

intimation being given to provide for the child, and find security to that effect, to order such young person forthwith to be transmitted to and received at any reformatory school. Now, when a destitute child is brought before a magistrate under the provisions of that act, it is quite clear, that when intimation has been made, the child is to be taken care of in the mean time, until it can be ascertained whether any person will appear and give the requisite security. But in that case, instead of taking care of the child in that manner, the magistrate granted a warrant to detain the child in the cells of the police office. Therefore when the child was brought up after the period of intimation had expired, it was insisted, or rather it was afterwards insisted, when the child had been sent to the reformatory, that the jurisdiction of the magistrate had ceased, because the character and condition of the child had altogether changed. And so the Lord Justice Clerk puts it very clearly when the order was afterwards pronounced, the child was no longer before the magistrate in the position contemplated by the statute, that is, brought before him immediately upon being found in the streets in a state of destitution, but, on the contrary, was brought up as a prisoner from the cells of the police office. Now, what possible analogy can there be between that case and the present? The character of the immediate arrest changed in this case by reason of the subsequent detention? Is there anything in the evidence to prove, that the party was discovered in the act of illicit distillation? It is clear, that the analogy between the two cases altogether fails, and that there was nothing whatever in the circumstances of this detention, even supposing it had been an illegal detention, which would take away from the magistrate that jurisdiction which attached to him under the act, by reason of the discovery which was made of the party, and the immediate arrest upon that discovery.

I wish, that it may be understood, that I do not intend to express any opinion which might countenance the delay which took place upon the present occasion in carrying the offender before a magistrate. My noble and learned friend (LORD CRANWORTH) thinks that there was no unnecessary delay, and he may be right in that respect. But I am bound to say, that, even if there was an improper delay, the officer was placed in a situation of great difficulty and embarrassment in consequence of the refusal of one or more of the magistrates to hear the case. However, I am so perfectly clear with regard to the question as to the jurisdiction of the magistrate not being taken away, that I could not have entertained any doubt whatever upon the subject, if it had not been for the very high respect which I entertain for the judgment of the learned Judges of the Court of Session who have decided this question.

With regard to the other objections which have been raised, in my opinion they are really very frivolous. I entirely concur with the opinions which have been expressed by my noble and learned friends, and I think, that upon the present occasion the interlocutors ought to be reversed.

LORD CHANCELLOR.—Lord Advocate, What adjudication do you pray?

*Lord Advocate.*—I think the judgment should run—reverse the second, third, and fourth interlocutors complained of, and remit to the Court of Session to refuse the note of suspension.

LORD CHANCELLOR.—Be it so.

*Interlocutors reversed, and cause remitted with a declaration.*

*For Appellant, J. Timm, Solicitor, London.—For Respondent, Holmes, Anton, Turnbull, and Sharkey, Solicitors, Westminster; John Leishman, W.S., Edinburgh.*

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MARCH 12, 1861.

JOHN ROBERTSON AIKMAN, *Appellant*, v. GEORGE ROBERTSON AIKMAN, and HUGH HENRY ROBERTSON AIKMAN, *Respondents*.

Domicile—Marriage—Legitimacy—Succession—Scotsman in English Sea Service.

HELD (affirming judgment), *That a native born Scotsman, who had left Scotland at the age of 13, and had been connected for thirty years with the East India Company's mercantile marine service, and who, thereafter, on an average, spent about seven or eight months every year in London, and the remainder in Scotland, had not lost his domicile of origin; and that children born to him in England of a mistress, whom he subsequently married in Scotland, were legitimate, and were to be preferred to issue born subsequent to the marriage, in a question of succession to his heritage in Scotland.*<sup>1</sup>

<sup>1</sup> See previous reports 21 D. 757: 31 Sc. Jur. 404, 755. Jur. 363.

S. C. 3 Macq. Ap. 854: 33 Sc.

The pursuer appealed to the House of Lords against the judgment of the Court of Session of 17th March 1859, maintaining, in his case, that it ought to be reversed—1. Because, at the date of his marriage, Captain George Robertson was domiciled in England. 2. Because the circumstances of Captain Robertson's residence in London during the time of his engagement in the maritime service of the East India Company, and afterwards, were sufficient to establish the abandonment of the original Scottish, and the acquisition of an English domicile; and if so, that it is clear, that he never resumed his Scottish domicile before his marriage. 3. Because, in holding the effect of such residence to be neutralized by the absence of a compulsory engagement to continue permanently in the East India Company's service, and by the prospect (originally, and for many years, remote and uncertain) of the succession of Captain Robertson to an entailed estate in Scotland, in the event of the death of his uncle without issue, the Court below had disregarded the true principles of the law of domicile, as well as the acts and intention of Captain Robertson himself, as evidenced by the whole course of his life.

The *respondents* supported the judgment on the following grounds:—I. Because it was not proved, that the respondent's father, at the date of his marriage, or at any prior time, had abandoned his domicile of origin, and had become domiciled in England.—*Munro v. Munro*, 1 Robins. App. 492; *Somerville v. Somerville*, 5 Ves. 787; *Abington v. Barton*, Massachusetts Reports, vol. iv. p. 312; *Brown v. Smith*, 15 Beav. 444; Phillimore on Domicile, p. 106. II. Because it was proved, that the respondents' father, at and prior to his marriage with their mother, was domiciled in Scotland. III. Because, by the law of Scotland, children born before marriage were legitimated by the subsequent marriage of their parents, and the right of succession to landed estate in Scotland, descendible to the oldest lawful son of the owner, belonged, on the death of the owner, to his oldest son by the person to whom he was first lawfully married, whether such oldest son had been born before or after the marriage, and without regard to the personal domicile of the father.—Balfour's Practicks, p. 239; Craig, Jus Feudale, Lib. ii. dieg. 13, § 16; Stair, iii. 3, 42; Ersk. i. 6, 57; Bank. i. 5, 54; *Kerr v. Martin*, 2 D. 752; *per* LORD BROUGHAM in *Fenton v. Livingstone*, 1 Macq. Ap. 497; 31 Sc. Jur. 578; *ante*, p. 862.

*R. Palmer* Q.C., and *Anderson* Q.C., for the appellant.

