but looking to what was known about this horse both by the pursuer and by Hamilton as to the weakness in his forearm, and also as to what was stated by the pursuer's brother Donald about his going lame occasionally when he was not carefully shod, I think we have in these two causes, or in one or other of them, sufficient to explain the accident. The probability is that the horse had a sudden attack of weakness, which would quite account for his falling in the manner described by the defender. Upon these grounds I agree with your Lordship that the interlocutors of the Sheriff-Substitute and of the Sheriff ought to be recalled.

LORD SHAND—As regards the law applicable to a case like the present I think that the Sheriff-Substitute has laid that down very clearly; the *onus* is undoubtedly on the borrower to show that the injury was not caused by carelessness. The question therefore which we have to determine is, did the defender in driving this horse use all reasonable care? The Sheriff-Substitute thinks that the defender has not succeeded in showing that he did so, but I am of the opinion expressed by your Lordships. Both the defender and his friend agree in saying that at the time of the accident the horse was being carefully driven, and with a tight rein, while the condition of the horse showed that he had not been driven too fast. When the horse stumbled and fell no stone could be discovered on the road to account for the accident, and yet the Sheriffs have both found that reasonable care was not used by the defender when he was driving. To my mind the evidence does not support this finding, and I think the reasonable inference to be drawn from it is that the accident was caused partly from the chronic weakness from which it suffered, and partly also from bad shoeing. It is to be kept in mind also that this horse was in the habit of being run in a four-wheeled machine, while on the day of the accident he had, with the pursuer's knowledge, been put into a two-wheeled cart. I therefore agree with your Lordships in thinking that we ought to reverse the interlocutor appealed against.

LORD ADAM—I agree with your Lordship that when an article, or a horse, is borrowed in good condition and is returned damaged, the *onus* is certainly on the borrower to show that he used all reasonable care in the use of the article lent, but it goes no further. That being so, the question comes to be, whether it is proved that the defender here took all reasonable care of this horse? If we believe the defender and his friend every care was taken of this animal, and as there is no suggestion that they are not to be believed, the defender ought, in my opinion, to be assoilzied. I do not think that it falls upon him to prove the specific cause which occasioned the loss, seeing that he has shown that he satisfied us that he used all reasonable care. No stone could be found upon the road, or in the horse's foot, to occasion his falling, but from the evidence we know enough of him to see how this accident might have and probably did occur.

The Court recalled the interlocutor appealed against, and found that the defender had proved that he observed reasonable care in using the horse, and that the accident and injury were not caused by the fault of the defender, and therefore assoilzied the defender.

Counsel for the Appellant—Guthrie Smith—Shaw. Agents—Rhind, Lindsay, & Wallace, W.S.

Counsel for the Respondent—Vary Campbell—Salvesen. Agent—W. R. Patrick, Solicitor.

Friday, December 7.

FIRST DIVISION.

[Sheriff of Lanarkshire.

HAMILTON *v.* HARDIE AND OTHERS (GAVIN HARDIE'S EXECUTORS).

Executor—Confirmation—Domicile—Confirmation of Executors Act 1858 (21 *and* 22 *Vict. c.* 56), *sec.* 9—*Sheriff Courts (Scotland) Act* 1876 (39 *and* 40 *Vict. c.* 70), *sec.* 41.

The Sheriff Courts Act 1876, sec. 41, *inter alia*, provides that where it is desired to include in the personal estate of anyone dying domiciled in Scotland personal estate situated in England, the fact that a deceased person died domiciled in Scotland "shall be set forth in the affidavit to the inventory, and it being so set forth therein, shall be sufficient warrant for the sheriff-clerk to insert in the confirmation, or to note thereon, and to sign a statement, that the deceased died domiciled in Scotland, and such a statement shall have the same effect as a certified copy interlocutor finding that the deceased person died domiciled in Scotland."

A testator died in England possessed of personal property both in England and Scotland. The executors nominated by his settlement, which was in Scottish form and *ex facie* valid, declared that he died domiciled in Scotland, and obtained confirmation from the commissary. Confirmation was opposed by a person who claimed to be one of the next-of-kin, and who averred that the deceased died domiciled in England; that the settlement had been procured from him under constraint, and made no provision for her, although for eighteen years before his death he had allowed her an annuity of £500; and that confirmation in England would facilitate the action which she intended to take to have the settlement set aside. No allegation of impecuniosity was made against the trustees, and it was not suggested that the estate would suffer by their administration. In an appeal, *held* that in view of the provisions of the statute warrant to issue confirmation had been properly granted, and that no sufficient reasons had been alleged for staying confirmation.

The Confirmation of Executors Act 1858, sec. 9, provides—"From and after the date hereof it shall be competent to include in the inventory of the personal estate and effects of any person who shall have died domiciled in Scotland any personal estate or effects of the deceased situated in England or in Ireland, or both: Provided that the person applying for confirmation shall satisfy the commissary, and that the commissary shall by

his interlocutor find that the deceased died domiciled in Scotland, which interlocutor shall be conclusive evidence of the fact of domicile." . . . .

