suffered, without lessening them on account of the circumstances under which it was inflicted; that if they gave damages beyond a compensation for the injury actually sustained they would give too much, but that if they gave less they would not give enough.

The jury found a verdict for 500l. being all the damages laid in the declaration.

Shepherd, Serjt., now moved for a rule calling on the Plaintiff to shew cause why this verdict should not be set aside and a new trial be had, on the ground of the damages being excessive, and because the jury ought not to have been directed to exclude from their consideration those circumstances which tended to shew the necessity of that punishment being inflicted which was the cause of the action; for that although the Plaintiff might perhaps be entitled to some damages, since the circumstances alluded to did not amount to a legal defence, yet the Defendant had a right to the benefit of those circumstances by way of mitigation (*a*)[1].

[226] But The Court were of opinion that his Lordship's direction was perfectly right in point of law, and that it did not appear from the report that the damages given by the jury were excessive.

Shepherd took nothing by his motion.

MARSH *v.* HUTCHINSON. June 21st, 1800.

An Englishman employed in the service of the British Government, residing in a foreign country and having lands there, upon the cessation of his employment in consequence of war between the two countries, sent his wife and family to this country, but continued to reside abroad himself. Held, that the wife not having represented herself as a feme sole was not liable to be sued as such (*a*)[2].

This was an action for goods sold and delivered by the Plaintiff to the Defendant. Plea non assumpsit.

The cause was tried before Marshall, Serjt., at the summer assizes for Norfolk, 1799: the Plaintiff's demand was for coals supplied to the Defendant during the last

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(*a*)[1] Upon this subject there seems to be some contradiction in the books. Thus in assumpsit and non assumpsit pleaded, a discharge was admitted in evidence by Hale, Ch. J., in mitigation of damages; though he said that exoneravit ought to have been pleaded. *Abbot* v. *Chapman*, 2 Lev. 81. In like manner a release was admitted; *Beckford* v. *Clarke*, 1 Sid. 236. And Holt, Ch. J., in case for words allowed the truth of the words to be given in evidence in mitigation of damages. *Smithies* v. *Dr. Harrison*, 1 Ld. Ray. 727. But the more reasonable rule seems to have been laid down by Price, Baron, in a case of *Dennis* v. *Pawling*, An. Do. 1716, Vin. Abr. tit. Evidence (l. b.), pl. 16, who in case for words refused to admit any thing in evidence which tended to justify the words, though in mitigation of damages only; saying, "that any thing which tended to shew a provocation or any transaction between the parties giving occasion for speaking the words was proper in the Defendant to make out, because these matters cannot be pleaded." Indeed so early as 21 H. 8, in trespass quare clausum fregit and not guilty pleaded, where the Defendant offered to give in evidence that the trespass was committed by his cattle through the default of the Plaintiff's fences, and this evidence was rejected because the matter ought to have been pleaded, the Defendant's counsel urged that it might be received in mitigation of damages; but Shelley, J., would not allow it, lest the jury should be induced to find a verdict contrary to law, and thereby incur an attaint. Keilw. 203 b. Subsequent to the case of *Smithies* v. *Dr. Harrison*, viz. in Mich. 17 Geo. 2, Lee, Ch. J., refused to allow the truth of words spoken to be proved in mitigation of damages, saying, that at a meeting of all the judges, a large majority of them had determined not to allow it in future, but that it should be pleaded, and that this was now a general rule. *Underwood* v. *Parks*, 2 Str. 1200, in support of that part of the proposition laid down by Price, Baron, that what cannot be pleaded may be given in evidence, the case of *Coote* v. *Berty*, 12 Mod. 232, may be referred to, where it was said, that in trespass for criminal conversation with the Plaintiff's wife, licence of the husband, or the bad character of the wife could not be pleaded in bar, but that those matters might be given in evidence in mitigation of damages. Vid. tam *Bingham* v. *Garnault*, cor. Bull. Esp. N. P. 337.