The *Attorney General* (*Bethell*), *Rolt* Q.C., and *Patton*, for the respondents.

The arguments consisted chiefly of comments upon the principal facts in the life of the late Captain Robertson. The following cases were referred to:—*Somerville v. Somerville*, 5 Ves. 750; *Anderson v. Laneauville*, 9 Moore P.C.C. 325; *Hodgson v. De Beauchesne*, 12 Moore P.C.C. 285; *Forbes v. Forbes*, 1 Kay, 359; *Maxwell v. Maclure*, 3 Macq. Ap. 852; 32 Sc. Jur. 408; *ante*, p. 938; *Bremer v. Freeman*, 10 Moore P.C. 324.

The case was argued in June 1860, and judgment was now given.

LORD CHANCELLOR CAMPBELL.—The only question in this case is, whether Captain Robertson, the father of the appellant and of the two respondents, was, on the 13th day of November 1820, domiciled in Scotland or in England. I agree with the unanimous judgment of the Second Division of the Court of Session, that he was then domiciled in Scotland.

The principles on which the case is to be decided are so well settled and so familiar, that there is no occasion to propound or to illustrate them; nor are the material facts on which the decision is to depend at all in controversy. It is agreed, that Captain Robertson was born in Scotland, and that Scotland was his domicile of origin. Therefore, Scotland must remain as his domicile, till it can be proved, that, *facto et animo*, he transferred it to another country. The first contention was, that this transfer took place so early as March 1775, when, being a boy of sixteen, he entered as a seaman on board the ship "Bute" at Calcutta, to return in that vessel to London; but I am quite clear, that he did nothing, from which such an inference can be properly drawn, between 1773, when he first sailed to the East Indies in a ship chartered by the East India Co., till 1805, when he finally quitted the sea. During that time he made ten voyages to India and China in ships chartered by the East India Co., but he never was, properly speaking, in the service of the company, and, at all events, he was only engaged in that service for the particular voyages. The ships in which he sailed belonged to private owners, who appointed the captain and officers, subject to the approval of the company. He was paid by the company, but this pay was deducted from the freight, and therefore came from the funds of the owners of the ship; and although he was allowed a certain tonnage for the carriage of merchandise in the ships in which he sailed, this operated as an abatement from the freight to be received by the owners, and must be considered as part of the wages which they allowed him. Such an employment bears no resemblance to that of the covenanted service of the East India Co. in India, or to an unlimited engagement by a British subject to enter and continue in the service of a foreign government, by which a Scottish domicile or origin has been held to be lost. Captain Robertson was at liberty, at the end of every voyage, to engage in any new profession or pursuit, and, in the long intervals between some of his voyages, he actually contemplated doing so, and tried to obtain new employment.

During all this time, he had no fixed residence, and although a new domicile might certainly be acquired by a person who might be living in lodgings, or in an hotel, and although in this

case Captain Robertson appears to have spent more of his time while ashore, in England than in Scotland, I can discover nothing from which an abandonment of Scotland as his domicile can be inferred. He seems habitually to have been eager to return to Scotland at the end of his voyage from India; and in Scotland he spent a considerable portion of his time till he went on a new voyage.

*Sir Charles Douglas's case (Ommaney v. Bingham, 5 Ves. 757)* goes to the extreme limit of giving effect to a residence in England, but there were in that case facts, in no way resembling those found here, to shew an abandonment of the domicile of origin.

The Lord Ordinary, who, I must say, shews a stronger leaning in favour of change of domicile than I think the established principles and the decisions on this subject justify, considers it doubtful whether, in the present case, there was any change of domicile before 1805; and he rests his opinion on the ground, that the domicile of origin was lost between 1805 and 1812, when the house at Auchengraymont was taken. Thus reasons the learned Judge—"Captain Robertson found himself in possession of a handsome fortune free from the duties and restraints of professional life, and at liberty to choose his place of residence according to his own inclination. He chose to live in London, his real place of abode being in Baker Street, with Mrs. Wigglesworth, his ostensible address being Ibbotson's Hotel. His confidential friends addressed him at the former; his female relations and comparative strangers at the latter place. During this period he went into Scotland from time to time, spending the summer or autumn months there, and returning to London early in the year."

But assuming, with the Lord Ordinary, that the domicile of origin continued till 1805, I see hardly any ground for contending that it was changed before 1812. The domicile of origin might well continue without the occupation of any fixed residence in Scotland. Captain Robertson no doubt was very fond of a London life, but suppose that he had been equally fond, as he might well have been, of a Paris life, and had passed all the time in Paris which he spent in London, even if he had hired a house and kept a mistress in it, would he thereby have lost his Scotch domicile? He was not engaged in any profession or occupation in London requiring his personal presence there. He had an account with a banker in London, and he belonged to a club in London, and he afterwards rented a house in London, which he insured in London. But surely all those facts are quite consistent with a domicile in Scotland, and are common to many noblemen and gentlemen domiciled in Scotland, who come yearly to London to attend to their parliamentary duties, or to enjoy with their families the amusements of the metropolis. The *animus* connected with the *fact*, if evidence must always be regarded, the Lord Ordinary seems to have given little attention to, or to what I consider highly important, viz. that at this time Captain Robertson was heir presumptive, under a strict entail, to a considerable landed estate in Scotland, expectant upon the death of an old gentleman, turned of 70, who was in declining health, and that Captain Robertson had looked forward with much satisfaction to this family inheritance, and had formed plans for the improvement of the mansion and grounds when he should get possession.

If a man settled in a foreign country be engaged in some permanent pursuit requiring his residence there, a mere intention to return to his native country on a doubtful contingency will not prevent such a residence in a foreign country from putting an end to his domicile of origin. But a residence in a foreign country for pleasure, lawful or illicit, which residence may be changed at any moment without the violation of any contract or any duty, and is accompanied by an intention of going back to reside in the place of birth on the happening of an event which, in the course of nature, must speedily happen, cannot be considered as invalidating the purpose to live and die at home. The Lord Ordinary does not even attach any importance to the purchase by Captain Robertson of the estate of Whitehill, because there was not a suitable mansion house upon it, and because there was some talk about his laying out his money upon it by way of investment. But he actually took the whole of this property into his own hands, and continued ever after to cultivate it for his own profit. He was thenceforth denominated territorially George Robertson, Esq. of Whitehill, and acquired all the consequence of a Scottish laird, of which he seems to have been proud. It is further to be remembered, that that acquisition was near the entailed estate of Ross, which he soon expected to inherit; and there is reason to infer, that he immediately began to look out for a permanent residence in the neighbourhood, although he did not succeed in obtaining one till 1812, about two years afterwards.

