his report; which, if it had been done, would have brought it up to the case of a judgment at law. Upon this course of authorities, setting aside the matter of form, which does not apply to this Court, whether the costs are a duty, or not, I think, it is fairly open. The Court had created that duty. The Court has determined, that the Plaintiff had a good equitable title, as he certainly had a good legal title, to have these deeds set aside. This Court having directed the trial, the party having properly sought his relief here, which I suppose he was obliged to do from not being able to give evidence at law, and prevailing in both cases, it would be very hard, if all the expence of the recovery should be entirely lost. That case before Lord *Camden* cannot be distinguished from this. If there upon the ground of a duty, which ought to be discharged by the Defendant, the Plaintiff's representatives had by the judgment a vested right to recover the costs, there can be no reason for me not to follow that, and establish it so far at least, that where the Plaintiff dies after a judgment for costs, though not taxed at his death, he may by a decree for revivor have those costs. When the case occurs of an abatement by the death of the Defendant, as to which I determine nothing, it will then be fit to consider, whether the inconvenience of drawing the account of assets in this Court will prevail against the principle, that seems very just and very fit to be followed.

BEMPDE *v.* JOHNSTONE. GRAHAM *v.* JOHNSTONE. *June 12th*, 1796.

The personal property of an intestate, wherever situated, must be distributed by the law of the country, where his domicil was; which is *prima facie* the place of his residence: but that may be rebutted and supported by circumstances.

George, late Marquis of *Annandale*, died in 1792, intestate, without issue, and a lunatic. The question, upon which these causes were instituted, was, whether his personal property, which was very considerable, should be distributed according to the law [199] of *England* or of *Scotland*. Sir *Richard Johnstone Vanden Bempde* and *Charles Johnstone*, half brothers of the Marquis on the side of his mother, and Lady *Christian Graham*, only surviving issue of *Henrietta*, late Countess of *Hopetoun*, half sister of the Marquis on the side of his father, were his next of kin by the law of *England*; and Lady *Christian Graham* alone was entitled by the law of *Scotland*. The material facts were these. *William*, Marquis of *Annandale*, in 1718, his first wife having died in 1716, married the daughter of *Vanden Bempde*; and by her had two sons *George* and *John*. He was one of the sixteen peers elected to represent the peerage of *Scotland*. After his second marriage he never returned to *Scotland*; but lived at *Whitehall* and *Ashsted* in houses, which he rented. He died at *Bath* in 1721. Upon the death of his eldest son *James*, in 1730, *George*, his eldest son by the second marriage, succeeded to the title. He was born in 1720 at his father's house in *London*. He continued there, till he was sent to *Eton*; where he remained till 1734; except in the vacation; when he visited his mother in *London*. Leaving *Eton* he went abroad, and continued abroad in different places till 1738; when he returned to *London*; whence in a few days he went to *Scotland*. He continued there a little more than a month; then returned to *London*; remained there about two months; and then went abroad. He continued abroad in different places till *December* 1739; when he returned to *England*; and he remained in *London* till *April* 1740. Then he went to *Scotland*. The beginning of *October* he returned to *England*. In *May* 1741, he again went to *Scotland*: he returned to *England* about the middle of *July*; and in *January* 1742, he went abroad. In *November* he returned to *England*; and remained there till *December* 1743; except that he was in *Paris* a fortnight or three weeks in that year. In *December* 1743, he went abroad. In the middle of *April* 1744, he returned to *England*; and remained there till his death. In 1747 a commission of lunacy issued against him; and he was found a lunatic from *December* 1744. By the will of his maternal grandfather *Vanden Bempde* a very narrow allowance was given to the Marquis and his brother, till they should attain the age of twenty-three; and, after either had attained that age, the trustees were directed to settle the estates upon such of them, as they should think fit, and his heirs male; and in default of appointment they were devised to Marquis *George* and his issue male in strict settlement, with several remainders over. The [200] trustees making no appointment, the Marquis became entitled under that will to the estates devised, including *Hackness Hall* in *Yorkshire* and a house in

Pall Mall. He did not become possessed of property in *Scotland* till 1733 or 1734 after a long litigation with the *Hopetoun* family upon the effect of a settlement by Marquis *James.* The journey of Marquis *George* to *Scotland* in 1741 was for the purpose of procuring his brother to be elected member of parliament for the boroughs near his estate: upon the two other occasions he went on visits to his mother and others. He lived in lodgings and ready-furnished houses on account of his narrow income.

