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priating these rents, until his death, in 1812, when actions were brought by the respondent which induced the appellants to bring a reduction of the leases in question. This was done on two grounds, 1st, That the cause of granting these was illegal, namely, to induce Mrs Esten to live with the late Duke. 2d, That by the entail under which he enjoyed the estate, leases "with evident diminution of the rent were "prohibited." The Court of Session decided the case on the first ground entirely, considering that the appellants had no case on the second ground, and decided, that, in so far as 'regarded the daughter, the leases were unexceptionable, and in reference to Mrs Esten, her mother, it did not appear that they were granted with the view of her entering into, or continuing in, an improper course of life, but as compensation for injury and loss incurred.

Against these interlocutors the present appeal was brought.

After hearing counsel,

The Lords find, that the leases in question were not warranted by the power contained in the deed of entail, and therefore subject to reduction, unless the same were homologated by the late appellant, Archibald, Duke of Hamilton, deceased, and by the appellant, Alexander, now Duke of Hamilton; and so far as the same were not so homologated, respectively, it is ordered and adjudged, that the interlocutors complained of be reversed; and it is further ordered that the cause be remitted back to the Court of Session, to review the same, subject to the above finding.

For the Appellants, *John Clerk, W. Hamilton.*

For the Respondents, *Alex. Maconochie, Sir Saml. Romilly, J. Blackwell.*

[Before the Lords' Committee of Privileges.]

1821.

STRATHMORE PEERAGE CAUSE.

Petition and Case of JOHN BOWES, an infant, claiming the titles, honours, and dignities of Earl of Strathmore and Kinghorn, Viscount Lyon, Lord Glammis, &c.; and

Counter Petition and Claim for THOMAS BOWES, brother to the late Earl (tenth Earl) of Strathmore, claiming the same titles, honours, and dignities.

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House of Lords, 29th June 1821.

MARRIAGE—LEGITIMATION PER SUBSEQUENS MATRIMONIUM—DOMICILE.—The late Earl of Strathmore was born in England. He had a house in London, and had estates in England. He had also estates in Scotland, and a mansion-house and servants there. He had formed an illicit connection with Miss Mary Millner, who was English, and lived with him in London, and had born him two children there, the eldest being a son, John Bowes, the claimant, the other a daughter. At the latter period of his life, when on deathbed, he procured a license from Doctors' Commons, and married Mary Millner, according to the English forms, in order to legitimate his children, having previously conveyed his English estates to John Bowes. The questions were, 1st, Whether the marriage celebrated on deathbed was good. 2d, What was the deceased's domicile. 3d, Whether his domicile being in England, did not effectually bar the operation of the Scottish rule of law of legitimation, by the subsequent marriage of the parents. Held that he was domiciled in England, and that such rule did not apply.

In the year 1805, or about that time, John Bowes, the late tenth Earl of Strathmore, entered into an illicit connection with Miss Mary Millner; and in the month of June 1811, she was delivered at Chelsea, in Middlesex, of a male child, whom the Earl adopted; and on the 29th of June in that year, the child was baptized at Chelsea, in the County of Middlesex, by the name of John Bowes, son of John and Mary Millner. Mary Millner was born in the year 1787, at Barnard Castle, in the County of Durham, of English parents, and she always resided in England. The child John was brought up and always resided in England, and neither he nor his mother, Mary Millner, had ever been in Scotland.

In 1817, the said tenth Earl executed a will of his English estates, "to John Bowes for life, my son or reputed son, who "was baptized in the parish of Chelsea, on or about the 29th "June 1811, by the name of John Bowes," with remainder to his issue tail male, and in failure of such issue, to the eldest, and every other son of the Earl's brother, Thomas Bowes.

In 1820, he fell into a severe disease of dropsy and water in the chest. For many weeks previous to his death, he was bedridden in his house at Conduit Street, where Mary Millner was resident with him. On the 1st July 1820, his Lordship sent for Mr John Dean Paul, Banker in London,

On Mr Paul's arrival, he found the Earl sitting upright in bed, supported by Mary Millner, his legs and body being much swollen, and in an advanced state of dropsy. His Lordship, in apparent haste and great agitation of mind, stated to Mr Paul that he wished to marry Mary Millner, that he could not rest until it was done, that he wished Mr Paul's assistance therein, in obtaining a special licence for the marriage in his own house; and he further requested Mr Paul to write a codicil to his will, and give to himself a legacy of £10,000, and a codicil dated the same date, 1st July 1820, was accordingly proved in the Ecclesiastical Court.

Mr Paul immediately applied to the Bishop of Canterbury, for a licence, but was refused. He then made an application to Doctor's Commons for, and obtained a licence to celebrate the marriage in the common form of the church.

