inheritance; and I am of opinion that there is no duty to pay this interest imposed upon the second tenant for life, as between her and those who are entitled to the interest in fee-simple subject to her life-estate.

The Court being of opinion that the *corpus* of the settled estates, subject to the mortgage, was properly charged with the sum of £343, being the interest which accrued due in the lifetime of the late tenant for life William Sharshaw; and it being admitted that he died insolvent; and the said sum having been paid by the trustees out of the proceeds of the bond, being other part of the settled property, and the Court being of opinion that they should be allowed the same in account. Order to raise the required sums, except the £160 for repairs, and the proper costs, including the costs of this application.

[341] FORBES *v.* FORBES. *Jan.* 16, 17, 18, 23, 24, *Feb.* 9, 1854.

[S. C. 2 Eq. R. 178; 23 L. J. Ch. 724; 18 Jur. 642; 2 W. R. 253. See *Hodgson* v. *De Beauchesne*, 1858, 12 Moo. P. C. 316; 14 E. R. 932; *Haldane* v. *Eckford*, 1869, L. R. 8 Eq. 642; *Aitchison* v. *Dickson*, 1870, L. R. 10 Eq. 595; *Douglas* v. *Douglas*, 1871, L. R. 12 Eq. 647; *In re Toolat's Trusts*, 1883, 23 Ch. D. 537; *Ex parte Cunningham*, 1884, 13 Q. B. D. 423.]

Domicil. Service in the Indian Army. Choice between two Residences.

A man cannot have two domicils, at least with reference to the succession to his personal estate.

Legitimate children acquire by birth the domicil of their father.

An infant cannot change his domicil by his own act.

A new domicil cannot be acquired except by intention and act; but, being *in itinere* to the intended domicil, is a sufficient act for this purpose.

But the strongest intention of abandoning a domicil, and actual abandonment of residence, will not deprive a man of that domicil, unless he has acquired another.

An engagement to serve, and actual service in the Indian Army, under a commission from the East India Company, when the duties of such an appointment necessarily require residence in India for an indefinite period, confers upon the officer an Anglo-Indian domicil; for the law, in such a case, presumes an intention consistent with his duty, and holds his residence to be *animo et facto* in India. And this, even if he have property in the country which was his domicil of origin.

An Anglo-Indian is not, for all purposes, an English domicil.

A domiciled Scotchman, having ancestral property but no house in his native country, by accepting a commission, and serving in the Indian Army, abandoned his domicil of origin, and acquired an Anglo-Indian domicil. He afterwards attained the rank of general in the Indian Army, and was made colonel of a regiment, and then left India with the intention of not returning thither, but came to Great Britain, where he lived part of the year in a house which he had built on his estate in Scotland, and part in a hired house in London, under circumstances which, if he had been a single man, would have given him again a Scotch domicil; but his wife and establishment of servants resided constantly at the house in London. Held, that this fact counterbalanced the effect of the other circumstances, and proved that his intention was permanently to reside in England; and that, therefore, he must be considered to have abandoned his acquired domicil in India, and acquired, by choice, a new one in England.

Nathaniel Forbes, afterwards General Forbes, was born in Scotland of Scotch parents, his father being possessed of an estate in that country, called Auchernach, on which, however, there was then no house.

In December 1786, being at that time a lieutenant on half-pay in the 102d Foot, a disbanded regiment, he contracted a marriage with a Scotch lady; and that marriage having been secret, and its validity being questioned, the ceremony was again solemnised formally between them on the 15th of July 1787. By a settlement in

the Scotch form, made previously to the second ceremony of marriage, and dated on the 14th of July 1787, the father of the lady settled certain property upon the said Nathaniel Forbes; and the said Nathaniel Forbes bound himself, on succeeding to the said estate of Auchernach, to settle half of it upon his wife for life, after his death, if she should survive him. There was issue of this marriage one son only, named Charles, who was born in 1787. Shortly after the formal celebration of the marriage Nathaniel Forbes obtained an appointment in the **[342]** service of the East India Company; and in December 1787, being still under age, he sailed for India, leaving his wife with her parents in Scotland, where she resided until 1796, when she joined him in India; and they remained there together until 1808, when he obtained a furlough, and they returned to Scotland.

In May 1794 the father of Nathaniel Forbes died, and he, having before that time attained the age of twenty-one, thereupon became entitled in possession to the estate at Auchernach, subject to the said settlement. During his residence in India he maintained a correspondence respecting this estate with persons in Scotland; and upon his return to Scotland, in 1808, he built a house there, and furnished it, and made some improvements in the grounds; and he resided in lodgings in the neighbourhood of Auchernach, or near London, until 1812, when he and his wife again sailed to India, where they remained until 1818, when his wife returned alone to England. In 1822 Nathaniel Forbes, who then attained the rank of general, and was colonel of a regiment, also left India, intending not to return thither, and came to England, and took, by the week, a furnished house in Sloane Street, Chelsea, where he lived, until June 1823, with his wife and son, and an establishment of servants whom he had hired. In June 1823 he went with his wife and son to Auchernach. At the same time he took, on a lease, which he renewed in May 1850, a house in Sloane Street, and, until 1841, he spent his summers at Auchernach, and his winters, from December to April, in Sloane Street; but from 1841 until his death in August 1851 he resided altogether in Sloane Street, and there he died.

On the 9th of February 1825 the said Charles Forbes, the only son of Nathaniel Forbes, died in England unmarried. In 1835 Nathaniel Forbes purchased another house and estate in Scotland, called Dunnottar, for £80,000.

