[379] SWINFORD v. HORNE. *June* 10, 1820.

A witness in the cause cannot be re-examined before the Master to the same matter, without an order which will only be made in cases of accident or surprise.

Mr. Cooper moved for leave to re-examine before the Master a witness who had been examined before the hearing; and he cited *Vaughan* v. *Lloyd* (1 Cox, 312).

Mr. Wetherell, *contrà*.

THE VICE-CHANCELLOR [Sir John Leach] held that the Master may, without order, examine to different matters a witness who had been examined before a decree, but not to the same matters; and that the Court will not make such an order unless in cases of accident or surprise. (See 2 Swanst. 264.)

[379] MUNROE v. DOUGLAS. *June* 13, 15, *July* 1, 3, 1820.

[See *Udny* v. *Udny*, 1869, L. R. 1 H. L. (Sc.) 448.]

An acquired domicil is not lost by mere abandonment, but continues until a subsequent domicil is acquired, which can only be, *animo et facto*, unless the party die *in itinere*, toward an intended domicil.

The late Dr. Munroe was born in Scotland, and educated there to the profession of a surgeon; at the age of nineteen he went out to Calcutta to practise, and in 1771 was appointed assistant surgeon to a regiment in the East India Company's service. On the 6th May 1789 he was appointed full surgeon in the company's service. In 1811 he was ranked as surgeon in His Majesty's service, but it was only local rank. He was married in India in 1797 to the Plaintiff. On the 15th March 1813 he made his will and added a codicil [380] thereto on the 22d September 1814. He left India on the 2d January 1815 with a determination, as the Plaintiff contended from his letters when in India, to spend the rest of his days in Scotland, and arrived in England on the 15th of the following June, where he took a house, and, owing to ill-health, became undetermined whether he should continue to reside in England or spend his days in Scotland. In July 1816 he went on a visit to Scotland, and died at Sir Robert Rawley's seat there on the 8th August 1816. By his will he had given property to his wife, the Plaintiff, to the amount of £1000 a year and upwards, and made dispositions in favour of his nephews and nieces, but he had not disposed of the remainder of his property, amounting nearly to £60,000; and the question now was, whether Dr. Munroe was, at his death, to be considered as domiciled in Scotland, or whether he was, as the Defendants contended, to be considered as domiciled in England, the distribution of the property being by law much more in favour of the Plaintiff in the former case than in the latter?

Many letters were given in evidence, written by the doctor during his residence in India, to shew that his determination was to spend his latter days in Scotland, and some passages in his will were relied upon as indicative of that intention. Letters, also, and conversations were in evidence to prove that, after the doctor's return from England, his health was such that he became undetermined whether he should spend his days in England or Scotland; and clear evidence was adduced that when he went to Scotland after his return from India, it was only on a visit, and without an intention of then permanently residing there. The evidence was very voluminous. The impression of it upon the [381] counsel and the Court will appear in the arguments and in the judgment.

Mr. Wetherell, Mr. Heald and Mr. Barber, for the Plaintiff. The widow of the late Dr. Munroe claims one-half of the property of her late husband on the ground that, at his death, his domicil was in Scotland. There is not, under all the circumstances of this case, any direct decision in point, but the authorities, as far as they go, appear to us in favour of the Plaintiff's claim.

It is clear from passages in the will that the doctor intended finishing his days

in Scotland. He there says as to his undisposed property, "I will not dispose of the remainder of my property (meaning the £60,000 undisposed of) till I come home, when it is my intention to cultivate a more intimate acquaintance with the junior members of my family, in order that I may divide my property equally amongst them." At the time he made his will he thought all the junior members of his family were resident in Scotland, and there it is he must be supposed as intending to cultivate the acquaintance he speaks of; Scotland he considered as his "home." Besides this, there are several letters of his in which expressions are used shewing his intention of returning to Auld Reckie (a Scotch expression, meaning Edinburgh), and making a permanent residence in Scotland; the *animus redeundi et morandi* is clear.

[All the evidence on the part of the Plaintiffs was here read, as was also, by consent, the evidence on the part of the Defendants.]

[382] The counsel for the Plaintiff, continued. The Plaintiff's evidence, we contend, arising from the expressions in the will, and the tenor of letters we produce, shew an intention of returning to Scotland. Our parol evidence shews that Dr. Munroe intended to go to Scotland and die there. The evidence of the Defendants is somewhat contradictory, but it purports that he only meant to visit Scotland, not to continue there, and to winter in London. The weight of the evidence, however, we insist, is in favour of an intention to die in Scotland.

THE VICE-CHANCELLOR. It is clear from the letters produced as exhibits and other proof that, when Dr. Munroe went to Scotland, it was merely for a visit, and that he intended to return to England: that cannot be doubted.

Counsel for the Plaintiff, continued. Some of these letters produced by the Defendant as exhibits were not known to us until they were just now read. They are certainly a very strong contradiction of our view of this part of the case, and of our evidence; and, as your Honor seems convinced on that part of the case, it is unnecessary to enlarge more upon it; but supposing it was not his then intention permanently to reside in Scotland, and that he only meant a visit at that time, yet still we insist that it was his intention at a future period to return to Scotland, and permanently reside there, and that he never resigned such intention, and then the question will be whether, by reason of his original domicil in Scotland and his general intention of finally residing in Scotland **[383]** and dying there, coupled with the fact of his actually dying there, there are not sufficient facts for the purpose of establishing his domicil in Scotland? In other words, we contend, first, that he never lost his Scotch domicil; or, secondly, that if he acquired a domicil in India, he abdicated it, and resumed his original Scotch domicil.