A great deal of evidence from the Marquis's letters was produced to shew his preference of the one country to the other. The arguments, which took up the greater part of *Hilary* Term, went very much at large into the learning of the civil law as to the domicil of the Marquis and his father. *Bruce* v. *Bruce*, *Lashley* v. *Hogg*, and *Balfour* v. *Scott* (stated in *Somerville* v. *Lord Somerville*, 5 *Ves.* 750; 6 *Bro. P. C.* 550, 577; 7 *Bro. P. C.* 566), all before the House of Lords, were cited.

Lord Chancellor [Loughborough]. The great value of the property and the consideration of the parties produced in this case a large field of argument; and I am much obliged to the Bar for their great ingenuity, and the great research, they made. I do not recollect ever to have heard with more satisfaction an argument carried on upon any point. I do not go into the detail of it; not from any disrespect to it, or any idea, that the points do not deserve to be stated, and to receive such answer as might occur to me to give them: but all questions of succession are in their nature questions of positive law; and if the argument had raised a doubt in my mind, and I were not inclined to follow the rule, that has prevailed in other cases, I am bound by repeated decisions in the House of Lords to make the decree, I intend to make; that the Marquis had that domicil in *England*, that decides upon the succession to his personal property, and carries the distribution according to the law of *England.* The point has been established in the cases in the House of Lords, which, if it was quite new and open, always appeared to me to be susceptible of a great deal of argument: whether in the case of a person dying intestate, having property in different places and subject to different laws, the law of each place should not obtain in the distribution [201] of the property situated there. Many foreign lawyers have held that proposition. There was a time, when the Courts of *Scotland* certainly held so. The judgments in the House of Lords have taken a contrary course; that there can be but one law: they must fix the place of the domicil; and the law of that country, where the domicil is, decides, wherever the property is situated. That I take to be fixed law now. The Court of Session has conformed to those decisions; according to which the Courts of *Great Britain*, both of *Scotland* and *England*, are bound to act. The question, what was the domicil, has been with regard to Lord *Annandale* established upon a very few propositions. Born in this country: educated in this country: this country was the seat of his expectations for the greater part of his life; reckoning his life to terminate at the period of his lunacy. During the greater part of that period he had no expectations of fortune, settlement, or establishment, any where but in this country, according to the disposition, his maternal grandfather made in his favour. The habit of his education carried him abroad at an early period. Returned, he never had a residence in *Scotland.* He never was there at any period with a fixed purpose of remaining. His existence there was purely a purpose of either visit or business; and both circumscribed and defined in their time. Wherever he had a place of residence, that could not be referred to an occasional and temporary purpose, that is found in *England*, and no where else. I am not clear, that the period of his lunacy is totally to be discarded. But I will take him to have died then. For the greater part of the period previous to that he was fixed in this country; and fixed by all those ties, that describe a settled residence, and distinguish it from that, which is temporary and occasional. The argument then rests upon the domicil of his father. In the first place, that question, what was the domicil of his father, is of itself a question, I am not called upon to decide; and I am by no means prepared to adopt the proposition, that his father should be considered as having had a domicil in *Scotland.* In the latter part of his life his domicil *de facto* was unquestionably in *England.* During the latter part of it, and from an epoch remarkable enough, when contracting a second marriage, and forming a new family, all the circumstances of his family at that period point much more to *England* than to *Scotland.* The question of domicil *prima facie* is much more a question of fact than of law. The actual place, where he is, is *prima facie* to a great many given purposes his domicil. You [202] encounter that, if you shew, it is either constrained, or from the necessity of his affairs, or transitory; that he is a sojourner; and you take from it all character of