[343] In 1812, before his return to India, Nathaniel Forbes took steps, with the concurrence of his wife and son, to revoke his marriage settlement, saying that he wished by will to make a suitable provision for his wife, and do away with "the trifling settlement" made on their marriage.

In the course of his voyage from India, in 1822, General Forbes formed an intimacy with a woman, who was one of the passengers, which he afterwards continued. By this woman he had three illegitimate children.

After the death of his only lawful son, the said Charles Forbes, the general attempted to revive his marriage settlement, and, with that view, had it registered at Aberdeen, for the purpose, as was alleged, of defeating his wife's claims upon his property under the Scotch law, if she should survive him. After having done this General Forbes executed certain deeds of entail according to the Scotch law, by which he settled the estates of Auchernach and Dunnottar on his illegitimate children and their issue in strict settlement.

By his will, made at Aberdeen in the Scotch form, and dated on the 8th of January 1840, General Forbes gave to his trustees and executors all his estate, real and personal, in trust to pay his debts, funeral expenses and legacies, and to make such addition to the provisions already made for his wife as would "enable her to enjoy a life rent annuity in the whole of £1 00;" and he gave her a life interest also in the lease of his house in London, and in the plate and furniture there at his death, on condition that she should release all claims under their contract of marriage or otherwise; and the said testator directed that, after accomplishing all the other purposes of the trusts thereby declared, the said trustees should lay out and invest the whole accumulations of rents and in-**[344]**-terests of his hereditable estates and debts, together with the whole produce of his personal means and estate, and the interest accruing on the accumulations, in the purchase of land and heritages situated as near and convenient as they could be reasonably had to his said estates of Auchernach and Dunnottar, and should settle and secure the lands and heritages so to be

purchased by a deed or deeds of strict entail upon the series of heirs thereinafter mentioned, and under the same conditions, provisions, limitations, restrictions, clauses prohibitory, irritant and resolutive, and other clauses, as were contained in the said entails of the estates of Auchernach and Dunnottar; with the addition thereto that, in the deed or deeds of entail so to be executed by his said trustees, they should introduce a clause obliging the heirs of entail to occupy the mansion-house, garden and offices at Auchernach (upon which he had laid out a large sum of money) for at least some part of every year after their succession, unless in the Army or Navy on actual service, or otherwise employed in the service of their country; and to uphold and keep the same, and also the mausoleum or burying-place which he meant to make out at Auchernach (if the same should be made out), always in good order and repair, and also preserve entire the whole growing wood about the mansion-house and policies of Auchernach and Dunnottar, and not allow the same to be cut down or damaged, so as to injure or affect the ornamental appearance or amenity of the mansion-houses or policies of either of those estates.

The testator made two codicils to this will when in Sloane Street, which were dated respectively in July 1846 and September 1847.

The bill in this suit was filed by the widow of General Forbes against his executors, insisting that the marriage settlement was revoked, and claiming to be entitled by **[345]** the law of Scotland to a moiety of the residue of the personal estate of her late husband, after payment of his debts. A cross-bill was also filed by one of the testator's illegitimate children to establish the will and for administration.

The question to which the argument was mainly addressed was what was the domicil of General Forbes at the time of his death?

The minor circumstances relied upon in the arguments on either side are fully stated in the judgment.

Sir F. Thesiger, Mr. Anderson, Q.C., and Mr. A. J. Lewis, for the Plaintiff.

Scotland, the place of his birth, was the original domicil of General Forbes. By entering the service of the East India Company he did not lose that domicil and acquire a new one. It is true that there are cases in which it has been held that a Scotchman, by entering into the East Indian service, has lost his original domicil and acquired a new one; but in none of those cases had the party property in Scotland, as General Forbes had here: *Marsh* v. *Hutchinson* (2 B. & P. 226), *Somerville* v. *Somerville* (5 Ves. 749), *Brown* v. *Smith* (15 Beav. 444). It was a rule of the civil law, from which our law on this subject is derived, "Miles ibi domicilium habere videtur ubi meret, si nihil in patriâ possideat;" Dig. lib. 50, tit. 1, sect. 23; Phill. Law of Domicil, p. 76. "In many cases actual residence is not indispensable to retain a domicil after it is once acquired; but it is retained *animo solo*, by the mere intention not to change it or to adopt another;" Story's Conflict of Laws, p. 47, pl. 44. But if General Forbes did lose his domicil of origin, and acquire an Anglo-Indian **[346]** domicil, he afterwards, on his return from India in 1822, abandoned his acquired domicil and revived his original one; for he returned in 1822 with the intention of remaining permanently in Scotland; and the various circumstances of this case (see the judgment, *infra*, p. 360) shew that his domicil of origin was revived: Story's Conflict of Laws, p. 52, pl. 47.

There can be only one place of domicil to regulate succession: *Bempde* v. *Johnstone* (3 Ves. 198), *Lashley* v. *Hog* (6 Bro. P. C. 577), Rob. on Law of Succession, p. 126; and see judgment in App. 436, where Lord Eldon says, "With reference to the question whether Scotland was or not the residence of Mr. Hog at the time of Mrs. Hog's death. . . . This gentleman had originally come from Scotland to make his fortune in England; he seems to have been a very sensible and a very industrious man; he had succeeded in trade to a great extent; but throughout his whole life he seems to have been influenced by a determination to spend as much of his life, and particularly the latter days of that life, as he could in his native country. He meant to take there his *summa rerum*—he meant that his establishment should be there, and he was acting upon that intention when he went there. . . . I see no reason to doubt that he was domiciled in Scotland at the death of his wife."