As to the first point, the case of *Bruce* v. *Bruce* (in the House of Lords, 15th April 1790, 7 vol. Bro. P. C. 230, edit. by Tomlyns) will probably be insisted upon by the Defendants, but that case varies from the present. In this case the testator died in Scotland; in that, he died in the East Indies. In this case Dr. Munroe was in the service of His Majesty, and liable to be sent from one country to another; in that case Bruce died in the service of the East India Company, whose employment imposed upon him the necessity of a local residence. Being in the King's service in India does not constitute a domicil. (See what Lord Thurlow says in *Bruce* v. *Bruce*, Dom. Proc. 2 Bos. & Pull. 230.) The death of Bruce in India was a strong circumstance on which Lord Thurlow very much relied.(1) We do not say that merely dying in Scotland gave Dr. Munroe a domicil there, but that it is a strong circumstance to evidence an intention to make Scotland his domicil, and seems to have had an influence in the decision of *Bruce's case*. If a man goes to India for the purpose of permanently residing there, *animo morandi*, his residence will con-**[384]**-stitute a new domicil; but not so if he does not intend a permanent residence—if he go there *sine animo remanendi*, and only means to raise a fortune and return to his original home. (See Vattell, liv. 1, c. 19, s. 218; Ersk. Inst. lib. 3, tit. 9, s. 4. To the same effect is the present French law. Code Civil, lib. 1, c. 3, tit. 3, s. 103, 106.) But not

(1) Dom. Proc. 5th April 1790, 7 vol. Pal; Cases, Toml. edit. S. C. 11 and 12 vols.; Dictionary of Decisions, p. 4617. And see a note of what Lord Thurlow said in the decision of that case, 2 Bos. & Pul. 230.

to press this point further, it being supposed to be concluded by the decision in *Bruce's case*, we shall proceed to the second point, 2dly, whether he did not lose his acquired domicil in India, and resume his original domicil in Scotland? By quitting India with a clear intention of never returning, he quitted his acquired domicil there, and, never after acquiring a domicil, does not his original domicil revive? Suppose he acquired a domicil in that part of the East Indies which belongs to the Dutch, would not his return to this country have been an abandonment of his Dutch domicil? Suppose, instead of returning to England, he had gone to France, with an ultimate intention of finally residing in Scotland, and that he had died in France, would he have carried his acquired domicil with him into France? It must have been held in such case that he was *in transitu* to Scotland, and that Scotland was his domicil. Admit that he went only on a visit to Scotland—still, as he intended ultimately to fix his abode there, and died on a visit, yet, dying with a previous intention of ultimately settling in Scotland, he must be considered as *in transitu*, and his original domicil must be considered as resumed. His death in Scotland was what he intended, though he did not foresee it would happen so soon, and while on a visit only to that country.

In *Colville* v. *Lauder* (Dictionary of Decisions, 33 and 34 vols. in Appendix, p. 9, tit. Succession), decided in Scotland on the [385] 15th January 1800, the case was thus:—"In 1793 David Lauder, a native of Scotland, went to the Island of St. Vincent, under indenture to follow his trade as a carpenter, leaving his wife, Jane Colville, with her relations at Leith. He remained at St. Vincent till the 21st July 1797, when he wrote to his father, William Lauder: 'As I never loved the West Indies, and as my health is very much hurt by a long continuance in it, I have determined to go off to America in a ship that sails from this in a few days, hoping my health may be re-established by a change of climate. I have, during my stay in this part, made shift to lay up some money, £200 of which I have converted into a bill of exchange, which is sent you indorsed, reserving to myself no more than will defray my necessary expenses to New York where, if it please God that I arrive, you shall hear from me; but, as a considerable time will be necessary before I can fix upon any plan of life, I will then be more explicit; only draw the money and secure it for me; for if I do not succeed to my wishes in America, I will return to my native country. I have wrote three different times to our friends at Leith, but have never been favoured with an answer. There must be some very grave and important reasons for so very extraordinary omission, but what they are I cannot conceive. However, be pleased to let them know that I have no desire to give them a fourth trouble. Dear father, it may so happen from the common accidents of life that you may never hear from me again, the money is either at your or my dear mother's disposal.'

"He sailed to New York soon after, and remained there till Spring 1798, when he went to Canada, where [386] he was drowned in the following September. It appeared from some jottings in his possession that he meant to have returned to Scotland in a few months. His widow claimed one-half of his funds as *jus relictæ*.

"In defence, his father founded on the letter above quoted, as excluding her right to any share of the £200 remitted to him.

"The Lord Ordinary repelled the defences.

"The Defender, in a petition, pleaded. When a Scotsman lives for years abroad in prosecution of his employment, he acquires a domicil there, which must regulate his succession, though he may intend to return to Scotland at some future period. In this case, therefore, the law of England must prevail, according to which the letter in question would be held as a testament effectually excluding the claim of the widow. Blackstone, vol. 2, pp. 402, 434.

