I do not mean at all to go, because it has been so fully analysed by my noble and learned friend who spoke first, and by Lord Cockburn in the Court below, that it is to my mind quite conclusive upon this case. As to allowing any further inquiry, I think there has been enough inquiry already.

Interlocutors appealed from affirmed, with an alteration in one of the said interlocutors, and appeal dismissed with costs.

Appellant's Solicitors, Bischoff, Coxe, and Bompas, London.—*Respondents' Solicitors*, J. Hope, W.S.; Connell and Hope, Westminster.

MAY 14, 1868.

JOHN BELL, Esq. of Enterkine, *Appellant*, *v.* MRS. ANNE BELL or KENNEDY, and Others, *Respondents*.

Domicile—Scottish Origin—Leaving Jamaica for Scotland—Looking out for an Estate—*B., the son of Scottish parents, who were domiciled in Jamaica, was born there. At the age of two years B. was sent to be educated in Scotland, and remained there till twenty-two, when he returned to carry on the business of a sugar planter on his paternal estate in Jamaica. In* 1828 *he married a Scotch lady in Jamaica. After making a fortune, he left Jamaica in* 1837 *for good, arrived in Scotland, and began to look out for an estate in England or Scotland upon which to settle. He lived in hired houses in Scotland, and did not find a suitable estate till* 1839, *in Scotland, when he purchased it, and had lived there ever since.*

HELD (reversing judgment), *That, though he had intended in* 1837 *to abandon, and did then abandon, his Jamaica domicile, yet he had not acquired a new domicile till* 1839, *when he purchased and settled on his estate in Scotland.*

This was an action by Mrs. Mary Anne Bell or Kennedy, wife of Captain Kennedy of Bennane, against her father, John Bell, Esq. of Enterkine, to recover her share of the goods in communion falling due on the death of her mother in 1838. The claim was founded on the state of the law prior to 18 and 19 Vict. c. 23, § 6. (See a like case, *ante*, p. 938.)

The defender pleaded *inter alia*, that at the time of his wife's death he was domiciled in Jamaica, and by the law of the domicile such a claim was incompetent.

The record was closed, and a proof taken, and the Lord Ordinary (Kinloch) held, that the defender was in 1838 domiciled in Scotland. On reclaiming note, the Second Division, on 17th July 1863, adhered. The cause proceeded, and ultimately the defender appealed.

The main facts bearing on the question of domicile were as follows:—The defender was born in Jamaica of parents domiciled there. He was sent when about the age of two years to be educated in Scotland, and remained there till he was of the age of twenty-two years. He then returned to Jamaica to carry on his father's business of a sugar planter on his paternal estate of Woodstock. In 1828 he married in Jamaica Miss Hosack, a Scotch lady, and mother of the respondent. He made a considerable fortune in Jamaica, but in consequence of the abolition of slavery, and other causes, he made up his mind to leave, and actually left Jamaica in 1837 for good, and set sail to Scotland, and, a few days after his arrival, took up his residence with his mother-in-law in Edinburgh. He then began to look out for an estate in England or Scotland. He next took a furnished house meanwhile in Ayrshire, and then his wife died in 1838. He had been in treaty for more than one estate before that, but had not fixed on any; and it was not till 1839 that he purchased the estate of Enterkine in Scotland, where he had lived ever since.

Sir R. Palmer Q.C., and *Cotton* Q.C., for the appellant, contended, that, though Mr. Bell had intended never to return to Jamaica when he left it in 1837, still he did not acquire any new domicile till 1839, when he settled on his own estate in Scotland, and therefore the original domicile being in force at his wife's death, the present action was incompetent.

Anderson Q.C., and *Mellish* Q.C., for the respondent, contended, that the domicile became Scotch the moment Mr. Bell arrived in Scotland in 1837, and therefore the action was competent.

The arguments were confined entirely to the question of domicile, and turned exclusively on inferences to be drawn from the facts and documents in the case. The following cases were

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[1] See previous report 1 Macph. 1127: 35 Sc. Jur. 651: 36 Sc. Jur. 285. S. C. L. R. 1 Sc. Ap. 307: 6 Macph. H. L. 69: 40 Sc. Jur. 476.

referred to—*Lashley* v. *Hogg*, 4 Paton, 581 ; *Somerville* v. *Somerville*, 5 Ves. 787 ; *Monro* v. *Monro*, 1 Rob. App. 492 ; *Moorhouse* v. *Lord*, 10 H. L. C. 272 ; *Aikman* v. *Aikman*, 3 Macq. Ap. C. 877, *ante*, p. 997 ; *Whicker* v. *Hume*, 7 H. L. C. 159 ; *Maxwell* v. *Maclure*, 32 Sc. Jur. 408 ; *ante*, p. 938 ; 3 Macq. Ap. C. 853.

LORD CHANCELLOR CAIRNS.—My Lords, this appeal arises in an action commenced in the Court of Session, I regret to say, so long ago as the year 1858 ; in the course of which action no less than sixteen interlocutors have been pronounced by the Court ; all, or the greater part of which, become inoperative or immaterial if your Lordships should be unable to concur in the views taken by the Court below of the question of domicile.

The action is raised by Captain Kennedy and his wife, the daughter of the late Mrs. Bell, and the defender is Mrs. Kennedy's father, the husband of Mrs. Bell. The claim is for the share, said to belong to Mrs. Kennedy, of the goods held in communion between Mr. and Mrs. Bell. This claim proceeds on the allegation, that the domicile of Mrs. Bell, at the time of her death, on the 28th September 1838, was in Scotland. And the question itself of her domicile at that time depends upon the further question, what was the domicile of her husband ? Her husband, the appellant, is still living, and your Lordships have therefore to consider a case which seldom arises, the question, namely, of the domicile at a particular time of a person who is still living.

