

Elchies on Stair, p. 110.; Ersk. 3. 8. 23.; Bankton, 2. 3. 130.; 3. 8. 27. July 16. 1830.
 Willison, Feb. 26. 1724, Dec. 18. 1724, (15,369.) Hall, Feb. 1726, (15,373.)
 Gordon, Nov. 21. 1753, (10,258.) Chisholm, Feb. 27. 1800, (No. 6. App.
 Tailzie); Stair, 1. 3. 3.; Ersk. 3. 3. 86. Strathnaver, Feb. 2. 1728, (15,373.);
 Feb. 25. 1730, (Craigie and S. 32.) Young, Nov. 13. 1761; (5. Brown's Sup.
 p. 884.) Gordon, July 29. 1761, (15,513.) Sutherland, Feb. 6. 1801, (No. 8.
 App. Tailzie). Lockhart, June 11. 1811; Elchies on Stair, p. 114.; Bankton,
 2. 3. 152. Spittal, Aug. 3. 1781; Bankton, 2. 3. 152-158. M'Gill, June 13.
 1798, (15,451.); Ersk. 3. 1. 13.; Stair, 1. 9. 3.

J. CHALMER—A. MACRAE,—Solicitors.

CATHERINE MONRO or ROSE, and HUSBAND, Appellants.
Dean of Fac. (Jeffrey)—Lushington.

No. 35.

GEORGE ROSS, Respondent.—*Brougham—Keay—Dundas.*

Parent and Child—Foreign.—Where a Scotchman by birth, who was heir of entail in possession, and proprietor of estates in Scotland, but in early life settled in England, making occasional visits to Scotland, had, by an illicit connexion with an Englishwoman, a son born to him in England, and afterwards came to Scotland with the child and mother, where, after a residence of fifteen days, he married her; and they remained in Scotland about two months, visited his estates, and returned to England with the child, where they remained until his death;—Found, (reversing the judgment of the Court of Session), that the child was not entitled to the benefit of legitimation by the subsequent marriage of his parents.

THE late Alexander Ross was by birth a Scotchman, and went in early life to London, where he settled in business as an army-agent. He succeeded in the year 1786 to the entailed estate of Cromarty in Scotland; and he also inherited a paternal estate called Overskibo, and was enrolled as a freeholder in two of the counties of Scotland. After he went to England, his residence was either in London or its neighbourhood. He married a lady in England, but she died in April 1809, without being survived by a son. He then formed an illicit connexion in London with an Englishwoman, Elizabeth Woodman, (who assumed the name of Mrs Saunders, being the Scotch for his own name, Alexander), by whom he had a son, (the respondent), born in London in February 1811. Mr Ross was in the custom of making occasional visits to Scotland for various purposes, such as voting as a freeholder at elections, letting the leases on his estate, amusement, or seeing his friends. In May 1815 he took lodgings at Newhaven, near Edinburgh, and arrived there on the 25th, with

July 16. 1830.

2D DIVISION.

July 16. 1830. Elizabeth Woodman and the respondent. He was regularly married to her at Leith on the 10th of June 1815; and after remaining some weeks at Newhaven, they went to the estate of Cromarty, accompanied by the respondent. They resided there till about the end of August, when they returned to London, where Mr Ross continued almost uninterruptedly till his death in that city in 1820. Subsequent to the marriage, the respondent was treated by his parents as their lawful son, and was acknowledged as such in the settlements of his father, which were executed by him in Scotland according to the forms of the law of Scotland. His widow was also found entitled to terce, &c.

The respondent, under the name of George Ross, and describing himself as the only lawful son of Alexander Ross, then took out a brieve for the purpose of having himself served lawful heir of tailzie to his father in the estate of Cromarty. Under that entail, the estate is descendible to heirs-male of Alexander Ross, whom failing, to the heirs of a party, now represented by the appellant Mrs Rose. That lady immediately executed against the respondent a summons of bastardy before the Commissaries, setting forth, that Alexander Ross having died without heirs-male lawfully procreated of his body, she had right to the estate of Cromarty as nearest and lawful heir of tailzie; averring, that the respondent was a bastard, seeing that he was begotten by Alexander Ross, a domiciled Englishman, in fornication with an Englishwoman, and born a bastard in England; and concluding, that it should be found and declared accordingly.

