Tuesday, July 15.

FIRST DIVISION.

[Lord Low, Ordinary.

BROOKS *v.* BROOKS' TRUSTEES. HUNTLY *v.* BROOKS' TRUSTEES.

Domicile — Change of Domicile — Proof — Home — Residence — Abandonment of Domicile of Origin—Englishman Residing Principally in Scotland but with Residences, Large Estates, and Business in England.

In order to establish that a man has lost his domicile of origin and has acquired a new domicile in another country, it is not sufficient to prove merely that he has taken up his residence in that country as his sole or chief residence, with an unlimited intention of continuing such residence, but it is also necessary to show that *animo et facto* he has manifested and carried into execution an intention to abandon his original domicile and to acquire a domicile in the country where he so resides.

A man whose domicile of origin was in England, and who was born and educated in England, during the last thirty years of his life had his principal residence at an estate in Scotland, originally rented but ultimately purchased by him, for which he had a great affection, and on which he expended large sums. He continued, however, to keep up a country house near Manchester and a town house in London, which were always kept ready for occupation, and in which he resided for a portion of every year. He drew the great bulk of his income from England, and continued, through managers and partners, over whom he exercised a general supervision, to carry on a banking business in Manchester, in which he retained a greatly preponderating interest and the right of absolute control. He also had large and valuable landed estates in Lancashire and Cheshire. He continued to identify himself socially and publicly with Manchester, and till eight years before his death was member of Parliament for an English constituency. In formal documents he desired to be designed as of the city of Manchester. He left a trust-disposition and settlement disposing of his heritable estate in Scotland, but his general testamentary directions were contained in a last will and testament in the English form and prepared in England. His attention having been directed to the question of domicile he was advised five years before his death that his domicile was English, and was apparently satisfied with that answer to his inquiries. *Held* that notwithstanding his residence in Scotland he had still retained his domicile of origin.

Expenses — Domicile — Alleged Change of Domicile—Action to Determine Question of Domicile.

In actions raised by the widow and a child of a truster against his testamentary trustees for the purpose of showing that he was a domiciled Scotsman, and accordingly had no power to dispose by his testament of the *jus relictæ* and legitim, the pursuers, who had been unsuccessful, craved the Court to find them entitled to their expenses out of the trust estate, on the ground that it was necessary to have the domicile of the truster judicially determined before the trustees could in safety distribute the estate. The Court *refused* the motion, and (*diss.* Lord M'Laren) found the pursuers liable in expenses to the defenders, that each party should bear their own expenses in the Outer House, and that the pursuer should be found liable only for expenses in the Inner House.

Sir William Cunliffe Brooks died on 9th June 1900, leaving a trust-disposition and settlement in the Scottish form and prepared in Scotland, and a last will and testament in the English form and prepared in England, both executed on 29th April 1900.

He was survived by his widow, Dame Jane Davidson or Brooks, and by two daughters, children of a former marriage, the Marchioness of Huntly and Lady Francis Cecil, sometime widow of Lord Francis Cecil and now wife of Captain Tillard, R.N. Lady Francis Cecil had six children—Mrs Ethel Francis Sophia Cecil or Hawkshaw, and three other daughters, Violet Dorothea Cecil, Edith Celendine Cecil, and Esterel Edith Philippa Louisa Tillard, and two sons, Ean Francis Cecil and Richard William Francis Cecil. Of the last-named all but the eldest daughter were in minority.

By the trust-disposition and settlement Sir William disponed and conveyed to his trustees his whole heritable property in Scotland (excluding Fasnadarroch therein and hereinafter mentioned), in trust (first) for payment of the expenses connected with the trust, and (second) in order that his trustees should hold the residue of his said heritable property for behoof of his grandson Ean Francis Cecil in fee, should he attain the age of twenty-five years, whom failing for behoof of certain other heirs therein mentioned, and under the declarations therein specified. By the said settlement Sir William confirmed a disposition granted by him on 18th July 1892 of the lands and house called Fasnadarroch in favour of his daughter Lady Francis Cecil. By the last will and testament Sir William made a number of pecuniary legacies and other bequests, and with regard to the residue of his estate he directed that it should be held in trust for all or any of his grandchildren or grandchild who should be living at his decease, and being a grandson or grandsons should attain the age of twenty-one years, or being a grand-daughter or

grand-daughters, should attain that age or marry.

An action was raised by Lady Brooks against the trustees acting under the aforesaid trust-disposition and settlement and last will and testament, concluding for declarator "(first) that the said Sir William Cunliffe Brooks was at the date of his death, which occurred on the 9th day of June 1900, a domiciled Scotsman; and (second) that the pursuer was entitled to payment of one-third of the net amount of his moveable or personal estate in name of *jus relictæ*."

The pursuer averred that at the date of his marriage with her Sir William was a domiciled Scotsman, and that he continued to be so down to the date of his death.

The defenders averred that Sir William's domicile of origin was English, and that he retained it till his death.

They pleaded—"(4) The statements of the pursuer, so far as material, being unfounded in fact, the defenders should be assoilzied, with expenses."

An action was also raised against the trustees by the Marchioness of Huntly, elder daughter of Sir William Brooks, concluding for declarator that Sir William was a domiciled Scotsman and that the pursuer was entitled to legitim.

The Lord Ordinary (Low) allowed the parties in both actions a proof of their averments.

The proof and argument in Lady Brooks' case was adopted by counsel for Lady Huntly.

At the commencement of the proof minutes were lodged by (1) Mrs Hawkshaw, and (2) by the remaining children of Lady Francis Cecil, craving leave to sist themselves as defenders to the actions, and to adopt the defences lodged by the trustees. The minuters were duly sisted, and the Court appointed Mr A. O. Mackenzie, advocate, as *curator ad litem* to the minor and pupil children. At the end of the proof the compearing defenders craved and were granted leave to amend the defences in Lady Brooks' action by adding certain averments to the answers, and the following additional plea—"(6) *Esto* that Sir William Cunliffe Brooks had acquired a Scotch domicile at the date of his death, his domicile at the date of his marriage was English, and it having been an implied condition of the antenuptial marriage-contract into which he entered with the pursuer that the law of England should continue to regulate their rights as spouses, the pursuer is not entitled to insist in the present claim, which is founded on the law of Scotland, and the defenders ought therefore to be assoilzied from the conclusions of the summons."

The pursuer obtained leave to add the following pleas—"(2) The pursuer is entitled to decree in respect that the late Sir William Cunliffe Brooks' domicile was in Scotland, both at the date of his marriage with the pursuer and at his death. (3) The pursuer is entitled to her *jus relictæ* as concluded for, in respect that her right thereto is not excluded by the said marriage settlement, whether construed according to the law of England or according to the law of Scotland. (4) *Esto* that the late Sir William Cunliffe Brooks was domiciled in England at the date of his marriage, the pursuer's legal rights in his estate do not fall to be determined by the law of England, but by the law of Scotland, being the law of his domicile at the date of his death."

Additional proof was allowed and led on the point raised by the amendment.

The following narrative of the purport of the proof and of the documents, so far as necessary for the decision of the case, is taken from the opinion of the Lord Ordinary (Low):—"In this action the pursuer seeks to have it declared that her husband, the late Sir William Cunliffe Brooks, was at the date of his death a domiciled Scotsman, and that she is entitled to *jus relictæ*.

"The material facts of the case—in regard to which there is little dispute—appear to me to be as follows:—

"Sir William Cunliffe Brooks was born in 1819 in Blackburn, Lancashire, where his father carried on the business of banker. He was educated in England, and in 1842 graduated at Cambridge, and soon afterwards he married his first wife, who was an English lady. He was called to the English bar in 1847, but in the same year he became a partner with his father in the banking business, the chief office of which by that time had been transferred to Manchester. He then took a lease of Barlow Hall, which is situated a short distance from Manchester, and which was his residence so long as he continued to take an active part in the business of the bank.

"Sir William's father died in 1864, and he then became sole partner of the bank. In 1864 also he purchased premises in Lombard Street, London, and established a branch of his bank there. The head office, however, continued to be in Manchester. In 1865 his wife died, and in 1869 he was elected Member of Parliament for the Macclesfield Division of Cheshire, and took a lease of the house No. 5 Grosvenor Square, London. In the same year he gave up the personal management of the bank, but continued to carry on the business through the agency of managers until the year 1888, when he assumed his nephews Samuel Burd Brooks and John Brooks Close Brooks as partners. These gentlemen took the surname of Brooks, by Sir William's desire, when they were assumed as partners. By the contract of copartnery Sir William was entitled to put an end to the partnership at any time—'Such dissolution to take effect on the day of the date of notice.' Sir William's share of the capital of the bank was £300,000, the shares of his partners being £30,000 and £25,000 respectively. Sir William's share of the profits was fixed at eight-tenths, each of his partners receiving one-tenth. According to a statement which was produced, Sir William during his life derived an income from the bank, including interest on capital, of (in round numbers) from £30,000 to £50,000 a-year. Although after the year

1869 Sir William ceased to take an active part in the banking business, he continued throughout his life to be in daily, or almost daily, communication with the head office, and he appears to have kept himself informed as to the general course of the business, and to have exercised a general supervision.

"Sir William also succeeded his father in large landed estates in Lancashire and Cheshire, the rental of which latterly exceeded £20,000 a-year. There was no mansion-house on these estates, but a considerable part of them was in the vicinity of Barlow Hall. I may here mention that Barlow Hall is a commodious residence (apparently an old mansion-house), built in a picturesque style of architecture, and surrounded by attractive grounds.

"Sir William appears to have made his acquaintance with the Highlands of Scotland sometime in the sixties, when he visited his friend, the witness Mr Sidebottom, who had a deer forest in the Blackmount district. Sir William subsequently took Drummond Castle, and in 1869 he went to Glen Tana on Deeside. The chief reason, in the first instance, for the selection of Glen Tana by Sir William as a highland residence, appears to have been that it was near Aboyne Castle, the seat of the Marquis of Huntly, who had married his elder daughter. Glen Tana was also then the property of the Marquis of Huntly.

"When Sir William first went to Glen Tana a lease for a limited period seems to have been prepared, but was not executed. In 1871, however, the Marquis of Huntly granted to Sir William a lease for twenty years, or for Sir William's life, or for his own life. Sir William had desired to have a lease for his life, but the fact that the estate was entailed was thought to create a difficulty, and accordingly a lease in the terms which I have mentioned was adopted.

"In 1872 an event occurred to which the pursuer attaches considerable importance. Sir William either built or converted a cottage at Glen Tana into a private chapel, which was consecrated for Divine service according to the rites of the Episcopalian Church. It was called the Church of St Lesmo.

"In 1874 Sir William's second daughter was married to Lord Francis Cecil, and in 1879 he himself married Miss Davidson, daughter of Lieutenant-Colonel Sir David Davidson, K.C.B., a Scottish gentleman who resided near Edinburgh. The marriage settlement was in the English form, and was prepared by Mr Wood, Sir William's solicitor in Manchester. The settlement narrates that Sir William had paid to certain persons as trustees the sum of £50,000. The purposes of the trust (after certain directions as to the disposal of the income during the joint lives of the spouses) were to pay the income of the trust fund to the pursuer during her life in the event of her surviving her husband, and to hold the capital for the children of the marriage, whom failing (the event which happened), for Sir William, his executors, administrators, or assigns absolutely. The trustees were three English gentlemen nominated by Sir William. The marriage took place, by Sir William's express desire, in the Chapel of St Lesmo. In the register Sir William's 'usual residence' is entered as '5 Grosvenor Square, London.'

"In 1885 Sir William lost his seat for the Macclesfield Division of Cheshire, but in the following year he was elected unopposed for the Altrincham Division of the county—a constituency which he continued to represent until 1892, when he retired from Parliament. In the same year (1886) a baronetcy was conferred upon him. The patent was in favour of 'William Cunliffe Brooks of the city of Manchester.'