When he had established himself at Auchengraymont, I must say that, in my opinion, if he had once lost his original domicile, he would now have recovered it. I cannot accede to the doctrine, that if a man have lost his original domicile, by acquiring a domicile in a foreign country, he cannot recover his original domicile while he retains a place of residence in a foreign country. He certainly cannot have two domiciles of succession at the same point of time, but the *animus* must determine the effect of a residence in a foreign country. We held, in *Maxwell v. Maclure*, that the English domicile continued, notwithstanding, that the individual whose domicile was in question, had actually again taken up his abode in Scotland; and upon this ground, that he had come back to Scotland for a temporary purpose, and that he still continued

to resort to his English residence as a home, and there executed the duties of a magistrate. During six years, when Captain Robertson was established at Auchengraymont, there, I think, he must be considered as having his household gods along with him, instead of their being at Ibbotson's Hotel, or at Miss Cumby's humble mansion in Margaret Street. At Auchengraymont he had a reputable establishment. There he exercises hospitality in a splendid style; he is visited by the Duke of Hamilton and the principal gentry of the county of Lanark; he is placed in the commission of the peace, and acts as a magistrate for the county of Lanark; and he continues to talk of the great things he is to do at the Ross on the death of his uncle. Therefore, notwithstanding his occasional visits to London, where Miss Cumby still chiefly resided, I am inclined to think, that he would have been considered as enjoying his domicile of origin, in the same manner as if Miss Cumby had been privately entertained by him in Edinburgh or Glasgow, and he had visited her in either of these cities instead of visiting her in London; but, I think, the question does not arise as to the recovering of a domicile of origin, as I rest my judgment on the ground, that his domicile of origin had never been lost.

I have next to consider the period between 1818 and the 13th of November 1820, when the marriage was celebrated. Now, it is quite clear to me, that Auchengraymont was given up, not with any intention of abandoning Scotland, as the place of Captain Robertson's permanent residence. He still kept the farm at Whitehill in his own hand; and he deposited the furniture he had used in the house at Auchengraymont in a place in Scotland, whence it might conveniently be carried to Ross when the entailed estate should at last come into his possession. He still passed a considerable part of his time in Scotland, he brought his future wife and some of his children to visit that country, and he made a trust disposition, according to the laws of Scotland, of his lands of Whitehill.

Having failed in the attempt which he had made to have his children recognised by his relations in Scotland, and his future wife being again pregnant in the autumn of 1820, he resolved to marry her, no doubt with the view of making all his children legitimate. Accordingly, he brought her to Scotland for that purpose. She had proposed, that the marriage should take place in England; but he objected, that he would not be married except by the laws of his own country. Accordingly, the marriage was celebrated at Glasgow, *in facie ecclesiæ*, in the parish church of St. Enoch's, by the ordained minister of that parish.

I cannot then doubt, that he believed that Scotland was his country, and that he then intended to settle all his family at the Ross, as soon as the octogenarian Mr. Aikman should expire, and that he had resolved to live and to die there.

What afterwards happened is only material, as it may weaken or strengthen the conclusion to be drawn as to the state of his mind, with respect to his domicile, at the time when the marriage was celebrated. He did not immediately fix his residence in Scotland, because his uncle and his sisters disapproved of his marriage, and his uncle survived till October 1821; but, on his uncle's death, being entitled to the immediate possession of the mansion at the Ross, he agreed with the widow to purchase the furniture which was left by her husband; and, on the 3d November 1821, he wrote a letter from the Ross to his wife to give her this information, adding, "so that when we come down we have nothing to do but to draw in our chair." He immediately set to work on the improvements which he had so long meditated, employing a very large number of workmen for that purpose. As soon as the widow had removed, he brought his wife and children to the Ross, and there the children remained two years with a tutor. Now, Captain Robertson, having taken the name and arms of Aikman, was regularly installed as the Laird of the Ross. In addition to being in the commission of the peace, he was made a Deputy Lieutenant, and regularly attended the meetings of the Lieutenancy. He was likewise summoned as a jurymen to the Assizes for the county of Lanark, and he seems to have been dearer to himself by acting in that capacity.

An attempt was made to introduce his wife into the genteel society of Lanarkshire. Had this succeeded I do not know that, being still fond of life in London, he would have entirely given up the house in Great Portland Street, which he had purchased before his uncle's death; but his keeping it, and going to reside there during the fashionable London season, was not, in my opinion, at all inconsistent with his domicile being considered to be in Scotland. However, all argument for an English domicile from the continuing the London house is completely at an end when we have ascertained the facts—that Mrs. Robertson Aikman was not visited in Lanarkshire; that she violently resented this slight; that she took a deep dislike to Scotland; and that afterwards she was continually importuning her husband to abandon it. Therefore, if there had been subsequent events, which I by no means say that there were, to shew, that her husband actually had before his death transferred his domicile to England, this change of domicile would not have been of the slightest importance to the decision of the cause; the legitimacy of the respondents depending entirely on the domicile of their father on the day of his marriage, in the year 1820.

I should not have advised your Lordships to reverse the judgment of the Court of Session in such a case, unless I had formed a very clear opinion, that the judgment was erroneous; but I

have great satisfaction in saying, that I cordially approve of it, and I advise your Lordships, that the appeal should be dismissed, with costs.