The Commissaries, after allowing a proof, found, ‘on the whole facts of the case, and in respect that no sufficient grounds have been alleged for denying to the defender the benefit of legitimation by the subsequent marriage of his parents, as recognized in the law of Scotland, assoilzied the defender.’*

The appellant having presented a bill of advocation, the Lord Ordinary reported the case; and, after a hearing before all the Judges, the Lord Ordinary, as advised by the Court, refused the bill, and the Court, on review, adhered.†

* See the opinions of the Commissaries laid before the House of Lords, Appendix, No. III.

† 5. Shaw and Dunlop, 605.—The Opinions will be found in the Appendix, No. IV. Lords Justice-Clerk, Glenlee, Craigie, Balgray, Gillies, Pitmilly, Alloway, Meadowbank, Mackenzie, and Medwyn, were in favour of the judgment. Lords President, Cringletie, and Eldin, dissented.

Mrs Rose appealed.

July 16. 1830.

Appellant.—1. The question is, What is the legal effect of the subsequent marriage in Scotland, where the child was begotten and born in a foreign country. By the law of Scotland, an effectual marriage is constituted by the interchange of consent ad ipsum matrimonium, and the law, from the posterior public celebration, infers a prior private interchange. The latter is held to be the true period of the nuptials, and thus the subsequens matrimonium works not to make the child which was a bastard a lawful child, but to declare that the child which, until the public celebration, had been erroneously reputed a bastard, was, and had been, from the first carnal intercourse of the parents, lawfully begotten. But this is a mere presumption, which rests on the fact that there was no impediment which prevented the practicability of that private interchange of consent of marriage. If there were such an impediment, as for example an intervening marriage, there is no room for the presumption; and posterior marriage between the parents will not legitimate the child, who cannot, from the circumstances in which his parents stood, be any thing but a bastard begotten. In like manner, since marriage is not, and cannot be constituted by mere interchange of consent in England, the child begotten in England must have been begotten in fornication. The presumption arising from a public ceremony in Scotland, that the bastardy was a mistake, and that truly from the beginning the child was lawful, cannot be admitted. The fact, in such a case, overcomes the presumption. It is an erroneous view to treat this presumption of the private interchange of the matrimonial consent, and the consequent constitution of matrimony, as a mere fiction, and to maintain that all inquiry whether there was a possibility of a consent is excluded. It is a rational and useful rule. The law lets in a presumption of a doubtful fact, of which, from its very nature, no direct evidence can generally be obtained; but a wise limit is placed to this indulgence, and wherever there is an impracticability of the event having happened, then the presumption will not apply. The law deals in fiction when it assumes as true some fact which certainly did not happen, in order to let in an equity which could not otherwise touch the real circumstances of the case. But it deals only in presumptions, where, in a doubtful case, and in default of conclusive evidence, a fact which is likely to be true, or for the evident interests of society it is wise to be inclined to believe to be true, is taken to be true. In a fiction, the law will exclude the inquiry of possibility or impossibility. In

July 16. 1830. a presumption, the law admits the objection of impossibility, and allows an inquiry into the fact. Besides, this is a Scotch presumption, unknown to the law of England, and cannot be extended beyond the territory in which the presumption is recognized. But, in the present case, the parties were undoubtedly domiciled in England at the time of the procreation, and consequently the Scottish rule, that the interchange of the matrimonial consent then took place, cannot be admitted. But the respondent was not only begotten illegitimately, he was also born a bastard; because his parents were resident and domiciled in England at the period of his birth. The status of bastard was thus indelibly impressed on him; for although personal status may not in every case be unchangeable by migration to another territory, (as slavery, outlawry, legal infamy, and others founded on municipal regulation), yet all relations or distinctions resting on the *jus gentium* must necessarily be indelible. The circumstance, therefore, of the parents subsequently entering into wedlock, cannot have the effect to give the respondent the status of legitimacy.