"In 1888 Sir William purchased Aboyne Castle. In 1891 he purchased Glen Tana, and in 1899 the estate of Ferrar. I do not think that I put it too strongly when I say Sir William would have preferred not to make these purchases, but that he was compelled, or at all events induced, by circumstances to do so. The Marquis of Huntly appears to have fallen into grave financial embarrassment, and Sir William purchased Aboyne to save his daughter's residence from her husband's creditors. The amount of land which he acquired along with Aboyne Castle was comparatively small, so that the Castle was much too large a mansion-house for the estate. Therefore when the adjoining lands of Ferrar came into the market it seems to have been a prudent thing to do, and commercially a sound transaction, for Sir William to buy the lands and add them to the Aboyne estate.

"In regard to Glen Tana Sir William would have preferred to have remained the tenant of the Marquis of Huntly, but when it became necessary that the estate should be sold for payment of debt, Sir William purchased it because he did not choose that anyone else should be his landlord. His own expression was that he purchased Glen Tana with 'a knife at his throat.'

"From 1869 onwards Sir William's principal residence was Glen Tana. He always resided some part of the year at Grosvenor Square and Barlow Hall, but his residence at these houses was, generally speaking, confined to what was necessary for the performance of his parliamentary or other duties and the transaction of business. During the six years from 1894 to 1899, both inclusive (these being the last six complete years of his life), his average residence at Barlow Hall was thirteen days, at Grosvenor Square forty-one days, and at Glen Tana 267 days. In 1900, down to the 9th of June, when he died, he had resided sixty-three days at Barlow Hall, twenty-four days at Grosvenor Square, and seventy-three days at Glen Tana. During his residence at Barlow Hall in that year he was engaged in having his final testamentary settlements prepared. I may mention that Sir William also occasionally spent some time during the winter at Antibes in the south of France, but I do not think that his visits there have any

bearing upon the question at issue.

"Sir William kept his domestic establishment at Glen Tana, and he built houses there for the families of some of his servants who were married. When he went to Grosvenor Square or Barlow Hall he took such servants with him as he considered to be necessary for the occasion. The house in Grosvenor Square was looked after in his absence by a housekeeper, who had two housemaids under her. He had also certain carriages which always remained in London. Barlow Hall was also in charge of a housekeeper and housemaids, and there was always a sufficient staff of gardeners there to keep the place in order. The instructions to the housekeepers at Grosvenor Square and at Barlow Hall were to have the houses ready for occupation upon a day's notice.

"Sir William became extremely attached to Glen Tana. He spent enormous sums of money upon or in connection with the estate, and especially in later years when he was not so able to indulge in field sports as formerly, the planning and superintending the construction of the various roads which he made, and buildings which he erected, seems to have been the chief pleasure of his life.

"Sir William had an account with a bank in Aboyne, but that seems only to have been used for local purposes, such as the payment of the accounts of local tradesmen, and certain payments in connection with the Glen Tana estate. All other payments, including the wages of his servants, were made by cheques upon Manchester.

"Sir William died on 9th June 1900. He left instructions in his will that if he died abroad he should be buried where he died, but that if he died in the United Kingdom he should be buried at Glen Tana. He was accordingly buried there. He seems to have frequently considered where he should be buried. But I think that the evidence shows that he did not finally make up his mind on the matter until he made his last will shortly before his death.

"Some time prior to his death Sir William seems to have entertained the idea of giving up his house in London, and he made inquiries with the view of selling the furniture. He also appears sometimes to have spoken of giving up Barlow Hall, but I do not think that he ever had any serious intention of doing so. As matter of fact he was in possession of both houses at the time of his death.

"He left two testamentary settlements. One in the Scotch form and prepared in Scotland, the other in the English form prepared by Mr Wood, his legal adviser in Manchester. The former dealt only with the Scotch estates, the latter with all his other means and estate. His own wish had been to leave only one settlement, but Mr Wood advised him, and ultimately he accepted the advice, to have a Scotch settlement dealing with the Scotch estates prepared by a conveyancer in Scotland. The trustees under both the settlements were the same. They are all Englishmen residing in England.

"By his Scotch settlement he left his whole heritable estates in Scotland to trustees for behoof of his grandson Ean Francis Cecil, and the heirs of his body, whom failing his grandson Richard Cecil and the heirs of his body, whom failing to his daughter Lady Francis Cecil. A liferent of Aboyne Castle was reserved to Lady Huntly.

"By the English settlement Sir William left his personal property in Scotland (which I understand consisted entirely of furniture and other corporeal moveables) to the persons who were to take the Scotch estates. The whole residue of his estate, real and personal, he directed to be realised and divided among his grandsons and granddaughters.

"In the Scotch settlement Sir William is described as 'Sir William Cunliffe Brooks, Baronet, of Glen Tana,' and in the English settlement as 'Sir William Cunliffe Brooks of the city of Manchester, Baronet.' He made first and last an immense number of wills. In those made according to the English form prior to 1895 he is described as 'of No. 5 Grosvenor Square, in the county of Middlesex, of Barlow Hall, in the county of Lancaster, and of the Forest of Glen Tana, in the county of Aberdeen, Baronet,' and in those made after 1895 as 'of the city of Manchester, Baronet.' When making a settlement of his Scotch estates according to the Scotch form he was described as 'Bart. of Glen Tana.' I do not think that the designations in the various wills can be regarded as being simply those which were selected by the conveyancer who prepared the deeds, because Sir William was a man who scrutinised the smallest details, and there is evidence that he was particular in regard to the way in which he was designated in any deed which he proposed to execute.

"There is also evidence, upon which both parties relied, which shows that Sir William's attention was called to the question of his domicile. In 1892 he wrote to Mr Wood,—'See enclosed. Am I a domiciled Scot?' The 'enclosed' was a cutting from a newspaper in the following terms:—'The Sutherland Heirlooms:— Important Decision. A domiciled Scotchman could not make a will by which he disposed of his personal estate to more than a certain extent.'

"In reply Mr Wood gave a very decided opinion that Sir William was not a domiciled Scot. In 1893, however, Sir William sent to Mr Wood a newspaper report of a case which had been brought in the Court of Session, in which the question of the domicile of Sir James Mackenzie of Glenmuick was raised. In an accompanying letter he wrote—'At the risk of telling you what you already know, I send the enclosed to direct your attention to the question of Scotch and English domiciles.' Mr Wood replied that his opinion remained the same, namely, that Sir William's domicile was English.

"Again in 1895 Sir William recurred to the matter. A case in regard to the domicile of an artist (a Scotsman by birth) had

been decided in the English courts. Sir William sent to Mr Wood a newspaper report of the case, and wrote—'You will care to see the enclosed on domicile.' Mr Wood again replied that he had no doubt as to Sir William's domicile being English. There is no evidence that Sir William ever again opened the question of his domicile.

"The pursuer argued that the correspondence showed that Sir William was himself doubtful as to the country of his domicile, otherwise he would from the first have accepted the opinion of Mr Wood.

"I am inclined to think that the sounder inference is that for which the defenders contend, that Sir William was in the end satisfied with Mr Wood's reiterated opinion. Sir William was extremely pertinacious, and was not the man to allow a matter in which he was interested to rest until he was satisfied. And the question of domicile was one in which he was interested. I think that there is no doubt that what first drew his attention to the matter was the statement in the report of the *Sutherland* case that a domiciled Scotsman could not make a will by which he disposed of his personal estate to more than a certain extent. That was a point which touched Sir William closely. The position of the Marquis of Huntly's affairs caused him much trouble, and his correspondence shows how anxious he was to secure that any provision which he might make for Lady Huntly should not fall into the hands of the Marquis or his creditors. If Sir William had thought that there was any chance of Lady Huntly being entitled to claim as her absolute property part of his personal estate, I think that we would have found him seeking for some means by which such a result could be avoided."

It also appeared from the proof and from the documentary evidence that down to his death Sir William exercised a very minute supervision over the management of his English estates, and that he kept up his connection with Manchester by subscribing to its local institutions and charities, and by taking part in its social life and public functions.

On 4th July 1901 the Lord Ordinary pronounced the following interlocutor:—"Assoilzies the defenders from the conclusions of the summons, and decerns: And having heard counsel for the parties on the question of expenses, finds the defenders the testamentary trustees of the late Sir William Cunliffe Brooks liable to the pursuer in the expenses of the discussion in the Procedure Roll, and *quoad ultra* Finds the said defenders entitled to expenses, with the exception of expenses incurred by them in connection with the amendment of the record by the compearing defenders, and the procedure following thereon and occasioned thereby: Finds the compearing defenders liable to the pursuer in the expenses occasioned by the said amendment and the procedure following thereon and caused thereby, and *quoad ultra* Finds the said compearing defenders neither entitled to nor liable in expenses," &c.

Opinion.— . . . . "I have now stated what appear to me to be the material facts of the case, and I shall now consider what is the rule of law which falls to be applied in such circumstances.

"The pursuer founded upon the question which was formulated by Lord Chancellor Cairns in the case of *Bell* v. *Kennedy* (6 Macph. (H.L.) 69), and upon Lord Westbury's definition of a domicile of choice in the case of *Udny* v. *Udny* (7 Macph. (H.L.) 89). In the former case Lord Cairns stated the issue thus—'The question which I will ask your Lordships to consider in the present case is in substance this—whether the appellant had determined to make and had made Scotland his home, with the intention of establishing himself and his family there, and ending his days in that country?' In the case of *Udny* Lord Westbury said—'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.'

"The pursuer argued that the idea which had prevailed prior to these cases, that it was necessary to the acquisition of a new domicile that there should be evidence that the party intended to abandon his old domicile was no longer the law, but that evidence of residence for a sufficient period *animo manendi* was all that was required, and was conclusive. If that view of the law is sound, I think that it would be difficult to resist the conclusion that Sir William had acquired a Scotch domicile, because he had for nearly thirty years voluntarily fixed his chief residence at Glen Tana, with an unlimited intention of continuing to reside there.

"It has, however, been repeatedly recognised that the question of domicile is always one which depends upon the special circumstances of each particular case, and that it is impossible to frame a definition which will be applicable to every case. Therefore a proposition which is unimpeachable and complete when read in reference to the circumstances of one case may be inapplicable, or at all events incomplete, when applied to the different circumstances of another case.

"Now, shortly stated, the circumstances in *Bell* v. *Kennedy* were these. Mr Bell had been born in Jamaica and had carried on business there as a planter for many years, but ultimately, owing apparently to the abolition of slavery, he sold his estate and wound up his affairs in Jamaica and left that country for good. He came to Scotland, and had resided there for some years when his wife died, and the question was whether at her death he had acquired a Scotch domicile. There was no doubt or dispute that he had abandoned Jamaica and severed all connection with that country, and therefore the only point at issue was whether his residence in Scotland had been in fact and intention such as is required for the acquisition of a domicile of choice.

"In the case of *Udny* the question was

whether a son of Colonel Udny born out of wedlock had been legitimised by the subsequent marriage of his parents. That question depended upon the domicile of Colonel Udny, 1st, at the date of his son's birth, and 2nd, at the date of the marriage. It was held without difficulty that Colonel Udny's domicile of origin was Scotch, although he was born in Leghorn. It was also held to be clear that his domicile was Scotch at the date of his marriage. The question of difficulty was as to his domicile at the date of his son's birth. He had been for some years in the army, and had then retired and set up a house and establishment in London, where he resided for thirty-three years, only visiting Scotland from time to time to look after an estate to which he had succeeded. Prior to the commencement of his residence in London he had only been in Scotland occasionally and for temporary purposes. He ultimately fell into debt, and being pressed by his creditors left London and went to Boulogne. It was during his residence there that his son was born. It was held by the Second Division that Colonel Udny had never acquired a domicile in England. Upon that question there was considerable discussion among the learned Lords, who heard the case upon appeal, although they were agreed that it was not necessary to decide the point, as the circumstances under which Colonel Udny left London and went to Boulogne showed that he had abandoned any domicile which he ever had in England. The Lord Chancellor (Hatherly) expressed no opinion as to whether Colonel Udny had or had not at one time acquired an English domicile. Lord Chelmsford was evidently of opinion that no such domicile had ever been acquired, on the ground that residence, however long continued, was not sufficient, unless there was evidence of intention to acquire a new domicile instead of the domicile of origin, and he doubted if there was sufficient evidence of such intention. Lord Westbury, on the other hand, was of opinion that Colonel Udny had acquired an English domicile by his residence in London, and it was as I read his opinion in that connection that he pronounced the dictum which I have quoted. Indeed, it seems to me that Lord Chelmsford and Lord Westbury differed to some extent as to what was necessary to the acquisition by Colonel Udny of an English domicile. The former thought that there must be evidence of intention to acquire a new domicile, while the view of the latter was that it was sufficient if it was proved that Colonel Udny had voluntarily fixed his chief residence in London, with an unlimited intention of continuing to reside there.