About eight o'clock on the following morning (Sunday, 2d July 1811), the Earl of Strathmore was carried from his bed-room by two men, and placed in a sedan-chair at the door of his house in Conduit Street, from whence he was carried to the church of St George's, Hanover Square, London, and set down as near the altar as possible. The rector of St George's having asked if he was desirous that the ceremony should proceed, and his Lordship having replied in the affirmative, the marriage took place according to the usual forms; and having been carried back to his bedroom, he died next day, 3d July 1811.

These are the facts, out of which the present competition arose, for the honours and dignity of the Earl of Strathmore.

John Bowes, the infant claimant, claimed on the ground that his father, the late Earl, must be viewed as domiciled in Scotland, and that, by the subsequent marriage of his parents, he was legitimated to the effect of succeeding to the titles, honours, and dignities of the Strathmore peerage, as a lawful born child.

The claim was thus made to rest upon the rule in the Scottish law, by which children, though born out of wedlock, become, upon the marriage of their parents, legitimate children, and to be so viewed in every question of *status* and succession.

Validity of Marriage on death-bed.

But 1st, An objection *in limine* was stated by Thomas Bowes, which struck at the validity of the marriage itself, celebrated in the manner above-mentioned. It was stated that the marriage contracted, as this was, on deathbed, when the Earl was incapable, either of consummation, or looking

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forward to that *consortium vitæ*, which forms the essential object of the contract, could not be valid or effectual. But, according to the canon law, which, on this point, is also the law of England, such a doctrine, the infant claimant contended, was unfounded. An absolute inability to consummate, arising from original defect in the constitution, or supervenient accident or malady, from which recovery is physically impossible, is held to annul marriage; but no disease, from which recovery is physically possible, although it should actually end in the death of the patient, nor any period of life, even the most advanced old age, is held an impediment to the connexion. A marriage *in articulo mortis*, is good, according to the express text of the law, in whatever state the body may be, if the mental faculties are entire; and and on this all the commentators are agreed. *Vide* Perez., tit. C, de Nat. Lib.—Inst. tit. ff. de Concub.

The same doctrine is laid down by the younger Voet, in his excellent commentary on the Digest: "Nihil autem "interest ad effectum legitimationis quo tempore nuptiæ "subsequantur, adeo ut vel *in agone mortis* interpositæ, "sobolem antea editam efficiant legitimam, dum quisque "matrimonium inire valet quamdiu vivit. Arg. Novell. 74. "Si modo nostris moribus solemnia nuptiarum adhibeantur, "aut super his dispensatio obtenta fuerit."

Craig, L. ii., Dieg. 13, § 26.

Accordingly, from a passage in Craig, mentioned in the case of the Master of Sempill and Joanna Hamilton, it appeared that the Master of Sempill was carried to church when on deathbed, and married for the purpose of legitimating his son.

Domicile in England.

2d, But as to the legitimation of the claimant, John Bowes, by the subsequent marriage of his parents, this further objection is stated, that the late Earl of Strathmore was domiciled in England, when the claimant was born, and also when his Lordship's marriage to Miss Millner took place,—that the Earl was himself born in England, was educated there, entered the army, and although he possessed estates in Scotland, where, at Glammis Castle, he had a mansion house, and kept up a suit of servants, yet he also possessed estates in England, and a house in London; and, further,—that the marriage was celebrated in England, and, consequently, it was to be inferred that the *status* of the claimant must be determined by the law of England, where such rule of legitimation does not prevail.

There were, therefore, two propositions involved in this

plea, 1st, That the legitimacy of a party depends on the law of the domicile where he was born, or rather where his parents were domiciled at his birth. 2d, That the legitimacy of a party depends on the law of the place where the marriage of his parents was celebrated.

1st, Let it be considered, in the first place, if the *status* of a person with regard to legitimacy, is determined by the law of the place where his parents were domiciled at the birth. For a definition of domicile, Mr Bowes refers to the well-known rescript, L. 7, C. *de Incolis*:—"Et in eodem loco "singulos haberi domicilium non ambigtur ubi quis larem "rerumque ac fortunarum suarum summam constituit," &c. Neither that authority, however, nor any other in the Roman law, can be of the smallest avail to him, in support of his claim. The sole purpose for which the above definition of domicile is given in the code, is to distinguish the municipality in which a person, according to the Roman law, was held as a *civis* from the municipality in which he was held as an *incola*. In both municipalities he was qualified to receive public honours, and in both it was incumbent upon him to execute public offices, and to pay taxes. In both, he was amenable to civil and criminal jurisdiction. But the former character was radical and indelible; while the latter was changeable at pleasure, at least it was so, if the change was not made fraudulently or intempestive. But, the late Lord Strathmore was a citizen or subject of Scotland, that was his "forum ad honores capessendos, ad onera ferenda, ad munera "subenda;" and the circumstance that he might enjoy similar advantages, and have similar duties to perform in consequence of a voluntary domicile some other where, did not, according to the principles of the Roman law, dissolve or weaken his connection with the country, not, indeed, of his birth, but of his origin. On the contrary, wherever the full exercise of the rights and duties of a municeps was competent and incumbent, and where he was amenable, as such, to the law and the magistrates, it mattered not whether the tie was formed by the one circumstance or the other. See Joan Voet, tit. ff. ad Municip., and the other commentators on that title.

