

SCOTLAND / JUDGMENT

Willar v Willar [1954] ScotCS CSIH_2 (29 June 1954)

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JISCBAILII_CASE_SCOT_CONFLICT OF LAWS 29 June 1954 Willar v. Willar LORD
WALKER'S OPINION.—This is an action of divorce for desertion brought by Captain Elmo
Malcolm Willar, who is a regular army officer stationed at Dundonald Camp, Troon,
Ayrshire. He claims to have acquired a domicile of choice in Scotland. He was born in
Newfoundland, his father was a native of Newfoundland, and I must hold that he had his
domicile of origin there. On 13th May 1944 he married in Newfoundland, and his wife has
never been in Scotland. In the same year as he married, the pursuer resigned from the
Newfoundland Army and enlisted in the British Army. He came to the United Kingdom,
where he received initial training. Thereafter he proceeded to Italy on active service and
remained there until July 1945, when he returned to England. In October 1945 he went on
service to India, where he remained until November 1947. Thereafter he was stationed in
England until July 1949, when he was posted to the Far East. He remained abroad until
August 1952 and it was then that he was posted to his present station in Troon. I am
satisfied from the evidence that by November 1947 he had formed a genuine intention of
settling in Scotland, so far as the requirements of military service might permit. The real
difficulty in this case arises from the nature of the pursuer's residence in Scotland,
because he is living in the course of his military service in a military camp. It has, I think,
been settled that a soldier in military service may in certain circumstances qualify, as
regards residence, for acquiring a domicile of choice in the place where he serves. In
Sellars v. Sellars , 1942 S. C. 206, where the claim of a naval rating to have acquired a
domicile of choice in Scotland failed, Lord President Normand (at p. 211) said this: "A
soldier does not, and cannot, acquire a domicile in the place where he is stationed if there
is nothing more to qualify his residence there than the mere fact that he is present in it
under orders." And Lord Moncrieff (at p. 213) said: "The true proposition, I think, must be
that, if there be nothing to prove a change of residence except residence dictated by

military service, such incidental residence is not per se relevant to show that there has been a settlement by choice in a new area of jurisdiction along with a renouncing by choice of the settlement within the former area." Mr Cowan has argued that there are here two elements which were not present in the case of Sellars and which are available to qualify his client in respect of residence for a change of domicile. The first is that Captain Willar, having acquired a liking for Scotland and a desire to settle there, at the end of his Far Eastern service requested that he should be posted to Scotland. He changed from the Royal Artillery into the Anti-Aircraft branch of the service in order to facilitate such a posting. In my view, however, the fact that he was posted to Troon in response to a request to his military superiors does not make his residence there any the less a residence under military orders. He would not be there except by order of his military superiors, and by such order he is liable to leave at any time. Accordingly, I do not think that the fact that he requested his posting can serve to distinguish this case from the case of Sellars. The second element that Mr Cowan founded upon was that from the days of Captain Willar's service in India and his return to England in November 1947, when he spent a long leave in Glasgow, he has been, as Major Tweddel described it, based upon Glasgow. Mrs Tweddel, who is the mother of the pursuer's friend, Major Tweddel, has kept in her house in Glasgow a room available for the pursuer and has also kept his personal belongings and his dog. I think, however, that that is rather a privilege which Mrs Tweddel has extended to Captain Willar than a right which he has acquired in Scotland of the nature that was in contemplation in the case of Sellars. The observations of the learned Judges in Sellars were evoked by the old decision of *Clarke v. Newmarsh*, (1836) 14 S. 488, where a military officer who had acted as Lieutenant-Governor of Fort Augustus was held to have acquired a domicile of choice in Scotland and so to have lost his domicile of origin in England. That was a very special case, because the military officer had held his position in Fort Augustus for about half a century, in the course of which he had acquired an interest in a farm which he carried on. He had become a Justice of the Peace for a county and he had married and lived with a Scotswoman in Fort Augustus. That is the kind of case that was under the consideration of the Court in Sellars and, in particular, was the type of case that Lord Moncrieff had in mind when he said (at p. 213): "The purchase or permanent occupation of a house, the transfer to the new area of wife and family, the succession to a landed estate would, any one of them, be a concurring circumstance which might be relevant to support the claim." There is nothing at all of that kind here, because Captain Willar has acquired no house in Scotland. He has never lived with his wife in Scotland and, indeed, apart from his residence under military orders in a military camp, he has nothing in Scotland except for the privilege which Mrs Tweddel has extended to him of keeping a room in her house available for his use on leave and retaining for him personal belongings and his dog. In my judgment, having regard to the difficulty of abandoning a domicile of origin and the transient nature of a military posting, the circumstances here are, as regards residence, not sufficient. Therefore I must find that this Court has no jurisdiction and dismiss the action. The pursuer reclaimed, and the case was heard before the Second Division (without Lord Mackintosh) on 3rd June 1954. At advising on 29th June 1954,—