"It is plain that the circumstances of this case are in strong contrast to those in *Bell* and in *Udny*. Sir William Brooks was not only an Englishman by origin but he had spent the best years of his life in England, carrying on a large business there and identifying himself in a very marked way with Manchester. When he took up his chief residence in Scotland he did not sever his connection with England, but continued to conduct his business there through the agency first of managers and then of partners, over whom he all along exercised a certain amount of control; and he continued to hold his English estates, and even added to them. Thus the seat of his fortunes and of his chief material interests remained in England, and he retained his English residences, which were always ready for his occupation, and which he in fact occupied for a part of every year.

"In such circumstances I think that more is needed to establish a change of domicile than would have been required if Sir William, although English by origin, had never had a settled residence or occupation in England (which was the kind of case which arose in *Udny*), or if when he went to Scotland he had by unequivocal acts severed his connection with England, as Mr Bell in the case of *Bell* v. *Kennedy* severed his connection with Jamaica. I am of opinion that the circumstances being such as we have in this case, it lies upon the party alleging a change of domicile to prove that there was an intention to make a change of domicile, and that residence alone (although of course it is an essential element), however long continued, is not necessarily of itself sufficient to establish such an intention.

"The first authority which I shall cite in support of that view is the case of *Somerville* (5 Vesey 750). The question there was as to the domicile of Lord Somerville, whose domicile of origin was Scotch, who had estates both in England and Scotland, and who resided part of the year in England and part of it in Scotland. The Master of the Rolls (Lord Alvanley) in a well-known judgment, said—'The original domicile, or, as it is called, the *forum originis*, or the domicile of origin, is to prevail until the party has not only acquired another but has manifested and carried into execution an intention of abandoning his former domicile and taking another as his sole domicile.'

"That statement of the law has been recognised and adopted in the House of Lords in many cases, to some of which I shall refer.

"In the case of *Munro* v. *Munro* (1 Rob. 492) the question was whether Sir Hugh Munro, a Scottish baronet who was possessed of estates in Scotland, had acquired an English domicile. A majority of the Judges in this Court held that he had acquired an English domicile, but the judgment was reversed upon appeal. The ground upon which judgment was given in this Court was, that Sir Hugh had removed his residence to London 'with a view to a long and settled though indefinite abode,' that he had taken a lease for twenty-one years of the house in which he resided in London, and that he had during his residence there 'no adequately furnished house for his accommodation and no domestic establishment in Scotland.' That is very like the line of argument upon which the pursuer contends

that she is entitled to succeed in this case.

"In the House of Lords the leading judgment was pronounced by Lord Cottenham, who repeated the words which I have quoted from Lord Alvanley's judgment in the case of *Somerville* as being a sound statement of the law. He subsequently said—'If then it be the rule of the law of Scotland that the domicile of origin must prevail unless it be proved that the party has acquired another by residence, coupled with the intention of making that his sole residence, and abandoning his domicile of origin, I cannot think that there will be much difficulty in coming to a satisfactory conclusion upon examining the evidence with reference to this rule.'

"The next case to which I shall refer is that of *Donaldson* v. *M'Clure* (20 D. 307, *affd.* 4 Macq. 852, and 1 Paterson 938), the circumstances of which are in some respects very like those of the present case. M'Clure, who was a Scotchman by origin, had gone to England as a lad, and settled in Wigan, where he prospered in business and made a fortune. After some five-and-thirty years he purchased a small property in Scotland upon which he built a mansion-house. The house in Wigan in which he had lived having been taken by a railway company, he removed with his wife and establishment to his house in Scotland, which was his chief residence until the death of his wife three years afterwards. He still, however, retained a house in Wigan under the charge of a housekeeper, and he frequently visited Wigan for short periods, and in many ways kept up his connection with that town. The question raised was as to the place of his domicile at the date of his wife's death. It was clear that he had acquired a domicile in England, but it was maintained that when he left Wigan and took up his principal residence in Scotland his domicile was changed. The First Division held that he had not lost his domicile in England, and that judgment was affirmed by the House of Lords.

"Lord Curriehill, in a well-known passage, stated the law thus—'It is proper to keep in view what is meant by an *animus* or intention to abandon one domicile for another. It means something far more than a mere change of residence. It imports an intention not only to relinquish those peculiar rights, privileges, and immunities which the law and constitution of the domicile confers on the denizens of the country in their domestic relations, such as those of husband and wife, parent and child, master and servant, in their purchases and sales and other business transactions, in their political or municipal status, and in their daily affairs of common life, but also the laws by which the succession of property is regulated after death. The abandonment or change of domicile is therefore a proceeding of a very serious nature, and an intention to make such an abandonment requires to be proven by satisfactory evidence. And considering that the domicile which the defender is alleged to have abandoned was in a locality where from his boyhood he had spent his life in active and prosperous business, and where he was enjoying the status and society and the municipal and political privileges to which he had risen, I desiderate clear evidence of his intention to abandon that domicile, and to change it to another domicile in a locality, where, so far as appears, he was a stranger.'

"It is said that that cannot be regarded as a sound statement of the law, because it received no approval when the case went to the House of Lords, and was inconsistent with the principles laid down in the subsequent cases of *Bell* v. *Kennedy* and of *Udny*. I am unable to take that view. There is nothing in the opinion delivered in the case in the House of Lords to suggest that Lord Curriehill's statement of the law was not regarded as sound, and it is not in my judgment inconsistent with the views expressed in the cases of *Bell* and *Udny*, when the essential difference in the circumstances of these cases, upon which I have already commented, is considered.

"In giving judgment in the case in the House of Lords the Lord Chancellor (Campbell) and Lord Cranworth did little more than express their concurrence in the view taken by the Judges of the First Division, but Lord Wensleydale referred to the case of *Somerville* (which I have already cited) as correctly laying down the law applicable to such a case, and stated as a clear proposition that a person cannot acquire a new domicile 'to the effect of regulating the succession to his estate unless he has abandoned his former domicile *animo et facto*.'

"The same learned Lord, in the case of *Aikman* v. *Aikman* (3 Macq. 854, 1 Paterson 997), succinctly stated the law thus—'Every man's domicile of origin must be presumed to continue until he has acquired another sole domicile by actual residence with the intention of abandoning his domicile of origin. This rule is laid down in the case of *Somerville*, and has been acted upon ever since.'

"Finally, in the case of *Steel* v. *Steel* (15 R. 896), in which all the authorities were reviewed, the First Division held it to be settled that the rule laid down in the case of *Somerville* was applicable to cases in which the question was not whether the domicile of origin having been undoubtedly abandoned, a new domicile had been acquired elsewhere, but whether the domicile of origin had ever been abandoned.

"There is one other case to which I must refer, namely, *Moorhouse* v. *Lord* (10 H.L.C. 272), a judgment which I did not mention in its order on account of the criticism and discussion which it has evoked.

The question was whether a Scotchman who had taken up his residence in France had acquired a domicile there. Lord Cranworth said—'In order to acquire a new domicile a man must intend *quatenus in illo exuere patriam*,' and (he added) that it must be established that the party meant 'to cease to be a Scotchman, and become an Englishman or a Frenchman or a German.' Lord Kingsdown in the same

case said—'A man must intend to become a Frenchman instead of an Englishman.'

"Now, it has been recognised that in these opinions the noble and learned Lords went beyond the question of domicile and strayed into the region of naturalisation and allegiance. It is to be remembered, however, that the question was whether a Scotchman had lost his Scotch domicile and acquired one in France, and it has been recognised that stronger evidence of intention is required where the party is alleged to have acquired a domicile in a truly foreign country than in the case of an Englishman going to Scotland or a Scotchman going to England. But even assuming that in order to establish that a Scotchman or an Englishman has acquired a domicile in France or Germany, it is necessary to prove that he intended *exuere patriam*, I am of opinion that no such excessive onus is laid upon a party alleging that an Englishman by origin has acquired a domicile in Scotland. It is not necessary to prove that he intended to cast off his country or to strip himself of his nationality, but it is necessary, in my judgment, in such circumstances as those with which I am dealing, to prove not only that he took up his residence in the country in which he is alleged to have acquired a domicile as his sole or chief residence, with an unlimited intention of continuing that residence, but also that it was his intention to acquire a domicile there. and to abandon his domicile of origin.

"That being in my opinion the rule of law applicable to such a case as the present, I shall now consider what is the result of applying the rule to the facts.

"I do not propose to examine the evidence in detail, because although there are a great number of minor incidents which might be founded on as pointing in this direction or in that, the decision of the question does not in my opinion depend upon the balancing of minor details, but upon the broad and outstanding facts of the case.

"It seems to me that the one fact upon which the pursuer must rely (and I by no means underrate its importance) is that Sir William lived at Glen Tana for nearly thirty years as his chief residence, and that his intention (which he carried out) was to continue his residence there during his life. All the other main facts of the case seem to me to imply that Sir William had never relinquished his English domicile.

"As I have shown, it has been laid down by the highest authority that residence alone is not sufficient to establish a change of domicile. There must also be evidence of intention to give up the old domicile and to acquire the new. I am of opinion, however, that it is not necessary that in all cases there should be evidence of such intention distinct and separate from the evidence of residence and its surrounding circumstances. The residence may be of such a kind, and entered upon and continued in such circumstances, that the inference is irresistible that there was an intention to acquire a domicile in the country of residence, and to abandon a domicile previously held. As an example of such a case I may refer to *in re Steer* (28 L.J., Exch. 22).

"I shall therefore consider, in the first place, what was the character of Sir William's residence at Glen Tana, what were the motives which induced him to take up his residence there, and what was his object in continuing that residence.

"I suppose that it is not open to doubt that Sir William first went to the Highlands of Scotland for the same reasons for which so many rich Englishmen acquire residences there. He was attracted by the sport, the pure air, the scenery, and the relaxation obtained from the cares of life and the burden of business; and the chief reason for his selecting Glen Tana as the particular part of the Highlands in which to fix his residence was that his married daughter lived in that neighbourhood. I see no reason to suppose that the same motives which first brought Sir William to the Highlands were not in great measure those which kept him there. He was perhaps exceptional in this respect that he never tired of the Highlands, and that his love for Glen Tana was greater than that which a man usually feels for a place which he has not acquired until somewhat late in life. But then, if I gauge his character correctly, Sir William was a man of ardent temperament, whose feelings and sentiments were apt to be stronger than those of ordinary men.

"Another reason why Sir William spent the greater part of the year at Glen Tana was that he found there constant occupation and interest in making roads and erecting buildings, upon which, as I have said, he spent vast sums. That expenditure was greatly relied upon by the pursuer as showing that Sir William had settled at Glen Tana as the seat of his family, and as the place in which all his interests were centred. That view would have had much greater force if the expenditure had been made upon truly improving and developing the estate, even although the improvements had been carried out upon the lavish scale which only a very rich man could afford. But although some of Sir William's expenditure was of that nature, the bulk of it, instead of improving the estate, will be found, I apprehend, by those who succeed him, to have created a very serious burden.

"What were the motives which induced Sir William to indulge in such expenditure may be very well gathered from what he himself said upon the subject. If it was suggested that he was spending an unnecessary amount of money upon some particular object, he would say that it was better than 'throwing it over a horse's tail,' or 'across a green board.' I think that that was equivalent to saying, 'I have plenty of money, and I find interest and occupation for my spare time by staying at Glen Tana and indulging my fancy for road-making and building, just as another man in my position might keep a string of racehorses and go to Newmarket.'