If the rules of the Roman law were to be applied, therefore, to the present case, the infant claimant, John Bowes, contended that the connection of the late Earl with Scotland, would have been held to be greater than his connection with England, because the character of *incola*, which arises from

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domicile, is less permanent and indelible than the character of *civis*, and arises from an original capacity of honours, and an original liability to public functions and public burdens.

As it cannot be presumed that any one wishes two different modes of distribution to take place, it follows that no person is held to have two domiciles in modern international law. But the rule refers solely to the case of intestate succession; for, as by the Roman law, a person might have two or more domiciles *ad capiendos honores et subeunda munera*, that is, two domiciles of honour and office; so, in modern international law, there is no reason why a person may not have two domiciles with regard to every other interest except intestate succession; and this is agreeable to the doctrine of the jurists of the highest name.

Questions concerning personal *status*, are totally unconnected with those which regard intestate succession, and depend on principles essentially different. Status according to the definition of Vinnius, "est personæ conditio aut qualitas "quæ efficit ut hoc vel illo jure utatur, ut esse liberum, esse "servum, esse ingenuum, esse libertinum, esse alieni, esse "sui juris." Vin. ad tit. I. de Jure Per.

By what law such questions shall be determined is a subject of much contention among modern jurists; and there are scarcely any two writers of authority who agree on the subject. Distinction has been taken between *statuta realia* and *statuta personalia*, and even a third has been added *statuta mixta*. The first always primarily and directly attach on property heritable or moveable. The second are laws attaching on persons directly, though occasionally affecting property as connected with personal status; and the third are laws which relate to forms and solemnities, whether judicial or extra-judicial, sanctioned by authority, for the purpose of constituting, transmitting, and dissolving rights. The *statuta realia* do not operate beyond the territory of the maker. The *statuta mixta* do operate, in most cases, beyond the territory. But in regard to the *statuta personalia*, or those which regulate *status*, there has been great diversity of opinion. One opinion was, that personal *statuta* universally operate *extra territorium*, so that every quality of *status* impressed on an individual in the place of his domicile, accompanies him and takes effect wherever he goes.

Although, therefore, the marriage of the late Lord Strathmore to Miss Millner, did not legitimate the claimant in England, that is no reason why that marriage ought not to

operate beyond the territory of England, so as to legitimate the claimant in Scotland, and render him capable of succeeding to honours, offices, and heritable estates situated in Scotland, where he possesses every quality necessary to create the legal character of heir.

2d, A second plea is set up by Mr Thomas Bowes, namely, that because the marriage of the claimant's father and mother was contracted in England, it cannot have the effect of legitimating the claimant. This point will require little consideration. If Mr Bowes adheres to this plea, he must, as already observed, abandon that on which he chiefly relies, namely, that *status* is regulated by *domicile*, for there is no connection between the *forum domicilii* and the *forum contractus*, their laws are entirely different; it is inconsistent, therefore, to maintain that both should determine. But, in truth, the *forum contractus* never is resorted to, except to ascertain whether the marriage is well constituted or not; the *effects* of the relation must depend on a totally different principle, namely, the law of the country where it is to take effect. Was it ever maintained, because an English couple was married at Gretna, that the wife imported into England a right to the terce and *jus relictæ;* or that the husband could claim a *jus mariti* of the nature established by the law of Scotland? A Gretna marriage is good in England, only in so far as matter of solemnity is concerned, on the principle, universally admitted, that *statuta mixta exeunt territorium.* In further proof of this, the claimant may appeal to the decision of the Scottish judges, finding unanimously, and after much deliberation, that an English marriage is dissoluble by the Commissary Court in Scotland, if the parties have a *forum jurisdictionis* there. If the English judges, on the other hand, decided that the Scottish divorce, in these cases, did not operate in England, a decision by no means incompatible with the judgment of the Court of Session, and in perfect uniformity with the doctrine of the Voets, of Gaylus, and Perezius; what is this but another more striking and authoritative precedent in favour of the claimant, John Bowes' plea?

In answer to the above case of the claimant, John Bowes, it was pleaded by the Honourable Thomas Bowes. Hon. Thomas Bowes' Case.

1st, That the domicile of John Bowes, tenth Earl of Strathmore and Kinghorn, and Baron Bowes, was in England, and not in Scotland.