2. But, independent of the preceding argument, the question must be decided by the law of the domicile of the parents at the date of the marriage. That domicile was England; and it is undoubted that the marriage could not, by the law of that country, have any effect to legitimize the respondent. In answer to this, it is quite irrelevant to say that the question has arisen in a Scottish Court, because, if this were admissible, there could be no question for decision: neither is it relevant that Scotland was the *locus contractus*, because there is no question as to the effect of that contract on the rights of the contracting parties, but as to a supposed right in the respondent; besides, the contract, although constituted by the forms of the law of Scotland, had reference to England for execution; and the parties were domiciled English subjects, the respondent's mother being a native of England, never in Scotland till the marriage took place, and never in that country thereafter: neither is it relevant to allege that Mr Ross was a native of Scotland, for although that may be an element of judgment in relation to a question of civil jurisdiction, and even in that question is, *per se*, of little weight, yet it cannot be of any moment in a question as to civil status; and the same observation applies to the circumstance of the possession of property in Scotland.

Respondent.—1. The general rule of the Scottish law is, that the children of persons lawfully married, whether born before or after marriage, are lawful children in all respects, includ-

ing succession to lands. When the children have been born before the celebration of the marriage, they are said to be legitimated per subsequens matrimonium. The effect however is, that in all respects they are held to be legitimate. Fornication is punishable as a crime by the law of Scotland; but the effect of the subsequent marriage of the parties is, that the law casts a veil over all that has previously occurred between them. It holds their intentions to have been correct, the proof of which is, the declaration solemnly given that they are married persons. The rule, that all the children of parties lawfully married are lawful children, forms a part of the common law of Scotland, not less fully established than the law of primogeniture, or the preference of males to females in succession to lands, and the equality of all lawful children in succession to moveables. How or when these legal rules or principles were introduced, may be matter of literary or antiquarian speculation; but the authority of the rules themselves in daily practice is liable to no dispute. It is known, however, that legitimation by subsequent marriage was introduced by the influence of the Christian religion. The first Christian emperor, Constantine, endeavoured by an imperial edict to allure parents from concubinage into marriage, by declaring that their children previously born should be held legitimate, if the parents should solemnize their marriage within a certain time. Edicts of this description were from time to time renewed by the emperors, Zeno, Anastasius, and Justinus. At length Justinian made the privilege perpetual. The rule was resisted for a time by the first feudal usages; but it ultimately prevailed in Scotland, and the Christian countries on the continent of Europe, as a part of the common law applicable to succession of every description.

But it is said that this rests on a fiction, viz. that the law feigns the father and mother to have been married antecedent to the conception and birth of the child; that in this case, the respondent having been born in England, (in which special solemnities are required to the celebration of marriage), the fiction cannot be entertained as possible. It is certain that the Roman imperial edicts contain no such fiction. It is true that the canonists state it, and Mr Erskine repeats it after them. The fiction has been suggested for the purpose of supporting a necessary exception to the general rule. The exception is, that children born in adultery cannot be legitimated. This just exception is said to be the result of the fiction, that to found legitimation by subsequent marriage, the marriage of the parties must have been legally possible at the date

July 16. 1850.

July 16. 1830. of the conception of the children, which it could not be if the parents were under an absolute disability of marrying each other. Fictions are merely speculations suggested for the purpose of systematizing the common or statute law of a country, or they are pretexts to explain the necessary exceptions to general rules, in order to give effect to the intention of the Legislature when the words employed seem defective or too general. In relation to legitimation by subsequent marriage, the intention of the law is to induce men to desist from an unlawful habit of concubinage, and to convert it into the state of lawful matrimony. The reward held out is the legitimation of the children born in concubinage. It was very far from being meant by this law to give countenance to adulterous or incestuous intercourse. To avoid that effect, the canonists said the law feigned that the parents were married before the conception of the children; but as this was in certain cases legally impossible, legitimation per subsequens matrimonium could not occur in such cases. But even if the supposed fiction of antecedent marriage were held to be of any importance in the law of Scotland, it could not affect this case, because nothing existed to prevent the marriage of the respondent's father and mother antecedent to the respondent's birth. The law of England created no such impediment; and as to the form of expressing the matrimonial consent, that is unimportant, because, confessedly, the marriage is valid. If the English marriage ceremony were essential in this case, the want of it ought to have annulled the marriage itself. But as the marriage was a Scotch marriage, placing the parties under the Scottish institution, it is in vain to say, that by any fiction devised to enforce the intention of the Legislature, the ordinary result of the Scottish institution of marriage is in this case defeated.

