There is a material difference between land and money. As to money, any part, that fails, of course falls into the residue. Then, where the sum is separated from the bulk of the personal estate, it would be a forced construction to throw that back into the general residue. But as to land, there must be an estate given; the intention to give is not sufficient. In *Marryat* v. *Townley* (1 *Ves. sen.* 102) the express joint-tenancy was controlled: Lord *Hardwicke* held, it was all blunder: it was impossible it could mean a joint-tenancy; as the conveyance was to be at the respective ages of twenty-one; and there was an evident intention of division.

I have not fully made up my mind upon this case: but I am inclined to think, *George Reade* was well advised at the time he made that deed.

Feb. 19*th*. *Lord Chancellor* [Loughborough]. In this cause my opinion is, that the execution of the power by *George Reade*, the great-grandfather of the Plaintiff, was good, under the circumstance, that had taken place, of the death of his eldest son, who in the will was one of the four objects of appointment, and who died in the life of his father, before any appointment. Under those circumstances, I conceive, the father well and properly executed his power by appointing only three fourths to his three surviving children. I do not find, that the Court of King's Bench had determined the precise question. I rather think, that was the opinion of the Court; though they would not put it so, and would not go farther than the legal title.

The Plaintiff therefore is entitled to two-fourths: but the account of the rents and profits cannot go beyond six years. (*Drummond* v. *The Duke of St. Albans*, 5 *Ves.* 433, and the note, 439.(1) As to that the bill prays too largely. You cannot recover more than six years mesne profits at law. My idea in giving you the two [750] fourths is, that you are legally entitled: then the circumstance of being obliged to sue in Equity does not alter the nature of the action for mesne profits. He must have the costs of the bill.(2)

(1) See *Smith* v. *Lord Camelford*, 2 *Ves. jun.* 698; where this point was so held after great consideration by the *Lord Chancellor*. See also Mr. Justice *Buller's* opinion to the same effect, 3 *Ves.* 661, in the judgment in *Goodtitle* v. *Otway*. *Cox* v. *Chamberlain*, 4 *Ves.* 631, and the notes, 1 *Ves. jun.* 309; 2 *Ves. jun.* 706.

(2) This decision, as far as it leaves one-fourth to the deceased child, is questioned by Lord *Eldon*, 1 *Ves. & Bea.* 92, *Butcher* v. *Butcher*. For the various questions and authorities on the subject of powers of appointment, see *Boyle* v. *The Bishop of Peterborough*, 3 *Bro. C. C.* 243; 1 *Ves. jun.* 299. *Bristow* v. *Warde*, *Wilson* v. *Piggott*, *Routledge* v. *Dorrill*, *Whistler* v. *Webster*, *Smith* v. *Lord Camelford*, 2 *Ves. jun.* 336, 351, 357, 367, 698. *Crompe* v. *Barrow*, *Vanderzee* v. *Aclom*, 5 *Ves.* 681, 771. *Wollen* v. *Tanner*, *Spencer* v. *Spencer*, *Long* v. *Long*, *Fortescue* v. *Gregor*, 5 *Ves.* 218, 362, 445, 553. *Kemp* v. *Kemp*, 5 *Ves.* 849; and the note, 1 *Ves. jun.* 310.

SOMERVILLE *v.* Lord SOMERVILLE. BAYNTUN *v.* Lord SOMERVILLE. *Jan.* 24*th*, 26*th*, 27*th*, *Feb.* 23*d*, 1801. *The Master of the Rolls for the Lord Chancellor.*

[See *Ex parte Cunningham*, 1884, 13 Q. B. D. 424.]

The succession to the personal estate of an intestate is regulated by the law of that place, which was his domicil at the time of his death. For that purpose there can be but one domicil; and the *Lex loci rei sitæ* does not prevail. The mere place of birth or death does not constitute the domicil. The domicil of origin, which arises from birth and connections, remains, until clearly abandoned and another taken. In the case of Lord *Somerville*, of two acknowledged domicils, the family seat in *Scotland*, and a leasehold house in *London*, upon the circumstances the former, which was the original domicil, prevailed.

The question in these causes was, whether the distribution of the personal estate of the late Lord *Somerville*, who died intestate, seised of real estates in *Scotland* and in *Gloucestershire*, and possessed of personal property in the *English* funds to a very large amount, should be made according to the law of *Scotland* or the law of *England*. The claimants by the law of *Scotland* were his Lordship's nephews

and nieces of the whole blood, exclusive of Lord *Somerville*, as being the heir at law entitled to the real estates. They were the children of the intestate's deceased brother and sister of the whole blood, Colonel *Somerville* and *Ann Whichmore Burgess*. Sir *Edward Bayntun*, half-brother to the intestate, being the surviving son of Lady *Somerville* by a former marriage, and two nephews and two nieces, of the half-blood, being the children of a deceased brother and sister of the intestate by a former marriage, claimed to participate in the distribution under the law of *England*. Lord *Somerville* obtained letters of administration.

The following circumstances were established by the evidence.

That branch of the *Somerville* family, from which the late Lord was directly descended, had been wholly settled in *Scotland* above [751] six centuries. His father, *James*, Lord *Somerville*, first came to England in 1721 at the age of twenty-three, for the purpose of prosecuting his claim to the Barony of *Somerville*; which he established in *May* 1723. In 1724 he married Mrs. *Rolt* of *Sprye Park*; where he resided with her on her estate till 1726; when he returned to *Scotland*. His daughter *Ann* was born during that residence in *England*. He continued in *Scotland*, where his two sons the late Lord *Somerville* and Colonel *Somerville* were born, till 1731; in which year he went to *Bristol* on account of Lady *Somerville's* health. In 1732 he returned to *Scotland*; and continued there till Lady *Somerville's* death in 1734; when he went to *England* to bury her and to surrender her estate to Sir *Edward Bayntun*, one of her sons by a former marriage. In 1736 Lord *Somerville* married again; and immediately returned to his residence in *Scotland*; where he continued till 1741; when he was elected one of the Sixteen Peers; and came up to attend Parliament; and resided three winters in *London* for that purpose, going in summer to his estate in *Scotland*. In 1744 being appointed a Lord of Police in *Scotland*, he went to reside there; discontinuing from that time his Parliamentary attendance. He continued in *Scotland*, till he went to *England* in 1760 or 1761 to be presented to the King and to visit his daughter. After passing six weeks in *England* on that occasion he returned to *Scotland*; and never again quitted it; dying at his house there in 1765. His residence in *Scotland* was at the family seat, called *The Drum*, or *Somerville-House*, in the summer, and at apartments, which he had in *Holyrood-House* in winter.

The late Lord *Somerville* was born on the 22d of *June* 1727 in *Scotland*, either at *Somerville-House*, or at *Good-Trees*, an old mansion in the neighbourhood, rented by his father, while the house was re-building. He remained there till the age of nine or ten years; in the course of which period he was at school at *Dalkeith*, and afterwards at *Edinburgh*. At the age of nine or ten he was sent into *England* to Mr. *Somerville* in *Gloucestershire*. He was at school there for some time; afterwards in *June* 1742 he went to *Westminster School*; which he quitted at *Christmas* 1743. He then went to *Caen* in *Normandy* for the purpose of education; where he remained till the age of eighteen; when upon the rebellion breaking out in *Scotland* in 1745 being sent for by his father he returned to *Scotland*; joined the royal army as a volunteer; and was present at the battles of *Preston Pans* and [752] *Culloden*; at which he served as an aid-de-camp to Generals *Cope* and *Hawley*. He continued in the army till the peace in 1763; and at different times during that period was in *England*, *Scotland*, and *Germany*, wherever his regiment happened to be, either in quarters or on service. Soon after quitting the army in 1763 he went to *Scotland*, to *Somerville-House*; and his father settled an annuity upon him. He then went abroad. In *September* 1765 on account of his father's illness he returned to *Scotland*; was present at his funeral in *December* in that year; and continued in *Scotland* about six months afterwards; but not succeeding in an application for his father's apartments in *Holyrood-House* he went to *London*; but did not turn off any of the servants at *Somerville-House*. From this period, in 1766, there was no evidence as to the actual residence till 1778 or 1779,(1) farther than that he passed the winter in *London* and the summer at *Somerville-House*. In 1779 he took a lease of a house in *Henrietta Street, Cavendish Square* for twenty-one years, determinable at the end of seven or fourteen years, at a rent of £84 a-year. He continued to occupy this house as his winter residence till his death; going every year to *Somerville-House* for the summer; and dividing the year nearly equally between them. The landlord of the house having purchased the ground-lease, of which thirty-six years were unexpired at *Midsummer* 1787, Lord *Somerville* endeavoured to get him to relinquish

it for a premium ; and expressed regret at the refusal. Being assessed to the taxes at £90 *per annum* he appealed ; and was reduced to £84 *per annum*. About ten years before his death he was elected one of the Sixteen Peers ; and he attended his Parliamentary duty every winter.

In *Scotland* Lord *Somerville's* establishment and stile of living were suitable to his rank and fortune. In *London* he had only one or two female servants ; and brought two men servants from *Scotland* ; taking them back with him ; and using job horses occasionally. His manner of living here was very private ; seeing no company ; dining usually at a club ; and keeping his servants on board wages. The house was out of repair ; and furnished upon a very limited scale. The furniture with the wine, coals, and plate, sold only for £66, 7*s.* 1*d.* and the fixtures [753] for £73, 10*s.* To some of his friends he declared repeatedly, that he considered his residence in *London* only as a lodging house, and a temporary residence during the sitting of Parliament ; and spoke of *Scotland* as his residence and home, where he was born, with the warmth of a native ; and he often complained with acrimony, that in any disputes, which he had, which came before the Session, it appeared to be a disadvantage to him residing so little among them. About a month before his death Colonel *Reading* urged him to make a will ; observing, that it would be cruel to leave his natural children without provision ; upon which he said he meant to take care of them and also of his brother's younger children ; and soon after this conversation the intestate told Colonel *Reading* (the deponent), that he had seen Sir *James Bland Burgess* ; who had alarmed him by telling him, if he died without a will, his personal estate would be divided among the several branches of his family ; which he much deplored ; and afterwards he said, he should soon go to *Scotland* ; and would then make his will.

Soon after that conversation Lord *Somerville* died suddenly at his house in *London* in *April* 1796, during the sitting of Parliament. In the books of the Bank of *England* he was described as of *Henrietta Street, Cavendish Square.*

Elizabeth Dewar, who had been housekeeper at *Somerville-House*, by her depositions stated, that she had heard the intestate say, he was an *Englishman* ; and when she told him, that when speaking against *Scotland*, he was speaking against his own country, he would answer, that he was born in *Scotland* : he was educated in *England* : his connections were *English* ; that he had no friend in *Scotland* ; and every thing he did was after the *English* fashion. The deponent had heard him say, his reason for going to *Scotland* was, that he might be at his estate ; that he did not like it ; but had promised his father, when dying, that he would live one half of the year in *Scotland*, and the other in *England* ; that he considered himself an *Englishman* ; that his estate in *England* was preferable to that in *Scotland* ; that he preferred *England* ; and would never visit *Scotland* except on account of the promise to his father ; and that he did not care though *Somerville-House* were burnt ; and this he frequently said in conversation with the witness.