The principles of law upon the subject of domicile are very

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Vide ante, vol. iii., p. 448.

clearly and decidedly fixed in relation to both divisions of the island, in the case of Ommannay *v.* Bingham. Though Sir Charles Douglas was by birth a Scotchman, yet he had, for the most part of his life, been abroad on foreign service, and in the naval service of his own country; and had frequently visited Scotland, and at one time had staid near a twelve-month there, where he also died; it was nevertheless decided that the *forum originis* was abandoned and lost, and as his chief and most permanent residence had been in England, where he possessed a lease-hold house, the preponderance of incidents in his life and habits was such, as to fix on him the *status* and character of a domiciled Englishman. This was decided upon the principles of general law, and has ever since been held as a ruling decision in both countries.

Bempde *v.* Johnstone, 3 Ves. Jun., p. 198.

The next case noticed, is that of Bempde *v.* Johnstone, &c., decided in the Court of Chancery 12th June 1796, in relation to the domicile of the Marquis of Annandale. The circumstances were: That the Marquis was born 1720, in his father's house in London. He continued there until he was sent to Eton, where he remained till 1734, except in the vacation, when he visited his mother in London. Leaving Eton he went abroad, and continued abroad, in different places, till 1738, when he returned to London, whence, in a few days he went to Scotland. He continued there little more than a month, returned to England, remained there about two months, and then went abroad. He continued abroad in different places, till December 1739, when he returned to England, and he remained in London till April 1740. Then he went to Scotland and returned to England in October, and so on until December 1743, when he went abroad. In the middle of April 1744, he returned to England and remained there until his death. During his life a commission of lunacy had been issued against him in 1747, and he was found to have been a lunatic from 1744.

The Lord Chancellor, upon these facts said, "That as to "his residence in Scotland, he never was there at any period "with a fixed purpose of remaining. His existence was "purely a purpose of either visit or business, and both cir-"cumscribed and defined in their time. Wherever he had a "place of residence that could not be referred to an occa-"sional and temporary purpose, *that* is found in England, "and no where else. I am not clear that the period of his "lunacy is totally to be discarded; but I will take him to "have died then. For the greater part of the period pre-

" vious to that he was fixed in this country, and fixed by all " those ties that describe a settled residence and distinguish " it from that which is temporal and occasional."

And so in the case of Lord Sommerville's domicile. The late Lord Sommerville was born in Scotland on 22d June 1727. He remained there till the age of nine or ten, in the course of which period he was at school at Dalkeith and Edinburgh. At that age he was sent to England to school for some time. Afterwards, in June 1742, he was sent to the Westminster school there for sometime, and thence to Caen, in Normandy, for the purpose of education, where he resided till the age of eighteen. Upon the breaking out of the rebellion in Scotland in 1745, he was sent for by his father, joined the royal army as a volunteer, and continued in the army until 1763. He then went to Scotland. Then went abroad, and, in 1765, on account of his father's illness and death, returned to Scotland, where he remained about six months. In 1779, he took a lease, for twenty years, of a house in Henrietta Street, Cavendish Square, London. He continued to occupy this house until his death, visiting Scotland in the summer, and staying, when there, at "Sommerville House." About ten years before his death, he was elected one of the sixteen peers, to represent Scotland in the House of Peers, and attended his Parliamentary duties every winter. In Scotland, Lord Sommerville's establishment and style of living were suitable to his rank and fortune. In London, he had only one or two female servants, and but two men servants from Scotland. In these circumstances, it was held that Lord Sommerville's domicile was that of Scotland. Thus showing, that it is the preponderance of incidents in a man's life, which goes to constitute his domicile.

2d, It is next to be considered whether any or what effect can be given to the ceremony of marriage, performed by the late Earl and Mary Millner, in England, on the 2d July 1820, when his Lordship was *in articulo mortis*, and, in particular, whether it can avail John Bowes, the son of Mary Millner, so as to make him a lawful heir and legitimate, in virtue of the Scottish law of legitimation *per subsequens matrimonium.*

In treating this point, it is scarcely necessary to mention, that legitimation, *per subsequens matrimonium*, though it prevails in Scotland, and several other countries in Europe, is altogether disowned by the law of England. But, though a different rule prevails in Scotland, even there that rule has

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been restricted in its operation; and legitimation of a child *per subsequens matrimonium*, confined entirely to cases where the parents were domiciled in Scotland. The same principle obtains in regard to the constitution of marriage itself, for in Lord Hardwicke's time it was decided on appeal from Scotland, in the case of M'Culloch *v.* M'Culloch, that cohabitation as man and wife, in a foreign country, would not have the effect of establishing a valid marriage by cohabitation, because the cohabitation, in order to have that effect, must be a cohabitation in Scotland, where that law prevails.

Vide ante, vol. ii., p. 33.

