

## COURT OF SESSION.

Thursday, March 12.

## FIRST DIVISION.

[Lord Cullen, Ordinary.]

## CORBIDGE v. SOMERVILLE.

(See also *ante*, 50 S.L.R. 591, 1913 S.C. 858.)*Husband and Wife—Divorce—Reduction—Jurisdiction.*

In an undefended action of divorce at a wife's instance the Lord Ordinary granted decree. The husband's trustee in bankruptcy thereafter brought an action for reduction of the decree, on the ground that the husband was a domiciled Englishman.

*Held* that, as the husband's domicile was English, the Court had no jurisdiction to grant divorce, and decree *reduced*.

*Domicile—Acquisition of Domicile—Intention to Abandon Domicile of Origin.*

A, whose domicile of origin was Scottish, removed with his family from Scotland when he was a lad of fifteen. After spending a year in Paris and two years as an apprentice in Liverpool he went to India, where he remained till 1868. He had no family home in Scotland, the family estate having been sold in 1843. After leaving India he settled in Liverpool, where he pursued a mercantile life for the next twenty-six years, viz., from 1868 to 1894. He married a Scotswoman in 1870, and in 1871 B, his son, was born. After retiring from business in 1891 A remained in Liverpool until 1901, when he left it for reasons of health and went to Bath. He died at Weymouth in 1908. There was no evidence that A had any relations in Scotland, and his visits to Scotland were simply for the purposes of sport. He retained, however, as his solicitors, the family agents in Scotland, his marriage contract was executed in Scotch form, and in his will, which was prepared by his Scotch solicitors and to which were appended several holograph codicils, he was described as a domiciled Scotsman.

*Held*, having regard to the whole course of A's life, that A had by 1871 acquired an English domicile, and that accordingly B's domicile of origin was English.

On 27th November 1911 Cooper Corbidge, C.A., London, trustee in the bankruptcy of Samuel Wallace May Somerville, residing in Cornwall, *pursuer*, brought an action against the bankrupt's former wife Mrs Caroline Stuart May Somerville, *defender*, and the bankrupt for reduction of a decree of divorce pronounced against the bankrupt by Lord Dewar on 18th June 1910, the ground of reduction being that Mr Somerville was a domiciled Englishman, and that accordingly the Court which pronounced the decree had no jurisdiction.

The *facts* are given in the opinion (*infra*)

of the Lord Ordinary (CULLEN), who on 12th November 1913 granted decree as craved.

*Opinion.*—"The question now falling to be decided on the proof recently taken is whether the bankrupt Samuel Wallace May Somerville was domiciled in Scotland at the time of the decree of divorce under reduction. He was born in 1871 in Liverpool, where his father John May Somerville resided and carried on business as a merchant, and as the first question raised relates to the domicile which he derived from his father, it is necessary to consider how the matter of John May Somerville's domicile stands; and as, further, it is conceded by the defender that the domicile of a child follows, during the years of dependency, that of the father, the critical period at which John May Somerville's domicile falls to be regarded is not earlier than the year 1885, when according to Scots law Samuel Wallace May Somerville emerged from pupillarity.

"John May Somerville, the bankrupt's father, was born at Broomrig, near Dumfries, in 1840. His parents were both Scotch, his father's name being Samuel Henderson Somerville. There was a property called Whitecroft in the Somerville family. It was in Dumfriesshire, but nothing more is ascertained about it than this, that while the father of Samuel Henderson Somerville had directed it in his will to be entailed, the entail was ineffective, as the property had to be sold at his death to pay debts. The free proceeds were settled in trust for the benefit of Samuel Henderson Somerville and his wife in liferent in the first place, and for other purposes.

"In 1855, when John May Somerville was fifteen years of age, his father Samuel Henderson Somerville gave up residence in Scotland and went to reside abroad, partly from motives of economy and partly from considerations affecting his health. He resided in various places on the Continent, and died at Ragatz in Switzerland in 1875. He never resumed residence in Scotland, although he visited it from time to time. He would appear to have remained during his life domiciled in Scotland.

"John May Somerville, the bankrupt's father, left Scotland with his father in 1855, being then fifteen years of age. He never thereafter resumed residence in Scotland. His education was completed in Paris. Thereafter he adopted a mercantile career, and in 1856 or 1857 entered an office in Liverpool as an apprentice. On the completion of his training there he accepted service with a firm in Bombay, where he remained for some years. When he left the service of that firm he returned, about 1868, to Liverpool, and entered into partnership there with the witness Mr Hawkes for the purpose of carrying on a mercantile business under the style of Hawkes, Somerville, & Company. The partnership was from year to year, and continued for twenty-six years.

"He married in 1870 a Miss Walker belonging to Glasgow. An antenuptial contract was entered into in Scottish form, which was drawn by the lady's solicitors in Glasgow and revised by Messrs Fraser, Stodart,

& Company, W.S., Edinburgh, who had been the solicitors of the Somerville family, and continued to act for John May Somerville throughout his life. The deed contained an exclusion of *jus relicte* and legitim.