(*a*)[2] Vide *Bogget* v. *Frier*, 11 East, 301, *Kay* v. *Pienne*, 3 Campb. 123.

three or four years, and the defence was coverture. It appeared that the Defendant's husband was an Englishman; that in 1783 he left this country, and had occasionally been here since that period; but that about ten years ago having purchased the appointment of agent for the English packets at the Brill in Holland, he had resided there ever since; that he was possessed of madder grounds in that country, from the cultivation of which he derived considerable profit; that on the irruption of the French into Holland in 1795, his employment as agent having ceased, he sent the Defendant together with his wife and family to reside in this country, but remained himself in Holland to look after his madder grounds, and also with a view to recover his situation if the intercourse between England and Holland should be re-established; that the Defendant lived at Aylsham in Norfolk, and was there considered to be a married woman. Upon this the Plaintiff's counsel insisted that the Defendant's husband being domiciled in a foreign country from which he was not likely to return, the Defendant must be treated as a feme sole, and therefore capable of making contracts to bind herself. The learned Serjeant directed the jury to ascertain the amount **[227]** of the demand; but conceiving that the Defendant had sufficiently proved her coverture, and that her husband's residence in Holland did not, under all the circumstances, enable her to bind herself by her own contract as a feme sole, nonsuited the Plaintiff, with liberty to move to set that nonsuit aside, and enter a verdict for the Plaintiff to the amount ascertained by the jury.

Accordingly in Michaelmas term last a rule nisi having been obtained for that purpose,

Sellon, Serjt., shewed cause, and after observing that the cases respecting coverture might be divided into two classes, first, that of separate maintenance secured to the wife; secondly, that which proceeded on the old exceptions of abjuration, and exile; said, that he should dismiss the consideration of the former altogether: with respect to the second class, he argued that the principle on which they proceeded was, that the husband had it not in his power to return to this country. *Margery Weyland's case*, Ryley, Plac. Parl. 66. *Lady Maltraver's case*, 10 Ed. 3, 53. *Sybell Belknap's case*, 1 H. 4, 1 a. *Countess of Portland* v. *Prodgers*, 2 Vern. 104. *Sparrow* v. *Carruthers*, cited 2 Bl. 1197, 1 T. R. 7. He observed that the more modern authorities had been determined on the foundation of a case, upon which more stress had been laid than it deserved; namely, *Deerly* v. *The Duchess of Mazarine*, 1 Salk. 116, 2 Salk. 646; for that in fact that case was not decided on a principle of law but on an equitable point of practice: the reporter himself having entitled it in the margin, "New Trial not granted for mistake in point of law, against the equity of the case;" that it was also thrown out there that the husband was an alien, and that a divorce might be intended, and indeed Lord Camden in the case of *Goslin* v. *Wilcock*, 2 Wils. 308, had declared, that "the jury in the case of *Deerly* v. *The Duchess of Mazarine* were liable to an attaint;" that moreover in *Walford* v. *Duchesse de Pienne*, Esp. Cas. N. P. 554. *Franks* v. *Duchesse de Pienne*, ib. 587, and *De Gaillon* v. *L'Aigle* (ante, vol. i. 357), the distinction was taken that the husband was an alien; that in those cases there was a complete desertion of the kingdom by the husband, and no animus revertendi to be presumed, whereas the husband in the present case being an Englishman, must be presumed to have the animus revertendi.

[228] Lens, Serjt., contrà, argued, that as in this case it did not appear that the Defendant on the one hand represented herself as a single woman, or that the Plaintiff on the other knew the circumstances of her situation, the question, Whether the latter were entitled to sue the former as a single woman? must depend upon a sound construction of that modification of the rule of law, that a feme-covert cannot be sued, which had already prevailed; that the first class of cases alluded to on the other side, proved that the general rule of law was subject to modification; and that the second class of cases, some of which were as ancient as the time of Edward the First, were in principle directly applicable to the present; that principle being, that where the husband is beyond the process of the Courts, and therefore not amenable to them, the rule of law ceases, that the liability of the wife is transferred to the husband: that though in *Deerly* v. *The Duchess of Mazarine* one point decided was, that the Court would not grant a new trial against the equity of the case, yet that another principle to be drawn from that case is, that the wife of a person not within the reach of the law is liable to be sued; that on the same principle proceeded the more modern cases of *Walford* v. *Duchesse de Pienne*, *Franks* v. *Duchesse de Pienne*, and *De Gaillon* v.

