at the issues, although they are not drawn up in the mode in which, if I had been framing them, I should have drawn them up, or in the mode in which, if more experienced pleaders than myself had drawn them, they would have framed them, I think they all do raise the substantial point in question; and I must observe, whatever difficulties there will be in the trial of the third issue, if the parties are not wise enough to abandon it, which, I think, they had much better do, the difficulties are difficulties not arising from the form of the issue, but from the substance of it. There will be exactly the same difficulties in whatsoever way you frame it, because the question is, whether, from the course of dealing throughout the whole of the partnership, Dr. Tulloch was not lulled to sleep and led not to take steps for bettering his condition, which, if the real state of things had been disclosed to him, he would probably have taken; the difficulty is one arising not on the form of the issue, but on the substance of it. But to the substance of the issue I think the respondents were entitled; and, consequently, the interlocutors affirming the issues ought not to be interfered with.

Interlocutors affirmed, with costs.

For Appellants, H. Harris, Solicitor, London.—*For Respondents*, Robertson and Simson, Solicitors, London.

MARCH 7, 1860.

Poor Mrs. JANE DONALDSON or MAXWELL, *Appellant*, *v.* SAMUEL M'CLURE, *Respondent.*

Domicile—Succession—Dead's Part—Wife's Next of Kin—Husband and Wife—*A Scotchman by birth went to and resided in England, where he carried on business and married; and after the lapse of nearly* 30 *years he returned to Scotland, where he purchased a residence, at which his wife died in the third year without leaving issue. They had kept on their English residence also. On the ground that the domicile of the married pair was in Scotland at the dissolution of the marriage, a claim was made by a party as next of kin of the wife, and, as such, entitled to a half of the goods in communion.*

HELD (affirming judgment), *That the domicile was in England at the dissolution of the marriage, there being no evidence to rebut the presumption of an English domicile arising from the retaining of the English residence; it being clear, that he had an English domicile before returning to Scotland.*[1]

The pursuer, who claimed to represent the deceased Mrs. Ann Donaldson or M'Clure, the wife of the defender, as her next of kin and executrix dative, brought the present action in the Sheriff Court of Dumfriesshire for the purpose of being found entitled to the dead's part, or one half of the goods held in communion during the subsistence of the marriage between the defender and his wife, who died, without leaving issue, on 8th April 1851.[2] The action, which proceeded on the medium, that the defender and his wife were domiciled in Scotland at the dissolution of the marriage, called on the defender to account for the means and estate forming the goods in communion, and to pay to the pursuer £20,000, or such sum as should appear to be the just half thereof, with interest from and after the death of his wife.

The defence was, that the rights of parties ought to be regulated by the law of England, as the defender and his wife were domiciled there up to the date of the dissolution of the marriage, and that, according to English law, the pursuer was not entitled to insist in such a claim.

The Sheriff having decerned in favour of the pursuer, the case came into the Court of Session by advocation.

The leading facts as to domicile, as arising from the statements and admissions of parties, and the proof, appear to be as follow:—The defender was born in 1793, in the parish of Buittle, and stewartry of Kirkcudbright, his father having been a farm servant or labourer in that parish during the greater part of his life. The defender was at first employed as a farm servant in his native parish; but about 1813 he left Scotland, and went to Wigan in England, where he served an apprenticeship to a draper, and where he afterwards commenced business on his own account.

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[1] See previous reports 20 D. 307: 30 Sc. Jur. 165. S. C. 3 Macq. Ap. 852: 32 Sc. Jur. 408.

[2] This right of the wife's next of kin to demand upon her death a division of the goods in communion, and to recover her share, was abolished in 1854 by the Statute 18 Vict. c. 23, § 6.

It was admitted by the pursuer, that from 1813 to 1848 the defender resided exclusively in Wigan; that he carried on business there till he retired in 1841; and that he never carried on business of any kind in Scotland. In 1837 he was married to his deceased wife, Ann Donaldson, who was a native of England, and whose father, Mr. Donaldson, a banker in Wigan, though born in Scotland, had been long a resident in England. Mr. Donaldson died in 1847, leaving considerable means, to which the defender succeeded through his wife. Subsequently to his marriage, the defender and his wife lived in the Wallgate of Wigan.