"The widow answered. In the whole circumstances of this case, the deceased cannot be considered abroad *animo remanendi*, or to have formed a domicil elsewhere, and therefore the law of his nativity must govern. Ersk. B. 3, T. 9, s. 4; so that it is unnecessary to investigate the effect of the letter in question by the law of England.

"Observed on the bench. When the deceased was in St. Vincent his succession would have been regulated by the law of England; but after leaving that island [387] he must, in the whole circumstances, be considered as *in transitu* to Scotland.

"The Lords adhered."

This is the whole of the case as reported in the Dictionary of Decisions.

The carpenter in that case had acquired a domicil in St. Vincent's, and if he had died there, that place would have been his domicil, but he leaves St. Vincent's, sails for America, and is drowned; he had renounced his acquired domicil, and had gained no other; and we see it was held that though he lost his Scots domicil by acquiring another, yet that having abandoned his acquired domicil, the original Scots domicil reverted. This case is very strong in favour of the Plaintiff. It establishes as a principle of law that if a man quits his acquired domicil and does not get another, the *domicilium originis* revives. There was an abandonment of the acquired domicil, and a letter written shewing an intention to get a domicil elsewhere, and actually residing in New York from 1797 to 1798, and no evidence of an intention finally to reside in Scotland, and yet that place, the *domicilium originis*, was held to be his domicil. That case was decided in 1800, subsequently to *Bruce* v. *Bruce*.

In *Macdonald* v. *Laing* (Dictionary of Decisions, 11 and 12 vols. p. 4627; tit. Foreign, 118), a native of Scotland, a military man, goes to Jamaica, returns back to Scotland, and dies there, and the Court held that the Scotch domicil existed, though his purpose of going to Scotland must be considered only as a visit, as his commission in His Majesty's service continuing, he might have **[388]** been ordered to England or elsewhere. Dr. Munroe was liable to no such orders. In that case, which was not appealed from to the House of Lords, and has subsequently been cited as an authority, the death in Scotland was considered as material. That case was decided on the 27th November 1794, and is thus reported:—"William Macdonald, a native of Scotland, acquired a considerable plantation in Jamaica, where he had resided about fifteen years. In 1779 he was appointed lieutenant in the 79th Regiment of Foot, at that time quartered in the island; he also got the command of a fort in it. In 1783 he obtained leave of absence for a year that he might return to Scotland for the recovery of his health. He died a few months after his arrival. The 79th Regiment was by this time reduced. He had no effects in Scotland, and his only property in England were two bills, which he had transmitted from Jamaica before he left it, in order, as was said, to purchase various articles for his plantation.

"His father intromitted with the funds in England.

"Jean Macdonald and other sisters of the deceased brought an action against him to account for their brother's executry.

"The Defender died during the dependence of this action, leaving his grandson, Alexander Laing, his heir, as to the succession of his son. The rights of the parties turned upon the question, whether William Macdonald had his domicil in Jamaica or in Scotland? Laing offered to prove that the deceased meant to have returned to Jamaica if his health had permitted, and that he had no intention of residing in this country; **[389]** and pleaded, moveable succession is regulated by the law of the country where the deceased resided *animo remanendi*. To which country this description belongs is to be ascertained not merely by the place of his birth, or of his death, but by the whole circumstances in his situation. See case of *Bruce* v. *Bruce*, No. 115, p. 4617. Upon this principle, William Macdonald had his domicil in Jamaica.

"The Lord Ordinary found the succession was to be regulated by the law of Scotland, in respect that William Macdonald died in Scotland his native country, where he had resided several months before his death.

"A reclaiming petition having been presented, the Court were of opinion that the domicil of William Macdonald was in Scotland, and that the proof offered was incompetent, and therefore unanimously 'refused' the petition without answers.

"A second reclaiming petition, along with which were produced two letters of the deceased, as shewing his intention to return to Jamaica upon the recovery of his health, was appointed to be answered. Upon advising which some of the Judges came to be of opinion that the domicil of the deceased was in Jamaica. A considerable majority, however, remained of their former sentiments.

"The Court adhered."

There is evidence that Dr. Munroe had the intention of finally settling in Scotland, and we say the execution of that purpose was intercepted by death. It is true he died on a visit, and that he intended returning to **[390]** London, but his final destina-

tion was Scotland. Suppose there was no evidence of Dr. Munroe's intention, where he would reside after he had left India, and he had died in England, it could not be contended that it was the same as if he had died before he left India, for according to that doctrine, if he had died in France, without any intention of a fixed residence there, he would have been domiciled in France. Suppose he had been a merchant in Spain, and had resided there for a considerable time and became domiciled, and that he afterwards gave up his business and quitted Spain for ever, going to various places and stopping only a short time, and no evidence adduced where he meant finally to reside, and he dies; where would you say his domicil was? His original domicil would revert. Where the acquired domicil is abandoned, the *domicilium originis* reverts. Dr. Munroe's residence in India only suspended his original domicil, and nothing but his death in India could have the effect of extinguishing the original domicil, and completing the acquired domicil. He afterwards abandoned his Indian domicil, by leaving it never intending to return, and as he acquired no new domicil, the original domicil reverts. He abdicated his Indian domicil the moment he embarked on board of ship for the purpose of quitting India never to return; and it cannot be held that though he left India in point of fact, he did not leave it in point of law. In a case of doubt as to the domicil, wherever it is in equilibrium the original domicil prevails. That is the effect of Lord Thurlow's judgment in *Sir Charles Douglas's case.* (See this judgment stated in *Sommerville* v. *Sommerville*, 5 Ves. 758.) It must be pre-**[391]**-sumed that when a man abandons his acquired domicil, he means to resume his native domicil. There is but little to be found in the civil law respecting domicil, nor could a question of this description arise at Rome, for there was no difference between the domicil of a person, whether born in a province of the Roman Empire, or in the capital; all were governed by one law.