[754] There was some farther slight evidence of expressions importing a preference of *England* ; and that he considered himself an *Englishman.*

The *Attorney General* [Mitford], the *Solicitor General* [Grant], Mr. *Newbolt*, and Mr. *M'Intosh*, for the Plaintiffs in the first cause ; Mr. *Mansfield*, Mr. *Adam*, and Mr. *Lockhart*, for Defendants in the same interest ; claiming as next of kin of the whole blood by the law of *Scotland.* The question in these cases must now be understood to depend entirely upon the domicil of the late Lord *Somerville* : the cases decided having put entirely out of sight the *Lex loci rei sitæ* with reference to this question. It was never understood in this or any country but *Scotland*, that the succession to moveable property could be regulated by two different laws. Some decisions in that country certainly did assert that proposition : but in *The Annandale Cause* (*Bempde* v. *Johnstone*, 3 *Ves.* 198 ; see page 203) it was not thought a subject of question ; and Lord *Hardwicke* in *Thorne* v. *Watkins* (2 *Ves. sen.* 35), the House of Lords in *Pipon* v. *Pipon* (*Amb.* 25), and Lord *Macclesfield* and Sir *Joseph Jekyll* in prior cases, had no doubt upon it : but the point was completely decided in *Balfour* v. *Scott* (in the House of Lords, 11th *April* 1793. 6 *Bro. P. C.* 550), *Lady Titchfield's* case ; in which the ground of the judgment in the House of Lords was expressly declared to be, that the personal estate of the intestate was to be distributed by the law of *England*, where he had his domicil. That declaration was certainly intended to put an end to the possibility of raising the question in future. The doubt

was raised in the case of *Bruce* v. *Bruce* (7 *Bro. P. C.* 566), from the manner, in which the judgment was given, out of some tenderness to what had passed in *Scotland*. The Interlocutor of the Court of Session was so worded, that it might have been understood to go upon the *Lex loci rei sitæ* : but it was not so understood in the House of Lords ; who were of opinion, that the personal estate in *England*, was to be regulated by the law of *England*, not because it was situated in *England*, but because the domicil was in *England*. In the *Annandale Cause* the *Lord Chancellor* takes the question as concluded ; for he intimates a doubt of his own upon it, if it was open.

Excluding the *Lex loci rei sitæ*, the Court must have recourse to the law of domicil ; and the question must now be taken to be, [755] where the late Lord *Somerville* is to be considered as having had his domicil at his death. At his birth without question his sole domicil was in *Scotland* ; the only place, with which he had any connection. His father had no establishment in *England*. When he was in this country as one of the Sixteen Peers of *Scotland*, he resided chiefly with the *Bayntun* family. There can be no doubt therefore as to his domicil ; and the domicil of origin of the late Lord, the place of his birth, continued during his father's life. During that period there is no pretence to say, he had any other domicil than the house of his father. He had no other fixed and settled habitation. As heir apparent of the family he is to be considered in a different light from a younger brother. The heir apparent must always look to the family house and estate, as that to which he is to return, and which is to be his ; an object of residence and attachment, which does not belong to the other branches of the family. At his father's death in 1765 he had no house whatsoever except *Somerville-House*. If he had died at that period, there could have been no doubt. There was no place in *England*, that could be deemed his domicil ; though he had an estate in *Gloucestershire*. It lies upon the other side to shew, that the clear, unquestionable, domicil, gained by birth, which continued during the life and after the death of his father, was abandoned and given up, and that he ceased to be a resident in *Scotland*. Scarcely any degree of residence in *England* without abandoning his residence in *Scotland* would be sufficient to change the domicil. From 1765 to 1778 there is nothing to change it. From that period though he resided in the winter in *London*, and only in the summer in *Scotland*, his permanent and constant residence must be taken to be *Somerville-House*, not the house in *London*, though held upon a term, that was likely to endure beyond his life : but the nature of the residence was not of that description, which is emphatically stiled *domicilium*, and in the Civil Law is thus described : (2)

" *Ubi quis Larem rerumque ac fortunarum suarum summam constituit.*"

Somerville-House without doubt was considered by him as his fixed and permanent residence, that of his family ; and the other [756] a residence of convenience. There he considered himself rather in the character of a private gentleman : at the other as Lord *Somerville*. He was a man of economy : but it is clear upon the whole evidence he lived more in the stile of a nobleman at *Somerville-House* ; and certainly by no means so in *Henrietta-Street*. His residence for the purpose of Parliamentary duty, on being elected one of the Sixteen Peers in 1790, according to all the law on the subject would have no effect. It is very convenient, that the original domicil should continue, unless an abandonment is shewn, and it is agreed by all writers on this subject, that from the moment you fix the domicil, an abandonment and a complete substitution of a new domicil must be shewn. It is not enough to shew residence in another place : the residence in the antient domicil likewise continuing. The one must completely supersede and do away the other. The presumption in all cases therefore is against change of domicil ; and the burthen of proof lies on that side. By residence as an officer in quarters in *England* a new domicil could not be acquired. As to his winter residence, which was lengthened, as he grew older, let them take the fact most favorably for them : admit, that he resided seven months of the year in *England* : is that a sort of residence under all the circumstances, that supersedes the domicil he had ; shewing a purpose to abandon it to all intents ? Suppose in 1766 he had yet a domicil to choose, and there was nothing to go upon but a residence in both countries, beginning at the same period, yet, taking with that the circumstances, that his residence in *Scotland* was upon his paternal estate, the seat of his honors, where his ancestors lived upwards of 600 years, the other in no way connected with his family, in which he lived in no

state, a common lodging house, the domicil must have been in *Scotland*. In *Scotland* he lived as a nobleman, anxious to keep up his dignity, as connected with that country; and, though a man of economy, he lived there in a manner suited to his dignity. In *England* he had no furniture, no establishment: he saw no company: the servants he brought to town were part of his *Scotch* establishment; which was a regular establishment. How could it be said, when he was leaving town, going to his castle in *Scotland*, that he was going from home, as a sojourner, a stranger, a visitor; and that returning to *London* he was going, *ubi larem rerumque ac fortunarum suarum summam constituit*? Suppose him with an estate in *England*, and another [757] in *Scotland*; each having a mansion-house and establishment, and that he divided his time equally between them: that would be something like a case: but even then the question, which was his proper country, must be decided in favor of *Scotland*; considering, that he was a *Scotch* Peer, and there was no reason to give a preference to *England*; other circumstances remaining the same.

The description of Lord *Somerville* in the bank books is merely that of the broker; and can afford no inference. Some of the witnesses speak to little expressions, denoting, that he wished to be considered an *Englishman*; and liked better to live in *England* than *Scotland*. That, which, it is to be observed, rests principally upon the suspicious evidence of a discarded servant, determines nothing. This is a question of fact. Dean *Swift* was very anxious to be considered as an *Englishman*: but he must have been considered domiciled in *Ireland*. It is idle to enter into little circumstances of that kind against such a weight of evidence. In *Balfour* v. *Scott* we were obliged to make use of such circumstances; which are only incidents in this case. Mr. *Scott* had the intention of completely abandoning his domicil in *Scotland* about twelve years before his death. His known purpose was that of watching the funds; in which he had invested his property. In the prosecution of that known purpose he broke up his establishment; leaving only a gardener: he only went two or three times to *Scotland*; and upon those occasions never resided at his own house; but was a visitor with his friends; and for the latter part of his life he never went to *Scotland*. He had clearly chosen a different domicil; which completely did away the *domicilium originis*.

In the case of Sir *Charles Douglas* (*Ommaney* v. *Bingham* before the House of Lords, 18th *March* 1796) the circumstances were these. He left *Scotland* in 1741, at the age of twelve, with a view to enter into the navy. From that time to his death he was in *Scotland* only four times. 1st, as captain of a frigate: 2dly, to introduce his wife to his friends; on which occasion he staid about a year: 3dly, upon a visit: 4thly, when, being appointed to a command upon the *Halifax* station, he went in the mail coach to *Scotland*, and died there, in 1789. He was not for a day resident there in any house of his own; nor as a resident. Under those circumstances it was strong to contend, that he retained the domicil [758] during all that time in a country, with which he had so little connection. He had no estate there, no mansion-house. He was not a Peer of that country. There was nothing but the circumstances of his birth and his death; and upon those circumstances, and because he had an occasional domicil there, the Court of Session determined, that he was domiciled in *Scotland*. He married in *Holland*; and had a sort of establishment there. He commanded the *Russian* navy for about a year; and was afterwards in the *Dutch* service. He had no fixed residence in *England* till 1776; when he took a house at *Gosport*; where he lived as his home, when on shore. That was the only residence he had in the *British* dominions. Whenever he went on service, he left his wife and family there; and he always returned to that place. His third wife was a native of *Gosport*. In his will he spoke of his dwelling-house at *Gosport*. Under these circumstances the cause came before the House of Lords. The Lords considered the circumstance of his death in *Scotland*, going there only for a few days, as nothing. The *Lord Chancellor* expressed himself to the following effect:

"The reasons assigned in support of the decision of the Court of Session are by "no means satisfactory. His dying in *Scotland* is nothing; for it is quite clear, "the purpose of going there was temporary and limited; nothing like an intention "of having a settled habitation there. The Interlocutory says, he had an occasional "domicil there: but the question never depends upon occasional domicil: the "question is, what was the general habit of his life? It is difficult to suppose a case

" of exact balance. Birth affords some argument; and might turn the scale; if all " the other circumstances were in æquilibrio: but it is clear in this case, his circum- " stances, his hopes, and sometimes his necessities, fixed him in *England*. His " taste might fix him at *Gosport* in the neighbourhood of a Yard: a place also con- " venient to him in the pursuit of his possession. Upon his visit to *Scotland* by a " letter he guarded his sister against the hope of his settling there."

The words of the Civil Law " *Larem rerumque ac fortunarum summam* " cannot be translated better than by the expression of that letter; that he had no thought of setting up his *Tabernacle* there. It means the main establishment.

[759] The *Lord Chancellor* then takes notice of his making a will; which would be totally subverted by considering him domiciled in *Scotland*. It became important to determine the domicil in that case; because by a codicil he had imposed a condition in restraint of marriage upon a legacy to his daughter, with a gift over to other children; and it was contended, that the condition was void by the law of *Scotland*, but good by the law of *England* on account of the gift over. (See *Stackpole* v. *Beaumont*, 3 *Ves.* 89, and the references.) If Sir *Charles Douglas* had died in the *Russian* or *Dutch* service, his property must have been distributed according to the law of *Russia* or *Holland*; for he had made himself a subject of those countries; and by his establishments there had lost his establishment in *Scotland*. His original domicil having been abandoned, when he afterwards entered into the service of this country he became domiciled here; as a *Russian* or *Dutchman* would on entering into our service.

Lord *Annandale's Case* is still weaker. There was not even the circumstance of birth in *Scotland*; and, with respect to Marquis *William*, he did not return to *Scotland* after his Parliamentary duty was closed; and there were other considerable circumstances, importing an intention to continue in *England*. The decision was properly founded upon this fact; that till a considerable period after the birth of Marquis *George*, there was nothing, that could by possibility afford a ground for contending, that he had a domicil in *Scotland*; and it was considered by the *Lord Chancellor*, that it was necessary to shew, that he had abandoned the domicil in *England*; and gained one in *Scotland*; for which there was no pretence.