permanency. If on the contrary you shew, that the place of his residence is the seat of his fortune; if the place of his birth, upon which I lay the least stress; but if the place of his education, where he acquired all his early habits, friends, and connexions, and all the links, that attach him to society, are found there; if you add to that, that he had no other fixed residence upon an establishment of his own, you answer the question; which would be, where does he reside? In *London*. Is that his domicil? It is; unless you shew, that is not the place, where he would be, if there was no particular circumstance to determine his position in some other place at that period. In this case every thing leads one to conclude, that the place, where Lord *Annandale* is found, is the place, where he would be, no occasion taking him to any other place. When that is fixed, and you have found all the circumstances, that give a character of permanency to that place, where he really is, it is in vain to inquire, where was his father's domicil. The case, last determined in the House of Lords, is the case of Sir *Charles Douglas*. (*Ommaney* v. *Bingham*, stated in *Somerville* v. *Lord Somerville*, 5 *Ves.* 750.) I particularly had the benefit of hearing all the arguments so well pressed in this cause and also at the Bar of the House in that. It fell to my share to pronounce the judgment: but it was much more formed by Lord *Thurlow* and settled in concert with him The general course of the reasoning he approved. It was one of the strongest cases; for there was first a determination of the Court of Session upon the point. Great respect was due to that. They had determined the point. The judgment was reversed. It came before the House with all the respect due to the Court of Session upon the very point, and under circumstances, that affected the feelings of every one; for the consequences of the judgment, the House of Lords found themselves obliged to give, were harsh and cruel. If the particular circumstances, raising very just sentiments in every mind, could prevail against the uniformity of rule, it is so much the duty of Courts of Justice to establish, there could be no case, in which the feelings would have led one farther. Lord *Annandale's* case is not near so strong. The habits of Sir *Charles Douglas* were military. He had no settled property. His life had been passed in very different parts of the world. If the consideration of his original domicil could have had the weight, that is attempted in this case, it would have had much more there; for there was less [203] of positive fixed residence there than in this case. At one time he was in *Russia*; at another in *Holland*; and in a fixed situation as commander of a ship in the *Russian* and *Dutch* service. His activity rendered him not much settled any where. It was necessary to take him, where he was found. The cause had this additional circumstance, that he happened to die in *Scotland*, the place of his birth: but undoubtedly he went there for a very temporary purpose; a mere visit to his family, when going to take a command upon the *American* service. That is so strong a case, that it makes it rather improper in me to have said so much. Dismiss the bill of Lady *Graham*: tax all the parties their costs; and let the distribution be according to the prayer of the other bill. (*Note*: *Thorpe* v. *Watkin*, 2 *Ves.* [*sen.*] 35. *Pipon* v. *Pipon*, *Burn* v. *Cole*, *Amb.* 25, 215. In the former case Lord *Hardwicke* observes, that, if the disposition of the property was to depend upon the locality, it would have the mischievous consequence of deterring foreigners from dealing in the *English* Funds. See *Somerville* v. *Lord Somerville*, 5 *Ves.* 750. *Potinger* v. *Wightman*, 3 *Mer.* 67. *Munroe* v. *Douglas*, 5 *Madd.* 379.)

M'KENNY *v.* EAST INDIA COMPANY. *July* 12*th*, 1796.

To entitle the widow of an officer in the *East India* Company's service to Lord *Clive's* bounty, the marriage must have taken place, before he retired from the service.

By deed, dated in 1770, reciting a legacy given by *Meer Mahommed Jaffier Cawn* to Lord *Clive*, and that Lord *Clive* being zealous for the prosperity of the Company, and considering, that an establishment of a provision for such of the officers and private men in the Company's service, as should be disabled by war, age, or disease contracted during their service, would tend to induce fit persons to enter into the service, and encourage the bravery of the troops, proposed to the Court of Directors to appropriate the interest of the said legacy for the support of a certain number of officers and private men, who from wounds, length of service, or disease contracted during service, are unable or unfit to serve, and whose fortunes are too scanty to afford the officers a decent, and the private men a comfortable, subsistence; and also to make some pro-