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

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

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

No. V.

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

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

that this case should be 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 to 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 had to 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 any thing. 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 as Baron Bowes a British Peer: —that the mother was an Englishwoman;—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 this 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 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 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 simply 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 thenceforward 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 of 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 rights 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 on 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 late 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 as a Scotsman 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 Scotsman. 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, and forming the United Kingdom of Great Britain and 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 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 connexion 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—you cannot construe it to have the effect with reference to a person 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 is not necessary; but I must say, that I cannot conceive how it could have that effect. In the case of Shedden *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 retrospective effect of the law of Scotland could not alter that 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 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 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 the 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 that 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 that 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, is to be regulated by the Scotch law.

The question was put by the chairman, That the petitioner, John Bowes, is not entitled, and has not made out his claim to the titles and dignity of Earl of Strathmore and Kinghorn, Viscount Lyon, &c. and that the petitioner, the Right Honourable Thomas Bowes, has made out his claim to the titles and dignities of Earl of Strathmore and Kinghorn, Viscount Lyon, &c.: Which being put, passed in the affirmative.

No. VI.

Verdict and Judgment of the Court of King's Bench, and Questions proposed by the House of Lords to the Twelve Judges, in the case Doe on dem. of Birtwhistle *v.* Vardill,—p. 294.

"The jurors say, upon their oath, that William Birtwhistle, being seized in his lifetime, in his demesne, of and in one undivided third part, the whole into three equal parts to be divided, of and in the premises in the within declaration contained, on the 12th day of May 1819 died so seized, without leaving any issue of his body: That all the brothers of the said William Birtwhistle have died in the lifetime of the said William, and that they all died unmarried and without issue, save and except Alexander, one of the brothers of the said William, who married and had issue in the manner and at the time particularly herein-after mentioned: That one Mary Purdie was also a person dwelling and remaining in Scotland, domiciled there until the time of his death herein-after mentioned: That the said Alexander Birtwhistle and the said Mary Purdie being so domiciled in Scotland as aforesaid, the said Alexander Birtwhistle did cohabit with the said Mary Purdie, and did beget upon the said Mary Purdie the within named John Birtwhistle; which said John Birtwhistle was the only son of the said Alexander Birtwhistle and of the said Mary Purdie, and was born in Scotland on the 15th day of May in the year of our