"From the period of his return from India about 1868 until 1901 John May Somerville resided in Liverpool (in which I include Birkenhead). The houses which he occupied would appear to have been held on lease. He latterly lived in Bidstone Road, Birkenhead, in a large house handsomely furnished. His father died in 1875. His mother thereafter came to live in family with him, and continued to live with him until her death in 1885. His wife died in 1891. At the end of 1894 he retired from business. He continued to live in Bidstone Road, Birkenhead, until 1901. About this latter period his health became unsatisfactory, and on medical advice he went to live in Bath. The lease of his house in Birkenhead had come to an end and he gave up the house. He entered into an agreement with a brother resident in London whereby the latter hired from him his furniture, which was of considerable value. At Bath he lived in rooms. From there he went on occasional visits to Liverpool. Between 1901 and his death his settled residence was in Bath. His death occurred in 1908 at Weymouth, where he had gone on a short holiday.

"From 1868, when John May Somerville went into partnership with Mr Hawkes, until he went to Bath in 1901, he resided, as I have said, in Liverpool. And as a person's residence in a particular place may be of one kind or another, and may involve, or may not, his settlement there, I am of opinion that John May Somerville was fully settled in Liverpool. Apart from holidays in pursuit of sport (to which I shall advert in a moment) all the elements which go to make up a settled residence were present. His business and worldly interest were centred in Liverpool, and his local interests and ties were just those of any domiciled Englishman residing there. He never had a residence elsewhere. He did not, prior to 1901, express any desire or intention of leaving Liverpool and of going to live elsewhere. In particular, he did not express any desire or intention of going to live in Scotland. He was freed from his direct business tie with Liverpool when he retired from his firm in 1894, but he made no change in his residence. It is true that he had a current lease of his house. But had he entertained any definite desire of returning to his native country, I take it that the disposal of the remainder of his lease would not have presented any great obstacle. It is also true that in 1897 he proposed to his brother a hiring arrangement regarding his furniture (afterwards carried out in 1901), but this was apparently only because he thought it better not to keep up such a large establishment for his sole accommodation. The proposal was not associated with any intention of going to Scotland.

"John May Somerville was a keen sportsman, and his holidays were devoted to the pursuit of sport in the form of shooting and fishing. He spent them in Scotland, Ireland,

and Norway, but more particularly in Scotland, where for a number of years he shared shootings and fishings with a friend, Mr Beauford. These were in the north, mostly in Ross-shire. Mr Beauford and he stayed there in a hotel, there being no lodge available. The account given of his comings and goings shows clearly enough that these were regulated merely by sporting objects. He never resorted for sport to Dumfriesshire, his native county, or to the south of Scotland. Indeed the evidence does not show that he ever visited that part of Scotland after he left it at the age of fifteen. I do not regard these sporting holidays in the north of Scotland as a material element in the case. They are no more evidence of an *animus revertendi* on the part of John May Somerville than they would be evidence of an *animus* on the part of his co-tenant Mr Beauford to settle in Scotland.

"John May Somerville would appear to have had a marked Scottish sentiment. But he was content to cherish it on a foreign soil.

"Much stress is laid by the defender on certain declarations as to domicile made by John May Somerville in his testamentary writings. Of these he executed a number. In 1890 he made a new will, which was drawn up by Mr Fraser, W.S., Edinburgh, whose services as his solicitor he retained throughout his life. In drawing up this will of 1890 Mr Fraser inserted a description of the testator as a domiciled Scotsman, and in sending the draft to Mr Somerville for approval he drew attention to the description adding that in his opinion Mr Somerville was still domiciled in Scotland, and that a declared domicile in Scotland would facilitate the winding up of his estate on his death. Mr Somerville returned the draft approved, without making any reference to the topic of domicile, and the will was executed as framed. In subsequent testamentary writings framed by Mr Fraser the description was repeated without any further reference to it in communications between him and his client. The defender points to these various documents embodying declarations by Mr Somerville as to his domicile. Now in certain cases, as, for example, in cases of double residence and a separation of interests between one country and another, such declarations may be of some importance. In other cases declarations as to domicile will be of no importance. A man cannot change his domicile merely by a declaration. If he is born and lives out his life in Scotland, he cannot make himself domiciled in England by declaring that country to be the place of his domicile. *E converso* if he migrates to England and settles in it, *animo manendi*, he cannot retain his Scottish domicile, contrary to the facts of his life, by declaring himself still domiciled in Scotland. His declaration in such circumstances is merely a defiance of the legal rule as to domicile under which settlement in a foreign country, *animo manendi*, involves the acquisition of a domicile there, although the person in question may either know nothing about the legal conception of domicile, or, if he does, may desire, con-