The Sheriff Courts Act 1876, sec. 41, provides that "where, under the provisions of the ninth and subsequent sections of the Confirmation of Executors Act 1858, it shall be desired to include in the inventory of the personal estate of any person dying domiciled in Scotland personal estate situated in England or Ireland, it shall not be necessary to have a special proceeding before the sheriff with the view to his pronouncing therein an interlocutor finding that the deceased died domiciled in Scotland. That fact shall be set forth in the affidavit to the inventory, and it being so set forth therein shall be sufficient warrant for the sheriff-clerk to insert in the confirmation, or to note thereon, and sign a statement, that the deceased died domiciled in Scotland, and such statement shall have the same effect as a certified copy interlocutor finding that the deceased person died domiciled in Scotland." . . . .

Gavin Hardie of Lancefield, Lanarkshire, died at Ealing, near London, on 25th May 1888, predeceased by his wife and children. He executed a general disposition and deed of settlement on 24th February 1888, which was prepared by a Scottish conveyancer, and was executed in Scottish form. As the deed was signed at Ealing, it was, as an additional solemnity, also attested in English form. By it he nominated and appointed Gordon Kenmure Hardie, and certain others, his executors, who thereafter made up an inventory of the deceased's personal estate, and applied to the Sheriff-Substitute of Lanarkshire for confirmation in common form.

Miss Augusta Hamilton, Kensington Gardens, London, who claimed to be one of the next-of-kin of the deceased, lodged a caveat in the Sheriff Court of Lanarkshire at Glasgow, craving that any application for the appointment of executors to the deceased should be intimated to her.

The Sheriff ordered the caveator to lodge objections, and the executors answers thereto.

The objector averred that the testator about 1852 executed a will in English form, which conferred substantial benefits upon her, and which was not revoked or altered until the making of the settlement now founded on, and that she believed this will was in existence; that in 1882 the testator, who was advanced in years and in delicate health, went to visit Mr G. K. Hardie, who detained him at his house, obtained influence and control over him, and thereafter prevented him meeting his relatives and friends; that while in a state of testamentary incapacity the present settlement was procured from him, in which the objector was completely ignored and unprovided for; that for the last eighteen years the testator had allowed the objector's mother £480 per annum, and herself £90 per annum; that over £20,000 of the inventory was situated in England, where the testator had his domicile.

The executors denied that the testator had not a Scottish domicile, or that he was in any way feeble or incapable of managing his affairs when the settlement in question was executed. They averred that at the time of his death he was domiciled in Lanarkshire. They denied the various other allegations of the objector, with the exception of the allowance given by the testator to her and her mother, which they alleged to be entirely voluntary on the testator's part.

The objector pleaded, *inter alia*—"(2) The testator having been domiciled for many years in England, and upwards of four-fifths of his moveable estate being there, the title of the trustees should have been confirmed there. (4) The application for confirmation in this Court was incompetent, in respect that the deceased did not die domiciled in the county of Lanark, and in respect that Edinburgh is the only Court in which confirmation is competent when the deceased dies domiciled furth of Scotland."

The executors pleaded, *inter alia*—"(3) The deceased being at the time of his death domiciled in the county of Lanark, the respondents, as executors foresaid, are entitled to apply for confirmation in this Court."

On 20th July 1888 the Sheriff-Substitute (SPENS) granted warrant to the Clerk of Court to issue confirmation in favour of the executors-nominate of the deceased Gavin Hardie under his deed of settlement of 24th February 1888.

"*Note.*—The deed of settlement of Gavin Hardie is executed in the Scottish form, and is *ex facie* valid. In it the deceased describes himself as of Lancefield, his origin is Scottish, and the bulk of his property appears to be in Scotland. The objector does not appear to be one of the next-of-kin, and she has therefore no title or interest to oppose confirmation. In these circumstances I see no reason for refusing to grant warrant to confirm the executors-nominate."

The objector appealed to the Court of Session, and argued—That looking to the very prolonged absence of the testator from Scotland she was entitled to have some inquiry instituted as to where his domicile really was. The Sheriff had decided this on the affidavit without any inquiry. The objector was one of the next-of-kin of the deceased. She was not a competitor for the office of executor. Looking to the amount of the estate as per inventory situated in England, the inventory should be returned there. Besides, English procedure was, in the initial stages, more favourable for the appellant, as certain pleas could be stated for her in England which could not be advanced here—Williams on Executors, p. 342; Alexander's Com. Prac., p. 1; Sheriff Court (Scotland) Act 1876 (39 and 40 Vict. c. 70), sec. 41.

The respondents argued that the testator had never lost his Scottish domicile; the bulk of his money was in Scotland, his settlement was in Scottish form, and his executors were Scotsmen —*Graham* v. *Bannerman*, February 28, 1822, 1 Sh. 339. The appellant had not made out any good case for staying confirmation, which was only an administrative title. All her rights were fully preserved to her, and she could bring a reduction of the settlement if so advised.

