

JUNE 3, 1869.

GEORGE UDNY, *Appellant*, v. JOHN HENRY UDNY of Udney and Another, *Respondents*.

Domicile—Domicile of Origin—Change of Domicile—Consul living abroad—Legitimation *per subsequens matrimonium*—*J. having a Scotch domicile of origin, went to Italy, and was a consul there for thirty-nine years, and during leave of absence died in London.*

HELD (affirming judgment with variation), *That he had never lost his Scotch domicile.*

J. R. having a Scotch domicile of origin, in 1812 left the army, married and settled in London, having his only residence there till 1844, when he went and lived at Boulogne to avoid his creditors. While living in London, he was owner of a family estate in Scotland, and visited it occasionally, and managed it; and on leaving London, he sold off his furniture not intending to return to London. In 1853 he returned from Boulogne to Scotland, married a second wife, and lived there till his death.

HELD, *per* LORD WESTBURY, *that J. R. acquired an English domicile before 1844—LORD CHANCELLOR HATHERLEY dubitante, and LORD CHELMSFORD negante.*

HELD FURTHER, *by all their Lordships, that the English domicile, if ever acquired, was abandoned in 1844, and the Scottish domicile of origin necessarily revived from that date.*

HELD FURTHER, *The domicile of J. R., (the father of an illegitimate child,) at the birth of the latter being Scotch, his subsequent marriage of the mother, while his domicile continued the same, legitimated such child, though born in England.*

Every person must have a domicile, and the domicile of origin continues till another be acquired animo et facto. A domicile of origin, however, never requires to be reacquired in the same way as a foreign domicile is acquired; on the contrary, it reverts or revives the moment the acquired domicile ceases or is abandoned.

The domicile of a person is an inference of law from the fact of his voluntarily fixing his sole or chief residence in a place, coupled with an unlimited intention of continuing to reside there—Per LORD WESTBURY.¹

This was an appeal against two interlocutors pronounced in an action of declarator, in which George Udney, the appellant, was pursuer, and John Henry Allat or Udney and his curator *ad litem* were defenders. The object of this action of declarator was to establish, that the respondent was illegitimate, and therefore not entitled to succeed to the entailed estates of Udney in the county of Aberdeen, on the death of his father. The condescendence in substance set forth, that the deed of entail of the estate of Udney was dated 1784, and that the appellant was the next heir of entail if John Robert Udney, then residing at Bruntsfield Terrace, Edinburgh, had no lawful issue, as was alleged to be the case. The pursuer alleged, that the said John Robert Udney was born at Leghorn about 1778. He was married in 1812 to Emily Fitzhugh, by whom he had an only child, John Augustus Udney, who died unmarried in 1859; and Emily Fitzhugh died in 1846. During the life of John Augustus Udney his father propelled the succession to him under the said deed of entail, and after the death of John Augustus the said John Robert Udney made up titles to him by special service as heir of tailzie and provision under the deed of entail. About 1847 John Robert Udney became acquainted with his present wife, Ann Allat, an Englishwoman, and they were married at Ormiston, East Lothian, in 1854. Before the said marriage, however, they had a son, the present respondent, who was born at Camberwell, London, in 1853. At the latter date it was alleged that John Robert Udney was not a domiciled Scotchman, nor was he so at the date of his marriage, 1854; therefore that it followed, according to the law of England, where the child was born, the latter was illegitimate; and once illegitimate, he was always illegitimate. Hence the main question turned on the domicile of John Robert Udney, the present heir in possession at the date of the birth of the respondent, his son, and at the date of the marriage of the respondent's mother. The respondent alleged, that the domicile of his father at the dates mentioned was in Scotland.

The leading facts as to John Robert Udney's history were as follow:—He was called Colonel Udney. He was born at Leghorn, where his father John Udney was British Consul. The Consul was born in 1725, and was the son of an Aberdeen advocate. His domicile was Scotch in its

¹ See previous reports 5 Macph. 164; 39 Sc. Jur. 163. S. C. L. R. 1 Sc. Ap. 441; 7 Macph. H. L. 89; 41 Sc. Jur. 457.

origin, and there seemed to be no sound reason for thinking that it was ever changed. He was appointed Consul about 1760, being then unmarried; and as far as could be ascertained, he was a merchant there of some kind, probably dealing in Italian and Roman antiquities, and pictures of the great masters. In 1766 Consul Udny was removed from Venice to Leghorn. As Consul, it was naturally to be presumed, that his British domicile would not be lost. When the French Government, in 1796, took possession of the port of Leghorn, and British property was seized, Consul Udny's property was also seized. While residing at Leghorn, the Consul seemed to have the provisioning of the fleet; and he used to send home pictures which he occasionally purchased abroad. While absent on leave, he died in London in 1800.

Colonel Udny, the son of the Consul, born in Leghorn in 1779, was sent to Scotland to be educated, as he was looked upon as likely to be the proprietor of a Scotch estate. He attended Edinburgh University for three years, and was boarded with the Bishop of the Scottish Episcopal Church. He afterwards entered the army, and left it in 1812. He at the same time married, and settled in London—at least, he rented a house there, and resided in it part of the year, for many years. He had no fixed employment or business while so living in London, except mixing in the pursuits of the turf. He was a freeholder in the county of Aberdeen from 1802. He had his Scotch property to look after, and took personal interest in the management, visiting Scotland every year. In 1844 he gave up the lease of his house in London, sold off his furniture, and went to Aberdeenshire to inquire minutely into the state of his affairs. Finding his income insufficient, he went to Boulogne, where he lived till 1853, making occasional visits to Scotland, and his wife only going for a few days to London to be confined—the respondent being born at that time. He had merely hired apartments at Boulogne, and during the same period he had no residence in London, and he had lived in Scotland since 1853, having gone there in that year under counsel's advice with the object of marrying the respondent's mother, and in order to legitimate the respondent thereby; and such marriage took place accordingly in January 1854.

On the above facts, Lord Ordinary Jerviswoode held, that the domicile of John Robert Udny in 1853 and 1854, at the date of the birth of the respondent, and at the date of the marriage of the respondent's mother, was in Scotland, and therefore, that by the subsequent marriage of the parents the respondent was legitimated. On reclaiming note, the Second Division unanimously adhered, whereupon the present appeal to the House of Lords was brought.

