[42] JOHN JAMES HOPE JOHNSTONE, GEORGE GRAHAM BELL, JAMES HOPE STEWART, and WILLIAM STEWART,—*Appellants;* MARY STEWART BEATTIE, an Infant, by Duncan Stewart her Grandfather and next Friend,—*Respondent* [March 27, 28, May 16, 26, 1843].

[Mews' Dig. vii. 1356, 1489, 1490, 1495; S.C. 7 Jur. 1023; and, in Court below, 1 Ph. 17; 10 L.J. Ch. 300. Explained in *Stuart* v. *Bute*, 1861, 9 H.L.C. 440. Commented on in *Ewing* v. *Orr-Ewing*, 1883, 9 A.C. 45; 1885, 10 A.C. 511. As regards observations on foreign curators of lunatics (10 Cl. and F. 76, and *passim*), see *Didisheim* v. *London and Westminster Bank* (1900), 2 Ch. 15; and *New York Security and Trust Co.* v. *Keyser* (1901), 17 T.L.R. 207.]

Jurisdiction—Foreign Infant—Appointment of Guardian.

A Scotchman, by deed duly made in the Scotch form, appointed his wife and eight other persons—all domiciled and resident in Scotland—to be tutors and curators of his infant daughter. Upon his death, his widow and four only of the eight accepted the trusts of the deed. The widow afterwards, with consent of her co-trustees, brought the infant to England, and after residing for three years in various places there, for the health of both, the widow died, recommending the infant to the care of her grandfather, who was then residing in England. The grandfather filed a bill in Chancery, in the infant's name, for the sole purpose of making her a ward of Court and preventing her removal to Scotland; and upon a contest arising between him and the Scotch tutors for the guardianship of the infant, the Lord Chancellor made an order, in the usual form, referring it to the Master to approve of proper persons to be guardians.—Held by the Lords (affirming that order),—

1. That the Scotch testamentary tutors were not testamentary guardians in England, according to the Act 12 C. 2, c. 24.
2. That the Court had jurisdiction to appoint guardians to the infant, although her domicile and all her property were situated in Scotland.
3. That the Court was bound to appoint guardians to the infant, being made a ward by the mere filing of the bill; and although the Scotch testamentary tutors had the exclusive control of all her property, answerable to the Scotch Courts only, they had no authority over the infant in England, nor power to protect her; nor entitled, by virtue of the deed of appointment, or by international law, to be confirmed or appointed her guardians in England. (*Dissentientibus* Lord Brougham and Lord Campbell).
4. That persons residing out of the jurisdiction, may if otherwise qualified, be appointed guardians jointly with a person who resides permanently within the jurisdiction.

Quaere, whether a bill filed to make an infant a ward of Court ought not to allege some right or claim of the infant to property within the jurisdiction, although untruly.

The suit, in which this appeal arose, was instituted for the purpose of obtaining the appointment, by the Court of Chancery, of guardians to the Respondent, **[43]** who was a Scotch young lady about the age of six years, and an orphan, residing in England, and possessed of considerable landed property in Scotland, but without any property in England or Wales. The Appellants were Scotch gentlemen, regularly constituted tutors and curators of the infant by the testamentary appointment of her father, a domiciled Scotchman; and they had duly accepted that office. The question for decision was, whether the Court of Chancery in England could, consistently with the laws and rules which govern the proceedings of that Court in such cases, disregard the authority of those tutors, and place the young lady under the exclusive control and protection of guardians appointed by the Court.

The facts were these:—Thomas Beattie, Esq., the father of the young lady, was a Scotch gentleman, born of Scotch parents, possessed of no property in England or Wales, but possessed of an estate at Crieve, in the county of Dumfries, of the value of £2300 per annum, subject to certain burthens charged thereon, and also of some other property in Scotland. He married a lady of the name of Christina Stewart, a

Scotch woman, also born of Scotch parents, and possessing no property in England or Wales, but entitled to a life interest in an estate called the Glen-Morven estate, of the value of £700 per annum, in the county of Argyll. In the year 1835, the Respondent was the only surviving child of the marriage. Her father, having been advised to go to Madeira for the benefit of his health, before his departure executed the following deed, dated the 3d of October 1835, and signed by two witnesses:

"I, Thomas Beattie, Esq. of Crieve, judging it to be proper and expedient to appoint tutors and cura-**[44]**-tors to the surviving child procreated, or the children to be procreated betwixt me and Christina Stewart or Beattie, my spouse, as shall happen to be within the years of pupillarity or minority at the time of my decease; therefore, I hereby nominate and appoint the said Christina Beattie, my spouse, and John James Hope Johnstone, Esq. (the first Appellant; seven other gentlemen were then named, including the other Appellants), to be tutors and curators to Mary Stewart Beattie, the child already procreated betwixt me and the said Christina Beattie, and to any other children to be procreated of my body, whether male or female, of my present marriage; declaring that the majority of the above-named persons accepting and surviving, and resident in Great Britain at the time, shall be a quorum, while there are more than two surviving; and in case they shall be reduced to two or one, the whole office shall be vested in such surviving persons or person, with power to appoint factors, etc., and generally to do every other act and deed in the management of the affairs of my said child or children competent to tutors and curators by the law of Scotland, etc." (The deed is fully set forth in Mr. Phillips's Report [1 Ph.] p. 17.)

Shortly after executing this deed, Mr. Beattie, with his wife and child, went to the island of Madeira, where he died in the month of April 1836; whereupon his widow and the Appellants alone, out of the persons named in the deed, accepted the office of tutors, the other persons named therein having declined to act. By this means the widow and the Appellants became the sole tutors testamentary of the infant, and became bound by the law of Scotland to continue such tutors until she should attain her age of twelve years, **[45]** when they would become curators, and so continue until she should attain her age of twenty-one years. The Appellants proceeded forthwith to perform the duties so reposed in them, and to manage the estate and affairs of the infant in Scotland, and complied with the requisites of the law of Scotland relating to such matters.

Mrs. Beattie, soon after the death of her husband, left the island of Madeira, and arrived in England with her daughter on the 5th of June 1836. In the end of that month they went to Scotland, and resided for a short time at the family mansion in Dumfriesshire. In the month of November of the same year, they went to Chester, where Mr. Duncan Stewart, Mrs. Beattie's father, then resided, he being collector of the customs there. Mrs. Beattie afterwards brought her daughter to London, but soon returned to Chester, and resided there for a year; after which she came again to London, and resided for a year in a hired furnished house in Avenue-road, Regent's-park, and afterwards in a rented house furnished by herself in Albion-street, Hyde-park, having occasionally for short periods gone with her daughter to Hastings, for the benefit of the health of both.

Mrs. Beattie made her will in October 1840, by which she appointed Adam Johnstone and Dr. Frederick Quin her executors, and bequeathed all she possessed to her father for his life, and after his death to her brothers. The will contained this passage: "My daughter is amply provided for; but it is my earnest request and prayer that she should be allowed to reside with her grandfather and my aunt Mrs. Buchanan, and that my co-trustees should not make any attempt to diminish the full allowance from Crieve and Glen-Morven during her minority. My daughter **[46]** unluckily inherits, from both her father and mother, most delicate health, and will require every comfort and care to rear her to maturity; and I most earnestly implore the gentlemen of the trust to prefer my dear child's health and comfort to any saving for a fortune, which her delicate constitution, if not properly attended to, may never allow her to reach. I am now writing from a bed of sickness, from which it may be God's decree that I never rise; and I would fondly believe that the gentlemen of the trust will not have the heart to lend a deaf ear to this last appeal

of a mother for her orphan child. May God forbid that my own desire that my daughter should pass her minority in the house and under the care of her natural protector and nearest blood relation, her grandfather, should meet with dissent: it is my dying request that she should have a governess in her grandfather's house, and never be sent to a boarding school."

Mrs. Beattie died in Albion-street, on the 21st of December 1840. Immediately after her death, the Appellant James Hope Stewart, by the desire of the other Appellants, came to London, and made the necessary arrangements for the care of the infant, and for her remaining in England, which was considered by her medical advisers to be necessary for her health. He engaged a Miss Wells as a governess for her, that lady having been approved of and about to be engaged by Mrs. Beattie at the time of her death; and he continued an old confidential servant to attend upon the infant as she had done theretofore, and left her also in the care of Miss Janet Graham Stewart, who was a relation of Mrs. Beattie and sister of two of the Appellants, and who had, at the request of Mrs. Beattie, resided with her during her last illness. The Appellant [47] J. H. Stewart returned to Scotland the 1st of January 1841, having previously arranged, provided his co-tutors should agree thereto, that Mrs. Buchanan, the aunt of Mrs. Beattie mentioned in her will, should come from Scotland and take charge of Miss Beattie until the close of the term for which the house in Albion-street had been taken, which was to June or Michaelmas 1841.

On the 6th of January 1841, Mr. Duncan Stewart, the infant's grandfather, without any notice to the Appellants, filed a bill in the Court of Chancery, in the name of the infant as plaintiff, by himself as her next friend, against the Appellants and the said executors Adam Johnstone and Frederick Quin, stating the matters before mentioned; and also that the Appellants and Mrs. Beattie, as trustees of the Scotch estates, had received the rents and profits of the said estates to a considerable amount, and that the Appellants had in their hands considerable sums of money on account of the said rents received by them in trust for the infant since her father's death, and that there was a considerable sum due to her on the like account from her mother's estate, possessed by her said executors. The bill further stated, that all the Appellants resided in Scotland, out of the jurisdiction of the Court, and that there was no person within the jurisdiction empowered to act as guardian of the plaintiff, or to receive the rents and profits of the said estates, or apply them for the maintenance and benefit of the plaintiff; that her father had no legal relative at the time of his death; that the said Duncan Stewart, her mother's father, was her nearest living relative, and the said Mrs. Buchanan was another of her nearest relatives; that both these were to be permanently resident within the jurisdiction, and the plaintiff was [48] always on terms of intimacy and affection with them, and was desirous that they should be appointed to act as her guardians. The bill prayed that the fortune and person of the plaintiff might be placed under the protection of the Court, and that Mr. Duncan Stewart and Mrs. Buchanan, or some other proper person or persons, might be appointed to be or to act as guardians or guardian of the plaintiff, and that all proper directions might be given for her maintenance and education; and that accounts might be taken, under the direction of the Court, of all the rents and profits of the said estates received by the Appellants and Mrs. Beattie, deceased, as such trustees as therein mentioned, or by their order, etc., since the death of Mr. Beattie; and that the Appellants, and the defendants Johnstone and Quin as the executors of Mrs. Beattie, might be decreed to pay into Court, for the benefit of the plaintiff, what, upon taking such accounts, should appear to be due from them respectively, etc.; and that all other accounts might be taken and directions given which should be necessary for properly effectuating the purposes of the suit.

On the same day that the bill was filed Mr. Duncan Stewart presented a petition in the cause, in the name of the infant, containing the same statements as were contained in the bill, and praying that he and Mrs. Buchanan might be appointed to be or to act as guardians of the petitioner; and that it might be referred to the Master to inquire and state to the Court the infant's age and the nature and amount of her fortune, and what would be fit and proper to be allowed for her maintenance and education during her minority, and from what past period such allowance should commence, and out of what fund it should be taken. This petition was

supported by an affidavit, which **[49]** contained statements to the same effect as the statements contained in the petition, and testified the fitness of Mr. D. Stewart and Mrs Buchanan to be guardians. And also on the same day, on the *ex parte* application of the infant's counsel, the Vice-Chancellor made an order appointing Mr. Duncan Stewart and Mrs. Buchanan to act as guardians of the infant, and referred it to the Master to inquire and state, etc. as prayed by the petition.

The Appellants, shortly after this order had been obtained from the Vice-Chancellor, were informed of the proceedings which had taken place; and having then appeared to the bill, they in February 1841 presented a petition to the Lord Chancellor, setting forth, among other matters before mentioned, the aforesaid deed of Mr. Beattie appointing them tutors and curators of his child, and stating their own powers and duties acting under that appointment in the events which happened, and other grounds on which they conceived that the order of the Vice-Chancellor was erroneous. The petition—after further stating that Mrs. Beattie did not by her will give any property to the infant; that there was nothing due to the infant from her mother's estate; that the infant had not acquired any English domicile, and had no property whatever in England; that in all the arrangements made by the petitioners for the education of the infant and management of her property, they considered solely what was most for her benefit, and they were perfectly able and willing to take care of her during her residence in England—prayed that the said order might be discharged or varied; and that if his Lordship should think it proper to interfere touching the guardianship of the infant, the Appellants might be declared to be, or, if they were not already such, might **[50]** be appointed to be the guardians of the infant: but if his Lordship should think fit to interfere touching the guardianship, and should not think it fit to declare or appoint the Appellants to be such guardians, then that his Lordship would be pleased to make such other order, by way of reference to the Master or otherwise, as to his Lordship should seem meet, having regard to the said testator's testamentary disposition, to his domicile, and to the circumstances and situation of the property of the infant; or that his Lordship might make such other order as the circumstances of the case might require.

This petition also came on to be heard before the Vice-Chancellor on the 19th of March 1841; and after hearing the matter fully debated on both sides, and hearing the several affidavits by which the petition was supported and opposed, his Honor ordered that his former order, dated the 6th of January, should be discharged, and that the Appellants should be appointed to act as guardians of the infant during her minority or until the further order of the Court, without prejudice to the question whether the Appellants were entitled to the guardianship of the infant, under the statute 12 Charles 2, c. 24, s. 8.

Mr. Duncan Stewart, in the name of the infant, presented a petition of appeal from this last order, to the Lord Chancellor; and this petition came to be heard before his Lordship on the 17th of April 1841, when his Lordship ordered that the Vice-Chancellor's order dated the 19th of March be discharged, except so far as the same discharged the order dated the 6th of January; and that it be referred to the Master to approve of a proper person or persons to be appointed the guardian or guardians of the infant: And the Master was to inquire and state to the Court the infant's **[51]** age, and what relations she had, and the nature and amount of her fortune, and also on what evidence or ground he should approve of any particular person or persons to be such guardian or guardians: And the Master was also to consider of a scheme for the residence of the infant, and what would be proper to be allowed for her maintenance and education, to commence from the 2d of December 1840, the time of her mother's death, and for the time to come during her minority; and to state out of what fund such allowance ought to be paid: And after the Master should have reported, such other order should be made as should be just (see his Lordship's judgment, 1 Phillips, 30).

This was the order now appealed from.

From the affidavits read before the Vice-Chancellor, on the hearing of the Appellants' petition, and afterwards before the Lord Chancellor, on the appeal to him, and set forth in the printed cases, the following extracts are made of the material

passages, which were frequently referred to in the arguments on this appeal, and by the Lords in their judgments.

The affidavit made by the Appellants on that occasion stated—among other things which were also stated in their petition—that Mr. Beattie's deed of nomination of tutors and curators was, according to the law of Scotland, an instrument of a testamentary nature, and that by the law of Scotland a tutor appointed by a father was, after the death of the mother, vested with the management of the person of the infant; and that the same deed being a document of a testamentary nature, constituted a good appointment of deponents not only to be tutors according to the law of Scotland, but also to be guardians of the infant according to the law of England. And the deponents said that they were informed and they believed that Mrs. Beattie, by her will, bequeathed all the property she had to her father for his life, and after his death to be divided among her surviving brothers; and that she **[52]** did not by her will bequeath any property whatever to her daughter, the infant plaintiff, and they did not believe that there was, as alleged in the bill, a considerable or any sum of money due to the infant from her mother's estate, and they verily believed that the infant had not any property whatever in England. And deponents said that they had for nearly five years duly managed the affairs of the infant in Scotland, and complied with the requisites of the law of Scotland in regard to giving up inventories of her property; and further, that they had held meetings yearly, at which they audited the accounts of the factor or receiver, and deposited the surplus rents in the Bank of Scotland, as directed by the deed of entail of the estate of Crieve, and they acted in all respects in accordance with the law of Scotland, and in conformity with the advice of Scotch counsel. And deponents said they were advised and believed it would be most inexpedient, and lead to a collision of laws and forms, if the Court of Chancery in England were to supersede the guardians appointed by the father of the infant according to the law of Scotland, and any expenditure for the maintenance of the infant would be liable to be overruled by the law of Scotland. And the deponents said, that in the arrangements which were made by them, they considered solely what was most for the benefit of the infant; and it was their intention, unless superseded, to consider what would be most for the health and benefit of the infant in the management of her education, and the choice of her residence. And they said that they could take care of the infant in England, while it might be expedient for her to continue in that part of the United Kingdom; and that the most anxious solicitude and attention had, since the decease of her mother, been entertained for and bestowed upon the infant by these deponents, and also by Miss Graham Stewart, the sister of the deponents, J. Hope Stewart and W. Stewart, who took charge of the infant by their direction.

The following is an extract from an affidavit made in support of the Appellants' said petition, evidencing the law of Scotland on the subject:—

John Marshall, of Edinburgh, esq., advocate, and James Newton, of the same city, esq., writer to the signet, severally said, that they had severally been admitted as an advocate **[53]** and as writer to the signet, and had respectively acted and practised as such in the Court of Session in Scotland, for upwards of 20 years; that they were well acquainted with the law of Scotland, as respected the nomination and duties of tutors or guardians according to that law. And these deponents said, that by the law of Scotland the nomination by a father of tutors to his infant child, invested the tutors named in his deed of appointment, and who accepted the office of tutors, with the guardianship of such infant until such infant attained the age of 12 years, if a female, and 14 if a male; and particularly that a deed of nomination by the father conferred upon such accepting tutors the right to the custody and charge of the person of the infant; and that this right of custody belongs to the tutors, to the exclusion of all other persons whatever, except in the case where the tutor happens to be the person who would succeed as next heir of the infant, in the event of his or her death, and excepting also in the case where the infant's mother is alive: That the mother is entitled to the custody of an infant whose father is dead until the infant attains the age of seven years, provided the mother remains a widow, but no such right of custody belongs to her relations upon her decease; and that even in a case where the mother was alive and remained the father's widow, a tutor nominated by the father has been held to be entitled to change the residence of an

infant under seven years of age for the sake of education, without the consent of the mother.

An affidavit made by Mr. Duncan Stewart, in opposition to the Appellants' said petition, contained several letters from Mrs. Beattie to him, set forth for the purpose of showing that she abandoned her Scotch domicile. The first of them was dated from Margate, the 5th of June 1836, upon her arrival from Madeira, and contained the following passage:—"When I reach London I hope you will be able to come and see me; my stay there will depend entirely on what the doctor says of Mary. Dr. Benton says it is madness attempting taking her to Scotland; but I shall be guided entirely by the opinion of the best medical men in town."

Another letter written by her, from Edinburgh, on the 28th of the same June, contained this passage:—"I saw William **[54]** Stewart and am sorry to say that affairs appear in considerable confusion: my allowance for Mary is to be £290, and my jointure only £399, which I confess puzzles me, as I always understood it was to be £500. This makes my income £995; and I therefore wish to know if you think that you and I could live quietly at Chester, on £500 per annum, as I do not wish to spend more than £400; and indeed, considering there will be no increase of allowance as Mary grows up, it will be quite necessary to make a little fund. Would you, my dear father, write me the expense of a neat small cottage in your neighbourhood, the price of butcher's meat, bread and coals, and in short, every particular that occurs to you?" "And before asking you to take the trouble of making these inquiries, it may be well to mention, that having been so long accustomed to manage my own house, no arrangement would be comfortable to me unless I considered the establishment entirely my own. As I expected William Stewart is throwing out hints already about Murrayfield, and was much surprised to find I intended to make a short stay in Scotland, and said he considered a Scotch climate, in autumn, equal to any other; but I told him frankly that I did not mean to have any opinion on the subject myself, and that it was a matter of too much consequence for me to take the advice of any unprofessional person; so I hope he will say no more."