trary to law, to avert the consequences of his actings. It is true that a man can only change his domicile *animo et facto*. But, as I understand the law of the matter, the *factum* is residence in a new country and the *animus* is the *animus manendi*, that is to say, residence there with the intention of continuing such residence permanently, or indefinitely, without any *animus revertendi*. If a man settles himself in a new country of his free choice, either with a definitely realised intention of residing there to the end of his days or (as is the more common case) with the intention of residing there indefinitely, and without harbouring any intention of reverting to the country he has left, a change of domicile follows, and it is not required as a condition of such change that he should know what domicile involves, should think about it, and, being seised of the subject, should make a resolution—superadded to his intention of permanent or indefinitely prolonged residence—to effectuate the legal change. Most people who change their domicile by settlement in a new country never apply their minds to the legal aspect of the matter, and make no resolution regarding it. They settle and the law attaches the change in their legal relations. To take an extreme case, an illiterate person who never heard of the subject of domicile, is incapable of intelligently grasping its meaning, and is ignorant of the fact that the laws of England and Scotland differ, may change his domicile by leaving the one country and settling down permanently in the other. This, of course, does not figure the case of John May Somerville, whom I am willing to credit with a knowledge of what domicile means, and with a realised intention of continuing to be domiciled in Scotland. But I apply the observations on which I have ventured to this effect that John May Somerville, having settled himself permanently or indefinitely in England with no intention of ever reverting to Scotland as a home, became in consequence domiciled in England, and could not avert his change of domicile by electing to describe himself as a domiciled Scotsman. Domicile of choice is a conclusion of inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with the unlimited intention of continuing to reside there. This is a description of the circumstances which create or constitute a domicile, and not a definition of the term. There must be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief of illness. And it must be residence fixed not for any defined period or particular purpose, but general and indefinite in its future duration. It is true that residence, originally temporary, or intended only for a limited period, may afterwards become general and unlimited, and in such a case, so soon as the change of purpose or the *animus manendi* can be inferred, the fact of domicile is established.—*Per* Lord Westbury in *Udny v. Udny*, L.R. 1 Sc. App. 441, and 7 Macph. (H.L.) 99. This statement may be

susceptible of amplification in cases of double residence and division of life as between one country and another. But I appeal to it as satisfactorily stating the rule as to the constitution of a domicile of choice in such a case as that of John May Somerville, who voluntarily fixed his sole residence in England with an unlimited or indefinite intention of continuing to reside there. And I cannot say that I have much difficulty in holding that John May Somerville was at the date of his death in 1908 domiciled in England. The question at issue, however, draws back, *ex hypothesi*, to the year 1885. I equally hold that he was at that period domiciled in England. He then had had his sole residence in England for about seventeen years. He had no tie with Scotland save that of birth and ancestry. His business and worldly interests were centred in England. He had not expressed or evinced any intention of reverting to Scotland as a place of residence. And the facts of his life after 1885 may, I think, be legitimately referred to as confirming the inference which I draw of his *animus manendi* at the earlier period.

“If the issue presented for decision on this head of the case had been as to John May Somerville’s domicile in 1871, when his son, the bankrupt, was born, I should have felt more difficulty. At that time he had only resided and had his business in Liverpool for three years. But, *ex concessis*, I am not called on to decide that question. Length of residence counts, taken along with the other circumstances of a man’s life. And I am of opinion, on a review of the facts of John May Somerville’s life, that at least by the year 1885 he had by settled residence in England become domiciled there.

“If I am right in the view above expressed, it is decisive of the case, as Samuel Wallace May Somerville, the bankrupt, at least when he emerged from pupillarity according to Scots Law in 1885, took an English domicile derived from the domicile of choice of his father. But as I may be wrong, there remains for consideration the question as to the domicile of Samuel Wallace May Somerville at the date of the decree of divorce under reduction, on the assumption that his domicile derived from his father when he emerged from pupillarity in 1885 was a Scottish domicile.

“A domicile of origin persists until another is acquired by choice. But as a domicile of origin may arise under one set of circumstances or another, it will yield more or less readily to facts pointing to an intention to change it, according to the circumstances of the particular case. It is one case, for example, if a man, having his domicile of origin in Scotland, has been born there, and continues in settled residence with all his worldly interests there, and only in middle life makes the change to a new country of residence, say England, which gives rise to the question. It is another case if the man is born, say in England, where his Scotch father is temporarily settled, and grows up to manhood there, if he has no direct personal relations with Scotland, has never taken up residence

there, and has nothing to bind him to that country save the tie of ancestry. As between two such cases the *onus* of proving an *animus manendi* in England will be less easily discharged in the former, the man having been rooted in Scotland in point of fact, and it being necessary to show that he intended to uproot himself and transplant himself in England. In the latter case there are no roots to uplift, and it may be the more easily shown that the man intended to settle in the country where he was born and has grown up.

“The latter of these cases is that of the bankrupt Samuel Wallace May Somerville. He was born in Liverpool, where his father resided and carried on business, and he was thus educated in England in the same way as the son of any domiciled Englishman, first at Harrow and thereafter at Sandhurst. He never resided in Scotland—apart from accompanying his father sometimes on sporting holidays—and he had no tie with Scotland calculated to lead him to resort thither unless his father, on whom he was dependent, should have chosen to revert to Scotland, which he never did. If Samuel Wallace May Somerville, on attaining manhood, had entered on the pursuit of a profession in England, nothing more, I think, would have been necessary to show that he had made England his home by adoption, and to attach to him a domicile of choice therein. As it was, he entered the army, and so did not locate himself specifically in England. He went with his regiment to India, where in 1899 he married the defender, being then twenty-eight years of age. He turned out improvident and dissolute. Not long after his marriage he resigned his commission, for reasons which the evidence does not make clear. He returned with his wife to England, where he resided until January 1901. He was in debt, and his father agreed to clear his feet on condition that he went to New Zealand. He lived with his wife and child in New Zealand on an allowance from his father until his father's death in 1908. Immediately on receipt of notice of his father's death he returned to Britain and went to Edinburgh to interview Mr Fraser, W.S., regarding his inheritance. This may be stated to have been (1) a fund of £5000 or thereby falling to him absolutely, and (2) a life interest in a settled fund of £18,000 or thereby which is at stake in this action. Having ascertained what fell to him, he then determined to purchase a residence in the South of England. The selection of the South of England was influenced by the health of his wife. The purchase of a residence—in contrast to the renting of one—was influenced by Mrs Somerville's view that her husband's available capital would be more safely disposed of in that way than if left in his hands. In the result the bankrupt purchased a residence known as Warnford Cottage, in Hampshire, at the price of £2150. It was not in good tenable repair, and he proceeded to have it made so, and also to have it enlarged by the building of a billiard room. For these purposes he contracted with a firm in London, whose account forms