It is laid down as a general principle in the Code (Cod. lib. 10, tit. 18, s. 4. It is in p. 422 of the Elzevir edition), "*Origine propria neminem posse voluntate sua eximi, manifestum est.*"

In another passage of the Code (lib. 10, tit. 39, s. 1) it is said, "*Non tibi obest, si cum incola esses, aliquod munis suscepisti modo si antequam ad alios honores vocaveris, domicilium transtulisti.*"

In another passage (Cod. lib. 10, tit. 39, s. 7; and see Dig. lib. 50, tit. 16, s. 203) it is said, "*Cives quidem origo, manumissio, allectio vel adoptio: incolas verò (sicut et Divus Hadrianus Edicto suo manifestissime declaverit) Domicilium facit. Et in eodem loco singulos habere domicilium, non ambigitur, ubi quis larem, rerumque, ac fortunarum suarum summam constituit, unde (rursus) non sit discessurus, si nihil avocet: unde cum profectus est, peregrinari videtur: quod si rediit peregrinari jam destitit.*"

If it be doubtful where a man's domicil is, the law presumes in favour of his original, natural, domicil, which is connected with rights and duties, early affections and **[392]** habitudes, to which it must be supposed he would be anxious to revert.(1) In Voet (Comm. ad Pand. lib. 5, tit. 1, pl. 92, at the end) there is the following passage:—"*Interim inficias haud eundem, quin in dubio unusquisque Domicilium in ipso potius originis loco, quam alibi, præsumatur habere: cum enim ab initio jus Domicilii à patre in filium translatum sit, atque ita filius secutus sit Domicilium habitationis paternæ, consequens est, ut is, qui id mutatum contendit, hoc ipsum probet; cum in eodem statu res unaquæque mansisse credatur, donec contrarium demonstratum fuerit.*" In another passage he says (lib. 5, tit. 1, pl. 97), "*Quoties autem non certo constat, ubi quis Domicilium constitutum habeat, et an animus sit inde non discedendi, ad conjecturas probabiles recurrendum, ex variis circumstantiis petitas, et si non omnes æque firmæ, aut singulæ solæ consideratæ non æque urgentes sint, sed multum in iis valeat judici, prudentis, et circumspecti arbitrium. Sic enim in dubio in loco originis et Domicilio paterno quemque præsumi continuasse Domicilium, jam ante dictum. Idemque est, si in aliquo loco majorem bonorum partem possideat; aut bonis divenditis, quæ alibi possidebat, in aliam urbem cum familiâ se contulerit, ibique assidue versatus fuerit: vel jus civitatis alique in loco sibi acquisiverit, atque ita illic habitet.*" Pothier says—"*Il paroît quelques fois incertain où est le Domicile d'une personne; ce qui*

(1) In *Ommaney* v. *Bingham*, Dom. Proc., 18 March 1796, the Lord Chancellor said, "Birth affords some argument and might turn the scale, if all the other circumstances were in *æquilibrio.*" See 5 Ves. 758.

arrive, lorsqu'elle a un ménage dans deux lieux différens, où elle va passer alternativement différentes parties de l'année. Il n'y a pas lieu à cette incertitude, lorsque cet homme a un bénéfice ou [393] *un charge, ou autre emploi non amovible qui demande residence dans l'un des lieux; car il n'est pas doubteux en ce cas que c'est dans ce lieu où doit être fixé son domicile. Lorsque cet homme n'a aucune bénéfice ni charge ou emploi, qui l'attache à l'un de ces deux lieux, on doit, pour fixer son domicile, avoir recours à d'autres circonstances, et decider, 1° pour le lieu où il laisse sa femme et sa famille lorsqu'il va dans l'autre; 2° pour celui où il fait le plus long séjour; 3° pour celui où il se dit demeurant dans les actes; ou pour celui où il est imposé aux charges publiques; ou pour celui où il se rend avec sa famille pour faire ses Pâques. A défaut de toutes ces circonstances, on doit,* in dubio, *décider pour celui des deux qui étoit le domicile de cet homme, ou de ses pére et mére, avant qu'il ait commencé de tenir un ménage dans l'autre; car le changement de domicile d'un lieu à un autre devant être justifié, on est toujours,* in dubio, *présumé avoir conservé le premier.* (Costumes d' Orleans. Introduction Générale aux Coutumes, chap. 1, s. 7.)