The case of Shedden was next referred to, to show that subsequent marriage of the parents, in a foreign country, will not legitimate the child previously born, to the effect of succeeding to heritable estate in Scotland.

Vide ante, vol. v., p. 194.

The principle of that decision was recognised by the Lord Chancellor (Eldon), in the late case of Gordon *v.* Gordon. In that case, the father of the parties, by birth a Scotchman, went as an engineer in the service, to America in 1754, and there formed a connection with an American female. In 1759, a son was born, and in 1761, another son, the plaintiff in the cause. In 1763, he purchased an estate in Pennsylvania, and in that year he married the mother, and after that marriage the defendant was born. The father died in 1787, and the eldest son died in the same year. There were also estates in the island of Granada. In 1790, an agreement was come to between the plaintiff and defendant, by which the latter agreed to relinquish his right as heir-at-law of his father, and upon that agreement the suit arose, the plaintiff having afterwards filed his bill to set it aside, on the ground of an alleged private marriage before the birth of the first son. Lord Eldon introduced his judgment in the following words:—"This is a very important case, and if I understand "it, it is thus represented. Many years ago, the plaintiff "and defendant in this suit, both of them the sons of the same "lady and gentleman, understood themselves in this sort of "situation to that lady and gentleman, namely, that the "plaintiff was the illegitimate son of those two persons, and that "the defendant was the legitimate son of those same persons. "They were Scottish people originally; but the marriage "having been in America, that marriage, by a decision in "the House of Lords, would not give legitimacy to children "that were born before marriage, whatever might have been "the case of Scotch people married in Scotland. So, under-"standing themselves as being related to their father and

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" mother, they accordingly came to an agreement with respect " to the enjoyment of their property."

The application of these cases to the present, must be instantaneously manifest, and it is equally obvious that it must prove decisive of this question.

It may be embraced in a syllogism, thus:—The parents' real or supposed, of John Bowes, the opposing party, were domiciled in England, and their marriage was celebrated there in 1820, the offspring having been antecedently born in 1811, in the same country. The question as to the *status* or legitimacy of John Bowes is, therefore, to be judged of by the law of England, where the parents were domiciled, and their marriage took place. The law of England admits not of legitimation of issue, *per subsequens matrimonium*, and therefore, John Bowes, born and domiciled also in England, can make no claim to a *status*, or to the character of legitimacy, which depends upon a law not recognised in the country of his own domicile, and where, in fact, no such law exists.

3d, Besides here, as the marriage founded on in this case was one entered into and celebrated in England, the marriage-contract was English, and must be judged of in all its relations and consequences, according to the *lex loci contractus*.

4th, Finally, there is still another point which goes, perhaps, more deeply into the state of some of the parties interested, than any of those which have been treated; for it ought to be considered, whether the late Earl of Strathmore in reality contracted any marriage at all with Mary Millner, the mother of John Bowes, the opposing party. Consent is the essentials of the contract, and it must be a marriage with a special reference to *consortium vitæ* not *concubitus*. The Earl, at the time of his marriage, being *in articulo mortis*, was utterly incapable of either *concubitus* or of fulfilling the duties which attach to the *consortium vitæ*. This absolute disqualification, on the Earl's part, must nullify the contract at once.

After hearing counsel,

LORD CHANCELLOR (ELDON) said:—

" 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 that this case should be

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presented to your Lordships for decision, at as early a period as possible. The testator died seized of very considerable property in England; he made a will and different codicils, which are in evidence before your Lordships, by which he devised certain real estates to his son or his reputed son, the petitioner, whose case has been heard at your Lordships' bar. Suits were instituted, or a suit was instituted in the Court of Chancery, in which, on his part, he was represented as Earl of Strathmore. Mr Bowes, the brother of the late Earl of Strathmore, the reputed father of the present infant, also presented himself upon the record as Earl of Strathmore; and a difficulty therefore arose in what manner the judge of the Court, in which I have the honour to preside, was to deal with these parties. In point of process, both of them could not be Earl of Strathmore, and I could not, therefore, consistently continue the process directed to either of them as Earl of Strathmore; and taking care that that act should not prejudice the interests of the Peer, if the present infant is the Peer, there arose out of the will of the late Lord, another question, which called for decision, namely, what was to be done with respect to guardianship? For the late Lord appointed a guardian, stating him to be his reputed son, and though we are in the habit of taking the representation of a reputed father, such a father cannot, according to our law, appoint guardians. It was necessary, therefore, for me to determine whether he was legitimate or illegitimate; if he was legitimate, the appointment of a guardian was a legal appointment; if he was illegitimate, it would be taken only as a recommendation to the Court of that which, if he had been legitimate, the testator would have recommended. My Lords, if this question had turned merely on questions usually arising in that Court, I should have taken on myself to decide them; but the right of the Peerage being in question, it did appear to me fit to suggest the necessity of applying to a tribunal within whose jurisdiction the determination of such right constitutionally falls; and this induced the application of those arguments, which I think I may take the liberty to represent, with the concurrence of all your Lordships, have on all sides very much distinguished the character, talents, and abilities of the counsel who had urged them.

