Plaintiff himself, in various sums, and for various purposes; £103 remains in the bank; and the residue is £427. If, therefore, the whole of this had been received by Roy, he has already replaced in the Bank of Scotland £569, which is more than the amount received by him.

The majority of the payments having been held by the Scotch Courts to be improper, each ought to replace what he has improperly retained. This is what this Court would hold, and I have no doubt this is the way in which the rights of Mr. Paul and Mr. Roy would be ultimately worked out by the Court of Sessions, although, as against the creditors, they are both severally bound to replace the whole.

[442] As to the payments for which the rents are said to be liable, an elaborate account is gone into to shew the rights between the parties; but Roy, being a mere factor or steward, is accountable only to his principal. And even if this were not so, it would be impossible to take an account of the rents of the estate in the absence of Mr. Renton and Major Anstruther; nor can I, in a suit constituted like the present, decide any question as to the proper or improper application of the rents of the estate.

The alternative prayed is this: that the Plaintiff may have contribution; that is, that the Defendant may be compelled to pay into the Bank of Scotland one-half the sum which Paul and Roy were ordered to repay. On what ground can I do this? Not on the ground of a foreign judgment adjudicating on their rights and liabilities, because there has been no final judgment; nor on the ground that this is the proper amount between the parties, because it is impossible for me to ascertain the proper amount. It can be only on the ground that a foreign Court has directed two persons, jointly and severally, to pay a sum of money into that Court; and acceding to that argument, it would be to decide that, after the foreign Court has ordered each to pay the whole, this Court is to alter that order, and direct payment in a different manner, viz., separately, in some given proportions.

Suppose I were to order Roy to pay half, or any other proportion, and afterwards the Court of Sessions were to hold that this was not the correct and proper proportion, how could I enable Mr. Roy to get back his money? I should, in truth, be making a final decree in a suit pending in another Court, in which no final decree had been made.

[443] I am of opinion that if I were to attempt to deal with this matter, I should be carrying on a suit concurrently with the suit in Scotland, without having all the parties before me, without having the means of obtaining the necessary evidence, and without the power of doing justice between the parties really interested in the matter.

I am of opinion, that before this Court would lend its aid to enforce a foreign decree, by compelling payment of a sum of money, the amount properly and justly due must be finally ascertained. But then would arise another point; viz., whether, if there had been a final decree, and the amount due had been ascertained, the Plaintiff would not be bound to seek relief by an action at law, rather than by suit in equity. I express no opinion whether this is the proper tribunal or not, as I decide on the other points.

I am of opinion, for the reasons I have stated, that the Plaintiff has made out no case for relief, and his bill must therefore be dismissed with costs. (NOTE.—See *Patrick* v. *Sheddon*, Q. B. 29th April 1853.)

[444] BROWN *v.* SMITH.(1) *Feb.* 12, 1852.

[S. C. 21 L. J. Ch. 356. Followed, *Ex parte Cunningham*, 1884, 13 Q. B. D. 418.]

A Scotchman came to England at the age of sixteen, and remained in the English

(1) DATES.

1795. Birth in Scotland.
1811. Came to England, and entered naval service.
1818.–1821. In Scotland, on half-pay.
1826.–1828. Half-pay.
1839.–1841. In London, on half-pay.
1841. Went to Malta.
1846. Death of Sister.
1848. Death at Malta.

naval service until his death in 1848. Held, that he had not lost his domicile of origin.

The mere declaration of intention to change a domicile, without an actual change of residence, is inoperative to create a new domicile.

To constitute a new domicile, there must be not only the *factum* of residence in a place, but the *animus manendi*.

It was referred to the Master to ascertain where the testator William Conborough Watt was domiciled at the time of his death. The Master found that he was domiciled in Scotland. The Plaintiffs took exceptions to the report, and insisted that he was domiciled in England.

It appeared that the testator was born in Scotland in 1795, and his domicile of origin was therefore admitted to be Scotch. He came to England in 1811, and entered into the medical service in the Navy as hospital mate. He then served as assistant and full surgeon on board eleven different Queen's ships, and became deputy-inspector of the Malta Hospital, where he died, in August 1848. From the year 1811 to his death (thirty-seven years) he was substantially on active service, with three exceptions, during which he was on half-pay: viz., first, for two years, 1819, 1820; secondly, for about two years, between October 1826 and September 1828; and, thirdly, for about two years, between September 1839 and October 1841. On the first occasion, he went on a visit to his sister in Scotland, and he remained there **[445]** the whole period. During his stay, he in a letter stated as follows:—"If I cannot get the 'Coast Blockade' or the 'Ordinary,' I must, from the precarious state of my health and the charge of an only sister, commence private practice; I have been looking out for a situation in some county town in England, but as none offers, I must commence in Scotland."