Mr. Bell was born in the island of Jamaica. His parents had come there from Scotland, and had settled in the island. There appears to be no reason to doubt but that they were domiciled in Jamaica. His father owned and cultivated there an estate called the Woodstock estate. His mother died when the appellant was about the age of two years, and immediately after his mother's death he was sent to Scotland for the purpose of nurture and education. By his father's relatives he was educated in Scotland at school, and he afterwards proceeded to college. His father appears to have died when he was about the age of ten years, dying, in fact, as he was coming over to Great Britain for his health, but with the intention of returning to Jamaica. The appellant, after passing through college in Scotland, travelled upon the Continent ; and soon after he attained the age of twenty-one years, he went out again to Jamaica in the year 1823 with the intention of carrying on the cultivation of the Woodstock estate, which, in fact, was the only property he possessed. He cultivated this estate, and made money to a considerable amount. He arrived at a position of some distinction in the island. He was the custos of the parish of St. George, and was a member of the Legislative Assembly. He married his late wife, then Miss Hosack, in Jamaica, in the year 1828 ; and he had by her in Jamaica three children. It appears to me to be beyond the possibility of doubt, that the domicile of birth continued during the events which I have thus described.

In the year 1834 a change was made in the law with regard to slavery in the island of Jamaica, which introduced, in the first instance, a system of apprenticeship, maturing in the year 1838 into a complete emancipation. This change appears to have been looked upon by Mr. Bell with considerable disfavour, and, his health failing, in the year 1837 he determined to leave Jamaica and to return to some part, at all events, of Great Britain. He entered into a contract for the sale of the Woodstock estate, the purchase money being made payable by certain instalments ; and in 1837 he left the island, to use his own expression, for "good." He abandoned his residence there without any intention at that time, at all events, of returning to the island. He reached London in the month of June 1837. He remained in London for a short time, apparently about ten days, and he then went on to Edinburgh and took up his abode under the roof of the mother of his wife, Mrs. Hosack, who at that time was living in Edinburgh. I ought to have stated, that while the appellant was in Jamaica he appears to have kept up a correspondence with his relatives and friends in Scotland. In the year 1833 he acquired (I prefer to use the term acquired rather than the word purchased) the estates of Glengabers and Craka. He appears to have taken those estates mainly in settlement of a claim for some fortune or money of his wife secured upon them.

It is apparent, however, that he had at no time any intention of residing upon Glengabers, and, in fact, the acquisition of those estates bears but little in my opinion upon the question of domicile, because in 1833, when he acquired them, his domicile beyond all doubt was, and for some years afterwards continued to be, in Jamaica. He wrote occasionally at that time from Jamaica, evincing a desire to buy an estate at some future period in Scotland, if he could obtain one to his liking, and even an intention, if he could obtain such an estate, of living in Scotland, but nothing definite appears to have been arranged or said upon the subject, and in fact at this time other suggestions as to other localities appear to have been occasionally entertained and considered by him.

In these letters he frequently uses an expression, that was much insisted upon at the bar—the expression of "coming home," but I think it will be your Lordships' opinion, that the argument is not much advanced, one way or the other, by that expression. It appears to me to be obviously a form of language that would naturally be used by a colonist in Jamaica, speaking of the mother country in contradistinction to the colony.

Up to this point, there is really no dispute with regard to the facts of the case. The birth

domicile of the appellant in Jamaica continued, at all events, to 1837, and the *onus* lies upon those who desire to shew, that there was a change in this domicile, by which I mean the personal *status* indicated by that word—the *onus*, I say, lies upon those who assert, that the personal *status*, indicated by that term, clings and adheres to the subject of it until an actual change is made by which the personal *status* of another domicile is acquired.

I do not think it will be necessary to examine the various definitions which have been given of the word "domicile." The question which I will ask your Lordships to consider in the present case is in substance this: Whether the appellant, before the 28th September 1838, the day of the death of his wife, had determined to make, and had made, Scotland his home, with the intention of establishing himself and family there, and ending his days in that country? The *onus*, as I have said, is upon the respondent to establish this proposition.

I will ask your Lordships, in the first place, to look at the facts subsequent to the return of the appellant to Scotland, as to which there is no dispute, then at the character of the parole evidence which has been adduced, and, finally, at a few passages in the correspondence which is in evidence.

As regards the facts which are admitted, they amount to this: The appellant lived under the roof of Mrs. Hosack from the time of his arrival in Edinburgh, in the year 1837, until the 1st of June 1838. He appears to have borne the whole, or the greater part, of her housekeeping expenses during that time. He inquired for, and looked after, various estates in the south of Scotland especially, and he indicated a preference for the estates of Blairstone or Auchindraine, of Mollance, and of Enterkine. With regard to Blairstone or Auchindraine, it does not appear, so far as I can discover, to have been actually offered to him for sale. With regard to Mollance, before he came to any determination as to it, it was sold to another person. With regard to Enterkine, at the time we are speaking of, 1st of June 1838, a negotiation had been going on by letters written between the appellant and those who were proposing to sell the estate, but the offer which he ultimately made for it had at that time been refused, and on 1st of June 1838 there was no pending offer on his part for the property. Mrs. Bell, his wife, at this time was expecting her confinement. The house of his mother-in-law, in which they were sojourning, was not sufficiently commodious for their wants, and the appellant took for one year a furnished house in Ayrshire, called Trochraigue. He took it with no intention, apparently, of buying the estate, although it appears to have been for sale, but with the intention of living for a year in the house, and he hired servants for his accommodation. He removed to Trochraigue on the 1st of June 1838, and while so sojourning there, Mrs. Bell died in her confinement on the 28th of September in that year.