LORD JUSTICE-CLERK (Thomson).—The pursuer's domicile of origin is Newfoundland. That domicile endures until he has acquired a domicile of choice somewhere else. The burden of proving that he has abandoned his domicile of origin and acquired a domicile of choice rests with the pursuer. In order to discharge the onus of showing that he has abandoned his Newfoundland domicile and acquired a domicile of choice in Scotland, he must satisfy the Court that he has taken up residence in Scotland with the object of remaining there permanently. The two elements of actual physical residence in Scotland and the intention to settle there must be present. Clearly there must be actual residence, and, in the absence of residence, no amount of intention will suffice. One cannot acquire a domicile of choice by wishful thinking, although, where intention is absolutely clear, a minimum of residence in the ordinary case at any rate is enough. Accordingly, in the great majority of cases the Court starts by examining the facts of the actual residence, and it frequently happens that these facts go far to persuade the Court that the intention to remain permanently is present. No doubt, if the facts of residence are ambivalent, other factors may point so strongly in the direction of intention as to lead to the conclusion that the choice of a new domicile has been established. But, even so, there must be a basic residence in the new country which is sufficient, when combined with evidence of intention, to amount to a choice of that new country as a home. The normal approach, accordingly, is "Here is residence; what is its significance as to intention?" Making that approach, unaffected by anything said by the Lord Ordinary, I think that I would have required a good deal of persuasion that the residence of the pursuer in Scotland was of a quality sufficient to point to an intention permanently to remain in Scotland. One might readily have expected evidence directed to show that his residence was not just a barracks existence, that he had some place that he could call his own and not a mere pied-à-terre in the house of the mother of a military friend. One would also have been impressed by the fact that as a soldier he was bound to go where he was sent. No doubt the pursuer expressed a preference to serve in Scotland and, indeed, took certain steps to facilitate the granting of the preference. But it is not uncommon for soldiers to prefer one station to another or to adopt expedients to make their preference effective. Nor, in the light of an expressed preference for a Scottish posting, would one readily attach much additional importance to his spending his leaves in Scotland with the exception of those which he spent on the other side of the Atlantic. Accordingly, if one had to approach this case in what I have ventured to call the normal way, one would have great difficulty in distinguishing it from *Sellars v. Sellars*. While that case clearly recognises that a soldier on military service in Scotland is not disqualified from acquiring a Scots domicile, it shows that the Court will not infer an intention permanently to remain in Scotland from "residence in Scotland under naval orders which might have been interrupted at any time by other naval orders"—Lord President Normand at p. 212. Lord Moncrieff said (at p. 213): "To establish choice of residence there must be evidence of a voluntary act upon the part of the person whose domicile is asserted to have been changed, and the mere fact of his being stationed on service within any particular area will never per se avail to establish such a choice. Per contra, if there be adduced sufficient evidence of a voluntary act of