"My Lords, if I had no reason from what had been decided in a case of this nature, recollecting what passed in this House in the case of Shedden *v.* Patrick, I might have ventured to say, that under the circumstances of this case, this child could not be legitimate. My Lords, I still retain that opinion, notwithstanding all I have heard at the bar, and I wish only, for my own sake, to take care that it may not be supposed I have given an opinion on points on which it is not necessary to say anything. The illegitimacy of this child appears to me to be made out by the circumstances which I shall shortly state, I mean the birth of

his father in England; the fact that his father was not, as his ancestors were (provided he was legitimate, I should call them his ancestors), a mere Scotch Peer, but that he was, as Earl of Strathmore, British; that he was Baron Bowes, a British Peer; that the mother was an English woman. I do not recollect that she had ever been in Scotland at all; if she had ever been in Scotland at all, it escaped my recollection; that the marriage was in England; that the domicile of Baron Bowes was principally in England; that her domicile was certainly altogether in England; and, under the circumstances, it does appear to me, attending to the principle which the House meant to maintain in Shedden *v.* Patrick, that, without deciding at all what would be the consequences of a person married in Scotland before the Union, or persons married in Scotland since the Union, or persons removed from Scotland, domiciled elsewhere, and going to Scotland and obtaining a domicile and marrying in Scotland; without determining those points at all, but recollecting the state and condition of these parties, and the fact that the father was a British Peer, and looking to the effect of the Act of Union, I am bound to tender to your Lordships my humble opinion, I am sorry so to state, but it is my duty so to state, that this child is not a legitimate child. The consequence of that opinion will be, if your Lordships adopt it, that he cannot make out his title. I do not entertain any doubts upon the grounds of the decision in this case. If any of your Lordships should entertain doubts upon this subject we must regularly go into a discussion of the merits of this case; but unless your Lordships do entertain doubts upon the subject, I think it sufficient, after the full discussion your Lordships have heard, to say that that is my opinion."

LORD REDESDALE.—My Lords, in stating what occurs to me upon this case, I will trouble your Lordships with very few words. My Lords, I think it is necessary to consider the effects the Articles of Union, and the subsequent Acts of Parliament referring to the Realms of England and Scotland, at one time distinct, have had upon this question. My Lords, by the Articles of Union, that distinct Peerage of England and Scotland ceased to exist; there was no such realm as the Realm of Scotland or the Realm of England, there was thenceforward only the Kingdom and the Realm of Great Britain; and all persons who were within the two distinct kingdoms before the Union of England and Scotland, and the subjects of these two distinct kingdoms became henceforth the subjects of the new Kingdom of Great Britain. My Lords, by the Articles of Union, the persons who were before Peers of the Realm of Scotland, became Peers of the Realm of Great Britain, by the express words of one of the Articles of Union—the 23d Article. My Lords, there is an express distinction between the character of Peer of the Realm, and Lord of

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Parliament. A Lord of Parliament has a distinct character. A Peer of the Realm is one thing, a Lord of Parliament is another thing. Your Lordships know, that those who are frequently called Spiritual Lords are not Peers too, but are simple Lords of Parliament; and so the sixteen elected Peers of Scotland, as elected Peers, are Lords of Parliament, though capable of being so elected only in consequence of their being Peers of the Realm of Great Britain, having been, previously to the Union, Peers of Scotland.

"My Lords, when they became, by the Act of Union, Peers of Great Britain, they claimed a right of inheritance in a dignity appropriated to Scotland, but a dignity in the Realm of Great Britain, namely, the dignity of a Peer of Great Britain; they acquired a new right hereditary throughout the country, and they lost the character, except for the purpose of the election of Peers of the Realm of Scotland, which for all other purposes, then ceased to exist. My Lords, as Peers of the Realm of Great Britain, they must be subject to the laws of Great Britain, and not to the peculiar laws of a particular district; for thenceforth England was not one district and Scotland another district, locally governed by their own particular laws, but both of them subject, for all general purposes, to the general laws of the United Kingdom. If your Lordships will look at the Act of Union, you will perceive that nothing is stipulated with respect to the continuance of the laws of England; but, it is evident, and it has always been conceived, that the law of England was thenceforth to be deemed the general law of the Realm of Great Britain—the new created Realm of Great Britain—except as qualified by the particular provision, with respect to the laws of Scotland, contained in the 23d Article of the Union.