It appears to me beyond all doubt, that prior to this time the appellant had evinced a great and preponderating preference for Scotland as a place of residence. He felt and expressed a great desire to find an estate there, with a residence upon it with which he would be satisfied. His wife appears to have been even more anxious for this than he himself was; and her mother and their friends appear to have been eager for the appellant to settle in Scotland. There is no doubt, that, since the death of his wife, he actually has bought the estate which I have mentioned —the estate of Enterkine, and that his domicile is now in Scotland. All that in my opinion would not be enough to effect the acquisition of a Scotch domicile. There was, indeed, a strong probability, up to the time of the death of his wife, that he would ultimately find in Scotland an estate to his liking, and that he would settle there. But it appears to me to be equally clear, that if, in the course of his searches, a property more attractive or more eligible as an investment had been offered to him across the border, he might, without any alteration or change in the intention which he expressed or entertained, have acquired and purchased such estate, and settled upon it, and thus have acquired an English domicile. In point of fact, he made more or less of general inquiry after estates in England; and a circumstance is told us by one of the witnesses, Mr. Telfer, as to which there appears to be no controversy, which seems to me of great significance. Mr. Telfer says, that his relations entertained great apprehension or dread that he would settle in England—a state of feeling on their part totally inconsistent with the notion, that he had, to their knowledge at that time, determined ultimately and finally to settle in Scotland.

These being the admitted facts, let me next turn to the character of the parole evidence in the case. As to the evidence of the members of the Hosack family and of the servants, very little is to be extracted from it in the shape of information upon which we can rely. They speak of what they considered and believed was the intention of the appellant: but as to anything he said or did, to which alone your Lordships could attend, they tell us nothing beyond what we have from the letters. As to the evidence of the appellant himself, I am disposed to agree very much with what was said at the bar, that it is to be accepted with very considerable reserve. An appellant has naturally, on an issue like the present, a very strong bias calculated to influence his mind, and he is, moreover, speaking of what was his intention some 25 years ago—a matter which I think any one of your Lordships, in your own case, would find to be one of considerable difficulty, if we were called upon, at the end of 25 years, to state what was the intention which upon any particular subject we then entertained. I am bound, however, to say, and therein I

concur with what was said by the Court of Session, that the evidence of the appellant appears to be fair and candid, and that certainly nothing is to be extracted from it which is favourable to the respondents as regards the *onus* of proof which they have to discharge.

I will now ask your Lordships to look at what to my mind appears the most satisfactory part of the case, namely, the correspondence contemporaneous with the events in the year 1837 and 1838. I do not propose to go through it at length, but I will ask you to consider simply certain principal epochs in the correspondence from which, as it appears to me, we derive considerable light as to the intention of the appellant.

In the first place, I turn to a letter written by the appellant on the 26th of September 1837, three months after the appellant and his wife had come to Scotland. He is writing from Minto Street, Edinburgh, to his brother-in-law, Mr. William Hosack, in Jamaica, and he says: "I have not got rid of my complaint as yet, and still find difficulty in walking much, and was obliged to forego the pleasures of shooting, on which I had so much set my heart. This country is far too cold for a person not having the right use of his limbs. In fact, I have been little taken with anything, and would go to Canada, Jamaica, or Australia without hesitation. I enjoy the fresh butter and gooseberries." Of the latter, that is, of the gooseberries, he proceeds to state some evil consequences which he had suffered, and then he says: "Everything else is as good, or has an equivalent fully as good, in Jamaica. My mind is not made up as to the purchase of an estate. Land bears too high a value in proportion to other things in this country, owing to the members of the House of Commons and of Lords being all landowners and having thereby received greater legislative protection. The reform voters begin to see this, and as soon as the character of the House of Commons changes enough, (and it is changing prodigiously,) the value of land will come to its true value in the state. I have formed these views since I came home, and have lost in proportion my land buying mania." Thus having, as I have stated, a domicile by birth in Jamaica, and having come to this country with an indeterminate view as to what property he should become the purchaser of, writing three months afterwards he says: "I have been little taken with anything, and would go to Canada, Jamaica, or Australia without hesitation." Nothing can be more significant as to the absence of any determination in his mind to make Scotland his fixed home, and to spend the remainder of his days there.

I come to the 27th of December 1837, when the appellant, again writing to the same brother-in-law in Jamaica, says, "As to the country, I like none of it. I have not purchased an estate, and am not likely to do so. I had my guns repaired, and bought a pointer, purchased the shooting for an estate for £10, have never been there, nor fired a shot anywhere else. Have had a fishing rod in my hands only for two hours, and caught nothing. I bought a horse, and might as well have bought a bear. He bites so, it would have been as easy to handle the one as the other. I exchanged him for a mare, and positively I have sent her to enjoy herself in a farm straw yard, without ever having been once on her back, or even touched her in any way." Here again we find, that, so far from his expressing a liking for the country upon better acquaintance, he says he does not like it, and, so far from a determination to purchase an estate in Scotland and end his days upon it, he says, "I have not purchased an estate, and am not likely to do so."