"It therefore seems to me that Sir William spent the greater part of the year at Glen Tana, not because the serious interests of his life centred there, but because he had so arranged his business and other affairs in England that, with the aid of well-selected managers and partners, he could carry them on without much personal attendance, and so was left free to devote a large part of his time to those sports and pursuits in which he took delight. I can gather no indication in the evidence of any disposition on his part to allow his business or his other interests in England to be prejudiced by or sacrificed to the attractions of Glen Tana. If he had found that his business was not prospering, and that it was necessary for him to give to it his personal attendance, I see no reason to doubt that he would have done so, even although the result might have been to reduce his annual residence at Glen Tana to something like the ordinary duration of a business man's holiday.

"Such being the character of Sir William's residence at Glen Tana, to what extent did he keep up his connection with England?

"1. Throughout his life he carried on a very large business as private banker in England—a business in which he was interested to the extent of eight-tenths, in which he had £300,000 invested, and over which he exercised constant supervision.

"2. He possessed and retained large landed estates in England, and he added to these estates, and kept himself conversant with, and controlled, down to minute details, their management.

"3. He represented an English constituency until 1892, when he retired from Parliament at the age of seventy-three.

"4. He retained two residences in England, one in London and one near the head office of his bank, and in the vicinity of his estates. Both these residences were furnished in a manner which rendered them suitable for the occupation of a person in his position in life. Both houses were kept ready for occupation at any time, and he resided at both during a part of each year.

"5. When he was married a second time in 1879 his marriage settlement was prepared in England according to the English form, and in view of the law regulating the rights of husband and wife in England.

"6. When he received a baronetcy in 1888 (seventeen years after he took up his residence at Glen Tana) he took a patent in which he was described as 'of Manchester.'

"7. To the last he kept up his connection with Manchester by subscribing to its local institutions and charities, and by taking part in its social life and public functions.

"8. It was almost to the last his wish to leave only one testamentary settlement of his affairs, that settlement to be in the English form, and prepared by his English solicitor. In the end he yielded to the advice of his English solicitor that his Scotch estates should be dealt with by a settlement framed according to the requirements of Scotch conveyancing, but his whole other means and estate, including his personal estate in Scotland, were dealt with in the English settlement, and the trustees under both settlements were Englishmen resident in England.

"I do not think that Sir William could, while living the greater part of the year at Glen Tana, have kept up his connection with England in a more unequivocal way, and having regard to the whole facts of the case, I can come to no other conclusion than that he never intended to relinquish, and did not in fact relinquish, his status as a domiciled Englishman.

"At a very late stage of the proceedings the beneficiaries who were sisted as defenders amended the record by adding certain statements chiefly in regard to the effect which, according to the law of England, the settlement made upon the marriage between the pursuer and Sir William had upon the rights of the spouses. They also added a plea-in-law to the effect that assuming that Sir William had acquired a domicile in Scotland at the date of his death, he was still domiciled in England at the date of his marriage to the pursuer, and that accordingly the marriage settlement regulated the rights of the spouses, and the pursuer had no claim to *jus relictæ*.

"In the view which I have taken it is unnecessary to consider that plea, but on the ground that Sir William never lost his English domicile I shall assoilzie the defenders."

A similar interlocutor was pronounced in Lady Huntly's action.

Both pursuers reclaimed, and argued—The Lord Ordinary had mistaken the real issue of the case, and if the true issue had been stated by him, he must, on his findings in fact, have given judgment in favour of the pursuer. The true issue was that stated by Lord Cairns in *Bell* v. *Kennedy*, May 14, 1868, 6 Macph. (H.L.) 69, 5 S.L.R. 566, and Lord Westbury in *Udny* v. *Udny*, June 3, 1869, 7 Macph. (H.L.) 89. The question as there stated was, whether Sir William had intended to make and had made Scotland his home with the intention of permanently residing there. If the pursuer could establish this—as undoubtedly she had established it—then the judgment of the Court must be in her favour. The Lord Ordinary, however, had added another element which he considered necessary to establish a change of domicile, viz., an intention to change one's civil status from one country to another, an apprehension of the effect of doing so, and an intention of doing it. That was an entirely erroneous principle depending on old doctrines which received no countenance in modern cases. If it were given effect to, the result would be that a man who knew nothing about the civil effects of a change of domicile, or even that there was such a thing as domicile, and moved from England to Scotland with the intention of living permanently in Scotland, leaving no interests in England, and having no intention whatever of returning there, would yet not be held to have abandoned his English domicile. In view of the decided cases such a result would manifestly be absurd. The Lord

Ordinary's view was based on the following series of cases:—*Somerville*, 1801, 5 Vesey 750; *Clarke* v. *Newmarsh*, February 16, 1836, 14 S. 488; *Munro* v. *Munro*, August 10, 1840, 1 Rob. App. 492; *Donaldson* v. *M'Clure*, December 18, 1857, 20 D. 307 (Lord Curriehill at p. 321), *affd.* March 7, 1860, 3 Macq. 852; *Aikman* v. *Aikman*, March 12, 1861, 3 Macq. 854. In particular, he had been influenced by the opinion of Lord Curriehill in *Donaldson*. That opinion, however, if carried to its logical conclusion, would produce the absurd result indicated above. It was true that the doctrine laid down in these cases had been quoted with approval by the Lord President in *Steel* v. *Steel*, July 13, 1888, 15 R. 896, 25 S.L.R. 675, but his *dicta* thereon were manifestly *obiter*, that being a perfectly clear case upon the facts that the person whose domicile was in question never intended to reside permanently out of the country of his domicile of origin. In any view, these cases were entirely inconsistent with the cases of *Bell* and *Udny*, and with the latest Scotch case, *Fairbairn* v. *Neville*, November 30, 1897, 25 R. 192 (Lord President, at p. 202-3), 35 S.L.R. 178. There were three cases where domicile was held to be in a country though the person in question did his best to make out that he never had any such intention—that is, in spite of his expressed intention—*in re Steer*, 1858, 3 H. & N. 594, 28 L.J. Ex. 22; *Doucet* v. *Geoghegan*, 1878, 9 Ch. Div. 441; *Craignish* v. *Hewitt*, [1892], 3 Ch. 180. See also *Abd-ul-messih* v. *Farra*, 1888, 13 App. Cas. 431; *Haldane* v. *Eckford*, 1869, L.R., 8 Eq. 631; *Brunel* v. *Brunel*, 1871, L.R., 12 Eq. 298; *Douglas* v. *Douglas*, 1871, L.R., 12 Eq. 617; *Forbes* v. *Forbes*, February 9, 1854, 23 L.J., Ch. 724; *Whicker* v. *Hume*, 1858, 7 H.L.C. (Clark) 124; *Attorney-General* v. *Winans*, 1901, 85 L.T. 508; Westlake's Private International Law (3rd ed.), p. 304; Dicey's Conflict of Laws, pp. 108-10; Foote's Jurisprudence, p. 26. It was clear, therefore, from the preponderance of modern authorities that the additional onus thrown by the Lord Ordinary upon the pursuer of showing that Sir William had intentionally abandoned his English domicile and acquired a Scotch one was erroneous. If in fact he relinquished his status as a domiciled Englishman by taking up his permanent residence in Scotland, then the law would do the rest, apart altogether from what his view may have been. But if that were the true issue before the Court, then there could be no doubt from what were almost the admitted facts that Sir William intended to make and did make Scotland his permanent home from 1869 onwards, and accordingly the Court must decide in favour of the pursuers. The fact that he inherited and continued to possess considerable property in England, and that he drew a large income therefrom and from the bank, did not counterbalance the fact of his permanent home being in Scotland — *Fairbairn* v. *Neville*, *supra*; *Anderson* v. *Laneuville*, 1854, 9 Moore, P.C. 325; *Forbes* v. *Forbes*, *supra*; *Platt* v. *Attorney-General of New South Wales*, 1878, 3 App. Cas. 336; *Attorney-General* v. *Winans*, *supra*.

Argued for the defenders—The pursuers' argument came to this, that domicile depended upon residence, and residence alone. They denuded the question of what was domicile from every other consideration whatever, and argued that all that was necessary for the acquisition of a new domicile was evidence of residence for a sufficient period *animo remanendi*. That was not the correct issue. Both the elements of abandonment and of acquisition must be present in the *animus* which had its consummation in the *factum* of the residence. There must be an intention of abandoning the domicile of origin and of acquiring a new one. It might well be that the facts in a case were so strong that such an intention would be inferred from them without any express declaration, but the mere fact of residence for an indefinite time did not come up to that. The cases upon which the Lord Ordinary had founded in support of this proposition amply bore it out. Nor was the law in any way altered by the decisions in *Bell* v. *Kennedy*, 6 Macph. (H.L.) 69, 5 S.L.R. 566; and *Udny* v. *Udny*, 7 Macph. (H.L.) 89. In *Bell* v. *Kennedy* the whole point was, not whether a man had or had not acquired a Scotch domicile, but whether he had acquired a Scotch domicile at a certain time. There was no question at all that the domicile of origin had been abandoned, and the one step in the process of acquiring a new domicile having thus been taken so far as intention was concerned, the only controversy therefore was at what point of time a new domicile had been acquired. Accordingly, Lord Cairns was not laying down any absolute rule conflicting with that laid down in previous cases, but was merely calling attention to the question of fact in that particular case. In the same way, in *Udny* v. *Udny* the only question was one of residence. It was equally clear there that England had been abandoned, and accordingly the element existing in the present case, the question of intention to abandon the domicile of origin, did not arise. there. The observations of Lord Westbury were confined to the facts of that particular case, which were connected with residence and with residence alone, while in the present case residence was merely one ingredient of domicile. Nor was the opinion of Lord President Robertson in *Fairbairn* v. *Neville* (25 R. 192) at variance with the defender's view. He in the same way was dealing with a case where the domicile of origin had been clearly and intentionally abandoned. In that case the man had spent his whole professional life in Scotland and had continued to reside there after retiring from his office. Moreover, there he never really had an English residence; he only succeeded to a small estate in England after coming to Scotland, and did not take up such a connection with it as to make the case one of double residence such as was found here. There was accordingly nothing to displace the authority of the cases upon which the Lord Ordinary founded. On the

contrary, the doctrine laid down in them was approved in the recent cases of *Vincent* v. *Earl of Buchan*, March 19, 1889, 16 R. 637, 26 S.L.R. 481; *Steel* v. *Steel*, July 13, 1888, 15 R. 896, 25 S.L.R. 675; *Sourdis* v. *Keyser*, March 11, 1902, 18 Times Law Reports, 414. If that were the law it was perfectly clear on the evidence that Sir William—while admittedly he preferred to live and did live the greater part of the last years of his life in Scotland—had never shown any intention of abandoning his domicile of origin, but had kept up to the end of his life the strongest connection with England, where all the more serious interests of his life had been and continued to be centred. The pursuer had therefore failed in discharging the serious onus of proving abandonment of the domicile of origin.

Counsel for the compearing defender and respondent Mrs Hawkshaw advanced argument in support of the additional plea for the compearing defenders, which in view of the decision of the Court it is unnecessary to set out.

At advising—

LORD PRESIDENT—The most important question in this case is whether the late Sir William Cunliffe Brooks had at the date of his death on 9th June 1900 acquired a domicile of choice in Scotland, or whether he at that date retained his domicile of origin in England. There is also a question as to whether he had acquired a domicile of choice in Scotland at 5th November 1879, the date of his marriage with the pursuer Lady Brooks.

Sir William Cunliffe Brooks was the son of a domiciled Englishman, a banker in Blackburn, Lancashire, and he was born there in 1819. He was educated exclusively in England, he took his degree at Cambridge in 1842, and in the same year he married his first wife, who was an English lady. He was called to the English Bar in 1847, and he practised on the Northern Circuit for a short time. He was, however, about that time assumed by his father as a partner in the banking business, the principal office of which was then in Manchester, and in 1847 he took a lease of Barlow Hall, a residence near Manchester, of which he continued to be the tenant ever afterwards down to the date of his death.