"My Lords, the consequence seems to me, that the rights of the Peers of the Kingdom of England before the Union, must be considered as the rights of all the persons who, by the Act of Union, were constituted Peers of Great Britain after the Union, so far as they were to be considered Lords of Parliament; that general right being qualified in respect of those persons who, previous to the Union, were Peers of the Realm of Scotland, because, with respect to them, the character of Lords of Parliament was given only to the sixteen Peers elected out of the general body.

"By the Articles of Union, and by the Acts of the two Parliaments of England and Scotland, which confirmed the Union, all the laws of England or Scotland, inconsistent with the Articles of Union, were repealed; and, consequently, no law in Scotland, no law of England, inconsistent with the Articles of Union, had henceforth any force. If, therefore, the law of Scotland taken by itself, and before the Union, could affect the character of a Peer born or domiciled in Scotland, but who had become, by the Articles of Union, a Peer of Great Britain, I do apprehend that

law could have no effect upon his character as a Peer of Great Britain. My Lords, if, therefore, the right of the Peers of the Realm of England were, upon the Union, communicated in this manner, by amalgamating in one body, as one may say, the Peers of Scotland and the Peers of England, as existing before the Union, and making the two Peers of one realm, namely, the Realm of Great Britain; and if, as I think, it is evident from the whole frame and texture of the Articles of Union, the laws of England were those which were to attach to the United Kingdom, except as they were qualified by particular provisions respecting Scotland, the consequence would be that any law of Scotland differing from the law of England prior to the Union, respecting particular succession to the dignity of a Peer of Great Britain, must be inconsistent with the Articles of Union; and, consequently, the Peers of the former Realm of Scotland, would become Peers of England, and the laws which made them particularly Peers of Scotland, would be held to be repealed.

"My Lords, with respect to the particular question now before your Lordships, the infant who claims, as son of the Earl of Strathmore, the dignity of Earl of Strathmore, now a dignity of the peerage of your Lordships, united in the kingdom of Great Britain and Ireland—for that is the effect of the subsequent Union with Ireland —stood in this situation. He was born in England, born of a British mother, and of a father, of whom I must say, in conformity to what has been decided, particularly in the Marquis of Annandale's case, a father domiciled in England. My Lords, with reference to the fact of his being one of those persons who, for certain purposes, are called Scotch Peers (but only for certain purposes so called, being all now Peers of Great Britain), if that course could operate to make any change, consider what would be the effect of it. The Duke of Richmond is Duke of Lennox; is the Duke of Richmond, therefore, to be considered a Scotchman on that account, distinct from his character arising from his domicile and his residence in England? A noble Lord (Verulam), whom I see, is a Peer also of the Kingdom of Scotland, for the purpose of electing one of the sixteen peers, I do not know what his situation may be with respect to Scotland, but, I believe, he would be very much surprised if he was to be considered in any respect as a domiciled Scotchman. There are other noble Lords who are certainly in a similar situation; I, therefore, take it that the circumstance of his being one of those persons who, for certain purposes, are still called Peers of Scotland, though really Peers of Great Britain, which is the only realm existing after the Union, in the reign of Queen Anne, and now joined and united with the kingdom of Ireland, that character cannot possibly affect the question, Whether he was or was not domiciled in England? His birth was in England—his residence was in England, and he

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must be taken to be, to all intents and purposes, a person domiciled in that district of the United Kingdom, which is called England. I apprehend, that if my Lord Strathmore had died intestate, his personal property would have been distributed according to the local law of England, the law of that part of the country; for he certainly was much more to be considered a person domiciled in England than the late Marquis of Annandale was, whose residence in England was under very particular circumstances. My Lords, the child that was born of Lady Strathmore, as she now is, and whom my Lord Strathmore acknowledges to be his child, was unquestionably born under circumstances which constituted him a person born out of lawful marriage. He was born in England of an Englishwoman, who never had been before in Scotland, and, I understand, never since was in Scotland; the law, therefore, that attached to him upon his birth, was the law of England; and if his mother or his supposed father had died within a few years after, unquestionably he was an illegitimate child, born in England, subject only to the law of England, and having no character whatever, but that which had been derived from his mother. But, it is said, that the subsequent marriage of his father shall have the effect, on account of the connection which that father had with the district of Scotland, of making him the legitimate heir of the dignity of Earl of Strathmore; though, my Lords, if it is to have that effect, it must have the effect of controlling the law of England, it must repeal the law of England for so much; and, I apprehend, that you cannot construe the provisions in the Articles of Union to have any such effect; you cannot construe the provisions in the Articles of Union, with respect to the law of Scotland, to extend beyond the local district of Scotland, upon whom, at his birth, the law of England attached, who was a natural-born subject of the realm, only because he was born in England, and who, in that character, was liable in all the consequences arising from the illegitimacy of his birth in England, because his father possessed a peerage, which is still called, for certain purposes, a Peerage of Scotland, and that, therefore, his state is to be governed by the law of Scotland. I do conceive, that that would be in effect to repeal the law of England, and that there is nothing whatever in the Act of Union, which can possibly give such effect to Scotch law. My Lords, I think the case which has been mentioned as decided in France, is strongly in point upon that subject; for, on what ground was that French case decided? The ground on which it was decided, was this, that the child was born in France —born there, subject to the laws of France, and that the retrospective effect was consistent with the laws of France—that he had gained, at the instant of his birth, the capacity of a child born in France; whereas this child, at his birth, had no such capacity