Passing over three months more, I come to a letter dated the 20th of March 1838, by Mrs. Bell, the wife's expressions being even more significant than those of her husband; for it is obvious, that she, of the two, was more inclined to settle in Scotland. She writes, "The extreme severity of the winter has put us a good deal out of conceit of Scotland, but, independent of that, I don't find the satisfaction in it I anticipated. If circumstances permitted me, I would not mind to return to Jamaica, though, I daresay, after being here a few years, I might not like it. This country is so gloomy, it is sadly depressing to the spirits, so unlike what one has been used to in dear lovely Jamaica. The vile pride and reserve of the people is here too a great source of annoyance. A man is not so much valued on the manners and education of a gentleman as on the rank of his great grandfather, that is to say, among a certain class. You will perceive from this, that we are still at Number 9. ,Bell has several properties in view, but is as undetermined about where we may settle as when he left Jamaica, Next week he goes to Ayrshire to look at an estate, and from thence to Galloway and Dumfriesshire. If we don't fix very soon, we purpose taking a furnished house in the country for twelve months." Now the whole of this passage, I think, is of considerable importance, but the last sentence I have read affords a key which may be useful in letting us into the design of the spouses in taking the furnished house of Trochraigue. The interpretation given by this letter is, that it was equivalent to saying, that they had not at that time fixed upon a residence.

I pass on for two months more. The offer which, in the interval, he had made for Enterkine had been refused. The furnished house at Trochraigue had been taken. The appellant and his wife were upon the eve of taking possession of it on the 1st of June 1838; and on the 28th of May 1838 the appellant writes to his brother-in-law in Jamaica: "I have taken a country house at Trochrigg. I leave this for it on the 1st of June. It is situated two miles from Girvan, which is twenty miles west of Ayr, on the sea coast. Therefore, for the next twelve months, you can

address to me, Trochrigg, near Girvan, Ayrshire, Scotland. The offer which I wrote you I have made for Enterkine I received no answer to until sixteen days after, and then I got an answer stating, that they had a better offer. Of this I believe as much as I like, for I see it advertised again in Saturday's paper. I do not know whether I shall make anything of this estate for the present, and I care not. It is still very cold, and if I do not make a purchase in the course of this year, I perhaps will take a trip next summer to the south of France, and see whether I don't find it warmer there." That is to say, in the next summer, which would be the summer of 1839, he was in expectation, that Mrs. Bell and his family would be able to accompany him to "take a trip to the south of France, and see whether he did not find it warmer there," not, as it seems to me, for the purpose of enjoying a temporary sojourn, but, if he found it a more agreeable climate, for the purpose of making it his permanent residence.

There is only one other passage to which I would ask your Lordships' attention. It is in a letter written one month afterwards, while Mr. and Mrs. Bell were at Trochraigue, on the 16th of June. Writing to Mr. William Hosack, the appellant says: "There are several gentlemen's seats in the neighbourhood, but none of them reside in them. We will probably have only three or four acquaintances, and shall be, in that respect, much the same as in Jamaica. We must, however, make the most of it for twelve months, in the hope that, during that time, I may be able to find some estate that will be suitable for me as a purchase."

I find nothing after this in the correspondence material before the death of Mrs. Bell, and the last sentence I have read appears to me to sum up and to describe most accurately the position in which the appellant was at Trochraigue; he was there in the hope that, during the "12 months," he might be able to find some estate that will be suitable to him for purchase; and upon that contingency, as it seems to me, depended the ultimate choice which he would make of Scotland or some other country as a place of residence. If his hope should not be realized, I see nothing which would lead me to think, but everything which would lead me to doubt, that he would have elected to remain in Scotland as his place of residence.

It appears to me, on the whole, upon consideration of the facts which are admitted in the case, and the parole evidence, and the correspondence to which I have referred, that, so far from the respondents having discharged the *onus* which lies upon them to prove the adoption of a Scotch domicile, they have entirely failed in discharging that burden of proof, and that the evidence leads quite in the opposite direction. There is nothing in it to shew, that the appellant's personal status of domicile as a native and an inhabitant of Jamaica has been changed on coming here by that which alone could change it—his assumption of domicile in another country. I am therefore unfortunately unable to advise you to concur in the opinion of the Court of Session. The Lord Ordinary entertained the opinion, that the appellant, from the first moment of his arrival in Scotland, and of his sojourn at Mrs. Hosack's house, had acquired a Scotch domicile. But nothing could be more temporary— nothing more different from the state of things that would lead to the conclusion of the assumption of a Scotch domicile, than the circumstances under which that sojourn took place. Lord Cowan, in delivering the opinion of the Court of Session, appears, on the other hand, to have thought, that the Scotch domicile was not acquired at the time of arrival in Scotland, but was acquired at the time of taking possession of Trochraigue. But if we are to put upon the occupation of Trochraigue the interpretation which the appellant himself put upon it at the time, so far from its being an assumption of a Scotch domicile, it appears to me to have borne an entirely different construction, and to have been a temporary place of sojourn, in order that a determination might be arrived at in the course of the sojourn as to whether a Scotch domicile should or should not ultimately be acquired.

There is one passage in the judgment of the Court of Session delivered by Lord Cowan, to which I must ask your Lordships more particularly to refer, for it appears to me to afford a key to what I think, with great respect, I must call the fallacious reasoning of the judgment. After speaking of the parole evidence given by the appellant, Lord Cowan uses these words: "For, after all, what do the statements of the defender truly amount to? Simply this, that prior to September 1838, he had not fixed on any place of permanent residence, and had not finally made up his mind or formed any fixed intention to settle in Scotland before he bought Enterkine. There is no statement that he had it in his mind to take up his residence elsewhere than in Scotland." If I read these words correctly, Lord Cowan appears to have intimated, that, in his opinion, it would not be enough to find, that the appellant had not fixed on any place of permanent residence prior to September 1838, and had not decidedly made up his mind or formed a fixed intention to settle in Scotland, unless proof were also adduced, that he had it in his mind to take up his residence elsewhere than in Scotland. I venture to think, that would be an entirely fallacious mode of reasoning, and would be entirely shifting the position of the proof which has to be brought forward. The question, as it seems to me, is not whether he had made up his mind to take up his residence elsewhere than in Scotland, but the question is, Had he, prior to September 1838, finally made up his mind or formed a fixed intention to settle in Scotland? Lord Cowan appears to admit, that the parole evidence itself would shew, that that had not been done; and that parole evidence is, in my mind, fortified and made very much more emphatic by the evidence of the correspondence to which I have referred.