Another letter, written by Mrs. Beattie from Murrayfield, the mansion on the Crieve estate, the 11th of July 1836, and set out in the said affidavit, was partly as follows:—"I arrived here on Friday night, and stood the journey very tolerably. My cough is a great deal easier, and I breathe more freely than when I saw you. I am sorry to say that my affairs still appear in the utmost confusion, and William Stewart is certainly not the man to lessen it; he has not offered me one sixpence, although the greatest pains have been taken to make me aware that, till Martinmas, I have no right to claim one farthing from my jointure, or even Glen-Morven, from the lease having been unfortunately taken in Mr. Beattie's name. I tried an insurance on my life, but they refused me, even at an office that takes extra risk, so that it will be the greatest kindness if you could send me a little sum." "I am afraid it does not rest with myself whether I shall remain here all winter or not, as it is out of the ques-**[55]**-tion my taking up my residence in any strange place without funds; here I dare say I can go on better, as the tradespeople know me."

Mr. D. Stewart's said affidavit also contained the draft of a letter alleged to have been written by Mrs. Beattie to the Appellant W. Stewart; there was no date. The following are extracts:—"Since the receipt of your letter I have not ventured to trouble you about my unfortunate affairs, for both the tone and matter of that letter gave me little cause to hope for either friendly advice or assistance from you, in the way I proposed, to extricate myself from the difficulties into which my youth and ignorance of business has led me. Under these circumstances, I have been forced to apply to others for counsel, and have in consequence been obliged to lay open all my affairs, together with the papers and correspondence connected with them since my return from Madeira. The remarks and observations which have been made upon them, have opened my eyes to the cruelty of the position in which I have been placed by my inexperience of worldly matters. I quite agree with you, that it is very much to be regretted that all the debts had not been paid, or settled in some way or other with the first loan; but surely this is not my fault. To you, as my man of business, as my husband's legal adviser and friend, I naturally looked for advice and assistance in my bereft situation. The sole object of my burthening myself with a debt of £5000 was to liquidate the whole of the debts, which I was assured by you

did not exceed £4000: I could only act under the guidance and advice of those whose duty it was to ascertain the whole amount that was owing, before a single farthing was paid to any one." "This cannot now, I fear, be altered, but it is undeniable that had more caution and kind forethought for my interest been used, that I might, indeed ought, to be now free from all debt and annoyance; for there cannot, I am told, be a doubt, that had the creditors been assembled, or, in accordance with my childish idea that such matters could be kept secret, each applied to separately, and matters stated fully to them, they would willingly have accepted the £5000 in payment of their whole demand; the more so as not one of them had the slightest claim upon me personally. I have recapitulated these matters with no wish to convey reproach, but in the [56] earnest hope and expectation that when you have weighed the hardship of my position, and how much I am the victim of my disinterested intentions, that you will not refuse your assent nor your influence with the other trustees to obtain theirs to the following plan, which has been pointed out to me, for extricating myself from the difficulties under which I still labour." (The plan was then stated.) "I do hope, when you have maturely considered all this, that you will use every endeavour to obtain the joint consent of the trustees by giving the proper bond of security. Mr. Beattie on his death-bed consoled himself, and often repeated to me the comfort it gave him, that I should be aided by your assistance and caution; and that all the persons named in the trust were fully aware of his love and liberal intention to his wife; could he see how that wife is now placed, how unhappily, and how unprotected: I appeal to all your better feelings, to prove your willingness to aid the widow of your departed friend. Your influence with the other trustees is not unknown to me, and I anxiously hope that you will now exert it in my behalf. Your's truly, C. Beattie."

The said affidavit of Mr. D. Stewart, contained a letter written to him by Mrs. Beattie the 23d of August, while she was residing in Albion-street, Hyde-park. The following are extracts:—"Pray, dear papa, read this as the thoughts of a child expressed to a parent; and be assured that any remark you may make, or any opinion you give, will be well received by me. Though I told you that I did not agree with the medical men, as to my lungs being more affected than they have been for some time, I am firmly persuaded that my illness is of a very serious nature; and that with my weakened constitution, there is little chance of my recovery. I do not deceive myself, my dear father, when I say that I am wasting away very gradually; and unless some great change takes place for the better, that things cannot last as they are for a very long while. I expressed to you my earnest wish, that, in the event of my death, Mary should reside with you. Her present excellent health, thank God, relieves me of all anxiety about her; but my own ailing state makes me very much alarmed to take another house; for the thought of my dying without any relation near me, is a very lonely and gloomy [57] prospect. Now, what I was going to say is, that if without inconvenience to yourself, you could meet with a house which is a little larger than your present one, and would allow us to come and visit you, it would be the greatest possible comfort to me; that in the event of anything happening, you would be on the spot to take charge of my poor child. I have the less delicacy in suggesting this arrangement to you, because, should it meet with your approval, and that nothing occurs to make this plan undesirable, my furniture could be sent down to you, and would not of course be removed again. Herbertson (her servant) tells me that Miss Hawkins's house was about £25 of rent, and she has often said it would be a most suitable house for you. If you should think so, and that the year's rent of your present house was likewise included, together with the expense of the furniture going down, it would not amount to more than the rent I was to give in Albion-street, £65. If God spares me and restores my health, I might be able to enjoy going to the Highlands for a month or two next summer; but whatever our future arrangements may be, it is a most natural thing that a sick, perhaps a dying daughter, should find a resting place in her father's house. If I remain in London, I am too ill at present to receive a stranger into my house; but if we go to you, it will be my earnest desire to get a very superior person to take charge of Mary, and also to be a companion to me. If fortunate in meeting with a lady-like and desirable person, I would leave this world with comparatively little anxiety on my mind, for I am sure that as long as you live, the child will be

tenderly cared for. Even in the event of my getting worse, and being advised to go to a milder climate, I would be much happier in leaving all my worldly belongings under your care than any one else's."

Another letter, from the same to the same, dated the 28th of the same month, and set forth in the same affidavit, contained the following:—"When I wrote to you about Miss Hawkins's house, I liked the idea of it, because the rent was so moderate, that whatever change might eventually have taken place, it would always have been a great pleasure to me to have kept it on, and to have spent always part of the year there as long as you were in Chester." "Of the house in **[58]** Albion-street, there is hardly a doubt but it will be let, and could be so many times over, on account of the situation; and immediately on receipt of your letter of yesterday, I had inquiries made, and found several were desirous of taking it, so that it is no anxiety to me, and I have every belief that both Dr. Quin and Mr. Johnstone will do everything in their power to gratify my wish when I express it to them. I like your account of the house in Stanley-place very much indeed, and I am sure with you and a good governess, both to look after my dear child, I shall be easier in my mind than I shall be anywhere else; but until I have communicated with these gentlemen, I cannot venture to ask you decidedly to take it." "My own strong wish is just to get comfortably settled; I have no idea that going abroad would do me any good, but I am quite sure that to see you happy, and Mary falling into good hands, will add greatly to my peace of mind; and this cannot be the case unless I am with you."

The affidavit containing these and other letters, further added,—"That it was considered more desirable that Mrs. Beattie should continue to reside in London; and accordingly, in September 1839, she finally resolved to take up her permanent residence there, and entered into an agreement for the house in Albion-street for three years from Michaelmas 1839; and she purchased furniture for the said house, and took up her residence there, and continued to reside therein until her death." The deponent (Mr. D. Stewart) then proceeded to say, that he instituted this suit with the approbation of all the nearest relatives of the infant, who were in London and best qualified to judge of the propriety of such a step, and who fully knew the situation in which the infant was left; and he verily believed, that except the four defendants, and a few of the members of the families of some of them, all the relations and connexions of the infant, and those most interested in her welfare, had been satisfied with the course pursued by this deponent in making her a ward of Court, in order to fulfil the wishes of his deceased daughter.

The following extract from an affidavit made by Dr. Quin, on the same occasion, was also frequently referred to by the **[59]** counsel on both sides, upon the question of domicile:—"And this deponent says, that in or about the month of April 1838, the said Christina Beattie came to town, and resided for some time in a house in Avenue-road, Regent's-park; and he says, that not finding the house comfortable, she on several occasions consulted him respecting the choice of some other fixed residence in England; and in or about the month of September 1839, having determined to fix her permanent residence in London, she took a house in Albion-street, Hyde-park, under a written agreement, for a term of three years; which agreement is now in this deponent's possession, as one of the executors. And this deponent says, that she furnished the said house in Albion-street, and went to reside there and continued to reside there until the time of her death. And this deponent says, that from frequent conversations he has had with the said Christina Beattie, he is perfectly satisfied that it was the full and deliberate intention of the said Christina Beattie to fix her permanent residence in England, and that she had no intention of ever returning to reside in Scotland, or of ever going to Scotland again, except for temporary purposes, if at all; and shortly before her death she exacted a solemn promise from this deponent, that he would not allow her to be taken to Scotland to be buried."

A second affidavit by the Appellant W. Stewart, contained the following extracts from a letter written by Dr. Quin to the Appellant J. H. Stewart, at Mrs. Beattie's request and dictation, shortly before her death:—

"Your letter of the 14th instant has had a most gratifying and calming effect upon Mrs. Beattie's mind, which has been long most painfully anxious respecting her beloved child's future residence and rearing. The kind solicitude you evince for

dear little Mary, and the desire shown to study her mother's wishes, have gone far, you will be gratified to learn, to lighten her anxiety." "The strong affection which her father has for Mary, and the devoted love and attachment which the child has ever shown for her grandfather, were guarantees to her that nowhere could her daughter be so happy and so tenderly taken care of as under the roof of her grandfather and aunt. It would be wrong in me to hold back [60] that I am aware that another motive has operated strongly on her mind, only secondary to her anxiety about her child's future welfare. The pecuniary difficulties in which she found herself placed since her husband's death (which difficulties she attributed to the diminution in her income, arising from the yearly sum set aside for the interest, premium, etc. on the money raised to discharge Mr. Beattie's personal debts) have prevented her from assisting her father and brothers as the natural generous dictates of her kind and affectionate heart would have prompted; and besides being in consequence incapacitated from doing anything for her own family during her life, she has deprived herself of the power of making any provision for them after death. These circumstances she conceives greatly strengthen her claims on the good feelings of the guardians to have her wishes complied with respecting the child's residence with her own nearest relations in preference to strangers, as far as it is compatible with her daughter's health and welfare, and the guardians' sense of their duty to the minor." "I have particularly drawn Mrs. Beattie's attention to that part of your letter, wherein you state your anxiety that she should express her sentiments as to the person to be entrusted with the charge of Mary, and that your own impression was that a lady with a cheerful and healthy family about Mary's own age, etc., and likewise to what you so justly say of the qualities most essential in the governess to be chosen. It is Mrs. Beattie's wish that a governess such as you have described her, and Mary's present nurse, should be constantly with the child; that the governess should have the sole control of the education and rearing of her charge, and be answerable to no one but the guardians, even when residing in the house of her grandfather: and that when it is necessary to remove her for the winter months elsewhere, it is her wish that Mary, her governess, and attendant, should all be boarded in some eligible family, and that the control should still remain solely with the governess. On my begging to know if she wished me to mention any one to you with whom she would prefer Mary to board in summer, she replied that she must leave that to the guardians to settle, and that circumstances as they arise at the moment would decide their choice and [61] the place of summer residence; but that she trusted that, in consideration to her, they would consult with the child's grandfather on the subject, whose every feeling must be enlisted in a proper selection. I have now faithfully transmitted Mrs. Beattie's wishes to you, and I trust that in doing so I have not diminished your desire to consult them in fixing the future residence of your precious little charge."

The letter of J. H. Stewart, in the above referred to, was set forth in a second affidavit by Dr. Quin, who had it from Miss Graham Stewart, to whom J. H. Stewart wrote it. The following are extracts:—"Mrs. Beattie, as I learn through the channel I have mentioned, has expressed anxious wishes that her daughter shall reside with Mr. Stewart and Mrs. Buchanan, at Chester; a wish that indicates her natural affection for her father and aunt, and her reliance on their care and tenderness. I am convinced such reliance would be met by the most affectionate solicitude and attention on the part of our friends and relatives; and as far as my feelings go, there are none with whom I would rather see our interesting charge placed. But yet I cannot but see some obstacles to a permanent residence with these kind friends. Mrs. Beattie I hear has very properly enjoined consultation with Dr. Quin, before Mary is removed from her present abode. This is clearly what ought to be done. Now if he disapproves of a removal during the winter and spring to any place north of London, there will arise cause for consideration as to the most eligible situation until these months pass over. Probably Dr. Quin may not be opposed to her residence in Chester, or even in Scotland, during the summer; but I apprehend that he may counsel that the south of England be her quarters in the cold season for many years. Seeing the probability of such advice from Dr. Quin, I do feel most anxious that Mrs. Beattie should consider and express her sentiments as to the person to be entrusted with so precious a charge. My own impression is, that if a lady with a cheerful and healthy family of children

about Mary's own age could be discovered, there would be the most eligible place of abode; the locality to be fixed of course by Dr. Quin. The cheerful society of well-brought-up children I must think of the utmost importance to the dear **[62]** girl's health, and to her happiness also. A governess, whose kindness of temper must be more looked to than accomplishments, will of course be always with Mary, whether she be in the southern or northern part of the kingdom. The greatest caution and solicitude must be exercised in finding such a person. It gives me inexpressible pain to write all this, which I must request you to show to Mrs. Beattie, or communicate to her at such time and in such a manner as you may judge are least likely to disturb her. I would have addressed my sentiments to herself directly, but supposing that you may introduce the subject in the quietest and least agitating form, I have taken this method." And this deponent says, that Mrs. Beattie being made aware of the said letter by Miss Stewart, conversed with this deponent thereon; and being gratified by the kind expressions contained therein, and believing from the tenor of the said letter that the wishes respecting her child contained in her will would be attended to by the trustees, she requested this deponent to write to J. H. Stewart in reply, and he did accordingly write to him the letter of the 18th of December 1840, set forth in the affidavit of the said W. Stewart; and such letter was written only three days before Mrs. Beattie's death, and she was at the time much distressed and exhausted by her conversation relating to it: when this deponent, having written the said letter by her bedside, read it over to her, she pointedly asked whether he considered there was anything in the letter likely to prejudice the claim for her child which she had made on the trustees by her will; and this deponent assured her on the contrary that he considered that the said letter would be more likely to have the effect of having her wishes acceded to, than if she put herself in opposition to the trustees; and under this assurance she consented to the said letter being sent. And deponent says, that Mrs. Beattie more than once afterwards recurred to the said letter, and conversed with this deponent about the future residence of her said child, making this deponent solemnly promise to do his utmost to see her will carried into effect." "And this deponent says, that on more than one occasion, Mrs. Beattie expressed, in this deponent's presence, her wish to have her child made a ward of Court during her life; but this deponent always dissuaded her **[63]** therefrom, fearing the fatal effect which the agitation likely to arise from legal proceedings would have upon her delicate state of health."

The following extract is from an affidavit made by Mr. Hart Dyke, of Doctors' Commons, on behalf of the Appellants, upon the appeal before the Lord Chancellor:— "Deponent saith that nominations of tutors and curators by a father, in the form of the said paper writing, or extract, registered nomination of Mr. Beattie, are always treated and considered by the Prerogative Court of the Archbishop of Canterbury as testamentary. And deponent saith, that if Mr. Beattie died a domiciled Scotchman, leaving personal effects in the province of Canterbury, but without having executed any other testamentary instrument than the said instrument of nomination, the defendants (the Appellants), as the accepting tutors of the infant, would now be entitled to a grant of administration for the benefit of the infant; and the said Prerogative Court would now, according to its usual and constant practice, grant administration to the defendants as such accepting tutors without requiring a guardian to be appointed by the Court of Chancery."

Mr. Turner and Mr. Romilly, for the Appellants:—By the principle of the order now appealed from, no distinction is made between English and foreign infants; Miss Beattie being a foreign child temporarily residing here, the Court of Chancery had no jurisdiction over her. The origin of its jurisdiction in appointing guardians to infants, is derived from the authority of the Sovereign as *parens patriae* (see *Wellesley* v. *The Duke of Beaufort*, 2 Russ. 20), delegated to the Lord Chancellor or Lord Keeper of the Great Seal, to be exercised by him for the benefit of the subjects of the Sovereign. There is no instance of its exercise over foreign infants without domicile or **[64]** property in this kingdom. The early cases show that it was confined exclusively to the infant subjects of the Crown of England, domiciled within the jurisdiction of the Court, or possessing property under its control; though it was afterwards extended to persons not falling exactly within that description.

This infant was only temporarily resident in England. There is no doubt that the domicile of origin, the domicile by birth, of herself and both her parents, was in Scotland. It is equally certain that they all retained their Scotch domicile while they resided in Madeira, where they went and sojourned for the benefit of Mr. Beattie's health. Upon his death Mrs. Beattie came with her child to England, thence proceeded to the patrimonial estate and mansion in Scotland, and after a short residence there came again to England, avowedly for the benefit of the health of herself and child. The mother continued up to the day of her death wholly undecided where to fix her abode, declaring frequently that her choice would depend upon the advice of the medical gentlemen whom she consulted. All her movements were referable to the health of herself and child, and also to economy in living, with a view to disencumber the patrimonial estate. Her letters, set out in her father's affidavit with the evident object of showing that she abandoned her Scotch domicile, do not establish that conclusion, but show that her mind wavered between London and Chester, with reference to health and a reduction of the expenses of living, and that she had no intention to stay in either place longer than was compatible with those objects. By Dr. Quin's advice she rented the house in Albion-street for a short period; and though she furnished it, so far was she from intending to reside permanently there, that she **[65]** proposed to her father to send the furniture to Chester. But even though she might have intended to abandon Scotland and reside permanently in England, intention alone is not sufficient to change the domicile of origin, which is never lost until a new domicile is actually acquired *ex animo et facto; Somerville* v. *Somerville* (5 Ves. 750), *Munroe* v. *Douglas* (5 Madd. 379), *The Harmony* (2 Robin. Adm. Rep. 322), *Attorney-general* v. *Dunn* (6 Mee. and W. 511), *Warrender* v. *Warrender* (2 Cl. and F. 488), *Munro* v. *Munro* (7 Cl. and F. 842); Story's Conflict of Laws, c. 3; 1 Burge's Comm. on Col. and For. Laws, c. 2.

If the mother did not change her domicile of origin, the infant's was not changed. The infant herself was incapable of the intention of choosing a new domicile; she could not acquire a domicile of her own by her own act, until she passed the state of pupillage and became *sui juris;* Wallace's Case (Rober. on Succ. 201), and per Sir W. Grant in *Somerville* v. *Somerville* (5 Ves. 787). Even though it were admitted that the mother did change her own domicile, it may be doubted whether she had power to change that of her child. The authorities on that point are not consistent. A guardian, it is said, cannot change a ward's domicile; but that a surviving parent may, was held in the case of *Potinger* v. *Wightman* (3 Merivale, 67), in which Sir W. Grant said that the domicile of the children follows that of the surviving parent. In that case the parent had been herself a guardian of the children, and had the consent of the other guardian; but in this the parent had the guardianship in conjunction with the other tutors and as their agent, without whose consent she could not remove the infant; *Scots* v. *Scot* (Morr. 16361), **[66]** *Walker* v. *Walker* (2 Shaw and D. 788). She recognised the power of the tutors, as appears from her will and from her letters, and particularly from the letter written by Dr. Quin at her dictation, to J. H. Stewart.