Sir R. Bethell, Solicitor-General, Mr. Rolt, Q.C., and Mr. Beales, for the Defendants. The simple question of fact is what was the permanent habitation of General

Forbes in this case? The acceptance of a commission in the Indian service would, of itself, at once give a Scotchman an English domicil. That would not be the effect of a commission in the English Army, though the holder of it were ordered to serve in England or abroad. The passage cited **[347]** from the Digest, therefore, does not apply. It referred to the peculiar effect of entering the Roman Army upon those who obtained enrolment in it; but the sanction of the East India Company is required for a man's residence in that country; and going to India in the service of the Company differs from going there in the service of the Crown, in its effect in changing a man's domicil. This results from the species of contract which, in such cases, is entered into with the East India Company; and therefore it does not matter that a man, entering into this contract, should have property in his own country. His domicil is, nevertheless, changed. In *Marsh* v. *Hutchinson* (2 B. & P. 226) Lord Eldon said that Lord Thurlow, in *Bruce* v. *Bruce* (2 B. & P. 229, n.), adopted the distinction with respect to a Scotchman, "that, if he had gone out in a king's regiment and died in the king's service, his domicil would not have been changed; but that, having died in the service of the Company, it was changed." In *Bruce* v. *Bruce* (*Ibid.*) Lord Monboddo "finds that, as Major Bruce was in the service of the East India Company, and not in a regiment in the British establishment, which might have been in India only occasionally; and as he was not upon his way to Scotland, nor had declared any fixed and settled intention to return thither at any particular time, India must be considered as the place of his domicil." And that decision was affirmed by the House of Lords. *Munroe* v. *Douglas* (5 Madd. 379), *Craigie* v. *Lewin* (3 Curt. 435). Therefore, General Forbes changed his domicil from Scotch to Indian, and therefore to English, because the East Indies are in the province of Canterbury: *Munroe* v. *Douglas* (5 Mad. 406). He never lost the domicil so acquired, because, after his return in 1822, he remained in the service, and received the pay of the company until his death: *Munroe* v. *Douglas* (5 Madd. 379), *Bempde* v. *Johnstone* (3 Ves. 198). After his **[348]** return he did not do any act or manifest any intention to regain a Scotch domicil. *Primâ facie* the place of a man's death is his domicil, for the purposes of testamentary succession: *Guier* v. *O'Daniel* (Phill. 115). General Forbes lived in England after his return, making only summer excursions to his Highland residence, which was not a fit house for him to live at altogether. In England he buried the remains of his only lawful child; and in England his wife and family of servants constantly resided. Now the word *domicilium* is defined in the Facciolati Lexicon to mean "*sedes domestica, habitatio certa et diuturna.*" The derivation of the word is from "*domus*" and "*colo;*" and the only word which we have that expresses its meaning is "home." But no place can be called a man's home where his wife is not, and where he has no establishment of servants, nor the usual comforts and conveniences which belong to a place of permanent abode. In Pothier's Introduction Générale aux Coutumes, c. 1, s. 7, cited 5 Madd. 392, he says, "Il parôit quelques fois incertain où est le domicile d'une personne; ce qui arrive, lorsqu'elle a un ménage dans deux lieux differents, où elle va passer alternativement différentes parties de l'année. . . . 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." In a passage of the Code, lib. 10, tit. 39, s. 7, Dig. lib. 50, tit. 16, s. 203, it is said, "Incolas . . . 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: **[349]** unde cum profectus est, peregrinari videtur: quod si rediit, peregrinari jam destitit." These definitions exactly tally with the nature of the general's residence in Sloane Street. Then the purchase of a house and estate at Dunnottar cannot affect the question. That was merely an investment of money. "If a man places his wife and family and household goods (under which class heirlooms, pictures and muniments might reasonably be included) in a particular place, the presumption of the abandonment of a former domicil and of the acquisition of a new one is very strong:" Phill. 118, citing from Grotius, "Accedit altera conjectura ex invectione familiæ et bonorum," &c., *The Phœnix* (3 Rob. 189); Story's Conflict of Laws, p. 50. As to the circum-

stance of paying taxes in Scotland, which has been relied on in *De Bonneval* v. *De Bonneval* (1 Curt. 856; Phill. 130, 132), it was doubted whether that would in any way constitute a domicil. That, being a duty imposed upon him by law, cannot be any *indicium* of an intention to fix the domicil. They relied also upon the other circumstances which are detailed in the judgment (*infrâ*, p. 362).

