

added, "conjunctly and severally." Now, these were fatal words for the feuar, because each was bound along with all the others. This was not a separate but a conjunct obligation. The Court were all of opinion that but for these words the result at which it arrived would have been the opposite. I see that in that case I said—"If the clause had stood precisely as it does, but without the words 'conjunctly and severally,' it could not have been contended that any party was bound but those who would generally be bound under such clauses in an ordinary feu-contract. The imposition of the obligations on the vassal, his heirs, executors, and successors, would have been read, according to inveterate practice, as an obligation on himself so long as he remained vassal and lived, and after his death on his heirs and executors, for payment of arrears, and on his successors in the feu for payment of feu-duty in the future." Now, that is just the clause which we have to construe here, and accordingly the case of *Straton* becomes an express authority on the present question.

LORD ADAM—I think this a very clear case, and I concur in the opinion expressed by your Lordship. The question turns upon the construction which is to be put upon what would be termed the *reddendo* clause in a feu-charter. By it the vassal Russell bound himself during his lifetime, and his heirs and executors, and his successors after his death, in payment of these feu-duties, and accordingly the question comes to be, are the defenders Russell's successors in the feu? If they are, then they are liable in the payments claimed; if they are not, then the sums demanded are not exigible from them. As they are not the vassal's successors in the feu, they are in my opinion entitled to absolvitor. But it was urged in addition that the true reading of the obligation undertaken by Russell was that he bound himself to provide a successor in the feu for all time coming, and that as he had failed in his undertaking, the sum now claimed in name of damages was due. I cannot see anything to warrant such a reading of this contract, and accordingly I think the only course open to the pursuer is just to adopt his ordinary remedy and resume possession of the feu.

The LORD PRESIDENT intimated that LORD MURE (who was absent from illness) concurred in the judgment.

The Court adhered.

Counsel for the Pursuer—Sir C. Pearson—Graham Murray. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Defender—D. F. Mackintosh, Q.C.—Begg. Agents—Morton, Neilson, & Smart, W.S.

Tuesday, March 19.

FIRST DIVISION.

[Commissariat of Edinburgh.

VINCENT AND GUARDIAN v. THE EARL OF BUCHAN.

*Foreign—Domicile—Proof—Onus.*

A lady whose domicile of origin was Scottish married in 1855 a domiciled Scotsman, with whom she resided, partly in Scotland and partly in England, down to the date of his death in 1883.

Her husband left her considerable property, consisting of a house in London, which after occupying for a few months, she sold along with most of the furniture which it contained, two farms in Scotland, which were in her possession at the time of her death, and about £15,000, which was invested by her Scottish agents on heritable security in Scotland. During the five years which she survived her husband she only revisited Scotland twice, residing for the most part in London in furnished houses, or in lodgings. She frequently went abroad, and she also visited occasionally various watering places in England. She died in London in 1888.

After her death a question arose as to whether her domicile was Scottish or English. *Held* that the *onus* of proving that the deceased had abandoned her domicile of origin fell upon the party alleging that she had *animo et facto* acquired an English domicile; and, on the proof, that this *onus* had *not* been discharged.

This was an application in the Commissary Court of Edinburgh for the appointment of an executor to the deceased Lady Elizabeth Lee Harvey, widow of Henry Lee Harvey of Castle Semple, Renfrewshire. She died in London on 13th January 1888.

Francis Erskine Vincent presented a petition to be decerned executor. He was the nephew of the deceased, and her sole next-of-kin by the law of Scotland. He alleged that Lady Elizabeth died domiciled in Scotland.

The application was opposed by the Right Honourable David Stuart, Earl of Buchan, the eldest brother consanguinean of the said Lady Harvey, who alleged that at the date of her death she was a domiciled Englishwoman, that her succession fell to be regulated by the law of England, and that by it, in cases of intestacy, brothers and sisters consanguinean were entitled to participate in the division of the deceased's estate, and to the office of executor, equally with the brothers and sisters german. The respondent maintained that he was entitled to be substituted for the petitioner, who was a minor, or to be conjoined with him in the office of executor.