[The Lord Chancellor:—The case of *Potinger* v. *Wightman* [3 Mer. 67] appears to have been well argued and well considered, and must be held conclusive as to the mother's power to change the domicile,—which is a novel point in the law of England,—unless there is some opposite decision.]

The only other authority that we can find is the *dictum* of the Lord Ordinary in the case of Wallace, in a note in Mr. Robertson's book on Personal Succession. But the law of Scotland declares that the mother cannot remove the child against the wishes of the tutors testamentary; Ersk. b. 1, tit. 7, s. 17. The tutors may fix the place of residence for the child, though they cannot deprive the mother of the custody if she continues a widow and resides where they appoint.

[The Lord Chancellor:—Suppose the Appellants to be testamentary guardians, may they not, for residing abroad or other cause, be removed, and new guardians be appointed by the Court to the infant residing here?]

Not without a bill filed for the purpose of removing them. Lord Cottenham, in his judgment in this case, says the Court cannot change testamentary guardians (1 Phill. 31).

[Lord Cottenham:—Where there is no acting guardian, the Court may appoint one; and so it may if there are testamentary guardians who act improperly (see *Duke*

of Beaufort v. *Bertie*, 1 P. Wms. 703) or go out of the jurisdiction: in either case **[67]** the Court will interfere to protect the infant. The Appellants, in their petition to the Court below, claimed, by virtue of the deed appointing them and others tutors and curators in Scotland, to be testamentary guardians within the Act 12 Charles 2, c. 24. Their counsel did not press that point before me; but I distinctly stated my opinion to be, as it still is, that they were not testamentary guardians.]

The inference from what they alleged in their petition is, that as tutors and curators of the infant, they have the same authority that English testamentary guardians have; and that the Court is bound to recognise them in that character. There is a case, *In re Lewis* (2 Molloy, 485), in which the Master of the Rolls in Ireland refused to remove a guardian residing out of the jurisdiction, on that ground; no authority being found for such a proceeding.

This infant has no property within the jurisdiction of the Court of Chancery. The Appellants appeared voluntarily to the bill, for the purpose of getting rid of an erroneous order; admitted by the learned Judge who made it to be erroneous, for he discharged it. Had they chosen not to appear, the Court could not make any effectual order against them. Though the bill alleged that the infant was entitled to an account from her mother's estate in England, it now appears that that allegation was false, and it is distinctly denied in the Appellants' affidavits. The infant's property being all in Scotland under the lawful protection and management of the Appellants, no order of the Court of Chancery could reach it, except by appointing a receiver, who should further apply for power to the Scotch Court. That **[68]** Court might aptly say, "If you ask us, by the comity of nations, to enforce your order, you must first set the example of comity by respecting, in England, the tutors acting under Scotch law."

It is of the utmost importance to the interests of the infant, to have herself, as well as her property, under the guardians appointed by her father. If other guardians be appointed in England, there must be two sets of accounts, taken possibly on different footings: first, an account by the curators of the infant's property, according to the rules of the Scotch Courts; secondly, an account of the expenditure of the allowance to the infant by the English guardians, agreeably to the rules of the Court of Chancery; and there may be danger of collision between the orders of the Courts in the two countries. By the article of the Union, no Court in England can interfere with the orders of the Scotch Courts. This order is not only inconsistent with the rights of the Scotch nation, as secured by the Act of Union, but its principle, if acted upon in future, may be productive of serious consequences to our international relations with other foreign countries. If the Court of Chancery must interfere with the testamentary tutors, the safest course will be to appoint or confirm them as guardians of the infant in England, by restoring the second order of the Vice-Chancellor, by which these four gentlemen were appointed guardians. They submit, and are willing and desire to accept the guardianship, under the jurisdiction of the Court of Chancery. There is no objection personally to them; it is not alleged that they are not proper persons to be appointed by the Court, as they have been appointed by a solemn instrument by the infant's father.

[The Lord Chancellor:—Suppose a child came here from a West India colony with its mother, and **[69]** the guardians appointed by the father's will remained in the colony, would they or the Court of Chancery have the guardianship? I refer to the case *Ex parte Watkins* (2 Ves. sen. 470), in which Lord Hardwicke, on petition to him for the appointment of a guardian, directed a reference in the usual terms to the Master; entertaining no doubt of the jurisdiction.]

There is a distinction between foreign children and children from our colonies. The governors of colonies have only a limited power of appointment of guardians of infants, or committees of lunatics, confined to the colonies; and therefore, if infants or lunatics come here from the colonies, the Lord Chancellor will appoint new guardians and committees; *Ex parte Watkins; In re Houston* (1 Russ. 312). Subjects of the Crown are entitled to its protection, especially if there be no guardians in this country and communication with the colony is tedious. But if a French or other alien child, residing here for temporary purposes, and having guardians or tutors regularly appointed ready to offer their protection, the Court would first refer to them. When guardians have been lawfully appointed by the father of a child,

according to the law of the country in which both are domiciled, and where their property is situated, and with which alone they have any connexion, the quality of such guardianship, and its effect on the *status* of the child, must accompany that child everywhere, must be acknowledged and recognised in every other country,* as much as the guardianship of the parent; and if the child is casually **[70]** in England by the act and consent of the guardians, the duty of the law of England is to look solely to these guardians, to acknowledge them as much as it must do the parent, and to protect their legal *status* as a part of the inherent *status* of the child, not to interfere with or supersede them. That doctrine has been recognised and acted upon in the cases of persons found lunatics in foreign countries, where guardians or committees had been appointed by a competent tribunal there; *Ex parte Otto Lewis* (1 Ves. sen. 298). It may be admitted that the Court of Chancery has a qualified jurisdiction to enforce the orders of foreign Courts, by the comity of nations, to be exercised as an auxiliary jurisdiction, at the instance and for the assistance of the parents or other natural guardians of infants, but never as an engrossing jurisdiction, superseding the authority of parents or guardians duly appointed.

The Appellants being duly appointed guardians in Scotland, ask that effect may be given to that appointment in England, as like appointments in England would be recognised in Scotland; *Nasmyth* v. *Nasmyth* (Moor. 4455), *Balfour* v. *Scott* (6 Bro. P. C. 550; and Cases in Appx. 566 *et seq.*). They do not object to be associated in the guardianship with Mrs. Buchanan, who may properly have the custody of the infant; but, without imputing any personal fault to Mr. Duncan Stewart, they feel that they cannot act with him.

[The Lord Chancellor:—If the order appealed from were to be discharged, except so far as it discharged the Vice-Chancellor's second order, which was made on the Appellant's petition, there would be no order.]

If the Lord Chancellor's order be simply discharged, the Vice-Chancellor's second order will be received, and the authority of the tutors recognised.

[71] The order appealed from is not supported by any general principle applicable to the protection of infants in this or any other country; nor by any particular principle regulating the interference of the Court of Chancery in such cases. The governing principle of that Court, in interfering in the appointment of guardians, or of persons to act as guardians of infants, is that the welfare of the infants requires such interference. This order cannot be supported on that ground; on the contrary, it will produce serious injury to the prospects of this young lady. Her property is all in Scotland, and there also are her friends and relations, except her grandfather, who is only temporarily residing in England as an officer in the customs. It being the practice in the Master's office to approve of none but persons permanently residing within the jurisdiction to be guardians, the Appellants, who were selected by the father to protect the infant and her property, must be excluded from the office of guardians, and some persons in England or Wales appointed to that office. The infant herself cannot, before she attains the age of 21 years, be allowed to depart from this country; *Mountstuart* v. *Mountstuart* (6 Ves. 363), *De Manneville* v. *De Manneville* (10 Ves. 52); without the leave of the Court, to be obtained only upon special circumstances, and sufficient security for her return when required by the Court; *Jackson* v. *Hankey* (Jac. 265, n.; *Anon.*), *Campbell* v. *Mackay* (2 Myl. and C. 32). She cannot visit her native country or her relatives, or become acquainted with her property or her tenants, or cultivate with them that mutual good feeling and sympathy which are usually productive of reciprocal advantages **[72]** to landlord and tenant. That state of things surely cannot be for this infant's benefit.

The rules of the Court of Chancery, which have been acted upon by all the Judges who have presided in that Court, compel its interference in some cases to remove an infant from the care and authority of even its father, where the Court is of opinion that the infant is not educated in such moral and religious principles as a parent ought to inculcate (*Wellesley* v. *Duke of Beaufort*, 2 Russell, 1). This rule, if applied to the case of a foreign infant entrusted by the father to the care of a person resident

* See the doctrines of jurists and the cases collected by Mr. Burge in his Comm. Col. and For. Laws, vol. 1, pp. 14-25; and vol. 4, p. 1003 *et seq.*: And by Dr. Story, in his Confl. of Laws, ch. 13.

in this country for the purposes of education, might in many cases wholly remove such infant from the authority and control of the father, although the education bestowed on such infant was not inconsistent with the doctrines and customs of the country where the father was resident, and to which such infant belonged. Let the consequences be considered for a moment. Nothing is so common as for Scotch tutors to send Scotch children, boys or girls, to English schools. Any one might at once make them wards of Chancery, and supersede the Scotch guardians. The children would be held to be without guardians. The Master in Chancery would be directed to fix their residence,—which must be always in England,—to lay down a plan for their education and maintenance; and the powers of the parent, and his wishes confided to his dearest friends, whether his nearest relations or not, might be wholly defeated, and the children wholly estranged from Scotland: nay, if the child should be sent only for a week to London for the advice of an eminent surgeon, the same result might follow.

[73] The Solicitor-general and Mr. Spencer Follett, for the Respondent:—The order made by the Lord Chancellor was not only right, but the only order that could be properly made. Here was a child of tender age brought to England, and residing there when her mother died; she had no guardian in England; a bill was filed for the purpose of obtaining for her the protection of a guardian, and an application was made to the Court for that purpose, whereupon the Vice-Chancellor made an order appointing guardians. The Appellants complained of that order; a contest arose between the parties; the Vice-Chancellor reversed his first order, and made another more erroneous; on appeal therefrom, the Lord Chancellor, after the Appellants declined his offer of appointing them jointly with Mr. D. Stuart and Mrs. Buchanan, directed the usual order of reference to the Master, leaving to him to select and approve of proper persons to be guardians. Was not that the usual course? it was in accordance with the practice of the Court from the time of Lord Hardwicke; *Ex parte Watkins* (2 Ves. sen. 470).

It is objected that the child in this case is domiciled in Scotland, and therefore the Court of Chancery had no jurisdiction. The short answer to that objection is, that it is wholly immaterial to the jurisdiction where her domicile is; she is an infant now residing and intended to reside in England, and the Court of Chancery is bound to extend its protection to her, as it is to all infants who require it, having no parent or guardian residing within the jurisdiction. But if the domicile is at all material, we are ready to show that it is in England, the domicile of the child following **[74]** that of the mother, the surviving parent, according to the rule laid down by Sir W. Grant in *Potinger* v. *Wightman* (3 Meriv. 67), and adopted by the American Judges and jurists, who are entitled to the highest consideration on this and other questions of international law, which constantly arise among the different States of the Union (Story's Confl. of Laws, c. 3). It is quite clear that this child's mother changed her domicile, having taken so strong a dislike to Scotland, that her last prayer was not to be taken to be buried there, and not to have her child taken there for her education. The whole of this contest arises from the refusal of the Appellants to comply with the dying request of this lady. Their conduct ever since her return from Madeira in 1836, when she spent about two months in Scotland trying to settle her affairs there, disgusted her with them and with Scotland, as is evident from some of her letters printed in the Appendix (vide *ante*, p. 54 *et seq.*). Whether she was right or wrong, it is an inevitable conclusion from these letters that she abandoned her Scotch domicile. It is equally clear that when in 1839 she took the house in Albion-street for three years and furnished it, she fixed her domicile there; there was the *animus manendi* joined to the act of fixed residence. This is a stronger proof of change of domicile than existed in some of the cases that have come before this House; *Bruce* v. *Bruce* (2 Bos. and P. 229, n.; and 6 Bro. P. C. 566). It may be mentioned that in *Warrender* v. *Warrender* (*ante*, Vol. II. p. 488), and *Munro* v. *Munro* (Vol. VII. *ante*, p. 842), the parties had retained their Scotch domicile, and for that reason this House held that they had **[75]** not acquired a new one: but here there is no Scotch domicile; it was abandoned, and all the mother's declarations, and acts also, demonstrate an English domicile. What is domicile but the permanent residence of a party? In *Bruce* v. *Bruce* it was held that a person who had gone to India, though with an intention to return to Scotland, which he called his home, changed his domicile. So in

the case of Harmony (2 Rob. Adm. Rep. 322), before Sir W. Scott, a party having gone to France only for four years, without any declaration of intention, was held to be domiciled there.

Although this child is now unquestionably domiciled in England, and to all intents and purposes an English child, yet, supposing she is not so domiciled but merely resident, we submit that in that view also the Lord Chancellor's order was right. Is not every resident in this country, foreign as well as native, entitled to the protection of our laws, which they are all, while here, bound to obey? The fact of an infant being a foreigner and having foreign guardians, does not prevent the exercise of the jurisdiction of the Court of Chancery; *Ex parte Watkins* (2 Ves. sen. 470), *Salles* v. *Savignon* (6 Ves. 572), *Campbell* v. *Campbell* (vide *post*, p. 136).

[Lord Campbell:—Would it not be necessary to make out a case demanding the exercise of the jurisdiction? Why should guardians be appointed, if they are not required for the protection of the child?]

Upon the filing of a bill in the name of an infant, the jurisdiction instantly attaches; the infant is then a ward of Court, and it is mere matter of course for the Court to order the Master to make the necessary inquiries and approve of guardians.

[The Lord Chancellor:—The moment the bill is **[76]** filed, the Court becomes guardian of the infant, before any inquiry; and the Master, to whom the Court refers the inquiries, is the deputy of the Court. No one can in the meantime take the infant out of the jurisdiction, without leave of the Court.

Lord Campbell:—So, if a boy from a foreign country where his parents or guardians reside, is sent to this country for his education, he may be made a ward of Court by any person filing a bill in his name, alleging falsely that he has property here; and being a ward of Court, he must have guardians appointed by the Court, and cannot return to his own country until he attains his age of 21 years. Is there any instance of an appointment of guardians where there is no property within the jurisdiction?]

If a bill is improperly filed, the Court will know how to punish the parties and vindicate its own authority. As to the allegation of property within the jurisdiction, it is quite immaterial; it is not property that gives jurisdiction to the Court, as is very evident from what Lord Eldon says, in his judgment in *Wellesley* v. *The Duke of Beaufort* (2 Russ. 1; *see* pp. 20, 21). In *De Manneville* v. *De Manneville* (10 Ves. 52) the child had no property except a reversion, yet the Court exercised the jurisdiction.

[The Lord Chancellor:—And so of lunatics; the Lord Chancellor has jurisdiction over all, but does not exercise it except where there is property; which seems to agree with what Lord Eldon said in the case referred to. But whether there is or there is not property within the jurisdiction in this case, cannot be ascertained until the hearing of the cause.]

At the time of the filing of this bill, the infant had no guardians in England; the Scotch tutors were **[77]** accounting parties, and they appeared to the bill, and are bound to account to her; but they had no authority over her or her property in this country: their authority was strictly territorial. The authorities on this point are referred to in Dr. Story's Conf. of Laws, c. 13, s. 504 *et seq.* He cites, among other cases, *Morrill* v. *Dickey* (1 John. Ch. Rep. 153), and *Kraft* v. *Vickery* (4 Gill. and John. 332); American decisions. In Mr. Burge's work also it is said, "When the minor or lunatic comes within the jurisdiction of a foreign tribunal, he ceases to be subject to that of the tribunal which had previously placed him *sub tutela*, and becomes subject to the jurisdiction of the tribunal of the country to which he had resorted" (4 Burge, [Comm. Col. and For. Law] 1003). The same doctrine is laid down by Lord Eldon in the case of Houston (1 Russ. 312). The Appellants, as testamentary tutors in Scotland, are not testamentary guardians in England within the statute 12 Ch. 2, c. 24, s. 8, for reasons which cannot be better stated than by referring to what Lord Cottenham said on that point (1 Phill. 32). It may be further added, that by the Scotch law, the power of tutors over a child ceases at the child's age of 12 years (*ante*, p. 53); whereas the statute of Charles continues the power of guardians till the ward attains 21. Then here is a child without a parent or guardian; what can the Court do? It is not sufficient to say there are guardians in Scotland or in France, because after the bill is filed the Court will not allow the child to be taken out of the jurisdiction, except by guardians amenable to the jurisdiction. As to the alleged hardship of preventing

the child from visiting her Scotch relations, estates, and tenants, surely that matter may be left to the [78] judgment and discretion of the Court, which frequently allowed maintenance to infants out of the jurisdiction, *Logan* v. *Fairlie* (Jac. 193), *Jackson* v. *Hankey* (*id.* 265, note,), *Stephens* v. *James* (1 Myl. and K. 627); never refusing any proper indulgence to its wards, *Campbell* v. *Mackay* (2 Myl. and C. 31). In Harwood's case it was said that the Court generally attends to the recommendation of the father of even an illegitimate child; and in *Chatteris* v. *Young* (1 Jac. and W. 106), persons so nominated were appointed guardians. Does not that admit the full jurisdiction of the Court? No case has been or can be produced, in which the Court appointed persons residing out of the jurisdiction to be guardians, although recommended and even appointed by the father, as in *Logan* v. *Fairlie*.

It is material to remember, that after the Vice-Chancellor's first order, the Appellants not having then appeared to the bill, another bill of the same kind was filed by the infant against the trustees of the Glen-Morven estate, one of whom resided near Carlisle, within the jurisdiction. That bill is still on the files of the Court, although no proceeding has been yet taken in it, as the Appellants put in their appearance to the bill against them, and instead of demurring, submitted to the jurisdiction of the Court. The allegation of property belonging to the ward in England, was admitted to be unquestionably true, in the bill against the Glen-Morven trustees. But whether there is property or not, the Court has jurisdiction to appoint guardians (per Lord Eldon, in *Wellesley* v. *Duke of Beaufort*, 2 Russ. p. 20).

[79] Mr. Turner, in reply:—It is admitted that all infants without parents or guardians in England, are entitled to the protection of the laws of England: on the other hand, those laws recognise the laws of foreign countries, and give effect here to their orders. This infant does not want the protection offered; she has guardians already appointed for her protection, as willing to take care of her in England as in Scotland; and the chief objection to the course pursued by the Lord Chancellor is, that while there is no imputation on those gentlemen, the Court of Chancery interferes to deprive them of their office.

[Lord Campbell:—The argument was, that if a foreign child is in this country, the Court of Chancery has a right to interpose its jurisdiction, even though the child has guardians. It is clear there may be cases in which that interposition would be proper.]

It is admitted that such cases may arise. But if this is not a case calling for that extraordinary protection, is it proper to interfere? This child has her guardians selected by her father.—[The Solicitor-general being here asked by the Lords whether he admitted the authority of a foreign father over his children in this country? said, Yes; a father's authority according to the laws of England, but no farther.]