The appellant in his *printed case* stated the following reasons for reversing the interlocutors:—1. Because the respondent was illegitimate at his birth, and was not legitimated by the subsequent marriage of his parents. 2. Because the respondent could not be legitimated by the subsequent marriage of his parents unless, at the date of the respondent's birth and at the date of the marriage, his father was domiciled in Scotland, and because he failed to shew, that his father was domiciled in Scotland at either of the said dates. 3. Because the respondent could not be legitimated by the subsequent marriage of his parents if, at the date of the respondent's birth or of the marriage, his father was domiciled in England, and because, at both of the said dates, or at least at the date of the respondent's birth, his father was domiciled in England. 4. Because the status of the respondent was to be regulated and ascertained by the law of England, and because that law did not admit of legitimation *per subsequens matrimonium*. 5. Because the law of the domicile which his father possessed at the date of the respondent's birth determined the status of the respondent and his capacity for being legitimated *per subsequens matrimonium*, and as at that date the respondent's father was domiciled in England, the defender could not be legitimated by the subsequent marriage of his parents.

The *appellant in person* contended—1. That the domicile of Colonel Udny at the birth of the respondent in 1853 was English. In establishing the fact, that the domicile of origin has been changed, it is not necessary to go the length of saying, that before one can change his domicile from one country to another, he must have made up his mind to renounce his nationality as well as change his home. That phrase, first used by LORDS CRANWORTH and KINGSDOWN, has been misunderstood, and no such doctrine is to be extracted from *Whicker v. Hume*, 7 H.L.C. 160; *Aikman v. Aikman*, 3 Macq. Ap. 854, *ante*, p. 997. The main point to be proved is, that the party has abandoned his former home, and adopted a new home; and this may be proved by his acts and intention, *i. e.* by his conduct. Colonel Udny's domicile at the birth of the respondent in 1853 was English. There is reason for saying his domicile of origin was Italian, seeing that his father, Consul Udny, was a domiciled Italian, the Consul having abandoned his original Scotch domicile, and settled as a trader in Italy, where he resided so long as thirty-nine years—*Bruce v. Bruce*, 3 Paton, 168; *Drevon v. Drevon*, 34 L. J. Ch. 129; *Cockrell v. Cockrell*, 25 L. J. Ch. 732. Such was the fair deduction from all the facts and circumstances known as to Consul Udny—*Hodgson v. Beauchesne*, 12 Moore, P.C. 329. If, then, Consul Udny was domiciled in Italy, so was his son, Colonel Udny. But even if Consul Udny never lost his Scottish domicile, and Colonel Udny also had his domicile of origin in Scotland, still Colonel Udny acquired an English domicile in 1812, when he left the army and married, and settled in London, where he lived uninterruptedly for thirty-three years, having his only residence and establishment there. It is quite consistent with his domicile being in England, that he was the proprietor of a

Scotch estate—*Somerville v. Somerville*, 5 Ves. 750; *Warrender v. Warrender*, 2 S. & M'L. 154; *Munro v. Munro*, 1 Rob. App. 492; *Ross v. Ross*, 4 W. S. App. 33. If, then, Colonel Udny was domiciled in England from 1812, when did he cease to be so and acquire a Scotch domicile? His visit to Scotland in 1854 was for a special purpose connected with his creditors, and did not change the previous English domicile, which continued, though at that time Colonel Udny was living at Boulogne. He never intended to leave Boulogne for Scotland permanently, but went only for a few weeks, intending to return to Boulogne. Therefore, both at the date of the respondent's birth in 1853, and the marriage of the respondent's mother in 1854, the domicile of Colonel Udny was English. It is the domicile of the father at the date of the birth of the bastard that determines the capacity of that child for legitimation; and as by the law of England bastardy is indelible, the respondent was illegitimate, without the capacity of becoming legitimate—*Boulnois*, ii. 2, 1; i. 2, 4; *Ross v. Ross*, 4 W. S. 296; *Re Wright's Trusts*, 2 K. & J. 595; *Re Don's Estate*, 4 Drewr. 194. There is nothing in *Munro v. Munro*, 16 S. 19; 1 Rob. Ap. 492, inconsistent with this doctrine. In all cases of change of domicile, the change must be proved *facto et animo*, and there is no sufficient proof of such change from the English domicile to a Scotch domicile either in 1853 or 1854. The same evidence is required of the reacquirement of the domicile of origin as of the acquirement of a new or foreign domicile—*Story's Conflict*, § 48; *per V.C. Leach in Munroe v. Douglas*, 5 Madd. 404.

Sir R. Palmer Q.C., Mellish Q.C., P. Fraser, and H. F. Bristowe, for the respondent.—The judgment of the Court below was right. The domicile of Consul Udny was Scotch, for he never lost his domicile of origin by his official residence as Consul in Italy. Nothing shews any intention on his part to abandon his Scotch domicile of origin. The Consul's domicile being Scotch, the Colonel's domicile of origin was also Scotch, and there must be affirmative evidence, that he ever changed this Scotch domicile for an English domicile. It is quite clear Colonel Udny never acquired an English domicile till 1812, and even then and thereafter, there was no sufficient evidence of a change, as mere residence is not enough, and cannot outweigh the combined effect of the Scotch domicile of origin, ownership of Scotch property, visits to such property, and management of it. His not residing at Udny was solely or mainly because there was no fit place of residence there. At no period between 1812 and 1844 when he went to Boulogne can it be predicated, that he had abandoned the Scotch domicile of origin, and adopted an English domicile. His removal to Boulogne made no change in his domicile, though it entirely dissolved all connexion with London. Colonel Udny went to Scotland in 1854 for the express purpose of marrying the respondent's mother, and thereby legitimizing the respondent as well as of permanently residing in Scotland. Mere residence in England is not enough; there must be an intention, and the carrying out of that intention, to abandon the old, and acquire another new domicile—*Whicker v. Hume*, 7 H. L. C. 159; *Hodgson v. Beauchesne*, 12 Moore, P. C. 285; *Jopp v. Wood*, 34 Beav. 88; 34 L. J. Ch. 212; *Re Capdevielle*, 2 H. & C. 985; *Attorney-General v. Wahlstatt*, 34 L. J. Ex. 29. It is a mistake to suppose, that the domicile of origin required to be reacquired; it revives or returns irrespective of the will of the party, whenever any acquired domicile is lost or abandoned. It adheres to the person, and is never extinguished, but is merely held in suspense by some acquired domicile, and is always ready to be resumed the moment an acquired domicile ceases.

Cur. adv. vult.

LORD CHANCELLOR HATHERLEY.—My Lords, the appellant in this case complains of two interlocutors pronounced in an action of declarator brought by him against the respondent, whereby he sought a declaration, that the respondent is a bastard, and is not entitled to succeed to the entailed estates of Udny, and other property of the family of Udny in the county of Aberdeen.