L'Aigle; that whether the husband be a foreigner or an Englishman can make no difference, provided he be beyond the jurisdiction of the Court that it mattered not whether the absence of the husband be for life or a shorter period, since it appeared both from *Belknap's case* and from *Sparrow* v. *Carruthers*, that a temporary suspension of the capacity of the husband to be sued, restored to the wife her liability for her own contracts; that the mere circumstance of the husband, in this case, being an Englishman, could not raise the presumption of an animus revertendi, he having been so long absent, having purchased property in Holland, and being domiciled there; and that such a presumption, if it could be raised, would be rebutted by his having made his election to remain in Holland, at the time when he found it necessary for temporary security to send his wife and family to England.

LORD ELDON, Ch. J. Suppose an Englishman going over to Holland, and residing there as agent for the British packets, should continue engaged in that single employment for 20 years, and should then die there, is it clear that his personal effects ought to be distributed according to the law of Holland? In the case of **[229]** *Bruce* v. *Bruce* (*a*) which I argued in the House of Lords, the question was, Whether the

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(*a*) The Reporters have been favoured with the following note of that case.

(IN THE HOUSE OF LORDS.)

Elizabeth and Margaret Bruce daughters of David Bruce deceased, and James Hamilton husband of the said Margaret, *Appellants.*

James Bruce, *Respondent*, April 1790.

William Bruce, son of the late Mr. Bruce of Kinnaird, left Scotland when young, and was for some years in the navy. In 1767, he went to the East Indies in the military service of the company, and continued there till his death in 1783, having risen to the rank of a major. In many letters to his friends in Scotland he expressed an anxious desire to return and spend the remainder of his life in his native country; particularly he wrote to that purpose a few months before his death, and he was in the course of remitting home his money, meaning soon to follow it himself, when he died. At that time a part of his fortune was in the hands of people in England, and he had remitted a considerable sum to his attornies in Scotland, in bills on the India Company, which were on the way home at the time of his death. Having made no will, the question arose, Whether his effects were to pass according to the distribution of the law of England, in which case Mr. Bruce of Kinnaird, his brother of the half blood, would have a share; or the law of Scotland, which prefers the whole blood exclusively. It was insisted by Mr. Bruce, that according to a long train of decisions in the Court of Session [1], (with an exception in the year 1744) [2], the law of the place where the effects are situated is the rule, and he contended that here the money was either actually in England or in bills due by the English East India Company; and even if the domicile of the deceased be the rule, Major Bruce was at the time of his death domiciled in India, a country subject to the laws of England. On the other hand, the brother and sisters of the full blood pleaded, that according to the Law of Nations, adopted in cases of this kind by all the countries of Europe, and by the civil law, the distribution of the personal estate of an intestate is to be governed by the law of the place where he had his domicile, and that a man could not have a domicile, but at a place where he had taken up residence with intention to remain; that Major

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[1] The authorities in the Scots law referred to were, Henderson's Bairns Durie, 88. *Melvill* v. *Drummond Durie*, 723. *Schaw* v. *Lewins*, 1 Stair's Decisions, 252. *Brown and Duff* v. *Bizet*, 1 Stair's Dec. 398. Dirleton's Dec. 10, S. C. *Brown* v. *Brown*, Lord Kilkerran, voce Foreign, fo. 199. Falconer, 11, S. C. *Morrison* v. *Sutherland*, Lord Kilkerran, voce Foreign, fol. 209. *Mortimer* v. *Lorimer*, Erskine's Institute, fol. 601, in notis ed. 1773. *Davidson* v. *Elcherson*, Faculty Collection, 13th January 1778. *Maclean* v. *Henderson*, ibid. eod. die. Erskine's Institute, B. iii. tit. 9, s. 4. Lord Kaim's Princ. of Equity, B. iii. c. 8, s. 4. The authorities in the Law of Nations referred to in the above case, are collected in *Hunter* v. *Potts*, 4 T. R. 184, in notis; in the argument of which last case may also be found the authorities in the Law of England which bear upon the subject.

