not belong in property to the proprietor of Mains of Struie and Dochrie Hill, but remains still unfeued off by the superior, the feuar of Mains and Dochrie having only a privilege of loaning, and not having right to the *solum*. I am not prepared to say that the titles might not be so read, but, on the other hand, I do not think that such a reading should be adopted unless no other reading is reasonable, looking not only to the titles, but to the character of the possession. Now, it is plain that if the loan were to be held not to have been conveyed, and that only a privilege of passage and pasture was granted to the feuar of Mains and Dochrie, the anomaly would exist that the superior would possess a piece of property to which he had reserved no access, and which, it is plain, could be of no beneficial use to him after he had given off the Mains of Struie and the hill of Dochrie, on the one hand, and the lands of Whitehill and Baulk, on the other. No access to it is reserved, and none has existed except through these lands, and the possession has been entirely adverse to the idea of any such useless reservation. Holding the words of the titles to be inconsistent with a grant of property, I am of opinion that there is no ground disclosed in this case for interpreting them in any other sense.

I have come, therefore, to the conclusion that the interlocutor of the Lord Ordinary should be recalled, and that the Court should find and declare in terms of the prayer of the petition, and grant interdict as craved, and I move your Lordships accordingly.

LORD YOUNG, LORD RUTHERFURD CLARK, and LORD TRAYNER concurred.

The Court recalled the Lord Ordinary's interlocutor, and gave decree in terms of the conclusions of the summons.

Counsel for the Appellant — Graham Murray—Shaw—Kennedy. Agent—Gregor Macgregor, S.S.C.

Counsel for the Respondents — D.-F. Balfour, Q.C. — Clyde. Agent — W. S. Haldane, W.S.

Thursday, March 12.

FIRST DIVISION.

[Sheriff Court of Lanarkshire.

FERGUSON *v.* BUCHANAN'S TRUSTEES.

(*Ante*, p. 100, and 18 R. 120.)

Jurisdiction — Forum non conveniens — Succession—Domicile—Res Judicata.

The executors under a will having obtained probate in England were proceeding to administer the estate there when the testator's daughter brought an action against them in a Sheriff Court in Scotland, raising the question of her father's domicile and of her right to legitim, and craving interim interdict against their removing the trust-estate outwith the jurisdiction of the Sheriff Court. Interim interdict having been granted, the executors raised an administration suit in the Court of Chancery in England, and inquiries were there ordered, *inter alia*, as to the testator's domicile, and in the event of it being found to be Scotch, as to whether his estate was subject to any payment to his daughter. The daughter then brought an action in the Court of Session raising the same questions as had previously been raised in the Sheriff Court, and in this action—the action in the Sheriff Court being meantime sisted—it was decided that the English Court was the *forum conveniens* for determining the questions of the testator's domicile and the pursuer's right to legitim.

Held that after this decision it was not open to the Court to consider these questions in the Sheriff Court action.

Thomas Buchanan died on 22nd September 1889, leaving a will dated 14th May 1889, in which he appointed his brother Robert Buchanan and his nephew Andrew Buchanan his executors. The deceased left moveable property to the value of over £8000, the bulk of which consisted of a sum standing to his credit in the books of a firm in Glasgow. The executors obtained probate in England on 21st October 1889, and were proceeding to administer the estate there when the testator's daughter Mrs Margaret Ferguson raised the present action against them in the Sheriff Court of Lanarkshire, in which she sought (1) to have it found that at the time of his death her father was a domiciled Scotsman; (2) to have the executors interdicted from distributing the estate on the footing that her father was a domiciled Englishman at the time of his death, without providing for the payment of her legitim, and from removing any funds belonging to the testator from the sheriffdom of Lanarkshire; and (3) to have the executors ordained to pay her a certain sum as legitim.

The Sheriff-Substitute having granted interim interdict, the executors raised an administration suit in the Chancery Division of the High Court of Justice in England, in which on 16th December 1889 Mr Justice Chitty appointed a receiver, and ordered certain inquiries to be made, and, *inter alia*, "(6) An inquiry whether the testator was at the time of his decease domiciled in England, and if it shall be found that the testator was not domiciled in England, where was his domicile, and in the event of its being found that the testator was domiciled in Scotland, (7) an inquiry whether the personal estate of the testator is subject to payment of any and what portion thereof to any child or children of the testator living at his death, notwithstanding the provisions of his said will."

On 23rd December the pursuer brought an action in the Court of Session against the executors and beneficiaries under her

father's will, concluding, *inter alia*, for reduction of the will, and for declarator that her father was at the date of his death a domiciled Scotsman, and that she was entitled to legitim out of his moveable estate; and for interdict against the defenders withdrawing the deceased's estate from Scotland.