The *patria potestas* of a foreign parent is recognized by the English law. The authority of these testamentary tutors succeeding to the *patria potestas*, should be recognized on the same ground. The cases cited on the other side are not applicable. *Salles* v. *Savignon* (6 Ves. 572) showed that a foreign child without guardians here may be made a ward of Court, and the Court will then exercise its power to punish persons offending against its jurisdiction—

[Lord Cottenham:—That is, according to your argu-[80]-ment on that case, the Court may do everything for the protection of the infant, except appoint guardians.]

In *Ex parte Watkins* (2 Ves. sen. 470) there was no question whether the guardian in the Leeward Islands had any authority in this country; but two parties here applied to the Court (by petition to avoid expense) to determine which of them had a right to the custody of the infant. The Lord Chancellor said, "It is not for me, but for the Master to decide that question." The case of Otto Lewis (1 Ves. sen. 298) bears out our proposition that the Courts here recognize the status of a party in another country. The American cases of *Morrell* v. *Dickey* [1 John. Ch. Rep. 153], and *Kraft* v. *Wickey* [4 Gill. and John. 332], cited on the other side, relate to the power of a guardian in one State over the infant's property in another State. In Mr. Wellesley's case (2 Russ. 1), Lord Eldon's order was founded on the father's improper conduct. That case differs in all its circumstances from this. In Harwood's case the Court held that the commitment was right, because the custom of London adhered to the child out of the jurisdiction (1 Mod. 79).

[The Lord Chancellor:—Suppose this child to have got into improper custody,

or into the grandfather's custody, by what process could the Scotch tutors regain possession of her?]

I apprehend by writ of *habeas corpus*, for which any one may apply.—[Lord Campbell: As in the late case of the Canadian prisoners (Watson's case, 9 Ad. and E. 731; S. C. 1 Perry and D. 516)].

[Lord Brougham:—The Court of Queen's Bench, in delivering the child from custody by writ of *habeas corpus*, would tell her she was at liberty to go where she wished. Suppose, then, she chose to go to the grandfather?]

[81] Then application might be made to the Court of Chancery on a bill filed by the tutors, as by English guardians.

[The Lord Chancellor:—And that Court would then appoint persons within the jurisdiction to be guardians.]

That would be an unnecessary interference while there are guardians, the tutors testamentary, whose authority the Court should respect. It is said in Mr. Burge's Commentaries on Colonial and Foreign Laws, in the passages before referred to (vol. i. c. 1, pp. 13, 14, 25), that personal laws are of universal extent and operation; that jurists concur in representing as personal laws, those which place minors under the authority of their guardians or tutors; that States, from comity and considerations of mutual interest, recognize and give effect to the laws of each other, where the rights either of their own subjects or of foreigners are derived from or are dependent on those laws; and that, from comity, foreign States recognize and give effect, almost universally, to those laws of the domicile which constitute the status, quality, or capacity of the person, and which are called personal. Vattel also says (B. 2, c. 7, ss. 84, 85), "It is the province of a nation to exercise justice in all the places under her jurisdiction; that other nations ought to respect this right;" and that, "in consequence of this right of jurisdiction, the decisions made by the Judge of the place within the extent of his power ought to be respected, and to take effect even in foreign countries. For instance, it belongs to the domestic Judge to nominate tutors and guardians for minors and idiots. The law of nations, which has an eye to the common advantage and the good harmony of nations, *requires therefore that such* **[82]** *nomination of a tutor or guardian be valid and acknowledged in all countries where the pupil may have any concerns.*" And accordingly there are numerous instances in which our Courts recognize and enforce the laws of foreign countries; *Sawyer* v. *Shute* (1 Anstr. 63), *Campbell* v. *French* (3 Ves. 323), *Dues* v. *Smith* (Jacob, 544), *Bladd* v. *Bamfield* (3 Swanst. 603, 4), *Lashley* v. *Hogg* (Robertson Pers. Succ. 414), *Anstruther* v. *Adair* (2 Myl. and K. 513). The Courts in Scotland, by the like comity, give effect to the laws of this and other countries; Ersk. Inst. B. 1, tit. 7, s. 2 (Ivory's edit. p. 164). In *Nasmyth* v. *Nasmyth* (Morr. 4455), the English guardians of a minor were held sufficiently qualified, without any confirmation, to authorise a suit in Scotland, in his name; and in *Johnston* v. *Clark* (Morr. 16,374), a guardian named in one of the colonies by a father to his natural child, was held entitled to take the child from the father's sister. If the law of England by comity adopts the law of Scotland, there is no doubt that these Scotch tutors are guardians of this child in England, until she attains the age of twelve years. The Court ought to recognise, and, if necessary, confirm them in the office, having regard to the solemn deed of the father, in preference to the unascertained wishes of the mother; whose rights as a parent, be it observed, were merged in her duty as joint tutor, in which character she must, according to the law of Scotland, have submitted to the majority.

[The learned counsel was proceeding to argue that the interference of the Court of Chancery with the guardianship of the infant, to the exclusion of the Scotch tutors, was an infringement on the rights of the Scotch nation, secured by the Act of Union;—

[83] The Lord Chancellor and Lord Campbell severally observed that he might pass that matter over without prejudice to his case, as they were clearly of opinion that the interference of the Court of Chancery in this matter was not an invasion of the Scotch Courts.

Lord Cottenham:—The invasion is not of Scotland by England, but of England by Scotland.]

Lord Brougham:—This being a case of first impression, and having excited great

interest in Scotland very naturally, and in this country also, we must take time to consider it.

Lord Campbell agreed that they ought to take time for consideration; although he had no doubt of the jurisdiction of the Court of Chancery.

The further consideration of the case was then adjourned.

Their Lordships finding afterwards that they were equally divided in their opinions on the validity of the order appealed from, ordered the case to be again argued by one counsel on each side, in the presence of other Peers. Accordingly on the 16th of May, Lord Langdale and other Peers being present, Mr. Turner was heard to argue the case for the Appellants, and the Solicitor-general for the Respondent. The jurisdiction of the Court was, on this occasion, declared by the Lords to be undeniable, and was therefore admitted by Mr. Turner, who also admitted that the Appellants were not testamentary guardians within the Act 12 Charles 2. The argument was principally applied to the justice and expediency of admitting the tutors to act as guardians in England. All that was new in the second argument has been incorporated with the above Report of the first arguments, except the statement of a case of *Campbell* v. [84] *Campbell*, referred to as a case in point, lately decided by Lord Cottenham. The circumstances of it are stated by Lord Campbell in his judgment, *infra*, p. 136.

The Lord Chancellor (May 26):—This appeal was argued at considerable length some time back, but as your Lordships did not agree in opinion as to the judgment proper to be pronounced, it was argued a second time a few days ago; and I am sorry to say that even now, as the result of the second argument, there is a difference of opinion among your Lordships. I entertain the utmost possible respect and deference for the opinions of those noble Lords who differ from the judgment which I have formed; but I think it my duty to move your Lordships that the order of the Court below be affirmed.

I will state to your Lordships very shortly the grounds upon which I think this order ought to be affirmed. A bill was filed in the name of an infant, Mary Stewart Beattie, by her next friend, her grandfather, against the Appellants and other defendants. The bill alleged that the defendants were in possession of rents and profits, the produce of the estates of the infant, to a very large amount: it prayed that they might account, in the Court of Chancery, for the sums which they had so received: it prayed also that a maintenance might be appointed for the infant, and that the estates and her person might be placed under the protection of the Court. This was the scope and the object of the bill.

It is proper that I should state, that according to the uniform course of the Court of Chancery,—which I understand to be the law of that Court, which has always been the law of that Court,—upon the institu-[85]-tion of a suit of this description, the plaintiff, the infant, became a ward of the Court,—became such ward by the very fact of the institution of the suit; and being a ward of the Court, it was the duty of the Court to provide for the care and protection of the infant; and as the Court cannot itself personally superintend the infant, it appoints a guardian, who is an officer of the Court, for the purpose of doing that on behalf of the Court, and as the representative of the Court, which the Court cannot do itself personally. If there be a parent living within the jurisdiction of the Court, or if there be a testamentary guardian within the jurisdiction of the Court, the Court in that case does not interfere for the purpose of appointing a person to discharge the duty, which is imposed upon the Court itself, of taking care of the person of the infant; but the parent or the testamentary guardian is subject to the orders and control of the Court, precisely in the same way as an officer appointed by the authority of the Court, for the purpose of discharging the duties to which I have referred. I apprehend that is clearly the law of the Court of Chancery; and it has always been so, as far as I have been able to understand and comprehend.

The manner in which this appointment (of guardian) is made, is not without previous inquiry and consideration. The Court directs the Master to inquire who are the proper persons to be entrusted with the care of the infant; and as that custody and care may endure for some time, it is necessary that some inquiry should be made

for the purpose of determining how that care should be exercised. That must depend, in some degree, upon the property which the infant possesses; and therefore an inquiry is made as to the property of the infant, and as to what is proper to be [86] allowed for maintenance, and also as to the manner in which the education of the infant shall be conducted. All these are preliminary inquiries as to matters of fact, for the information of the Court; and when the Master has made his report, the report is taken into consideration by the Court, and the Court acts upon it according to its judgment: it does not necessarily adopt the suggestions of the Master, but it uses the materials which are found by him as the ground upon which the judgment proceeds.

Now the order which is here complained of, is merely an order of this description. The Lord Chancellor has directed the Master to inquire who are proper persons to be appointed as guardians of the infant, or, in other words, to approve of persons to be guardians; to inquire what will be a proper maintenance for the infant, what her property consists of, and what scheme of education should be adopted. I apprehend, therefore, that the order is according to the common rule of the Court, and I really do not precisely understand the grounds upon which it is objected to. I can state some of the objections which have been urged at the bar, but which appear to me to be altogether invalid.

One objection is this: that tutors and curators have been already appointed; that the young lady being a Scotch child, tutors and curators have been appointed in Scotland by the will of the father. The father is dead, and the mother also is dead; but the child is here in England. The tutors and curators are domiciled and living in Scotland; they are out of the jurisdiction of the Court. The Court can exercise no control over them; cannot make them amenable for any misconduct in the management of the infant; and I apprehend that in all cases the Court [87] requires that there shall be a guardian appointed within the jurisdiction of the Court, responsible to the Court, subject to its jurisdiction and its authority. If there be a parent, residing out of the jurisdiction, the Court interferes, and appoints a guardian within the jurisdiction: if there be a testamentary guardian, residing out of the jurisdiction, the Court appoints a guardian within the jurisdiction: because it must have some person to look to, some person who is the representative of the Court on the spot, responsible to the Court, who shall have the care and management of the infant.

The tutors and curators, domiciled in Scotland, have no authority in this country; they cannot control the infant. If the infant chooses to take the protection of any other person, who may be an improper person, deluded, if you will, by that person, the tutors and curators have no power of themselves to interfere. But they have the power to interfere through the medium of the Court of Chancery. A guardian may be appointed by the authority of the Court of Chancery; and if a complaint is made to that Court by the tutors and the curators, the Court of Chancery will set it right through the medium of the officer whom the Court has appointed. If it is thought desirable that the child should go to Scotland to reside, the tutors and curators have no power to take the child to Scotland, unless the Court, having appointed a guardian, thinks fit for the benefit of the child to direct the guardian to hand the child over to the Scotch tutors and curators, in order that it may be carried to Scotland for the purpose of education, or for any other purpose.

It seems to have been assumed in the argument in this case, that because the guardians are appointed by [88] the Court of Chancery, therefore the Court of Chancery has decided by this order that the child is to remain in England; that she is to be educated in England; that she is to have her maintenance given in England, and that she is to continue in England up to the time of her attaining the age of 21. But no such consequence follows. The Court of Chancery may, at any time that it thinks proper, direct the infant to be taken to Scotland, to be educated there, if it considers that it will be for the benefit of the infant. The order does not go to the extent of saying that there is to be no change in the residence of the child: it is subject entirely to the control, to the order, and to the discretion of the Lord Chancellor for the time being.

It is supposed also that the tutors and curators appointed in Scotland are not to be the guardians of the child, or not to be among the guardians of the child. All

that the Court requires is this: that there shall be some person within the jurisdiction, and responsible to the Court, performing the duties of guardian. There is nothing in this order inconsistent with the Lord Chancellor ultimately appointing the tutors and curators who reside in Scotland, as guardians, with any other persons who are residing and domiciled in this country, and subject to the jurisdiction of the Court. It does not appear to me, therefore, that any of those objections which have been successively urged at the bar are valid objections to this order. It appears to me to be an order in the common course.

But it is said that if this order is to prevail, it will follow that any child of Scotch or other foreign parents, brought to England for the purpose of education, may be made a ward of Chancery, and impounded [89] at once in this country. Undoubtedly there may be cases of that description. One may suppose circumstances of such a nature as to render the interference of the Court of Chancery not only proper but absolutely necessary. Cases may be supposed where the Court of Chancery under such circumstances ought to interfere. But then it is said that fictitious cases may be set up, and that a bill may be filed expressly for that purpose by some concert or contrivance. My Lords, the authority of the Court may, of course, be subject to be abused in this, as in every other instance; but the Court will vindicate its authority, and will not suffer it to be abused: and I know no case in which it has ever been suggested that in this direction any abuse has been committed of the authority of the Court of Chancery. Suppose a bill obviously fictitious for the purpose I have stated were to be filed, the Court would afford an instant remedy. The bill might be referred to the Master, for the purpose of determining whether it was for the interest and benefit of the infant that the suit should be prosecuted; and if the Master should report in the negative, there would be an end of the suit, and the costs would fall upon the party who had so improperly instituted the suit; and as a suit can only be instituted through the medium of a solicitor, the Court would visit the solicitor in a further and much more exemplary manner. It does not appear to me, therefore, that the objection that the authority may be abused, is any valid objection in a case of this description.

It is further suggested that this bill is filed solely for the purpose of making this infant a ward of the Court of Chancery. It may be so. It often happens that bills are filed solely for such purposes; and it may be a very important object, in which the [90] interest of the infant is deeply concerned. Whether this bill is of that description or not, is wholly immaterial. The bill states facts, which bring the case within the jurisdiction of the Court. It states that there are large sums in the hands of the defendants; it prays for an account; it prays that the money may be paid into Court; it prays also for the allowance of a maintenance; it prays that the child's property may be put under the jurisdiction of the Court.

The defendants, who are in Scotland, have appeared to this bill; but they have not put in their answers, and the cause is not at issue. We cannot decide the merits of the cause, in this stage of it, upon a motion of this description. Such a course of proceeding was never heard of in the Court of Chancery. The cause is depending; the defendants must put in their answers; issue must be joined; all the evidence must be heard, and the cause must be decided as every other cause must be decided. We cannot anticipate the result; but till the result takes place, the child is a ward of the Court of Chancery. No person can interfere where a child is a ward of the Court of Chancery, without calling down upon himself the process of that Court. The appointment of guardians in this respect makes no difference. Whether there be guardians or not, the child is under the immediate control and in the custody of the Court of Chancery. The appointment of guardians in this respect makes no difference. The guardian is only appointed as an officer of the Court, as the mode by which the jurisdiction and authority of the Court is to be exercised. It may happen, indeed, in the result that this bill should be dismissed. It may happen that the plaintiff, the next friend, may have to pay all the costs. It may happen that in the result the Court [91] may direct this infant to be handed over to the tutors and curators in Scotland; but we cannot anticipate what will be the result until the cause comes to an issue; until the witnesses are examined, and until the cause is decided. Until that takes place, as I said before, the child is absolutely a ward of Court, and cannot be taken out of the jurisdiction of the Court, whether guardians

be appointed or not. The appointment of a guardian makes no difference, except as the medium through which the jurisdiction of the Court is exercised; because the Court thinks it better that there should be *prevention* against violence and misconduct, than that it should be afterwards called upon to investigate a charge of violence and misconduct, for the purpose of affording a remedy.

For these reasons, I think this order ought to be sustained. I confess that in the course of the argument I found it very difficult to understand what ground there was for objecting to it, consistently with the course of practice and the uniform authority of the Court of Chancery, with respect to cases of this sort. I must, therefore, under these circumstances humbly move your Lordships that this order be affirmed.

Lord Brougham:—The facts of this case are few and simple, and I need not recite them. It is my misfortune to have formed a different opinion from that of my noble and learned friend; and I must now state to your Lordships the grounds of the judgment which I am compelled to give in opposition to his.

The appointment of guardians to infants, who are unprotected, appears to arise in all countries from the necessity of the case; and it would be difficult to **[92]** point out any other particular in which the jurisprudence of all countries agrees more generally than in the existence of such a power, usually confided by the Sovereign to the Courts of the realm. The nature of the appointment seems personal, as the object of it is the infant individual's personal protection. But there is incident to the office also the care of the infant's property; and in some systems of law, as that of Rome and of the countries which adopted the civil law, a distinction is made between the care of the property and that of the person; curators being given to the former, tutors to the latter.

It is very material to the present question that we should mark the provisions of the Scotch law on this head; Scotland being beyond all reasonable doubt the domicile of the infant in this case, as it is admitted to have been the place of her birth, and the place where all her property real and personal is situated. By the law of Scotland the father may appoint a guardian to act after his decease. In default of such appointment or of the appointed guardian's accepting the office, the right of the guardianship by law devolves on the next of kin, called the nearest agnate; a year, *annus deliberandi*, is given this relation to determine whether or not he will accept the office called that of tutor legitim, or of law. In case he declines, a guardian is named by the Court of Session,* called a tutor dative. But so much is the will of the parent and the legal right of the agnate regarded, that if either the tutor testamentary or the tutor of law at any time shall elect to act, the powers and appointment of the tutor dative at once cease.

[93] The necessity of extraordinary protection to unprotected infants leaves no doubt of the power in the Sovereign, or those to whom he has delegated it, to appoint a guardian, whensoever an infant comes before him or them, and requires protection. The jurisdiction of the Court of Chancery in the present case flows from that source, and is indisputable. And I must be allowed to observe, in passing, that much of the argument and reasons of the authorities urged for the Respondent have been pointed to combat a position which is not at all a necessary part of the Appellants' case; namely, the supposed denial of the Court's jurisdiction. That jurisdiction I hold to be indisputable. But it does not follow that in every case the jurisdiction must be exercised; that the Court is bound, as a matter of course, always to interfere; that the nomination of a guardian is of such necessity as to follow immediately from the fact of infancy coming to the Court's knowledge, in the same manner in which the dismissal of a suit for want of prosecution, or signing a decree by consent of all parties on matters that leave no option to the Court. The Court always and in every case has the jurisdiction, but it is not always and in every case a matter of course that it should be exercised: on the contrary, though the right is absolute, its exercise is discretionary; so that in many cases the exercise of it, I hold, would be a plain miscarriage of the Court, and one that would require correction by the Court of appellate jurisdiction. Thus the Court of Chancery has interfered in preventing

* Sitting as the Court of Exchequer, the duties and powers of which were, by the Act 2 Will. 4, c. 54, transferred to a Judge of the Court of Session.

the father himself from exercising the *patria potestas* over the child, when the situation and the interests of the child were competently brought before it (*Wellesley* v. *Duke of Beaufort*, 2 Russ. 1). But though the right of inter-**[94]**-ference was generally vested in the Court, the circumstances authorising its exercise were matter of discretion in it, and of review by the appellate tribunal (*Wellesley* v. *Duke of Beaufort*, 1 Dow and Clark, 154). So it may always be a question whether the understood right to appoint a guardian has been wisely and discreetly exercised; and if the Court of Appeal finds that it has not, there is ground for a reversal of the order.