the greater part of his liabilities under his bankruptcy. The repairs and beautifying of the house, and the addition thereto, were duly carried out, and in September 1909 the bankrupt settled down in residence at Warnford Cottage with his wife and child. Unfortunately he had spent in other ways most of the money which should have gone to pay the bill for the house, and in October 1909 he was served with a writ at the instance of the London firm. On 2nd November he left Warnford Cottage for London, and he did not thereafter live with the defender. In April 1910 the defender raised against him in this Court an action of divorce on the ground of adultery committed by him in London in November 1909, and in that action she obtained, on 18th June 1910, the decree in absence which the pursuer now seeks to reduce. Since he left Warnford Cottage on 2nd November 1909 the bankrupt has resided in England, and since the decree of divorce he has subsisted on an allowance made to him by the defender.

“Such being the material facts of the bankrupt's life, the question under consideration is, whether, if his domicile of origin was Scotch, he retained that domicile at the period of the divorce, or, on the contrary, had then become settled, permanently or indefinitely, in England, so as to acquire a domicile of choice there. The question is a somewhat narrow one. I have come to the conclusion that his domicile was in England, and I shall state my reasons for so thinking. In the first place, his assumed Scottish domicile of origin carried with it no linking of his actual life with Scotland. He has never had any residence there. I put aside the sporting holidays with his father as not material to the issue. Apart from the time he spent abroad he has lived all his life in England and has had no home elsewhere. These facts might not have been enough, under the conditions of his life, to definitely fix him in England as being by choice the country in which he had settled *animus manendi*. But what he did after his father's death, when he became independent as to means of living, seems to me to be sufficient to show his intention to settle in England *animus manendi*. He purchased Warnford Cottage in Hampshire, and the circumstances attending its purchase make it clear in my opinion that he intended to settle in it with an indefinite intention of continuing to reside there. There was no intention of merely sojourning there or elsewhere in England with a prospect of ultimately resorting to Scotland. It is true that the bankrupt has, or professes to have, a strong inherited sentiment for Scotland. Also that he seems to have had airy dreams of some impossible future when he might reacquire Whitecroft in Dumfriesshire; but these were quite divorced from the realities of his situation, and formed no factor in the practical ordering of his life. When his father died, and he had ascertained his inheritance, he took up residence in England, and there is, in my opinion, no reliable evidence to show that he entertained an intention of leaving England for Scotland

in the future. People do not, for the most part, come to a resolution that they will end their days in a particular place where they live. What they usually do is to settle down or continue settled in residence in a particular country with an indefinite intention of continuing to reside there. And such an intention constitutes the *animus manendi* required to attach to them a domicile in the country where they are so settled.

"The period of the bankrupt's actual residence at Warnford Cottage was very brief. And the question under consideration would, no doubt, have been easier of solution had he resided there for a prolonged period after he made the purchase. But the material element, on the facts as they stand, is not the brevity of his residence but his intention of residence as importing an *animus manendi* in England or not. I am of opinion that he did settle *animo manendi* in England, where he has since resided, and, accordingly, that if the domicile he derived from his father be assumed to have been in Scotland, he had at the date of the decree of divorce under reduction acquired, by choice, a domicile in England.

"Following the views which I have expressed I shall pronounce decree of reduction in terms of the conclusions of the summons."

Mrs Somerville reclaimed, and argued—The Lord Ordinary was in error in regarding the year 1885—when the bankrupt became *sui juris*—as the critical date; the critical date was 1871, the year of his birth. At that date his father's domicile was Scotch. The bankrupt's domicile of origin was therefore Scotch. *Esto* that when he attained pupilarity he could have acquired an English domicile, he had never done so. The *onus* of showing that a domicile of origin had been abandoned was a heavy one, and the pursuer had failed to discharge it. As to what would infer abandonment of a domicile of origin and the acquisition of a domicile of choice, reference was made to the following authorities—Westlake's *Private International Law* (5th ed.), sec. 256 *et seq.*; *Hoskins v. Matthews* (1855), 8 De G. M. & G. 13; *in re Steer* (1858), 3 H. & N. 594; *Moorhouse v. Lord* (1863), 10 H.L.C. 272; *Capdevielle v. Capdevielle*, (1869) 21 L.T. 660; *Steel v. Steel*, July 13, 1888, 15 R. 896, 25 S.L.R. 675; *Fairbairn v. Neville*, November 30, 1897, 25 R. 192, 35 S.L.R. 178; *Brooks v. Brooks' Trustees*, July 15, 1902, 4 F. 1014, 39 S.L.R. 816, *aff.* December 14, 1905, 8 F. (H.L.) 4, 43 S.L.R. 112; *Winans v. Attorney-General*, [1904] A.C. 287.