According to Pothier, therefore, if it be a case *in dubio* where the domicil is, the original domicil must prevail. The same rule is laid down in Denisart (tit. Domicil, tom. 1, p. 514, pl. 12, 13).

The meaning of Pothier also appears to be, that when a man has left his acquired domicil without getting another, his original domicil revives. There is a case in Cochin (Œuvres de Cochin. tom. 5, p. 5) of the Marquis de St. Parterre, which bears some analogy to the present. The marquis resided sometimes at Paris, sometimes in the province of Mayenne, where he was born, and they decided that it ought to be presumed that he intended to preserve his original domicil.

[394] In the case of *La Virginie* (5 Robinson's Admiralty Reports, 99) Sir William Scott says, "It is always to be remembered that the native character easily reverts, and that it requires fewer circumstances to constitute domicil, in the case of a native subject, than to impress the national character on one who is originally of another country."

There is no case either in the Roman or any other law exactly in point; but all the authorities shew that in a case of doubt, of equilibrium, the original domicil must prevail.

In the case of *Chiene* v. *Sykes*, determined by Sir William Grant in 1811, of which there is no printed report, the circumstances were very similar to this case, and the Master of the Rolls referred it to the Master to ascertain what the law of Scotland was, and where was his domicil, and the Master found he was domiciled in Scotland, and an order was made that his property should be distributed according to the law of Scotland.(1)

---

(1) That case was thus:—

Margaret Chiene, Widow, v. *James Sykes and Others.*

Robert Chiene, the late husband of the Plaintiff, by his will, dated the 9th day of November 1801, and by a codicil thereto, dated the 29th day of January 1802, amongst other things, gave his wife the interest of certain sums for her life. The Defendant Sykes, one of the executors, proved the will and codicil in the Prerogative Court of Canterbury shortly after the testator's death in the year 1802. The bill was filed by the widow against the acting executor and legatees of her husband's will, praying an account of the testator's personal property, and that a moiety thereof might be paid to her; but if the Court should decree against such claim, that the will of her husband might be established.

The Court, by a decree, dated the 27th of April 1807, referred it to a Master to inquire, among other things, where the testator, Robert Chiene, was domiciled at the time of his death. The Master, by his report, dated the 11th of February 1808, certified that, by the deposition of William Brown, postmaster of the Royal burgh of Crail in Scotland, the said William Brown made oath that he knew Robert Chiene the testator from his infancy; that the said Robert Chiene was born in the town of Crail, and as the deponent believed in the house of his maternal grandfather, with whom his mother resided at that time; that the said Robert Chiene was a natural child of John Chiene, shipmaster in Crail, and Anne Brown, residing there; that the said Robert Chiene

[395] They will perhaps contend on the other side that the acquired domicil was not renounced, and that coming from India to London was only changing his situation [396] from one place to another, within the province of Canterbury, and that his acquired domicil was not thereby lost. It may be admitted that the East Indies and the [397] Colonies, in the politic sense of the word, are part of the mother country, but for the purpose of domicil they are foreign to this country.

[398] Mr. Bell, Mr. Horne and Mr. Abercrombie, for the Defendants. We contend that Dr. Munroe never abandoned his English domicil, but that he retained it up to his death. As your Honor is perfectly acquainted with all the facts of the case it is not necessary to detail them. They say it is apparent from the will that he intended to go to Scotland for the purpose of residing there; but by the will he makes a provision for his nephews and nieces, and gives a great part of his fortune to his wife. At the time he made his will he intended to leave India, and he makes a disposition for the expenses of the voyage to England. He says, if she does pay her expenses she is to have 8000 rupees, &c. Now if he had an intention of returning to reside in Scotland the effect would have been to render the will [399] a complete nullity, and would in effect give to his wife and sister that part of his fortune which it was his intention should be divided amongst his nephews and nieces. It is impossible, therefore, to conclude that at the time he made his will he intended to return to Scotland.

---

received his education at the school of Crail, during which time he resided with his mother; and when seventeen or eighteen years of age he entered into the seafaring line, and went abroad as a sailor; that he the said William Brown had particular occasion to know that the said Robert Chiene returned to Crail again in the year 1784, from the circumstance of his the said William Brown's being postmaster at that time, and having inspected the quarterly bills of the office he found entries of letters to a Robert Chiene in that year; that he the said William Brown could not with precision say how long the said Robert Chiene remained at Crail at this time, but that he was certain he again went abroad in less than twelve months, and resumed his occupation as a seaman; he the said William Brown having reason to believe, from seeing letters addressed to him, that he was appointed master of the "Experiment" frigate; that the said Robert Chiene returned to Crail again in the year 1802, and resided there till his death, which happened in November in that year; that some years before his return, he the said William Brown understood that a dwelling-house and garden, and some other subjects, in the burgh of Crail, were purchased for him and his brother jointly; that on his return to Crail last mentioned he rented a house, in which he resided for some months, till he got one, purchased for himself, repaired, when he went to reside in it, and continued to do so till his death; that the said William Brown was informed, in the year 1780, by Elizabeth Wilkinson, his brother's wife, that the said Robert Chiene was, some time previous, married to Margaret Wilkinson at Philadelphia, where she, Elizabeth Wilkinson, was present at the time; and he received the same information from her husband, Patrick Brown, and the brother of him the said William Brown; that he had heard that it was the said Robert Chiene's intention to buy some land in the neighbourhood after his last return, and from which he the said William Brown inferred that it was his the said Robert Chiene's intention to reside at Crail in future. And by the deposition of Andrew Whyte, town clerk of the Royal burgh of Crail, the said Andrew Whyte made oath that he knew the said testator, Robert Chiene, for about eighteen years previous to his death; that he understood the said Robert Chiene to have been a native of the burgh of Crail before named, but that he had left that place and gone abroad before he the said Andrew Whyte became acquainted with him, which happened in the year 1784, on his return from abroad to his native place; that on his aforesaid return he became tacksman of a rabbit-warren in the neighbourhood of the burgh of Crail, which he held for one season under him the said Andrew Whyte, and again went abroad in the course of the following year; that he again entered into the seafaring line to which he was originally bred, and did not return to his native place at Crail till the year 1802; that some years previous to his return last mentioned, he caused to be purchased, jointly with John Chiene his brother, a dwelling-house, granary, and two gardens in the burgh of Crail, all which had previously belonged to their