I have humbly, therefore, to advise your Lordships to assoilzie the defender from the conclusions of the summons, and to reverse the sixteen interlocutors which have been pronounced by the Court below.

LORD CRANWORTH.—My Lords, since your Lordships separated on Tuesday, I thought that I should best discharge my duty by making a slight analysis of the evidence bearing upon this question of domicile. The conclusion at which I had arrived was so strong in conformity with what has been expressed by my noble and learned friend, that I thought that the best course I could take in order to explain my view to your Lordships, and that the parties might see that it had not been a view formed, or expressed, hastily, would be to put down a reference to all the letters and evidence which bore upon the question. But, having done so, I must state to your Lordships, that the whole course of the evidence has been so thoroughly gone through by my noble and learned friend, that I feel, that I should be rather wasting your Lordships' time, if I were to attempt to go over again that which has been so completely exhausted by him.

Now I agree with what was stated by Mr. Anderson when he said, that it was remarked by Lord Loughborough, that *primâ facie* the place where a man *is* must be taken to be his domicile. Where he *died* was the expression there, but I think the same observation must apply to any time in his life. Therefore, I think it is fair to say, that *primâ facie*, on the 28th of September 1838, when Mrs: Bell died at Trochraigue, where they were all residing at that time, Trochraigue must be taken as the domicile, if there was no other evidence upon the subject. If we were told *simpliciter*, that Mr. and Mrs. Bell were living at Trochraigue in Scotland, and that there Mrs. Bell died, you might assume that that was their domicile. But that is easily rebutted, because undoubtedly the first inquiry as to the domicile of anybody is, what was his domicile of origin? Now, that that was Jamaica is not disputed. That it continued in Jamaica up to the month of April 1837 is not and cannot be disputed. His residence there was interrupted for his education, partly in Scotland and partly on the Continent, but thither he returned immediately afterwards; there he married, and there he had his family; there he set up his *Lares*, (as was said,) and there he continued (as I have stated) till April 1837, and would probably have continued much longer, but that his health began to fail in 1836. Then he returned to England. I say England, and it was really to England, because he landed at Dover; he passed a few days in London, and then went directly down to Mrs. Bell's mother's house in Minto Street, Edinburgh. When he came there, I have no doubt in the world, that he had a strong wish to be able to make himself a domiciled Scotchman, that is to say, he had a strong inclination to purchase a place where, as he expressed it in two or three letters, there should be accommodation for a gentleman's family, accompanied with shooting, and so on. I have no doubt he would have wished to purchase such a property if he could have got it, but after residing as he did temporarily with his mother-in-law for about nine months, his inclination seems to have been very much shaken. Because, from time to time, as has been pointed out by my noble and learned friend from letters written by him in September 1837, and in December 1837, and by his wife in March 1838, and in another by his wife in April 1838, which was not mentioned by my noble and learned friend, (which, however, does not add to the case,) it is plain, that he found that he was not quite so much pleased with the country to which he had returned as he expected to have been; and I think, therefore, that his inclinations were a good deal shaken upon this subject. Still I think it was a predominant wish upon his part, that he should be able to find that which would enable him to make himself a domiciled Scotchman. He entered into negotiation for several places but failed; and finally, as he expresses it in a letter which has been alluded to by my noble and learned friend, he says what amounts to this: Because I cannot get a place to purchase such as I desire, therefore temporarily I will take a furnished house, and there establish myself for a time.

Now, upon that subject, I think it is fair to say, that if the evidence had proved that he had come to the conclusion: "I have firmly determined to be a Scotch person, and nothing shall prevent my getting a Scotch estate. I like Scotland, and I will be there; and as I cannot get immediately a permament residence there, I will be content for the present with a temporary one—" I think that would do. There is no mystery in this question of domicile. What was said upon the subject by Lord Wensleydale in one of the cases is, I think, perfectly correct. It is not necessary that you should be the owner of a fee simple in the country, that you should be a free-holder, or, that you should be a leaseholder, or even that you should be the occupant of a house at all. I think the theory goes to this, that if you establish that there was a determination to live in Scotland, and if the party goes and lives at an hotel, that is enough. He is there—that is the *factum;* and there is also the *animus;* and the two unitedly constitute the domicile. But here it appears, that Mr. Bell took that furnished house not only till he could get Enterkine or some other place, but till he could make up his mind what to do; because, when writing to his friend or relative as to his taking Trochraigue, he says—"I shall look out and see, and if I do not get better satisfied I shall go to the south of France." I do not allude to these expressions as shewing, that he meant to establish himself in the south of France, but as shewing the very indeterminate state of his mind during the time of his residence at Trochraigue.

That being so, the case seems to me to be exhausted, because whatever might have been his

animus (and I think there is no proof of a determined *animus* to be in Scotland,) there is no *factum*, because he did not take that place as the beginning of a permanent residence, but only as a place where he might look out and see what he should do, and determine, whether or not he should eventually become a Scotchman. What was pointed out by my noble and learned friend seems to me to be perfectly clear, that some of his relatives had a dread, that if in the mean time, while he was living in Scotland, some pleasant country house across the border, in Northumberland, had offered, he might very likely have been led to purchase it, and so have taken up his permanent residence in England; and had he done so, nobody could have said, that by so doing he had changed his intention. He had never formed any intention inconsistent with his taking a house on the southern side of the Tweed instead of the northern. Upon these grounds I entirely agree with the conclusion arrived at by my noble and learned friend.