LORD CRANWORTH.—The question for the House to decide, is one of a class which often presents great difficulties, namely, the question as to where a person was domiciled at the time of his death, or at some particular epoch. Here the question is where the deceased Captain Robertson Aikman was domiciled on the 13th of November 1820, when he married Miss Cumby, the mother of the appellant and of the respondent, the former having been born after, the latter before the marriage. In the present inquiry we are free from some of the difficulties which have occurred in other cases. There is no doubt as to the domicile of origin of the deceased. He was undoubtedly born in Scotland, being the child of Scotch parents domiciled there. The domicile of origin was therefore certainly Scotch. There is no question here of an Anglo-Indian domicile, nor of a foreign domicile. The only question is, whether, having been born Scotch, he had become a domiciled Englishman on the 13th of November 1820.

It is a clear principle of law, that the domicile of origin continues until another domicile be acquired, *i.e.* until the person whose domicile is in question has made a new home for himself in lieu of the home of his birth. The difficulty in these cases arises from the circumstance, that the character of the residence of a man who is making his way in life, or passing idly through it, is often equivocal. His residence at a particular place may have been intended to be merely temporary. It may have been selected from motives of health, or economy, or convenience, or from mere restlessness, or instability of character, without the intention, in any of these cases, of abandoning a prior home and adopting a new one. Whether this is or is not the nature of any particular residence, must depend on all the circumstances connected with it, the investigation of which must obviously open the door to wide and extensive inquiries.

Here the appellant insists, that his father lost his status as a Scotchman previously to his marriage, by acquiring a domicile in England. The burden of the proof is on him. The Court of Session decided, contrary to the interlocutor of the Lord Ordinary, that the appellant had failed to establish the point for which he contended. The question now to be decided is, whether that decision was right. In the first place then, as regards the period prior to October 1805, when Captain Robertson finally quitted the sea service, I think it clear he had not acquired an English domicile. His residences in London, while he was in the sea service, had no character of permanence, though on different occasions they lasted for two or three years, and one even more. He remained in London, not because he considered it as a home, but because by being there he was more in the way of obtaining employment in ships trading in India. During that period he had no settled home, and his domicile of origin, therefore, remained unaffected. Assuming, then, that when he reached England in October 1805, on the conclusion of his last voyage, his domicile was still Scotch, the question is, whether his domicile was changed between that date and the day of his marriage, on 13th November 1820. I know of no mode of coming to a just conclusion on this subject, except by tracing his course of life during the whole of this period, in order to make out, as far as the facts enable us so to do, whether he had, at any time before the marriage, fixed his residence in England as his permanent home, to the exclusion of Scotland. Unless this is made out by the appellant, the burden of proof being on him, the original Scotch domicile must prevail.

There is no doubt that, during the fifteen years which elapsed between October 1805 and November 1820, he lived longer in England than in Scotland. The evidence shews him to have passed in that period only about 65 calendar months in Scotland, leaving 115 passed wholly or almost wholly in England; but, though the fact, that a person has resided for a longer time in one place than in another may afford some evidence, that the former was intended by him to be his permanent home, yet that evidence is liable to be rebutted by circumstances. The question, therefore, here is, what inference as to domicile we ought to draw from the residence in England of Captain Robertson, looking to all the circumstances connected with it.

In the first place, it is plain, that Captain Robertson was a man of very loose habits of life. Mrs. Coombs states in her cross-examination, that she had been informed by the deceased Mrs. Wigglesworth, that before the year 1802 Captain Robertson had lived with a woman named Ball, in Green Street, to whom the witness understood he allowed £100 a year. The truth of this statement is confirmed by the fact, that in his banker's books for many years there are frequent cheques for £25, payable to the name of Ball or Sarah Ball, the earliest dated on the 13th of July 1804, when he was in India, the last on the 26th of March 1811. These were probably quarterly payments in respect of the £100 a year. Two payments, one of £20, the other of £30, appear to have been made to Mrs. Ball in 1812, after which her name does not occur in the accounts, from which I presume she had then died.

In 1802 or 1803, Captain Robertson formed an intimacy with Mrs. Wigglesworth, and from the time of his return to England, after his last voyage, he cohabited with her at her house in Baker Street, always, however, having a room of his own at Ibbotson's Hotel, which he represented to all persons, except very intimate friends, as being his place of residence. In the first five years, after his return in October 1805, he only visited Scotland twice, namely, once in

August 1806, when he remained there five months, and again in July 1808, when he remained eight months, but after the autumn of 1810, his visits to Scotland were more frequent and regular. Except in 1818, when he made a short excursion to France, he went to Scotland regularly every year in the autumn, and stayed on an average about five months. While he was in Scotland in the autumn of 1810, he purchased the farm of Whitehill, near the entailed estate of Ross, and began to look out for a residence in that neighbourhood. Two years afterwards, namely, at Martinmas 1812, he became tenant from year to year, at a yearly rent of £78 10s., of the house of Auchengraymont, also situate in the neighbourhood of Ross, and of Whitehill. He continued to be the tenant of this house up to Whitsuntide 1818. Though it was hired as a furnished, or partly furnished house, yet he brought into it a great deal of furniture of his own, and kept up there a considerable establishment, both of servants and horses, his elder sister Margaret acting as mistress of the house, and managing also the farm of Whitehill. While he had this house, he passed rather more time in Scotland than in England.