[2] *Brown* v. *Brown.*

personal estate of a Scotsman who [230] had died in the East Indies, in the service of the Company, should be distributed according to the law of Scotland, which was [231] his domicilium originis, or of the province of Canterbury which extends to the East Indies? Lord Thurlow in his judgment adopted this distinction; that if he had

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Bruce never intended to remain in India, and had no fixed habitation there, and therefore Scotland, where he was born, and to which he expressed his resolution to return, and was actually preparing to go, was his country, and in the eye of law the place of his domicile all along. The Lord Ordinary (Lord Monboddo) pronounced the following interlocutor: "Finds, 1mo, That as Major Bruce was in the service of the East India Company, and not in a regiment on the British establishment which might have been in India only occasionally, and as he was not upon his way to Scotland nor had declared any fixed and settled intention to return thither at any particular time, India must be considered as the place of his domicile. 2do, That as all his effects were either in India or in the hands of the East India Company, or of others his debtors in England, though he had granted letters of attorney to some of his friends in Scotland, empowering them to uplift those debts, his res sitæ must be considered to be in England: therefore finds, that the English law must be the rule in this case for determining the succession of Major Bruce, and consequently that James Bruce of Kinnaird is entitled to succeed with the defenders his brother and sisters consanguinean; and decerns and declares accordingly.

The Court of Session having affirmed the Lord Ordinary's interlocutor, the children of the full blood entered their appeal.

After counsel on both sides had been heard, the Chancellor (Lord Thurlow) spoke to the following effect: That as he had no doubt that the decree ought to be affirmed, he would not have troubled their Lordships by delivering his reasons, had it not been pressed with some anxiety from the bar, that if there was to be an affirmance the grounds of the determination should be stated, to prevent its being understood that the whole doctrine laid down by the interlocutor appealed from, and particularly that on which it was said the judges of the Court of Session proceeded principally in this and former cases similar to it, had the sanction of this House. It had been urged that the judgment should contain a declaration of what was the law, and he had revolved in his own mind whether that would be expedient. It was not usual in this House, or in the courts of law, to decide more than the very case before them, and he had particular reluctance to go farther in the present case, because, as had been stated with great propriety by one of the Respondent's counsel, various cases had been decided in Scotland upon principles, which if this House were to condemn, a pretext might be afforded to disturb matters long at rest. But he could have no objection to declare what were the grounds of his own opinion, and how far he coincided with the rules laid down by the Court below. Two reasons were assigned for having declared that the distribution of Major Bruce's personal estate ought to be according to the law of England: 1st, That India, a country subject to that law, was to be held as the place of his domicilium, and certain circumstances were mentioned from whence that was inferred; these he considered only as circumstances in the case, and not as necessary circumstances; that is, though these had been wanting, the same conclusion might have been inferred from other circumstances. In his mind, all the circumstances in Major Bruce's life led to the same conclusion. The 2d reason assigned by the interlocutor was, That the property of the deceased, which was the subject of distribution was, at the time of his death, in India or in England. As to this he founded so little upon it, that he professed not to see how the property could be considered as in England. It consisted of debts owing to the deceased, or money in bills of exchange drawn on the India Company. Debts have no situs, they follow the person of the creditor. That proposition in the interlocutor therefore fails in fact. But the true ground upon which the cause turned was, the deceased being domiciled in India. He was born in Scotland but he had no property there. A person's origin in a question of, Where is his domicile? is to be reckoned as but one circumstance in evidence which may aid other circumstances; but it is an enormous proposition that a person is to be held domiciled where he drew his first breath, without adding something more unequivocal. A person's being at a place is primâ facie evidence that he is domiciled at that place, and it lies on those who say otherwise to rebut that evidence. It may be rebutted no doubt. A person travelling;—on a visit;—he may be there for some