LORD CHELMSFORD.—My Lords, I agree with my noble and learned friends, that Mr. Bell had not acquired a domicile in Scotland at the time of his wife's death in September 1838. Questions of domicile are frequently difficult and perplexing, not so much from the want of a definition of the term domicile, as from the equivocal and often conflicting circumstances upon which the establishment of a domicile depends.

This case being one of an alleged change of domicile, it is necessary to bear in mind, that a domicile, although intended to be abandoned, will continue until a new domicile is acquired—until there is not only a fixed intention of establishing a permanent residence in some other country, but until also this intention has been carried out by actual residence there. It may be conceded, that if the intention of permanently residing in a place exists, a residence in pursuance of that intention, however short, will establish a domicile.

Mr. Bell's original domicile was Jamaica, and it is for the respondents, who rely upon a change of domicile, to prove that such change took place. The change of domicile (if any) must be dated subsequently to April 1837, when Mr. Bell turned his back upon Jamaica, and apparently with the intention of never returning to the island. The learned counsel at one time seemed disposed to argue, that Mr. Bell, having a fixed intention of making Scotland his future residence, the moment he quitted Jamaica with that view, he acquired a Scotch domicile. But as intention alone is not sufficient to constitute domicile, this argument was not much insisted on.

It was contended with more plausibility, that if Mr. Bell left Jamaica with the intention of never returning, but of purchasing land in Scotland, as soon as he arrived in Scotland and set about this intention, he acquired a domicile. I do not think, however, that there is a sufficient proof of a fixed intention on the part of Mr. Bell to purchase an estate in Scotland, and not elsewhere, with a view to a permanent residence, until he became the purchaser of Enterkine, whereas after the period when the respondent's case requires that the domicile should be established, he was certainly upon the look out (if I may use the expression) for a place in Scotland, and would no doubt have closed with any advantageous offer. But it seems to me to be equally clear, that he was not so wedded to the idea of a residence in Scotland, as that, if anything more eligible had presented itself in England, he would not have embraced it. To use his own expression upon his examination in the cause, he had "no fixed intention as to what he was to do for the future."

No doubt, if he could have purchased Enterkine on satisfactory terms before his wife's death, he would have become the owner, and from the moment of the purchase the change of his domicile would have been complete. But the negotiations for Enterkine were broken off before his wife's death, and they were not renewed till the following year; although he may have kept his eye upon the estate, and never have altogether abandoned the idea of becoming the purchaser of it.

I agree with Mr. Anderson, that, if a person has a fixed intention to acquire a domicile in a certain place, any residence, however slight or temporary in its character, following upon that intention, and in pursuance of it, will be sufficient to establish the domicile. Therefore, if the temporary residence at Trochraigue had been connected with an intention on the part of Mr. Bell permanently to reside in Scotland, the fact, coupled with the intention, would have given a Scotch domicile. But the act of taking this residence furnishes in itself no proof, that Mr. Bell had made up his mind to a permanent residence in Scotland, and without the proof of this essential element in the constitution of domicile, the residence at Trochraigue is of no consequence.

As Lord Moncreiff said in *Munro* v. *Munro*, "It is a settled rule in the constitution of a domicile, that it is not formed or proved by the mere fact of residence, however long continued, without the *animus* or purpose of permanent domiciliation, much more (where the question is, whether a man at the age of thirty one has changed his domicile, abandoning that which he had held from his birth) must there be proof not only of the fact of residence elsewhere for a given time, but of an intention to constitute a new domicile in exclusion of the old. The question is one partly of fact, but still more of intention, and unless both be proved either directly, or as matter of necessary inference, the change of domicile cannot be presumed to have taken place."

I think the respondents have failed to prove Mr. Bell's intention to acquire a new domicile

before the death of his wife on the 28th of September 1838, and therefore, that the interlocutors finding that he became domiciled in Scotland at this date ought to be reversed.

LORD WESTBURY.—I have very few words to add to what has been already stated to your Lordships; and, perhaps, even those are not quite necessary.

What appears to me to be the erroneous conclusion at which the Court of Session arrived is in great part due to the circumstance, frequently lost sight of, that the domicile of origin adheres until a new domicile is acquired. In the argument and in the judgment we find constantly the phrase used, that he had abandoned his native domicile. That domicile appears to have been regarded as if it had been lost by the abandonment of his residence in Jamaica. Now residence and domicile are two perfectly distinct things. It is necessary, in the administration of the law, that the idea of domicile should exist, and that the fact of domicile should be ascertained in order to determine which of two municipal laws may be invoked for the purpose of regulating the rights of parties. We know very well, that succession and distribution depend upon the law of the domicile. Domicile, therefore, is an idea of law. It is the relation which the law creates between an individual and a particular locality or country. To every adult person the law ascribes a domicile, and that domicile remains his fixed attribute until a new and different attribute usurps its place. Now this case was argued at the bar on the footing, that as soon as Mr. Bell left Jamaica, he had a settled and fixed intention of taking up his residence in Scotland. And if indeed that had been ascertained as a fact, then you would have had the *animus* of the party clearly demonstrated, and the *factum*, which alone would remain to be proved, would in fact be proved, or, at least, would result immediately upon his arrival in Scotland.