Can these cases be at all compared with this? Lord *Somerville* never for a year together abandoned his residence in *Scotland*. In point of duration he had full as much residence there as in this country; abstracted from the circumstances, that make that quite a different residence from this. In this case there was a mansion-house actually resided upon. Suppose, he had lived several years entirely in *England*; going only occasionally to his mansion in *Scotland*: still that must have been considered his residence. His death in *London* happened in *April* before the period of his usual annual return to *Scotland*. No intention is to be inferred [760] from that: on the contrary there is direct evidence of his intention to get back to *Scotland*, when attacked by illness, and an intention, when he should get there, to make an arrangement of his affairs; looking to the law of that country. But it is sufficient to say, he died in the course of that temporary residence every year in *England*; and there is nothing to shew, he had abandoned the intention of returning, as usual. If he had died in the first winter of his residence in *London*, it might have been said, *non constat*, that was not intended to be his permanent residence. Even that weak argument is taken away in this case; which is not a case, in which the Court is driven to the necessity of laying hold of little circumstances, to determine a question very doubtful, and of nearly even balance.

The *Master of the Rolls* [Sir R. P. Arden]. Have there not been any cases in the Spiritual Court with reference to this point upon the Custom of the Province of *York*? (2 *Burn's Ecc. Law*, 746.) There must have been many instances of two residences: one within the Province; the other without it. Then would the place of the death make a difference? The Custom, as expressed, affects the goods of every inhabitant dying there, or elsewhere.

I cannot form to myself any other argument for those, who claim by the law of *England*, except, that his death makes a difference; considering the residence equal. Therefore what do you say to this case? Suppose, a man having a *forum originis* in some other part of the world comes to live and to have a residence here and in *Scotland*; dividing his time equally between them. It is almost an impossible case. I am clearly of opinion, that I must be bound by the decisions in the House

of Lords; that if there is a preponderating domicil, that must decide; and not the *Lex loci rei sitæ*. Those cases have clearly decided, that the *lex loci rei sitæ* is totally out of the question; except where a man can be considered as having no domicil. The *Lord Chancellor* in Lord *Annandale's Case* says, he should have thought, the point, if open, was susceptible of a great deal of argument: but his Lordship considered it decided; and so I understand it. Then in the case I now put, if the residence is equal, the question would be, whether the *forum originis* or the *forum mortis*, if I may so call it, is to [761] furnish the rule. They must contend, I think, that being equally domiciled in each country, the place of his death is to decide. Or, suppose him a foreigner, and nobody knows whence he comes, so that you have no *forum originis*, and the residence equal.

For the Plaintiffs. To make that case bear upon this, the question must be put as between the *forum originis* and the place of his death. Supposing a fixed, clear, domicil *in Scotland*, and then a degree of residence in *England* from thenceforth quite equal to that in *Scotland*, the circumstance of his death is not of the least weight; for if the domicil is once fixed, you must shew a change of domicil. The death is accidental; and in Sir *Charles Douglas's Case* was laid entirely out of the question. The case of a man without a domicil cannot exist. If a child being illegitimate cannot have the domicil of his father, it must be the place of his birth: if he is born on board ship, the place, to which the ship belonged: if no other domicil can be found, the place, where he was at his death. Every person must have a habitation of some description.

But this is not a case of *equilibrium*; which, if such a case can be supposed, must arise either from the habits of a vagrant life or an equally divided residence, with the absence of all evidence of birth or extraction. The question of domicil depends upon facts and circumstances of residence, proof and presumption of intention of residence. The desire of the Roman Jurists to systematise and subtleize has occasioned their giving much greater weight to the circumstances of birth and extraction than they really deserve. The late decisions, agreeing with *Bynkershoek*, one of the greatest of them, in bringing it back to the true consideration, have held, that those are only some of the circumstances. In *Bruce* v. *Bruce* (in the House of Lords, 15th *April* 1790) Major *Bruce*, born in *Scotland*, but settled in *India* many years, professed an intention to return to *Scotland*; but not till he had acquired a competent fortune; and he died in *India*. He was held domiciled in *England*. That decision weakened the force given by the Jurists to the circumstances of birth and extraction; and determined, that a mere intention, depending upon a very doubtful event, would not do; that it must be a residence with a view to make it perpetual. But though birth and extraction [762] were there decided not to be every thing, yet it was not held, that they are not circumstances of great importance.

Lashley v. *Hogg* only confirmed the principle, that the *Lex domicilii* is always to rule, and not the *Lex loci rei sitæ*; more strongly confirmed in *Balfour* v. *Scott*. In Sir *Charles Douglas's Case* there was nothing in favor of the *Scotch* domicil but the doctrine of the Civilians, and the extravagant weight given to the circumstances of birth and extraction. The *English* domicil prevailed rather by the weakness of the *Scotch* domicil than by its own strength. The same observation applies to Lord *Annandale's Case*: the *Scotch* domicil resting upon mere extraction, aided by property and rank; for even birth was wanting. That certainly, as the *Lord Chancellor* observes in that case, is a very small circumstance; being accidental; and the mere place of death is much more insignificant; for all other circumstances being equal, the circumstance of birth, slight as it is, might turn the scale; affording some presumption of affection: but that presumption, which alone can give any weight to the accident of birth, cannot be raised in the other case, of the death; which is liable to the same objection as the *Lex loci rei sitæ*; making the rule depend on accident, quite independent of the intention.

The next circumstance, *rerum fortunarumque summa*, was wanting in *Bruce* v. *Bruce* and other cases. The next, the rank and dignity of Lord *Somerville*, of itself furnishes a link of connection: but the most important circumstance is, that the connection created by rank is strengthened by duty, as one of the Sixteen Peers. That is strong, as a link of connection with *Scotland*, and a reason for a temporary residence in *England*. The general principle of all the laws of *Europe* is, that a

permanent public duty changes the domicil; that a temporary public duty does not. The word "*legatus*," as used by the foreign lawyers upon that subject, was applied chiefly to the Deputies of the towns and provinces of the Empire coming to present petitions. *Huber* applies this doctrine of the Roman Law to the Deputies of the *Dutch* provinces attending their duty at the *Hague*; concluding, that residence for that purpose does not take away the original domicil; and the same was decided by a Court of very considerable authority, the *Rota* of *Rome* (*Farnese Decis. Rom.*); and is adopted by *Denisart*, in his collection with regard to the Law of *France*.

[763] This circumstance is not to be found in any of the other cases. Another circumstance is the nature of the establishments; where the residence is pretty nearly equally divided between the Capital and the country seat. With respect to that, in the case of a nobleman or a gentleman of landed property, all other circumstances being equal, the circumstance of the country-house being upon his landed estate ought always to preponderate; and the other residence is to be considered secondary only. In this instance all the causes of preference from birth, rank, and also the *rerum fortunarumque summa*, apply to *Scotland*. *Huber* quotes a decision of the Supreme Court of *Friesland*, upon the 2d of *July* 1680, precisely upon that point; by which the domicil was held to be at the country-house; and his observation upon that is, that where the principal concerns are in town, that is the domicil; where in the country, the country residence. In *Denisart* (article *Domicil*) are three cases, decided by the Parliament of *Paris*; one is the case of Mademoiselle *De Clermont Santoignon*; another is that of the Count *De Choiseul*, in 1656; who was held to be domiciled in *Burgundy*; though he went there only in the shooting season; and an opposite case is mentioned of a Bourgeois in *Paris*; who paid the Capitation tax in the country: but that was held to be only his secondary residence: his principal concerns being in *Paris*. In *Denisart Dictionaire* 2, letter *D.* p. 165, it is laid down, that the original domicil is constituted the first domicil; and that is preserved, till another is chosen. With respect to the particular question, the distribution of the personal estate, it is laid down, that the domicil continues, until changed; and the reason is the presumption of attachment to the place of birth and connections. Several cases are stated; all tending to establish the same point. From those cases it appears, a minor could not do any act to change his domicil; that a military man shall be presumed to have his *domicilium originis*, unless it is quite clear he meant to establish another; and unless that appears, in the case of a military man they always have recourse to the original domicil. In *D'Aguesseau's* Collection (vol. v. 115) the case of the Duke of *Guise* is stated; a case, not strictly relative to the distribution of personal estate, but applying to this subject. The question was, whether it could be said, he had no domicil; or, that his domicil was not at *Brussels*; and the conclusion is, that the former is absurd; the latter more so; for all persons serving the King of *Spain* in *Flanders* cannot be considered [764] to have their domicils elsewhere than in the Capital of the Low Countries. Every great lord is considered as having his domicil in the Capital; unless he has another in point of fact: but the Capital is resorted to only, in case there is in point of fact no other.

Apply that doctrine to this case; in which there is a domicil in point of fact.

Other cases are to be found in the same author. The case of a bastard is stated (vol. vii. 373); and upon the question, what destroys the domicil of birth, it is laid down, that nothing has that effect but clear facts tending to establish this principle; a relinquishment of the native country, and a clear purpose of establishment elsewhere; and the number of years is limited. *Cochin* states the case of the Princes of *Germany*. He also states (vol. v. 1), the case of the Marquis *De St. Paterre*; who was born in *Mayenne*; became a page; and afterwards entered the army. He lived sometimes at *Paris* in hired lodgings; sometimes at the house of a friend; called in some acts of his hotel. He returned to the place of his birth; and died there. The question was, whether the *domicilium originis* was destroyed; and it was held, not; and the reason is; that his residence at *Paris* was not more than was necessary in his way of life as a military man; that he kept his country-house; had there all his *instrumentum domesticum*; and notwithstanding some acts done at *Paris* the original domicil remained.

This is a precedent in all points applicable to the case now before the Court. Upon the doctrine of these cases it is clear, that where the *domicilium originis* is connected

with birth, ancestors, property, muniments necessary to the support of that property, and acts done in respect of it, to get rid of that domicil there must be clear, distinct, positive, facts, combined with intention. Death is nothing without intention and volition; but where there is a previous intention of residence, confirmed by the fact of residence, the fact of death is a circumstance, that will be taken into consideration to fix the domicil: but in this case the fact is quite the other way; and the death merely accidental in *London*.

In *Bruce* v. *Bruce* the Interlocutor was affirmed; and the only reason of Lord *Thurlow's* delivering any opinion was, that the ground he took was different from that of the Court of Session. [765] Mr. *Bruce* was a younger son. The whole of his personal estate was situated either actually in *England* or in *India*. The Court of Session determined upon the *Lex loci rei sitæ*. Lord *Thurlow* thinking that erroneous, entered into the question of domicil; and according to a very authentic note he was very unwilling to go into the question. Mr. *Bruce*, originally a younger son without fortune, was only once in *Scotland*. He returned from *London* to *India*; and never shewed any intention of returning to his native country: nothing appeared but some expression a little before his death, that he wished to be considered a *Scotchman*. That is not like this original, continued, connection with *Scotland*; attended with rank, property, &c. Mr. *Bruce* resided in *India* his whole life, except about one year in *London*.