Sir F. Thesiger, in reply. General Forbes did not change his domicil of origin by entering the service of the East India Company. In *Bruce* v. *Bruce* (2 B. & P. 229; 7 Bro. P. C. 556), *Munroe* v. *Douglas* (5 Madd. 406), and *Craigie* v. *Lewin* (3 Curt. 435), the parties did not possess property in their own country; but their only tie was that it was the place of their birth. But if General Forbes did abandon his original domicil, he afterwards reacquired it, and it was not necessary that he should quit the Indian service to enable him to do so. There must be actual service, as well as intention to serve, either to affect such a change, or the continuation of a domicil so changed. A **[350]** liability to serve is not enough. In *Craigie* v. *Lewin* (3 Curt. 435), the party was in actual service, and only came over to this country on furlough; but in this case General Forbes, in 1822, came back with a fixed intention of remaining; and there was nothing in the nature of his connexion with the Indian Army from that time to prevent his obtaining a new domicil. An Anglo-Indian domicil is not in all respects similar to an English domicil; for instance, legacies by a man so domiciled are not liable to legacy duty: *Thomson* v. *The Advocate General* (10 C. & F. 1); and, therefore, General Forbes might acquire an English domicil after his Indian domicil, supposing him to have at one time acquired that; but the domicil of origin is more easily revested than a new one acquired: *La Virginie* (5 Rob. Ad. Rep. 99), *Munroe* v. *Douglas* (5 Madd. 405). If General Forbes had proposed to return to Scotland, *animo manendi*, and died *in itinere*, that would have been enough to have restored him to his original domicil. In Phill. Law of Dom. 146, it is said, "In questions on this subject, the chief point to be considered is the *animus manendi*." In that work eleven *criteria* of domicil are collected, page 100. It is not enough to take two or three of these, and say that, in a case in which they do not exist, the domicil is disproved. The question must be whether the *criteria* that do exist are not sufficient to fix the place of domicil. For example, one creterion is the residence in a particular place of the wife and family of the person; but a domicil, established from other facts, is not disproved by the fact that the wife and family do not reside there. It might be that the husband and wife agreed to live apart, or that General Forbes did not wish his wife to go with him to Scotland for some reason. It could not be any recollection of the son's death that prevented her going, for he died in London; it might be that Mrs. Forbes **[351]** did not like Scotland. Another criterion selected is where the rites of hospitality were performed by General Forbes, and that he had an establishment in England which he did not take to Scotland. In *Somerville* v. *Somerville* (5 Ves. 789) Lord Alvanley said that it did not affect the question that a man spent more money at one place than another. The character of the house and premises at Auchernach is relied on. [THE VICE-CHANCELLOR. There is no evidence that the wife thought it an unfit abode. I need not trouble you as to that.] He did not go to Dunnottar, because he had no attachment to that at his partrimonial inheritance. Certain expressions of dislike to Auchernach have been relied on; but these were anterior to the making of the will, by which he desired his heirs to reside at Auchernach. [THE VICE-CHANCELLOR. They were words said in anger, and were inconsistent with his living himself half the year at Auchernach.] And also with the direction in his will to his trustees to purchase other lands as near to Auchernach as possible. General Forbes did not deliberately choose to reside in England; he was obliged by ill-health: *Johnstone* v. *Beattie* (10 C. & F. 42). The place of a man's death is only presumed to be his domicil, *primâ facie*, until something is shewn to repel that presumption. [THE VICE-CHANCELLOR. If a man have two places of abode, may not the election to make one his domicil be implied from the fact of his living there, because it did not suit his state of health to reside at the other?] Here General Forbes never abandoned the intention of returning to Scotland until he became physically incapable of doing so. All his public duties were in Scotland, where he was a Commissioner of Taxes and Justice of the Peace. He kept his important documents at Auchernach, had an establishment there, and continually resorted thither until prevented by ill-health; and it was there that he desired to be buried.

[352] *Feb.* 9. THE VICE-CHANCELLOR Sir W. PAGE WOOD. The question to be first determined in this cause is that of the domicil of the late General Forbes at the time of his decease, the case of the Plaintiff requiring as its foundation that the succession to his personal estate shall be regulated by the law of Scotland, or, in other words, the establishment of a Scottish domicil. Those who have been called upon to express a judicial opinion upon questions of domicil have, in numerous instances, commenced by acknowledging the assistance they have derived from the research and arguments of counsel, and it is assuredly my duty to make the same acknowledgment in the present instance. I may also adopt the words of Lord Loughborough, in *Bempde* v. *Johnstone* (3 Ves. 200), "that if I do not go into the detail of the argument, it is not from any disrespect to it, but that all questions of succession are in their nature questions of positive law;" and I am of opinion that in this case, as in the case then before him, the way to a conclusion, if not absolutely cleared, has been sufficiently indicated by authority.

No attempt has been made, at least in our law, to define domicil. Definition, founded on etymology, is never satisfactory, etymology being often in itself unsettled. That definition, which has been suggested in the present instance, "*domum colo*," is scarcely to be accepted; and it is remarkable that, in an early Roman writer, the word is used in direct opposition to its present legal signification; for in the Miles Gloriosus of Platus (Act 2, Scene 5) the female slave who wishes to pass for a stranger at Ephesus, says,—

"Ostium (1) hoc mihi
"*Domicilium* est. Athenis *domus* ac herus."

[353] I believe that any apparent definition, such as a man's "settled habitation," or the like, will always terminate in the ambiguity of the word "settled," or its equivalents, depending for their interpretation on the intention of the party, which must be collected from various *indicia*, incapable of precise definition.

Certain general propositions have, however, been established or recognised by decision; and, as is observed by Lord Cottenham in *Munro* v. *Munro* (7 C. & F. 876), it is of the utmost importance not to depart from any principles which have been established relative to such questions, particularly if such principles be adopted not only by the law of England, but generally by the laws of other countries.

I consider the following propositions to be thus settled:—

1. That a man cannot, at least with reference to the law of succession to personal estate, have two domicils (this is treated as settled by Lord Alvanley, in *Somerville* v. *Somerville* (5 Ves. 750)).

2. That every person born in wedlock acquires by birth the domicil of the father; and thus, except in the case of a nomadic horde, of which, perhaps, the gypsies are the only instance in Europe, "*quorum plaustra vagos rite trahunt domos*," every one must have a domicil of origin; and it is therefore evidently more logical to commence an investigation of the question of a man's domicil from a certain origin, namely, his domicil at birth, than from an accidental circumstance, such as his place of residence at his death.