2. The law of England cannot govern this case. The question relates to the effect of a Scottish marriage, and to the succession to a Scottish estate, and to a Scotsman. It must therefore be regulated by the law of Scotland, precisely on the same principle as the decision in the case of *Birtwhistle*,* in relation to an English estate, was held to be governed by the law of England, although the marriage was made in Scotland. The appellant has no right to challenge the respondent's status except with reference to the question of the succession to the estate of Cromarty; and therefore, although in form it has been tried in a Court not competent

* 5. Barn. & Cres. 438. This case was appealed, and after taking the opinions of all the Judges, the House of Lords proposed to them the Queries which will be found in the Appendix, No. VI.

to decide any question as to the succession to an heritable estate, yet that is truly the question at issue. July 16. 1830.

EARL OF ELDON.—My Lords, In this cause, which has been called the legitimation cause, it is not my intention to trouble your Lordships with more than a very few words. It is merely to state, that the points which have been raised in the discussion of this case have not escaped my attention, and that I do not give an opinion upon it without maturely considering the cases which have been previously decided. I have looked through all the judgments in the Consistorial Court, and the judgments of the learned Judges in the Court of Session, in order to correct the opinion I had formed upon those former cases, and which I had thought it right and consistent with my duty to express. I have listened with the utmost attention also to that which was stated at your Lordships' bar; and the result I have come to is, that it is not possible for me to find that the respondent was legitimate:—If I am right in that, the judgment must be reversed.

LORD CHANCELLOR.—My Lords, I will state to your Lordships in a word, what are the facts of this case:—A person of the name of Ross, who was a Scotchman by birth, came to England in early life, and resided in England, where he carried on business for fifty years, domiciled in London, where that business was carried on. He formed a connexion with a woman with whom he cohabited. By that woman he had, in 1811, a child. Five years afterwards, while he was still domiciled in London, he went to Scotland with the child and with the woman, for the purpose of being married. He did not go to Scotland for the purpose of remaining in Scotland, but went obviously *animo revertendi*. He was married in Scotland,—remained in that country a few weeks,—returned to London to his former domicile,—remained there during the continuance of his life, and died in London. The question is, Whether, by the law of Scotland, the child has become legitimate by the marriage of his parents under the circumstances I have stated?—Now, my Lords, there was a principle stated at the bar, upon which, however, I should be unwilling to decide this case, but which I will state to your Lordships: That by the law of Scotland, where persons cohabit together unmarried, and a child is born, and they afterwards marry, with certain exceptions it is considered, that a contract of marriage was formed previous to the conception of the child. It was contended at the bar, as it had been contended in the Court below, that this rule does not apply to a case of the present description, for that no such contract could constitute a marriage in this country,—that nothing could constitute a marriage except the ceremony of marriage *in facie ecclesiæ*,—and that therefore, if such be the principle of legitimation *per subsequens matrimonium* relied upon, the individual cannot be legitimate in this case. My Lords, attending to

July 16. 1830. the whole of the argument, I consider the law of Scotland; in this respect, fit matter for consideration in other cases; but I do not wish to dispose of this case upon that principle. My Lords, this brings me, then, to the cases to which my noble and learned friend has alluded,—among these the case of *Shedden v. Patrick*, which, with one exception, was similar to the present. A native of Scotland went to America, where he was domiciled,—he lived there for more than twenty years,—he lived with a woman, by whom he had a child, and he afterwards married her in America. His father had a landed estate in Scotland, and the child born previously to the ceremony of marriage claimed as his heir. My Lords, when that case came before the Court in Scotland, it was considered by the learned Judges in that Court as necessary in the first instance to determine, as a distinct question, the question of legitimacy, and the question of status. My noble and learned friend has had the kindness to hand me a manuscript copy of the opinions of the Judges of that Court at the time when that case was decided. The fifteen Judges of the Court were unanimous in their judgment, with the exception of only one, who expresses his dissent, however, with great doubt and great diffidence, and they decided in that case distinctly and clearly against the legitimacy. Now, my Lords, referring to the judgment of some of those learned Judges, I should infer that they came to a conclusion upon the ground I am about to state—that, by the law of the country where the child was born, it was not only illegitimate, as is found, but that, by the law of that country, the illegitimacy was indelible, and therefore a subsequent marriage could not have the effect of rendering the child legitimate. A distinction might possibly be made between a marriage in Scotland and a marriage in America; but I do not enter into that distinction, for this reason, that if a marriage be celebrated according to the law and usage of the country in which it takes place, and according to that it is complete—it is complete everywhere; therefore I do not see, very distinctly, why marriage in Scotland should have a greater effect than would be attributable to a marriage in America, with respect to a child who had been previously born. It appears to me therefore unnecessary to go into that point. It is sufficient that the child be born in a country where the illegitimacy is indelible;—that, in any country whatever, would have the effect of rendering that child illegitimate. I collect that opinion to have been expressed in the case of *Shedden v. Patrick*. I collect this also from the judgment of Lord Redesdale, in the judgment in the case of the *Strathmore peerage*,* where the noble and learned Lord commented upon the case of *Shedden v. Patrick*; and I believe that, at the time when *Shedden v. Patrick* was decided in this House, that noble and learned Lord was a member of it: however, these are the observations