gone out in a King's regiment, and died in the King's service, his domicile would not have been changed: but that having died in the service of the Company, it was changed. Had the Defendant's husband been engaged in the service of government only, it might have made a material difference in the case. The question however in the view of the law may perhaps be reduced to this, Whether the Defendant's husband having been employed in Holland by the British government, he has remained there after the cessation of that employment merely to collect what the civilians call summas rerum, or with any further views? And yet if it were clear that this man never intended to return to England, and might therefore be represented as incapable of being sued in this country, before we come to a conclusion upon the case, there are many considerations to be weighed. In the case of abjuration, and in those other cases which amount to a civil death, I think that I understand the situation in which the wife was placed. The husband being civilly dead, the wife was entitled to dower of his land in the same manner as if he were actually dead (*a*); so she became entitled

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time on account of his health or business;—a soldier may be ordered to Flanders, and be detained at one place there for many months;—the case of ambassadors, &c. But what will make a person's domicile or home, in contradiction to these cases, must occur to every one. A British man settles as a merchant abroad; he enjoys the privileges of the place; he may mean to return when he has made his fortune, but if he dies in the interval, will it be maintained that he had his domicile at home? In this case Major Bruce left Scotland in his early years; he went to India; returned to England, and remained there for two years without so much as visiting Scotland, and then went again to India and lived there sixteen years and died. He meant to return to his native country it is said, and let it be granted; he then meant to change his domicile, but he died before actually changing it. These (His Lordship said) were the grounds of his opinion, though he would move a simple affirmance of the decree, but he would not hesitate as from himself, to lay down for law generally, That personal property follows the person of the owner, and in case of his decease must go according to the law of the country where he had his domicile; for, the actual situs of the goods has no influence. He observed that some of the best writers in Scotland lay this down expressly to be the law of that country; and he quoted Mr. Erskine's Institute as directly in point. In one case it was clearly so decided in the Court of Session, and in the other cases which had been relied on as favouring the doctrine of lex loci rei sitæ, he thought he saw ingredients which made the Court, as in the present case, join both domicilium and situs. But to say that the lex loci rei sitæ is to govern though the domicilium of the deceased be without contradiction in a different country, is a gross misapplication of the rules of civil law and jus gentium, though the law of Scotland on this point is constantly asserted to be founded on them."

Decree accordingly affirmed simply.

(*a*) This is supported by the authority of Bracton, lib. 4, Tract. 6, c. 7, fo. 301 b. Britton, cap. 106, fo. 251, and Fleta, lib. 5, cap. 28. In these books the wife seems to have been considered as equally entitled to dower in the case of a civil as of a natural death. With respect to entering into religion, they treat the wife as dowable where the husband is actually professed, though not where he is in a state of probation only; and lay it down that the fact of profession in such case must be tried by the certificate of the ordinary. It was said, however, in M. 32 Edw. 1, Fitz. Abr. tit. Dower, pl. 176, by Bereford, that although the husband be professed, the wife shall not have her dower until his natural death; this doctrine has been adopted in F. N. B. 150. F. Co. Litt. 33 b. 132 b. Perkins, Sect. 307. Hale's MSS. Co. Litt. Book 1, Note 205, Ed. 15, and Gilbert Treat. on Dower in Law of Uses, 401. The reason assigned in most of these books is, that the wife, by withholding her consent, might prevent her husband from becoming professed: Lord Chief Baron Gilbert treats profession as a separation, not a dissolution of the marriage, and observes, that although the ecclesiastical law gave alimony during the life of the husband, yet she could have no separate interest by way of dower while the marriage continued. Sir Edward Coke, indeed (1 Inst. 33 b.), goes so far as to lay it down generally, that dower arises on the natural, not on the civil death of the husband. This dictum, however, he no otherwise supports than by instancing the case of profession, which exception, if well founded, seems to proceed upon reasons not altogether applicable to the cases of abjuration and exile. With respect to abjuration for felony, though the