THE VICE-CHANCELLOR [Sir John Leach]. You need not trouble yourself upon that part of the case; you may assume it to be quite clear that when he arrived in England he had no settled intention where he should fix his abode.

Argument continued. Dr. Munroe, by his residence in India, acquired an English domicil; *Bruce* v. *Bruce* is an authority for that; and in *Somerville* v. *Somerville* it was observed that in *Bruce* v. *Bruce* the question was, whether the property should be administered according to the law of the province of Canterbury or according to the law of Scotland; whether his domicil should be considered as in England or in Scotland. There is no question here about an Indian domicil. There is no such thing: an English domicil may be acquired in India, but there is no such thing as an Indian domicil contradistinguished from an English domicil. The personal estate of a person domiciled in India is distributable according to the law of England, and just the same as if he resided in England; the same law prevails in all the colonies. It has been made a question whether, if this gentleman had gone to France on his return from India instead of coming to England, his original domicil would not have revived. If a person residing in India acquired a domicil here and had died on his return, it could not be said he had acquired [400] a new domicil; and it would be difficult to say that by giving up of his Indian habitation he had abandoned his English domicil. If so, any person coming from the north and travelling for his health would

---

father and were sold for behoof of his creditors: that on the said Robert Chiene's return to Crail last mentioned he at first rented a house in which he lived for some months and thereafter removed to the one purchased by him and his brother, after the last had undergone some repairs, and lived in it till his death, which happened in the month of November following; that on his said last-mentioned return to Crail he informed him, the said Andrew Whyte, that he was married to a lady who resided in Philadelphia, and with a view of settling an annuity on his wife he employed him, the said Andrew Whyte, to purchase some land in the neighbourhood of Crail; and that the said Andrew Whyte made an offer for same accordingly but did not obtain the purchase. And that by the deposition of Robert Murray the said Robert Murray made oath that he knew the said testator, Robert Chiene, for a period of thirty years before his death and from the time he was a boy at school: that he had heard the said Robert Chiene was born at Crail, and that at the time the said Robert Murray knew him as at school he resided with his mother, Ann Brown, at the town of Crail: that the said deponent, Robert Murray, went abroad himself early in life and did not return to Crail till the year 1787, so that he knew not the early part of the said Robert Chiene's history intervening betwixt his leaving the school at Crail and his return to that place after mentioned: that he knew the said Robert Chiene returned to Crail in the year 1802, where he resided till his death, which happened in the month of November in the said year: that he understood, although he had no particular occasion to know the same, that some years previous to the said Robert Chiene's return to Crail, as before mentioned, a dwelling-house with gardens with some other property was purchased on account of him and his brother jointly in that burgh: that on the said Robert Chiene's return he at first rented a house at Crail in which he resided for some months and afterwards removed to the one he had purchased, after it had undergone some repairs, and resided therein till his death: that he had heard the said Robert Chiene married a sister of the wife of Patrick Brown, deceased, some time a captain of a merchant ship and a native of Crail, a brother of Mr. William Brown, the then present postmaster of Crail, and that he had heard that the said Robert Chiene's wife had resided, and still resided, in America. And the said Master further certified that three several letters, appearing to have been written by the testator to the Plaintiff, bearing date respectively the 1st day of November 1801, the 21st day of March 1802, and the 25th of August 1802, had been exhibited to him, and the handwriting of the said testator proved by an affidavit of William Penrose, of, &c., made in the said cause on the 12th day of December 1807, the contents of which letters, inasmuch as they appeared to him to shew the said testator's intentions as to residence, he had set forth in the third schedule annexed to his report; and the said Master was of opinion that the said testator was domiciled in Scotland at the time of his decease; and the decree was accordingly.