in reference to Scotland, he was born in a country where, according to the law of that country, he was incapable of being a legitimate child. It seems to me, therefore, that if your Lordships were to hold this subsequent marriage of the Earl of Strathmore with the mother of his child, to have the effect of legitimating the child, the consequence would be, you would abrogate the law of England, in so far as that is certainly not within the meaning of the Articles of Union. My Lords, I do not enter into the question whether, if this marriage had been celebrated in Scotland, it might have had the effect of legitimating the child, because, I think, it not necessary; but I must say that I cannot conceive how it could have that effect. In the case of Sheddan *v.* 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 on 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 restrospective effect of the law of Scotland could not alter that character which, at its birth, attached upon him. My Lords, I apprehend, that this is the true ground of the decision—he was an alien, and that character could not be altered by the retrospective effect 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. My Lords, if we were to enter into the consideration of the effect of a subsequent marriage, because it was solemnized in this country, I am afraid we must go a great deal further than I think it necessary to go in this case. The law of Scotland admits an acknowledgment of marriage as equivalent to the actual form of marriage—the ceremony of marriage is not necessary for the purpose, according to the law of Scotland; but, I apprehend, it never can be allowed that that sort of acknowledgment, except in Scotland, could have that effect. I presume that, unless that acknowledgment was in Scotland, it could not be deemed to have the effect of legitimating a child not born in Scotland, so that, under these circumstances, he could, by the law of the country in which he was born, become a legitimate subject. The acknowledgment of a marriage, we are told, would, in Scotland, have a legitimating effect: when or where that marriage was solemnized, in a case of mere acknowledgment, need not be declared; it is sufficient, by the law of Scotland, simply to declare that this person, describing her, is the wife of the person who makes that acknowledgment, and that has the effect of giving to the wife and to the supposed issue, the legal character of a wife and legitimate child, by the retrospective effect which that marriage had. My Lords, I forbear to enter further into that part of

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the case, because I think it would carry your Lordships much further than it would be necessary to go; and I have not observed that, in the arguments at the bar, that has been at all considered. My Lords, upon the whole, I do conceive the subject that is now in question, is an inheritance governed by the law of the United Kingdom, and that the person who is to claim that inheritance, must, according to that law, be heir of the person from whom he claims it by descent; that, according to the law of England, taken independently of the law of Scotland, it is impossible that it could be claimed by a person who now appears before your Lordships; that if the law of Scotland was to be admitted to have the operation which, in this particular case, to which I would wish to confine myself, it is alleged it ought to have, it would operate as a repeal of the law of England—it would be repugnant to the law of England, and, therefore, is inconsistent with the Articles of Union. Upon that ground I am of opinion that the claimant has no right to the dignity of Earl of Strathmore, and, consequently, that the dignity does properly belong to Mr Thomas Bowes, the brother of the late Earl of Strathmore."

LORD CHANCELLOR.—"I wish it to be distinctly understood that I do not mean to intimate any opinion to your Lordships, what might have been the law as applicable to this case, if those parties had been married in Scotland. That this case is open to inquiry, investigation, and decision, whenever it arises; and I take leave to make that addition to what I have before said, because I do apprehend that the succession of Scotch Peers, by which I mean Peers domiciled in Scotland, and, *ipso facto*, Scotchmen are to be regulated by the Scotch law.

It was resolved and adjudged that the petitioner, John Bowes, is not entitled to the titles, honours, and dignities of the Earl of Strathmore and Kinghorn, Viscount Lyon, Lord Glammis, Tannadyce, Ledlaw, and Strathdightie, claimed by the said petitioner.

Resolved and adjudged, that the petitioner, the Right Hon. Thomas Bowes, hath made out his claim to the titles, honours, and dignities of Earl of Strathmore and Kinghorn, Viscount Lyon, Lord Glammis, Tannadyce, Ledlaw, and Strathdightie, claimed by the said petitioner.

Resolved and adjudged, that the petitioner, John Bowes, is not entitled to the title, honour, and dignity of Baron Bowes, claimed by the said petitioner.

For John Bowes, *Chas. Wetherell, Geo. Cranstoun, John Fullerton, Jas. Abercromby, W. G. Adam.*

For the Hon. Thomas Bowes, *Anthony Hart, R. H. Blossett, L. Shadwell, R. Hamilton.*