Argued for respondent—The evidence showed that the bankrupt's domicile of origin was English, and if that were so the claimer's case admittedly failed. If, however, the bankrupt's domicile of origin were Scotch, the facts showed that he had abandoned it, and that at the date of the divorce he was a domiciled Englishman. As to what was sufficient to acquire a domicile of choice, reference was made to *Somerville v. Somerville* (1801), 5 Vesey 749a; *Donaldson v. McClure*, December 18, 1857, 20 D. 307; *Hodgson v. De Beauchesne*, (1858) 12 Moore P.C. R. 285; *Bell v. Kennedy*, May 14, 1868,

6 Macph. (H.L.) 69, 5 S.L.R. 566; *Udny v. Udny*, June 3, 1869, 7 Macph. (H.L.) 89; *Douglas v. Douglas*, (1871) L.R., 12 Eq. 617; *in re Craignish*, [1892] 3 Ch. 180; *Murray v. Maclachlan*, (1900) 8 S.L.T. 233.

At advising—

LORD PRESIDENT—We have listened to an interesting discussion in this case, in which many aspects of the law of domicile have been explored and reviewed. We have traversed a region in which there are no conflicting decisions but many apparently conflicting dicta. It is not my intention—because it is wholly unnecessary for the purposes of this case—to endeavour to reconcile these conflicting dicta, if, indeed, they be conflicting, for I agree entirely with the view expressed by the Lord Ordinary (Lord Low) in the *Brooke's case* (4 F. 1014), where he says—"It has . . . 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."

That observation seems to me to be very apposite to the case which we have before us, which is not one in which we have to consider and decide between two competing residences, or one where we have to decide whether the man had a residence in the country in the true sense or not. I am satisfied, as I think all your Lordships are, that these questions of domicile can never be solved by phrases, but only by an accurate examination of the facts of the particular case. And for my part I am quite ready to endeavour to answer upon the evidence before us the question which was put by Lord Halsbury in *Winans' case* ([1904] A.C. 287)—"Was this place intended to be the man's permanent home?"—and I should be disposed to say that the domicile of a man is just that place in which his home is fixed without any present intention of removing therefrom. These simple words seem to me to express much better than more elaborate phraseology the true question at issue.

Now the difficulties, it appears to me, vanish when we pay regard to the simple facts of John Somerville's life story. He was born in Scotland in the year 1840, and when a lad of fifteen he removed with his family from Scotland. And the family from that date onwards ceased to have any connection with Scotland, ceased to have any ties which bound them to Scotland—save this, that their man of business remained in Edinburgh. In the year 1868, after his education had been completed and his business training had been commenced, he settled down in Liverpool and began trade there as a merchant. He was married in the year 1870, and the bankrupt Samuel May Somerville was born in the year 1871. And the first question we have to consider is, was John Somerville a domiciled Englishman or a domiciled Scotsman in 1871?

Now in considering that question it is legitimate to have in view subsequent events, which often reflect—and in this case I think do reflect—an invaluable light upon the intention of the bankrupt's father at the date of the bankrupt's birth. With these subsequent events, as they are disclosed in evidence now before me, I come without hesitation to the conclusion that at that date John Somerville was a domiciled Englishman. He had no residence in Scotland. He had no need to abandon any residence, for he had no residence to abandon. He could not abandon his domicile of origin in the true sense of the word. No man could. His domicile of origin always remains ready to revive, however long dormant, when the domicile of choice ceases. He simply took up his residence, like any other business man, in the town of Liverpool, and he remained a citizen of Liverpool until the year 1901. He gave up business in 1894. He was then released from all the commercial ties which bound him to the city of his adoption. But he did not take advantage of that opportunity to retire or revert to his native land. On the contrary, he continued to reside in Liverpool and to discharge all the duties, so far as we see, of an ordinary citizen down to the year 1901, when he left Liverpool only for reasons of health. For, so far as the evidence goes, it leads, I think, to the conclusion that he would have spent the remainder of his life in the place where he had had his residence and carried on business for more than a quarter of a century had it not been that the condition of his health demanded a change. He made a change—to Bath, where he lived, off and on, until the year 1908, when he died.

Accordingly John May Somerville, dying at the age of sixty-eight years, had never had a residence in the true sense of the word in Scotland from the time when he was a boy of fifteen, but had, in the ordinary sense of the word, a permanent residence in England—in Liverpool for the most part—throughout the whole of that period. But a permanent residence does not, as the Lord Ordinary points out, mean a residence which the man when he begins to occupy it determines to occupy for the remainder of his life. Men never make such resolutions. Indeed we cannot in this fleeting world have a permanent residence in that sense of the word. But it was his residence all these years, and he retained no tie with his native land except, as I have said, his man of business.