3. That the domicil of an infant cannot be changed by his own act.

4. That a new domicil cannot be acquired except by **[354]** intention and act, "*animo et facto*;" and, apparently, if a man be *in itinere*, it is a sufficient act for this purpose. (See Sir John Leach's judgment in *Munroe* v. *Douglas* (5 Madd. 379).)

5. As a corollary, perhaps, to the last proposition, the strongest intention of abandoning a domicil and actual abandonment of residence, will not displace the domicil unless another be acquired.

In *Somerville* v. *Somerville* (5 Ves. 749), *Munroe* v. *Douglas* (5 Madd. 379), and *Munro* v. *Munro* (7 C. & F. 876), and the cases there cited, I think abundant authority may be found for the above propositions. There are two questions, however, of great importance in this case, which are not determined by the above propositions, namely:—

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(1) "Hosticum," in some editions.

1. What is the effect upon domicil of an engagement to serve and actual service in India, under a commission in the Indian Army?

2. What must be the conclusion as to domicil in a case where the party has held and occupied two residences, situate in different countries?

I shall consider the authorities upon these two points after I have stated the facts to which the law has in this case to be applied. The life of the testator may be conveniently divided into three periods for this purpose. The first, ending on his return from India in 1808; the second, on his return from his second residence in India in 1822; and the third, the period from 1822 to his death.

The testator, General Forbes, was born in Scotland, of Scottish parents. His father was not only domiciled there but was the owner of an estate called Auchernach, which **[355]** had descended to him from his ancestors, on which, however, there was then no residence.

The testator, in 1786 or 1787 (the date is in dispute), being yet under age, and having a commission in the King's Army of lieutenant, and apparently also a dormant appointment as cadet in the Indian Army, married the Plaintiff, his cousin, also a Scottish lady; and such marriage was had in Scotland, and a Scottish settlement was made on or after the marriage.

He soon afterwards went out to India, under his appointment in the Indian Army, leaving his father and his wife in Scotland, and being still under age.

There can be no doubt, therefore, that his domicil of origin was Scottish, and that such domicil continued until he atttained his age of twenty-one.

This he did before 1794, when his father died, and the paternal or rather ancestral property of Auchernach descended upon him.

His wife, in 1787, was near her confinement, and in that year had a son, named Charles. In 1796 she also went out to India, to join her husband there.

There was at this time no residence at Auchernach, nor any other residence belonging to the testator in Scotland; but the testator took great interest in the estate, and kept up a correspondence on the subject with persons in Scotland. He and his wife remained in India till 1807, when they left India, the testator being on furlough, and arrived in England in 1808.

The question here arises whether, before 1807, the Scotch domicil of the testator ceased by the acquisition of **[356]** an Indian or Anglo-Indian domicil: and I am of opinion that it did.

I think that this point is concluded by the case of *Bruce* v. *Bruce* (note to *Marsh* v. *Hutchinson*, 2 B. & P. 229), which has been followed by several subsequent cases, such as *Munroe* v. *Douglas* (5 Madd. 379), and *Craigie* v. *Lewin* (3 Curt. 435).

I apprehend that the question does not turn upon the simple fact of the party being under an obligation by his commission to serve in India; but when an officer accepts a commission or employment, the duties of which necessarily require residence in India, and there is no stipulated period of service, and he proceeds to India accordingly, the law, from such circumstances, presumes an intention consistent with his duty, and holds his residence to be *animo et facto* in India.

I do not think that his being a lieutenant on half-pay in a disbanded King's regiment affects the question. Some reliance was placed by Sir F. Thesiger on the apparent exception in the civil law of the case where a soldier has property elsewhere; and on Lord Thurlow's observation in *Bruce* v. *Bruce* (note to *Marsh* v. *Hutchinson*, 2 B. & P. 229), that Bruce had no property in Scotland. But the mere possession of real estate, without any residence, was held by Lord Stowell, in the *Dree Gœbraeders* (4 Rob. 235), to be insufficient to fix the domicil or national character of the person not resident upon it; and I think it concluded by authority, in which conclusion my reason entirely acquiesces, that a service in India, under a commission in the Indian Army, of a person having no other residence creates an Indian domicil.

[357] The question remains whether this acquired domicil was subsequently changed and a new domicil acquired; and, if so, whether such new domicil was in England or Scotland; for I agree with Sir F. Thesiger that there may be a difference between an Anglo-Indian and an English domicil.

The facts, subsequent to 1808, are these: The General remained on furlough in Great Britain from 1808 to 1812. During this time he built a mansion (for so he

styles it in legal documents) on the Auchernach estate. He took great interest in its progress, and though he had lodgings near London went down frequently to superintend the building, residing at a farm-house near the spot; and on two occasions, namely, 1809 and 1811, the Plaintiff, in her answer to the cross-bill, which has been read in evidence, says that she went and resided with him at some neighbouring place. In a letter written in February 1812 to his father-in-law, on which much observation has been made in another part of the case, the testator speaks of arrangements during his absence, and refers to the hope of returning permanently to Scotland, and of seeing his father-in-law at Auchernach.

In 1812 the testator and his wife (the Plaintiff) returned to India, and the testator remained there till 1822, his wife having returned in 1818. The Plaintiff, in her answer to the cross-bill, says that on two several occasions, between 1818 and 1822, she went to the new mansion and resided there with her son Charles, who appears to have been more frequently there from 1816. The general, during the whole period of his absence, wrote frequent letters to those who managed the property, and took great interest in the house and grounds.