The true inquiry, therefore, is—Had he this settled purpose, the moment he left Jamaica, or in course of the voyage, of taking up a fixed and settled abode in Scotland? Undoubtedly, part of the evidence is the external act of the party; but the only external act we have here is the going down with his wife to Edinburgh, the most natural thing in the world, to visit his wife's relations. We find him residing in Scotland from that time; but with what *animus* or intention his residence continued there, we have yet to ascertain. For although residence may be some small *primâ facie* proof of domicile, it is by no means to be inferred from the fact of residence that domicile results, even although you do not find, that the party had any other residence in existence or in contemplation.

I take it, that Mr. Bell may be more properly described by words which occur in the Digest—that when he left Jamaica he might be described as *quærens quo se conferat, atque ubi constituat domicilium*—Dig. lib. 50, tit. 1, 27. Where he was to fix his habitation was to him at that time a thing perfectly unresolved; and, as appears from the letters which your Lordships have heard, that irresolution, that want of settled fixity of purpose, certainly continued down to the time when he actually became the purchaser of Enterkine. But the *punctum temporis* to which our inquiries are to be directed as to Mr. Bell's intention is of an earlier date than that. The question is—Had he any settled fixed intention of being permanently resident in Scotland on the 28th of September 1838? I quite agree with an observation which was made in the Court of Session, that the letters are the best evidence in the case. To those letters your Lordships' attention has been directed, and whether you refer to the language of the wife's letters, or look exclusively at the language of the husband's letters, written to his familiar friends or his relatives whom he left in Jamaica, it is impossible to predicate of him, that he was a man who had a fixed and settled purpose to make Scotland his future place of residence, to set up his tabernacle there, to make it his future home. And unless you are able to shew that, with perfect clearness and satisfaction to yourselves, it follows, that the domicile of origin continues. And therefore I think we can have no hesitation in answering the question where he was settled on the 28th September. It must be answered in this way: he was resident in Scotland, but without the *animus manendi*, and therefore he still retained his domicile of origin.

It is matter of deep regret, that, although it might have been easily seen from the commencement of this cause, that it turned entirely upon this particular question, yet we find, that ten years of litigation have taken place, with enormous expense and an enormous amount of attention to a variety of other matters which would have been wholly unnecessary if judicial attention had been concentrated upon this question, which alone was sufficient for the decision of the case.

LORD COLONSAY.—My Lords, while I do not differ from the judgment proposed, I cannot say, that the case has appeared to me to be so very clear and free from difficulty as it has appeared to my noble and learned friends. I think it is a case of nicety on the evidence. But having gone over that evidence more than once with much care, and having listened to the whole of the able argument for the respondents, I do not see any sufficient ground for rejecting the conclusion at which my noble and learned friends have arrived.

The principle of domicile is one which occupies a very prominent place in our law and in the law of all civilized countries. It exercises an influence almost paramount in regard to personal status and rights of succession as well as to political international relations. It has therefore necessarily undergone much discussion in all countries, and both in ancient and modern times. Yet there is perhaps no chapter in law that has, from such extensive discussion, received less of satisfactory settlement. That is no doubt attributable, in no small degree, to the nature of the

subject, involving as it does inquiry into the *animus* of persons who have either died without leaving any clear record of their intentions, but allowing them to be collected by inference from acts often equivocal; or who, being alive and interested, have a natural, though, it may be, an unconscious tendency to give to their bygone feelings a tone and colour suggested by their present inclinations.

I am not disposed to take the evidence of Mr. Bell as the corner stone of my judgment. I agree with the respondents in thinking, that what Mr. Bell wrote at the time, and what he did at the time, are better materials and safer grounds for judgment than what he says now. And I should have been of that opinion even if his evidence had been less open to criticism, and less vulnerable than it is.

The case presents itself to my mind in this light: Mr. Bell's domicile was in Jamaica—not only his domicile by residence and property, and as being the seat of his mercantile pursuits and all his worldly interests, but also his domicile of origin. To this last I attach considerable importance, though I think, that the measure of its importance on the question of evidence may be and in this case is modified by other considerations, such as the previous history of his family and of his wife's family, and his own early associations by residence in Scotland for twenty years from childhood until manhood. Still I think the circumstance, that Jamaica was the domicile of origin is not unimportant in this case, and especially on the question as to the extinction of that domicile. Then I think it is very clear, that Mr. Bell left Jamaica with the intention of never returning, or, as it is expressed in some of the letters, he left it "for good." I further think, that his leading desire at that time, and for some time previously, was to acquire a landed estate in Scotland which would give him a desirable residence and be at the same time a good investment for his money. This last was, I think, a *desideratum*, for it appears, that he intended to invest in that way the whole, or nearly the whole, of his fortune, and was even disposed to borrow £14,000 or £15,000 to enable him to make such a purchase as he desired. But I do not think, that his having sailed from Jamaica with that intent extinguished his Jamaica domicile. I know of no authority for that proposition. There are *dicta* to the effect, that if Scotland had been the domicile of origin, and he had bid a final adieu to Jamaica and sailed for Scotland, and had died *in itinere*, the domicile of origin would be held to have revived; but there is no authority for saying, that a person dying *in transitu* from the domicile of origin to a foreign land had lost the domicile of origin. He could not so displace the effect which the law gives to the domicile of origin, and which continues to attach until a new domicile is acquired *animo et facto*. He cannot have acquired a domicile in a new country which he has never reached.