The first question that arises in considering this matter is the degree in which the protection is wanted and the infant left unprotected, because this may be said to be the ground of the jurisdiction; but most emphatically it is the thing that calls for, and thus justifies the exercise of it. Now, as there are guardians in this case, appointed by the *lex domicilii*, this leads me to consider what are the powers of a guardian beyond the territory in which he is appointed and to which the infant belongs.

Most of the authorities in the general law of Europe seem agreed that the guardian validly appointed in any given country has an authority for the protection of the ward and the administration of his personal estate everywhere, *ex comitate:* and the manifest convenience of this *comitas*, as well as the evident consideration that the appointment is eminently of a personal nature, appears to justify this position. The guardian is a substitute for the parent; and the artificial relation resembling the natural, from which it flows, ought surely to follow the same analogies, and to extend everywhere with the person. Nor would it be easy to assign any reason why the Court of a foreign country, in which the ward might chance to be temporarily resident, should refuse to **[95]** recognize the tutorial relation, and the powers which it bestows, less than the parental relation and the *patria potestas* belonging to it. If there were, from the nature of the thing, any local peculiarities in the law or the jurisdiction appointing guardians; if that relation was constituted by virtue of any peculiar local policy varying in different countries, there might be some reason for holding that the Courts of one country should not regard the appointment made of guardians in the other. If, for example, in the feudal times, any right of a territorial description belonged to the lord over the infant orphan of his vassal, it would be much less clear that a foreign country should respect the claims of such lord when asserted beyond the limits of the lord's and vassal's country. But where the choice is made either by the natural parent in exercise of his parental power—a power common to all nations, or by the substitution of the next of kin in default of such appointment, or by the authority of the supreme Court to which the parent and infant alike owe allegiance, and which has the sole disposal of the infant's property, then surely nothing can be alleged to show that this choice should not be respected everywhere and in every country in which the infant may accidentally be found for a temporary residence.

There is no difference between the systems of the two countries, no peculiarity in that of Scotland, except that which makes the application of an English jurisdiction much more intolerable; because the law of the infant's domicile gives, as I have shown, a great preference to the guardians of blood and kindred, and confines the authority of the Court within very narrow limits. The only exception to the natural authority, which rests upon principle, is that of the **[96]** real estate. It seems reasonable enough that the power of the foreign-appointed guardian should be confined to the personalty of the infant, in order to exclude his interference with the immoveable property, which is more peculiarly subject to the *lex loci* than the moveable which has no *situs*, but follows the person of the owner.

The authority of all, or nearly all, jurists follows these principles. Vattel (B. 2, c. 7, s. 85) lays it down generally that the guardian appointed by the Judge of the domicile, is guardian wherever the pupil may have any concerns. Heritius says (1 Opera de Colli. Leg. s. 4, n. 8), "*Tutor datus in loco domicilii etiam bona alibi sita administrat;*" but he confines this to personalty. It is to be observed that his *dictum* excludes all necessity of confirmation or new appointment by the foreign Courts, wherein the guardian is to sue or be sued. Matthaeus (De Auctionibus, L. 1, c. 7, n. 10) confines the power also to personalty; though others, as Stockmans (Decis.

125, n. 6), make it general. Boullenois (Obs. 4, p. 51) is equally strong to this effect; and Merlin (Repertoire, p. 412) expressly says, a guardian sues for debts due to his ward abroad, without any confirmation whatever of his title. Even those who have been cited on the other side, as P. Voet and J. Voet, are, in so far as personal property is concerned, only apparently at variance with the authorities, because they hold all such property to belong to the country of the infant's domicile, and that its disposal is governed by the laws of that domicile. And one thing at least is clear, that none of those jurists—not even Dr. Story, who quotes the American laws as not recognizing the authority, in one State, of the guardians named in another—have ever thought **[97]** of contending that the foreign guardian cannot exercise the personal superintendence of his ward; still less, if less be possible, do they ever contemplate the possibility of any Court appointing guardians for a foreign infant. We may add the authority of what was held in the case of a bankrupt's assignees, in *Hunter* v. *Potts* (4 T. Rep. 182), by the Court of King's Bench, and in Morrison's case by this House (in February 1749), in the instance of a lunatic's committee, as cited in *Sill* v. *Worswick* (1 H. Blacks. 665; see p. 677); in both of which cases the legally appointed curator in one country was held entitled to act in another.

Now can it be doubted that these principles, although not sufficient to exclude the jurisdiction of the Court in any given country, would be abundantly sufficient to restrain its exercise; in other words, that they would prescribe to the Court, in which the infant's protection either as to person or property came in question, the sound sense of limiting its inquiry in the first instance to the question whether the infant was unprotected or had a guardian already appointed validly by the Court, or according to the law of the country to which she belonged and in which her property was situated? If it were found, in the result of this inquiry, that the infant had such guardians, would it not follow that to them the Court should leave the matter, or, at the most, should only appoint them or rather confirm their appointment, in order to remove every shadow of doubt respecting their title to act? Though even to that interposition there would be a serious objection, as we shall presently see. Such I humbly conceive to be the course which the Court of Chancery in the present instance ought **[98]** to have taken; and not having taken it, I hold that there has been a miscarriage, which this Court is required to correct.

Now observe how manifest is the inconvenience of such a course. The authority of the guardian appointed here may not be wholly nominal and nugatory, but it is at least exceedingly imperfect. The person he may dispose of; the property he cannot touch. Next observe the absurdity of calling upon him to account here, when he cannot by any possibility have any money passing through his hands. He cannot receive a shilling of the ward's estate, except by the good pleasure of the Scotch guardians, who are wholly and irremediably beyond the Court's jurisdiction. Again, mark the consequences of there being an English guardian under the authority of the Court here; he cannot remove the ward out of the jurisdiction, although that ward is only here accidentally; she may have been brought up for her education; she must remain here till she attains majority. The penalty of resorting to our schools is her banishment forth of Scotland; the punishment she would have undergone for theft in her own country. Her frequenting our seminaries entails upon her the same fate to which she would have been subject if bred up at home in a school of thieves; she may have resorted to our milder, our less austere climate, more skilful physicians, more salubrious springs; her health is restored by these doctors and those places, and she is released from their hands and quits those haunts, but only to fall into the hands of the more stern doctors of the law, and to linger in the more pitiless atmosphere of the Master's office; and, restored from sickness to exile, she cannot enjoy in her own home the health which she has regained among us. The Court **[99]** has no choice in this matter; discretion it does possess as to appointing a guardian and bringing the ward within the scope of its jurisdiction; but once there, it cannot suffer her escape.

In *De Manneville* v. *De Manneville* (10 Ves. 52) an order was made on the father and all others to take no step, and to give security against taking any step, for removing the infant abroad to the father's own domicile, which of course was the child's also. In *Mountstuart* v. *Mountstuart* (6 Ves. 363) the two guardians of a Scotch infant, heir apparent to Scotch honours and estates, differed as to place where he

should be kept; and one of them prayed an order for his removal to Scotland, only during the long vacation. But the Court of Chancery refused the application, holding that it had no power to make an order which should suffer the ward to be removed out of its jurisdiction. Nor would it make the least difference upon the argument, if it were made to appear that the Court might possibly in the present day relax the rigour of this rule; because if the law contended for be good for anything, it was the law also at the time when *Mountstuart* v. *Mountstuart* and *De Manneville* v. *De Manneville* were decided; that is in 1801 and 1805; and therefore it is subject to all the objections which thence can arise. Nor does it materially alter the arguments I am urging, if we admit that, on an application to the Court, the infant would be allowed to go to Scotland; for it is a serious grievance to any of the Queen's subjects to be prevented from going home without application to a Court of Equity. Nor is it any answer to the inference drawn from them, that the Court may hereafter be applied to for a new rule for allowing the ward to be **[100]** removed to her own country, or for handing her over to her Scotch guardians; because the question and the only question now before us, is the order made and actually subsisting. That order stands or falls by its own merits, and is not to be supported by assuming that a future order may alter, vary, or reverse it; and let it be remembered that it is an order extending over the whole period of the infant's minority; the guardians are appointed until she is 21 years of age. The consequences then are as I have described them. Surely we should pause upon a position which leads to such consequences. If this decision be affirmed, who can safely send his infant child to England for any purpose, whether of education or of health? Who can safely bring him across the border when he comes to visit a friend? Every one who honours me with his presence in Westmorland, brings his children at the risk of their never returning to Scotland until they shall have completed their age of 21 years. Death may remove the parent, and then the Vice-Chancellor of Lancaster puts forth his long arm, or the Great Seal its longer arm, names guardians, and can no longer make an order permitting the children's return across the border.

The error which seems to me to have pervaded this judgment arises from the undoubted position that the mere filing of the bill, in which any infant is concerned, makes that infant a ward of Court; and that then the naming a guardian is of course, because the Court's powers are exercised through a guardian. But this only shows that incidental, and necessarily incidental, to a suit respecting the property or other rights of any infant, is the constitution of the wardship and consequent appointment of the guardian. Why is this such an incident? Because the infant must be represented and protected in the matter **[101]** brought before the Court. But here, let it be carefully kept in mind, there is no such suit; no *lis pendens* incident to which is the wardship and guardianship. The object and the sole object of the suit is to have a guardian appointed. That is the whole matter; and therefore all that is wanted of the Court is to make a ward and name a guardian, for no purpose of dealing with any rights in controversy before it, but simply and solely for the appointment's sake. The application is to name a guardian for the sake of naming a guardian. He is to be appointed; and on the Court asking for what purpose, the answer is, merely that he may be appointed. There are guardians enough already in Scotland willing to act, and much more able to act than any the Court can name, because they can be both curators and tutors; both manage the property and protect the person. But no; these are to be disregarded, in order that others may be named with half the authority, and may prevent the ward from returning home.

That the account which I have given of the manner in which the pendency of a suit constitutes any infant a ward of Court is the correct one, appears manifest both from the nature of the thing and from the books of Reports. Observe how Lord Hardwicke deals with the subject, in the well-known case of *Butler* v. *Freeman* (Amb. 302). After showing that the Court's jurisdiction is derived solely from the *patri potestas*, delegated by the Crown with the Great Seal, he says the Court will even protect an infant against its parent, and *à fortiori* interferes though there be a guardian appointed. In other cases we have actual examples of such interference, as in *Wilcox* v. *Drake* (Dickens, 631; see Jac. 250, n.), where the **[102]** father's insolvency, and in *Smith* v. *Bate* (Dickens, 631), where the guardian's insolvency, were held sufficient grounds for interference to protect the infant. But see how that great and discreet

Judge defines the limits within which this power shall be exercised, in strict accordance with the argument which I have been holding. "I own," says he (Amb. p. 303), "that there must be a ground to bring the matter properly before the Court; and therefore, if the father be living and no suit instituted here, the Court cannot act in a summary way. There must be a suit pending, relative to the infant or his estate, to entitle the Court to this jurisdiction." The suit there was relative to an estate, and the bill prayed directions for its management. But there would be an end entirely and at once to this limitation, this qualification or anything like it; and the power and its exercise would become absolute and universal and of course, if, instead of a suit pending, there was only a bill praying the appointment of a guardian. For the only ground of the jurisdiction, or at least its exercise, being the suit, and the application for a guardian being in vain, according to Lord Hardwicke, without such suit, the judgment below in this case assumes the very application itself to be suit sufficient, none other being pending. The existence of some suit being the condition precedent of the appointment of guardian, and none having power to apply with effect unless there be such suit, it is said that the application itself supplies the condition and furnishes the ground for the appointment; that is, the application furnishes the ground for itself. The law says, "A. shall not go to Rome unless some one of the King's subjects shall be allowed to go to Rome." A. applies **[103]** on the ground that he is one of the King's subjects, and that his going to Rome executes the condition precedent. It is as much a reasoning in a circle as can well be imagined; and I may moreover be permitted, with the greatest respect for my noble and learned friend who has preceded me, to say that to insert in his proposition the words "of this description," makes his proposition, "the appointment of a guardian in a suit of this description," as complete a *petitio principii* as can be conceived.

As for the allegation of property in England, which the bill contains, I can see no difference that this makes in the case; besides that, it is positively denied and not re-affirmed. Such an allegation could always be made; and if it were sufficient to entitle a party, not otherwise entitled, to the order prayed, the power of obtaining such an order would be absolute, and the appointment of a guardian would become quite a matter of course. If the argument I have held is of any avail, assuredly it cannot be defeated in this manner by a naked and gratuitous suggestion.

I am therefore of opinion that there has been a miscarriage in this case; that this House is called upon to reverse the erroneous order. That the Great Seal had a right to interfere, had a jurisdiction over the question, and that it was called upon to exercise that jurisdiction and to entertain the question up to a certain point, is quite manifest; because an allegation, whether by bill or by petition, that the infant, being within the jurisdiction was not protected, there was a necessity for entertaining the complaint, so far at least as to inquire into the state of the facts, and ascertain whether or not the law and the Courts of the infant's domicile had not sufficiently provided for the guardianship. So in a suit for the restitution of **[104]** conjugal rights or jactitation of marriage, and nullity of marriage, our Courts Christian will entertain the question and inquire into the validity of the alleged marriage, although it is averred in the libel to have been so solemnized in a foreign country. But having opened the door to the inquiry how far by the law of that country the marriage was valid, the English law, to use Sir William Scott's happy expression in a celebrated case (*Dalrymple* v. *Dalrymple*, 2 Hagg. Cons. Rep. 59), withdraws and leaves the Scotch law to decide the point. So here the Court of Chancery must needs ascertain that guardians have been appointed and duly appointed in the country of the infant's domicile; and having so found, the Great Seal ought, in my humble judgment, to withdraw and leave the guardian of the domicile in possession of the ward.

If it be said that the Scotch guardian is out of the jurisdiction, and that mischief might have arisen to the ward without a remedy, or that the good intentions of the Court might be defeated by leaving the custody to persons over whom it has no control, —the answer is obvious, and it is satisfactory. The property, at all events, must be left so unprotected in every respect; over that the Court can have no control. But the Scotch guardians, who have the care of it, may also extend their care to the person though in England; nor will they be unaccountable in performing that office. They are accountable to the Scotch Court, and they will be compelled by that Court

to do their duty, and visited with punishment for neglecting it, as well touching the person as touching the property. We are not dealing with the natives of some barbarous country, which has no **[105]** regular tribunals and no system of jurisprudence; we have to do with the law and the customs and the Courts of a people as civilised as ourselves, and we may safely leave it to the Judges who sit in authority over that people to see that the Scotch guardians do their duty. There is no complaint competent here, no application for superintendence and control, no petition for redress respecting the personal management of the infant, which may not be urged with entire hope of full success in the Courts in Scotland; and the same law and the same judicature to which we must of absolute necessity leave the whole care of the property, may well be left to take care also of the person, and to dispose of all the questions that may arise in connexion with that care.

These arguments I submit respectfully but confidently to your Lordships; I submit them to my noble and learned friend, whose candour I well know is equal and in proportion to his sagacity; and I feel assured that if they should have the effect of raising any doubt in his mind, the party and the law will have the benefit of that doubt. And on the other hand, I am sure that I should at once have retracted the opinion which I had formed, in case what I have heard had impressed a doubt upon my mind.

Lord Cottenham:—It has been my fate, in the Court of Chancery and in this House, to hear this case three times argued; and I now have the additional advantage of hearing what has fallen from my noble and learned friend, who has just addressed the House; and but for the difference of opinion which I was aware existed upon this subject among the Members of your Lordships' House, I certainly should have **[106]** thought it a case which was purely of course, and this an order which is consistent with every day's practice in the Court of Chancery, and to the pronouncing of which I never in my experience have known any exception. But knowing that this did not strike other noble and learned Lords in the same light, I have thought it my duty very carefully to review the whole of these proceedings from the commencement, and to see whether there is anything in what has been stated which should induce me to alter the opinion I formed in the first instance.

Before I proceed to state to your Lordships the result of this investigation, there is one point, which seems to have struck my noble and learned friend very forcibly, on which I would wish to make one or two observations; namely, the supposed sort of imprisonment within the large limits of this country, which he seems to have imagined is imposed upon an infant, who has the misfortune, as he would represent, of having guardians appointed by the Court of Chancery in this country. My Lords, there is no such imprisonment; there is no other restraint than the necessity of asking the leave of the Court, before the infant is taken out of the limits of the jurisdiction. If there is any such restraint, any such imprisonment, I certainly never heard of it during the administration of my duties when I had the honour of holding the Great Seal. When an application of that sort was made to me, the only subject upon which, as it occurred to me, I ought to form an opinion, was whether, under all the circumstances, it was for the interest and benefit of the child that the application should be granted. The misfortune therefore supposed to be inflicted upon the child is, that the mind of the Lord Chancellor for **[107]** the time being should be exercised upon the question, whether it is for the interest of the child or not that it should be allowed.

A case very similar to the present occurred while I was Chancellor (*Campbell* v. *Campbell*, vide *infra*, p. 138). A Scotch child was brought into this country, and the same contest arose. An application was made to appoint a guardian. The Scotch tutor or curator resisted that, and upon the same ground upon which it has been resisted in this case; viz. that the Scotch tutor and curator had authority over the child in England, in opposition to the power of the Great Seal, and to the exclusion of any person to whom the Court of Chancery might think fit to entrust the duty of superintending and taking care of the child. I certainly was not much impressed with the argument; it was very shortly urged, and I believe not very strongly felt by those who urged it. Upon that occasion I formed the same opinion which I did in the present case, that the Scotch tutor and curator had no authority or power whatever in this country, and that the child was therefore entirely without protection here; and

that it was a case, therefore, in which it was the bounden duty of the Court of Chancery to appoint an officer of its own to take care of the child. It afterwards occurred that it would be beneficial to the child to go back to the country to which she belonged. An application was made to me: I investigated the whole of the case; I found that the child's friends all resided in Scotland; that she had no connexions in England; that there were means furnished for an excellent education for the child in Scotland; and therefore, without doubt or difficulty, I allowed the child to be taken back to Scotland, where **[108]** I believe she has been ever since. This only shows that the hardship which is supposed to exist by the Court of Chancery taking, as it were, possession of these infants, and depriving them of all the advantages of being brought up amongst their own relations in their own country, has no place whatever, if, under all the circumstances, it appears to be for the interest of the child, that the child should be permitted to go back to its own country.

In the present case it is important, before entering upon the consideration of the questions in it, thoroughly to understand the proceedings in the cause, so far as relates to the manner in which those questions have been brought before this House. The infant having been made a ward of Court by the filing of the bill, a petition was presented, praying that the infant's grandfather and great aunt might be appointed guardians, upon an allegation and affidavits that they were the nearest relations, and that there was no person within the jurisdiction of the Court, entitled or empowered to act as guardians; but not stating the appointment of the Appellants as tutors and curators in Scotland. The Vice-Chancellor, by the order of the 6th of January 1841, appointed the grandfather and great-aunt to act as guardians, according to the prayer; which I, on the appeal to me, thought ought not to have been done as a permanent appointment, without a previous reference to the Master. A petition was afterwards presented by the Scotch tutors and curators, praying that this order might be discharged; and that, if the Court should think proper to interfere touching the guardianship of the infant, they, the petitioners, might be declared to be, or if not already such, might be appointed guardians; but that if the Court should not think proper to declare **[109]** or appoint them guardians, then that an order might be made, by way of reference or otherwise, having due regard to the father's testamentary disposition, to his domicile, and to the circumstances and situation of the property of the infant. The only part of the petition to which the prayer that the petitioners might be declared to be guardians can be referred, is an allegation that the instrument appointing them tutors and curators was in its nature testamentary, and as such, constituted not only a good appointment of tutors and curators according to the law of Scotland, but also constituted a good appointment of guardians according to the law of England. The same proposition was attempted to be supported by affidavits, and particularly by that of Francis Hart Dyke; but I do not find any allegation or attempt to prove that tutors and curators appointed according to the law of Scotland, are, as such, recognized in this country as guardians, so to be considered as entitled to the legal custody of infants whilst residing in this country.