By an interlocutor dated the 23d January 1866, the Lord Ordinary in effect found, 1st, That John Udny, (designated as Consul Udny,) the grandfather of the respondent, was born in Scotland of Scottish parents in 1727, and that his domicile of origin was Scottish, that he resided as British Consul successively at Venice and Leghorn, and that John Robert Udny, the father of the respondent, afterwards called Colonel Udny, was born at Leghorn in the year 1779, and that Colonel Udny retained, throughout, his domicile of origin, viz. that of Scotland; 2d, That John Robert Udny, on his birth, took from his father a Scotch domicile of origin, and retained it prior to, and at the date of, his marriage to the mother of the respondent at Ormiston in Scotland on the 2d of January 1854; 3dly, and separately, That from and after the 13th of November 1853, when John Robert Udny returned to Scotland from Boulogne, he had, and continued until his death to have, a domicile in Scotland; and on these findings he sustained the defences. The appellant reclaimed against this interlocutor to the Court of Session, and their Lordships, the Judges of the Second Division, on the 14th December 1866, recalled the interlocutor of the Lord Ordinary, and found, that the respondent was born at Camberwell, near London, in May 1853, his parents, John Robert Udny and Ann Allat, being then unmarried; that they were regularly married at Ormiston in January 1854, that Colonel Udny's domicile of

origin was in Scotland, and that he never lost it, and in particular, that he was a domiciled Scotchman at the date of the respondent's birth, and at that of his marriage with the respondent's mother, and throughout the interval between those three events. And they therefore found, that, though illegitimate at his birth, he was legitimated by the subsequent marriage of his parents, and they sustained the 2d plea of the defence, and found the respondent entitled to expenses.

The whole question in the case is, whether or not the respondent, who (it is admitted) was born several months before the marriage of his parents, was legitimated by that subsequent marriage. This depends upon the question of the domicile of Colonel Udny, and the important periods at which it is necessary that his domicile should be ascertained are three, viz. that of his birth, that of the birth of the respondent, and that of the marriage of Colonel Udny with the respondent's mother.

The appellant, who argued his case in person with very considerable ability, contended, 1st, that the domicile of origin of Colonel Udny was English; 2d, that even if that were not so, yet that he, at the time of his first marriage to Miss Fitz Hugh in 1812, abandoned Scotland for England, sold his commission in the army, took a house on lease for a long term in London, and resided there till he left England for France in 1844, for the purpose of avoiding his creditors, and had thus acquired an English domicile, and that he never reacquired his Scotch domicile; 3d, that at all events, if he did so recover it, yet it was not recovered at the date of the respondent's birth in May 1853, nor even till after the intermarriage of respondent's parents in January 1854.

As regards the first period, namely, the domicile of origin of Colonel Udny, we did not hear the respondents. Your Lordships were satisfied that Colonel Udny had never abandoned his Scottish domicile.

Domicile of origin continues until another be actually acquired *animo et facto*. The Consul was employed by our Government at Venice and at Leghorn. An attempt was made, by reason of some early correspondence, to shew, that he had also been engaged in trade whilst at Venice, but we were I believe all satisfied, that the appellant, on whom the burden of proving the acquisition of a new domicile is thrown, produced no sufficient evidence to that effect, and indeed the pleadings did not raise a case of Italian domicile, but one of English domicile, as regards Consul Udny's status at the birth of his son Colonel Udny.

Consul Udny was appointed to Leghorn in 1776, where he married the mother of Colonel Udny in the same or the following year, and the Colonel was born there in November 1779. In 1784 the Consul's wife came to England with the Colonel and another child, leaving the Consul at Leghorn. During his wife's absence from Italy an active correspondence seems to have been carried on by the Consul with his elder brother Robert, then owner of the Udny property, of which Robert's letters only remain, but they are sufficient to shew the continued interest of the Consul in Scottish matters. In September 1798 the Consul came to England on leave of absence.

It was argued, that the Consul, by taking a house in London, in which his wife resided on her coming to England in 1784, and by sending his boy to Eton, indicated his intention of permanently settling in England. It appears to me, that there is no evidence of any such intention. He had not resigned his office of Consul. It is true, that he shewed an unwillingness to return to its duties, not unnatural considering the disturbed state of the Continent of Europe, and his brother Robert reproaches him with this indecision, but certainly there is no trace of any intention of abandoning his domicile of origin for an English domicile between his return in 1798 and his death on the 17th of January 1800. The alleged trading on the part of the Consul whilst in Italy, at Leghorn as well as Venice, might well be referred to the business allowed by Government to be carried on by their consular agents.

I answer, therefore, the first inquiry, viz. that of Colonel Udny's domicile of origin, by saying, that it was clearly Scottish, that being the domicile of his father at the Colonel's birth.

A more difficult inquiry of fact arises as to the domicile of Colonel Udny at the date of the respondent's birth in May 1853. Colonel Udny appears to have left the army about the same time that he married his first wife, viz. in 1812. On his marriage he executed a contract of marriage dated the 28th of August 1812, and other instruments connected with his marriage, with several provisions referable to Scottish law, and described himself as of Udny, in the county of Aberdeen. He on his marriage took a long lease of a house in London, in which he resided till 1844. He made frequent visits to Scotland, but had no residence there. He at one time contemplated restoring Udny Castle, and, even three years after he had commenced his residence in London, appears to have still thought it possible, that he might complete the restoration, and plans were about that time submitted to him for that purpose. For many years, however, he seems to have abandoned all hope of so doing, owing to his means being insufficient for the purpose. He was appointed a magistrate in Scotland, but appears not to have acted as such. When in Scotland he usually resided with friends, but occasionally at hotels in the neighbourhood of his property, and he continually received detailed accounts of the estates, and took much

interest in their management. His choice of England as a residence appears to have been considerably influenced by his taste for the sports of the turf. By his first marriage he had a son, John Augustus Udny, of whom more mention is made afterwards.

Under these circumstances, (the details of which I do not think it necessary more minutely to examine,) the Lord Ordinary and the Court of Session concurred in opinion, that the long and habitual residence in England was not sufficient to amount to the abandonment of the Colonel's Scottish domicile of origin. This point, I confess, appears to me to be one of great nicety. I am not prepared to say, that I am satisfied with that conclusion; but neither should I be prepared, without further consideration, to recommend to your Lordships a reversal of the judgment appealed from, on the ground, that the opinions of their Lordships in the Court below upon this point were erroneous.

Owing to this action having been raised in the Colonel's lifetime, the Court below had the advantage of the testimony of Colonel Udny himself,—a circumstance which does not often occur in questions of domicile. It appears to have been very candidly given, and (as was observed by the Lord Ordinary) by no means overstates the case in favour of the continuance of his Scottish domicile.

Several other witnesses were examined, who do not carry the case further. But be this as it may, the events in the Colonel's life subsequent to 1844 appear to me to be those upon which the question of his domicile at the birth of the respondent really depend.