In *Balfour* v. *Scott* (6 *Bro. P. C.* 550, edit. 1803), I admit, Mr. *Scott* was the son of a gentleman of property: but during the latter part of his life he did clear acts of desertion of the *domicilium originis*; selling off his establishment; dismissing his servants, &c. He was only once or twice in *Scotland*; and then in the house of a relation. His whole attention was applied to this country. He had no intention of returning to *Scotland*: on the contrary an intention of not returning was demonstrated by facts; and he had made it impossible to go to his own home in *Scotland*. It is impossible to apply that case to this: Lord *Somerville's* residence in *London* being a mere lodging house; all his muniments, furniture, &c., being in *Scotland*: though a man of economy, having great regard for the honor and dignity of his family; living penuriously in *England*, in *Scotland* like a nobleman of his fortune at his family seat; returning constantly to his home; which was always established as his home; a home consistent with his rank in life and the shew belonging to it.

The case of Sir *Charles Douglas* has but one feature of similarity to this: the entry into the service at an early period of life. The distinction is, that Lord *Somerville*, upon the death of his father, returned to his residence in *Scotland*; and fixed himself there; having only a temporary residence in *London*: Sir *Charles Douglas* after a long naval life, partly in different foreign services, established himself at *Gosport*; and there was no reason to suppose, he ever meant to have a permanent establishment in *Scotland*. In Lord *Annandale's Case* there were some circumstances of similarity; [766] others, directly opposite; and all these cases, being mere clues for the direction of the judgment of the Court, must be considered with all their circumstances. *William*, Marquis of *Annandale*, lived in *Scotland* in the house of his first lady; which after her death passed into the *Hopetoun* family. He was one of the Sixteen Peers. After his second marriage he never returned to *Scotland*; he lived in *England*; and died at *Bath*. Marquis *George* was born and educated in *England*. His visits to *Scotland* during a period, when there were great doubts of the sanity of his mind, were made as to a country, where he had no home. The only evidence was, that he stamped with his foot upon the ground there; and said, "here I build my house." Compare that case with this. The *Lord Chancellor* in his judgment has very accurately summed up the points establishing the domicil of Lord *Annandale*, shewing, what would be his judgment upon this case. The principal circumstances are reversed here. Lord *Somerville* was born in *Scotland*: his expectations of fortune, settlement and establishment were there: he always had a residence in *Scotland*: Lord *Annandale* never: the existence there of Lord *Annandale* purely a purpose of either visit or business: and wherever he had a place of residence, that could not be referred to an occasional and temporary purpose, that was in *England*: in this case the residence was temporary in *England*. Upon comparison of the cases the same principles must determine in favour of the *Scotch* domicil; which was never changed. The

reason stated by Lord *Hardwicke* against the adoption of the *Lex loci rei sitæ*, that it would prevent foreigners purchasing in our funds, is equally strong against changing the *domicilium originis* upon slight circumstances.

When did Lord *Somerville* begin to acquire a domicil in *England*? If not in the first six months, he never did. As to his actual residence, the time he was at *Westminster School* must be subtracted, according to all the Jurists; and as to the remaining period, considering the particular reason of it, and the establishment kept up in *Scotland*, there is nothing like an equilibrium. The only positive evidence in favour of the *English* domicil is, that he expressed a dislike to *Scotland*; and said, his reason for going there was the dying injunctions of his father: but the wish of the party has no effect in constituting a domicil; though the intention certainly has. That evidence proves decisively his intention to [767] keep up his *Scotch* residence. In *Bruce* v. *Bruce* there was only birth, and paternal residence and extraction, with an intention to return at some time uncertain. In *Balfour* v. *Scott* there was a complete abandonment, and change of establishment. In Sir *Charles Douglas's Case* there were birth, and paternal residence and extraction; but neither property, nor estate; and there was positive intention never to settle in *Scotland*. In Lord *Annandale's Case* there was property and rank; but neither birth, nor public duty: nor any of the circumstances to be found in this case. All presumption is in favor of the *Scotch* domicil; and nothing in favor of the *English* but this particular residence of a few months in the year, accounted for in a great degree by public duty, and, admitting, he took the house antecedent to the commencement of that duty, answered by the establishment kept up in *Scotland*. The evidence of his intention to make a will upon his return to *Scotland*, alarmed at the possibility of a distribution, that would take in the half-blood, proves, that he had not a person in this country, whom he intrusted with the management of his affairs.

With respect to the supposed case put by the Court of a foreigner coming here, having a domicil abroad, or no known domicil, and then an equal residence, upon the question, whether the death shall not decide, the analogy to the rule in *Godolphin* (part i. c. 20, fo. 58), as to the place, where the will is to be proved, goes a great way to decide that. In the case stated from *Cochin* the death was connected with circumstances of intention and establishment: but in Sir *Charles Douglas's Case* it was considered of no weight, notwithstanding his connections in *Scotland*, being merely accidental. Lord *Somerville* died with a clear intention to return to *Scotland*: the Parliament then sitting; and the period of his return not arrived. The place of his death therefore was mere accident, not coupled with intention, or any fact denoting it. The effect of the change of domicil may be considered as against the compact of the two countries upon the Union (article 18); that the municipal laws concerning private right shall not be altered except for the evident utility of the subjects within *Scotland*; and though that certainly relates to legislative alteration, it is a guide to prevent alteration by the effect of judicial authority. The only case, that can be found, applicable to the custom of the province of *York* [768] is *Chomley* v. *Chomley* (2 *Vern.* 48); in which it was held, that the Custom of *London*, where the residence was, controlled the Custom of *York*. The privilege of strangers to have a distribution according to the law of their own country depends upon a principle of the law of nations.

Mr. *Piggott*, Mr. *Lloyd*, Mr. *Romilly*, Mr. *Sutton*, and Mr. *Steele*, for the Defendants, claiming under the law of *England*. (Mr. *Richards*, for the Defendant Lord *Somerville*, observing, that, though his interest was under the *English* law, his wishes were in opposition to it, did not argue the question.) This question arises upon the death of a person in *London*; where he had lived for a great number of years: the property also is found here: the bill filed, and administration taken out in this country; and all the parties to the cause are here. This case does not afford the singularity of a foreigner coming here, and claiming under a foreign law. It is the common case of the death of a person in *London*, having property and relations here. Those, who claim this property exclusively, call in the aid of a foreign law; which has no recommendation or title to preference over the law of this country from its superior reason or wisdom This question is recent in this country. The Courts of Justice will not resort to foreign law without great caution and considerable regret; particularly upon questions of fact; which, if depending upon the mere

opinion of the Judge, unrestrained by any rules of law or evidence, must come to arbitrary decision. It is therefore the more important to collect the rule from that, which appears to have been decided, and to abide by it. The only rule, that can be collected, is, that though it should be true, that in the distribution of the property of infants the law of the domicil of origin is to guide; not, of the place of birth; for that is not the correct notion of the domicil of origin; it may be purely accidental, on a voyage or a journey; but the domicil of the father; the rule adopted by the Civil Law; or rather the law of *France*; for the Civil Law on this subject has reference rather to the burthen of offices than the distribution of property: yet, admitting that to be the rule, it is impossible not to observe upon all the authorities, that it is confined to cases, where no will has been exercised on the subject of habitation and abode; that natural privilege of every man, sanctioned by the laws of all countries, to choose for himself; and the domicil of origin is resorted to, because no intention is shewn to have any other: but if the will of [769] the person has been exercised on the subject of abode and habitation, that rule gives way.

Where the evidence is so extremely equal, that the Court finds itself in that situation, that it must resort to something else than residence, as it does, when it resorts to the domicil of origin, then, this being the country, where the property is, where the intestate resided, and had a domicil, friends and connections, when the origin has been so long out of the question, why is the Court to adopt that for the sake of adopting a law distinguished neither for wisdom, reason, or humanity, and to reject the law of the country in which it sits? Inextricable confusion will be the consequence, if the circumstances of this case do not prove the domicil in this country. When the territorial property goes according to the law of *Scotland*, there can be no reason to complain of injustice to these persons. It is impossible upon the cases in the House of Lords to suppose, that the domicil of origin was the rule resorted to. If they were persons living in the world, in the pursuit of fortune, foris-familiated, the question was, where was their domicil: where did they live at the time of their deaths, not of their origin? If the origin is the principle, it must have had an effect in those cases infinitely beyond what it can in this. If origin is to be looked to, it is impossible to conceive a case, in which that must not decide. This is a question of fact: a question, which it was the object of the House of Lords, and of this Court in the only case decided in this Court, to simplify as much as possible; to avoid the difficulties, into which the question will run, if the doctrine the Court has heard upon this occasion is warranted.

It is only necessary to read the *Lord Chancellor's* judgment in the last case to decide, where was Lord *Somerville's* home in 1796; when he died: where was the seat of his affairs: where, in the words of the Civil Law, did he pass his festivals; and where was his property. This residence has been stated, as if it was occasional and temporary. The question for a jury would be, was not this the peculiarly chosen abode; not cast upon him by accident in 1796 and at his death in that year? Nothing can constitute a choice, if this case does not afford evidence, that he exercised it. What is there to shew, this is not the place, where Lord *Somerville* would have been, no particular circumstances determining [770] his position in some other place; according to the *Lord Chancellor's* expression. (3 *Ves.* 202.) Where is the *animus revertendi* to be found? Where was the seat and centre of his affairs and the management of his fortune? Can it possibly be doubted, that it was in *London*? He had a small paternal estate in *Scotland*; which he did not sell; and if in the summer, when no man of his description is found in *London*, if his economical turn, induced him, instead of a watering place, to go and have the satisfaction of seeing his paternal estate, could that change his fixed and permanent residence? If in the progress of things that estate was of more value at his death, yet there is no comparison between his property in the two countries: the estate in *Gloucestershire* exceeding £1000 a-year; and the property in the funds amounting to 50 or £60,000; of itself more than countervailing the estate in *Scotland*. In the books of the Bank, constituting his only title to this vast property, he is invariably described as of *Henrietta-Street, Cavendish Square*.

This case has many circumstances like Mr. *Scott's*. He kept his family estate, a large estate; and the house was not quite dismantled; for he kept one room: yet it was held, that the domicil was in *England*; though his residence here was only for the last nine years of his life; which in this case is thirty years. It is in

evidence also, that Lord *Somerville* had natural children, and was not married. (*Note*: The Court expressed surprise, that the circumstances as to these children, which might be material, were not brought forward by evidence. An inquiry was proposed; but was not directed.) The *Lord Chancellor* in Lord *Annandale's Case* refers to the habits of his life, his friends and connections, and all the links, that attach him to society. (3 *Ves.* 202.) In this instance all his habits, connections, and pursuits, are found in *London*. Are these children, with the claim they have upon him, and the natural relation avowed by him, no tie or connection upon such a question? Lord *Somerville* laments, that he suffered some inconvenience from not residing sufficiently in *Scotland*. That shews, *England* was his home. He does not deny the consequence of his residence in *England*, or say, that it shall be changed. He merely complains of it as an inconvenience. That is an express and unequivocal affirmance of that, which was the effect of his own choice; the domicil he invariably had in *London*.

