's legitimacy, it is consolatory to think, that the more extensive consequences of these principles are perhaps not generally adverse to the preservation of good order in society.

The conclusion to which I am thus compelled to come, I would express by an interlocutor in these terms:—'Having considered the 'memorials for the parties; and having resumed consideration of the 'revised condescendence for the pursuer, and answers thereto, as also 'the proof adduced, and productions for the defenders, and whole

'process; find it is admitted, that the late Alexander Ross, the de-
'fender's father, was by birth a Scotsman, and succeeded to estates
'in Scotland, but that he went in early life to London, and settled
'there in business as an army-agent: Find it averred, and not denied,
'that his residence was in London or its neighbourhood for a period
'of about fifty years, from the time of his first going to reside till his
'death in the year 1820, although it is at the same time admitted that
'he paid occasional visits to Scotland for different purposes, such as
'voting as a freeholder at elections, letting leases of his property,
'amusement, or seeing his friends: Find it averred by the defenders,
'and not denied, that he also visited his estate in Scotland after his
'marriage, and remained there for the space of two months: Find, in
'these circumstances, that the late Alexander Ross must be held to
'have been domiciled in England from the time of his first going to
'reside there till his death: Further, find it averred, and not denied,
'that Elizabeth Woodman, the mother of the defender, is a native of
'England, and no change of her domicile from that country is al-
'leged: Find it proved, that the defender was born on the 6th of
'February 1811, in Brook Street, New Road, London: Find it also
'proved, that the said Alexander Ross and the said Elizabeth Wood-
'man were regularly married at Leith, in Scotland, on the 10th of
'June 1815. On the facts of the case, In respect that the defender
'was born in England, and that his parents, both at the period of his
'birth and at the date of their marriage in Scotland, were domiciled
'in England, by the law of which country he is held to be illegitimate;
'therefore find, that the defender is not entitled to have the benefit
'of legitimation per subsequens matrimonium extended to him, in the
'peculiar circumstances of his case; and find, decern, and declare,
'in terms of the second conclusion of the libel.'

As it would not fall within the scope of such an interlocutor as this, directly to notice the chief plea of the defender's argument, as hitherto maintained, to prevent misconception, which might otherwise arise, that this plea had not been duly weighed, I would also propose to add this note:—'It was maintained, in the memorial for the defender, that,
'according to the principle of the decisions of the Superior Tribunal
'in the English divorce cases, this Court was bound to decide in fa-
'vour of the legitimacy: But, after the fullest deliberation, with the
'most anxious desire to manifest all the deference which is impera-
'tively incumbent on them in regard to the decisions of the Supreme
'Court, the Commissaries were satisfied that no such inference could
'be warrantably drawn from the decisions referred to, and that these
'were never intended, nor could be considered, as precedents to re-
'gulate such a case as the present, which appears to them to be of a
'nature essentially different.'

Mr Commissary Ross.—The present case is a very important one, and attended with considerable difficulty. I have given to it all the attention in my power; but, from the length of time already occupied by the opinions already delivered, I shall merely state the result I have come to, without entering into any detail of the grounds on which my opinion is formed.

The result of the consideration I have given to the case is the same with my brother next me, (Mr Commissary Tod), and generally upon the same grounds. What might be the decision in a case of English parties, having no connexion with Scotland whatever, coming here and taking advantage of our law for the purpose of legitimating their

children previously born in England, by the law of which they could not be legitimated, I am not called upon, nor am prepared, to say. I am bound only to look to the case before me, in which a strong connexion with Scotland must be held to be established. And looking to the present case only, and viewing it in all its facts and circumstances, I hold, that no sufficient grounds have been alleged by the pursuer for denying to the defender the application in his favour of the law of legitimatio per subsequens matrimonium, as recognized by the law of Scotland. I consider the defender to be within the legitimating influence of our law, and that he must therefore be assoilzied from the second conclusion of the pursuer's libel.