In 1844 the Colonel, after having been involved for some time in pecuniary difficulties, (owing chiefly to his connexion with the turf,) was compelled to leave England in order to avoid his creditors. He at first thought of taking some house in the country, by which I think he meant in the rural parts of England; but afterwards the pressure of creditors became too great to admit of his so doing, and he appears in the autumn to have visited Scotland, where correspondence took place between himself and Mr. Brebner, his agent, as to arranging a trust deed, by which Colonel Udny and his son, John Augustus, were to make provision, as far as possible, for the payment of their debts. On the 2d of October he writes to Mr. Brebner to mention that "a creditor is pressing for immediate payment of £1200; so let there be no time lost." And by a letter of his son to Mr. Brebner, of the 4th November 1844, it appears that his father left England for Calais on the previous day. He about this time sold the lease of the London house in which he had so long resided. He sold also, as he himself states in his evidence, (p. 103,) all his furniture and everything that was in the house, including what had belonged to his mother, his sister, and his first wife. He went from Calais to Boulogne, and there resided in a hired house till 1853. He says in his evidence, "When I went to Boulogne, I had no further connexion with London. I had a married sister living there, and various other relations. During the nine years when my headquarters were at Boulogne, I never resided in London. The time that I came over for my wife's confinement in 1853, was the first time I visited London after leaving it for Boulogne. I remained there at that time only about a couple of days, and returned to Boulogne. While I was at Boulogne I came over more than once to Scotland to visit my property. These were not long visits, but I did make them."

This seems to be an accurate account of his arrangements. The wife alluded to in the above statement is the mother of the respondent. The Colonel's first wife did not go with him to Boulogne, but she joined him for a short time in 1845, leaving him afterwards on account of ill health, and residing with his brother in London. She died in 1845.

The Colonel at Boulogne formed an illicit connexion with the mother of the respondent, and in May 1853 came to England in consequence of a wish, that she should be attended in her confinement by an English medical attendant; and on the 9th May the respondent was born at Camberwell. The Colonel appears to have returned almost immediately to Boulogne.

The Colonel had been living on a very scanty allowance. His eldest son, too, was embarrassed with debt; and at a very early period after the birth of the respondent, the father and son appear to have thought, that the birth of his child might facilitate the barring of the entail of the Scotch estates; for in a letter of the 29th May 1853 the Colonel writes to his son, "I shall be glad to hear of your interview with Mr. Skinner" (their legal adviser). "I think the great difficulty will be the uncertainty of the child's life; however, you will talk over all these matters with him."

From this time to the end of the year much correspondence takes place on this subject, and the Colonel was advised that, by marrying the respondent's mother, he might, according to the law of Scotland, render the respondent legitimate, and that then the concurrence of the appellant in barring the entail would not be requisite. The advice on this latter point was erroneous. But without entering into all the details of the correspondence, it is enough to say, that the Colonel came over to Scotland in November 1853, clearly with the intent to celebrate a marriage with the respondent's mother, and with the hope of raising money for the benefit of his eldest son and himself, by getting rid of the entail. He was under an impression, that his English creditors could not molest him whilst in Scotland; he was much mortified afterwards to find that this was not the case, and that the only advantage afforded him by his residing in Scotland

in that respect would be a longer notice before any attempt could be made to arrest him. Under the annoyance of this feeling he writes several letters to his son and others, expressive of his disgust at having been hurried away from Boulogne, and his dislike to residing in Scotland. But I cannot bring my mind to doubt, that his intention in returning to Scotland was to do that which he accomplished, viz. to marry in regular form the respondent's mother, and, for that purpose, to be domiciled there.

I do not rely on his letter of 9th July 1859, where he expressly asserts it to have been his intention in 1853 to be permanently domiciled in Scotland, because that letter may be open to the objection (it was very shortly *ante litem motam*) of his anticipating the difficulties that have since arisen, and the claim of the appellant. Neither do I think we can safely rely on the recital contained in the disposition by his elder son of the 2d December 1853, on which much reliance was placed by Sir R. Palmer, which recites, that in consequence of the Colonel having become desirous, and made arrangements, to return again and to remain in Scotland, it had been agreed, that he should renounce and discharge a certain annuity, in consideration of which his son was to make the disposition in question, because the father was not a party to that instrument. But on the other hand, though the recital itself may not be evidence, yet the Colonel took advantage of that instrument, and the whole course of the arrangements made shews that the Colonel's intent, for which alone he came to Scotland, was by his marriage to make the respondent legitimate, and by means of that legitimation to deal with the estates. These objects required a Scotch domicile, and it would be singular to hold, that he having in fact married on the 2d January 1854, and resided in Scotland thenceforth to his death in 1861, (after the raising of the present action,) the domicile must not be taken to have been Scottish as it ought to be, for the purposes he had in view from the time of his return in 1853.

It is true, that the death of his elder son in the interval between the marriage and the death of the Colonel, and the consequent falling in of the policies of insurance on his life, placed the Colonel to a certain degree in an easier position, and removed his apprehension of difficulty from his creditors; but I think his possible intention to leave Scotland (if molested by creditors) in no way disproves the existence of a resolution to remain as he did in that country, (if allowed so to do,) as his chosen and settled abode.

It seems, therefore, clear to me, that the Colonel was at the time of his marriage domiciled in Scotland, but the question remains as to what was his domicile in May 1853 at the time of the respondent's birth.

If he were domiciled in England up to 1844, and retained an English domicile up to and after May 1853, then the question would arise, which has not been determined in any case by the Scottish Courts, whether the child, being illegitimate at its birth, and its putative father not having at that time a power of legitimating him by means of a subsequent marriage with his mother, could be legitimated by his putative father subsequently acquiring a Scottish domicile before marriage with the mother.

I have myself held, and so have other Judges in the English Courts, that according to the law of England a bastard child whose putative father was English at his birth could not be legitimated by the father afterwards acquiring a foreign domicile, and marrying the mother in a country, by the law of which a subsequent marriage would have legitimated the child. I see no reason to retract that opinion. The status of the child depends wholly on the status of the putative father, not on that of the mother. If the putative father have an English domicile, the English law does not at the birth of the child take notice of the putative father's existence. But if his domicile be Scottish, or of any other country allowing legitimation, though the mother be English at the birth, the putative father (as in *Monro v. Monro*) is capable of legitimating the child. The foreign law, though deeming the child to be *filius nullius* at birth, yet recognizes the father as such at the moment of his acknowledging the child either by marriage and formal recognition as in France, or by marriage only as in Scotland. I do not think, that the English law can recognize a capacity in any Englishman, by a change of domicile, to cause his paternity and consequent power of legitimation to be recognized. But however this may be, the question does not in my judgment here arise. I am of opinion, that the English domicile of Colonel Udny, if it were ever acquired, was formally and completely abandoned in 1844, when he sold his house, and broke up his English establishment, with the intention not to return. And indeed his return to that country was barred against him by the continued threat of process by his creditors. I think, that on such abandonment his domicile of origin revived.