It was in the summer of 1811, the year after his purchase of Whitehill, that he became acquainted with Miss Cumby. The case does not disclose the circumstances which led to his acquaintance with her. She merely states in her evidence, that it commenced in the summer of 1811, when she was in the twenty third year of her age, and was living with her married sister, Mrs. Wade. It was not till after his return to Scotland, 1812, that she began to live with him as his mistress. In that year he went to Scotland in the month of September, and for the three or four previous months she had lived with him in lodgings at the house of a tradesman in Marylebone Street, but when the Captain went to Scotland, she at his request returned to the house of her sister, Mrs. Wade. On his coming back to London in March 1813, he cohabited with her in furnished lodgings in Welbeck Street. In July of that year he returned to Scotland, and at his desire she joined him there at lodgings he had taken for her in Edinburgh. They returned to London in April 1814, and passed the summer partly in lodgings in London, first in Buckingham Street, and afterwards in Oxford Street, and partly at Cheltenham, where they both went on the ground of health. From September 1814 to February 1815, Captain Robertson was in Scotland, and during his absence, as indeed all his other absences in Scotland up to this time, Miss Cumby lived with her sister, Mrs. Wade. Very soon after his return to London in 1815, viz. in March of that year, he agreed to purchase the house in Margaret Street. The purchase was not completed till the following month of August, at which time it appears, from a letter from his solicitor, that he was living in lodgings at 212, Oxford Street. I suppose Miss Cumby was living with him. He went to Scotland in September or October 1815, and it does not appear whether he lived in the Margaret Street house before he went. He had apparently given orders as to the furnishing, and Miss Cumby took possession, and on the 1st of December of that year, she gave birth in that house to a daughter, her first child. Captain Robertson was in Scotland when that event occurred, and he was also, in January 1817, when she gave birth to the respondent, George, her second child, and eldest son. In 1815, 1816, and 1817, the Captain had, according to his usual habit, gone in the autumn to Scotland, and remained there till the following spring. After his return to London in April 1818, about which time he gave up Auchengraymont, he was not again in Scotland till August 1819, when he went there, taking with him his infant daughter, then a child of not quite four years of age. He endeavoured to induce his family to notice the child, but without success, and his uncle, Mr. Aikman, the person in possession of the entailed estate, was so angry at the attempt, that he refused to see him. It was probably this which induced him to return to London earlier than usual. Instead of remaining till the spring of 1820, he returned at the end of December 1819. In October 1820, he went with Miss Cumby to Scotland, and, on the 13th of the following month of November they were married in Glasgow.

Was he at that time a domiciled Englishman or a domiciled Scotchman? The conclusion at which I have arrived is in conformity with the decision of the Court below, and with that at which my noble and learned friend has arrived. I think he had never lost his domicile of origin. It is true, from the time when he quitted the sea service, he lived more in England than in Scotland, but that was the result, as I interpret his acts, not of his having intended to substitute England for Scotland as his home, but of his finding London better suited than Scotland to the ill-regulated life he was leading, till he should, in the ordinary course of events, succeed to the entailed estate.

There are many circumstances leading the mind to this conclusion. For the first five years, namely, from October 1805 to October 1810, he lived with Mrs. Wigglesworth, and though he contributed largely to the expense of the establishment, yet the house in which they lived was hers, not his. It seems clear, that he did not confine his affections exclusively to Mrs. Wigglesworth, for it must have been during this period that his natural son, Edward, was born; at least this may be fairly presumed, when we consider, that the youth went out from England as a cadet in the military service of the East India Company at the end of 1825, or at the very beginning of 1826, and that he was still at school in 1823. He was probably, therefore, born between 1805 and 1810. Be this as it may, I cannot consider the residence of Mrs. Wigglesworth as indicative

of any intention to make London his permanent home. It is true also, that he had a room at Ibbotson's Hotel, where his letters were addressed to him, and where he saw persons whom he could not bring to such an establishment as that where he was living. But this does not, in my opinion, vary the case. I will not say, that, in point of law, a person may not acquire a domicile by residence at an hotel, but it can rarely happen, as a matter of fact, that such a residence is intended to be of a permanent character, and, in the case of Captain Robertson, the room at Ibbotson's was obviously intended as merely a blind to conceal his real residence.

I am, therefore, clearly of opinion, that up to the summer of 1811, when he broke off his connexion with Mrs. Wigglesworth, Captain Robertson had done nothing which made him a domiciled Englishman, and that his domicile of origin, therefore, remained unaltered.

This brings us to his connexion with Miss Cumby, whom he afterwards married. The connexion with her as his mistress began, as I have already stated, in the spring or summer of 1812, but until 1815 he had nothing like a home for her. They lived at such temporary lodgings as might be convenient, and whenever he went to Scotland she returned to the house of her sister, except during the winter of 1813, when she, at his desire, followed him to Scotland, and he procured her a lodging in Edinburgh.

There was surely nothing in this to indicate any intention of settling in England. On the contrary, even if there had not been a Scotch domicile of origin, there was much to lead to the inference, that he was settling permanently in Scotland. He knew, that in the course of nature he would probably succeed, on the death of an uncle then advanced in life, to an entailed family estate in Lanarkshire. He had obviously, looking to that as a probable event, purchased a farm in the neighbourhood of the settled property, and he hired a residence in the same neighbourhood, where he spent a large part of every year with a suitable establishment. These facts are surely far stronger if that were necessary to shew an intention to acquire a Scotch domicile, than are the circumstances of this connexion with Miss Cumby as his mistress up to 1815, to shew an intention to acquire an English domicile. That, however, is not the question. We have not to say whether he acquired a Scotch domicile, but whether he lost his Scotch, and acquired an English, domicile. Such an inference cannot be drawn from anything which occurred up to 1815. In that year, however, he purchased the house in Margaret Street, and became a householder. He was rated to the poor rate from the year 1815, in respect of this house, and from the year 1817, his name appears in the *Court Guide* as the occupier of it, and when in London he lived there with Miss Cumby. It was argued, that by thus taking a house, in his own name, in which he lived when in London, and in which the woman with whom he cohabited always lived, he clearly shewed his intention to make that his home.

This reasoning does not convince me. It must be assumed, that at the time he bought the Margaret Street house his domicile was Scotch. He was Scotch by origin; he looked to succeed, at no distant day, to an entailed Scotch estate. He had purchased, and constantly occupied, a farm near the family property, and he occupied a hired house in the neighbourhood, where he kept an establishment suitable to his station in life, and resided for nearly half of every year. I cannot think, that, in these circumstances, he lost his Scotch domicile by taking a small house in London, where, when in town, he lived with the mistress with whom he had cohabited at various lodgings in different parts of the town during the preceding two or three years. The purchase of this house may fairly be taken to shew, that he looked to a more permanent connexion with Miss Cumby than he had originally contemplated, but not that he thought of adopting her domicile as his own, or of ceasing to be a Scotchman. Long after he had purchased his house, letters from his family were addressed to him at Ibbotson's. The printed evidence contains two from his sister Margaret so addressed, one dated the 4th of August 1817, the other December 1818; from which I cannot but infer, that this house, though taken and occupied by him, and in his own name, was really regarded by him as the residence of his mistress rather than of himself. This occupation of it was to some extent clandestine; and though Miss Cumby constantly remained there, he passed a great deal of his time in visiting his friends in different parts of England. He did not avow to his mother and sisters that he had any such residence.