MR COMMISSARY GORDON.—This is a most important case. But after the long opinions which have been delivered, I should be sorry to take up the time of the Court in going over the whole of my notes. My views coincide in some respects with the opinion of my brother on my left hand, (Mr Commissary Fergusson); and it appears to me, on the facts of this case, that the interlocutor that was read by him is the one which should be pronounced, though I am aware the decision goes the other way, as, when the Court are equally divided, the judgment goes in favour of the defender.

I shall shortly state my views. The points to which the attention of the Court has been called are, domicile, and legitimation per subsequens matrimonium.

There is certainly great difficulty to the right determination of domicile, in questions of status, from the different decisions that have been given in the Courts of Great Britain on this point. On the most careful consideration of the views entertained regarding domicile in the divorce cases of Edmonstone and Tewsh, and Levet, and Forbes, and Rowland, and of Pye, in the Court of Session, I do not think that they apply to this case. But if these principles did apply, there can be no doubt that this Court has no alternative but to apply the law, with regard to domicile, as settled in these divorce cases, which it has uniformly done in all subsequent cases of English divorces. It appears to me clear, that the defender having been born in England a bastard, and having resided for four years thereafter in England, his domicile during his minority was fixed by his mother's residence there, and his own birth there. With respect to domicile, it appears to me that the cases of Ommaney *v.* Bingham, decided in the House of Lords 18th March 1796; Bempde *v.* Johnstone, in the Court of Chancery, 12th June 1795, (Vesey, p. 202. vol. iii.); Somerville *v.* Lord Somerville, decided by Sir William Grant in the Rolls-Court in 1801; and Lord Chancellor Eldon's opinion in Tovey and Lindsay—are decisive of the domicile of Alexander Ross, the reputed father of the defender; and, applying thereto the facts of this case, I consider that the father of this defender must be held to be domiciled in England. To these I may add the principles laid down in the Consistory of London, 29th July 1752, by Sir Edward Simpson, (Haggard's Reports, vol. ii. p. 405.), 'That a minor son is domiciled where his father lived until he comes 'of age,' &c.; which principles were recognized by Sir William Scott in the case of Middleton *v.* Jamieson, 21st November 1802. (p. 446.)

The domicile of Elizabeth Woodman, before her marriage, was indisputably English; and, after her marriage, it must be held to be so, as fixed by her husband's domicile.

By the Roman law, no relation was recognized between an illegitimate child and his reputed father; but between the mother and the

child it was as perfectly acknowledged as in legitimate children. The father had no power to appoint tutors or guardians, neither were the agnates entitled to act as such. The mother communicated to her bastard child her state in society. In Scotland the law is the same; and the settlement of an illegitimate child is fixed by the residence of the mother: In England it is fixed by the place of its birth, filius nullius. On every view of these authorities, therefore, I consider the defender's domicile to be unquestionably English, whether he be considered legitimate or illegitimate.

Holding the domicile to be English, we come to the point, Are we entitled, from the subsequent marriage of the defender's father and mother, to apply the Scotch law of legitimation per subsequens matrimonium? It is clear, from all our law authorities, and the uniform decisions, that children born in Scotland previous to the marriage of their parents are legitimated by the subsequent marriage, if there is no mid-impediment. But it does not follow, that this law, which by a fiction holds the marriage to have taken place at the time of the child's being begotten, can be farther extended so as to reach children born out of the territory of Scotland.