The Sheriff Commissary allowed a proof, the petitioner being appointed to lead. The following facts were established—Lady Elizabeth Lee Harvey was a daughter of the late Henry David Erskine, 12th Earl of Buchan, who was a domiciled Scotsman. She was born in Scotland. In 1855 she married Henry Lee Harvey of Castle

Simple, Renfrewshire, who was a Scotsman. They resided at Castle Simple after her marriage (down to the date of Mr Harvey's death in May 1883), a small part of each year being spent at Mr Harvey's London house, 113 St George's Square. At his death Mr Harvey left her two farms in the county of Renfrew (which she still held at the time of her death), and from £14,000 to £15,000 of moveable property, which was lent out upon various securities by her Scottish agents (chiefly heritable securities over Scottish property). Mr Harvey also left her his London house in St George's Square, which she occupied for a few months after his death, and then sold it. After Mr Harvey's death Lady Elizabeth only visited Scotland twice. She lived partly in London in various furnished houses in Cadogan Place, and also in lodgings there, and partly on the Continent, and at different watering places in England, and she died in lodgings at 85 Cadogan Place in January 1888 intestate, and without issue. The more important passages in the evidence bearing upon the question whether at the time of her death Lady Elizabeth had or had not abandoned her Scottish domicile of origin are quoted in the opinion of Lord Adam.

On 29th June 1888 the Sheriff-Substitute (HAMILTON) pronounced an interlocutor finding that the deceased died domiciled in England, and sustaining the first plea-in-law for the respondent.

"*Note.*—It is not disputed that the late Lady Elizabeth Lee Harvey, who was the daughter of a Scottish Earl, and the wife of a Scottish landed proprietor, had her domicile in Scotland down to her husband's death in 1883. The question is whether she afterwards acquired a domicile in England, which she retained until her death in January last. After careful consideration the Sheriff-Substitute has come to be of opinion that the question must be answered in the affirmative. Shortly stated, the import of the evidence seems to him to be—That when Lady Elizabeth left Scotland after her husband's death she had no intention of returning, that she voluntarily fixed upon London as the place where she would live in future, and that the character and circumstances of her residence there, which lasted practically without interruption from the time of her leaving Scotland until her death, showed a present intention to make London her home or permanent place of abode.

"The Sheriff-Substitute in dismissing the petition is not to be held as deciding that the petitioner is not entitled to be decerned executor to the deceased. It is not denied that by the law of England he has right to a share of the estate, and he may have right also to a share in its administration, but this question will be better considered on a new application than on any amendment of the present petition."

The petitioner appealed, and argued—The Sheriff was wrong in throwing upon the petitioner the *onus* of proof, for there could be no doubt that, looking to the facts of the case, Lady Elizabeth was a domiciled Scotswoman at the date of her husband's death—that was in 1883—and the only question to be determined was whether she between 1883 and 1888 (the year of her death) abandoned her domicile of origin, and acquired a domicile of residence; but the *onus* was on the respondent to displace this

Scottish domicile of origin—*Steel v. Steel*, July 13, 1888, 15 R. 896; *Moorhouse v. Lord*, L.R.; 10 H. of L. 272; *Donaldson v. M'Clure*, December 18, 1857, 20 D. 307. There was not on Lady Elizabeth's part any change of domicile *animus et facto* after her husband's death. She had no fixed residence, and no desire to make one. The mere circumstance of long-continued residence did not *per se* constitute a change of domicile—*Udny v. Udny*, December 14, 1866, 5 Macph. 164; *Bell v. Kennedy*, May 14, 1868, 6 Macph. H. of L., 96; *Patience v. Main*, L.R., 29, Ch. Div. 976; *Munro v. Munro*, Aug. 10, 1840, 1 Rob. App. 492; Fraser on Husband and Wife, ii. p. 1265.