Upon this petition the Vice-Chancellor made an order, discharging his former order, and appointing the Appellants to act as guardians of the infant during her minority, or until further order; without prejudice to the question, whether they were entitled to the guardianship under the statute of Charles 2, c. 24. This order, appointing the Appellants to act *as* guardians, and not declaring them *to be so*, and reserving only the question as to the claim to be testamentary guardians, would be a decision against their claim to be entitled to the custody of the infant here, as tutors and curators in Scotland, if any such claim had been made before him. The order would, indeed, be irregular, if the petitioners were entitled to be recog-**[110]**-nized as guardians in any character, except as appointed by the Court.

From this order an appeal was brought before me in the Court of Chancery; and from the Report of the case (1 Phillips, 17), I find that, although the claim as testamentary guardians was slightly alluded to, no reference whatever was made to the title supposed to exist in Scotch tutors and curators, to be treated in this country as lawful guardians. No such claim having been made before me, I neither formed nor expressed any opinion upon it; but I held that the Scotch instrument did not appoint the Appellants testamentary guardians under the statute of Charles 2. Having thus decided against the only ground upon which the present Appellants claimed a right

to the guardianship, I saw that there were but two modes of proceeding upon; either to appoint them at once as persons selected and preferred, though not legally appointed, by the father, or to make the usual reference to the Master. To appoint the Appellants at once would, for the reasons stated by me, as given in the Report, have been improper, and contrary to the acknowledged practice of the Court. The reference therefore became a matter quite of course. It excludes no one, and concludes no question, except the only one argued before me, that the Appellants are not testamentary guardians under the statute of Charles 2: a decision in which the Appellants have acquiesced, not having thought it worth while to raise it again, either in the printed cases, in the reasons assigned for the appeal, or by the argument at the bar; it being always kept in mind, that if the Appellants were testamentary guardians under the statute of Charles 2, it **[111]** would be irregular and improper for the Court to appoint them. Finding, therefore, that the only point upon which I was called upon to decide in the Court of Chancery is not now in dispute, I do not feel that reluctance to take any part in this appeal, which I should have felt if the propriety of my decision upon any point raised before me had been called in question; and I have some satisfaction in finding that this is the state of the case, because a new point has now been raised, for the first time, of great importance if capable of being supported; and calculated, if supported, very much to cripple the jurisdiction of the Great Seal, and to deprive many infants of the benefit of its protection.

The proposition is, that the law of England recognizes the right and authority of a Scotch tutor and curator, with respect to an infant resident in England; and, although it may interfere to aid that authority, or to supersede or control it if improperly exercised, it has no right to take the child under its own care by the appointment of guardians. If that be right, then no doubt the order appealed from is wrong; but so is the order of the Vice-Chancellor of the 19th of March 1841, sought by this appeal to be established; for that order is as inconsistent with the alleged right of a Scotch tutor and curator, as the order appealed from; and yet that order was obtained upon the application of the Appellants themselves, attempted to be supported in their resistance to the appeal before me, and now asked to be restored, as would be the necessary consequence of the success of the present appeal.

The order of the 19th of March 1841 is not the subject of appeal, and cannot therefore be altered by this House: but the House, it was argued, might **[112]** vary the order of the 17th of April 1841, so as to correct the order of the 19th of March 1841; but this House can only deal with that order so far as the Lord Chancellor could have dealt with it when the appeal was before him, and he could not have altered it for the benefit of the then Respondents and now Appellants. He might have refused all, or granted all, or any part of what the then Appellant and now Respondent asked; but he could not, upon that proceeding, have declared the Scotch tutors and curators entitled, in this country, to be recognized as guardians of the infant. If this House should be of opinion that such right exists, how could effect be given to that opinion in the present appeal? Certainly not by discharging the order appealed from, which would re-establish the order of the 19th of March 1841, which assumes that the Appellants have no claim of right, unless they can show that they are testamentary guardians under the Act of Charles 2; and certainly not by any variation of that order, which the party appealing from it, the present Respondent, did not ask.

The proposition raised at the bar is, however, of such general importance, that it would be much to be lamented if this appeal were to be disposed of without a due consideration of its merits. If the Scotch tutors and curators are entitled to exercise the duties of that office in England, and therefore to be recognized by the Court of Chancery as having lawful right to the care and custody of the infant whilst in this country, it must be considered what are the rights and duties so to be exercised and recognized in this country. Are they those rights and duties which belong to the office of tutors and curators in Scotland, or the rights and duties which belong to guardians in England? For **[113]** they differ in several essential particulars. In Scotland the office determines upon the child attaining the age of twelve years; in England it continues up to the age of twenty-one: in Scotland, the majority controls the minority; in England, all must concur. If, therefore, the Court of Chancery is bound to recognize the rights and duties of Scotch tutors and curators, as they exist by the law of Scotland, it must take upon itself to administer foreign law; for it is not disputed

that the Court has jurisdiction over them if they do not properly execute their duties; that is, their duties according to the law of Scotland. Follow this view to any of its consequences, and the absurdity will be apparent. It cannot be contrary to the duty of a tutor and curator in Scotland to promote the marriage of the infant without the consent of the Court of Chancery in England, or to remove the infant from England to Scotland. Is the Court of Chancery, therefore, to permit such proceedings with respect to an infant, being a ward of Court, because it has tutors and curators in Scotland? Would it be the duty of the Court of Chancery, upon any complaint made, first to imagine in what manner and to what extent the Courts of Scotland would interpose, and to regulate its own interference by that rule? This rule, in the case of a Scotch child, with Scotch tutors and curators, might be ascertained without difficulty or delay; but if such be the rule as to a Scotch child, it must equally apply to all other foreign children; and thus the Court might have to administer the laws of other countries, however remote and uncivilized.

It was urged, that the Court must recognize the authority of a foreign tutor and curator, because it recognizes the authority of the parent of a foreign **[114]** child. This illustration proves directly the reverse; for, although it is true that the parental authority over such a child is recognized, the authority so recognized is only that which exists by the law of England. If, by the law of the country to which the parties belonged, the authority of the father was much more extensive and arbitrary than it is in this country, is it supposed that the father would be permitted here to transgress the power which the law of this country allows? If not, then the law of this country regulates the authority of the parent of a foreign child living in England, by the laws of England, and not by the laws of the country to which the child belongs. If foreign tutors and curators are to exercise in this country the rights and duties which belong to their office in their own country, more deference would be paid to the authority of their office than to that of a parent. If the rights and duties of foreign tutors and curators of a child in this country are not to be regulated by the law of the country to which the child belongs, what are the rights and duties supposed to belong to them which the Courts of this country are bound to recognize? They cannot as such be treated as testamentary guardians, there being no testamentary appointment under the Act 12 Charles 2, c. 24; or as guardians appointed by the Court of Chancery, there being no such appointment. They cannot be English guardians, without being able to derive their authority from some one of those sources from which the English law considers that the right of guardianship must proceed; and it has before been shown that the rights and duties of a foreign tutor and curator cannot be recognized by the Courts of this country, with reference to a child residing in this country. The result is, that such foreign tutor and **[115]** curator have no right, as such, in this country; and this so necessarily follows from reason, and from the rules which regulate, in this respect, the practice of the Court of Chancery, that it could not be expected that any authority upon the subject would be found.

It appears, however, that the very case came before Lord Hardwicke, in *Ex parte Watkins* (2 Ves. sen. 470). A child had had a guardian appointed by the Governor of the Leeward Islands, and coming to this country Lord Hardwicke was applied to, to appoint a guardian. The question does not appear to have been contested, but the facts were distinctly stated, and Lord Hardwicke referred it to the Master to approve of proper persons to be appointed guardians, by the usual order. This is the only case directly in point, which has been referred to on either side; but there are other matters of frequent occurrence which proceed upon the same principle. If a commission of lunacy be in force against a person in Ireland, or in any of the colonies, and that person afterwards come to England, it is a matter of course to take out a new commission in this country, as *In re Houston* (1 Russ. 312); but why, if the foreign committee has the same authority in this country that he has in his own? The case *Ex parte Lewis* (1 Ves. sen. 298) turned upon a totally different question; which was, whether the party having been found *non compos* at Hamburgh, satisfied the term "lunatic" in the Act 4 Geo. 2, c. 10, so as to give the Lord Chancellor jurisdiction to direct a conveyance; the words of the Act being, "All persons, being lunatic, or the committees of such persons, shall convey."

Writers upon the civil and international laws were quoted in this case, as to the comity of nations in **[116]** recognizing rights and duties existing under the laws of

other countries. These are well collated and observed upon by Dr. Story, and the result he draws from them is by no means favourable to the argument of the Appellants; but had it been otherwise, the law and practice of this country must decide the question.

If then there be no right in this country, in these Scotch tutors and curators as such, what order could have been made in preference to that appealed from? Ought the application of the child's relations to discharge the Vice-Chancellor's order of the 19th of March 1841 to have been refused, and that order of the Vice-Chancellor appointing the Appellants to act as guardians to have been established? That is, was it proper, if the tutors and curators had not, as such, any right in this country, to appoint four of the parties named in the instrument appointing them, all being out of the jurisdiction, and therefore to take the child from the care of its nearest relation, without the usual inquiry before the Master? In *Ex parte Watkins*, Lord Hardwicke refused to act without inquiry; in *Logan* v. *Fairlie* (Jac. 193), Lord Eldon refused to appoint a person residing in Scotland to be guardian, although the infant appears to have been in that country; and in *Ex parte Ord* (Jac. 94) he held that the committee of a lunatic going abroad could not continue committee; and the well-known practice of the Court is not to appoint persons guardians who are out of the jurisdiction, unless associated with others who are within it. In *Wellesley* v. *The Duke of Beaufort* (2 Russ. 1), Lord Eldon appointed another to act as guardian of a child, merely on the ground of the father being abroad. Upon these grounds it would have been impossible to have **[117]** established the order of the 19th of March 1841. But independently of that objection, would it have been right, without inquiry, to have given to these four Scotch gentlemen, by the appointment of the Court, the power of guardians of this child?

It appeared from the affidavit that the child was of delicate health and requiring peculiar care; that the mother had been most anxious that the child should continue under the care of its nearest relations in this country; and that a contest had arisen, or had become unavoidable, between those nearest relations and the Scotch tutors and curators, for the care and custody of the child. Such a case would probably have called for inquiry as against testamentary guardians, and certainly required it before disposing of the contest by investing one of the parties to it with the authority of guardian appointed by the Court. Whether the order appointing the Appellants guardians should stand, or the usual reference to the Master be directed, was the only question before me in Chancery, and is in fact the only question now before the House. The Appellants, who obtained that order of the 19th of March 1841, and never sought to have it varied, cannot now complain of it, or ask the House to vary it. It appointed them guardians, and they were contented to accept the appointment from the Court; and yet they now ask the House to declare—the order standing unappealed from by them—that they are entitled to exercise all the authority of guardians, without and independently of the authority of the Court.

It has been said that if the Court had jurisdiction, it ought not in this case, in its discretion, to have exercised it. This is not very intelligible to those who are accustomed to the proceedings in Chancery. **[118]** It means, I presume, that the Court ought not to have interfered: but when the order appealed from was made, the question as to interference or non-interference had gone by. The Court had interfered by appointing guardians, and none complained of the fact of interference, but only as to the manner in which it had been conducted. What, upon this doctrine of non-interference, ought to have been the order upon the appeal to the Lord Chancellor? To have refused the application, and thereby to have left the Appellants appointed guardians by the interference of the Court; or to have granted what was prayed *simpliciter*, and so to have left the other parties guardians by the interference of the Court; or to require the usual assistance of an inquiry by the Master before deciding upon the future custody of the infant, which was the order made and now appealed from? In truth, however, independently of form, the doctrine of non-interference has no place in the case of an infant, for whose protection no legal right of guardianship in any person in this country exists. The Court being informed that there is no such right of guardianship, supplies the omission as of course, by its own appointment. It is true that in lunacy there is a discretion exercised as to whether the commission should issue, although there may be no doubt as to the lunacy; but

there are obvious distinctions between the two cases, one of which is that a commission of lunacy is of itself an evil, although often necessary to prevent greater. This does not apply to the appointment of a guardian to an infant where none already exists, and the application for that purpose is never refused. All infant wards of the Court are under the protection of the Court. If there be a father living, or a guardian regularly appointed, the Court does not interfere, **[119]** except to assist the father or guardian, unless in certain cases in which the misconduct of the father or guardian renders interference necessary for the protection of the child. But if there be no father or guardian regularly appointed, the Court protects the child through the means of its officer, whom it appoints to perform that duty in the character of guardian. If there be no father or other person entitled of right to act as guardian, it is impossible that an order referring it to the Master to make the inquiries necessary to enable the Court to appoint proper persons to act as guardians, can be wrong.

In this case there is no father; and if there was no person entitled as of right to act as guardian, the order was quite of course. That there was no person so entitled as of right to act as guardian, would, I think, be amply established by the consideration before adverted to, if the question were open for consideration; but it is not competent for the Appellants to raise that question, the object of this appeal being to establish an order under which they were themselves appointed guardians.

Under these circumstances, the order appealed from was the only order which could have been made; and the grounds upon which the Appellants have complained of it are incompetent for them to take, and are untenable upon the merits.

Lord Campbell:—I am of opinion that the order of the Lord Chancellor appealed from should be reversed: that the second order of the Vice-Chancellor should be set aside as well as the first, and that the petition for the appointment of guardians should be dismissed.

I do not doubt the jurisdiction of the Court of **[120]** Chancery on this subject, whether the infant be domiciled in England or not. The Lord Chancellor, representing the Sovereign as *parens patriae*, has a clear right to interpose the authority of the Court for the protection of the person and property of all infants resident in England, even where testamentary guardians have been appointed, and even where the father is alive and actually himself resident in England. If it be for the benefit of any infant that the Court should appoint guardians, to become officers of the Court, and to take care of the person and property of the infant under the superintendence and control of the Court, there can be no doubt of the power of the Court to do so. Although this jurisdiction was probably very rarely exercised till the abolition of wardship with the military tenures, and the great increase of personal property in modern times, I have no doubt that it existed at common law. Upon a strict examination it would probably be found that the care of idiots and lunatics even belongs to the Lord Chancellor at common law; although, as by the Act 17 Ed. 2, c. 10, the profits of their lands and tenements are given to the Crown and become a branch of the Royal revenue, there is now a deputation to the Lord Chancellor respecting them, signed by the Sovereign, and countersigned by the Lord High Treasurer or Lords Commissioners of the Treasury.

Upon an appeal against any order of the Court of Chancery for the appointment of guardians to an infant, the only question is whether the jurisdiction of the Court has been properly exercised; and the criterion is, whether it was for the benefit of the infant. Notwithstanding what has been said by my noble and learned friend who last addressed your Lordships, I can see no difficulty whatever in a Court of Appeal admit-**[121]**-ting that the Court below has jurisdiction to interfere and to appoint guardians, and yet going on to inquire whether there was a due occasion for the interference of the Court, and whether its jurisdiction has been properly exercised. The Court of Chancery having a clear jurisdiction to grant an injunction or to appoint a receiver; upon an appeal from that Court we might surely inquire whether a proper case has been made out for granting an injunction, or appointing a receiver; and if we thought there was not, without questioning the jurisdiction of the Court, we should be bound to reverse the order which the Court had improperly made.

Let us inquire whether in this case the Court was called upon to interfere and to appoint guardians. To justify the appointment

of guardians, it cannot be enough to show that there is an infant having a temporary residence in England, placed here by the authority and under the superintendence of its father resident abroad, and judiciously and tenderly cared for by persons appointed by him for that purpose, the person of the infant requiring no care from the Court of Chancery, and the infant having no property in this country. If the father of such an infant be alive, the Court would not appoint guardians to it. Can it make any difference whether the child is so resident in England by the authority and under the superintendence of its father, or of tutors or guardians appointed by the deceased father, and confirmed by the legal tribunals of the country in which he was domiciled at the time of his death, and in which all the property of the infant is situated? Is it possible to lay down this proposition, that the Court of Chancery, whenever applied to, is bound to appoint guardians to an infant resident in England for a temporary pur-**[122]**-pose, if its father be dead? The mere death of a father of an infant domiciled abroad, and resident here for health or education or amusement, with the consent of those in whom the parental power is vested by the law of the country of its domicile, cannot necessarily require the expensive and useless and inconvenient process of the appointment of guardians by the Lord Chancellor. It would be ridiculous to suppose that such an appointment must invariably and inflexibly be made, without considering whether the personal safety or personal interests of the infant require the interference of the Court; although the infant has no property to be protected; and although the appointment would manifestly be injurious to the infant itself, as well as perplexing, annoying, and detrimental to its foreign guardians. The benefit of the infant, which is the foundation of the jurisdiction, must be the test of its right exercise.

Next let us attend to the facts of this case, which were regularly before the Lord Chancellor when the order appealed against was made. In October 1835, Thomas Beattie, domiciled in Scotland, having landed estates in that country, and married to a Scotch woman, by whom he had an only child, then just born in Scotland, executed a deed according to the law of that country, by which he appointed the Appellants and his wife tutors and curators of the child; whereby they were entitled, upon his death, to the custody and care of the person of his child till she was 12 years old, and to the management of all her property, under the superintendence of the Court of Session, till she was 21. He then went with his wife and child to Madeira for the recovery of his health, and died there in April 1836.—(His Lordship having then stated the facts *ut ante*, p. 45, *et seq.*, proceeded.)

[123] The Appellants had accepted the office of tutors and curators on the death of the child's father, and had been confirmed in that office by the Court of Session. According to the law of Scotland they cannot renounce the office after they have accepted it, and they are bound to act under the superintendence of the Court of Scotland, and to account annually for all the property of the infant coming into their hands; that Court laying down certain rules as to the proportion of the annual income which may be applied to the maintenance and education of the ward. From the death of the father they managed all the infant's property according to the course of the Court, and they concurred with the mother in the care of the infant, consenting to her living with the mother at Chester and in Albion-street, where a suitable establishment was kept up for the infant's comfort and education.