I am of opinion that the testator's domicil remained **[358]** unchanged during all the period up to his leaving India in 1822. The furlough, or limited leave of absence, implied that it was his duty to return, and he appears always to have intended to return to India; and, therefore, whatever intention might be indicated by his building his house of ultimately residing in Scotland, there was no intention up to 1822, and much less any act by which the Anglo-Indian domicil was abandoned.

But I now come to by far the most important part of the case, the only part in fact which occasions any difficulty; for up to this time the testator has had but one residence, and the really difficult questions of domicil have usually arisen only in those cases where the party has had two residences; for since the law recognises one domicil only in respect of succession to personal estate, the point to be determined is which of the two residences formed the domicil.

The facts of the case can, I think, be briefly stated.

The testator, having acquired the rank of general, and being colonel of a regiment, landed in England about November 1822. He at first took a furnished house in Sloane Street, by the week, as appears by several receipts, and he occupied this house until July 1823. He also hired servants, and bills are put in evidence of this date for "the liveries of a coachman and footman." He went down in June 1823, accompanied by the Plaintiff, to Auchernach, where his son Charles had been living since 1816, and where, as I before observed, the Plaintiff had been with her son twice during the general's absence. How long they remained there does not distinctly appear; but, after going there, and in the same year 1823, he took a lease of another house, No. 121 in Sloane Street, in which house he resided every winter till the year 1841, and in **[359]** which he continued to reside throughout the year from 1841 till his death in 1851, under the circumstances to which I shall presently refer. He renewed the lease of the house in May 1850.

From the time of his first going to Auchernach, in 1823 down to 1741, he appears to have gone every year to Auchernach from about May to November, dividing the year nearly equally between the two places.

I may observe that it is clear that his Anglo-Indian domicil was now abandoned, and that the testator must be taken to have become domiciled either at Auchernach or in Sloane Street, for he had no intention whatever of returning to India; and I regard, as immaterial in the question of domicil the remote possibility of his being called upon as colonel of a regiment to return at some indefinite period to active service in India. The case is thus brought to that of a double residence; and the first inquiry is which of these was, *ab initio*, his chosen domicil; and if it were the residence in Sloane Street, the further inquiry becomes unnecessary; if it were Auchernach, it would have to be considered whether he afterwards abandoned it for Sloane Street.

Now, if the testator had died in or soon after June 1823, when he went down with the Plaintiff to Auchernach, and before he had taken the lease of the house in Sloane Street, then, in the absence of any testimony as to his intention of acquiring a permanent residence in London, and an establishment there, the necessary conclusion

would, I think, have been that he became domiciled in Scotland. But this conclusion would arise merely from the absence of any such evidence of an opposite tendency as his subsequent acts afford; and there is nothing illogical in accepting subsequent acts as evidence of the original **[360]** intention; for, even in criminal matters, the felonious intention of an apparently lawful acquisition of property is confirmed from the subsequent conduct of the accused. Looking to these facts, that the general had, before June 1823, an establishment of servants in London; and that he never attempted, and can never be supposed to have intended, to pass the winter at Auchernach, I think I am bound to regard his intention of taking the house in London to have been formed before he left London for Scotland, though apparently carried into effect on or soon after his return.

Again, then, I have to ask, which of these residences was his chosen domicil, *ab initio?*

In support of his choice of a Scottish domicil the Plaintiff alleges :—

1. That it was his domicil of origin.

2. That, independently of his residing at Auchernach, his course of conduct, as proved in evidence, shews his attachment to Scotland as his country, and to Auchernach as his ancestral property; and the following facts are established in evidence :— That he gave directions as to the management of the Scotch property even when in India, from the time of his father's death in 1794; that on his return from India, in 1808, he superintended the building of the mansion; that on leaving for India, in 1812, he wrote to his father-in-law expressing his hope of returning and seeing him at Auchernach; that he continued to keep up a constant correspondence about the property and its management; that his son resided there occasionally during his absence, and his wife spent some time there with her son on her return in 1818; that he went down there with her in July 1823, before he had a fixed abode in London; that, in 1827, he registered the settlement of 1787; and afterwards strictly entailed the Auchernach es-**[361]**-tate upon his illegitimate issue (his son Charles having died in 1825, and, by his will, required the heirs in tail to reside, during a part of the year, in the mansion he had built; that he, in 1835, laid out £80,000 in the purchase of an estate in Scotland called Dunnottar; and that he desired, by his will, to be buried in a mausoleum at Auchernach.

3. That he resided half the year at Auchernach; and that the residence was kept furnished, and that he had an establishment there, consisting of a reeve or bailiff, cook, gardener and coachman; and that he continually superintended all the details of the property by letter.

4. That he took upon himself the public duties of a Commissioner of Taxes and of a Justice of the Peace, and exercised his rights as a heritor with reference to a pew in the church and the appointment of a schoolmaster.

5. That he had a safe constructed there in which he kept his pedigree, his commissions and other documents, and, in particular, his will, and the codicils thereto (except, I believe, the last).

6. That, in his deeds and will, he describes himself as of Auchernach.

7. That, in oral declarations, he treated Auchernach as his home; and Chalmers, a witness for the Plaintiff, and also the Defendant, Gordon Forbes, called by the Defendants, both speak to this.