Argued for respondent—While admittedly Lady Elizabeth's domicile of origin was Scottish, and while she admittedly retained this up to the date of her husband's death, after that event she, by her permanent residence out of Scotland and mostly in London, acquired *animus et facto* a domicile of residence in England. So far as Lady Elizabeth had any fixed determination, it was not to return to Scotland. Her *animus* in the matter was to be gathered from her acts. It was possible that she did not realise what she was doing when she made London her home; but a person might by his acts acquire a domicile of residence, and his *animus* would be interpreted by his actings. By her not residing in Scotland, and by making London her permanent home, Lady Elizabeth had shown her intention of abandoning her domicile of birth. She was a widow whose home in Scotland was broken up, and this of itself favoured a change of domicile, while her most valued friends were resident in London, and her interests were after her husband's death all centred there. The Sheriff might have been wrong in ordering the petitioner to lead in the proof, but any *onus* which lay upon the respondent had been shifted, and the proof showed that Lady Elizabeth at the time of her death was a domiciled Englishwoman.

At advising—

LORD ADAM—Lady Elizabeth Lee Harvey died intestate and without issue on the 13th January 1888. Thereafter the petitioner Francis Erskine Vincent, who is a minor, presented a petition to the Commissary of Edinburgh praying to be decerned executor-dative *qua* next-of-kin to her along with his father as his curator.

The petition is presented on the footing that Lady Elizabeth Lee Harvey was at the time of her death domiciled in Scotland.

It is not disputed that the petitioner is the only child of Lady Margaret Erskine or Vincent, and that she and Lady Elizabeth Lee Harvey were the only children of the second marriage of the Earl of Buchan, and that therefore the petitioner is the deceased's sole next-of-kin by the law of Scotland. The petition, however, is opposed by the Earl of Buchan, who is the eldest brother consanguinean of Lady Elizabeth Lee Harvey. He alleges that he is one of her next-of-kin according to the law of England, and that by that law brothers and sisters consanguinean are entitled in cases of intestacy to participate in the division of the deceased's estate equally with the brothers and sisters german, and he further alleges that Lady Elizabeth Lee Harvey was at the time of her death domiciled in England.

The question at issue between the parties, and the only one that was argued to us, is, whether Lady Elizabeth Lee Harvey was at the time of her death domiciled in Scotland or England?

The Sheriff Commissary, on considering the proof, pronounced on 29th June 1888 an interlocutor by which he found that the deceased died domiciled in England, and dismissed the petition.

It is against this interlocutor that the present appeal is brought.

Lady Elizabeth Lee Harvey was the daughter of the Earl of Buchan, who was a Scottish Peer and a domiciled Scotsman. She was born in Edinburgh, and was married in 1855 to Mr Lee Harvey of Castle Semple, who was also a domiciled Scotsman, and the proprietor of that estate in Scotland, where she principally resided with him until his death in May 1883. There can be no doubt or question therefore that Lady Elizabeth Lee Harvey was from her birth down to this date, 1883, a domiciled Scotswoman. It is at this date accordingly that the respondent alleges that Lady Elizabeth changed her domicile.

That being so, the *onus* undoubtedly lies upon the respondent of proving the change he alleges, and I may remark in passing, although it is not very material now, that the interlocutors of the Sheriff-Substitute of 16th and 31st March 1888 respectively were erroneous, in respect that by ordering the petitioner to lead in the proof they failed to recognise the *onus* thus lying on the respondent. What that *onus* is, and what the respondent must prove in order to establish a change in the domicile of origin, is, I think, quite settled in law, and I need only to refer to the recent case of *Steel v. Steel*, 15 R. 896, and to the authorities there cited. These cases settle that the respondent must prove not only that Lady Elizabeth intended to abandon her Scotch domicile after the death of her husband, but also that she actually acquired *animo et facto* a domicile in England. The domicile of origin cannot be lost until another is acquired—merely to prove therefore that Lady Elizabeth when she went to England did not intend to return to Scotland to reside there would *per se* avail the respondent nothing. I think that it is equally well settled in law and in reason that an intention to abandon the domicile of origin is not easily to be presumed. It is not easily to be presumed that a person intends to abandon those civil rights which he has hitherto enjoyed, and which have hitherto regulated his life, and to subject himself to foreign laws. But this no doubt is a question of degree, and it may more easily be presumed, for example, that a Scotsman may have intended to subject himself to the laws of England than to those of a purely foreign country.