This subject has not been much treated of by our institutional writers. Lord Kames, (B. iii. ch. 8. sect. 1.), when treating of the validity of foreign marriages, says,—'According to the doctrine here 'laid down, a child ought with us to be held legitimate by a subsequent 'marriage, provided the marriage ceremony was performed in a country 'where such is the law; because marriage in such a country must im-'port the will of the father to legitimate his bastard children.' But he does not consider it to extend to England, where it is not the law. Mr Hutcheson says, in his Treatise, (vol. i. p. 3.), 'The status of a per-'son must be determined by the law of his domicile.' The oldest decision that I have met with is referred to in the Strathmore case,—a French one, to be seen in the 'Journal des Audiences de Parlement de 'Paris,'—Henri de Conti. In that case, the child was born in France, where legitimation per subsequens matrimonium is the law. The marriage and domicile of the parents were in England. In it the child was held to be legitimated. The case of Patrick and Shedden, 1st July 1803, is the earliest case in this country. The circumstances of that case have been fully spoken to by my brothers. I hold it to be exactly the same as this case, because I cannot give any weight to the locus contractus. In the case of Gordon of Knockespork, (not mentioned by my brothers), the Judges of the Court of Session held the case of Shedden to be a ruling one. In the late case of Strathmore, the same principles appear to have been laid down in the Court of last resort. The Lord Chancellor Eldon, no doubt, expresses himself as not determining any question not then before the House of Lords; but I have not been able to discover any material difference in this case from the case of Shedden and that of Lord Strathmore—and, in the latter case, Lord Redesdale thus expressed himself:—'The law, therefore, that attached to him at his birth, was the law of 'England.' And again, after holding the French case of Henri de Conti to be strongly in point, his Lordship says,—'My Lords, I do 'not enter into the question, Whether, if this marriage had been cele-'brated in Scotland, it might have had the effect of legitimating the 'child, because I think it is not necessary; but I must say, that I 'cannot conceive how it could have that effect. In the case of 'Shedden against Patrick, it was determined that a child, illegitimate 'in the United States of America, was not capable of inheriting in

'Scotland. It has been stated, that that was decided upon the ground 'that he was born an alien:—Why was he born an alien? Because the 'law of America touched him at his birth, and the retrospective effect 'of the law of Scotland could not alter the character which at his birth 'attached upon him. My Lords, I apprehend that that is the true 'ground of the decision. He was an alien, and that character could 'not be altered by the retrospective character of the law of Scotland. 'So I apprehend that this child was born illegitimate, according to the 'law of the country in which he was born, according to the condition 'of his mother, of whom he was born, and according to the state of 'his father, who was at the time a person unquestionably domiciled in 'England.'

Although this case has been brought in a Scotch Court, I hold it to be clear, that we are not entitled to apply our own law to it; but that we are, on the contrary, bound to apply the law of England, where he and his father and mother were domiciled;—and I agree in this respect with my brother. But I am further of opinion, that the status of a child is fixed by the law of the country in which he is born; and that, if born illegitimate in England, he can only be legitimated by the rescript of the Prince. I do not think that the subsequent marriage of Alexander Ross and Elizabeth Woodman in Scotland, can have the effect of legitimating the defender George Ross—and I hold the opinion given by Lord Redesdale, in the case of Strathmore, that 'the retrospective effect of the law of Scotland could not alter the 'character which at his birth attached upon him.' The will of his parents at that time is to be considered, and not their subsequent will. The law of England, they must have known, or were bound to know, did not admit of legitimation per subsequens matrimonium, and therefore it was then their will that he should be born illegitimate, and that he should have the status or condition which his mother could transmit to him. I am, on the whole, of opinion, that both on the point of domicile, and on the status which attached at his birth, the defender must be held illegitimate.

There is an unfortunate collision betwixt the laws of the two countries—but the two countries can only be considered as different districts of the United Kingdom, and the one state or district can never possess the power to controul or repeal the law of the other district in which the laws are different. I may add, that this principle was laid down by the Court of Session in the case of Moorcombe *v.* Maclelland, 27th June 1801, where it was decided, that 'this Court ought not to 'be made an engine for either eluding the laws of another, or for de-'termining matters foreign to its territory.'

I have thus shortly stated the views I entertain on this important and very difficult case. I am not surprised there should be a difference of opinion among us with regard to it. It is one of the most important cases that has ever occurred in this Court; and, although I lean to the interlocutor which has been proposed, I do not regret that the decision will be in favour of the defender. Where there is an equal division of the Court, as I have said, the decision is in favour of the defender. An interlocutor, therefore, will be drawn up by my brothers at my right hand, (Mr Commissary Tod and Mr Commissary Ross), and signed next Court-day.