Nothing of this sort can be said as to his Scotch residence. He was evidently anxious to take his place there as a country gentleman. In 1817 he became a magistrate of the county of Lanark, and afterwards acted in that capacity. He kept at Auchengraymont a considerable establishment, and the evidence shews, that the house was at times filled with company from the neighbourhood. He was in the habit of dining occasionally at Hamilton Palace, and of visiting General Campbell, Sir David Baird, Sir James Steward, and probably other Scotch gentry. Several of his letters were dated from the residence of General Campbell of Monzie, and many of them were franked by gentlemen in his neighbourhood.

All these considerations satisfy me, that, in purchasing and occupying, so far as he did occupy, the house in Margaret Street, he had no intention to create for himself a permanent home in England to supersede or even compete with his Scotch domicile. I am aware, that some of the circumstances which influence my judgment ceased to exist at Whitsuntide 1818, when he gave up Auchengraymont. After that he had no residence in Scotland. But assuming it to be made

out, as I think that it is, that up to that time he remained a domiciled Scotchman, I cannot come to the conclusion, that his status was changed by the circumstance of his giving up that house. He originally intended, when he gave up the house, to stow away all his furniture at Whitehill. In fact part was deposited there, part at Hall Craig, the residence of his brother, part at his mother's house in Edinburgh, and part at the Ross. This naturally suggests, that he looked to a future and no distant day when he would again require his furniture in the neighbourhood of Auchengraymont. His uncle, the tenant in tail of the Ross, was then eighty years of age, and laboured, or at all events was, by Captain Robertson, supposed to labour under a serious infirmity. The time when the succession would open to him could not be very distant. The occupation of Auchengraymont had evidently been a source of great expense to him. He had then two children by Miss Cumby, and the prospect of a large family. Though I can see nothing to make me think he meant to fix himself permanently in England to the exclusion of Scotland as his home, yet there is much to shew, that he had begun to look to his connexion with his mistress as one which was to endure through life. From the very commencement of their intimacy, during the three years and upwards which elapsed before he became the purchaser of the Margaret Street house, he directed his letters to her by the designation of Mrs. Robertson. I find but one exception to this, namely, a letter dated the 3rd February 1813, which he directed to her as Miss Cumby. His widow, in her evidence, says, that he excused himself from acknowledging her publicly as his wife on the ground, that by so doing he would be likely to offend his uncle whom he was to succeed at Ross.

The inference which I draw from the evidence is, that when he first connected himself with Miss Cumby he had no thought of fettering himself by the bonds of matrimony, but that in the lapse of years as he grew older, and particularly as children were born to him, he gradually found it more and more difficult to sever the connexion between himself and his mistress. Even before he had any child, namely in the autumn of 1813, he seems to have formed a hope, that he might partially introduce her in Scotland, and in 1819 he was most anxious to induce his friends and relations to recognize daughters whom he had brought down with him to Scotland. He had then three children, of whom he was very fond. He was in the sixtieth year of his age, and it cannot therefore be matter of surprise, that he had at length resolved to marry the woman he had so long cohabited with. Assuming this to have been a resolution not suddenly or hastily formed, but one, the necessity or expediency of which had been for years gradually forcing itself on his mind, it cannot be supposed, that he could have had the intention of doing anything which should affect his status as a Scotchman.

Without imputing to him knowledge of law, we can hardly suppose him not to have known, that, as a Scotchman, he might, by marrying his mistress, make his children legitimate, and that, as an Englishman, he could not do so. It is therefore highly improbable, that he could have intended to constitute the small house in Margaret Street his permanent home to the exclusion of the many ties which bound him to Scotland.

On this broad view of the case, without dwelling on all the minute circumstances of the case, I have come to the conviction, that the decision of the Court of Session was right. I agree with what was said at the bar, that much stress cannot, in cases like the present, be laid on casual expressions, as, for instance, that the person whose domicile is in question has spoken of "going home." It was truly said, that the word home, when so used, can have little or no weight in determining a question of domicile. But there is an expression in one of Captain Robertson's letters which does appear to me to be entitled to considerable attention. In writing from Hamilton to Miss Cumby on the 24th of February 1817, in speaking of his intention to leave Scotland shortly, he says, "I must be a few days with the old lady, my mother, in Edinburgh." Now, this appears to me clearly to shew, that when he made his annual journeys to and residences in Scotland, he did not consider them as visits to his mother. He came annually to Scotland, because he had a house and interests of his own there, and when there he made visits to his mother. I do not build much on that expression, but I think it is entitled to consideration.

It remains only that I should say a few words on what occurred after the marriage. Nothing which Captain Robertson then said or did could affect his previous status, but his subsequent conduct may not improperly be looked at for the purpose of considering, whether it throws light on his previous course of life. The character of acts, prior to the marriage, of an equivocal nature, may be explained by what he did subsequently. But looking to his subsequent history, I see nothing to alter or qualify the opinion I have expressed, founded on his conduct up to the time of his marriage. In the spring of 1821 he purchased and removed into a much better house than that in which he had been living in Margaret Street. This change was necessary in consequence of his rapidly increasing family. But even if this had occurred before instead of after his marriage, I could not, looking to what occurred six months later, have considered it as indicating an intention to make London his home to the exclusion of his connexion with Scotland. In the autumn of the same year 1821 his uncle died, and he became entitled to the family house and estate. He went down to his uncle's funeral, and in order to be able to enter into immediate occupation of the house, he purchased the furniture from his uncle's widow. In fact, however,



he allowed her to remain in the occupation till the following spring, when he went down with his wife and children, and commenced his residence in the family mansion. Soon after arriving there, he engaged a family tutor (William Hamilton) to reside in the house in charge of the three eldest children. The tutor continued there with his three pupils for two years, though Captain Robertson, who then took the additional name of Aikman, with his wife and younger children, went up to London at the end of 1822, and remained there for about six months. During this period, and afterwards, Captain Robertson Aikman made extensive alterations and improvements both in the house and grounds; conducting himself in all respects as a man, who had succeeded to an inheritance to the enjoyment of which he had long been looking.