From a careful consideration of the evidence I am satisfied that when Lady Elizabeth, upon the death of her husband in 1883, having no longer a residence in Scotland, went to reside in London she had no intention of abandoning her Scottish domicile. I think she had no settled intention of residing in London or elsewhere in England. I think the state of her mind was, that she had resolved to have no permanent home anywhere, but to reside either in England or abroad from time to time as best suited her health and convenience at the time, and I think that this continued to be the condition of her mind until her death.

If this be the right view of the evidence, then the respondent's case must fail, because in that case Lady Elizabeth never had the *animus* to change her domicile, which was necessary as the first condition for the acquisition of a new domicile. That Lady Elizabeth should not have desired to form a permanent residence at any particular place was, I think, in her circumstances very natural. There had been only one child of the marriage between her and her husband, a daughter, but she had died, and Lady Elizabeth after her husband's death was left very much alone in the world. She seems to have had few ties left, and no particular reason for selecting one place rather than another for a permanent residence. As regards Scotland, Castle Semple was entailed, and had passed into the hands of comparative strangers, so that she had no longer any residence there. She seems to have had few or no friends in England except her Scottish relatives, and of them she seems to have been most attached to her stepmother Lady Buchan, an aged lady, who had brought her up. There is, however, evidence as to what Lady Elizabeth's intentions were as regards her future life.

Lady Buchan, who I think is more likely than anyone else to have known her intentions in this respect, says—"Her first idea, I believe, in the world was, that she never would have a home again after losing her husband and child. Then she came to London, and she always disliked London excessively, and came, I believe, only because she knew I was so much attached to her. (Q) Did she ever speak to you about living abroad?—(A) No; she always said she never would live anywhere, but she meant to go abroad. I daresay it would have ended in her living chiefly abroad, and only coming to England and Scotland occasionally." And again Lady Buchan says, in answer to the question, "Do you believe that she had any intention in her mind as to where she would live when she was in London?—(A) I am quite sure of her mind so far that she was determined she never would, you might say, 'live' anywhere. One cannot tell what might have happened, but I am quite sure it would not have been London or England—any part of England. But I do not believe she ever would have settled. I do not believe so." Then again Lady Buchan says, with reference to Lady Elizabeth having sold her furniture—"She told me she sold the things because she did not want them any more, and never could want them again. I have heard her say that very often. (Q) Did she say why she would not want them again?—(A) Because she said she never could be happy in this world, and she never would attempt to make a home for herself again. She said that to me in different words, but implying that. That was the only thing in fact I think that she had clear in her mind."

Mrs Dr Garrett Anderson, who attended her professionally for a number of years, says on this subject, in answer to the question, "Did she speak to you as to her intentions at any time?—(A) As to staying do you mean? Yes.—The only thing that I can remember bearing upon it at all was that once or twice I tried to interest her in different things in London, and she always said, 'Oh, it was not worth while taking up things in London; I am here only passing; I am here

as it were for the time.' I remember her saying that, and I think that is all."

Mr Ligertwood, who is a very reliable witness, speaking to a conversation which took place in 1886, is asked—"Did she say anything on that occasion as to where she was going to live?—(A) Not much; she thought it would end in her living abroad, as she thought the climate suited her better. "(Q) Did she ever make use of any expression that gave you to understand that she had any intention of residing permanently at any particular place?—(A) No, but I thought when she spoke about living abroad it would be Carlbad as she was very fond of it. (Q) Did she use any expression to make you think that she thought of living in London or any other place?—(A) No, I don't think so." And Dr Campbell, who is a witness for the respondent, and who had been her medical attendant for several years, says on this subject—(Q) "In the course of your conversation with her did she ever say anything which showed her intention as to the place of her residence?—(A) Not the slightest. She seemed to have no wish at all. She seemed to be absolutely indifferent as to where she was."