8. That, if Scotland be thus established as his domicil, then he never abandoned the intention of returning thither; but that it appears from the evidence of his medical man that, in 1841, he was advised, on account of his health, not to go there, because of the distance from medical advice; and that, down to 1844, he frequently expressed his intention of going down; and in a letter of that year he desires that the property may not be let, as he has not made up his mind whether he shall go down; and that his house was kept in a state fit for his reception down to 1850, **[362]** as proved by Mr. Clarke; and, in fact, that increasing infirmity alone prevented his returning thither.

On the other hand, the Defendants, in support of the choice of Sloane Street as a domicil, allege :—

1. That General Forbes had, in India, acquired an English domicil, and must be shewn to have abandoned it. I have, however, dealt with this suggestion by observing

that an Anglo-Indian is not an English domicil; and his Anglo-Indian domicil was clearly abandoned in 1823 in favour either of Scotland or of England.

2. That the residence in Scotland must be regarded as nothing more than a place for the summer excursions of the general; and that it was not a mansion fit for a person of his fortune, but an inconsiderable dwelling-house; in support of which view evidence has been given that the mason contracted to build it for £450; and the general himself in a letter stated £30 a year to be too high a rental for it, and suggested its full value to be £20 a year.

3. That he never took the Plaintiff, his wife, to reside there; but that she always resided in Sloane Street, or made summer excursions elsewhere.

4. That he kept a full establishment of servants in Sloane Street, but had no servants, except the cook and gardener, at Auchernach, and he used to hire occasional female servants by the month when he went down, applying for that purpose to the hotel-keeper at Aberdeen.

5. That he repeatedly expressed a strong dislike to Auchernach, and used to say to the hotel-keeper, when returning thence, that he was going home.

6. That he entertained his friends in London according to his rank in society, and belonged to several clubs there.

7. That he took a long lease of the house in Sloane Street, and renewed it, and attended a meeting of ratepayers at Chelsea.

[363] 8. That a duplicate of his will, and all the codicils thereto, were in Sloane Street.

9. That, in a document relating to an action of declarator in Scotland, he describes himself as "of Auchernach, residing in London," and in his codicils to his will as "now residing in Sloane Street."

10. That, even if Auchernach were first selected as his abode, yet, by residing ten years previously to his death in Sloane Street, and dying there, he must be taken to have ultimately adopted Sloane Street as his domicil.

Now, setting aside for a moment the question of the testator's ultimate continuous residence in Sloane Street, which would be more properly considered in the question of whether he had first acquired and then abandoned a Scotch domicil, I have no hesitation in saying that, if the testator had not been a married man, the evidence preponderates in favour of his having acquired, in 1823, a Scottish domicil. I think that the house was a sufficient mansion in his own judgment, and it is his judgment that can alone decide his choice, for the residence of himself and those who came after him. The charge of £450 for its erection seems to have been for the work and labour of the mason, and not for materials; his estimate of its annual value was made when he was attempting to evade the income tax; and he describes it as a mansion in the instrument in which he imposes residence on the owner of the property. Looking, therefore, to his domicil of origin, his residing there half the year, and his being a Justice of the Peace, and his keeping his pedigree and other documents there, and his general attachment to Scotland, I do not think that the difference of the two establishments (had he, I say, been a single man) would have countervailed these *indicia* of preference. I do not set much value on his oral declarations to Chalmers or Gordon Forbes on the one hand, or to the innkeeper at Aberdeen on the other; nor **[364]** on his description of himself in deeds, which seem, except in some French cases, to have been regarded as of little weight where a person has two residences. In the action of declarator he naturally describes himself as "of Auchernach, and residing in London," because it was an action as to the property in Scotland; and he adds "residing in London," it being incidental to the act he was doing to shew that he was out of the jurisdiction. His expressions of disgust at Auchernach appear to have been ebullitions of temper, and but of little moment. But the main feature in this case, and that which I think must determine it in favour of the original selection of his domicil in Sloane Street, is that the testator was a married man; and that not only his chief establishment of servants, but his wife, constantly resided there, and not in Scotland, and, in fact, his wife's residence appears to have determined that of the household. I know of no instance in which a married man, having two houses, in both of which he has been in the habit of residing, has been held not to be domiciled in that in which his wife and principal establishment of servants

always remained when he was at the other. I say always remained, for I think it clear on the evidence that the Plaintiff was never herself settled at Auchernach, and no establishment was formed there suitable for her residence. She went thither with the testator in July 1823, for how long does not appear; and she went again in 1830, but at no other time; and when she went she took her own maid with her; and from 1823 to 1851, with these exceptions, she and the testator's principal establishment of servants remained always in Sloane Street.

If, in applying to our own times the definition of the code "ubi quis larem ac fortunarum suarum summam constituit," an equivalent be sought to "*larem*," the wife would, I think, without impropriety, be regarded as the tutelary genius of our homes.

[365] The expression,

"Linquenda tellus, et domus, et placens
Uxor,"

shews how close was the association of wife and home in the mind even of a heathen poet. (Hor. Lib. 2, Carm. 14.)

Lord Brougham has taken this view in that part of his speech on moving the judgment in *Sir George Warrender's case* (2 C. & F. 337), where he says: "A connection formed for cohabitation, for mutual comfort, protection and endearment, appears to be a contract having a most peculiar reference to the contemplated residence of the wedded pair; the home where they are to fulfil their mutual promises, and perform those duties which were the objects of the union; in a word, their domicil, the place so beautifully described by the civilian: "Domicilii quoque intuitu conveniri quisque potest in eo scilicet loco in quo larem rerumque ac fortunarum suarum summam constituit, unde rursus non sit discessurus si nihil avocet, undeque cum profectus est peregrinari videtur."