It is clear, that by our law a man must have some domicile, and must have a single domicile. It is clear on the evidence, that the Colonel did not contemplate residing in France, and indeed, that has scarcely been contended for by the appellant. But the appellant contends, that when once a new domicile is acquired, the domicile of origin is obliterated, and cannot be reacquired more readily or by any other means than those by which the first change of the original domicile is brought about, namely, *animo et facto*. He relied for this proposition on the decision of Sir John Leach in *Munroe v. Douglas*, (5 Madd. 379,) who certainly held, that a Scotchman having acquired an Anglo-Indian domicile, and having finally quitted India, but not yet having settled

elsewhere, did not reacquire his original domicile, saying expressly, "I can find no difference in principle between an original domicile and an acquired domicile." That he acquired no new domicile may be conceded, but it appears to me, that sufficient weight was not given to the effect of the domicile of origin, and that there is a very substantial difference in principle between an original and an acquired domicile. I shall not add to the many ineffectual attempts to define domicile. But the domicile of origin is a matter wholly irrespective of any *animus* on the part of its subject. He acquires a certain *statum civilem*, as one of your Lordships has designated it, which subjects him and his property to the municipal jurisdiction of a country which he may never even have seen, and in which he may never reside during the whole course of his life, his domicile being simply determined by that of his father.

A change of that domicile can only be effected *animo et facto*, that is to say, by the choice of another domicile evidenced by residence within the territorial limits to which the jurisdiction of the new domicile extends. He in making this change does an act which is more nearly designated by the word "settling" than by any other word in our language. Thus we speak of a colonist settling in Canada or Australia, or of a Scotsman settling in England, and the word is frequently used as expressive of the act of change of domicile in the various judgments pronounced by our Courts. But this settlement *animo et facto*, by which the new domicile is acquired, is of course susceptible of abandonment if the intention be evidenced by equally decisive facts to those which evidenced its acquirement.

It is said by Sir John Leach, that the change of the newly acquired domicile can only be evidenced by an actual settling elsewhere, or (which is, however, a remarkable qualification,) by the subject of the change dying *in itinere* when about to settle himself elsewhere. But the dying *in itinere* to a wholly new domicile would not, I apprehend, change a domicile of origin if the intended new domicile were never reached. So that at once a distinction is admitted between what is necessary to reacquire the original domicile, and the acquiring of a third domicile. Indeed the admission of Sir John Leach seems to have been founded on the actual decision of the case of *Colville v. Lauder*, M. 14,964, Succession App. No. 1, cited in full in *Munroe v. Douglas* from the Dictionary of Decisions. In that case a person of Scottish origin became domiciled at St. Vincent's, but left that island, writing to his father, and saying, that his health was injured and he was going to America, and that, if he did not succeed in America, he would return to his native country. He was drowned in Canada, and some memoranda were found indicating an intention to return to Scotland, and it was held, that his Scottish domicile had revived.

It seems reasonable to say, that if the choice of a new abode, and actual settlement there, constitute a change of the original domicile, then the exact converse of such a procedure, viz. the intention to abandon the new domicile, and an actual abandonment of it, ought to be equally effective to destroy the new domicile. That which may be acquired may surely be abandoned, and though a man cannot for civil reasons be left without a domicile, no such difficulty arises if it be simply held, that the original domicile revives. That original domicile depended not on choice, but attached itself to its subject on his birth; and it seems to me consonant both to convenience and to the currency of the whole law of domicile, to hold, that the man born with a domicile may shift and vary it as often as he pleases, indicating each change by intention and act, whether in its acquisition or abandonment, and further to hold, that every acquired domicile is capable of simple abandonment *animo et facto*, the process by which it was acquired, without its being necessary, that a new one should be at the same time chosen, otherwise one is driven to the absurdity of asserting a person to be domiciled in a country which he has resolutely forsaken and cast off, simply because he may (perhaps for years) be deliberating before he settles himself elsewhere. Why should not the domicile of origin, cast on him by no choice of his own and changed for a time, be the state to which he naturally falls back, when his first choice has been abandoned *animo et facto*, and whilst he is deliberating before he makes a second choice?

Lord Cottenham in *Munro v. Munro* (7 Cl. & F. p. 876) says, "So firmly indeed did the civil law consider the domicile of origin to adhere, that it holds, that, if it be actually abandoned and a domicile acquired, but that again abandoned, and no new domicile acquired in its place, the domicile of origin revives."

No authority is cited by his Lordship for this. He probably alluded to some observation of Sir William Scott, having a considerable bearing in that sense in the case of *La Virginie*, 5 Rob. Adm. 98, and the "*Indian Chief*," 3 Rob. Adm. 12.

The passage in the case of *La Virginie* is this:—"It is always to be remembered, that the native character easily reverts; that it requires fewer circumstances to constitute domicile in the case of a native subject, than to impress the national character on one who is originally of another country" (5 Rob. 99). In the case of the "*Indian Chief*," the question was, Whether the ship was the property of a British subject? for if so, her trading was illegal. The owner, Mr. Johnson, averred, that he was an American. Sir William Scott held him to be an American by origin, but, having come to England in 1783, and remained till 1797, he had become an English merchant. But he quitted England before the captain of the vessel, and letters were produced shewing his intention to return to America, which he does not appear to have reached until after; and

Sir William Scott says, "The ship arrives a few weeks after his departure; and, taking it to be clear, that the natural character of Mr. Johnson as a British merchant was founded on residence only, that it was acquired by residence, and rested on that circumstance alone, it must be held that, from the moment he turned his back on the country where he had resided, on his way to his own country, he was in the act of resuming his original character, and is to be considered as an American. The character that is gained by residence ceases by residence. It is an adventitious character, which no longer adheres to him from the moment that he puts himself in motion *bonâ fide* to quit the country *sine animo revertendi*."

Story, in his Conflict of Laws, § 47 (at the end), says, "If a man has acquired a new domicile different from that of his birth, and he removes from it with intention to resume his native domicile, the latter is reacquired even while he is on his way; for it reverts from the moment the other is given up."

The qualification, that he must abandon the new domicile with the special intent to resume that of origin, is not, I think, a reasonable deduction from the rules already laid down by decisions, because intent, not followed by a definite act, is not sufficient. The more consistent theory is, that the abandonment of a new domicile is complete *animo et facto*, because the *factum* is the abandonment, the *animus* is that of never returning.

I have stated my opinion more at length than I should have done, were it not of great importance, that some fixed common principles should guide the courts in every country on questions of international importance. In questions of international law we should not depart from any settled decisions, nor lay down any doctrine inconsistent with them. I think some of the expressions used in former cases, as to the intent *exuere patriam*, or to become a Frenchman instead of an Englishman, go beyond the question of domicile. The question of naturalization and of allegiance is distinct from that of domicile. A man may continue to be an Englishman, and yet his contracts and the succession to his estate may have to be decided by the law of the country in which he has chosen to settle himself. He cannot at present, at least, put off and resume at will obligations of obedience to the government of the country, of which at his birth he is a subject, but he may many times change his domicile. It appears to me, however, that each acquired domicile may be also successively abandoned *simpliciter*, and that thereupon the original domicile *simpliciter* reverts.