This intention he never carried into effect, but he returned to England, and got appointed to another ship.

In 1826, on the second occasion of his being on half-pay, he went to Scotland, and returned in 1829, and was appointed to another ship. In 1829 he expressed to one witness an intention not to return again to Scotland: "that his father and mother being dead, and his sister living in London, and the only person for whom he had any affection, it was his wish and intention to be continuously employed in the naval service, with a view to his becoming entitled, by promotion, to such an amount of half-pay as, together with the income to arise from investments he was then, from time to time making, would enable him to retire from the service on such half-pay, and to reside permanently in England."

On the other hand, there was evidence to shew that after he left Scotland in 1828, he had, in letters, expressed himself "as longing for the time when he could settle himself down for life" amongst his friends in Scotland.

In 1830 he made his will in the English form.

On the third occasion of his being on half-pay he went to reside with his sister at Pimlico, where he continued until his reappointment in October 1841.

[446] During his residence in Pimlico, he acted as secretary of the medical officers of the Navy, who were raising a fund to present a testimonial to their chief; and he was, during that time, "pressing his claims to employment and promotion in the Navy;" and, in a letter from Pimlico, in December 1840, he stated that his sister's coming to Scotland was "entirely dependent on his being obliged to go abroad to complete a period of two years' service; but that, should God spare him to return, it was more than probable that his final abode would be Scotland, unless he succeeded to a staff appointment, which he ought long since to have had, and was still disposed to believe he might obtain."

In October 1841, after his appointment to the "Queen," which took him out to Malta, he wrote to a friend in Scotland, as follows:—"Nor would I even object to being placed on permanent half-pay of my present rank, and a snug residence in your neighbourhood for the remainder of my life."

He then took his sister with him to Malta in the "Queen" in 1841, where he was appointed Deputy-Inspector of the Malta Hospital; and he retained that appointment, and remained in Malta down to his death in August 1848. His sister died there in 1846.

One witness stated that while at Malta, the testator had said that he had made England his "home," that Scotland had now no attraction for him, that he should never return there, and had determined to return to England to settle, never again to be removed; and "that he had made up his mind to occupy a house near one of the parks in London, to marry an English lady, and to establish himself as a married man in every comfort."

[447] In addition, there were several witnesses who spoke of the testator's having expressed an intention, while in Malta, of returning and settling in Scotland.

There were some other minor circumstances relied on by the Plaintiffs as proving an English domicile, such as his always having an agent in London to whom he remitted his funds for investment, that he had sent for his sister's piano from Scotland to London, &c., &c.

Mr. Stuart and Mr. Hetherington, for the Plaintiffs, in support of the exceptions, argued that under these circumstances the testator's domicile was in England. They stated that the father of the testator was illegitimate; and that if the domicile were held to be Scotch, then, by the Scotch law, the Plaintiffs, who were the next of kin *ex parte maternâ*, would be excluded, although there were none *ex parte paternâ*.

The following cases were cited: *The Attorney-General* v. *Dunn* (6 Mee. & W. 511, 526); *Whicker* v. *Hume* (13 Beav. 366); *Munroe* v. *Douglas* (5 Madd. 379); *Somerville* v. *Somerville* (5 Ves. 750, 758); *Bruce* v. *Bruce* (2 Bos. & P. 229, n.); *Bempde* v. *Johnstone* (3 Ves. 198); *Ommaney* v. *Bingham* (cited 5 Ves. 757, and 6 Bro. P. C. 550); 1 Burge Com. (p. 34, 40); Story on Confl. of Laws (p. 48).

Mr. Elmsley and Mr. G. S. Carr, *contrà*, were not heard.

THE MASTER OF THE ROLLS [Sir John Romilly]. I should be pleased if I could concur with the Plaintiffs' argument, thinking it a great evil that there should **[448]** be a difference in the law in the two countries; but I am satisfied that the testator never lost his domicile of origin.

This gentleman was born in Scotland; and, at the age of sixteen, he went to Haslar Hospital as a surgeon's mate. He remained in the Queen's service until his death, and during the whole time, there were only three periods, of about two years each, during which he could have changed his domicile—namely, in 1818, 1826, and 1839.

In December 1818, being on half-pay, he went to Scotland, but as soon as he obtained employment, he returned to England, and remained in the service until 1826, when he was, for a second time, placed on half-pay. He spent this time in Scotland, and appears to have speculated on carrying on business as a surgeon in England, or if he could not, then in Scotland.