thereby abandon his Scotch domicil. *Ommany* v. *Bingham* was the case of a Scotchman who had acquired an English domicil by serving in the Navy and a residence in England, but he died in Scotland on a temporary visit; and the House of Lords held that he was domiciled in England. It is clear, therefore, that death at a place does not constitute a domicil there. In *The Marquis of Annandale's case* (*Bempde* v. *Johnstone*, 3 Ves. 199) it was held he was a domiciled Englishman. The original domicil cannot be changed unless by an acquired domicil; but when a domicil is acquired it requires as much to alter that domicil as it did to abandon the original domicil; both are on the same footing as to abandonment; neither can be lost unless a new domicil is acquired. The passages in the Roman law do not seem to apply to the question of domicil as it relates to the distribution of a man's property, but only as it related to public burthens and offices. There are some other passages in the Digest (lib. 50, tit. 16, s. 203) and also in the Code (lib. 10, tit. 39, s. 7), besides those already quoted, but they fall within the observation before made on domicil as treated in the civil law. The most pertinent doctrine is to be found in Pothier (Coutumes d' Orléans Introduction Générale, chap. 1, s. 9) and Denisart (art. Domicile, 513). The former says, "*Une personne ne peut à la vérité, etablir son domicile dans un lieu qu'*animo et facto, *en s'y établissant une demeure.*" The latter says, "*Deux choses* **[401]** *sont nécessaires pour constituer le domicile,* 1° *l'habitation réelle; et* 2° *la volonté de la fixer au lieu que l'on habite.*"

It is quite clear that Dr. Munroe had acquired an English domicil by his residence in India, there is both the *animus* and the *factum* in support of that. The circumstance of his quitting India did not change his domicil. If he had quitted India with an intention of going to Scotland, and had arrived there, with an intention of not going to any other place, then it might have been contended that he had assumed his original domicil, but that was not so. His dying in Scotland did not alter the nature of his domicil. It was the same as if he had died in England. Some years before he left India he intended to return to Scotland, but he could not have so intended when he made his will, for the reasons before stated. They must shew an intention to return to Scotland, finally to reside there, and that he executed, or was in the execution of, that intention. We have shewn by evidence that he did not mean to make his final residence in Scotland. Denisart (tit. Domicile, s. 11) says, that is only a man's domicil which is the domicil of fact and intention, and that the original domicil of the father and mother shall be taken to be his domicil until he has got another, and that it shall be presumed that he has retained his domicil until there is proof to the contrary. He does not say, as is contended on the other side, that if a man has acquired a new domicil, and afterwards leaves his habitation, he entirely divests himself of that domicil, although he might not have acquired a new one; on the contrary, he says that a man cannot loose his original domicil until he has *animo et facto* **[402]** acquired another; he does not mean to say that the *domicilium originis* is any stronger than that which the man acquires himself, and it seems that the same principle applies to an acquired, as to an original, domicil. Before an acquired domicil can be lost, it must be shewn, not only that he has abandoned the acquired domicil, but also that a new domicil is acquired. If a man goes to any place not with an intention of fixing his domicil there, but with an intention of returning, he does not acquire a new domicil, but the instant a man has acquired a domicil, there must be, as Pothier and Denisart say, not only the *animus* but the *factum* of a new domicil, before the acquired domicil can be lost. All the authorities are to that effect.

In Sir Charles Douglas's case (*Ommaney* v. *Bingham*, before the House of Lords, 18th March 1796), it was much argued upon the hardship of holding his domicil to be in England, in order to give effect to a forfeiture; Lord Loughborough takes notice of the consequence that would arise from his being considered as domiciled in Scotland, as that would have the effect of subverting his will. In *Somerville and Somerville* (5 Ves. see p. 787), Lord Alvanley states the proposition we contend for, namely, that the last domicil is to be considered as the domicil of a man, until he acquires another; and that can only be acquired *ex animo et facto.* Much has been said about the attachment which a man feels for his original domicil—for the place of his home, and where he has been brought up: but suppose a child born in England, during a visit there of his father and mother, who were natives of Scotland, he would be a domiciled Scotsman, although he might never have been in Scotland. What attachment could he feel

towards his original domicil; his attachment would be to [403] the place where he was brought up. It is decided that it is not a man's domicil which is the place of his birth, but that which is the domicil of his father and mother, for which he may have no attachment whatever. In *Bempde* v. *Johnstone* (3 Ves. 201), Lord Loughborough held, the Marquis of Annandale was to be considered as domiciled in England, observing, "that he never had a residence in Scotland. He never was there, at any period, with a fixed intention of remaining. His existence there was purely a purpose of either visit or business, and both circumstanced and defined in their time. Wherever he had a place of residence that could not be referred to an occasional and temporary purpose, that is found in England, and nowhere else." In another passage (3 Ves. 203), observing also, "the cause has the additional circumstance that he happened to die in Scotland, the place of his birth; but undoubtedly he went there for a very temporary purpose, a mere visit to his family, when going to take a command in the American service."

Unless they prove that there was an actual abandonment of the acquired domicil, and an intention in execution of resuming his original domicil, the *domicilium originis* can have no effect. In the passages quoted from Voet he does not say, the *domicilium originis* cannot be changed, but that it is to be taken to be a man's domicil, until he he has, *ex animo et facto*, acquired another. If he has acquired another domicil, such domicil is the effect of his own choice, and may therefore be presumed to be more preferred than the *domicilium originis.*

[404] What Voet says applies as strongly to an acquired, as to an original domicil. There are other passages in Voet (Comment. ad Pandectas, lib. 5, tit. 1, pl. 96, 97) which shew in what manner a domicil may be acquired; but whether the domicil be original, or acquired, it can only be lost by an intention to abandon it, carried into execution. "*Non tamen in dubio præsumenda facile domicilii mutatio; sic ut eam allegans, tanquam rem facti, probare teneatur.*" (*Ib.* pl. 99.)