In 1864 Sir William's father died, and he then became sole proprietor of the bank. His first wife died in 1865, and in 1869 he was elected Member of Parliament for an English constituency. In that year he took a lease of the house No. 5 Grosvenor Square, London, and gave up the direct personal management of the bank, but he continued to carry on the business through the instrumentality of managers till 1888, when he assumed two nephews as partners. By the contract of copartnery entered into between himself and them he had right to terminate the partnership at any time, the dissolution to take effect on the day of notice, so that they had not any really independent position in the business. His share of the capital of the bank was £300,000, and the shares of his two partners were £30,000 and £25,000 respectively. He had right to eight-tenths of the profits, his partners each having right to one-tenth. It appears that the income which Sir William derived from the bank, including interest on capital, amounted to from about £30,000 to £50,000 a-year. Although Sir William gave up the personal management of the Bank in 1869 he remained throughout the rest of his life in constant communication with the head office, and he was daily informed by letter as to the course of the business. He appears to have exercised a vigilant supervision over it, and this is not surprising, as the income which he derived from it was not like the return from a safe investment but a profit from trading in money, which if unskilfully or injudiciously conducted might have landed him in very large pecuniary loss, and possibly in further liability. It appears to me that his residence at Glen Tana did not constitute or result in any material change in his business interests, and that if England was, as it undoubtedly was, the seat of his fortunes before he went to Glen Tana, it, in my judgment, continued to be the seat of his fortunes thereafter.

Sir William inherited from his father extensive landed estates in Lancashire and Cheshire, yielding a rental of about £20,000 a-year. There was no mansion-house upon these estates, but a considerable part of them was situated at no great distance from Barlow Hall. These estates were let to tenants, and latterly considerable portions of them were successfully developed as building land.

For several years prior to 1869 Sir William came to Scotland for purposes of sport in autumn, and in that year he became tenant under a lease for eleven seasons of the forest of Glen Tana, which belonged to the Marquis of Huntly, and was situated near Aboyne Castle, then the residence of the Marquis. In 1869 the Marquis married the elder of Sir William's two daughters, who were his only surviving children. In 1872, when Sir William was still lessee of Glen Tana, he established a private chapel there, called the Church of Saint Lesmo. In 1876 the existing leases were renounced, and Sir William obtained a new lease for fifteen and a-half years from Martinmas of that year of the forest, estate, and fishings of Glen Tana and other lands.

Sir William's second daughter was married to Lord Francis Cecil, son of the Marquis of Exeter, in 1874, and in 1879 Sir William married Miss Davidson, a Scottish lady, by whom he was survived, and who is the pursuer of the leading action. The marriage settlement between Sir William and Miss Davidson is in the English form, and it was prepared by Mr Wood, his solicitor in Manchester. The trustees under it were English, and the settlement contains none of the provisions usual and appropriate to the case of Scottish persons in the position of Sir William and his wife, a circumstance which seems to me to show that Sir William and his legal advisers did not consider that he was then domiciled in Scotland. This has been regarded as

material in cases similar to the present. In accordance with Sir William's wish, the marriage took place in the church of St Lesmo, and in the register then signed his usual residence is stated to be 5 Grosvenor Square, London.

Sir William did not retain his seat at the election of 1885, but in 1886 he was elected for another division of Cheshire, a seat which he held till 1892, when he finally retired from Parliament. In 1886 he was made a baronet, the patent being granted in favour of "William Cunliffe Brooks, of the City of Manchester." He seems to have always been proud of being known and regarded as a "Manchester man." I find no evidence that Sir William's interest in his banking business or in his English properties ever flagged, and to the end his gifts by way of charity were much larger in England than in Scotland. He was particular in correcting the proofs for peerages and similar books of reference so as to show that he retained his English position and interests. Thus in the proofs for the entries in Debrett's and Burke's Peerages in 1900, the last year of his life, corrected by himself, Barlow Hall and Manchester are mentioned before the forest of Glen Tana in the statement of his "seats." So on his menu cards and ball programmes he had a picture of Barlow Hall at the top and of Glen Tana at the bottom of the first page.

Sir William purchased Aboyne Castle in 1888, Glen Tana in 1891, and the estate of Ferrar in 1899. I agree, however, with the Lord Ordinary in thinking that the evidence shows that he would have preferred not to have made these purchases, and that he was compelled, or at all events induced, to do so by force of the circumstances to which his Lordship refers. The price which he paid for Glen Tana was £120,000.

It appears that at the date of his death Sir William was proprietor of real estate in England of the value of about £543,000 as against heritable estate in Scotland of the value of about £261,000, and it was stated by the defenders' counsel, and not disputed, that he had received £685,314 in rents from his English properties in thirty-six years.

Sir William resided chiefly at Glen Tana from the year 1869, although he also resided for relatively small portions of each year at 5 Grosvenor Square and Barlow Hall. From 1869 till his death his principal domestic establishment was at Glen Tana, No. 5 Grosvenor Square and Barlow Hall being each in charge of a housekeeper and housemaids. His chief residence for the last thirty years of his life was thus at Glen Tana, and it is clear that he was much attached to it, as also that he greatly enjoyed living there, first for the sport and amenity which it provided, and latterly also for the pleasure which he derived from making improvements upon it.

Sir William by his will expressed the desire that if he died abroad he should be buried abroad, but that if he died in Great Britain or Ireland he should be buried at Glen Tana, and accordingly on his death on 9th June 1900 he was buried there. His views as to how his remains should be disposed of after his death appear to have fluctuated. At one time he seems to have desired that he should be buried at Ashton, and at another time that he should be cremated.

Sir William had desired to leave only one testamentary settlement, but by the advice of Mr Wood, his solicitor in Manchester, he executed two, one in the English form, dealing with his general estates, and the other in the Scottish form, dealing with his landed property in Scotland. The trustees under both settlements are the same, English gentlemen resident in England.

By his Scottish testamentary settlement Sir William left his whole heritable estates in Scotland to trustees for behoof of his eldest grandson Ean Francis Cecil and the heirs of his body, whom failing, his grandson Richard Cecil and the heirs of his body, whom failing, to his daughter Lady Francis Cecil, and he provided a liferent of Aboyne Castle to Lady Huntly. By his English settlement he left his personal property in Scotland to the beneficiaries to whom his Scottish estates were bequeathed, and he directed that the whole residue of his estates, real and personal, should be realised and divided among his grandchildren. In his Scottish settlement he was described as "of Glen Tana," and in his English settlement as "of the City of Manchester." From the terms of these testamentary instruments and the evidence as to what passed at and about the time of their execution, I think the fair conclusion is that Sir William believed that his testamentary capacities and powers depended on the law of England, not on the law of Scotland, or in other words, that he was domiciled in England, not in Scotland. Of course it is possible that he may have been mistaken as to this, but in the question of intention, to be afterwards considered, his understanding and belief on this subject seem to me to be of much importance.

It appears from letters which passed between Sir William and his English solicitor Mr Wood that his attention had been called to the question of his domicile, but if he entertained doubts on the subject these seem to have been removed by the assurances of Mr Wood that he was domiciled in England.

Upon these facts the question arises—Had Sir William Cunliffe Brooks at the date of his second marriage in 1879, or at the date of his death in 1900, lost his English domicile of origin and acquired a domicile of choice in Scotland? On this question the pursuers maintain that it is not necessary to the acquisition of a new domicile that it should be proved that the person to whom the question relates intended to abandon his domicile of origin and to acquire a domicile of choice elsewhere, but that it is sufficient that he should have fixed his chief residence in a place other than his domicile of origin, with an unlimited intention of continuing to reside there. In other words, the pursuers contend in effect that residence, and residence alone, is sufficient

to constitute aud prove a change of domicile, and that the true question is not what the person intended or desired as to his domicile, inasmuch as (they contend) a man's domicile may be changed without his ever thinking or knowing of such a a thing as domicile. The defenders, on the other hand, maintain, and the Lord Ordinary has held, that residence is not *per se* sufficient to bring about or prove a change of domicile, but that it must appear upon sufficient evidence that the person whose domicile is in question intended to abandon his domicile of origin and to acquire a domicile of choice. On the question of intention the fact of residence may, in the absence of other evidence, be very material, possibly conclusive, but still the defenders maintain that the true question is, what did the person whose domicile is in question intend his domicile to be? There is certainly a long and weighty series of decisions in support of the latter view. The pursuers rely chiefly upon certain *dicta* by Lord Chancellor Cairns in the case of *Bell* v. *Kennedy*, 6 M. (H.L.) 69, and by Lord Westbury in the case of *Udny* v. *Udny*, 7 M. (H.L.) 89, as overruling the prior decisions in so far as at variance with them. It will therefore be proper in the first instance to see how the authorities stood when the cases of *Bell* v. *Kennedy* and *Udny* v. *Udny* were decided, and what has been the course of the decisions since.

In the case of *Somerville* v. *Somerville*, February 23, 1801, 5 Vesey 750, Lord Alvanley, the Master of the Rolls, laid down as the third rule to be derived from the decisions that "the original domicile, or, as it is called, the *forum originis* or the domicile of origin, is to prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicile and taking another as his sole domicile." It is plain that the intention of abandoning the former domicile is of the essence of this definition, and it appears to me that this view is not only sound in principle, but that it is in accordance with the course of the decisions both in England and in Scotland during the period of more than a century which has elapsed since the judgment in *Somerville's* case was pronounced. The importance of that case is the greater in the present question, from the fact that it (like the present) was a case of double residence, Lord Somerville having had a family seat in Scotland and a leasehold house in London. The Scotch domicile of origin prevailed.

In the Scotch case of *Munro* v. *Munro*, August 10, 1840, 1 Robinson's App. 492, the Lord Chancellor (Lord Cottenham), expressly approved of the principles laid down in the case of *Somerville*, saying (p. 606) that it is of the utmost importance not to depart from any principles which have been established relative to such questions, particularly if such principles be adopted not only by the laws of England but by the laws of other countries, and adding—"It is, I conceive, one of those principles that the domicile of origin must prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicile and acquiring another as his sole domicile. Such, after the fullest consideration of the authorities, was the principle laid down by Lord Alvanley in the case of *Somerville* v. *Somerville*, and from which I see no reason for dissenting. 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 new domicile acquired, but that again abandoned, and no new one acquired in its place, the domicile of origin revives. To effect this abandonment of the domicile of origin and substitute another in its place it required '*le concours de la volonté et du fait*,' '*animo et facto*'—that is, by actual residence in the place, with the intention that the place then chosen should be the principal and permanent residence "*larem rerumque ac fortunarum suarum summam.*"

So in the case of *Donaldson* v. *M'Clure*, 21 D. 307, 3 Macq. 852, it was distinctly stated in the House of Lords that there must be an intention to abandon one domicile for another, Lord Wensleydale saying that a person could not acquire a new domicile "to the effect of regulating the succession to his estates, unless he has abandoned his former domicile," and the same noble and learned Lord said practically the same thing in the case of *Aikman* v. *Aikman*, March 12, 1861, 21 D. 757, 3 Macq. 854, in which it was held that a natural born Scotsman, who had been for thirty years in the Mercantile Marine Service of the East India Company had not abandoned his Scotch domicile of origin. In giving the leading judgment Lord Wensleydale said—"The rule of law which leads to this conclusion is perfectly settled. Every man's domicile of origin must be presumed to continue until he has acquired another sole domicile by actual residence with the intention of abandoning his domicile of origin. This change must be *animo et facto*, and the burthen of proof unquestionably lies upon the party who asserts the change. This rule is laid down in the case of *Somerville* v. *Somerville*, and has been acted upon ever since."