Now Mr Murray founded very strongly and very properly upon the terms in which the marriage contract, made in 1870, was expressed, and the two trust-dispositions and settlements of John Somerville, with the series of codicils appended to the former, as showing a clear intention on the part of John Somerville to retain his Scottish domicile. But these deeds are very easily explained by the fact that the man of business who was employed to draw them naturally drew them in the language with which he was familiar and not in the language of a foreign state, and very naturally, I suppose,

desired that the succession to his client's means and estate should be regulated by the law of Scotland—a desire which, no doubt, John Somerville as a patriotic Scotsman may have shared. But while some of these expressions might have been of weight in a doubtful case, they really have no weight in a case such as this where there is no double residence and no doubt as to where the man's permanent residence in the sense I have explained is.

I therefore reach the conclusion without hesitation that, upon the simple facts as I have endeavoured to recite them, the domicile of John Somerville was English at the date of Samuel Somerville the bankrupt's birth; and therefore I somewhat modify, so far as I am concerned, the conclusion at which the Lord Ordinary arrived when he says that "If the issue presented for decision on this head of the case had been as to John May Somerville's domicile in 1871, when his son, the bankrupt, was born, I should have felt more difficulty. At that time he had only resided and had his business in Liverpool for three years." Now that is perfectly true, but, nevertheless, the Lord Ordinary seems to have left out of view for the moment the train of subsequent events, which, I repeat, throw back valuable light upon the intention of John Somerville in 1868, and leave no doubt in my mind that he intended then to take up his permanent residence in Liverpool.

If this conclusion is correct, then Mr Murray says *cadit questio*. But it is satisfactory to see that if we had regard merely to the circumstances of the bankrupt's own life we should reach exactly the same conclusion. He never was in Scotland except for temporary visits. He never had any residence there. But when he had an opportunity—his first opportunity—to take up a residence at all, he took it up in England. I do not seek to press too hard against him the answer which he gave in the examination in bankruptcy, where he says that after buying Wharnford Cottage in Hampshire he had the idea of making his permanent home there and settling down there with his wife and daughter; and if that answer had not been in accordance with the proved facts of the case, of course we should have disregarded, or at all events attached very little importance to it. Answers given to legal gentlemen who are cross-examining a witness upon questions involving mixed fact and law are of course of very little value if it can be shown that the witness did not fully apprehend what he was saying. But this was in answer to a very simple question of fact, and it appears to me to be in complete harmony with all the events in Samuel Somerville's life. I reach, then, without difficulty the same conclusion as that at which the Lord Ordinary arrives when he says—"I am of opinion that he did settle *animo manendi* in England, where he has since resided, and accordingly that if the domicile he derived from his father be assumed to have been in Scotland, he had at the date of the decree of divorce under reduction acquired by choice a domicile in England."

For these reasons I am for affirming the judgment of the Lord Ordinary, and I desire to express my entire agreement, subject to the modification which I have just mentioned, with the whole reasoning of the Lord Ordinary's note.

**LORD JOHNSTON**—We have had a most powerful argument from Mr Murray and his learned junior, and although I have come without hesitation to the conclusion that that argument cannot be sustained, I must confess that I do so with regret. The primary question in the case is the domicile of John May Somerville, the father, at the date of his son Samuel's birth, namely, 1871, because that of course is the date which gives Samuel his domicile of origin. If the question had arisen at or after 1894, when the father retired from business, or indeed at a period many years earlier, I should have had no difficulty in saying that John May Somerville's domicile, originally Scottish, had become English. But the question is much more difficult if it is to be determined as at 1871.

John May Somerville's life had been as follows:—He was born in Dumfriesshire in 1840; he left it after the sale of the family property in 1855; he lived for the best part of two years in Paris, where, I understand, he completed his education in a French school. But in respect that his father left Scotland, apparently in narrow circumstances, and continued to live at various places on the Continent until his death, I think it is evident that John May Somerville had his own way to make in the world. Accordingly in 1857 he went for a year or two into a Liverpool merchant's office as an apprentice. It is matter of common observation that Dumfriesshire natives seeking business openings naturally drift towards Liverpool, where they find friends and fellow-countrymen. But after less than two years in this Liverpool office John May Somerville found an opening in India in the service of a Bombay business having Liverpool connections. There he remained for nearly ten years, 1859 to 1868. *Quo animo* he went to India is not known. It may have been to acquire a knowledge of the Indian end of an export business and make business friends and connections in India with a view to returning to Liverpool and establishing himself in such business there, as he ultimately did, or it may have been with a perfectly open mind ready to take the first opening that offered. If I may hazard a conjecture, I should think that the idea uppermost in his mind was the former, and that was consistent with subsequent events.

John May Somerville, then, did leave India in 1868, returned to Liverpool, and entered into a partnership in Liverpool to carry on a Liverpool-Indian business. But his partnership was only for a year, and thereafter from year to year. Notwithstanding this, that business he carried on from 1868 to 1894, or for twenty-six years. Two years after commencing business he married, and from that date onwards his home in the full sense, as well as his business interests, was centred in Liverpool. He retired from business in

1894, and his wife having died, considerations of his own health led to his leaving his home in 1901 for a warmer climate in the South of England, where he died.