For these reasons, my Lords, I propose to your Lordships the affirmance of the interlocutors complained of, and the dismissal of the appeal with costs.

LORD CHELMSFORD.—My Lords, at the opening of the argument of this appeal for the respondent, his learned counsel were informed, that your Lordships were of opinion, that the domicile of Colonel Udny down to the year 1812 was his Scotch domicile of origin, and that the case was therefore narrowed down to the questions raised by the appellant, whether the domicile had been superseded by the acquisition of another domicile in England, and whether such after acquired domicile was retained at the time of the birth of the respondent, and continued down to the period of the marriage of the respondent's parents in Scotland. In considering these questions, it will be necessary to ascertain the nature and effect of a domicile of origin; whether it is like an after acquired domicile, which, when it is relinquished, can be reacquired only in the same manner in which it was originally acquired, or whether, in the absence of any other domicile, the domicile of origin must not be had recourse to for the purpose of determining any question which may arise as to a party's personal rights and relations. Story, in his Conflict of Laws, (§ 48,) says, the moment a foreign domicile is abandoned, the native domicile is reacquired. Great stress was laid by appellant in his reference to this passage upon the word *reacquired*, which is obviously an inaccurate expression. For, as was pointed out in the course of the argument, a domicile of origin is not an acquired domicile, but one which is attributed to every person by law. The meaning of Story, therefore, clearly is, that the abandonment of a subsequently acquired domicile *ipso facto* restores the domicile of origin. And this doctrine appears to be founded upon principle, if not upon direct authority. It is undoubted law, that no one can be without a domicile. If, then, a person has left his native domicile and acquired a new one, which he afterwards abandons, what domicile must be resorted to, to determine and regulate his personal status and rights? Sir John Leach V.C., in *Munroe v. Douglas*, 5 Madd. 404, held, that, in the case supposed, the acquired domicile attaches to the person till the complete acquisition of a subsequent domicile; and (as to this point) he said there was no difference in principle between the original domicile and the acquired domicile. His Honour's words are, "A domicile cannot be lost by mere abandonment. It is not to be defeated *animo* merely, but *animo et facto*, and necessarily remains until a subsequent domicile be acquired, unless the party die *in itinere* towards an intended domicile." There is an apparent inconsistency in this passage; for the Vice Chancellor, having said, that a domicile necessarily remains until a subsequent domicile be acquired *animo et facto*, added, "unless the party die *in itinere* towards an intended domicile," that is, at a time when the acquisition of the subsequent domicile is incomplete, and rests in intention only. I cannot understand upon what ground it can be alleged, that a person may not abandon an acquired domicile altogether, and carry out his intention fully by removing *animo*

non revertendi, and why such abandonment should not be complete until another domicile is acquired in lieu of the one thus relinquished.

Sir William Scott, in the case of the "*Indian Chief*," 3 Rob. Adm. 20, said the character that is gained by residence ceases by residence. It is an adventitious character which no longer adheres to a person the moment he puts himself in motion *bonâ fide* to quit the country *sine animo revertendi*, and he mentions the case of a British born subject who had been resident in Surinam and St. Eustatius, and had left those settlements, with an intention of returning to the country, but had got no further than Holland, the mother country of those settlements, when the war broke out, and it was determined by the Lords of Appeal, that he was *in itinere*, that he had put himself in motion, and was in pursuance of his native British character.

Sir John Leach seems to me to be incorrect also in saying, that in the case of the abandonment of an acquired domicile, there is no difference in principle between the acquisition of an entirely new domicile and the revival of the domicile of origin. It is said by Story, § 47 of his Conflict of Laws, that if a man has acquired a new domicile different from that of his birth, and he removes from it with an intention to resume his native domicile, the latter is reacquired even while he is on his way, (*in itinere*), for it reverts from the moment the other is given up. This certainly cannot be predicated of a person journeying towards a new domicile which it is his intention to acquire.

I do not think, that the circumstances mentioned by Story in the above passage, viz. that the person has removed from his acquired domicile with an intention to resume his native domicile, and that he is *in itinere* for the purpose, are at all necessary to restore the domicile of origin. The true doctrine appears to me to be expressed in the last words of the passage—that the domicile of origin reverts from the moment the other is given up.

This is a necessary conclusion, if it be true, that an acquired domicile ceases entirely whenever it is intentionally abandoned, and that a man can never be without a domicile. The domicile of origin always remains as it were in reserve to be resorted to in case no other domicile of origin is found to exist. This appears to me to be the true principle upon this subject, and it will govern my opinion upon the present appeal.

Upon the question, whether Colonel Udny ever acquired an English domicile which superseded his domicile of origin, there can be no doubt, that his long residence in Grosvenor Street for the space of 32 years from 1812 to 1844 is calculated to produce a strong impression in favour of the acquisition of such a domicile. Time is always a material element in questions of domicile, and, if there is nothing to counteract its effect, it may be conclusive upon the subject. But in a competition between a domicile of origin and an alleged subsequently acquired domicile, there may be circumstances to shew, that however long a residence may have continued, no intention of acquiring a domicile may have existed at any one moment during the whole of the continuance of such residence. The question in such a case is not, whether there is evidence of an intention to retain a domicile of origin, but whether it is proved, that there was an intention to acquire another domicile. As already shewn, the domicile of origin remains till a new one is acquired *animo et facto*. Therefore a wish or desire expressed from time to time to return to the place of the first domicile, or any looking to it as the ultimate home, although wholly insufficient for the retention of the domicile, may yet amount to material evidence to rebut the presumption to acquire a new domicile arising from length of residence elsewhere. In this view it would be a fair answer to the question, Did Colonel Udny intend to make England his permanent home? to point to all his acts and declarations with respect to Scotland and his estates there, to the offices which he held, to the institutions to which he belonged, and to his subscriptions to local objects, shewing, that though his pursuits drew him to England and kept him there, and his circumstances prevented his making Udny Castle fit for his residence, he always entertained a hope, if not an expectation, that a change in his fortunes might eventually enable him to appear in his country of origin, and to assume his proper position there as a Scotch proprietor.