In the case of *Steel* v. *Steel*, 15 R. 896, this Division of the Court adopted the rule laid down in *Somerville's* case that in order to effect a change of domicile it is necessary to prove intention to acquire a domicile in a new country and to abandon the domicile of origin. There is no indication that either Lord President Inglis or the other learned Judges who took part in the decision of the case of *Steel* v. *Steel* ever supposed that the *dicta* in *Bell* v. *Kennedy* or *Udny* v. *Udny* had altered the well established law on this subject. The pursuer's counsel contended that the case of *Steel* v. *Steel* should be disregarded because the case was clear on the facts, and all the *dicta* were therefore *obiter*, but I do not think that the authority of the case can be displaced in this way. Again, in the case of *Vincent* v. *The Earl of Buchan*, 16 R. 637, this Division of the Court held that a heavy onus lay on

the respondent to prove that the deceased had *animo et facto* abandoned her domicile of origin, and that he had failed to prove her intention to abandon it. The learned Judges in that case treated the rule which requires the *animus* as well as the *factum* to be proved as quite settled. The last important case on this subject which has arisen in the Scottish Courts is that of *Fairbairn* v. *Neville*, November 30, 1897, 25 R. 192, which appears to me to be in entire accordance with the series of Scotch decisions to which I have just referred. The pursuers rely upon the circumstance that Lord President Robertson, in stating the question relative to the domicile of Mr Shepherd, quoted the words of Lord Chancellor Cairns in *Kennedy* v. *Bell*, to which I shall afterwards advert, but there is nothing in them at variance with the views above expressed as to what requires to be proved in such a case, and the whole tenor of the judgments is in entire accordance with these views. Lord President Robertson said that the case was not one of double residence. It was suggested by the pursuer's counsel that the views expressed in *Vincent's* case were gone back upon in the case of *Fairbairn*, but I do not think that there is any ground for this suggestion.

The same rule appears to have been consistently applied in England. Thus in the case of *re Steer*, June 9, 1858, 28 L.J. Ex, 22, Chief-Baron Pollock said—"The Lord Chancellor, in the case of *Munro* v. *Munro*, said—and I think said very truly—that the question of domicile of origin is very frequently difficult, and there is no doubt Sir Richard Bethell has established the principle by the authority cited that you cannot get rid of a domicile of origin by reason only of the *factum*, but that there must be the *animus*." In this case there was no double residence. The necessity of establishing an intention to abandon the domicile of origin when it is sought to make good a domicile of choice was fully recognised, and indeed expressly enforced, in the recent case of *Sourdis* v. *Keyser and Others*, March 11, 1902, in the Court of Appeal in England. In that case the present Master of the Rolls said—"What was the intention of the testator? A person could not acquire a new domicile without abandoning the old domicile. There must therefore be an abandonment of the old domicile before there could be the acquisition of a new domicile," and the Lord Justices expressed the same views.

It is, however, as already stated, contended by the pursuers that the earlier of these authorities are displaced by certain *dicta* of Lord Chancellor Cairns in *Bell* v. *Kennedy* and Lord Westbury in *Udny* v. *Udny*. In the former of these cases Lord Cairns said—"The question which I ask your Lordships to consider in the present case is in substance this—whether the appellant had determined to make and had made Scotland his home, with the intention of establishing himself and his family there and ending his days in that country." It is true that in the question thus stated there is no reference to the intention of abandoning the previous domicile, but the circumstances of the case did not require any such statement, because there was no doubt that Mr Bell had in 1837 permanently left Jamaica, where he had been born and had his domicile of origin, and severed all connection with it. The material question was whether he had acquired a domicile of choice in Scotland at a particular time. The loss of his domicile of origin in Jamaica and the acquisition of a domicile of choice in Scotland need not necessarily have been simultaneous. The question of abandonment of the domicile of origin came first, and the question of the acquisition of a domicile of choice came second. Lord Cairns having considered the question of abandonment next proceeded to deal with the question of acquisition. The only point for consideration then came to be whether Mr Bell's residence in Scotland had been of such a character and duration as to establish a domicile of choice in that country. In the case of *Udny* v. *Udny*, also, it was not necessary that the question as to the loss of a domicile of origin should be adverted to in the judgment. Colonel Udny's domicile of origin and his domicile at the date of his marriage were both Scotch, and the question related to his domicile at the date of the birth of his illegitimate son, who was born at Boulogne. It was held in this Court that Colonel Udny had never acquired an English domicile, and there was a difference of opinion in the House of Lords upon this point, but the noble and learned Lords were agreed that it was unnecessary to decide it, as it was clear that in going to Boulogne Colonel Udny had abandoned any domicile which he might ever have had in England. It is easier to infer the abandonment of one domicile of choice for another domicile of choice than to infer the abandonment of a domicile of origin for a domicile of choice. Lord Chelmsford thought that a domicile in England had not been acquired, on the ground that residence, however long continued, was not sufficient in the absence of evidence of intention, to lead to the acquisition of a new domicile, and it was doubtful whether there was evidence of such an intention. Lord Westbury, on the other hand, appears to have thought that Colonel Udny had acquired an English domicile, and in this view the question came to be whether that acquired domicile was superseded by a domicile of choice in France. There was no question between the domicile of origin and an alleged French domicile. For these reasons I concur with the Lord Ordinary in thinking the circumstances of the present case are altogether different from those of *Bell* v. *Kennedy* and *Udny* v. *Udny*, and it does not appear to me that anything which was said by the noble and learned Lords in these cases was intended to displace the doctrine which I have shown was then already well established both in England and in Scotland, viz., that the domicile of origin must prevail unless the person whose domicile is in question has manifested and carried into execution an intention of abandoning his domicile of origin and acquiring a domicile of choice.

These noble and learned Lords do not suggest that nothing except residence is to be considered in such a question. Residence and domicile are essentially different things, the latter involving questions of intention not material to the former.

It appears to me that the views now stated derive material support from the doctrine repeatedly enunciated in the decided cases as well as by the text-writers, that a new domicile can be acquired only *animo et facto*, the animus being to surrender the domicile which the person holds at the time and to acquire another domicile elsewhere. I therefore think that the contention of the defenders that the *animus relinquendi* is highly material, and indeed essential, is well founded, and that Sir William's residence in Scotland was for purposes of health and recreation, and not with the view of abandoning his English domicile and acquiring a Scotch domicile in its stead.

It was pointed out in the course of the debate that in many, if not in most, of the cases which have arisen there was no question of double residence—that is to say, no case of the person whose domicile was in question spending part of the year in one country and part in another country, and it is no doubt true that with the great increase of wealth and of facility of communication which has taken place in recent years it is much more common than it formerly was for persons to have residences in more countries than one, a circumstance which gives additional importance to the present case. It appears to me that where there is such divided residence a heavier onus is cast upon the persons who allege an abandonment of the domicile of origin than in cases where the person has only one residence when the question as to his domicile arises. In such cases it is essential to have regard not only to what the person's relations are with the country to which he has transferred his principal residence, but what are his relations to the country in which he previously resided, and which may still be the seat of his fortunes and of his larger interests. In the present case Sir William's larger and more important patrimonial interests continued to be in England down to the time of his death, or, in other words, England was in his case the *sedes fortunarum*. He carried on to the end, no doubt chiefly by partners and managers, the extensive banking business in Manchester and other places in England, in which he had large sums of money invested, a business over which to the last he exercised a constant and vigilant supervision. He also continued down to his death to be the owner of large landed estates in England, and he took much interest in them, and paid close attention to their administration and development. He continued to the last to have two residences in England—Barlow Hall which he had held on lease from 1847, although he seems to have spoken of giving it up when Lord Egerton proposed to increase the rent, and 5 Grosvenor Square, London, and although latterly he only resided for short periods in these houses they were constantly kept ready for his reception. There is also evidence that he took an active interest in the redecoration of Barlow Hall as well as in obtaining fresh supplies of plants for the garden there, and that shortly before his death he ordered additional linen and other furnishings for the house. Then although he sometimes designed himself as of Glen Tana, he at other times used the designations "of Manchester," and "of 5 Grosvenor Square," and these along with Barlow Hall were treated by him as his principal designations.

Without going over the other points so fully and ably dealt with in the Lord Ordinary's judgment, it is sufficient to say that I am of opinion that the pursuers have failed to prove that Sir William ever abandoned his English domicile of origin and acquired a Scotch domicile of choice in its place, and I therefore think that his Lordship's interlocutor assoilzieing the defenders from the conclusions of the summons should be adhered to.

LORD KINNEAR — I am of the same opinion, and I have very little to add to what your Lordship has said. I shall not resume the facts in detail, because they have been already stated by your Lordship, and have also been stated very completely and accurately by the Lord Ordinary. If we were to look at the life of Sir William Cunliffe Brooks at Glen Tana alone there would be very strong grounds for inferring a Scotch domicile. His residence there was by no means of the temporary and occasional character which might be expected in the case of an Englishman who comes to the Highlands for purposes of sport, without any intention of fixing himself there in a permanent home. Glen Tana was for many years his favourite residence. He lived there for the greater part of the year. He spent a great deal of money in building and in improving the estate. He seems to have been more deeply attached to it than to any other place of abode. He took a great interest in the welfare of the people in the neighbourhood, and did a great deal for them; and the evidence tends to show that he had no intention of giving up his connection with the place during his lifetime, but that he looked forward to residing there during the greater part of the year, as he had in fact done for many years, and ending his days there. He appears, in short, to have made it, in a very real sense, a home for himself and his family, and also a centre of kindness and friendliness for the whole neighbourhood. But notwithstanding all this, it was only a part of his life, and in some respects not the most important part, that had any connection with Glen Tana. He was a banker in Manchester. He had property in land yielding over £20,000 a year in Lancashire and Cheshire. He took a part in the public affairs of that locality such as might be expected of a wealthy banker and landowner of considerable energy and force of character. He was proud of his

position in the city and in the county, and he continued to the last to speak of himself as a Manchester man. The elements, therefore, which, according to the classical definition which has been generally accepted in our law, ought to be combined in order to constitute domicile, are in this case distributed. They are divided between England and Scotland. He had established his domestic hearth—*larem*—in Scotland, but the bulk of his property and business—*rerum ac fortunarum suarum summam*—he certainly held and always continued to hold in England. If the controversy had been between two alleged domiciles of choice, the question which of these two kinds of interest ought to prevail would perhaps have been more difficult than I think it really is in this case. I cannot see any reasonable ground for holding that the question of domicile is to be determined by a mere comparison between the length of period in each year during which a man may live in one residence or in another in a case where he has two residences, or by a comparison of the number of friends whom he entertains in the one case and in the other; and if it depends upon a comparison between the importance of the various interests connected with one place or another, then I am unable to find any common standard for adjusting the measure of a man's interest in a favourite home with the measure of his interest in the place of his property and his business. But if the question did depend solely upon a comparison between the two places of residence, I should have attached much weight to the consideration that not only were his affairs and interests in England of much greater magnitude than in Scotland, but that everything that went to make his position in the world, everything that went even to make it possible for him to possess and live in a place like Glen Tana, was locally connected with England, and not with Scotland. But then I think the true point of the case—and as I think the conclusive point—is that England was his domicile of origin, and the evidence satisfies me that he never entertained for a moment the intention of abandoning that domicile. The very able argument for the pursuers really resolves into an attempt to refute the doctrine which has been hitherto accepted in this Court as to the nature and effect of a domicile of origin, and I do not think the attempt was successful. Giving all due consideration to the Dean of Faculty's criticism, I am unable to see any reason for doubting that Lord Curriehill's doctrine in *Donaldson* v. *M'Clure* is still good law when he says—"To abandon one domicile for another means something far more than a mere change of residence. It imports an intention not only to relinquish those peculiar rights, privileges, and immunities which the law and constitution of the domicile confer on the denizens of the country in their domestic relations, in their business transactions and in the daily affairs of common life, but also the laws by which the succession to property is regulated after death. The abandonment or change of a domicile is therefore a proceeding of a very serious nature, and an intention to make such an abandonment requires to be proved by satisfactory evidence." I, of course, agree that a man may change his domicile although he has no correct appreciation of the difference between the law of his native country and that of a foreign country. He may know nothing whatever about the law of domicile. But Lord Curriehill says nothing to the contrary. He is explaining the serious nature of the change, and the reason he gives for so describing it seems to me to be a perfectly just one when he points out that it involves the consequence that the validity of a man's testamentary acts and his power of disposing of his personal property will be governed by the law of a foreign country. As an item of evidence that may be more or less material according to circumstances, but it cannot be insignificant in a case where it is shown that the person whose domicile is in question had directed his attention to the difference between the law of England and Scotland as to testamentary capacity, and had a very decided intention to dispose of his whole personal property by will. But at all events Lord Curriehill's conclusion that there must be satisfactory evidence of an intention to change the original domicile seems to be established by authority which cannot be called in question in this Court. Lord Cottenham in *Munro* v. *Munro* says "The domicile of origin must prevail until he has manifested and carried into execution an intention of abandoning his former domicile and acquiring another as his sole domicile;" and Lord Wensleydale says in *Aikman* v. *Aikman* "Every man's domicile of origin must be presumed to continue till he has acquired another sole domicile by actual residence, with the intention of abandoning the domicile of origin. The change must be *animo et facto*, and the burden of proof unquestionably lies upon the party who asserts that change."