Having regard to the prior history of John May Somerville, although he had a Scottish domicile of origin, it was a domicile in the theoretical or technical sense, and one with which he had no real connection since his father sold his property and left Scotland so far back as 1855; and allowing reasonable but not preponderating effect to the reflex light thrown by the events of his subsequent life, I come without any hesitation to the conclusion that in 1871 John May Somerville had acquired a domicile in England. The only real point in favour of a Scottish domicile is that to which your Lordship has adverted, namely, the fact that John May Somerville, although having all his business interests in England, retained as his solicitors the family agents in Scotland, and that accordingly all the documents connected with his estate and his business affairs, looked at from that point of view, were documents executed in Scotland, in Scotch form and having reference to Scots law. I have, as has your Lordship, given considerable weight to this consideration, but I cannot allow it to overcome the conclusion which I feel necessarily must be drawn from the other facts of his life.

If, then, the domicile of John May Somerville was English in 1871, the domicile of origin of his son Samuel May Somerville was English from his birth. There is no pretence that if this was the case, anything at any time of his life occurred to indicate that Samuel May Somerville had acquired a Scottish domicile of choice. And therefore, on these short grounds, although I do so with regret—for the result is itself an aggravation of the misfortunes which have already befallen the defender—I am compelled to the conclusion that the Lord Ordinary's interlocutor is sound and must be adhered to. I do not, however, think it necessary to enter upon the second question which his Lordship considers in his judgment. Had it been necessary to do so I would have desired time to consider my judgment.

**LORD MACKENZIE**—I am of the same opinion as your Lordships. It is impossible to overlook the fact that our judgment involves very great hardship to the defender in the action. The case is therefore one which deserves and has had most anxious consideration. But we have had an elaborate and excellent argument, and as I for my part base my opinion upon the facts of this case it would not have been of any avail to have taken further time to consider what our judgment should be. I think that this, like many other cases of domicile, is capable of being decided once the exact facts are ascertained, and that the difficulty is not with the law.

The question as put now is whether in 1871 John Somerville was a domiciled Englishman or not. That depends upon whether the *onus* which lies upon the pursuer has been discharged, which is to show



that his domicile of origin, which was Scottish, had been lost and an English domicile acquired. It has been pointed out in more than one case that it is easier for a Scotsman to acquire an English domicile than it is for either a Scotsman or an Englishman to acquire a domicile in a foreign country.

The law applicable to this case may be stated interrogatively. Was John May Somerville settled in England *animo manendi* when his son was born? Your Lordship has referred to the judgment of Lord Halsbury in the case of *Winans*, where this question was put—"Where was the home"? There is a passage which deals with the matter in the opinion of Baron Bramwell in the case of *in re Steer*, which was decided in 1858 (3 H. & N. 594), where a quotation is given from Phillimore on Domicile in these terms—"The definition of domicile according to the Roman law is as follows—In whatsoever place an individual has set up his household gods, and made the chief seat of his affairs and interests, from which, without some special avocation, he has no intention of departing; from which, when he has departed, he is considered to be from home; and which, when he has returned, he is considered to have returned home."

The facts in the case are that John Somerville was born in 1840 in Scotland. The particular connection with Scotland seems to have been with the estate of Whitecroft, in Dumfriesshire. John Somerville, however, was not born at Whitecroft, and in 1843, his father, who lived until the year 1875, sold Whitecroft. At the age of fifteen John Somerville left Scotland. He was in Paris for one year. He was an apprentice in Liverpool for two years; and then in 1859 he went to India, where he remained until 1868. There was no family home in Scotland during that period of absence in India, and there is nothing to indicate that when he was on leave from India he came back to Scotland to any home there. When he did leave India, he did not return to Scotland, but established himself in Liverpool. While in India, apparently, he had been preparing himself for the mercantile life which he pursued in Liverpool for the next twenty-six years, from 1868 down to 1894. He married a Scotswoman in 1870, and in 1871 Samuel, his son, was born. Then in 1891 his wife died, and in 1894 he retired from business. That, of course, is a critical date, because he is then an entirely free agent with this qualification, which was pointed out in the course of Mr Howden's argument, that he had still some years of a lease of his house in Liverpool to run. But that was a matter which he might have arranged. He also appears to have had some valuable furniture, and it was suggested that that was the reason why he did not remove from Liverpool in 1894. But be that as it may, he remained in Liverpool until 1901, when he left it, for reasons of health, and went to Bath, where he remained, although by a chance he was at Weymouth in 1908 when he died.

Upon these facts I come to be of opinion, without doubt, that when we look at the

whole course of his life it throws light upon what his position was in 1871. The length of his residence in Liverpool is the most important fact. There is also this, that his mother joined him in Liverpool and died there in the year 1883. It seems to have been the family centre so far as his mother was concerned. He also erected a tombstone in the cemetery there—a tombstone which was sufficient for himself and for other members of his family. He expressed a desire to be buried there, and in point of fact he was buried there. There are expressions of his intention spoken to by the lodging-house keeper, no doubt at a somewhat late period of his life, to the effect that he intended to remain in England. There is an entire absence of any evidence of his ever having visited his native district of Scotland, Dumfriesshire. He was fond of Scotland, but fond of Scotland for the purposes of sport. His visits to Scotland were simply for the purposes of sport. He never seems to have been near Whitecroft. Then, again, there is the absence of any evidence that he had any relations in Scotland. If he had relations in Scotland there is no evidence that he visited them. There is not disclosed in the proof any reason why his intention should not be held to be in accordance with his actings, both when he was in business and after his business connection with Liverpool had ceased. He seems to have been a member of several clubs in Liverpool and to have been connected with charitable institutions there. It is not shown that he was a contributor to any charitable institution which had a Scottish connection, and he seems to have belonged to no club in Scotland. In short, there is an absence altogether of any evidence from which one would draw an inference that he had any intention of going back to Scotland.