I do not think it necessary to continue the inquiry as to his subsequent course of life further than to say, that having, as I infer from the evidence, failed in the object he had at one time had much at heart, namely, that of inducing the families in the neighbourhood to visit and associate with his wife, he, in the year 1834, let the Ross as a furnished house, and it so continued, except for a few months, to be let until his death in 1844. After he had thus let the Ross, he still went occasionally to Scotland with some of his children, without his wife, but he resided principally in London. Whether he had at his death acquired an English domicile is not now the question.

I have only thought it right to advert thus shortly to his life after the marriage, for the purpose of pointing out, that there was nothing in what then occurred tending to shew, that he had previously to that event abandoned or lost his Scotch domicile. Whatever conclusion as to domicile ought to have been drawn, if he had died the day after the celebration of the marriage, must, in my opinion, be come to now. I see nothing in what afterwards occurred to explain or qualify the character of what went before.

On these grounds, as I have already stated, I think the decision of the Court of Session was right, and ought to be affirmed.

LORD WENSLEYDALE.—This case depends upon one question only, whether the appellant has proved to your Lordships' satisfaction, that his late father, Captain Robertson Aikman, was on the 13th November 1820, when he was married at Glasgow, domiciled in England? If he has established that fact, then the marriage could not render his brothers who were born before it legitimate; if he has failed to do so it did, and the eldest was consequently entitled to the Scotch estate.

The rule of law which leads to this conclusion is perfectly settled. Every man's domicile of origin must be presumed to continue until he has acquired another sole domicile by actual residence, with the intention of abandoning his domicile of origin. This change must be *animo et facto*, and the burden of proof unquestionably lies upon the party who asserts that change. This rule is laid down in the case of *Somerville v. Somerville*, 5 Vesey, 787, and has been acted upon ever since.

It is perfectly clear, that Captain Robertson Aikman was a domiciled Scotchman by origin; he was born in Scotland, and his family and connexions were established there. Has the appellant proved, that his father had changed that domicile for an English one at the date of this marriage?

If the question had related to the disposition of his personal estate, which must be made according to the law of domicile of the deceased at the time of his death, and for this purpose a man can have only one domicile, I think, that I should have come to the conclusion, that he was then domiciled in England.

He died in London in January 1844. For twenty-three years he had a house in Portland Street, and lived there with his family. And although he obtained possession of the ancestral house of Ross in September 1821, and occupied it, he quitted it in 1834, and continued to let it as long as he lived, and resided from 1834 till the time of his death, about ten years, in London.

This very long residence in a house in London, held on a long lease with his family unbroken by any actual residence in Scotland, would probably have led me to think, that he had finally elected to make that his home, and spend the residue of his life there. But the question to be decided is, Had that domicile commenced before the 13th November 1820? Had he then finally abandoned his domicile of origin, and elected England as his home? This makes it necessary to look at the whole course of his earlier life.

In 1810 he appears to have purchased a small estate at Whitehill, near to Auchengraymont, and in 1812 he took a house to reside in that place, and did reside there, but not exclusively. He became a Justice of the Peace for the county of Lanark, and performed the duties of that office by attending the Quarter Sessions. In May 1818 he gave up his residence at Auchengraymont, but did not dispose of his furniture, which he left at various places in the neighbourhood, which has the appearance of an intention to use it again in Scotland. In 1821 he became possessed of Ross by the death of his uncle, and occupied the house of his ancestors till 1834, at the same time with his London house.

Looking at these circumstances, if there were was nothing in the previous course of his life to shew an intention to abandon his domicile of origin altogether, I should say, that your Lordships ought not to be satisfied, that the appellant has proved what he was bound to do, viz., that his

father was domiciled in England at the period of his marriage. Little reliance can be placed upon the circumstance of his going to Scotland to be married as indicating his domicile at that time. If he knew the law, he would have known, that a marriage in Scotland was not necessary to give a retrospective operation so as to legitimize his previously born children; and, if he did not know the law, he may have supposed, that a marriage in Scotland was necessary for that purpose, and would effect it, and therefore adopted that course. The most material point as to the marriage is, that he told Mrs. Aikman, if she is to be believed, that he would be married according to the laws of his own country. The important question then is, whether he had, by his previous course of life and his residence in London, acquired a sole domicile in England? If he had, that acquired domicile could not be lost again by his residence for a part of a year in Scotland,—according to the doctrine of Sir William Scott, in *La Virginie*, 5th Rob. Adm. Cas. 99. The native character easily reverts, and requires fewer circumstances to constitute domicile in the case of a native subject, than to impress the national character on one who was originally of another character. But if a fresh domicile is acquired, so as to supersede the domicile of origin, it cannot be got rid of—according to the authority of Sir Herbert Jenner Fust, *Craigie v. Lewin*, 3 Curt. 435,—except by a total abandonment of the domicile acquired, and the residence at Auchengraymont certainly had not that effect. I understood my noble and learned friend on the woolsack to throw a doubt upon that doctrine. I am not quite sure whether I rightly understood him or not; but it appears to me immaterial to decide that point for the purpose of coming to a conclusion upon this case.

The whole case, in my view of it, resolves itself into the effect of the evidence of the conduct of Captain Robertson from 1773, when he first entered into the sea service on board private vessels trading to the East Indies, up to the year 1812, when he first had a residence in Scotland. If he had been in the regular service of the East India Company, in their navy, he would have acquired an Anglo-Indian domicile, which is equivalent to an English one; but this is a case of a temporary employment on different occasions for the East India Company, imposing no permanent obligation to serve in the East Indies, and therefore, of itself, without more, created no such domicile. He resided sometimes in London in the intervals of his employment in voyages, and occasionally he visited Scotland, up to the time in 1805, when he left the sea service finally. During that period he was longer in London than in Scotland, but his residence there may be explained by the greater facilities it afforded for his obtaining employment in ships sailing to the East Indies, and not because he had meant to make it his home. He took no house for his residence, which shews strongly, that he did not mean to settle himself there permanently. He led an irregular and dissolute life. In 1802 or 1803, he formed a connexion with Mrs. Wigglesworth, and stayed in her house, paying a part of the expense of it, with a nominal residence at Ibbotson's Hotel, no doubt for the sake of appearances. In 1811 he formed an attachment to Miss Cumby, whom he afterwards married, and lived with her in lodgings till the end of 1815.