Is there then any evidence that Sir William Cunliffe Brooks intended to abandon his English domicile? I think not. The only proof of such an intention that requires serious consideration is, that he had been living for so many years in his favourite house of Glen Tana, and that he probably intended to go on dividing his time between Glen Tana and his residences in England, and spending by far the greater part of the year at Glen Tana for the remaining years of his life. But that is not necessarily inconsistent with an intention to retain his original domicile, because the evidence shows that it is not inconsistent with his retaining material interests of great importance in England, with his performance of public and private duties locally confined to England, with his continuing to give constant personal care and supervision to affairs of great importance, and finally with his entertaining a certain conviction that he was, and I think a fixed intention so far as in him lay to remain, a domiciled Englishman. I have already said that I

think he made Glen Tana, in the proper sense of the word, a home, but it was not his sole residence, and although a man may not have two domiciles there is nothing to prevent him having two residences either in the same or in different countries, which may be properly and accurately described as homes. Sir William retained to the end his home in Grosvenor Square and his home of Barlow Hall in Lancashire, both of which were kept ready for occupation on a day's notice, and in each of which he resided for a part of every year. It is perhaps more material that he continued to superintend his business as a private banker, which indeed he practically retained in his own hand even after he had assumed his nephews as partners, because he not only continued to hold an enormously preponderating interest in the concern, but he stipulated that he should be entitled to turn either of his partners out at a moment's notice, and it is in evidence also that he continued to the last to control the management of his large estates in England. He kept up his connection with Manchester in other ways which the Lord Ordinary has pointed out, and—what is most material when we are looking for some indication of an intention to abandon his domicile of origin—he did nothing from beginning to end to sever a single tie which bound him to England. The Lord Ordinary founds upon two other points, to which I think, with his Lordship, great weight is to be attributed. It has been thought material in considering the question of domicile to see how a man described himself in formal deeds and documents, and the Lord Ordinary points out that Sir William Cunliffe Brooks took care to describe himself as "of Manchester." He did so, as your Lordship says, in his patent of baronetcy. I think the criticism which was made by the pursuer's counsel upon this point is mistaken. It was said that the description of a man in such a patent is not his own language but the language of the Crown officials from whose office the patent proceeds, and no doubt it is the sovereign who speaks in a patent of that kind. But even if it were the language of the sovereign or his officials alone the material point would still remain that Sir William Brooks accepted it as the true description of the character of the place to which he himself belonged when he accepted the title of Sir William Cunliffe Brooks of Manchester. But then I think the whole argument is founded upon a mistake as to the practice, because though the style and description in such a patent are the language of the sovereign, the person who receives it has generally an opportunity of saying how he desires to be described, and if there is no reason against it he is so described. Accordingly I do not think it can be doubted that it was Sir William's own voluntary desire and intention that he should be called Sir William Brooks of Manchester. The other point upon which the Lord Ordinary founds is probably more important, and that is, that he so described himself in his last will, and that that last will is in all respects the will of an Englishman. I think this is material, because, as your Lordship has pointed out, Sir William Brook's attention was called, by a case referred to in the newspapers, to the difference between the law of Scotland and the law of England as regulating personal succession, and I observe that whether Lord Curriehill's observation upon that topic is generally applicable or not, it is certainly very applicable to this particular case, because it appears that when Sir William's attention had been called to the matter he thought it raised a question upon which he ought to be satisfied, and he asked his legal adviser, Mr Wood, of Manchester, whether he had become a domciled Scotchman. Mr Wood's opinion, very confidently expressed, was that he had not lost his English domicile, and I certainly infer, with your Lordship and the Lord Ordinary, that Sir William was satisfied with that answer. I do not think we can speculate, it would be idle to speculate, as to what he would have done or might have done if, instead of being told "the thing is quite clear, and you are undoubtedly an Englishman," he had been told "there may be a very difficult question, and if you wish to remain a domiciled Englishman you must consider what steps you ought to take." We do not know what he would have done if that had been the advice he received, but I think the evidence of his treatment of his affairs, both during his life and in his testamentary disposition, is quite enough to show us that he would have been surprised and seriously disturbed if he had received that advice. It appears to me that the reason of the question put to Mr Wood and the designation of himself in his settlement is brought out very clearly in one of the letters in his correspondence with Mr Wood, because Mr Wood had written to him explaining what in his opinion an English owner of landed estate in Scotland might do by way of testamentary disposition. It appears that Sir William was in the habit of answering business letters by writing upon the margin his own notes and comments upon what his correspondent had said, and then returning the letter. In this case Mr Wood's letter sets out—"An English owner of heritable estate in Scotland may, by an English will executed and attested according to English law, dispose of such estate, &c.," and Sir William Brooks' comment upon that is this —"Then I desire to do so"—that is to say, I desire, as an English owner of heritable estate, to execute a will according to the English form to dispose of that estate. It appears that the question had been discussed between him and his solicitor as to whether it would not be advisable to have a separate testamentary settlement disposing of his Scotch heritable estate and an English will disposing of his English estate, and it was with reference to this discussion, I presume, that Sir William said he desired to do what he had been told might be done; but then he goes on to consider some suggestions as to the advisability of having a separate instrument to

dispose of the Scotch heritable estate, and in his comment upon that he explains his reason for preferring one instrument to two, because he says "it would be more convenient to have one will only, and that an English one, in which I may be described, as I am described in my patent of baronetcy, as of Manchester." The point of the whole discussion is that Sir William was resolved to make it clear that his will was that of an Englishman exercising the testamentary powers given to him by the law of England. The result was that he executed a general settlement in which he described himself as Sir William Cunliffe Brooks of Manchester, and he yielded to the opinions of his advisers by having a Scotch deed disposing of his Scotch estate, and as that instrument was intended to dispose of the estate of Glen Tana, the granter is very naturally described as proprietor of the property he is going to dispose of. I do not think that neutralises at all the effect of his styling himself as Sir William Brooks of Manchester in the will disposing of his personal estate, and we must observe that throughout the whole evidence, both documentary and oral, there is very strong indication of a long cherished intention on the part of Sir William to make such provision of his personal estate as the law of England would allow him to do, because it is evident that he was extremely desirous to make ample provision for his eldest daughter, but at the same time not to leave very large sums of money at her uncontrolled disposal. As the result of the whole evidence on this subject I think we have to take into account the very significant proof of intention to retain his domicile which is displayed by his execution of a will as an Englishman entitled to dispose of his personal property, and desirous of doing so according to the law of England.

But then it was maintained by the counsel for the pursuers that the doctrine which I have been supposing to be settled in *Somerville*, *Munro*, and *Aikman*, and other cases to the same effect, cannot now be accepted as good law, because it has been rejected by more recent decisions. The first decision cited for this purpose—*in re Steer*—does not seem to me at all inconsistent with the doctrine that it is indispensable to prove an intention to abandon the domicile of origin. What was decided in that case was that a man's verbal expressions of intention will not neutralise the effect of unequivocal conduct, but it does not at all follow that intention established by conduct or other satisfactory evidence is unimportant. But I think the most material basis for the argument was supposed to be founded on the statements of the law made by Lord Cairns in *Bell* v. *Kennedy*, and by Lord Westbury in the case of *Udny*. The Dean of Faculty put the argument, if I rightly followed him, in this way, that Lord Cairns in *Bell v. Kennedy* states the issue to be considered in cases of this kind, and that when he says, "The question which I ask your Lordships to consider is, whether the appellant has determined to make and has made Scotland his home with the intention of establishing himself and his family there, and ending his days in that country," he is stating the one issue of fact which in his judgment it was proper to consider in all cases of this kind. I think it is perfectly clear, when Lord Cairns' opinion is read as a whole, that he was not stating any absolute issue for all cases of domicile, but that he was asking the attention of the House of Lords to the question of fact, which, in his opinion, arose at a particular stage of his argument in a particular case. The question involved in *Bell* v. *Kennedy* was entirely different from that which we are considering. There was no question at all that the domicile of origin had been lost; but the controversy, and the only controversy of importance, was, at what point of time a new Scotch domicile had been acquired in place of the original domicile in Jamaica; and after having stated, so far as necessary, the facts which bring him up to the point at which the observation quoted is made, his Lordship points out that the question next to be considered is that which he states. I do not see any reason to suppose that Lord Cairns intended to lay down a general rule of law in conflict with the rule of law laid down by the House of Lords in previous cases. An observation of the same kind is equally applicable to Lord Westbury's language in *Udny*. What his Lordship says, in the course of delivering judgment, must be referred to the particular case he was dealing with, and that was a very different case indeed from anything we have to consider. The true point of it lay in the distinction between the domicile of origin and an acquired domicile of residence, and what Lord Westbury was engaged in pointing out was that the domicile acquired by residence in a foreign country may be lost much more readily than the domicile of origin can be. I am unable, therefore, to see that there is anything in what his Lordship says that affects the doctrine laid down in the previous cases. But then it is said that the notion of its being necessary to prove an intentional abandonment of the original domicile has been discredited by the observations of the Lord Chancellor and Lord Westbury in *Udny* v. *Udny* upon the language used by Lord Cranworth and Lord Kingsdown in *Moorhouse* v. *Lord*. It does not appear to me that anything that was said by these noble Lords was intended to affect the authority of the judgment in *Moorhouse* v. *Lord*. I do not think Lord Westbury was dissenting from the doctrine laid down by the House in that case, but he was criticising the language which had been used when Lord Cranworth said that to prove a new domicile it was necessary to prove an intention *quatenus in illo exuere patriam*, and when Lord Kingsdown talked of a man throwing off his nationality. I do not think these phrases necessarily import a change of allegiance or political status. *Exuere patriam* is a phrase of Tacitus, who uses it in a connection which puts the notion of its implying a change of allegiance altogether out of the question. But it

is open to a criticism which is generally applicable to the use of picturesque and metaphorical language in legal definition, that it is not easy to fix its meaning, and that it is therefore apt to be interpreted in a sense that was not intended. Lord Westbury's criticism, accordingly, is not that the noble Lords who decided *Moorhouse* v. *Lord* laid down doctrine from which he dissents, but that they used language which he considers misleading; and indeed his criticism of the language seems to me to imply his assent to the doctrine, so far at least as we have to consider it, because the fault he finds with it is that it disregards the distinction between *patriam* and *domicilium;* and it follows that if all that is said about throwing off the *patria* or the nationality had been said of the domicile of origin, Lord Westbury would have accepted it as perfectly sound. I see no reason, therefore, for rejecting the law which I think is settled by decisions that are binding upon this Court—that in order to acquire a new domicile, it is necessary *animo et facto* to abandon the domicile of origin.

LORD ADAM and LORD M'LAREN concurred.