There is also a voluminous correspondence produced containing many of Lady Elizabeth's letters, principally upon business matters, but it does not throw much, if any, light on her intentions in this respect. I may, however, refer to one, of date 25th August 1883, addressed to Mr Ligertwood, in which she writes—"Of course I shall be more in London now than anywhere else." That is exactly what she was doing during the few future years of her life, but that is a very different thing from being settled permanently there.

As regards the evidence of the servants I do not think it is of any weight. Lady Elizabeth seems to have said to them one thing to-day and another thing to-morrow; that she was going to live in London, in Germany, or in Paris, just as she happened to be pleased with her surroundings at the time.

Nor do the circumstances of her residence in London after her husband's death afford any presumption that she intended to reside there permanently. Her husband had left her by disposition and settlement everything in his power, and among other subjects a house in St George's Square, London, in which they had resided for a part of the year, and in which she was residing when he died. But she broke up her establishment there, sold the most part of the furniture, and ultimately the house also. Too much weight must not, however, be attached to the sale of the house, because she thought it too large for her, and did not like the situation. After breaking up her establishment in St George's Square she lived for some time in lodgings, and then successively in three furnished houses in Cadogan Place, which situation she liked, and she ultimately died there in lodgings or furnished apartments. Every year, except one when she travelled in England, she resided for some months abroad. This mode of life does not appear to me to suggest any element of permanency of residence, but rather a desire on her Ladyship's part to be able to move about when and where she pleased.

On the other hand, as regards Scotland, it is true that she had no residence there, and only

visited it twice after her husband's death. She had two farms in Renfrewshire which her husband had left her, and although when bad times came, and she had trouble with her tenants, she wished to sell these farms, they had not been sold at the time of her death. Her husband had also left her between £14,000 and £15,000 of moveable property. This was all invested in Scotland, and her whole business matters were managed by her agents in Scotland, and she continued to contribute through Mr Ligertwood to numerous local charities there. These facts might have been of little avail if the question had been whether they were sufficient to maintain a domicile of choice, but they are sufficient to show that Lady Elizabeth had never severed her connection with Scotland.

I think the error into which the learned Sheriff-Substitute has fallen lies in this, that he has failed to appreciate the difference between a domicile of origin and a domicile of choice, and on the whole matter I am of opinion that the respondent has failed to prove that Lady Elizabeth took up her residence in England with the intention of permanently residing there, that consequently she never lost her Scottish domicile, and that the interlocutor appealed against ought to be reversed.

LORD PRESIDENT—I am entirely of the same opinion, and I think everything in this case is so very clear that I cannot understand how the learned Sheriff-Substitute arrived at the result he did, except in consequence of the mistake which he made at the outset of throwing the *onus* upon the petitioner of proving that Lady Elizabeth Lee Harvey died domiciled in Scotland. She was resident in London at the time of her death, and accordingly the Sheriff-Substitute seems to have thought that in consequence of this circumstance it fell upon the petitioner to show that she had retained her Scottish domicile. That, however, is not the case. The question for determination is, whether or not Lady Elizabeth lost her Scottish domicile, and that it is clear she could not have done without at the same time acquiring a new domicile. The *onus* is upon the respondent of proving this, especially as Scotland was admittedly the domicile of origin by the existence of a domicile of origin.

The LORD PRESIDENT intimated that LORD MURE (who was absent from illness) concurred in the judgment.

LORD SHAND was absent from illness.

The Court recalled the interlocutor of 29th June 1888, repelled the pleas-in-law for the respondent, sustained the plea-in-law for the petitioner, and remitted the case to the Sheriff Commissary to decern the petitioner executordative in terms of the prayer of the petition.

Counsel for the Petitioner—Balfour, Q.C.—Graham Murray. Agents—Dundas & Wilson, C.S.

Counsel for the Respondent—D.-F. Mackintosh, Q.C.—Low. Agents—J. K. & W. P. Lindsay, W.S.