I do not say, in order to obtain a domicile in a country, a man must necessarily have a house of his own, and reside in it. Circumstances may be so strong as to shew a fixed purpose of abandoning his own country, and making his home in another, and to shew also the accomplishment of that object, though he lives in inns or temporary lodgings. But such cases must be rare. Here there are no material circumstances tending to shew, that he had made his home in London. The fact of his having ultimately made it so after he had quitted Scotland in 1834, can hardly be considered as tending to shew, that he had formed the same resolution when the circumstances were so different in 1805.

There are some facts of no great importance urged by both sides upon this part of the case. That he executed a will in the English form in 1802, evidently prepared by an attorney, is of no weight to shew, that he then considered that his domicile was in England; for the rule, that the will must conform to the law of the domicile, was certainly not then well understood, as it is now, and the attorney would probably not ask any question about the domicile of a man wishing to make a will. That he made another will in 1815, in Scotland, is of as little weight for the same reason on the other side; and besides, the will seems to have been made in a form applicable to both countries.

His being made a member of the Royal Society of Edinburgh, and a burghess of Burntisland in 1791-92, tends to shew an adherence to his domicile of origin, and may be set off against his being a member of a local society in London, and on the standing committee of it in 1810, which imports residence. Until he took a house of his own to reside in, there is no evidence, that weighs with me much, of an acquired domicile in England. This he did at the end of 1815, when he took a house in Margaret Street, on a lease for years, and resided with Miss Cumby there. But, at the very time he did so, he had taken another residence in Scotland, namely, in 1812; and that circumstance, I think, prevents his house in London being thus considered his sole home. And without a sole domicile, his domicile of origin cannot be lost. This is a great difficulty in the appellant's case. When we come to the first evidence of a satisfactory nature of a domicile in England, it is met by evidence of another domicile acquired in Scotland. The double residence

continued till May 1818, when he gave up residing at Auchengraymont. Until that, it seems, that no sole domicile could be considered as established in London; nor could the continuance in the house in Margaret Street up to November 1820, without any additional circumstances, have the effect of creating a sole domicile in England from May 1818 till November 1820, especially when it is borne in mind, though he quitted Auchengraymont, he left his furniture in Scotland, which is some evidence of his intention to resume a Scotch residence, which he did soon after, when he came into possession of Ross. It is not improbable, that if he meant to make London his home at any time, he meant it to be so only until he should become entitled to his ancestral house at Ross, but a residence for a definite time, though of uncertain duration, would not, I conceive, confer a domicile. It is essential, in all the definitions given of the meaning of this term, that it should not be for a limited time. That he did not afterwards, when he came into possession, remain there till death, arose from other circumstances—probably the reluctance of his wife to live in Scotland, and the reluctance of his acquaintances to visit his wife and his once illegitimate family.

On the whole, though not without some doubt, I concur in the advice given to your Lordships, that there is no clear proof of an English domicile in November 1820, and therefore no sufficient reason to disturb the decision of the Court of Session in this case.

LORD CHANCELLOR.—My Lords, I am desired by my noble and learned friend, LORD BROUGHAM, who heard the whole of the argument in this case, to say, that he entirely concurs in the conclusion, that the interlocutors appealed against ought to be affirmed.

*Interlocutors affirmed, with costs.*

*For Appellant*, John Robertson Aikman (Appellant in Person), Solicitor, London; Dundas and Wilson, C.S., Edinburgh.—*For Respondents*, Maitland and Graham, Solicitors, Westminster; Hamilton and Kinnear, W.S., Edinburgh.

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MARCH 19, 1861.

THE BRITISH LINEN CO., *Appellants*, v. THE CALEDONIAN INSURANCE CO.,  
*Respondents*.

Forgery—Fraud—Bank Cheque—Letter of Credit—Payment on Forged Signature—Discharge—16 and 17 Vict. c. 59, § 19—*H. the country agent of C. an insurance company, forged a proposal for an insurance on the life of A B, combined with a loan in his favour. A bond was also forged by H., and sent to the head office. The C. company on advancing the loan obtained a letter of credit, in favour of A B, and sent it to H. to be delivered to A B; but H. himself cashed the cheque, on a forged indorsation of A B, with H.'s own indorsation subjoined. This occurred before the passing of the act 16 and 17 Vict. c. 59. H. having absconded, the C. Company sued the bank for the contents of the letter of credit, on the ground that the bank had not paid it to the payee.*

HELD (affirming judgment), *That the payment by the bank on the forged signature did not form any valid defence against the action for payment at the instance of the C. insurance company.*<sup>1</sup>

William Harvie, writer in Dalry, was the agent for the pursuers (the Caledonian Insurance Co.) there in 1853. On the 22d June 1853, Mr. Harvie transmitted to H. D. Dickie, the manager of the Insurance Company in Edinburgh, the following documents, viz., 1. Proposal for an insurance for £800 on the life of Andrew King, farmer, Brachenhills, bearing to be subscribed by King, with queries answered by the agent annexed, signed by Harvie; 2. Medical officer's report signed by Archibald Blair, surgeon; 3. Private friend's report, bearing to be signed by John Allan, Langmuir; and 4. Certificate of A. King's baptism, bearing to be signed by William Duff, session clerk. The signatures of "Andrew King" to the proposals, and of "John Allan" to the friend's report, were not genuine; the signatures of Mr. Harvie and the surgeon were genuine.

Mr. Harvie, in his letter transmitting these documents, requested that, if the order for assurance was approved of, a policy should be sent immediately; he also stated, that the applicant proposed to borrow £450 upon the policy, when issued, and offered for security three gentlemen named, and that the security was first class. In answer to a letter from Mr. Moinet, of the head office, asking a reference as to the responsibility of the sureties offered, Mr. Harvie

<sup>1</sup> See previous reports 21 D. 1197: 31 Sc. Jur. 653. S. C. 4 Macq. Ap. 107: 33 Sc. Jur. 392.