If the residence in England began under circumstances which indicate no intention that it was to be permanent, when did it assume the character of permanence? By proof that the Colonel had intentionally given up his Scotch domicile, and adopted a different one. It appears to me, upon this question of fact, that, throughout the whole of the Colonel's residence in London, there was always absent the intention to make it his permanent home, which is essential to constitute a domicile, residence alone, however long, being immaterial, unless coupled with such intention. But even if it should be considered that Colonel Udny's residence in England, though not originally intended to be his permanent home, after a certain length of time ripened into a domicile, yet in 1844 he gave up the house in Grosvenor Street, and returned to Boulogne, where he remained for nine years without any apparent intention of again taking up his residence in England. This abandonment of the English residence both in will and deed, although accompanied with no immediate intention of resuming the Scotch domicile, put an end at once to the English domicile, and the domicile of origin *ipso facto* became the domicile by which the personal rights of Colonel Udny were thenceforth to be regulated.

This makes it unnecessary to consider what would have been the condition of the respondent

if his birth had taken place in England before the assumption of the Scotch domicile by Colonel Udny and the subsequent marriage of his parents in Scotland, after that domicile had been resumed. Because, the domicile being Scotch, the place of the birth of the respondent is wholly immaterial, and the case is completely governed by the authority of the case of *Dalhousie v. M'Dowall* and *Munro v. Munro* (in 7 Cl. & F., 817, 842), in each of which the birth of the illegitimate child and also the subsequent marriage of the parents took place in England, but the domicile being Scotch, it was held, that neither the place of the marriage nor the place of the birth affected the status of the child.

The existence of the Scotch domicile renders it also unnecessary to consider whether the parents of the respondent went to Scotland for the purpose merely of legitimating the respondent by their marriage there, and deprives the case of *Ross v. Ross*, 4 W. S. 289, which was insisted upon by the appellant, of all application. For in that case, as stated by the LORD CHANCELLOR, the parties were domiciled in England, the child was born in England, the parties went to Scotland for the purpose expressly of being married, and having been married, they returned to England to the place of their former domicile.

I agree with my noble and learned friend, that the interlocutors appealed from ought to be affirmed.

LORD WESTBURY.—My Lords, the law of England, and of almost all civilized countries, ascribes to each individual at his birth two distinct legal states or conditions, one by virtue of which he becomes the subject of some particular country, binding him by the tie of natural allegiance, which may be called his political status, another by virtue of which he has ascribed to him the character of a citizen of some particular country, and as such possessed of certain municipal rights, and subject to certain obligations, which latter character is the civil status or condition of the individual, and may be quite different from his political status; for the political status may depend upon different laws in different countries, whereas the civil status is governed universally by one specific principle. Domicile or the place of settled residence of an individual is the criterion established by law for the purpose of determining the civil condition of the person, for it is on this basis, that the personal rights of the parties, that is, the law which determines his majority or his minority, marriage, succession, testacy or intestacy, must depend.

Every man has ascribed to him by law a domicile, which is a fiction or creation of international law, and depends on rules which, being mainly derived from the Roman law, are common to the jurisprudence of all civilized nations. It is a settled principle, that no man shall be without a domicile, and to secure this result the law attributes to every individual as soon as he is born the domicile of the father if the child be legitimate, or the domicile of the mother if illegitimate. This has been called the domicile of origin, and it is involuntary. Other domiciles are domiciles of choice, for, as soon as the individual is *sui juris*, it is competent to him to elect and assume another domicile, the continuance of which depends upon his will and act. When another domicile is put on, the domicile of origin is for that purpose relinquished, and remains in abeyance during the continuance of the domicile. But as the domicile of origin is the creature of law, and independent of the will of the party, it would be inconsistent with the principles on which it is by law created and ascribed, to suppose, that it is capable of being, by the mere act of the party, entirely obliterated and extinguished. It revives and exists whenever there is no other domicile, and it does not require to be regained or reconstituted *animo et facto* in the manner which is necessary for the acquisition of a new domicile of choice.

Domicile of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place with the unlimited intention of continuing to reside there. This is a description of the circumstances which create or constitute a domicile, and not a definition of the term. There must be a residence freely chosen and not prescribed or dictated by any external necessity such as the duties of office, the demands of creditors, or the relief of illness. And it must be residence fixed not for any defined period or particular purpose, but general and indefinite in its future duration. It is true, that residence originally temporary, or intended only for a limited period, may afterwards become general and unlimited, and in such a case, so soon as the change of purpose or the *animus manendi* may be inferred, the fact of domicile of origin may be extinguished by act of law, as, for example, by sentence of death, exile, and perhaps outlawry, but it cannot be destroyed by the act of the party. Domicile of choice, if it is gained *animo et facto*, may be put an end to in the same manner.

Expressions are found in some books in one or two cases, to the effect, that the first domicile remains until another is acquired. This is true, if applied to the domicile of origin, but it cannot be true if such general words were intended (which is not probable) to convey the conclusion, that a domicile of choice, though unequivocally relinquished and abandoned, clings, in spite of his will and act, to the party until another domicile has *animo et facto* been acquired. The cases to which I have referred are in my opinion met and controlled by other decisions, but more especially by the reason of the thing. A natural born Englishman may, if he domiciles himself in Holland, acquire the *status civilis* of a Dutchman, which is of course ascribed to him in respect

of his settled abode in Holland, but if he breaks up his establishment, sells his house and furniture, discharges his servants, quits Holland, declaring that he will never return to it again, and taking with him his wife and children for the purpose of travelling in France or Italy in search of another place of residence, can it be said, that he carries his Dutch domicile on his back, and that it clings to him pertinaciously until he has finally set up his tabernacle in another country? Such a conclusion would be absurd. But there is no absurdity, but, on the contrary, much reason in holding, that an acquired domicile may be effectually determined by an unequivocal intention and act, and that, when it is so determined, the domicile of origin instantly revives, and continues until a new domicile of choice is acquired. According to the *dicta* in the books, and cases referred to, if an Englishman lived for twenty years after he had finally quitted Holland without acquiring a new domicile elsewhere, and afterwards died intestate, his personal estate would be administered according to the law of Holland, and not according to that of his native country. This is an irrational consequence of the supposed rule. But when a rule supposed to be laid down by one or more decisions plainly leads to an absurdity, there is great reason for believing, that no such conclusion was intended to be laid down.

In Mr. Story's Conflict of Laws, in the passage already referred to, it is stated, that the moment the foreign domicile is abandoned the native domicile is reacquired. The general authorities that warrant that position are there referred to.