* See Appendix, No. V.

July 16. 1830

the noble and learned Lord makes:—‘ 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;’—I agree with the noble and learned Lord—I do not think it necessary;—‘ but I must say that I cannot conceive how it could have that effect.’ The opinion of that noble and learned Lord is quite obvious from what I have stated, and from a subsequent passage, in which he considered the position of the child at the time of its birth, and the character stamped upon it at the time of its birth, as deciding the case. He afterwards says:—‘ 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.’ Taking the whole of the judgment of the noble Lord together, I should conclude that he was of opinion, that if the child was illegitimate at the time of his birth, and according to the law of the country where it was born, that character was stamped upon it indelibly—no subsequent marriage could render him legitimate. But it is not necessary to decide that question, for this reason—These parties were domiciled in England—the child was born in England—the marriage did not take place indeed in England, but the parties went to Scotland for the purpose expressly of being married; and having been married, they returned to England, to the place of their former domicile. I wish, agreeably to that which has been stated by my noble and learned friend, that this case should be decided with reference to this state of facts, without entering upon those other questions which the case may raise. I am of opinion, upon that ground, that the judgment of the Court below should be reversed.

EARL OF ELDON.—My Lords, The learned Lord’s conclusion appears to me to be perfectly correct, that it is your Lordships’ duty to reverse this judgment. Under the circumstances of this case I will just take this opportunity of saying, that I have given the greatest consideration to that which has been expressed in the judgments of your Lordships’ House, and that stated at the bar of the House by the Counsel, and to the decisions in Scotland with respect to matters of divorce; with reference to which I shall say no more at present than this, that I pledge myself to give the best assistance in my power to your Lordships, if I live till the next Session of Parliament, in endeavouring to settle what the law is upon that subject. Your Lordships know the Judges of the Consistorial Courts have differed with the Court of Session with respect to this very important point. It will be in the recollection of some of your Lordships, that, some few years ago, a person who was divorced in one of the Courts in Scotland, formed the opinion that he might marry again: he did marry again; he had been

July 16. 1830. originally married in England ; he was convicted of bigamy, and the twelve Judges assembled to consider the effect of his conviction, which was a conviction on the Northern Circuit. The twelve Judges found, that the marriage having occurred in England, the divorce *e vinculo matrimonii* could not take place but by an English Act of Parliament.* Whether that is right or wrong I will not stop to discuss ; but I must say, that the subjects of England and Scotland should not be left in such a state of the law, subject to such a difference of opinion between the Judges in England and the Judges in Scotland. The mention of the case brings to my mind, that, holding the great seal at the time, it did appear to me to be a case in which some degree of mercy, on account of those decisions in Scotland, ought to be extended to that individual, and it was so extended : but I must take the liberty of saying, that the law of Scotland and the law of England ought not both to remain as they now are on such a question ; and I will myself, if no other noble Lord undertakes it, introduce into your Lordships' House some measure for the purpose of disencumbering the subjects of both parts of the kingdom of certain contradictions, which are so extremely inconvenient ; and I should hope your Lordships would feel the matter to be extremely worthy of your attention.

LORD WYNFORD.—My Lords, With respect to the case to which my noble and learned friend refers, it was as much considered as any case which ever came before the learned Judges. It was argued by some of the most able men at the bar. The Judges were so clear in their opinion of the law, that they ordered the prisoner, who married a second wife during the life of his first, but from whom he had been divorced by a Scotch Court, to be transported. Mercy was afterwards shewn to this man by the Crown, I believe upon the ground, that as this was the first case in which it had been decided, that an English marriage was a good subsisting marriage, notwithstanding a Scotch divorce, he might not have been aware that he was acting illegally.