At advising—

LORD PRESIDENT—The respondents in this appeal are the executors of the late Mr Gavin Hardie of Lancefield, who were nominated in a deed of settlement executed by him on 24th February of the present year. The deed, though executed at Ealing, near London, was drawn by a Scottish conveyancer, and it was executed in

Scottish form, but it was also attested in English form according to the law of the place of signing, which was in the circumstances a very proper proceeding. The application for confirmation was made to the Sheriff of Lanarkshire under the authority of the Confirmation of Executors Act 1858, and especially sec. 9 there—[*His Lordship here read the section quoted above*]. Now, that statute, so far as regards the finding by the Sheriff of the domicile of the deceased, has been to some extent altered by the Sheriff Court Act of 1876, which by its 41st section provides as follows—[*His Lordship here read the section above quoted*]. Now, whatever one may think of the expediency of the provisions of this Act we are bound to give effect to them. The language of the statute is somewhat loose, but it seems to imply that the facts set forth in the affidavit and inventory are to be a sufficient warrant for the Sheriff-clerk inserting in the confirmation that the deceased died domiciled in Scotland, and the Sheriff-clerk has in the present case proceeded accordingly. The appellant, however, appeared and opposed the confirmation upon various grounds. She says that she is one of the next-of-kin of the deceased, and that there was a previous will under which she took a considerable benefit, but that by the present will she is deprived of that benefit, and that the present will was obtained from the deceased when he was incapable of managing his affairs. She further avers that the testator was not a domiciled Scotsman at the date of his death, and that as a large part of the testator's moveable property included in the inventory is situated in England the inventory should have been returned there. But the will is *ex facie* valid, and although the appellant says it is reducible on the ground of incapacity, yet this application for confirmation has now been going on for six months, and nothing has been done by the appellant in the way of setting aside this will.

In these circumstances the question comes to be, whether we can, on the averments made by the appellant, stop this confirmation, and I can only say that I see no grounds for doing so. The averments which have been made with regard to the domicile of the testator are extremely vague, and as we had occasion to observe on a somewhat recent occasion, the allegation which it would be necessary to make in order to stop confirmation would be, not that the testator had at the date of his death an English domicile, but rather that the testator had actually changed his domicile, and the evidence of such a change would require to be both clear and distinct.

In the present case I cannot see any sufficient ground for our interference with the course of this confirmation, especially as there is no allegation of impecuniosity against these executors, nor is there any suggestion that this estate can in any way suffer by being administered by the respondents. It was urged that the respondents are not domiciled Scotsmen, but by being confirmed executors to a domiciled Scotsman they will be under the jurisdiction of this Court.

Upon these grounds therefore I am for adhering to what the commissary has done.

Lord Mure—I am of the same opinion. What the appellant wishes us to decide is, that it is incompetent on her averments for the executors-nominate to take out confirmation in Scotland, but that they ought to be ordained to proceed to the English Courts as more convenient for the appellant, because certain pleas could be more effectively stated for her there than they could be here. It does not, however, appear to me that any sufficient grounds have been stated to warrant us in staying this confirmation, and I am therefore not disposed to interfere with what the commissary in the circumstances has done.

Lord Shand—The course which the appellant proposes here is certainly somewhat of a novelty, as she seeks to be allowed to lead proof of the domicile of the testator with a view of determining in what part of the United Kingdom confirmation is to take place. Now, all that confirmation gives is a title to administer the deceased's estate, and to my mind no good or sufficient ground has been suggested why the parties who have been nominated should not be allowed to act. But it was further urged that this lady would obtain some incidental advantage if these confirmation proceedings were allowed to go on in England, because fuller evidence was there admissible in the initiatory stages of the proceeding.

In the present case everything has been done in proper form, and the deed in question is *ex facie* regular and formal. But it was urged that by statute executors-nominate are not bound to find caution. Now, if at any time a serious objection was taken to a will, and an action of reduction was commenced, and it was urged that the executors-nominate were impecunious, and might squander the estate, then upon such averments the Court might in its discretion stop confirmation for the purpose of protecting the estate. But all that is suggested here is, that this lady might get certain questions in which she is interested more cheaply decided in England than she can do in this country. The only averment of the appellant which appeared to be of any importance was that for eighteen years prior to the deceased's death he was allowing her and her daughter an annuity of £500, and yet in his later deed he makes not the slightest provision for her. This is somewhat peculiar, and may require some explanation, but I cannot see in it, or in any of the other averments of the appellants, anything to warrant us in refusing to these executors an administrative title.

Lord Adam concurred.

The Court refused the appeal.

Counsel for the Appellant—Sir C. Pearson—Baxter. Agent—Andrew Fleming, S.S.C.

Counsel for the Respondents — J. A. Reid. Agents—Murray, Beith, & Murray, W.S.