Now, there is nothing more clear than this: that the mere declaration of intention to change a domicile, without an actual change of residence, is inoperative to create a new domicile; therefore the Court must disregard any expressed intention which has not been carried into effect.

In 1826 he had done nothing to change his domicile, and down to October 1829 his domicile was in Scotland. It has not been contended by the Plaintiffs' counsel, nor could it have been consistently with the settled law on this subject, that the employment in the Navy created any change of domicile.

Between October 1839 and October 1841 there was an interval of two years in which he was on half-pay; and during that period he took lodgings in Pimlico, and he remained there until he was again employed. It **[449]** is said that where the circumstances, hopes, and necessities of a person are in a particular country, that creates a domicile. It is contended that here his hopes and necessities were in London, and that he had fixed himself there for life. But it appears from the evidence that he had no intention to fix anywhere for life, but merely until he could obtain employment in the Navy, and that he found Pimlico a convenient place for this purpose. To constitute a new domicile in a place, there must not only be the *factum* of residence there, but the *animus manendi*, that is, there must be a fixed resolution to have a permanent and continued residence in the place of actual residence.

Any such intention is negatived here: for, first, there is no evidence of a determination to pass the remainder of his life at Pimlico; it appears he resided there merely with a view of obtaining employment in the Navy, which might enable him, when he

had acquired a competency, to retire on half-pay, and he intended, at that time, to fix his future permanent residence. Secondly, during this time the letters shew that his disposition was rather towards Scotland, and not England. It appears therefore to me that the *animus manendi* is negatived by these two circumstances.

In 1841 he went to the Mediterranean in the "Queen," and remained there seven years, until his death in August 1848. Although there is some evidence to shew that his disposition was then in favour of England—that he was attached to a lady there, and that he intended to come over, and marry and settle in London, still these facts are immaterial, for, unless he had previously changed his Scotch domicile, this was a mere intention, not carried into effect by a *de facto* residence in England.

The exceptions must be overruled.

[450] MIDDLETON *v.* MIDDLETON.(1) *Feb.* 12, *April* 15, 1852.

A testator devised his E. estate, subject to debts, &c., to his wife for life, with remainders over, and he devised his C. estate, subject to his debts, &c., to his wife absolutely. He afterwards mortgaged his E. estate. Held, on a deficiency of the personal estate, that the estates E. and C. ought to contribute rateably towards payment of the mortgage.

The question arose on the will and codicil of Charles John Middleton. By his will, dated the 28th of February 1831, he expressed himself as follows:—"I desire and direct that all my debts, funeral and testamentary expenses, and all legacies herein mentioned, or which by any codicil to this my will I may hereafter give or bequeath, may, in the first place, be paid and satisfied out of my personal estate, or if that should prove insufficient, out of my real estate; and I hereby charge the same upon my personal and real estates respectively in the hands of my devisees and executors hereinafter named." He then devised his freehold, leasehold, and copyholds "in England, or wheresoever situate, to trustees and their heirs for ever, in pure trust, subject to debts, expenses, and legacies, as aforesaid, to suffer and permit" his wife to enjoy them for life, and after her decease, to his brother, H. J. Middleton, for life, with remainders over. He bequeathed all his personal property to his wife absolutely, subject to certain pecuniary legacies. He then, after reciting that he possessed estates in the East and West Indies, devised his lands, &c., in the colonies to his wife and her heirs absolutely, "subject only to payment of debts, expenses, and legacies, as aforesaid; for his will and intention was to bequeath to her all he possessed, and **[451]** to create an interest in his lands and real estate in England only, after her decease, as detailed above."

The testator had a copyhold estate at Midanbury, in Hampshire, and a share in a freehold estate in Jamaica. He afterwards purchased two houses in Calcutta, and by a codicil made in 1835, after reciting he had purchased these two houses in Calcutta, he proceeded thus:—"Now I desire and direct, that these tenements shall follow the uses of my will now in England, and in the event of my demise, shall become the sole property of my wife, to be enjoyed and disposed of by her as fully and entirely as if I had myself been alive."

On the 12th of January 1843 the testator borrowed the sum of £1,500 from Messrs. Child, his bankers, and he gave his bond of that date for securing the repayment, together with an equitable mortgage on the Midanbury property.

The testator died in January 1844; and a bill having been filed for the administration of his estate, it was found, that the personal estate was insufficient for the payment of the debts, that a small balance of £15 remained unapplied, and that there was still a debt by simple contract, of £194, and that the debt of £1500, to Messrs. Child & Co.,

(1) DATES.

1831.	Will.	1843.	Mortgage.
1835.	Codicil.	1844.	Death.