The mother died in December 1840, and on the 6th of January 1841, Mr. Duncan Stewart, without any complaint against the tutors, filed a bill in the name of the infant, against them and other persons the executors of Mrs. Beattie. The bill imputed no misconduct whatever to the tutors, but merely alleged that they lived out of the jurisdiction of the Court, and that there was no person in this country entitled to act as the guardian of the infant, or to receive the rents and profits of her estates, or to apply the same for her maintenance and benefit. It contained an allegation, not supported by affidavit, that the mother's executors had in their hands some part of the rents and profits received in the mother's lifetime; but in reality it was shown by affidavits that the infant had no property within the jurisdiction of the Court, beyond her wearing apparel. The prayer was that Mr. D. Stewart her grandfather, and Mrs. Buchanan **[124]** her grand-aunt, might be appointed her guardians, and that proper directions might be given by the Court for her maintenance and education; and that an account might be taken, under the directions of the Court, of all

the rents and profits of the estates, and of all monies received by the tutors on her behalf, since her father's death. On the same day a petition was presented by Mr. D. Stewart, in the name of the infant, stating the same facts, and praying for the appointment of himself and Mrs. Buchanan as guardians; and then, on an *ex parte* application, the Vice-Chancellor appointed them to act as guardians, and referred it to the Master to inquire and state the infant's age and her fortune, and what would be a proper allowance for her maintenance and education.

The Appellants then appeared to the bill, and presented a petition, stating their appointment by the law of Scotland, where the child was domiciled, the prudent arrangements they had made for the comfort of the child on the mother's death; that they had in all respects faithfully done their duty as tutors and curators, and that the infant had no property within the jurisdiction of the Court of Chancery. They submitted that the institution of the suit, and the proceedings for obtaining the order for the appointment of guardians, were unnecessary and improper, and they therefore prayed that the order might be discharged; but added a prayer that, if the Court thought fit to interfere, they might be appointed guardians of the infant. This petition was fully supported by affidavits.

The matter again coming before the Vice-Chancellor, he very properly reversed his first order, and I think he ought to have dismissed the first petition; but instead of this, he made an order appointing the four Appellants to act as guardians of the infant **[125]** during her minority, or until the further order of the Court, without prejudice to the question whether the Appellants were entitled to the guardianship of the infant under the stat. 12 Chas. 2, c. 24, and without any further direction. Then came the appeal by Mr. D. Stewart to the Lord Chancellor, when the order now appealed against was pronounced, whereby the second order of the Vice-Chancellor was reversed, except in so far as it reversed the first; and it was ordered, according to the common form where guardians are ordered to be appointed to an infant that has none, "that it be referred to the Master to approve," etc.

If this order is to stand, guardians must be appointed as officers of the Court of Chancery; and when appointed they would have all the rights and powers of guardians, and would be entitled, under the superintendence of the Court, to the care of the infant and the management of all her property, until she attained the age of 21. The guardians so to be appointed are not in the nature of guardians *ad litem*, to attend to the suit or the interests which it involves; but general guardians, for the care and management of the person and property of the infant during minority. Now I am humbly of opinion that this order, so absolutely requiring the appointment of guardians to this infant, as officers of the Court of Chancery, superseding, as far as that Court can, the functions of the tutors appointed by her father and confirmed by the Court of Session, and directing that the infant and all her property shall be under the care and management of the Court of Chancery during her minority, ought not to be supported; that the utmost that could properly have been asked would have been to direct inquiry whether it would be for the benefit of the infant that any English guardian should be appointed, **[126]** but that there was no case made even for directing such an inquiry; and that, both orders of the Vice-Chancellor having been reversed, the petition ought to have been dismissed. My noble and learned friend is reported to have said, "With respect to the first application to the Vice-Chancellor, I think it was a very improper one, because there seems to have been nothing whatever in the situation of the infant to justify such an application (1 Phillips, 31)." I most heartily concur in that observation. There appears to me to have been nothing in the situation of the infant which required the appointment of guardians by the Court of Chancery on the 6th of January 1841; and I think there was as little on the 17th of April 1841, the date of the order now appealed against.

When the case was argued before Lord Cottenham, it would appear that the only points discussed at the bar were the regularity of the second order of the Vice-Chancellor, without a previous inquiry by the Master whether the tutors were to be considered testamentary guardians under the Act of 12 Chas. 2, c. 24; and whether, the Court exercising the power of appointment, the tutors named by the father were not entitled to be preferred. I cannot help thinking that, if the counsel for the tutors, instead of relying on their preferable right, and trying in vain to support their appointment as English guardians without any reference to the Master, had insisted

that no case was made out for the interference of the Court, and that the appointment of guardians would be prejudicial to the infant, the petition would then have been dismissed. The second order of the Vice-Chancellor could not stand; for it is a well-settled and a very reasonable rule of practice, that before the appoint-**[127]**-ment of guardians, there must be a reference to the Master to inquire who are fittest to be appointed. That order being set aside, and there being no sufficient ground for contending that the tutors were to be treated as testamentary guardians, Lord Cottenham properly disposed of the questions argued before him. But I humbly apprehend that, instead of proceeding to make an order by which guardians were to be appointed, and the person and property of the young lady were to be under the care and management of the Court of Chancery till she reached 21, and by which she was not to be allowed to marry or to go out of the jurisdiction of the Court without the leave of the Lord Chancellor, he ought to have said that, under the circumstances, neither the care of her person nor the management of her property required his interference, and therefore that the petition for the appointment of guardians should be dismissed. He surely must have had the power to do so, although there was no appeal by the tutors against the second order, and they were willing to acquiesce in it. When it was set aside at the instance of the other party, the Lord Chancellor had a right to consider what was the fit order to be substituted for it, and to look to the petition presented by the tutors, in which they submitted that there was no occasion for the appointment of guardians; and the petition for the appointment of guardians ought then to have been dismissed, if it ought to have been dismissed by the Vice-Chancellor.

I will now consider the grounds on which it was insisted at this bar, that the order of the Lord Chancellor ought to be affirmed. One of the learned counsel for the Respondents, justly feeling that the principle for which he contended necessarily carried **[128]** him so far, manfully argued that in every case where there is an infant resident in England, though domiciled out of England and having no property in England, the Court of Chancery, on an application for that purpose by any one, is bound to appoint guardians to the infant; so that boys and girls cannot be sent from Scotland or any foreign country to an English school, or to take advantage of the milder climate of England, or to have the benefit of medical advice in England, without being liable to be made wards of Chancery, and prevented from returning to their native land till they attain the age of 21, being educated and disposed of in marriage under the superintendence of the English Court of Chancery! To show the rigorous superintendence very laudably exercised by the Court over its wards, I may here mention the case of *Jeffreys* v. *Vanteswarlswarth* (Barnardiston, 144), where female infants, having arrived at years of discretion, and having property and relations at Dantzic, were allowed to go to that city only on their guardians entering into recognizance that they should return within a certain period, and should not marry without leave of the Court. I presume there is to be reciprocity on this subject; and that, if English children go to Scotland for education or health, or to see the wild scenery of that country, tutors dative may be appointed to them by the Court of Session (vide n. *ante*, p. 92), and they may be detained and educated in that cold and Presbyterian country. *Pari ratione*, if they are making a tour in Italy or Spain, they may be laid hold of by the tribunals there established to take care of infants, and for the supposed good of their souls brought up in the true Roman-catholic faith. The mere statement of such propositions renders any refutation of them unnecessary.

[129] In this case a bill has been filed, alleging that the infant has some property in England by the receipt here of some part of the rents and profits of her Scotch estates, so that she is *eo ipso* a ward of the Court; and, being a ward of the Court, guardians must be appointed to her. But the bill is avowedly filed for the sole purpose of the appointment of guardians, to change the custody of the infant; and the allegation in the bill and petition, as to property in England, is unsupported by affidavit, and is proved to be false; therefore if such a bill, which may be filed by any one, is of itself sufficient to impose the obligation of appointing guardians, we come back to the absurd proposition, that the Court is bound to appoint guardians to any foreign infant brought into England, for whatever purpose and for however short a time. The filing of the bill can impose no necessary obligation to appoint guardians, although thereby, in some sense, the infant immediately becomes a ward of Court; for the same consequence follows wherever a bill is filed relative to the estate or person of an infant, or for the administration of property in which the infant is alleged to be

interested, although the child be under the immediate tutelage of the father, or under the care of a statutory or common-law guardian, or of a guardian appointed by the Court; or the infant be resident abroad. The position will not hold good that a guardian must be appointed to every infant so made a ward of Court, as an infant may be made a ward of Court as well during the father's life as after his death, and as well where there are testamentary guardians as where there are none. The filing of the bill entitles the infant to all necessary protection from the Court, but does not compel the Court to interfere in a manner which **[130]** would be injurious to the infant. It is quite clear that in this case the appointment cannot be justified in respect of any property of the infant within the jurisdiction of the Court, and can only be justified with a view to the care of the person.

On the second argument of the case at this bar, the Respondent's counsel attempted to rely on another bill, said to have been filed in the Court of Chancery, in the name of the infant, against the trustees of the Glen-Morven estate, one of the entailed estates belonging to the infant in Scotland: but I am clearly of opinion that the attempt entirely fails. The order is not made in that suit; and the only account we have of it, and the only reference to it in the proceedings, is in the affidavit of Mr. Duncan Stewart, made on the 26th of February, merely stating that a bill had been filed against these trustees for an account of their receipts in respect of the Glen-Morven estate, and to have the same secured or otherwise applied for the benefit of the infant, under the direction of the Court of Chancery. We are not told when the bill was filed or where the trustees reside, or what has been done under it; and it is clearly part of the machinery by which Mr. Duncan Stewart seeks to obtain the custody, care, and education of the infant, in place of the tutors. But how does this bill, respecting the rents and profits of the Glen-Morven estate, show any property belonging to the infant within the jurisdiction of the Court of Chancery.

If the care of the person of the infant required the appointment of guardians, the Court might undoubtedly interpose for that purpose, irrespective of any considerations of property; and it is said that she is to be taken as wholly unprotected, because according to the authorities the tutors appointed by the law of Scotland can in no degree and for no purpose be **[131]** recognized in England. I must first observe that this would be a very inconvenient doctrine, and would lead to the general necessity of appointing guardians for all foreign infants found in England who have lost their fathers. I suppose it is admitted that the existence and power of the father, although he be resident abroad, would be recognized by the Court of Chancery; although it is said that the existence and authority of tutors or guardians appointed by the law of the country in which the child is domiciled, would not be so recognized. But after a diligent attention to all the cases cited, and all the writers referred to on this subject, I can find no authority for this distinction. The foreign jurists are very much divided as to the extent to which a guardian to an infant appointed in one country shall be recognized in another. Boullenois (Obs. 4, p. 51), Merlin (Rep. Absens. c. 3, art. 3, s. 2, n. 2), Vattel (B. 2, c. 7, s. 85), Huberus (De Conflictu Legum, B. 1, c. 3, s. 2), and Hertius (Opera de Colli. Leg. s. 4), all expressly lay down that the guardian duly appointed by the law of the country where the infant is domiciled, is in every other country to have the same powers, and is entitled to assert any claims over the moveable property of his ward; and to sue for debts due to his ward in foreign countries, without having any confirmation of the guardianship by the local authorities, although the power over immoveable property belonging to the ward must entirely depend on the *lex loci rei sitae*. On the other hand, Paul Voet (De Stat. s. 4, c. 2) and other jurists deny that the appointment of guardians has an extra-territorial authority, so as to entitle the foreign guardian *virtute officii* to exercise **[132]** any rights, powers, or functions over the property of his ward, situated in a different State from that in which he was appointed guardian; and such appears from Dr. Story (Confl. of Laws, c. 13, s. 504a) to be the law in the different States forming the American Union. But in none of these writers is there the least intimation of opinion that the foreign guardian, whether he may assert a right of property and sue in his own name or not, will not be recognized so far as the care of the person of the infant is concerned, or that foreign tribunals will appoint new guardians superseding those appointed by the law of the country where the infant is domiciled, because the infant happens for a temporary purpose to be within the territory over which those tribunals exercise jurisdiction; and I cannot help thinking that Professor Story,

whose authority has been relied upon by the Respondents, would be very much startled at the idea of the Court at New York appointing guardians to an infant domiciled in Kentucky, and having no property out of that State, because the infant had been sent to school at New York by guardians regularly appointed by the proper Court in Kentucky. Indeed I know that the present analogous appointment has created great astonishment among jurists out of England, and is not considered in harmony with the enlightened principles on which the law is generally administered in this country.

Reference has been made to several cases to be found in our own Reports; but I think none of them will be found at all to support the order appealed against, or to throw much light on the subject. It is said to have been the opinion of this House, in Morri-**[133]**-son's case (cited in 1 H. Blacks. 677, 682), that an English guardian has authority to institute a suit for the personal property of his ward in Scotland, upon the ground that the administration of his personal estate, granted by the law of his place of domicile, must be taken to be everywhere of equal force with a voluntary assignment by himself. But we have no authentic report of the decision; and as it does not seem to have been acted upon either in England or in Scotland, I do not think that any reliance can be placed upon it. However, the case *Ex parte* Lewis (1 Ves. sen. 208) is a direct authority to show that for some purposes the Courts of this country will recognize a curator or guardian appointed by a foreign tribunal. That was a petition grounded on the statute 4 Geo. 2, c. 10, that a lunatic heir of a mortgagee might be directed to convey to the mortgagor; the words of the Act being, "that all persons, being lunatic, or the committees of such persons, shall convey." There had been no commission in this country, but there having been a proceeding before a proper jurisdiction, the Senate of Hamburgh, where he resided, upon which he was found *non compos*, and a curator or guardian appointed for him and his affairs,—Lord Hardwicke said he would take notice of that appointment, and ordered that, on payment of the mortgage-money, there should be a conveyance to the mortgagor. In *Ex parte* Watkins (2 Ves. sen. 470) it is said that the Governor of the Leeward Islands had appointed guardians, but that failed as soon as the infant came to England; so that another guardian was to be appointed, and there was a reference to the Master for that purpose. But we are not in the slightest degree informed what was the nature of that **[134]** appointment; and the infant may have been domiciled in England, and might have had property in England and nowhere else. Reliance has been placed upon Houston's case (Russ. 312), showing that where a person has been found a lunatic in Jamaica, and is brought to England by one of his committees, a commission of lunacy ought to issue against him here; and there is no doubt that a committee of a lunatic, under a commission in Ireland, will not be allowed to deal with the property of the lunatic in England, until there has been a commission of lunacy in England and he is appointed committee in England; but this is indispensably necessary for the proper management of the property of the lunatic in England, for the Court in Jamaica or in Ireland, appointing the committee, could exercise no control over him in respect of the property in England; and the Court of Chancery in England could not do so until, being appointed under an English commission, he becomes amenable to that Court.

The only other authority cited in the first argument, on this part of the subject, was *Salles* v. *Savignon* (6 Ves. 572), which, if accurately reported, although it does not bear very closely upon the recognition of a foreign guardian, would go to show that the Lord Chancellor may make all infants, in all parts of the world, wards of Chancery; and may at any time treat any person who may afterwards come within his jurisdiction, having had dealings with an infant so made a ward while abroad, answerable for what was done out of the limits of his jurisdiction. According to the Report of that case, a gentleman and a young lady, natives of the island of Martinique, domiciled there, aliens **[135]** and French subjects, happened to be in England; the young lady had property in Martinique, and none in England. The gentleman wishing to marry her, wrote to her mother, who was her guardian, in Martinique, offering any settlement that might be approved. They then went to Scotland, and were married there. After they had left England, and on the very day on which they were married in Scotland, a bill was filed to make her a ward of Chancery. They afterwards returned to England, probably on their way to Martinique, and the gentleman was proceeded against for a contempt in marrying a ward of Chancery. In the

language of the Report, the Lord Chancellor expressed some displeasure at the husband's not attending upon the first notice, but, observing that being a foreigner might be some excuse, would not commit him, but ordered him to attend from time to time, and forthwith to lay a proposal before the Master. I have a most sincere respect for the Court of Chancery, and for the long line of most distinguished Judges who have presided over it; but if such proceedings are sanctioned by this House, there may be some danger that Chancellors, in their zeal to extend to mankind the benefits of their jurisdiction, may think, as high functionaries entrusted with spiritual jurisdiction have thought, that there can be no limit to their power, and that the exercise of it must always be beneficial for those over whom it is exercised, although present pain and suffering may be the consequence. My noble and learned friend said that no case had ever occurred in which there had been a complaint of an excessive jurisdiction on the part of the Lord Chancellor, with respect to the jurisdiction of the Court of Chancery. It is possible he may approve of what was done in this case, but I beg to put this question **[136]** with great respect,—on what sound principle of jurisprudence can the interference of the Court, in the case I have last referred to, be justified? The parties were in the same situation as if the marriage had taken place in France or in China; and it is utterly impossible to say that the foreign gentleman by marrying a foreign lady in a foreign country, before any step had been taken to make her a ward of Chancery, was guilty of any contempt of the Court, actual or constructive.

After the first argument at the bar, in this case, was closed, and after I had written these observations, there was communicated to me the note of a case not in print, which has been referred to by my noble and learned friend who last addressed the House; *Campbell* v. *Campbell*, before Lord Cottenham; which is supposed to show that the present order is in conformity with the established practice of the Court of Chancery. According to that note, a female infant domiciled in Scotland, happened to be in London, in the care of a tutor and curator appointed by the law of Scotland, likewise domiciled in Scotland, and then in London. The young lady had recovered a very large sum of money (I believe £17,000) from a noble Marquis, for a breach of promise of marriage. The agent of the noble Marquis having the money in his hands to pay over to her, filed a bill in the Court of Chancery in her name, against himself, and paid the money into Court. The note states that the money was paid into Court before the application; and at all events there was, within the jurisdiction of the Court, a sum of £17,000 belonging to the infant; and it was in respect of that sum belonging to the infant, within the jurisdiction of the Court, that the bill was filed. Thereupon an application was made to Lord Cotten-**[137]**-ham, then Chancellor, to appoint a guardian to the infant, and a guardian was appointed. Now this was probably a very proper order, although I see no reason to suppose, as has been done, that it was this order which secured the £17,000 to the infant. But in that case there was property of large amount belonging to the infant, actually paid into Court; and it does not appear that she had any property out of the jurisdiction of the Court. How can that be a precedent for a case like the present, where the infant has large property beyond the jurisdiction of the Court, and none within it? Is it supposed that if the young lady had been in London for a temporary purpose, under the judicious care of her Scotch guardian, without any property in England, Lord Cottenham would have made an order for the appointment of English guardians? I can only say that, in my opinion, such an order would have been extremely preposterous, and that on appeal to this House it ought to have been set aside. If there be any practice in the Court of Chancery to sanction such an order, it is full time that the practice should be reformed, for I think it is entirely contrary to principle, to expediency, and to common sense.

On the second argument in this case, to show the power of the Court of Chancery in the appointment of guardians, reference was made to the case of *Stephens* v. *James* (1 Myl. and K. 627), where guardians were appointed by Lord Chancellor Brougham to an infant who had been carried to America before the bill was filed making her a ward of Court. I think that was a very proper exercise of the power of the Court, for there was large property within the jurisdiction of the Court, to be managed for the benefit of the infant; **[138]** but if it was meant as an authority to show that wherever an infant is made a ward of Court, guardians must as a matter of course be appointed, it may be used to show that the Court of

Chancery may appoint guardians for all foreign infants all over the world; for any foreign infant resident abroad may be made a ward of Chancery, by filing a bill containing a false allegation of property within the jurisdiction of the Court.

But it is said that, in the present case, the order is to be supported on the ground that the infant was domiciled in England. I think it is extremely doubtful whether her domicile had been changed; and at any rate an English domicile, if acquired, would not render the appointment of guardians by the Court of Chancery less unnecessary or less detrimental. She was undoubtedly domiciled in Scotland at the time of her father's death. I think that the case of *Potinger* v. *Wightman* (3 Merivale, 67) must be taken conclusively to have settled the general doctrine, that if after the death of the father an infant lives with her mother, and the mother acquires a new domicile, it is communicated to the infant. But in this case the mother's Scotch domicile continued till she acquired another, and I find great difficulty in fixing any time when it can be said that she had acquired a new domicile.