[771] Next, as to the nature of the establishment in *London*: the manner of life is objected to; not the constancy of it; which is the circumstance to constitute a domicil: not the manner of living there; whether parsimoniously, or otherwise. Suppose, he dined frequently at a club; kept his servants on board wages; and did not see a great deal of company: is that to give a character to his residence: or, that he travelled down to *Scotland* and received the compliments of his friends and neighbours on his arrival; and left servants there on his return to *London*? His motive might have been not to part with the family estate, and the house built by his father, and left by him unfinished. Are we to compute the hours he passed in each place? In *Bruce* v. *Bruce* what became of origin? There was a clear intention of returning. Mr. *Bruce* was a gentleman of family. His residence in *India* was for a temporary purpose, to establish a fortune: not intending to take up his residence there; but a fixed intention to return in his mind. If origin, coupled with residence for a temporary purpose, and an intention to return, is to decide, it must have had effect in that case: yet the distribution was held to be according to the law of *England*; by which *India* is governed. Why is not the long residence in this case, employed in the acquisition and management of fortune, to have the same effect against the domicil of origin? The reasoning would be correct in subtracting the residence on account of his being in Parliament, if the residence had been taken for that purpose.

How can *Balfour* v. *Scott* be reconciled with their argument? There was a paternal estate and a mansion house: but for the last nine years he had visited *Scotland* but three or four times. In Sir *Charles Douglas's Case* what was the residence to repel all the circumstances: birth and death in *Scotland*, a respectable *Scotch* family, service in the *British* navy, then in the *Dutch*, then in the *Russian*, then in the *British* again? Merely, that he had a house in *Gosport*; which he quitted in 1783; dying in 1789. In that interval he had been in *Amsterdam*; where he had married his first wife. In the *Annandale* cause the domicil of the father was resorted to; which was thought material; as it was supposed what Marquis *George* had done during his long lunacy had not fixed a character upon his residence in this country. If the acts done in that case were sufficient to shut out the question of the domicil of the father, *a multo fortiori* there is a choice of domicil [772] in this case. Was the residence here constrained, from the necessity of his affairs: was it transitory, as a sojourner; according to the expressions of the *Lord Chancellor* (3 *Ves.* 202): was it for a temporary purpose? The residence of Lord *Somerville* was the seat of his fortune. It was not the place of his birth: but upon that the *Lord Chancellor* says the least stress is to be laid: but it was the place of his education; which is a link in the connecting chain. (*Note*: The *Master of the Rolls* here observed, that he could not think, the *Lord Chancellor* meant the place, where he was at school, but education coupled with the residence of his parents.) Lord *Somerville* prided himself on his *English* education; the object of which upon the evidence was to avoid the Northern dialect. Consider also what the *Lord Chancellor* says in the same place of the *Douglas* cause. The conclusion is, that where there is positive, fixed, residence, it is not a question of more or less of it: but it excludes the *domicilium originis*. We are discussing, what will has been exercised upon the subject. The visits of Lord *Somerville* to *Scotland* might be under the injunction of his father, the opposite to choice. Safety and certainty are on one side of this

question: on the other the utmost uncertainty and inconvenience. There was no such length and character of residence in any of the cases in the House of Lords. Lord *Somerville* a month before his death speaking of his object to provide for his natural children, and his brother's younger children, states his intention to make a will to prevent his property from being torn to pieces. The fair inference is, that he did not deny the effect of his acts. A declaration under such circumstances, not qualifying, but proposing a remedy, is perfectly consistent with the permanent domicil in *England*. It would be equivocal, if the natural children were the only objects: but the object also was to exclude the half-blood from his intention in favour of Colonel *Somerville's* children. Upon the other construction he would have said, he did not mean permanent residence by all this. The question must be decided by fixed residence; though, where there is no fixed residence, the domicil of origin may be resorted to. In *Burn* v. *Cole* (*Amb.* 415) Lord *Mansfield* said, that in *Pipon* v. *Pipon* (*Amb.* 25) the distribution of an intestate's effects was held to be according to the laws of the country, where the intestate resided and died; and in a case there cited his Lordship says, that case ought to have been decided [773] upon the residence. In the former of those cases the residence in *London*, that destroyed the effect of the residence in *Jamaica*, was not more than a year. *Pipon* v. *Pipon* was decided upon the ground, that debts follow the person of the creditor.

The Roman Law is to be laid quite out of the question upon this subject. The very definition of the domicil by that law is quite inapplicable to modern manners. By that law the subject was considered only with reference to the burthens to be imposed upon a man, not as to the succession to his moveable property. In *The Digest* (Lib. 50, tit. 1, l. 6, s. 2) this is stated: "*Viris prudentibus placuit duobis "locis posse aliquem habere domicilium*"; and the case is put of a divided residence, perfectly *in æquilibrio*; and they differed upon the effect of it. *Labeo* decided, that the party had no domicil at all: others held, that he had several domicils. (*Dig.* lib. 50, tit. 1, l. 5.) That shews, how inapplicable every thing in the Roman Law is to the question as to the succession to the moveable property of the intestate. As to the law of *France* and *Holland*, certainly it is of great importance to consider, what the law of modern Europe is; as nothing is to be found upon it in our law. It is very important, that the same rule should prevail as to the succession. The definition of the domicil in the modern law of Europe is very plain and simple. In *Vattel* (B. 1, c. 19, s. 218, p. 103) it is thus described; a fixed residence with an intention of always staying there; or in *French* "*l'intention se fixer.*" The definition in *Denisart* is pretty much the same. It consists in the fact and the intention: actual residence, and the intention to establish himself in the place where he resides; and no habitation, however long, will do unless with that intention.

This case then naturally divides itself in two parts: 1st, the period prior to the death of the intestate's father: 2dly, what has taken place since. This case depends entirely upon the latter: but the original domicil has been very much insisted on for the purpose of throwing upon us the burthen of shewing, that domicil was abandoned. It is necessary for us to shew, Lord *Somerville* acquired another domicil; not, that he had abandoned his first domicil; for that is *ipso facto* gone by the acquisition of the other: otherwise all the cases, that have been referred to, which are very [774] frequent in the *French* law, of two habitations, one in the capital, the other in a Province of *France*, would have been decided in an instant. In the case of Mademoiselle *De Clermont Santoignon* she certainly never abandoned her first domicil; but always went there in the summer; and the same observation applies to the case of the Marquis *De St. Paterre*: but the question was, whether there was not so much more continued residence in the capital, that a new domicil was acquired; which put an end to the original one. When once it is established, that the domicil depends upon the fact and intention of residence, frequently you must have recourse to the domicil of origin; as in the case of an infant; and that is the reason given for the position, that the domicil may be in a country, in which the party never was. That the domicil of origin is never to be resorted to, when any other can be found, appears in many writers: *Houard's Dictionary of Norman Law*, art. *Domicil*. The domicil of habitation is the only one, to which we pay any regard. That scarcely any regard is paid to the other in our law appears from the very few cases; which are only four: the question as to what circumstances constitute a domicil not being at all considered in *Lashley* v. *Hogg* (6 *Bro. P. C.* 577). The

words of Lord *Thurlow* in the case of *Bruce* v. *Bruce* are printed in Mr. *Ommaney's* Petition on the *Douglas* cause. His Lordship says, the origin is to be received but as one circumstance in evidence; but it is an erroneous proposition, that the domicil is to be held to be, where the party drew his first breath, without something more: it is *prima facie* evidence; but may be rebutted. Mr. *Bruce* settled abroad; enjoyed the privileges of the place: he might mean to return, when he had made his fortune: but can it be contended, that his original domicil continued? Granting, he meant to return, he meant to change his domicil; but had not done so at his death.

In *Voet* upon the Pandect (B. 5, tit. 1, s. 98) that very case of going to *India negotiorum ratione* is stated; and that a modern law was made upon the subject in *Holland*. It is said, that when Sir *Charles Douglas* quitted *Scotland*, he had lost his domicil immediately: but it was never suggested in that case, that he was domiciled in *Russia* or *Holland*; and it was said, that, when he came into the *British* service, he came as a *Briton*. That must be recollected [775] with reference to the circumstances, under which Lord *Somerville* quitted his country originally. Mr. *Scott* had nothing like an establishment in this country. He lived either in chambers or a small house. But I principally rely on Lord *Annandale's Case* to shew, that the domicil of origin is hardly regarded in our law; for in that case particularly it ought to have had weight, if it ever had. A distinction is made in all the writers between the *domicilium originis* and the *domicilium nativitatis*. The latter is never the domicil; unless the other cannot be ascertained, The *Lord Chancellor* would not decide the question as to the domicil of Marquis *William*; not considering the domicil of origin at all material. The residence of Marquis *George* with his mother in *England* had been relied upon; and there is some little allusion to it in the judgment: but *Pothier*, a writer of great authority, treating of the custom of *Orleans* in the firt section of his introduction as to the Customs of *France*, is clear, that the domicil of a minor cannot be changed by the residence of the guardian. Lord *Annandale* was of a most unsettled disposition. His letters shewed a dislike of all parts of this island. His habits were foreign. It seemed necessary there to settle the domicil of his father; but the *Lord Chancellor* would not decide it; saying only, that it was not clear, the domicil of Marquis *William* was not in *England*. Till the Union he came here only once, as a foreigner. He was violent against the Union; and never came to *London* to reside till long afterwards; when he was elected one of the Sixteen Peers. He had three houses in *Scotland*; and was attached to that country by many circumstances, that cannot exist here: he had many hereditary jurisdictions, and some of the *Dumfries* boroughs. He had resided three years in *England* before the birth of the Marquis *George*; and had married a *Dutch* lady in *England*. It is true, he had brought furniture from *Cragie Castle*; as he might very easily do by sea: but the circumstances were very slight to prove a change of domicil.

One principle, and only one, can be collected from all these cases; that in countries circumstanced as *England* and *Scotland* the presumption is always in favour of the *English* domicil. It is to be presumed, a *Briton* means to consider himself as a *Briton*, and not as a *Scotchman* merely; and upon all the cases of the *French* noblemen, as that of the Count *De Choiseul*, it is to be observed, they are nothing at *Paris*: in the country they had privileges, [776] as Lords of those districts; which were all lost at *Paris*. Therefore the presumption was, that the domicil was in the country. These districts taxed themselves; and had other privileges; which existed even at the Revolution. There can be no such presumption in the case of a *Scotch* nobleman. He has the same privileges in *London* and in *Scotland*. In *Domat* (Vol. ii. b. 1, tit. 5, s. 7, par. 13) it is said, as there are places exempt from certain contributions, the inhabitants of those places enjoy the exemption only, during the time they live there; and cannot transfer the privilege to another place. These privileges exist in the *French* cases, but not in this. If the circumstance, that seems to be relied on, as distinguishing this case from that of Sir *Charles Douglas*, that Lord *Somerville* was the heir apparent of the family, gives any additional weight to the domicil of origin, it is singular, that it is not noticed in any of the cases. How can that distinction be material, considering the origin of the law of domicil? By the Roman law all the sons, till emancipated, were equally *filii familias*. What greater uncertainty can there possibly be than relying upon such a circumstance

with a view to judge of a man's acts and intention to acquire a domicil in another place? Certainly the consideration of birth and the expectations he has in the country, where his father was settled, are not to be laid out of the case. Those are circumstances to be used to shew, where it was likely the son would wish to be domiciled: but when you have the fact of his residence and declarations of his mind, when you have ascertained what he did and said, it is not material to resort to what he would be likely to do and say. Lord *Somerville's* return to *Scotland* in 1745 is to be accounted for by the state of the country at that period. The first thing he did was to join the army. During the eighteen years he was in the army he was not once in *Scotland*, except, when his regiment was there. When he went there in 1763, and his father settled an annuity upon him, that was the only business, upon which he then went there. His next appearance there was, when he was sent for upon his father's illness; and his stay merely long enough to see him die. If Sir *Charles Douglas* quitting his country, and entering into a foreign service, changed his domicil, why did not Lord *Somerville*, entering into the *British* service? It is stated from the high authority of *D'Aguesseau*, that the reputed domicil of every great Lord in *France* is at *Paris*; unless he has in fact acquired one elsewhere. Lord *Somerville* [777] certainly had acquired none elsewhere. Serving his Majesty as a *Briton*, not as a *Scotchman*, why was not the original domicil got rid of? If he had expectations in *Scotland*, had he not also in *England*? The estate in *England* was much larger. But those circumstances ought not to have much weight in any case. (*Note*: There was some difference in the statement as to this. The *English* estate was £1000 a-year. The *Scotch* estate was stated to be now £2500 a-year. On the other side it was said to have been at that time only £600 a-year.)