On 24th December the Sheriff - Substitute (SPENS) sisted the present action till the issue of the action in the Court of Session. In that action the conclusion for reduction was abandoned, and on 15th November 1890 the Second Division dismissed the action with expenses, holding that the Court of Chancery was the proper *forum* for determining the question of the deceased's domicile and the pursuer's right to legitim. (*Ante*, p. 100, and 18 R. 120.)

On 27th November 1890, consideration of the present action having been resumed, the Sheriff-Substitute recalled the interim interdict and dismissed the action, finding no expenses due. The defenders appealed to the Sheriff, and pending the appeal uplifted the funds of the testator which were in Glasgow, and transmitted them to the Receiver in Chancery.

On 27th December the Sheriff (BERRY) at the request of parties recalled the interlocutor appealed against, and remitted the case back to the Sheriff-Substitute.

On 15th January 1891, in the administration suit, Mr Justice Chitty decided, after an inquiry in which the testator's daughter did not appear, that the testator was at the time of his death a domiciled Englishman.

Thereafter parties were allowed to revise their pleadings in the present action, and the defenders set forth the proceedings in the Court of Session and the Court of Chancery, and pleaded *res judicata*.

On 16th February 1891, the record having again been closed, the Sheriff-Substitute dismissed the action.

The pursuer appealed, and argued—*Primâ facie*, this was a case for the Scottish Courts, the pursuer and defenders being Scotch, and the bulk of the estate being situated in Scotland—*Brown* v. *Maxwell's Executors*, July 17, 1883, 10 R. 1235. The pursuer was no party to the proceedings in the Court of Chancery, and a decision pronounced there could not be *res judicata* against her. Further, she was not precluded from proceeding with the present action either by the decision of the Second Division in the action before them or by the proceedings in Chancery, because the questions of her father's domicile and her right to legitim were first raised in the present action. The fact that these questions were first raised in Scotland did not appear to have been put before the Second Division. If they had been, probably the decision of that Court would have been different from what it was. The competency of an action must be judged of at the time it was raised, and this action having then been competent the pursuer was entitled to have the questions raised by it considered.

The defenders argued—The pursuer had superseded the present action by raising the action in the Court of Session, and in that action the Second Division had decided that the Court of Chancery was the proper forum for determining the questions now sought to be raised here. Following upon that decision the English Court had disposed of these questions, and it was impossible for the pursuer to reopen them in this action.

At advising—

LORD ADAM—This action was instituted in the Sheriff Court of Lanarkshire by Mrs Jane Buchanan or Forsyth, only child of a certain Mr Thomas Buchanan, against the trustees and executors of her late father. The objects of the action were substantially these—in the first place, to have it found that the deceased Mr Buchanan was a domiciled Scotsman at the time of his death, in the next place to have the defenders interdicted from removing the trust-estates outwith the jurisdiction of the Sheriff of Lanarkshire, and lastly, for payment to the pursuer of the amount of her legitim. It appears that in October 1889, before the action was raised, the executors obtained probate in England, and were proceeding to administer the estate there, but on 2nd December 1889 the Sheriff-Substitute, by the first order pronounced in the action, granted interim interdict against the defenders removing the estates outwith the jurisdiction of the Sheriff of Lanarkshire, and this so hampered the defenders that they brought an administration suit in Chancery. I do not know the exact date on which the administration suit was brought, but I see that on 16th December 1889 Mr Justice Chitty pronounced an order in which he directed a variety of accounts and inquiries to be taken and made, and among them "(6) An inquiry whether the testator was at the time of his decease domiciled in England, and if it shall be found that the testator was not domiciled in England, where was his domicile, and in the event of its being found that the testator was domiciled in Scotland, (7) an inquiry whether the personal estate of the testator is subject to payment of any and what portion thereof to any child or children of the testator living at his death, notwithstanding the provisions of his said will;" thus raising the question of domicile and the pursuer's consequent right to legitim, just as it had been raised in the Sheriff Court action. So that we now have two actions raising the same question, one in the Sheriff Court and the other in England. But soon afterwards a third action was raised between the same parties—an action of reduction, declarator, count, reckoning, and payment by the present pursuer against the present defenders—and because of the existence of this action the Sheriff-Substitute on 24th December 1889 sisted proceedings in the present action. In the Court of Session action the pursuer concluded in the first place for reduction of the will of her father, and secondly for declarator that he died domiciled in Scotland, and that she consequently was entitled to legitim out of his moveable estate, and then we have