Counsel for the pursuer Lady Brooks moved for expenses out of the trust-estate, or alternatively that she should not be found liable in expenses, and argued—This was a question not really starting for the first time after the testator's death, but it was started by himself. It seemed to him a reasonable case to raise, and was, so to speak, bequeathed by him to his successors. It was necessary to decide the question of domicile, and the trustees would not have been in safety in distributing the estate until it was decided. The question of expenses was really one of equity for the Court to determine. In *Abd-ul-Messih* v. *Farra,* 13 App. Ca. 431, the unsuccessful party was awarded expenses out of the estate in the Lower Court, but was found liable in the expenses of the appeal. A similar course was adopted in the recent case of *Sourdis* v. *Keyser,* 18 T.L.R. 414. There was no case in England where expenses had been given against the unsuccessful party trying a question with the executors as to the domicile of the deceased. In the case of *Craignish* [1892], 3 Ch. 180, where the man raised the question of his own domicile, expenses were awarded against him because the Court disbelieved his evidence.

A similar motion was made by counsel for Lady Huntly.

Argued for the defenders—There was no rule of practice in the Scotch Courts under which cases as to domicile were exceptions to the general rule that expenses must follow the result. This question was not one raised by the testator as in the case of an ambiguous will, and there was no reason for making the beneficiaries under the will, whom the pursuer had sought to deprive of a large sum, pay the expenses of the unsuccessful attempt. The trustees had been quite prepared to administer the estate without this attack by alleged creditors.

LORD PRESIDENT—There is no doubt that this question is an important one, looking to the magnitude of the costs which must have been incurred. There have been cases in which a testator has done something by which an ambiguity or a doubt has been created. Wills have been of such an ambiguous character that in order to clear the questions arising under them and make the administration safe or practicable disputes as to their construction and effect have had to be decided. It has been said in some of these cases that the doubt or ambiguity was created by the testator, and that he must pay for clearing it, that is to say, that his estate must pay for what he had done. But I am unable to see that the present case is of that kind. There is no doubt or ambiguity, so far as we know, in regard to the legal construction and effect of any testamentary instrument which was executed by Sir William Brooks, and the contention of the pursuers is that he disposed by an unambiguous settlement of estate which he had no power to dispose of, that he had disposed of the widow's share, the *jus relictæ,* and of the legitim of his children. Now, the decision of that question does not depend upon the terms or tenor of any writing, but upon facts entirely external to the testamentary instruments which he executed. I can well understand that if there was a state of facts in which the administrators of a testate estate did not feel safe to pursue an administration without the authority of the Court, that also might be a case in which the costs of obtaining that authority might be given out of the estate, or no costs given; but that is not the nature of the present case. Both the pursuers here, Lady Brooks and Lady Huntly, are claiming adversely to Sir William's testamentary settlement. They maintain that he disposed of property which he had no right to dispose of—in other words, that he truly disposed of their property. Now, I am not able to see that there was any serious doubt as to that, or that even if there was, the question depended upon anything for which Sir William was responsible, and therefore it appears to me that there is no ground for treating this case differently from ordinary cases, and that the expenses which we now have to dispose of, like the expenses before the Lord Ordinary, must follow the result.

LORD ADAM—I am of the same opinion, and my opinion is founded entirely upon the practice and procedure in such cases in our own Courts. I do not know or pretend to know anything about the rules of the Probate Court in England or of other courts, or how they deal with a case of this kind. I put that entirely aside. How it works out I do not know, but I think if the doctrine is applied which the Dean of Faculty wishes us to apply in this case, namely, that in a case of domicile where there may be some difficulty about the facts, either party though unsuccessful is to have expenses out of the estate, we shall have a great many more cases of disputed domicile than we have

had, and I should not be willing to introduce such a rule into the law of Scotland. Hitherto we have got on without any such rule. Then, as your Lordship has pointed out, this is not a claim under the will at all. It is not a claim arising under an alleged ambiguity in the will, or under the construction of the will, or anything of the kind. We know there are cases where an ambiguity has been created by the act of the testator himself. In most cases—I do not say all—the parties got their expenses out of the estate because the testator was at fault. But this is not a case of this kind at all. It is a claim made by a person in the character of a creditor of the estate—a creditor as against the beneficiaries on the estate—and that really is their position. He says, "the testator has disposed of money that I am entitled to," whether in the case of the *jus relictæ* or the legitim. That is an indirect challenge of the will, and if so, according to my experience, the unsuccessful party in that case as in every other case is liable to expenses, which must follow the result. Here the whole expenses of the litigation have been caused by this claim adverse to the will. It may be that if there had been no dispute there might have been a little formal expense in the Probate Court, and that would have been all, but to say that, because not of an ambiguity in the will, but of a doubt which has been raised as to the domicile of the testator because he chose to have a residence in one country as well as in another, the expenses of the litigation are to fall upon the estate, is to my mind out of the question. In adhering to the law of Scotland we can be put right elsewhere if necessary, but I think that the Lord Ordinary is quite right as to the expenses in this case, and therefore I think we should adhere to his interlocutor in that respect.

LORD M'LAREN—I am very unwilling to express a difference of opinion in regard to expenses, but I cannot shut my eyes to the fact that the costs, especially in the Outer House, of the investigation into Sir William Brooks' domicile must amount to a very large sum of money. These costs represent a sum of money much greater than we often have to decide upon in dealing with the merits of other actions, and therefore, as the case may go further, it would not be right that I should withhold my opinion. Now, my opinion is that each party should bear their own expenses in the Outer House, but that the expenses in the Inner House should follow the event. I am not of opinion that cases regarding the administration of a testamentary estate have any application to the present question. In such cases there is a common fund, the testamentary estate, upon which a number of parties are claiming, all claiming *ex facie* of the will, because their names are in the will or one or other of the testamentary instruments, and in such cases it has been the practice in Scotland—and if I am not mistaken in England also — to allow all parties their costs out of the estate, at least in the court of first instance. It may be that in such cases some of the claimants get nothing because of some ambiguity or some question of revocation, but nevertheless, as they are named in the will, they are all supposed to have such an interest in it as to entitle them to have their question tried at the expense of the fund. The statement of that principle suffices to show it has no application to a question of this kind. But again, I do not think that this case is to be ruled by the principle which we apply to actions of reduction of a will where either the testamentary capacity of the alleged testator or the fact of his having made a will is in dispute, because it has been the practice, I think on sound principle, to deal with such cases as entirely and absolutely hostile litigation where expenses throughout follow the event. But this case appears to me to differ from both these categories, because it was necessary in order to a safe administration of this estate that the domicile of Sir William Brooks should be ascertained. Proof must be given of domicile in the Court of Probate in England, or in an analogous proceeding in Scotland. Where there is no doubt about the domicile that proof may be of a merely formal character, but where there is a real doubt, as in this case, I cannot see that the trustees would be in safety to distribute the whole estate in terms of the will, ignoring the claims of legitim and *jus relictæ*, without satisfying a court of justice either in England or Scotland that the deceased was domiciled in England. In order to satisfy the Court proof would have to be adduced —it may be not at such great length as has been allowed in a contentious case. Perhaps there has been too much proof, too much printed matter introduced into the case, but that would be a question of taxation. But now, if a proof of some kind is necessary, it is always to the advantage of the distribution that the adverse interest should be represented and both views submitted to the Court. Therefore, on the ground that the proof of domicile was necessary to safe administration, I think the investigation of the facts in the Court of first instance ought to be at the expense of the estate. That, however, would not apply to the Inner House expenses. Apparently the mode of dealing with the expenses which I propose is one which has been followed in the large majority of the domicile cases in England — I think the Dean of Faculty said in all but one, where the circumstances were peculiar; and with the utmost respect for the opinion of Lord Adam, I do think that in questions of expenses English authority may be usefully cited, as it is cited every day in mercantile cases, and many other questions, in which there are no peculiarities of our own law that ought to lead to a difference of practice. But I find that in the last case in our own courts—the case of *Fairbairn*—the Outer House expenses of both sides were paid out of the estate, and that is going further than I should propose, but then that was by agreement of parties. As

nothing was said against that proposal in the Outer House, I think it not unlikely that, apart from consent, expenses would not have been given in the Outer House to either party, and I am not aware of any rule or practice in our Courts that would oblige us to give expenses in this case. For these reasons therefore—though, of course, without very great confidence in my own opinion, since it differs from that of your Lordships—I must respectfully dissent from the order proposed.

LORD KINNEAR—I agree with your Lordship in the chair and with Lord Adam, and I confess I must agree with Lord Adam in thinking that in a question of this kind we ought to follow our own practice, not because I have any doubt that the practice of the English Courts may be extremely valuable and extremely well founded, but because it would be very dangerous to follow a practice with which we are so imperfectly acquainted, and as to which I say for myself that I know absolutely nothing whatever. I agree with the view that we must look at this case as an action by the pursuers for the purpose of attacking the will of Sir William Cunliffe Brooks. I do not think it is at all a litigation of the kind which arises from ambiguous testamentary disposition, or from any act which may well be ascribed to the testator. The attack is not suggested by any ambiguity in the document itself, nor does it arise from any ambiguity in his own conduct. His whole course of life was perfectly open and well known, and the difficulty arises merely in the application of general rules in the law of domicile to particular facts. If there be any difficulty in the exposition or application of the rules of domicile it is not one for which Sir William Brooks or his estate should be made responsible, and I therefore see no reason for departing from the general rule that expenses should follow the result.

Counsel for the *curator ad litem* moved for expenses out of the shares of the trust-estate falling to the minor children.

The Court pronounced this interlocutor:—

"The Lords having considered the reclaiming-note for the pursuer Dame Jane Davidson or Brooks against the interlocutor of Lord Low, dated 4th July 1901, and heard counsel for the parties, Adhere to the said interlocutor: Refuse the reclaiming-note, and decern: Find the *curator ad litem* to Ean Francis Cecil, Richard William Cecil, Edith Celendine Cecil, and Esterel Edith Philippa Louisa Tillard entitled to expenses, as between agent and client, out of the shares of the estate falling to be paid to them respectively: also Find the pursuer liable in additional expenses since the date of the interlocutor reclaimed against, and remit," &c.

A similar interlocutor was pronounced in Lady Huntly's action.

Counsel for the Pursuer, Lady Brooks—Dean of Faculty (Asher, K.C.)—Macphail. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Pursuer, Lady Huntly—Balfour. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Defenders—The Lord Advocate, K.C.—Shaw, K.C.—Cullen—Adam. Agents—J. & A. F. Adam, W.S.

Counsel for the Compearing Defender, Mrs Hawkshaw—Ewan Macpherson. Agents—J. & F. Anderson, W.S.

Counsel for the *Curator ad litem*—Pitman. Agents—J. & F. Anderson, W.S.

Tuesday, July 8.

SECOND DIVISION.

[Dean of Guild, Edinburgh.

SOMERVILLE *v.* DICK.

Burgh—Dean of Guild—Buildings—Internal Alterations—Alteration of Structure—Hatchway—Cutting of Joists—Necessity for Warrant—Edinburgh Municipal and Police Amendment Act 1891 (54 *and* 55 *Vict. cap.* cxxxvi.) *sec.* 59.

Held (*diss.* Lord Young) that the operation of cutting away part of the joists of a floor in a house for the purpose of making a hatchway was an "alteration of structure," for which a warrant from the Dean of Guild Court was required under the Edinburgh Municipal and Police Amendment Act 1891, section 59.

Burgh—Dean of Guild—Penalty—Technical Offence—Amount of Penalty.

A technical offence against the Edinburgh Municipal and Police Amendment Act 1891, section 59, having been committed by the carrying out of certain operations upon the floor and joists of a house without a warrant, in the erroneous but *bona fide* belief that such a warrant was not required, the Court on appeal, in view of the character of the offence, and of the fact that certain other items in his complaint had been ultimately abandoned by the Dean of Guild Court Procurator-Fiscal, *reduced* a penalty of £10 imposed by the Dean of Guild to the sum of one shilling.

Expenses—Dean of Guild Court—Petition Partially Abandoned by Procurator-Fiscal—Technical Offence—Sole Ground of Complaint Insisted in Taken only at Late Stage of Case.

A proprietor of subjects in Edinburgh who was making certain alterations on his premises made no application to the Dean of Guild Court for a warrant, being advised that no such warrant was required in the circumstances. After his operations had been practically completed he was served with a petition presented in the Dean of Guild Court by the Procurator-Fiscal