In 1842 he bought a property, with a dwelling house, called Kerfield, near Dumfries, and in 1847 and 1848 he further bought two adjoining enclosures of ground, and to the whole he gave the new name of Laurel Mount. In April or May 1848, the defender and his wife left their residence in Wallgate of Wigan, the premises having been taken by the Manchester and Southport Railway Company, for the purposes of their act, and they removed to a smaller house in Standishgate of Wigan, which had belonged to and been occupied by Mr. Donaldson, and out of which they had turned the tenant. Towards the end of June 1848, they came to Laurel Mount, the tenant of which had been warned to leave at that Whitsunday, and they brought with them their carriages, servants, and horses, but they left a housekeeper in charge of their dwelling in Wigan. The defender stated, and there was evidence in corroboration, that his wife was in delicate health at this time; that a change of air had been recommended; that he had tried to obtain several villas in the neighbourhood of Wigan without success, and that, in consequence, they had removed to Laurel Mount. Before and after their removal to Laurel Mount, handsome stables and other outhouses were erected, and considerable expense was incurred in rendering the place a desirable residence. It did not appear that any addition was made to the dwelling house. Mrs. M'Clure died at Laurel Mount on 8th April 1851, and was buried in Dumfries in a piece of ground bought after her death, and on which a tomb was erected.

After they went to Laurel Mount in June 1848, both Mr. and Mrs. M'Clure had visited Wigan once or twice in each year. When they went thither, they went together, taking servants with them, and they lived in their house in Standishgate for several weeks at a time, and sometimes M'Clure was there alone for several weeks. Mr. M'Clure was a town councillor of Wigan from 1847 till November 1850, and he was also a Justice of the Peace for that burgh.

The Court of Session held that the domicile of the parties in 1851 was in England.

The pursuer appealed, maintaining in her *printed case*—1. According to the legal import and effect of the evidence in the case, the domicile of the respondent at the time of the death of his wife must be held to have been in Scotland. 2. Such must be held to be the result according to the recognized and established criteria of domicile. More particularly—(1) Scotland was the respondent's domicile of origin; (2) although absent in England for a certain period of his life, the respondent always kept up a close connexion with Scotland, where he was born and brought up, and where his relations resided; (3) for some years prior to the dissolution of his marriage, the respondent had removed, with his wife and servants and establishment generally, to Scotland, where he has ever thereafter continued to reside; (4) in Scotland he, as well before and preparatory to his removal thither, as afterwards, acquired considerable real estate, on which he erected a mansion house for himself and family; (5) on his estate in Scotland he also erected a family mausoleum or burying place, in which his wife has been interred; and (6) all the circumstances clearly shewed that the respondent had, for some years before the death of his wife, finally returned to Scotland, the domicile of his origin, and had resolved there to remain for the remainder of his life.

The respondent pleaded in his *printed case* that—1. The respondent was domiciled in England, and not in Scotland, at the time of the death of his wife. 2. Even although the respondent's domicile were Scotch in April 1851, when his wife died, the appellant would not be entitled to claim any share of the goods in communion, inasmuch as England was the place of the matrimonial domicile of the parties, and their domicile during the time the respondent acquired these goods. 3. At all events, the appellant's claim would be restricted to a share of such personal estate only as the appellant might instruct the respondent to have acquired during the time the respondent had a Scotch domicile. See 18 Vict. c. 23, § 6.

Mundell and *Adam*, for the appellant, contended—That due weight had not been given by the Court below to many of the circumstances in this case. In other cases the like circumstances had received much less weight—*Forbes* v. *Forbes*, 1 Kay, 359; *Anderson* v. *Laneauville*, 9 Moore P.C. 325; *Hodgson* v. *De Beauchesne*, 12 Moore P.C. 285; Phillimore on Domicile, 184. [LORD CHANCELLOR.—It is of very little use going into other cases and singling out one circumstance here and there, and saying less weight was given to it there than here. One circumstance is nothing, unless we know all the other circumstances which make up each particular case. Here we must balance all the circumstances together.]

Attorney-General (Bethell), *Anderson* Q.C., and *Sir H. Cairns* Q.C., for the respondent.—The decision was right. Starting with a previous English domicile, the fact that Mr. M'Clure took a Scotch residence for the benefit of his wife's health, contemporaneously with his retaining an

English residence, did not take away his English domicile, but rather confirmed it. All the circumstances favoured the supposition of an English domicile.