My Lords, in respect of the present case I will merely say, that I entirely concur in every thing that has fallen from my noble and learned friends. All Jurists agree, that the personal quality of a man must be decided by the law of the country in which he was born. I could refer your Lordships to authors of almost every country in Europe, particularly to Dutch writers, to prove this. This person was born in England a bastard, and by the law of England bastardy is indelible. He cannot become legitimated.

Boullenois, a French writer, in a commentary on the decision of one of the Courts of that country, says, in the case of De Conti, that although a native of a country, according to the laws of which a marriage subsequent to the birth of a child renders such child legitimate, is rendered legitimate by a marriage of his parents in England after

* Case of Lolley, 7th Dec. 1812. Russell and Ryan's Crown Cases, 237.

his birth, that a person born a bastard in England is not legitimated by a subsequent marriage of his parents in France, on account of the indelible quality of bastardy under the law of England. July 16. 1830.

LORD CHANCELLOR.—My Lords, The very case my noble and learned friend has mentioned, the case of De Conti, decided in France in the year 1668, establishes, that where a child is born in a country where he would become legitimate by a subsequent marriage, he becomes so, although the marriage has taken place in a country in which a different law prevails, and where a subsequent marriage would not have the effect of rendering him legitimate. That child was born in France, where that law has effect,—the parents afterwards came over to England—were married in England. There the French Court decided, that the effect of the marriage in England, although that law does not prevail in England, was to render the child legitimate in France, which is a complete confirmation of the principle I have alluded to.

The House of Lords ‘ordered and adjudged, that, under the special circumstances of this case, the interlocutors complained of, in so far as they find the respondent George Ross entitled to the benefit of legitimation by the subsequent marriage of his parents, and in so far as they find expenses due by the appellant, be reversed.’

Appellant's Authorities.—Huberi Prælect. de Conflictu Legum, 2. 1. 3. § 8. 10. 12.; Burgundius de Statutis, p. 10. 18.; Voet. de Stat. p. 137. 319.; Hertius de Selectis, &c. 1. 4. 8.; Hofacher, Prin. Jur. Civ. 1. p. 112–14.; Merlin, vol. x. § 7. Voorda de Statutis, 3. 47. in Bib. Fac.; Pothier, Coutumes d'Orleans, 11. 1. 7.; Cod. de Incolis, 1. 27. D. ad Municipalem, § 1.; Muller, Domicilium, § 17. 64. 76. Forum Contr. § 23.; Boullenois, Traité de la Personnalité, &c. vol. i. p. 62. Christophe de Conti, June 21. 1668, (Guessiere, Journal des Audiences, No. 3. p. 283.) Bruce, April 15. 1790, (see Bell's Cases, 519.) Douglas, Feb. 7. 1792, (2928.); and March 18. 1796, (House of Lords.) Ommaney, March 18. 1796, (House of Lords.) Hog, June 7. 1791, (8193.; Bell, 491.: affirmed, May 7. 1792.) Bempde v. Johnstone, (3. Vesey, jun. 198.) Sommerville, (5. Vesey, jun. 758.) Strothers, July 1. 1803, (No. 4. Ap. For. Comp.) Selkraig, (2. Dow, 230.) Pedie v. Grant, June 14. 1822, (reversed July 5. 1825, ante, i. 717.) Morecombe v. M'Lellan, June 27. 1801, (F. C.) Shedden v. Patrick, July 1. 1803, (No. 6. Ap. Foreign): affirmed, March 2. 1808. Strathmore Peerage, March 1821, in House of Lords. See Appendix, No. V.

Respondent's Authorities.—Pothier, vol. iii. p. 320.; Menochius, p. 662. No. 16.; Schurff Cent. 2. 56. No. 4.; Code Nap. Mot. vol. iii. p. 15, 16. and 61.; Perenzius, p. 400. No. 26.; Huber de Conflictu Legum, § 9. 12. 13. 15.; Dictionnaire des Arrêts, vol. i. p. 777. and vol. ii. p. 546.; 2. Craig, 13. 16.; 1. Ersk. 6. 52.; 1. Bank. 5. 54.; Hertius de Collisione Legum, § 4. 10. 16.

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