some other conclusions which are not here material. We thus have a third action raising precisely the same question of the testator's domicile and the pursuer's right to legitim. Now, the result of the Court of Session action was this—the reductive conclusions were abandoned by the pursuer, and on 15th November 1890 their Lordships of the Second Division held that the Court in England was the *forum conveniens* for determining the question of the testator's domicile and the consequent right of the pursuer to legitim. The Court of Session action having thus been disposed of, the Sheriff-Substitute recalled the interim interdict and dismissed the action before him. The whole trust funds were then transmitted to the receiver in Chancery in England, and the proceedings in the action there went on, with the result that after an inquiry before Mr Justice Chitty, at which the pursuer might have appeared but did not, the deceased was found to have died domiciled in England. We are now asked to disregard all these proceedings, and to revive the Sheriff Court action which the pursuer herself seems to have superseded when she brought the action of reduction in the Supreme Court. In my opinion we cannot do so. I think that we are precluded by the judgment of the Second Division from taking that course. I think we cannot disregard that judgment, and it was determined that the Court in England is the proper Court for settling the questions between the parties. I am of opinion, therefore, that we should refuse the appeal and affirm the interlocutor of the Sheriff-Substitute.

LORD M'LAREN—I am of the same opinion. The pursuer's claim is as a creditor on her father's estate for the amount of her legitim, and if she had been content to raise an action against her father's trustees for payment of her legitim, and had used arrestments on the dependence, it is not unlikely that the courts of this country would have entertained the action, for I do not think it can be disputed that the courts of Scotland have a concurrent jurisdiction to entertain such an action against trustees who are all residents in Scotland, where also the bulk of the trust funds were locally situated. But that is not the course which the pursuer has seen fit to follow, and she has her own advisers to blame for the somewhat pretentious claim which she has made to interfere with the entire trust management, by seeking to have the trustees interdicted from removing any part of the moveable property belonging to the trust out of the jurisdiction of the Sheriff of Lanarkshire, and from following out administrative proceedings of any sort in England, until her right to legitim is settled. Be that however as it may, the Court of Session has already determined, in the action in the other Division, that the court in England is the *forum conveniens* for the determination of the questions between the parties. It is said that the Second Division would not have arrived at the conclusion they did if they had had before them the fact that the Sheriff Court action was prior in date to the suit in Chancery; but I think we must assume that the pursuer there urged everything which she regarded as favourable to her case, and the question having been determined by the Second Division, I am of opinion that we cannot disturb that judgment.

LORD KINNEAR—I also concur. If I thought the question here was, whether the proceedings in Chancery were in themselves such as to preclude the pursuer from bringing an action of any sort in Scotland for payment of her legitim, I should have desired to take time for consideration. But that is not the question with which we have here to deal, for it has been decided by the Second Division that the Court of Chancery is the convenient *forum* for the determination of the question between the parties, and it was only after that decision that Mr Justice Chitty pronounced the judgment finding that the domicile of the testator was in England. The question therefore is, whether we are to pronounce a judgment opposed to that of the other Division? and I agree with your Lordships that it is in vain to ask us to reconsider that judgment.

The LORD PRESIDENT was absent.

The Court dismissed the appeal.

Counsel for the Pursuer — D.-F. Balfour, Q.C. — Guthrie Smith — Salvesen. Agents—Gill & Pringle, W.S.

Counsel for the Defenders—Asher, Q.C. —A. S. D. Thomson. Agents—Simpson & Marwick, W.S.

Thursday, March 19.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

LIVINGSTONE *v.* BEATTIE.

(*Ante*, vol. xxvii., p. 562, and 17 R. 702.)

Crofter—Sub-Tenant—Crofters Holdings Act 1886 (49 *and* 50 *Vict. cap.* 29), *sec.* 34.

Held that the sub-tenant of a tenant-farmer was not a "tenant" in the sense of the 34th section of the Crofters Holdings Act 1886, and was accordingly not entitled to the benefits of that Act as a crofter.

Landlord and Tenant—Sub-Tenant—Agricultural Holdings Act 1883 (46 *and* 47 *Vict. cap.* 62), *sec.* 42.

Opinions by Lord Adam and Lord M'Laren that in the Agricultural Holdings Act "tenant" does not include sub-tenant except where the principal tenant holds under a lease of extraordinary duration.

Opinion contra by Lord Kincairney.

Crofter—Requisite Residence on Holding—Crofters Holdings Act 1886 (49 *and* 50 *Vict. cap.* 29), *sec.* 34.