Pothier, in the passage of the Coutumes d'Orleans, cited in *Munroe* v. *Douglas* (5 Madd. 393), lays this down as the first of the distinctions in favour of one of two residences as to domicil; and says that one should decide "pour le lieu où il laisse sa femme et sa famille lorsqu'il va dans l'autre."

Grotius, in speaking of the *criteria* of domicil, says: "Accedit altera conjectura ex invectione familiæ et bonorum" (Phill. 118, n.); and Lord Stowell, in the case of *The Phœnix* (3 Rob. 189), says: "He is not a married man holding any connexion with that place by the residence of his wife and family."

[366] Story, in his "Conflict of Laws," says: "If a married man has his family fixed in one place and does his business in another, the former is considered the place of his abode," though, as Dr. Phillimore observes, he does not cite any decided case to that effect.

The effect of the residence of the wife being, after all, but evidence of intention may be rebutted by stronger evidence of a contrary character. If, as in *Sir George Warrender's case*, the husband were living apart from the wife; if, perhaps, some particular state of health required the wife to reside in a warm climate not agreeable to her husband, or the like, so that he was obliged to visit his wife away from home, he might still be domiciled at a residence of his own apart from her. But no such facts exist here. It is true that the general had unhappily formed an adulterous connexion, but not with a party living in Scotland; and the Plaintiff hints, rather than states, that after 1830 the residence at Auchernach became distasteful to her, owing, it is alleged, to some connexion of the illegitimate children with that place. It is also said, not by her but in the argument, that her son, who died in 1825, had resided there, and that his memory was associated with the place. But I am now considering the first choice of abode; and I do not find that the general ever contemplated his wife's residence at Auchernach; but that he did contemplate her residence in Sloane Street, and that the establishment of servants suitable for a joint residence of husband and wife in the condition of life in which I find these parties was in London and not at Auchernach. The wife clearly, I think, on the evidence, was a traveller and visitor only whenever she went to Auchernach, and was at home only in Sloane Street. It appears to me that her husband, in so deciding on her residence, did, in fact, also decide that there was to be his own home, and that he therefore never reacquired a domicil in Scotland.

[367] As there was no necessity originally for the Plaintiff absenting herself from Auchernach, neither was there any necessity for the testator fixing his residence in London, it must have been his free choice in every respect; he could have resided in parts of Scotland during the winter, or he could have from time to time visited the South, without taking a permanent residence and fixing his establishment there. It may also be observed that, if a party select two residences, in one of which he can reside all the year, whilst in the other his health will not permit him to do so; and he must from the first be aware that, should his health fail him, his days must be passed where alone he can constantly reside; there is an additional reason for concluding that he regards such place from the first as that which must be his home, a conclusion greatly fortified by his chief establishment being from the first fixed there.

It is not necessary for me therefore to consider whether or not, if the Scottish domicil had been reacquired, it would be lost and an English one substituted for it by the last ten years of the testator's life being passed in Scotland. *Munro* v. *Munro* (7 C. & F. 876) affords strong ground for saying that this would be a question of difficulty. I think, from the evidence, it is clear that the testator wished to make his usual journeys to Scotland, if he were equal to them. Whether, when he resigned himself to the impossibility of so doing, such resignation must be taken to have been equivalent to a purpose of changing his domicil, is, I think, a point of considerable nicety. There are no indications, however, in evidence of a wish or intention to return after 1844. If I had been compelled to come to a conclusion, I should probably have held that he had abandoned his Scottish domicil, and by choice resigned himself to an English home.

[368] The case of the Plaintiff has, therefore, failed; but I do not think such failure ought to be visited with costs. The question of domicil was one that, looking to all the acts of the testator, might be fairly raised, though I do not wish to intimate any doubt in my own mind in respect of the conclusion at which I have arrived. The questions which remained behind, had this been decided in the Plaintiff's favour, especially respecting the time of her marriage, were raised in a great measure by declarations and conduct of the testator himself. The disposition of his property has been that which was necessarily most painful to a wife; and the mode in which he attempted to screen himself against any interference with that disposition, by setting up a settlement that he at one time at least intended to abrogate, and had, with more generosity and justice than he has since shewn, declared to be trifling, would sufficiently dispose the Court not to visit with costs an unsuccessful attempt on her part to obtain the proportion of her husband's property, recognised by the law of Scotland as her due, and not perhaps even to English notions extravagant, after more than sixty years of union.

The bill must therefore be dismissed without costs.

[369] LOWE *v.* THOMAS. *Feb.* 14, 15, 1854.

[S. C. affirmed, 5 De G. M. & G. 315; 43 E. R. 891 (with note, to which add *Dunally* v. *Dunally*, 1857, 6 Ir. Ch. R. 543).]

Will. Construction. Money. Stock in the Funds. Context.

The word "money" in a will will not pass stock in the funds, unless its meaning is enlarged by the context.

"I bequeath to my brother J. the whole of my money for his life, at his death to be divided between my two nieces, R. and M.; my clothes to be divided likewise between them; my watch and trinkets for my niece M.; the longest survivor of the said nieces to become possessor of the whole money." The testatrix, at her death, had about £60 cash, a considerable sum of stock in the funds, and some furniture and trinkets and clothes. Held, that the furniture did not pass by the will, nor the stock.

Miss Ann Thomas made her will in the words and figures following:—"I, Ann Thomas, do give and bequeath to my brother John Thomas, the whole of my money