Then what passed after the death of the elder Lord *Somerville*? Immediately afterwards his son came to *London*. That was the moment, in which it was most natural to decide, whether he meant to be a resident *Scotchman* or an *Englishman*. In his father's life there was a strong indication of a purpose not to reside in *Scotland*; for his father's dying request to him was to live there during part of the year. The house in *Scotland* was then used only as a summer country-house, as most convenient for him. It does not appear, when he took the house in *London*. It is taken in the argument, and calculations are made upon that, as if it was only from 1778: but that is not a fair way of putting it. It was not in consequence of being elected one of the Sixteen Peers that he resided there. We find him appealing from the rates in 1773. That shews a probability, that he had a lease at that time; for they reduced him then from £90 to £84 a-year; just as they did afterwards. In 1769 he was residing there. He was extremely anxious to purchase the remainder of the term. As to the nature of his establishment, the quantity of furniture, &c., these questions never can turn upon such circumstances. All the writers upon the subject agree, that such circumstances are of no consequence, so that he has a permanent term in the house. *Domat* (Vol. ii. b. 1, tit. 16, s. 3, par. 5) says, it is the same, whether it is his own house or a hired one. It is manifest, why Lord *Somerville* stated to his friends in *London*, that he considered that house as a lodging-house: a natural excuse for him to make: but we know it was not so, from the long term he took and the longer he wished to take. Next, as to his title-deeds: there is no evidence, that they were in *Scotland*: but it is natural to suppose, those of his *Scotch* estate were there.

The most important part of the case consists of the declarations of Lord *Somerville*, and the description of himself in the books of [778] the bank. Those circumstances are treated as slight: but they are considered most important by all the foreign lawyers; as superseding every other. Though the Encyclopedie is certainly not a book of authority, yet the rule as to what constitutes a domicil is distinctly laid down; and the authorities referred to. *Pothier* (Treatise on the Custom of *Orleans*, 10) speaks of it as the place, where he describes himself as residing in public acts; or to which he goes with his family, in order to keep *Easter*; and he goes on to say, that only where these circumstances are not to be found, where there is no declaration upon the subject, where it is in perfect *æquilibrio*, you must have recourse to the original domicil. The expression "*Un menage*" is not to be translated into *English*. In the case of Mademoiselle *De Clermont Santoignon*, cited from *Denisart* (Art. Domicil, No. 17), her change of residence was not alone sufficient to shew, that

she had changed her domicil. The decision was upon the acts she had done; describing herself as domiciled in *Mayenne*. The case of the Marquis *De St. Paterre*, cited from *Cochin* (Vol. v. p. 1), is much stronger; who in deeds, that he had executed from 1704 to 1714, described himself as residing in the city of *Mans*, but only lodging at *Paris*: from 1714 to 1720 he had described himself sometimes as residing in the one, and sometimes in the other. Being equal therefore in that respect it is said, no inference could be drawn. But there was nothing farther in favor of the domicil at *Paris*; and there were other circumstances; shewing, he considered himself as going to *Paris* from home. He kept a journal, entitled "*De mon voyage a Paris.*"

In the case of Mons. *De Courtaneon* (*Coch.* Vol. iii. 702) there was no decision being referred in order to know, how he described himself in his public acts. Another case in *Denisart* (Art. Domicil, No. 32) was decided entirely upon the party's description of himself. The case of the Duchess of *Hainhault* (*Coch.* Vol. ii.) also turned entirely upon the same point. It was said there, as here, the broker might give any description. It is very material in the case of a common man to describe himself uniformly. But in none of Lord *Somerville's* letters and papers has he described himself with reference to *Scotland*; and as all the papers are in the possession of those resisting the *English* domicil, it may be assumed, that no such description is to be found.

[779] Then as to his declarations: certainly, when coupled with the fact, they are very material; and here are three witnesses unimpeached. The conversation with Colonel *Reading* as to the consequence of his living so little among them shews, he thought, they considered him as a foreigner. In summer *Edinburgh* is even more deserted than *London*. This shews his conscientiousness, that he was not living as a *Scotch* nobleman. The evidence of what passed with Sir *James Bland Burgess* is also very material. It is also a very important consideration, that his residence in *Scotland* was universally only during the summer months. It is held by authors of great authority, that a country residence will not change the domicil. *Bynkershoek* (*Quest. Jur. Priv.* b. 1, c. 16, 185) states the case of a brewer at the *Hague*, who having one son by a deceased wife, hired a house near *Leyden* for the purpose of acquiring the inheritance of the son by the law of that place. He took the house for three years; and carried to it part of his furniture: but at the *Hague* he had the whole of his establishment. The distribution was determined to be according to the law of the *Hague*; and the reason given is, that at *Leyden* he was residing at a country-house. That applies strictly to this case. Lord *Somerville* was residing at his *Tusculanum*, as *Bynkershoek* calls it, *voluptatis causa in æstate*. It is impossible to ascribe his residence in *London* to any purpose but that of being a domiciled *Englishman*. The case referred to in *D'Aguesseau* of a residence of ten years being necessary to acquire a domicil in *Britanny* is quite out of the question. The reason given by *Pothier* is, that you can ascribe the residence to nothing but an intention to acquire a domicil. The inclination of the Court in all the decisions, that have taken place in this country, though it has not come to a rule, which is much to be lamented, has been to hold, that the domicil is in the capital of *Great Britain*, unless an intention to the contrary is shewn. If with the strong circumstances, denoting Lord *Somerville's* intention to acquire a domicil in *England*, he should be held not to have a domicil in *London*, the law will be left in a state of more uncertainty even than at present.

The *Attorney General* [Mitford], in Reply. This is one of the clearest cases in favor of the *Scotch* domicil; and if the Court decides against it, the consequence must be, that every *Scotch* nobleman coming to *London* for the winter will cease to be domiciled in *Scotland*. [780] In that respect the case is of infinite importance. It is to be decided not only upon the circumstances, but also according to the established rules of law; and there is infinitely more of law than of fact in these cases. The distribution is to be according to the law of that place, which for the purpose of succession is by the law of all countries to be considered the domicil. Using the civil law and the authority of text writers, we are frequently using what is no authority upon the subject of domicil, applied for many other purposes. I put out of consideration upon this question the *Lex loci rei sitæ*; against which there have been repeated decisions. That never was the law of any country farther than that there were some decisions in *Scotland* tending to that effect. The rule

upon this subject is a rule of convenience, and an extent of convenience, which shews the necessity of adhering strictly to it; adopted throughout those nations of *Europe*, that had intercourse with each other, by a sort of comity between them, for obvious reasons. Most of them being founded upon the dissolution of the Roman empire had taken the text of the civil law as the principal ground of their decisions with regard to personal property; and from their feudal origin most of them had taken that law as the ground of their decisions with respect to real property. It is true, in the time of *Justinian* all the inhabitants of the empire had the freedom of the city: but at different times the decisions were according to the laws of those different countries. The Jewish law of succession differed much from the Roman; and this question without doubt would have depended upon the circumstance of the domicil in the estimation of the Roman lawyers. If the person was a citizen of one of the cities having the freedom of *Rome*, it would be according to the Roman law. If he continued a citizen of *Jerusalem*, then it would be according to the Jewish law.

The different nations of *Europe* have certainly taken the Roman law as their guide; and it is necessary for every Court to follow the same rule upon this subject of the succession to personal property. That foreign nations have not that idea of the *Lex loci rei sitæ* is particularly noticed by Lord *Hardwicke* in *Thorne* v. *Watkins* and other cases. Upon the same grounds in the *Jersey* cause (*Pipon* v. *Pipon*, *Amb.* 25) he refused to interfere upon property, happening to [781] be in this country: the representative being resident in *Jersey* and amesnable there; and the bulk of the property being there. As to the cases upon the custom of *London*, in *Chomley* v. *Chomley* the circumstance of a capital mansion at *York* was not sufficient to prevent the distribution of the personal estate according to the custom of *London*. The domicil for the purpose of offices and for the purpose of succession may be different; and so with reference to bearing charges and being assessed to taxes. By the *French* law that was considered very important; because it altered the assessment upon the other persons; which in 1663 produced a regulation, requiring, that changes of domicil should be registered. The domicil for the purpose of being amesnable to justice was very important in *France* and other countries; where the Courts had limited jurisdictions. It was matter of stipulation, that for that purpose the domicil should be held to be at *Paris* or some other place. They distinguish the question for all these purposes. In these references therefore to those writers it is necessary to inquire the purpose. This qualification will make some of these quotations extremely different from what they are represented to be: the domicil not being treated of with a view to succession; and though a man may have several domicils for these different purposes, for the purpose of succession he can have only one.

These are the simple and only rules of law. As to the circumstances, habitation is the principal ingredient: but it is not the only circumstance; and of itself it by no means constitutes the domicil: it must be of that description, which has the effect of establishing the party in that situation, contra-distinguished from any other situation, in which he has ever been. One clear and unquestionable rule is to be collected from all the text writers, and also as a matter of necessity; that the domicil of origin is the domicil of every person, until that is abandoned, and another gained. The domicil every child has on its birth must remain, until that is lost, and another acquired. Until another is acquired, that one cannot be lost. After the peace of 1783 such of the *Americans* as chose to remain in *America*, subjects of the States, ceased to be part of the *British* nation; and lost their character of *Britons*. So it is as to the domicil of origin; which must remain, until the party ceases to have it, and gains another. The intent to abandon it simply will not do; unless there is an actual abandonment, and the acquisition of another. This principle is fully [782] established by the cases in the House of Lords; for what could have raised the question, unless the domicil of origin remained, until it was abandoned, and another acquired. Mr. *Bruce* entered into the *India* service, not the King's service. A great deal turned upon that; for he was bound to reside in *India*; and could not reside elsewhere, except by the leave of the Company, and consequently for a temporary purpose. Therefore by entering into that service he was conceived to have abandoned his original domicil, and to have gained a new one. It did not depend upon the place, in which he lived in *India*. That was not inquired. It

turned upon his residence in *India* under an obligation, that was to last during his whole life, unless put an end to. I confess, speaking individually, I think it would have been wiser to have held, that the domicil of origin remained; adhering to that rule; and that the act done ought not to have been deemed to amount to an abandonment: the highest Court of Justice however was of a different opinion. But the whole case was founded upon the question between the domicil of origin and the new one. It is now said, the domicil of origin is a slight circumstance. In that case it was the whole, and in the case of Sir *Charles Douglas*. It is contrary to the articles of Union to say, his entering into the King's service was an abandonment; for the army is as much that of *Scotland* as *England*. But he entered into the *Russian* and *Dutch* services; abandoning, not only the *Scotch* domicil, but the *English* one. He partly made himself a subject of a foreign power; taking a qualified oath of allegiance in those countries. He married in *Holland*. Afterwards he had no residence in the world but at *Gosport*, no family establishment any where else. (*Note*: The *Master of the Rolls* said, he had great doubt, whether that with the consent of His Majesty changes the domicil. See *Curling* v. *Thornton*, reported by Dr. *Addams* in his *Ecclesiastical Rep.* vol. ii. page 6.)