LORD CHANCELLOR.—Notwithstanding the able argument for the appellant, I have come to the conclusion that your Lordships should affirm the judgment of the Court of Session.

I do not think, that any question of law arises here. There was a domicile existing in England, and it is allowed, that the *onus* lies upon the appellant to shew, that that domicile was transferred to Scotland. I think that, although there might be a residence in England, that would not absolutely and completely prevent the change of domicile to Scotland; for one can easily conceive evidence being produced to shew, that, although the residence was retained in England, the domicile was transferred. In the course of the argument cases were put, in which I concurred, to shew that such would be the result; but then the *onus* clearly lies upon the party who alleges the change of domicile. There being a residence in England still subsisting, and that residence being used from time to time by the party whose domicile is in question, it would require strong evidence to shew, that, while that residence was retained and used, there had been a transfer of the domicile. I am of opinion, that such evidence has not been adduced here.

If there had not been a prior domicile in England, and, at about the same period of time, a residence in England had been acquired, and a residence in Scotland, I should have said, that there was not even an equipoise; that there was strong evidence to shew, that the principal residence was in Scotland. But here the *onus* is cast upon the party, who claims a portion of the substance of the husband as next of kin to the wife, to shew, that the English domicile had been abandoned. Now, I think, that she has entirely failed to do that. The time when the domicile is supposed to have been transferred is on the 22d of June 1848, the day that he left Wigan and went to Kerfield or Laurel Mount. Now the single circumstance of crossing the border could not be enough for that purpose. We must look to see what was the state of things at that time and afterwards. When he so left his residence in Wigan he continued to be a town councillor of Wigan; he continued to be a magistrate of the burgh; he had his house in Wigan, at which he left his servants; he himself, without his wife, used to go there occasionally; the house was always kept up for his residence; and it is allowed, that he had political reasons for still keeping up a connexion with Wigan. Well, then, how can it, under those circumstances, be said, that he abandoned his domicile in Wigan, and that he transferred himself to Laurel Mount? I think the evidence of Mr. M'Clure himself is very strong for the purpose of proving the continuance of his English domicile, for he is called by the other side as a witness and examined, and we must give some weight to the evidence which was then extracted from him.

This question being put to him—"If you had succeeded in getting a country house in the neighbourhood of Wigan, would you have come to Scotland?" he says, "We never intended it." According to that evidence, their going to Scotland at that time was because they could not get a suitable house. After they had been turned out of their house in Wigan, they made various attempts to get a residence named Larches and Adlington Hall; but they were unable to obtain a suitable residence in that neighbourhood, and then they came to Laurel Mount for the sake of Mrs. M'Clure's health; but there is no proof of any intention whatever of abandoning the Wigan domicile.

My Lords, these cases (where there is no question of law) resolve themselves into questions of fact as to the inference to be drawn from the evidence; and I cannot, by any means, say that the Judges of the Court of Session were wrong in their finding upon this evidence, when they say, that it does not convince them, that it was the intention of Mr. M'Clure to transfer his home from Wigan to Laurel Mount. I should only be repeating what the learned Judges have done very ably, if I were to make any further comments upon the evidence, and therefore I shall simply advise your Lordships to affirm the interlocutor and dismiss the appeal.

LORD CRANWORTH.—I quite agree with my noble and learned friend, that this question is to be decided upon the facts of the case. In the course of his very able argument, Mr. Mundell referred to something which fell from me in a question of domicile not long ago in the Privy Council, the case of *Hodgson* v. *Beauchesne*. The question was, as to whether a gentleman was or was not domiciled in France. And, in that case, I am reported to have stated, (and I dare say quite accurately reported,) that the question entirely turned upon the facts of the case, and upon the construction, which, as men of the world, we should put upon the acts of parties as disclosed in the evidence. To that I entirely adhere; but, at the same time, I think it is important, that there should be no misunderstanding upon this subject. It must not be supposed, that questions of domicile are simply and entirely in all cases questions of fact; they are questions in which very important principles of law are to be laid down, and very difficult questions of fact often have to be looked to in order to apply to them the principles of law. I take the principle of law which we have to look to in this case to be this, that where it is admitted on both sides, that a certain person has at one time a particular domicile, the *onus* of proof to be deduced from all the circumstances and facts of the case lies on the party who wishes to shew, that that domicile had been changed. The presumption is, that it continues till evidence has been given to shew, that it has been changed. And then, what the facts are, in each particular case, which will or will