The inference we draw from the passages in Voet is, that until a man has acquired another domicil he must, *ex necessitate*, retain his acquired domicil, and that he cannot acquire another by intention only. Here, as in *Bruce's case*, Dr. Munroe, by his residence in India, acquired an Indian-English domicil. What then deprived him of it?

It cannot be doubted from the evidence, as your Honor has intimated that this gentleman had not determined to reside in Scotland. He must be considered as domiciled in England, and his property must be distributed according to the intention expressed in his will.

The Vice-Chancellor [Sir John Leach]. It is settled by the case of Major Bruce that a resident in India, for the purpose of following a profession there, in the service of the East India Company, creates a new domicil. It is not to be disputed, therefore, that Dr. Munroe acquired a domicil in India.

It is said that having afterwards quitted India in [405] the intention never to return thither, he abandoned his acquired domicil, and that the *forum originis* revived. As to this point, I can find no difference in principle between the original domicil and an acquired domicil; and such is clearly the understanding of Pothier in one of the passages which has been referred to.

A domicil cannot be lost by mere abandonment. It is not to be defeated *animo* merely, but *animo et facto*, and necessarily remains until a subsequent domicil be acquired, unless the party die *in itinere* toward an intended domicil. It has been stated that, in point of fact, the testator went to Scotland, in the intention to fix his permanent residence there, but this statement is not supported by the evidence.

It has also been stated that the testator, knowing he was in a dying state, went to Scotland, in or to lay his bones with his ancestors, but this too is clearly disproved.

It may be represented as the certain fact here, that when this gentleman left England on his visit to Scotland, he had formed no settled purpose of permanent residence there, or elsewhere. That he meant to remain a few months only in Scotland, and to winter in the south of France, and with this fluctuation of mind on the subject of his future domicil, he was surprized by death, at the house of a relation in Scotland.

I am of opinion, therefore, that Dr. Munroe acquired no new domicil after he quitted India, and that his Indian domicil subsisted at his death.

[406] A domicil in India is, in legal effect, a domicil in the province of Canterbury, and the law of England, and not the law of Scotland, is therefore to be applied to his personal property.

[406] KAYE v. CUNNINGHAM. *June* 21, 1820.

The Court will restrain a proceeding at law against a sequestrator, but has no authority to compel a party to be examined *pro interesse suo.*

This was a motion to restrain a party from proceeding at law against a sequestrator in possession under an order of Court; and that the party might be examined *pro interesse suo.*

THE VICE-CHANCELLOR. The Court will not permit its officer to be drawn into a litigation which it cannot control; but it has no authority to compel a party to be examined *pro interesse suo.* Such an order can only be made upon the application of the party, or by his consent.

[407] HENLEY v. WEBB. *July* 5, 1820.

A husband before Lord Eldon's Act, borrowed an estate for the purpose of suffering a recovery, in order to acquire the ownership of money to be laid out in land. *Semble,* his wife is dowable of the estate borrowed.

This was a bill by a widow for dower. The husband being entitled to a sum of £14,200 in Court, to be laid out in land, of which he would be tenant in tail, obtained from Sir John Webb, on the 15th September 1781, a conveyance by bargain and sale of the estate in question, in fee; Sir John Webb covenanting that he was seised in fee. On the same day he conveyed this estate by lease and release to the trustees of the £14,200 in consideration of that sum, which was also the price paid to Sir John Webb. He soon afterwards suffered a recovery of that estate, being equitable tenant in tail, under the trustees; and having thus obtained the fee-simple of the estate, he reconveyed it to Sir John Webb, for the same sum for which he had purchased it; having, in fact, entered into an agreement with Sir John Webb that he would do so before the bargain and sale made to him; the intent of the transaction being to make himself master of the £14,200.

Mr. Sugden and Mr. Pepys, for the Plaintiffs.

Mr. Bell and Mr. Shadwell, for the Defendants, who claimed under the will of Sir John Webb, insisted that the previous agreement made the husband a trustee of the estate for Sir John Webb, and that the wife therefore was not entitled to dower. It was also further objected, on behalf of the Defendant, that Sir John Webb was never in fact seised in fee of this estate.

[408] As to the first point, THE VICE-CHANCELLOR expressed his opinion that the purpose of the transaction was to make the husband the absolute owner of the estate, and not a trustee, in order that he might suffer a recovery, and that he was to become a trustee for Sir John Webb only after the recovery suffered, and that the wife's right to dower attached upon it when in possession of the husband as absolute owner, paramount to his character of trustee, and he could afterwards only deal with it subject to dower.

As to the second point, THE VICE-CHANCELLOR suggested that there might be great difficulty, upon the principle of estoppel, for those who claimed under Sir John Webb, to set up an objection, contrary to the effect of his own covenant that he was seised in fee (see *Anon.* 12 Mod. 399), but both points being legal, a case was directed to be stated for the opinion of a Court of law.