It must be remembered that all her own property, as well as the child's, was situate in Scotland; that she went to reside there on her husband's death; that she came to England only on account of her health, and her child's; that all the tutors appointed by her husband resided in Scotland; and that there can be no doubt her daughter would return to occupy the mansion of her ancestors. I see no reason to think that, **[139]** in case she should recover her health and her daughter should be brought back to Scotland, she had permanently adopted England as her place of residence, although her father resided at Chester. She undoubtedly expected to die in England, and she gave directions that her body should be buried in England: but this was in her last sickness, of the fatal termination of which she had a foreboding. The question is, whether she had taken up her permanent residence in England in case she should recover her health and strength? If, instead of remaining in Albion-street, Hyde-park, she had gone for her health to the island of Madeira, where her husband died, and had written letters stating that she should die there, and had given directions that she should be buried there, although she had died and been buried there, unquestionably her Scotch domicile never would have been superseded.

I likewise think there is considerable weight in the argument that the general doctrine, that the domicile of an infant follows that of the mother who survives the father, may admit of an exception, where the infant is residing with the mother in a foreign country, by authority of a tribunal of the country of domicile, or of those who by the law of that country have a right to determine the residence of the infant, and where there is a certainty that the infant will be brought back to the country of original domicile. If an English nobleman were to marry a Frenchwoman, and to die leaving an infant daughter and heir, made a ward of the Court of Chancery, and the Chancellor were to give leave that she should reside with her mother in France, on security being given that she should be brought back within the jurisdiction when required; although the mother should clearly acquire a domicile in France, and the child should die there, **[140]** I do not believe that the Courts of this country would hold that the succession to her personal property would be regulated by the Code Napoleon, instead of the Statute of Distributions. She might be considered as in the care of the Court, rather than of her mother. So, if it were necessary to decide the question of domicile in the present case, there might be strong grounds for contending that the infant while in England was in the care of the tutors, and so has never lost her domicile of origin. But however this may be, I am clearly of opinion that, if the order would have been improper had that domicile remained, it was equally improper on the supposition that an English domicile had been acquired. The question would still be, is the appointment of guardians wanted? And will it be for the benefit of the infant? Where there is personal property to a considerable amount within the jurisdiction of the Court, not exposed to any risk, and about which there is no dispute, domicile may be material for guiding the discretion of the Chancellor, whether he should interfere for its due management; but in this case Lord Cottenham considered the domicile immaterial, and so far I agree with him.

Then it is urged, that the appointment of the tutors was not meant by the father

to have any operation beyond the territory of Scotland. To this objection Lord Cottenham appears to have given considerable weight, and here I feel bound to differ from him. I do not think that it was intended, or that it can operate as an appointment of guardians in England, under the English statute 12 Charles 2; but I cannot doubt the intention of the father, by the appointment, that the infant should remain under the care and superintendence of the tutors, not only in Scotland, **[141]** but in any country into which, for her health or education, it might be necessary to send her. Can it be supposed to have been his intention, that if she were permitted to pay a visit to her grandfather at Chester, their power over her was to be for ever gone; that she was thenceforth to become a ward of the Court of Chancery; that a reference was to take place to a Master in Chancery for a scheme for her education and maintenance; that she should not be permitted to marry without the consent of the Lord Chancellor; and that she should not be at liberty to revisit her own country without his permission, to be obtained on an undertaking to bring her back within his jurisdiction?

In the Appellant's case laid upon your Lordships' table, there are remarks which I was rather surprised to hear gravely repeated by the Appellants' counsel at the bar; that the order appealed against is a violation of the articles of Union between England and Scotland. The order does not, in the remotest degree, proceed upon the supposition that the Court of Chancery has any power judicially to review the proceeding of the Court of Session of Scotland, and to set aside an appointment of guardians confirmed by the authority of that Court, The order, I conceive, would have been the same had the infant been French, and the appointment of tutors, under whatever authority she came into England, had been made in France, according to the law of France, and confirmed by a French Court of competent municipal jurisdiction. The order, I think, would have been erroneous, but it would have been no assumption of jurisdiction over the French Court, and would only have proceeded on what I regard as a mistaken view of the law of England, that wherever there is an **[142]** infant resident in England, guardians must be appointed to the infant by the Court of Chancery of England. I conceive, that according to that law, even with respect to a child of English parents, born and domiciled in England, the Court ought not to interfere to appoint guardians, unless there be property belonging to the infant to be taken care of, or unless the personal security, proper education, or marriage of the infant, require the appointment of guardians. This rule, which is extremely reasonable in itself, is to be collected from *Ex parte Belcher* (1 Bro. C. C. 556), and it seems to have been uniformly acted upon. Not an instance has been cited or can be cited of the Court of Chancery interfering to appoint guardians, the infant having no property within the jurisdiction of the Court. In *Wellesley* v. *The Duke of Beaufort* (2 Russ. 1), where guardians were appointed, the father absent from this country, there was large property within the jurisdiction to be protected, and the appointment of guardians was clearly for the benefit of the infants.

The interference of the Court appears particularly officious in a case like the present, where the infant being here for a temporary purpose has large property in another country, has guardians taking charge of that property under the superintendence of the supreme Court of that country, and is tenderly and judiciously taken care of here under the authority of those guardians. In this case, not only would the will of the father, as to the custody, care, and education of the child, and the management of her property, be entirely defeated, but a heavy expense must be incurred by the double accounting in the Court **[143]** of Session and in the Court of Chancery. Such an expense in some cases might eat up all the profits of the estate, and leave the infant without means of subsistence. I must likewise observe, that in a case like this, where there is no property in England, I know not how the order is to be carried into effect. An appointment of receivers to collect the rents of real estates in Scotland or France, or any other foreign country, might be treated with very little respect where it is to operate, might give rise to a collision of jurisdiction, very much to be deprecated, and I believe cannot be rested either on precedent or principle for its justification.

It has been urged at the bar, that where a bill is filed fraudulently in the name of an infant alleging property within the jurisdiction, there might be a summary

application of the Court to take it off the file; but the objection would be made, that this fact cannot be tried on affidavit. However, in this case, it now sufficiently appears to the House, and is not seriously disputed, that the allegation of property within the jurisdiction is colourable. Then it is contended that the suit should go on to its conclusion, and that then justice will be done: but the nominal Plaintiff will cease to be an infant before the suit is concluded. Part of the prayer of the bill is, that the tutors may account for all the rents and profits which they have received from the estates of the infant since the death of her father, or which they may at any time hereafter receive. If the order stands, and guardians are appointed under it, there seems to be an almost absolute certainty that the infant must remain under their care, and that her property must be administered in the Court of Chancery during the whole period of her minority. I conceive that the **[144]** case ought to be disposed of as if there had been, as there might have been, a petition for the appointment of guardians without any bill being filed; in which case the Court must have considered whether, in respect of the person or property of the infant, any case was made for the appointment of guardians. The bill was palpably and avowedly filed merely for the appointment of guardians, and it does seem very strange that the mere filing of the bill should render it inevitably necessary that guardians should be appointed. This argument applies with equal strength whether the father of a foreign infant be alive or dead, and whether the infant resides within or beyond the jurisdiction of the Court.

Upon the whole, I am strongly of opinion that the petition for the appointment of guardians ought to have been dismissed by the Lord Chancellor, and ought now to be dismissed by this House.

I was much struck by the objection at one time made, that by setting aside the order of the Lord Chancellor we must set up the second order of the Vice-Chancellor, against which there is no appeal. We have been asked by the learned counsel for the Respondent to disregard technical objections, and to decide the case on the merits of the application for the appointment of guardians. Independently, however, of any waiver, upon consideration I think the objection could not be supported. Upon a writ of error from the Courts of Common Law, your Lordships, as the ultimate Court of Error, are to look to the whole record, and to pronounce the judgment which the Courts below ought to have pronounced. I conceive that the same principle guides your Lordships upon appeals from Courts of Equity. The Lord Chancellor was to consider what order ought **[145]** to have been made by the Vice-Chancellor; and, very properly disapproving of both the orders made by the Vice-Chancellor, he might have made an order for dismissing the petition, if he thought that that was the order which the Vice-Chancellor ought to have made. The order which the Lord Chancellor could and ought to have made, it is now the duty of your Lordships to make.

I am aware that, as my noble and learned friend, from whose order this appeal is brought, has not altered his opinion as to the propriety of the order, a majority of the noble and learned Lords who offer advice to your Lordships on this occasion, think that the order ought to be affirmed; but, differing from them, and being obliged to give my voice for reversing the order, I have thought that I should act respectfully to them, and in the discharge of my public duty, by stating fully the reasons on which my opinion is founded, in a case of such difficulty and magnitude.

Lord Langdale:—Amidst the differences of opinion which exist in this case, it is satisfactory to me that no doubt is thrown upon the jurisdiction of the Court of Chancery to appoint guardians for any infant residing in England. The whole property of an infant may be situate in a foreign country, and tutors and curators of the person and estate of the infant may have been duly appointed according to the law of the country where the property is; and yet it may be evident that, without the authority of a guardian duly appointed here, and subject to the control of the Court of Chancery, the infant may be without the protection which may be absolutely necessary for its welfare, and even for its safety. **[146]** The jurisdiction being indisputable, the exercise of it in particular cases becomes a matter of discretion and expediency, depending on the peculiar circumstances of each case; and it is alleged that in this case the Court of Chancery ought either to have

appointed the Scotch tutors and curators to be guardians, as was done by the second order of the Vice-Chancellor, or ought otherwise to have refused to interfere at all, because no misconduct was imputed to the tutors and curators.

The case, as far as it is known,—and I beg emphatically to say, as far as it is known, for the case is still subject to inquiry and investigation, and is of course but imperfectly known, appearing only on the affidavits of the parties, the effect of which may be materially altered,—but the case, so far as it now appears, is of the most simple description. An infant, whose whole property is alleged to be in Scotland, and whose tutors and curators are usually resident in Scotland, is now resident in England and entitled to the protection of the English laws. Her grandfather, also resident in England, assuming, as he has a perfect right to do, to be the next friend of his grandchild, files a bill in her name in the Court of Chancery, praying, amongst other things, that her fortune and person may be protected by the Court, and that proper directions may be given for her maintenance and education. It may have been right or wrong to institute this suit. The usual and proper mode of trying that question is to apply to the Court of Chancery on behalf, of the infant, to have it inquired into and ascertained whether the suit is beneficial or prejudicial to the interests of the infant. If upon inquiry it appears to be contrary to the interests of the infant that the suit should be prosecuted, the **[147]** Court stays the further prosecution of it, and charges the costs upon those by whom the suit has been improperly commenced; but in this case there has been no application made for any such inquiry, and upon the bill being filed the infant became a ward of the Court of Chancery; and at the same time it became the duty of the Court to protect her interests, or to see that they were duly protected. The usual and regular mode of doing this is by appointing guardians. It is true that if an infant be improperly detained by any unauthorized person, the Lord Chancellor may, by writ of *habeas corpus*, have the infant brought before him and set free. But upon a *habeas corpus* I apprehend that the Lord Chancellor has no more authority than is possessed by a Judge at common law; and for the protection of the infant, that authority is of a very different kind and of greatly inferior efficacy to that which is possessed by the Court of Chancery on the appointment of a guardian.

The order complained of refers it to the Master to approve of proper persons to be guardians, to inquire and state the infant's age, what relations she has, and the nature and amount of her fortune, and on what grounds he approves of any particular persons to be guardians; and he was to consider a scheme for the residence of the infant, and what would be proper to be allowed for her maintenance and education. This is very nearly the order which, in ordinary cases, is made by the Court for the protection of infants, within its jurisdiction, on whose behalf its protection is required. The guardians appointed under such orders are properly to be considered, as has been stated by my noble and learned friend, as officers of the Court appointed to carry its intentions into effect and to act under its control for the benefit of the infants. **[148]** In approving of guardians under the order, the Master is bound to use his best discretion to make all necessary and proper inquiries, and to take all the circumstances of the infant into his consideration. The Scotch tutors and curators, whom I assume for the purpose to have been properly appointed, being out of the jurisdiction and consequently not subject to the control and authority of the Court, it would not seem to be consistent with sound discretion to appoint them sole guardians, unless other arrangements could be at the same time made to secure for the infant that protection which it is the duty of the Court to afford.

But it may be admitted, and I think properly, that the appointment of tutors and curators by the father, though it may not be valid in England, is entitled to the greatest and most attentive consideration, and that the Court of Chancery would be strongly inclined to act upon it so far as it could consistently with its duty of maintaining that authority over the infant which is so entirely necessary for the protection of the infant while in England. One obvious mode of attending to the appointment made by the father of tutors and curators resident in Scotland, and at the same time of securing the authority and control of the Court over the person of the infant while in England, would be to associate in the guardianship some

persons residing in England, with the tutors and curators residing in Scotland; and when we are considering a case of discretion, it is important to observe that an offer of this kind was made to the complaining parties by the Lord Chancellor, before he pronounced the order now in question.

It has been supposed that the order will lead to a direct conflict between the laws or the Courts of **[149]** England and Scotland, and that the order is so expressed as wholly to exclude the Scotch tutors and curators from the office of guardians. I conceive this to be wholly erroneous; we ought to presume that the Courts of England and Scotland will be equally anxious to do that which may appear to be most beneficial to the infant. The person is in the one country, the property is said to be wholly in the other. Instead of conflicting with one another, why should not the respective Courts of the two countries be mutually assistant in promoting their common object? We are not to presume the existence of any feeling likely to prevent them from so acting as to promote the common object, in the manner authorized by their respective and independent jurisdictions and forms; and although it is not to be expected that either the Master would approve or the Court appoint persons resident out of the jurisdiction to be sole guardians; yet there is nothing in the order to prevent the Scotch tutors and curators from proposing themselves to be guardians together with one or more persons resident in England, who might also be proposed by themselves, approved of by the Master, and appointed by the Court; and in the peculiar circumstances of this case it may possibly appear, upon the inquiry before the Master, that it would be beneficial to the infant to have guardians both in England and Scotland.

One part of the order requires the Master to consider of a scheme for the residence of the infant; and it being supposed in the argument that there is some general and inflexible rule binding the Court to keep its infant wards within the jurisdiction, it is thence inferred that under this order the Master cannot consider whether the infant ought at any time to be per-**[150]**-mitted to reside in or to visit Scotland. It is undoubtedly a general and useful rule that an infant ward is not to go out of the jurisdiction without special leave, and in the absence of special circumstances; but when special circumstances occur—and it may appear by the Master's report that they exist in this case—the special leave is always given. There are infant wards of the Court now abroad with leave given, sometimes for the general benefit of the infants, sometimes for the sake of health or peculiar instruction, and even for the sake of amusement. The infants who become wards of the Court of Chancery have indeed great and peculiar protection, but they are not debarred of any freedom or of any advantages which the most careful, considerate, and liberal parent would desire his child to possess.

Those who imagine that the Court acts necessarily upon any fixed and inflexible rules in the management of infants, appear to me to forget the paternal and discretionary nature of the jurisdiction, the great care and anxiety with which the interests of the infant wards are constantly attended to, the changes of regulation which are so easily made even from day to day, if required by a change of circumstances, and the extent to which all technical and positive rules are made to bend to the peculiar circumstances which may be from time to time presented by individual cases.

I consider it to be premature and useless to speak of plans of management, and the consequences of them, or the difficulties of carrying them into execution, till the subject has been fully investigated, and the facts are ascertained and stated, and the plan is proposed in the Master's report. But I may perhaps be allowed to observe, that if it should ultimately **[151]** appear most beneficial to the infant to reside sometimes in Scotland, sometimes in England, if guardians were appointed, some or one of them resident in England and some or one of them resident in Scotland; and if it should unhappily become necessary to call upon the Courts of the two countries to exercise their powers, I know of nothing which would render it impracticable for the English Court of Chancery to order the guardian resident in England to deliver up the infant to the guardian resident in Scotland. And why should we doubt that the Scotch Courts would consider beneficial to the infant the same course of management, which upon evidence and consideration had been approved by the English Court of Chancery; and, if necessary, order the guardian resident

in Scotland, being the tutor or curator there, to deliver up the infant to the guardian resident in England? I cannot anticipate differences of opinion, or that either of the Courts would have any difficulty in directing that which would be most beneficial to the infant. It is not reasonable to suppose that the guardians to be appointed under the order will conflict, or that the Courts of the two countries will conflict in such a matter. It is possible that in carrying out any scheme difficulties may arise, more especially if those whose duty it is to concur in all things for the benefit of the infant should refuse or neglect to do so. If difficulties should occur, they must be met as they best may, by adopting that course which under the circumstances shall appear to be for the benefit of the infant; but at present it does not appear to me that there is any difficulty whatever. The infant is here, and entitled to the protection of the Court of Chancery; and it is amongst other things, to be inquired where she ought to reside. **[152]** Whether she ought to remain here or to be sent to Scotland, it is in either case necessary to appoint a guardian who may have a legal control over her person, to protect her whilst here, or, if proper, to deliver her to the person duly appointed to protect her in Scotland.

It has been stated that it would be unsafe and imprudent to take the infant to reside in Scotland, and the tutors and curators have expressed no intention to remove her to Scotland; and in this state of things the complaint made of this order is somewhat singular. The tutors and curators seem to say that the infant ought to be in England, where she cannot be protected by the Courts of Scotland, which have no jurisdiction over her person in England. At the same time they say that she ought not to be protected by the Courts of Chancery in England; and therefore that in the result she ought to be left in England to the care or neglect of the tutors and curators resident in Scotland, free from the control of or responsibility to the laws relating to guardianship which prevail in either country.

My Lords, for the reasons which I have stated, I am of opinion the order complained of ought to be affirmed.

Lord Brougham:—I have listened with the greatest attention to the arguments of my noble and learned friends, and I retain my opinion. But I desire to have it distinctly understood that the argument on the supposed inconsistency of the order with the treaty of Union forms no part of my reasons; I disclaim it entirely, and think it puerile and absurd. As well might it be said to be against the treaty of Union that the Court of Queen's Bench should enter-**[153]**-tain an action of *assumpsit* on a judgment of the Court of Session; or that its referring to and upsetting that action, on the ground of the parties having been decreed against without any notice of the suit, as was once determined in a like action on a West India foreign judgment, was against the treaty of Union.

But I desire to ask a question of my noble and learned friends, who have contended for protection to infants, upon the ground that an application to the Great Seal will always ensure the fullest liberty to the Scotch ward. Will they be pleased to tell me this: Suppose a Scotch ward, Lady Loudon for instance, late Marchioness of Hastings, 20 years of age, but under 21, and having Scotch honours and estates, were made a ward of Court here, would the Court of Chancery for a moment listen to her application for leave to go to Scotland and there marry the man of her choice, and make the settlement she chose on him and his issue, as the settlement her Scotch guardians chose; and would she be suffered to marry and to settle as she and they pleased, without leave first had and obtained of the Court of Chancery here? This question I desire to have answered by those who hold that it makes no kind of difference in a person's position to be made a ward of Court.

The judgment of the House was, that the appeal be dismissed, and the order complained of affirmed.

Mr. Follett asked that the costs of the Respondent in the appeal might be costs in the cause.

The Lord Chancellor:—The House makes no order as to the costs of the appeal.