My Lords, I have troubled your Lordships with these general observations, because, in the first place, I cannot at all concur in the expressions attributed to, and which probably were used by, a noble and learned Lord in his speech to this House in the case of *Moorhouse v. Lord*, 10 H. L. 272, where these words are found. It is said by the noble and learned Lord, "a man must intend to become a Frenchman instead of an Englishman." These words are likely to mislead, because they would seem to imply, that he must put on not the *civilis status* of a Frenchman, which may be co-existent with that of the Englishman, but that he must change his natural allegiance; and again in the same book I find, that the editor of the last edition of Mr. Story's Conflict of Laws has been misled probably by that expression, for he draws from the case this conclusion: "The result of the more recent English cases seems to be, that to a change of natural domicile there must be a definite and effectual change of nationality." My Lords, I apprehend that would be a very erroneous conclusion, and that domicile does not depend upon what is here attributed to it in one of the speeches which guided the decision of that case, namely, that the party must intend to put off the one nationality, and to put on another. That would lead to confusion between *patria* and *domicilium*, which are two independent things, as I have already endeavoured to explain, and must not be confounded one with the other.

Now the application of these general rules to the circumstances of the present case is very simple. My Lords, I concur with my noble and learned friend, that the father of Colonel Udny, the Consul at Leghorn and afterwards at Venice, and again at Leghorn, did not by his residence there in that capacity lose his Scotch domicile. Colonel Udny was therefore a Scotchman by birth. But I am certainly inclined to think, that when Colonel Udny, to use the ordinary phrase, settled in life, and took a long lease of a house in Grosvenor Street, and made that the place of abode of himself and his wife and children, becoming in point of fact subject to the municipal duties of a resident in that locality, and remained there for a period I think of 32 years, there being no impediment in point of occupation, or duty, to prevent his going to reside in his native country—under these circumstances, I should come to the conclusion, if it were necessary to decide the point, that Colonel Udny undoubtedly acquired an English domicile. But if he did so he eventually relinquished that English domicile in the most effectual way by selling or surrendering the lease of his house, selling his furniture, discharging his servants, and leaving London in a manner which would leave not the least doubt, that he never intended to return there for the purpose of residence. If, therefore, he acquired an English domicile, he abandoned it absolutely *animo et facto*. Its acquisition, being a thing of choice, was equally put an end to by choice. He lost it the moment he set foot on the steamer to go to Boulogne, and he reacquired his domicile of origin. The rest is plain. The marriage, and the consequences of that marriage, must be determined by the law of the country of his domicile. That was Scotland. I think, therefore, that the conclusion has been rightly arrived at, that it is incumbent on your Lordships to dismiss this appeal. And as it is an appeal wholly of an adverse character, I see no reason, though I should have been glad to have found one, for departing from the ordinary rule, namely, of dismissing the appeal with costs.

LORD COLONSAY.—My Lords, I regard this case as one of very considerable importance, inasmuch as it has afforded an opportunity for bringing out more clearly than has been done in any of the former cases the radical distinction between domicile of origin and domicile of residence. The principles of that distinction have been so clearly stated by my noble and learned friends who have spoken, and the facts of the case have been so clearly put before the House, that I can do nothing but add my adherence to those principles, and to the application of those principles which has been made in this case.

LORD CHANCELLOR.—My Lords, in point of form it has occurred to me, that as the second interlocutor of the Court of Session contains these words, “that his domicile of origin was in Scotland, and he never lost his said domicile of origin,” it would be better, in affirming the interlocutor, to omit that finding.

LORD WESTBURY.—It might be met by wording the declaration in this way,—that when he left England in 1844 his domicile of origin revived.

LORD CHANCELLOR.—The judgment of the House on that part of the case will be in this form: That the interlocutor of the Court of Session be varied by substituting for the words “that he never lost his said domicile of origin,” these words, “and that if such domicile of origin was ever changed, yet by leaving England in 1844 his domicile of origin reverted.” And then with reference to the interlocutor of the Lord Ordinary, inasmuch as by the subsequent order it is varied, it is unnecessary to deal with that in any way.

Interlocutors affirmed with variation, and appeal dismissed with costs.

Appellant's Agents, Coverdale, Lee, and Co., Bedford Row, London.—Respondents' Agents, W. Skinner, W.S., White, Broughton, and White, Great Marlborough Street, London.

JUNE 11, 1869.

MRS. SCOTT of Rodono, *Appellant, v.* LORD NAPIER, *Respondent.*

Loch—*Solum*—Common Property—Pertinents—Riparian Rights in a Lake—*By Crown charter dated 1599, the lands of R. abutting on two navigable inland lakes through which a river runs, were granted to the predecessors of S. cum silvis lacubus et pertinentiis, the same description being followed in all subsequent titles. N. the owner of the lands of B. also abutting on the lakes, had a Crown charter of 1607 purporting to grant the lands (una cum) along with two lakes, and separate feu duties being payable for lands and lakes, but after 1621 the separate mention of the lakes and corresponding feu duty disappeared from the titles of N. N. set up a claim to the exclusive ownership of the lakes, which were six miles long, and relied on exclusive possession for time immemorial.*

HELD (reversing judgment), (1) *That each riparian owner had primâ facie a joint right to the lake; (2) that the words una cum did not import, that the lakes were thereby made pertinents of the lands of B.; (3) that the total omission of all mention of the lakes after 1621 must have been intentional, and the right to the exclusive ownership of the lakes, if ever valid, was now cut off by the negative prescription; (4) that on the evidence no greater or more exclusive possession on the part of N. had been proved than of any other riparian owner; (5) that S. had with the other riparian owners a joint right to the lake.*¹

This was an appeal from interlocutors of the First Division as to the right to the bed of St. Mary's Loch, on the borders of Selkirkshire. The river Yarrow rises about three miles above the lake, and flows through it. The lake consists of two parts—one called the Loch of the Lowes, and the other St. Mary's Loch, both being joined by a neck of the Yarrow. The lands of Rodono nearly surround the Loch of the Lowes, and were acquired in 1860 by Mr. Scott, the appellant, who began to build a mansion on his lands. The other owners of land adjacent to the loch were Lord Napier, who had the whole of one side of St. Mary's Loch, and a small part of one side of the Loch of the Lowes, and the Duke of Buccleuch and Mr. Murray of Henderland. Mr. Scott having put a boat on the Loch, Lord Napier resisted this, and claimed the *solum* of and exclusive right to the whole loch, and obtained an interdict thereupon. Mr. Scott thereupon raised this action of declarator, to have it declared, that he, by virtue of his titles and possession, had, along with the other owners of land surrounding the loch, a joint right or common property in the loch, and a joint right of using boats, fowling, fishing, floating timber, and exercising other rights over the loch. The pursuer alleged, that the ancient titles to his lands mentioned “lochs, fishings, and pertinents;” that Lord Napier, being the only resident near the loch, had kept a boat on the loch, but others had done so too, and, that his Lordship's titles did not mention the loch as part of his lands, nor give him any exclusive right to the loch. The Duke of Buccleuch and Mrs. Murray made no appearance in the action; but Lord Napier appeared, and set up his claim to the exclusive right to the loch, and relied especially on a Crown charter, dated 1607,

¹ S. C. 7 Macph. H. L. 35; 41 Sc. Jur. 475.