In *Balfour* v. *Scott* there was an abandonment, if any thing can be called so. He sold all his furniture, except that of one room. He had no family establishment in *Scotland* of any description: it is even stronger than that; for he destroyed that, which he had there before. In the *Annandale* cause the *Lord Chancellor* expressly considers the domicil of origin, that of the father, as the whole argument for Lady *Graham*. Can the domicil of origin be now treated as nothing but a slight circumstance? Courts of Justice will be extremely unwilling to give up the rule as to that; a rule of the greatest convenience; affording a point to start from, [783] something to decide in doubtful cases; according to the observation in the passage cited from the Encyclopedie; that, where there is any doubt, the party is always considered as having preserved his first domicil; a rule certainly of wisdom. If another domicil is gained, that in the same manner must remain, until abandoned. This is equally a rule of necessity. A man cannot be without a domicil of some description. The *dicta* to the contrary in some of the writers will prove quite unfounded. This is analogous to the principle we find in our own law. In the case of *Wardship*, for instance, a man might hold of several lords: then upon his death who was to have the wardship: supposing he did not hold of the King; who would be preferred? The rule is stated in *Fitzherbert's Natura Brevium* (333, 8th edit.); that the heir shall be in ward to that lord, of whom he held by priority: but the tenant might, if he chose, change the priority by making a feoffment in fee and taking back an estate again. That rule was established for the purpose of convenience upon the principle, on which we are now contending.

Another rule with respect to the domicil of origin, which has been repeatedly insisted on, is that also cited from the Encyclopedie, that, where it is doubtful, which of two places is to be reputed the domicil, as if the fact of habitation is doubtful, and one appears to be the domicil of origin, that will turn the scale. But that must be, understood, where it cannot be clearly shewn, that the domicil of origin continued the place of habitation; for if that remains the habitation to this extent, that there is no abandonment, that will remain the domicil. Where the question is between two places, both acquired, if one can be considered as properly the seat, it is to have the preference; and upon that the case of *The Brewer* at the *Hague* was decided, upon the distinction in *Huber*, that with reference to a citizen his domicil was, where his trade was carried on; and the country residence was to be considered as merely *voluptatis causa*; and the reverse as to a nobleman. Upon that distinction it was determined in that case, that the establishment at the *Hague* remaining, the domicil of the father was not altered by the residence at *Leyden*: nor consequently that of the son: yet the son lived and died there. That disproves the position, that, the place, where the party dies, is to decide, if there is any [784] doubt. He was considered as living still under the protection of his father. In the *Douglas' Case* also the place where he died did not prevail. In considering the habits of different countries, as applied to this subject, and quoting the civil law, it must always be with a qualification; and that removes the objection, that the expressions of the civil law are not applicable. Family pictures may in some degree denote the family seat; and in this view may be considered as answering the *Lares* of the Romans.

Upon comparison of the value of the effects at the two houses, it is evident, where the *summa rerum* was. Recollect the habit of these countries; feodal countries. The head of the Barony is always considered as the place where the Baron should be found; the place, where he was to be summoned. The Duke of *Norfolk's* seat must be considered to be at *Arundel Castle*; though his house in town is freehold. So *Woburn* is the *Duke of Bedford's*. Those are the places, where they reside, when particularly in the character of Dukes of *Norfolk* and *Bedford*. The distinction between the eldest and the youngest sons is clear. The former must always look to the family seat, as that, which is to become his residence. The younger has no reason to look to that at all. The house in *London* was at first hired; and taking a lease afterwards is only another species of hiring. The mere object was the pleasure of indulging in winter in a town residence; not to establish a family mansion, but merely for convenience; it may be very truly said, *voluptatis causa*. There he had no regular establishment; and his declarations are the most positive; that he considered that house as a mere lodging house. It was a very just excuse to his friends. He could not see them there. He had not the means. He had no plate or other necessary articles. He must have given any entertainment at a tavern. It is said, that was the residence of his choice: the other descended upon him. But he did live in *Scotland*. It is said, his residence there was merely a point of duty from compliance with his father's injunction. It must however be shewn, that he abandoned that: whatever inclination to *London* may appear. In all the other cases there was no balance of residence: whatever there was of residence was out of *Scotland*: in this there is a residence there, a family house built by his father, and constantly resorted to by the intestate; and to the last moment of his life an intention to resort to it: the establishment kept up, shewing the *animus revertendi*. In *Alexander* v. *M'Cullogh* (before Lord *Thurlow*) [785] that argument prevailed; and upon that ground the party was held a *Scotchman*, and his will was construed according to the law of *Scotland*, notwithstanding his residence in *Virginia*; and notwithstanding what has been attributed to Lord *Thurlow* in *Bruce* v. *Bruce*, he did not consider, that going for the mere purpose of trade would be an abandonment of domicil. The question is, not, whether *London* was also the place of Lord *Somerville's* habitation, but whether *Somerville-House* was abandoned; and in no moment can that be said to have ceased to be the place of his habitation. As to the description of the intestate, there is no instance of describing a nobleman by his abode. I do not know, why any such description as that in the books of the Bank was necessary in the case of a Peer; unless, in order to know, where to apply in case of forgery. Certainly it was not necessary to identify him. He might perhaps have made declarations against *Scotland* to his servants in peevish moments; but his declarations to his friends are quite different. It is plain also, that the time of the conversation with Sir *James Bland Burgess* was the first moment, in which he had the least idea, that he might be considered a domiciled *Englishman*; and his determination upon that is to make a will immediately on his return to *Scotland*. *Burn* v. *Cole* was not a question of domicil; but, whether the Prerogative Court of *Canterbury* had jurisdiction.

Feb. 23d. The *Master of the Rolls* [Sir R. P. Arden]. This case has been extremely well argued on all sides; and I have the satisfaction of thinking. I have received every information, that either industry or abilities could furnish. The question is simply as to the succession to the personal estate of the late Lord *Somerville*. It is in some respects new: so far as it is a question between two acknowledged domicils. In the late cases the question has been, whether the first domicil was abandoned; and where at the time of the death the sole domicil was: but here the question is, which of two acknowledged domicils shall preponderate; or rather, which is the domicil; according to which the succession to the personal estate shall be regulated. Questions upon the law of succession to personal estate have been very frequent of late in this country; and unless the Legislature interposes, which I sincerely hope they will, to assimilate the law of the whole island upon this subject, such questions may be expected very frequently to occur. In the course [786] of a few years there have been four cases in the House of Lords, and one in this Court. I have been favoured with the opinions delivered by Lords *Thurlow* and *Loughborough*; the former in *Bruce* v. *Bruce*; the latter in *Ommaney* v. *Bingham*, the case of Sir *Charles Douglas*. I have very fully considered all the cases, and the

opinions of those two learned Lords, and the authorities referred to in the printed cases, and also all the authorities referred to by the foreign jurists; which were very properly brought forward on this occasion. It is unnecessary to enter into a comment upon all these authorities. It will be sufficient to state the rules, which I am warranted to say result, with the reasons for adopting them in this case.

The first rule is that laid down by those learned Lords, adopted in the House of Lords, and admitted in this argument to be the law, by which the succession to personal estate is now to be regulated: whatever might have been the opinion of the Courts of *Scotland*; which certainly at one time took a different course. That rule is, that the succession to the personal estate of an intestate is to be regulated by the law of the country, in which he was a domiciled inhabitant at the time of his death; without any regard whatsoever to the place either of the birth or the death, or the situation of the property at that time. That is the clear result of the opinion of the House of Lords in all the cases I have alluded to: which have occurred within the few last years. This, I think, is not controverted by the Counsel on either side: but it was said, that law could prevail, and be applied, only, where such domicil can be ascertained; and that I admit.

The next rule is, that though a man may have two domicils for some purposes, he can have only one for the purpose of succession. That is laid down expressly in *Denisart* under the title *Domicil*; that only one domicil can be acknowledged for the purpose of regulating the succession to the personal estate. I have taken this as a maxim: and am warranted by the necessity of such a maxim; for the absurdity would be monstrous, if it were possible, that there should be a competition between two domicils as to the distribution of the personal estate. It could never possibly be determined by the casual death of the party at either. That would be most whimsical and capricious. It might depend upon the accident, whether he died in winter or summer, and many [787] circumstances not in his choice, and that never could regulate so important a subject as the succession to his personal estate.

The third rule I shall extract is, that the original domicil, or, as it is called, the *forum originis*, or the domicil of origin, is to prevail, until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicil and taking another as his sole domicil. I speak of the domicil of origin rather than that of birth; for the mere accident of birth at any particular place cannot in any degree affect the domicil. I have found no authority or *dictum*, that gives for the purpose of succession any effect to the place of birth. If the son of an *Englishman* is born upon a journey in foreign parts, his domicil would follow that of his father. The domicil of origin is that arising from a man's birth and connections.

To apply these rules to this case. It cannot be disputed, that Lord *Somerville's* father was a *Scotchman*. He married an *English* lady; returned to *Scotland*; repaired his family house; occupying another in the neighbourhood in the meantime; and he had apartments in *Holyrood-House*. For the first part of his life after his marriage he seems to have made *Scotland* almost his sole residence: nor was it contended, that during that period he had acquired any other. The father being then without doubt a *Scotchman*, the son was born; and at the age of nine or ten was sent into *England* for education, and from thence to *Cæn* in *Normandy*. It cannot be contended, nor do I think it was, that during the state of pupillage he could acquire any domicil of his own. I have no difficulty in laying down, that no domicil can be acquired, until the person is *sui juris*.(3) During his continuance in the military profession I have not heard it insisted, that he acquired any other domicil than he had before. Upon his father's death and his return to *Scotland*, a material fact occurs; upon which great stress was laid on both sides. It is said, his father's dying injunctions were, that he should not dissolve his connection with *Scotland*. In the subsequent part of his life he most religiously adhered to those injunctions. But it is said, that in conversation he manifested his preference of *England*; and that if it had not been for those injunctions of his father he would have quitted *Scotland*. Admit it. That in my opinion is the strongest argument in favor of *Scotland*; for, whether willingly or reluctantly, whether from piety or from [788] choice, it is enough to say, he determined to keep up his connection with that country; and the motive makes not the least difference.