not be sufficient to establish that in evidence, is a matter upon which it is impossible, or, at least, next to impossible, to lay down any general rule. Now, here it is quite clear, that Mr. M'Clure was at one time, and for a very long period of his life, domiciled at Wigan. Has it been established, that he changed his domicile? I must own, that, if this question had arisen as in *Forbes* v. *Forbes*, with reference to a person who, having no domicile, (for I may put it so,) had come from India or from some distant country to England, and the facts now in evidence were to be considered with reference to the question whether his domicile was established as being at Wigan or at Laurel Mount, I think there would have been strong reason in favour of the proposition that his domicile had been established at Laurel Mount; but that is not what we have to deal with here. It must be taken as a conceded point, that Mr. M'Clure's domicile was once established at Wigan; and then the question is, whether all that is proved shews, that he ceased to be domiciled at Wigan, and transferred his domicile to Scotland. Now I do not at all mean to say, that he might not have changed his domicile, even if he had retained his residence at Wigan. That would not be a case very easy of proof; but such a case might occur, as in one case which I suggested to the counsel in the course of the argument. A person might have a country residence at some watering place on the French coast, at Boulogne, for instance, where he might have been living, not because he was embarrassed, but for some other reason,—he might have been so living there, that, *ex concessis*, he was domiciled there. But he might have a magnificent estate left him in Yorkshire, which might induce him to quit Boulogne and to come and live in Yorkshire; but, nevertheless, he likes Boulogne as a bathing place, and retains his house there, and goes there every year. I should think it would be a difficult proposition to maintain, that, if he had retained that house and gone there every year for a month, having lived eleven months of the year in Yorkshire, and had so gone on for twelve years, his will, executed according to the English Statute of Wills, would not pass his personal property. That, I think, never could be the law. At the same time, it is perfectly true, that, when a residence is retained in a place where a party has been domiciled, that is a circumstance, and a very cogent circumstance, to shew, that that party does not mean to change his domicile. Now, here, Mr. M'Clure did retain a residence at Wigan, though certainly not so good a one as the residence that he formerly had, nor so good a one as the one he had at Laurel Mount. But it was the one that his father in law had lived in, and which he, from time to time, frequented, and he had considerable connexion with Wigan, which continued down to his death. And there is no evidence sufficient to satisfy my mind, that he had changed his domicile. I think, that the suggestion which was made in the course of the argument is probably the truth, that he had made up his mind to live at Laurel Mount to a certain extent, even during the life of his wife, and that, if his wife died, he would abandon his residence at Wigan. But that did not constitute a change of domicile. Therefore I concur with my noble and learned friend in thinking, that the interlocutor of the Court of Session should be affirmed and the appeal dismissed.

LORD WENSLEYDALE.—My Lords, I am entirely of the same opinion with my noble and learned friend on the woolsack and my noble and learned friend who has just addressed the House. If the question here had been, which of the two houses, the one at Wigan or the one in Scotland, he meant to make his domicile, in the first instance, unconnected with any other circumstance in the case, I should say, that the weight of evidence seems rather to be in favour of the Scotch residence over the English residence. But that is not the true point to be decided here. The law upon the subject is to be applied to the facts, which I apprehend to be clear, and to be well laid down in the case to which I have referred in the course of the argument of *Somerville* v. *Somerville*, 5 Ves. 750. The law I take to have clearly established three propositions. The first of them is, that the succession to personal estate is to be regulated by the law of the domicile. The second rule is, that although a man may have two domiciles for other purposes, yet he can have but one domicile for the purpose of the distribution of his effects in case of testacy or intestacy; and that the burden of proof lies upon the party who alleges, that he was domiciled in a particular place. Whether it be a case of testacy or intestacy, it is absolutely necessary that he should be able to do so, for a man can have only one domicile for this purpose; he may have several residences and several domiciles for other purposes, but for the purpose of the distribution of his effects he can only have one domicile. There may be a difficulty in ascertaining his domicile. The question is not simply where he most frequently lived, but you must determine where his domicile was, and, according to the domicile, the effects are to be distributed.