The one fact which requires to be weighed in judging the defender's case is the evidence of the documents which Mr Murray mentioned in his speech and to which we had been already referred. That is only one point, although there are several documents. It arises from the fact that the man of business was a well-known Writer to the Signet in Edinburgh. When he was instructed to prepare the necessary deeds to give effect to his client's wishes he naturally adopted the language of the legal system with which he was acquainted. Lord Kyllachy points out in the case of *Murray* (8 S.L.T. 233), to which we were referred, in speaking of a marriage contract somewhat similar to the marriage contract here, that that was an element that required to be weighed along with the other evidence in the case. I am unable to hold that the terms of these documents are sufficient to outweigh the very strong evidence on the other side.

With regard to the declaration in the will of 1890 and the letter which was written directing the testator's attention to the fact that he was described as a domiciled Scotsman, the answer contains no reference to that important point.

Accordingly, much as one regrets the



result, I feel that the facts in this case are too strong to be got over; and if one comes to the conclusion, as I do, that the domicile of origin of the husband in this case, the bankrupt, was English, then nothing which he did afterwards could by any possibility be considered as divesting him of his domicile of origin. Therefore the conclusion at which the Lord Ordinary has arrived is right. It is not necessary, putting my judgment upon that ground, to go into the other matters which were dealt with by the Lord Ordinary.

LORD SKERRINGTON—I agree with your Lordships. I think the case a peculiarly hard one for the defender, because I do not think that her advisers could have given her any other advice than that she should institute her action of divorce in the Scottish Courts. But when we review the very full proof which has been taken in this action of reduction, I concur with your Lordships in thinking that the permanent home of the bankrupt's father in 1871 was in England and not in Scotland; and in my view of the law that is enough to change his domicile from Scotland, where he was originally domiciled, to England.

I regret very much that the law should be so, because I think it is most unfortunate that a person's civil status should be allowed to remain in a state of uncertainty and dependent upon a judicial inquiry into a number of minute facts. I should have been glad, if I had seen my way to do so, to have adopted what I think was the view of certain eminent lawyers to the effect that a domicile of origin cannot be lost unless the person has knowingly and deliberately abandoned it in the sense that he has intentionally changed his civil status from that of a Scotsman, to that of an Englishman or of a foreigner as the case may be. In that view it would be practically impossible ever to prove a change of domicile, and I think that this law would be highly beneficial. The authorities as a whole are against this view, and accordingly I am constrained to concur with your Lordships.

The Court adhered.

Counsel for Pursuer—M'Lennan, K.C.—Dallas. Agents—Forbes, Dallas, & Co., W.S.

Counsel for Defender—Murray, K.C.—Howden. Agents—Fraser, Stodart, & Ballingal, W.S.

Friday, March 13.

EXTRA DIVISION.

[Sheriff Court at Banff.

M'WILLIAM v. GREAT NORTH  
OF SCOTLAND RAILWAY COMPANY.

*Master and Servant—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 1 (1)—Accident Arising Out of and in the Course of the Employment—Prohibited Act.*

A railway porter had as part of his duties to be in attendance upon the platform to transfer luggage to and from passenger trains running on main and local lines. A train stopped at its usual place, twenty yards from where he was standing. As the van passed he tried to jump on, so as to be ready to remove luggage as quickly as possible; he fell and was injured. Jumping on trains by porters was strictly prohibited. He had been given the company's book of rules, but had not read it; he had also been checked and warned against the practice. *Held* that the accident arose out of and in the course of the employment.

In an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) between William M'William, sometime railway porter, Portsoy, *appellant*, and the Great North of Scotland Railway Company, *respondents*, the Sheriff-Substitute (DUDLEY STUART) refused compensation and stated a Case for appeal.

The Case stated—"The appellant, who is twenty years of age, entered the respondents' service as a railway porter at Tillynaught Station on 3rd April 1913. On 26th April he met with the accident for which he claims compensation. It was part of his duties to be in attendance upon the platform on the arrival of passenger trains and to transfer luggage and parcels to and from the trains running on the main line and the local line to Banff. On the day in question the appellant was on the platform, opposite the door of the booking office, awaiting the arrival of the 10.55 a.m. passenger train from Elgin, which arrived at Tillynaught Station one minute after scheduled time, namely, 12.15 p.m., in order to be ready to remove luggage and parcels from the van of that train. The point at which the van of said train usually stops and at which it stopped on this occasion was about twenty yards farther up the platform than the point where the appellant was standing. As the van of the train passed the appellant, which it did at a considerable rate of speed, he ran after it, and overtaking it as its speed decreased, jumped or tried to jump upon the footboard of the luggage van, which was the last vehicle but one of the train, in order to be ready to remove the luggage as quickly as possible when the train stopped. He succeeded in taking hold of the handle at the end of the van, but did not succeed in getting a foothold with both feet upon the footboard. He appears to