to the enjoyment [232] and profits of her own land, though if he had not been civilly dead, he would have been seised of the lands in her right (*a*): and indeed she might have sued for an assault in her own name, and might have been made a Defendant without her husband, in all cases in which the husband must otherwise have been joined. In those cases there is no difficulty, because the fiction of law which considers the husband as civilly dead, puts the wife in the same situation as if he were actually dead. With respect to the more modern cases, in which a separate maintenance has been secured to the wife, or in which the husband has left the kingdom either with or without the power or intention of returning, and in which the wife has been held capable of suing and being sued alone, I wish to know to what extent the principle goes on which they have proceeded: whether under such circumstances a married woman is to be considered as a feme sole on a principle which stops short as a matter of contract, or on a principle which goes to a greater extent and obliges us to consider her as a feme sole to all intents and purposes. Undoubtedly, the policy of the law which has considered a married woman as incapable of being called upon separate from her husband, admits of some modifications arising from particular circumstances. When the husband is banished he is considered as civilly dead; but transportation for a term of years may give rise to many difficulties with respect to the enjoyment of the husband's estate, both real and personal. But besides the difficulties which might arise during the term of the transportation, another difficulty of equal importance occurs where the wife has contracted debts after the period of her husband's transportation has elapsed, but before his actual return to this country. The case before us must be decided on some principle which will govern such a case as that. Though the case of *Sparrow* v. *Carruthers* was decided by Mr. Justice Yates (a name that will be illustrious as long as the law of England [233] remains), yet as far as his opinion can be collected, he seems to have treated it as a material circumstance in evidence, that the time of the transportation was not out; and he does not give any opinion as to what would have been the situation of the parties if it had been out. We cannot presume to say how he would have decided had the husband continued to reside abroad after the period of his transportation had expired, or had only remained there to collect his affairs with a view to return to this country when he had so done.

HEATH, J. There is a great difference between the cases of an Englishman residing abroad, leaving his wife in this country, and of a foreigner so doing. The former may be compelled to return at any time by the King's privy seal; but in the old cases of banishment and abjuration, as well as in the more modern one of transportation, the husband could not return, as it would have been contrary to law. There is no case in which the wife has been held liable, the husband being an Englishman.

As the case of *Marshall* v. *Mary Rutton*, 8 T. R. 545, in which it was expected that the whole doctrine respecting the liability of a feme covert to be sued would be fully discussed, was then pending before the twelve judges, the Court desired that this case might stand over until that had been determined.

And on this day Lord Eldon, Ch. J., said, that after all the discussion which the doctrine had undergone, the court could see nothing to induce them to think that the direction given to the jury in this case was wrong.

Per Curiam. Rule discharged.

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dower of the wife was originally forfeited by the attainder with which it was attended, yet as the 1 Ed. 6, c. 12, removed that forfeiture, it should seem that between that time and the 21 Jac. 1, c. 28, which abolished the privilege of sanctuary and consequently put an end to abjuration altogether, the wife might have been entitled to dower on this civil death of the husband. Supposing this to have been the case, the same consequence would naturally ensue a transportation for life at the present day.

(*a*) So a jointress was entitled to her jointure upon the abjuration of her husband, *Margery Weyland's case*; so if the husband aliened the land of the wife, and afterwards abjured the realm, she might have had a cui in vitâ. Co. Litt. 133 a. But in the case of profession, if the wife aliened the land which was in her own right, and then deraigned her husband, he might enter and avoid the alienation. Hil. 33 Ed. 3, Fitz. Ab. tit. Entrè congeable, pl. 52. Co. Litt. 132 b.