Then see, how after his father's death he proceeded to establish himself in the

world. From that time undoubtedly he was capable of establishing another domicil. Until that time there could be no doubt, that the surplus of his personal estate must, if he had died, have been distributed according to the law of *Scotland*. Then, to trace him from that time. It appears, he had determined not to abandon his mansion-house: so far from it, he made overtures with a view to get apartments in *Holyrood-House*; from which I conjecture, that, if that application had been granted, he might have been induced to spend more time than he did in *Scotland*. He came to *London*. I will not inquire, how soon he took a permanent habitation there: but I admit, from that time he manifested an intention to reside a considerable part of the year in *London*, but also to keep up his establishment in *Scotland*, and to spend as nearly as possible half of the year in each. He took a lease of the house, evidently with the intention to have a house in *London* as long as he lived; with a manifest intention to divide his time between them. It is then said, there are clearly two domicils alternately in each country. Admit it: then the question will arise, whether in case of his death at either, that makes any difference. It was contended in favor of the *English* domicil, that in such a case as that, of two domicils, and to neither any preference, for it cannot be contended, that the domicil in *Scotland* was not at least equal to that in *England*, except the *lex loci rei sitæ* is to have effect, the death should decide. There is not a single *dictum*, from which it can be supposed, that the place of the death in such a case as that shall make any difference. Many cases are cited in *Denisart* to shew, that the death can have no effect; and not one, that that circumstance decides between two domicils. The question in those cases was, which of the two domicils was to regulate the succession; and without any regard to the place, where he died. These cases seem to prove, and if necessary, I think, it may be collected, that those rules have prevailed in countries, which, being divided into different provinces, frequently afford these questions. The fair inference from them is, that, as a general proposition, where there are two co-temporary [789] domicils, this distinction takes place; that a person not under an obligation of duty to live in the capital in a permanent manner, as a nobleman or gentleman, having a mansion-house, his residence in the country, and resorting to the metropolis for any particular purpose, or for the general purpose of residing in the metropolis, shall be considered domiciled in the country: on the other hand a merchant, whose business lies in the metropolis, shall be considered as having his domicil there, and not at his country residence. It is not necessary to enter into that distinction; though I should be inclined to concur in it. I therefore forbear entering into observations upon the cases of Mademoiselle *De Clermont Santoignon* and the Count *De Choisieul*, and the distinction as to the acts of the former, describing herself as of the place in the country.

The next consideration is, whether with reference to the property or conduct of Lord *Somerville* there is any thing shewing, he considered himself as an *Englishman*. It was said, for the purpose of introducing the definition of the domicil in the Civil Law, "*Ubi quis laremrerumque ac fortunarum suarum summam constituit*," that the bulk of his fortune was in *England*; and the description in the bank books was relied on. I lay no stress whatsoever on that description in those books or in any other instrument; for he was of either place; and was most likely to make use of that, to which the transaction in question referred. It was totally immaterial, which description he used. It is hardly possible to contend, that money in the funds, however large, shall preponderate against his residence in the country and his family seat. It is hardly possible, that should be so annexed to his person as to draw along with it this consequence. Upon nice distinctions I think it might be proved, that his principal domicil must be considered as in *Scotland*. Great stress, and more than I think was necessary, was laid upon the manner, in which he passed his time in each place. There is no doubt, the establishment in *Scotland* was much greater than that in *London*. In my opinion *Bynkershock* was very wise in not hazarding a definition. With respect to that to be found in the Civil Law, the words are very vague; and it is difficult to apply them. I am not under the necessity of making the application; for my opinion will not turn upon the point, which was the place, where he kept the sum of his fortune. It is of no consequence, whether more or less money was spent at the [790] one place or the other; living alternately in both. Some time before his death he talked of making his will in *Scotland*. That circumstance is decisive, that his death in *England* was merely casual, not from

intention. The case then comes to this. A *Scotchman* by birth and extraction, domiciled in *Scotland*, takes a house in *London*; lives there half the year; having an establishment at his family estate in *Scotland*, and money in the Funds; and happens to die in *England*. I have no difficulty in pronouncing, that he never ceased to be a *Scotchman*: his original domicil continued. It is consistent with all the authorities and cases, that, where a man has two domicils, the domicil he originally had shall be considered his domicil for the purpose of succession to his personal estate, until that is abandoned, and another taken.

It is surprising, that questions of this sort have not arisen in this country, when we consider, that till a very late period, and even now for some purposes, a different succession prevails in the Province of *York* (4 *Burn's Ec. Law*, 364). The custom is very analogous to the law of *Scotland*. Till a very late period the inhabitants of *York* were restrained from disposing of their property by testament. The alteration may account for the very few cases occurring; for very few persons of fortune die intestate; though it has happened in this case. Before that power of disposing by testament such cases must have been frequent; and the question then would have been, whether during the time the custom and the restraint of disposing by testament were in full force, a gentleman of the county of *York*, coming to *London* for the winter, and dying there intestate, the disposition of his personal estate should be according to the custom or the general law. One should suppose it hardly possible, that some such case had not occurred. I directed a search to be made in the Spiritual Court and the Court of Chancery; where it was most likely that such a case would be found: but I do not find, that any such case has occurred. Some observations may arise upon that custom. It may be thought, there are some inaccuracies in the words of the Statute (4 *Will. & Mary*, c. 2) upon it. The custom (2 *Burn's Ec. Law*, 750), as it is stated to have existed, is thus expressed; that there is due to the widow and to the lawful children of every man being an inhabitant or householder within the said Province of *York* and dying there or elsewhere intestate, being an inhabitant or householder, within that Province, a reasonable [791] part of his clear moveable goods; unless such child be heir to his father deceased, or were advanced by his father in his life-time; by which advancement it is to be understood, that the father in his life-time bestowed upon his child a competent portion whereon to live. I observe, the Statute giving the power of disposing by testament, after reciting the custom, directs, that it shall be lawful for any person inhabiting or residing, or who shall have any goods or chattels within the Province of *York*, to give, bequeath, and dispose of all their goods, chattels, debts, and other personal estate. One would suppose from this, that the Legislature had some reference to the *lex loci rei sitæ*; and that it was supposed, the custom would attach upon any property locally situated there; though the party was not resident; and though it is now too late to doubt the law upon that, I have some reason to think, our Spiritual Courts inclined, as the Courts of *Scotland*, to the *lex loci rei sitæ*: and if the question had occurred in that Court, and the authority of the House of Lords had not interfered, that would have been considered as the rule; and for this reason; that their jurisdiction is founded upon it: the distribution arising from the place, where the property is situated; and it is natural for the Judge, who acquired his authority from the situation of the property, to suppose, the rule should be that of the place, where the property is. But that now certainly is not the case.

I shall conclude with a few observations upon a question, that might arise; and which I often suggested to the Bar. What would be the case upon two co-temporary and equal domicils; if ever there can be such a case, I think such a case can hardly happen: but it is possible to suppose it. A man born, no one knows where, or having had a domicil, that he has completely abandoned, might acquire in the same or different countries two domicils at the same instant, and occupy both under exactly the same circumstances: both country houses, for instance, bought at the same time. It can hardly be said, that, of which he took possession first, is to prevail. Then, suppose he should die at one: shall the death have any effect? I think, not, even in that case; and then *ex necessitate* the *lex loci rei sitæ* must prevail; for the country, in which the property is, would not let it go out of that, until they know by what rule it is to be distributed. If it was

in this country, they would not give it, until it was proved, that he had a domicil somewhere.

[792] In these causes I am clearly of opinion, Lord *Somerville* was a *Scotchman* upon his birth; and continued so to the end of his days. He never ceased to be so; never having abandoned his *Scotch* domicil, or established another. The decree therefore must be, that the succession to his personal estate ought to be regulated according to the law of *Scotland*.

(1) The fact was, that during the former part of that period Lord *Somerville* had furnished lodgings in *London*; and during the latter part occupied the house, of which he afterwards took a lease; which appeared by the parish rates since 1773; beyond which they could not be found.

(2) *Cod. Lib.* 10, tit. 39, l. 7. See also *Dig. Lib.* 50, tit. 16, l. 203, which is thus expressed:

"*Eam domum unicuique nostrum debere existimari, ubi quisque sedes & tabulas* "*haberet, suarumque rerum constitutionem fecisset.*"

(3) A domicil cannot be acquired by the act of the infant: but, with the exception of fraud, a domicil acquired by the surviving mother, becomes the domicil of the infant. *Pottinger* v. *Wightman*, 3 *Mer.* 67.

See upon the subject of domicil the references in the note, 3 *Ves.* 203. In *Curling* v. *Thornton*, in the Prerogative Court of *Canterbury*, *Michaelmas* Term, 1823, published by Dr. *Addams*, in his *Ecclesiastical Reports*, vol. ii. page 6, an attempt to establish a domicil in a foreign country against a Will, made in this country, failed; the original domicil not being completely abandoned; if a *British* subject can adopt a foreign domicil to the extent of completely abandoning his *British* domicil; and if a change of domicil can have the effect, beyond an alteration of the succession in the event of an intestacy, to annul a will, according to the law of the original domicil: propositions, considered by the Court (Sir *J. Nicholl*) as not sustained by authority, and doubtful on principle.

WRIGHT *v.* HUNTER. *Rolls. Feb. 5th*, 1800; *Feb. 24th*, 1801.

Money paid by one partner in a joint concern, being his liquidated share of the joint debts, to another partner, as agent for settling the debts, if not applied accordingly, may be proved as a debt upon the bankruptcy of the latter; and therefore a payment by the other on the same account after the bankruptcy cannot be recovered from the bankrupt; who had obtained his certificate: but in respect of another payment, also after the bankruptcy, in consequence of the failure of the bankrupt and other partners in paying their shares, a right to contribution arose; and the whole was recovered in an action against the bankrupt, who had obtained his certificate; the Defendant not having pleaded in abatement. Though contribution among partners is now enforced at law, the jurisdiction of Courts of Equity is not ousted; and therefore though the bill was dismissed, the object having been obtained in an action directed, the Court would not dismiss it with costs.

Robert Hunter, *Margaret Hunter* and *Henry Keowen Hunter*, who were copartners in business in equal shares, were in 1791 concerned with the Plaintiff in a ship: the Plaintiff being entitled to six twenty-fourth shares; and the *Hunters* to eighteen twenty-fourth shares. On the 8th of *February* 1793, the Plaintiff settled the account of the outfit of the ship and cargo with *Robert Hunter* for himself and his partners; who were also pursers and husbands of the ship; and the Plaintiff then paid to the *Hunters* the sum of £782, 19*s.* 2*d.*; which was his proportion of the charge. On the 9th of *October* 1793, the *Hunters* became bankrupts; and at that time the sum of £1638, 8*s.* 8*d.* remained due on account of the outfit and cargo of the ship. After the bankruptcy it came out, that the *Hunters* had sold eleven twenty-fourth shares without the knowledge of the Plaintiff; and by agreement subsequent to the bankruptcy the debt of £1638, 8*s.* 8*d.* was apportioned among the several owners; and the Plaintiff paid his proportion; amounting to £409, 12*s.* 2*d.* The *Hunters'* share under that apportionment not being paid was subdivided among the other owners; and the Plaintiff also paid £168, 13*s.* 4*d.*, his proportion upon that division.