But Mr. Bell did reach Scotland, and there the difficulty of this case begins. His leading desire was to find in Scotland an estate such as he would be disposed to invest his fortune in. He arrived in Scotland in June or July 1837. He immediately set about prosecuting inquiries as to estates, chiefly in Ayrshire, Dumfriesshire, and Galloway. Among these was the estate of Enterkine. For that estate he made an offer in 1838 which was refused. He made a higher offer in 1839, which was accepted. I have no doubt, that from the date of that purchase he was to be regarded as a domiciled Scotchman. His leading desire with which he left Jamaica and arrived in Scotland, and which during two years' residence in Scotland he still entertained, had now been realized. He had found a property such as he had desired, with a mansion that suited him. He invested his fortune in that purchase, and took up his abode in that mansion, and he and his whole interest thus became as it were identified with that estate and rooted in the soil. The question here, however, is, whether in September of the preceding year he had acquired a Scotch domicile.

To that question an affirmative answer was given by all the five learned Judges who considered the case in the Court below. A negative answer has been given by all my noble and learned friends who have now addressed the House. In these circumstances, and it being very much of a jury question, I may be excused for regarding it as a question of some difficulty.

The argument of the respondents, that Mr. Bell having quitted Jamaica for good, and gone to Scotland, where he had many attractions, with the avowed intention of investing his fortune in land in Scotland, and having indicated no disposition to make any other investment, his Scotch domicile must be held to have commenced from the time he arrived in Scotland and set about the prosecution and realization of that object, although in the mean time, while prosecuting his inquiries, he provided himself with a temporary habitation, was very forcibly put, and under certain supposable circumstances must be entitled to the greatest weight. I do not think, that the acquisition of a permanent habitation by purchase or lease is necessary to domicile, neither do I attach importance to the circumstance, that his inquiries or views were not always directed to the same estate, or to estates in the same county. If it was clear, that, prior to September 1838, there was a fixed determination to invest his fortune in land in Scotland, and to reside there, I think that there was enough of actual residence to support the case of the respondents. But I think, that while he had a strong desire to invest in land in Scotland with a suitable mansion on it, the fulfilment of that desire was contingent on his finding an estate that would give him not only a suitable residence but also an adequate return for his money. This was indispensable, because his whole fortune was to be invested. Such an investment is not always,

or easily to be got, and it is to me by no means clear, that if he had not been able within a short time to obtain such an investment, he would have remained in Scotland. Looking to what appears to have been the state of his health, and the opinion expressed as to the climate, it seems not at all unlikely, that in that event he would have lived chiefly in a warmer climate, and perhaps occasionally visited his friends in Scotland. He might or might not have invested in land elsewhere. But I do not see sufficient ground for holding, that he had resolved to make Scotland the country of his residence, except in the event of his being able to make such an investment as he desired. In the mean time his mind was unsettled as to where he should finally cast anchor. His location in Scotland was tentative.

If his final offer for Enterkine, in the spring of 1839, had been rejected, I see no reason to conclude, that he would have remained in Scotland; and if he had then gone to a preferable climate and taken up his residence there, I think it could not have been held, that he had in the previous September become a domiciled Scotchman. If he had gone to Scotland with intent to reside permanently there, without regard to any particular mode of investing his fortune, the contingency on which I think so much depends would have been out of the case, and his location in Scotland would not have been attributable to that purpose of investigation previous to decision, to which, I think, it may fairly be attributed. No doubt, the continuance of the residence of a person in any country, however long he has been there, may, in a sense, be said to be contingent on possible future occurrences. But that has no resemblance to the present case, for there the purpose to settle in a particular country, and so acquiring a domicile there, was contingent, and, as I think, in suspense.

Upon these grounds I am disposed to concur in the judgment proposed.

Other defences were pleaded in the action, and were maintained in the Court below, and as the learned Judges in that Court were of opinion, that the Scotch domicile had been established, it was proper, and indeed quite necessary, for them to deal with those other defences, and it would equally have been our duty to have done so if we had taken the same view as they did of the import of the evidence in regard to domicile; but in consequence of our having taken a different view of the import of that evidence, it has now become unnecessary to deal with those other defences.

Interlocutors reversed.

Appellant's Solicitors, J. W. and J. Mackenzie, W.S.; Grahames and Wardlaw, Westminster. —*Respondents' Solicitors*, G. Cotton, S.S.C.; Uptons, Johnson, and Upton, London.

MAY 26, 1868.

ANGUS MACKINTOSH of Holme, *Appellant*, *v.* PATRICK ARKLEY, Sheriff substitute of Edinburgh, *Respondent*.

Process—Preliminary Defence—Time of Pleading—*The Statute* 13 *and* 14 *Vict. c.* 36, § 7, *as to the time of pleading a preliminary defence, is directory only, and the Court may allow it to be pleaded along with pleas to the merits.*

Lunatic—Warrant to Remove to an Asylum—Reduction—Interest of Judge—*The Statute* 55 *Geo.* III. *c.* 69, § 8, *does not require evidence to be given on oath to a Sheriff on granting a warrant to send a lunatic to an asylum. The Statute applies to lunatics not cognosced as well as those cognosced.*

The Sheriff, who grants warrant which is ex facie *regular and within his jurisdiction, has no interest in the document such as renders him liable to be made defender in an action of reduction of such warrant.*[1]

This was an action against the Sheriff substitute of Edinburgh, for reduction of (1) a warrant dated 13th June 1852, to confine the pursuer in Saughtonhall madhouse; (2) a madhouse licence granted by defender to the keepers to receive and detain the pursuer.

The condescendence alleged certain facts as to the granting of the said warrant and licence by the defender as Sheriff substitute, and averred, that the defender acted maliciously, negligently, recklessly, wrongfully, illegally, and without probable cause; but there was no conclusion for damages.

The following were the pleas in law for pursuer:—1. The defender having maliciously, negligently, illegally, wrongfully, and without probable cause, made the order and granted the

[1] See previous report 39 Sc. Jur. 114. S. C. 6 Macph. H. L. 141: 40 Sc. Jur. 482.