But, in this case, it is perfectly clear, that another proposition (the third proposition laid down in the case to which I have referred) must be considered; and that proposition is, that every man must be presumed to be domiciled according to the law of his origin and in the place of his origin, that is, the place of his family, in the first instance; and that though, for municipal purposes, he may acquire another domicile, he cannot acquire another domicile to the effect of regulating the succession to his estate, unless he has abandoned his former domicile *animo et facto*. And the burden of proof in this case is upon the appellants to shew, that Mr. M'Clure had *animo et facto* abandoned his former domicile, which he had unquestionably acquired in

Wigan. She must prove both of these circumstances,—not only, that he had intended to change his domicile, but that he actually changed his domicile. I cannot myself conceive a case in which it could happen, that a man might be said to have intended to abandon his former domicile unless he had quitted the place where he resided, and ceased to reside there. If he still kept a residence in that place, with the intention of residing there indefinitely at any time when he chose to reside there, I cannot conceive, that in such a case as that (though I do not deny that such a case might happen) he could have abandoned his former domicile. I confess I have difficulty in conceiving that case, although my noble and learned friend on the woolsack, and my noble and learned friend who last addressed your Lordships, conceived, that there might be such a case. But that is not the nature of the present case, because here the burden of proof lying upon the appellant to prove the fact of the change of domicile, he has failed in that proof; he has not made out, that the party both intended to quit Wigan, and did actually abandon his former domicile. I consider the simple fact (without going into the other circumstances of the case) of his retaining his house in Standish Gate, connected with the keeping of an establishment of servants there, is a proof, that he had not actually abandoned the domicile which he unquestionably had. On that account, therefore, without entering into the other circumstances of the case, although there are some circumstances rather tending to shew, that he meant to make his residence in Scotland, I think it is clear, that he certainly had not abandoned his English domicile, and therefore was not capable of acquiring a domicile for the purpose of succession in Scotland; for, until his English domicile was abandoned both in intention and in fact, he could not acquire a new domicile in Scotland. Upon that short ground I think this case must be decided; and though the Court of Session considered this a case of some difficulty, I must own that, looking at the simple fact that has to be established and made out, it does not appear to me to be one of much difficulty. The proof which lies upon the appellant has not been made out to my satisfaction, and I think therefore, that the interlocutor ought to be affirmed.

LORD KINGSDOWN.—My Lords, I quite agree in the opinions which have been expressed by my noble and learned friends. We must be satisfied, in order to advise the reversal of this judgment, that the opinion of the Court below was wrong. So far from being of that opinion, I am quite satisfied they came to a right conclusion,—that there never was a dissolution of the link which connected Mr. M'Clure with Wigan so long as his wife lived. So far as a change of residence took place, it certainly was not in consequence of any intention to change his domicile. He was anxious to obtain a residence in the country, near Wigan, for the sake of his wife, with whom the air of the town did not agree, and he endeavoured unsuccessfully to obtain several residences in the immediate neighbourhood of Wigan, which, so far as appears in this case, were quite of sufficient magnitude and importance to equal the villa which he obtained and furnished in Scotland; and being unable to acquire either of those residences, he removed to Scotland for his wife's health. He still, however, retained his connexion with Wigan; and the probability is, that, as long as his wife lived, he desired to retain his connexion with Wigan, and to keep his domicile in England. When his wife died, that tie was dissolved, and in all probability he intended to remove his domicile to Scotland; but there is no proof that he did actually abandon his domicile at Wigan and remove it to Scotland.

Interlocutor affirmed, and appeal dismissed with costs.

For Appellant, Dodds and Greig, Solicitors, London; Malcolm Macgregor, S.S.C., Edinburgh.—*For Respondent*, Maitland and Graham, Solicitors, London; John Galletly, S.S.C., Edinburgh; T. and J. M'Gowan, Solicitors, Dumfries.

MARCH 23, 1860.

THE CALEDONIAN RAILWAY COMPANY, *Appellants*, *v.* SIR NORMAN MACDONALD LOCKHART, BART., and Others, *Respondents*.

Arbitration—Decree Arbitral—Railway—Submission following the Statute—Lands and Railways Clauses Acts—Res Judicata—1. *The proprietor of an entailed estate entered into a submission to a single arbiter, with a railway company, in regard to price of lands, intersectional damage, access and accommodation works, and, generally, as to all questions between the parties. It narrated the Lands Clauses Act, and provided that the arbiter should conduct the proceedings in strict conformity with the regulations of that act, and of the acts* 8 *and* 9 *Vict. c.* 17 *and* 33,