choice, the act will not be defeated or refused effect merely because the area of choice happens to coincide with an area of service." There is, of course, a little more in the present case than in *Sellars*. There is the indication of a preference for a posting in Scotland. More extensive leaves were spent in Scotland. The pied-à-terre was of a more convincing character and was used somewhat as a home address. I cannot think, however, that the evidence of residence, taken by itself, would be enough to lead to the inference of a voluntary act of choice. It is at best equivocal. It would be difficult on these facts, taken alone, to draw the inference that the pursuer intended to settle or to make his home in Scotland. The residence to which he can point can equally be explained on the footing that he liked the place in which he was stationed and liked it sufficiently to spend his leaves there. As for the use which he made of his friend's mother's house, that was just what any professional soldier without a settled home might be glad to take advantage of. In these circumstances one would be inclined to reach the conclusion reached by the Lord President in *Sellars*, that "the pursuer's intention was not really an intention to remain in Scotland as in a country where he was already settled, but an intention, if circumstances permitted, to acquire a settled home in Scotland at the conclusion of his service." However, in the present case, the approach for us is not the normal one. The Lord Ordinary has expressed the view that by November 1947 the pursuer had formed a genuine intention of settling in Scotland, so far as the requirements of military service might permit. We are not therefore in the type of case where sufficient residence must be discovered to support intention. The Lord Ordinary has in fact held that the intention to settle is established, although he recognises that the exigencies of his military service may in the future prevent his continuing to reside in Scotland. This finding seems to me to differentiate the case from *Sellars*, where the position was as the Lord President put it in the passage I have just quoted. This brings out a distinction between a present intention and a future intention. This was also the view of the Lord Ordinary (Keith), who observed (at pp. 207-208): "He professes an intention to make his home in Scotland, and hopes to end his days there." At another place (p. 209) he said: "A man may develop an attachment for any part of the world in which he is stationed under orders. He may form a resolve to settle there when his period of service is finished." While no doubt the Court in *Sellars* accepted that the pursuer had conceived a genuine attachment to Scotland, they were not prepared in the circumstances of his residence in Scotland to affirm that there was a present choice of Scotland as his home. But, once a present intention to settle is affirmed, it seems to me that, if there is de facto residence, that should be enough. The residence, even in a military camp, is no longer equivocal in the sense that it may or may not point to intention. It is, on the facts of the case, the only way in which the settled intention can be expressed by residence. The Lord Ordinary was not entitled to take away with his left hand what he had given with his right. When he said that the real difficulty in the case arose from the nature of the pursuer's residence in Scotland, he was taking that point too late in the argument, as his concession of the genuineness of the intention to settle in Scotland involved an acceptance of the fact that the nature of his residence in Scotland was compatible with the formation of such an intention. If, then, I am right that it is too late to

question the nature of the residence once the intention to settle is conceded, there is ample authority that, once intention is clear, a minimum of residence is enough. I regard this as a very special case on the facts, the particular circumstances of which are very unlikely to recur, and I base the conclusion that domicile is made out on the finding of the Lord Ordinary as to intention. There were a number of matters which he was entitled to have in view in reaching that finding, and he had the opportunity of seeing and hearing the pursuer. Two matters in this connexion particularly impress me. The pursuer has gone far to sever his roots with Newfoundland. So, of course, had Bell in *Bell v. Kennedy* severed his roots with Jamaica, but the reason why a Scots domicile was not made out was that it still remained an open question whether his ultimate choice was to be Scotland or England. Here the pursuer is in a very different position; Scotland is the only alternative to Newfoundland. Further, the pursuer tried to persuade his wife to come to Scotland. If he had succeeded, there is every prospect that he would have been under the necessity of settling her here, and, if he had done so, it would have been an important factor. As it is her refusal which has condemned him to a bachelor existence, I do not think that his bachelor arrangements should weigh too heavily against him. The pursuer had a heavy onus to discharge in order to satisfy the Lord Ordinary that he had formed a genuine intention to settle in Scotland. But, having done so, I do not see that he is to be defeated because, as things have turned out through no fault of his, all or practically all that he can offer in the way of residence is in pursuance of his military service. This view seems to me to be consonant with the outlook expressed in Dicey, (6th ed.) p. 124, where it is stated: "Although there are dicta to the contrary, it is submitted that there is no rule of law that a soldier, sailor or airman cannot acquire a domicile in the place where he is stationed. If all that appears is the mere fact that a soldier, sailor or airman is resident in a country under orders, and there is nothing more to qualify his service, then it may be said that such residence does not involve the acquisition of a new domicile. If, on the other hand, there is evidence that such a person has voluntarily formed the intention of remaining indefinitely in the country in which he is stationed, he may be held to have acquired a domicile there. However, a heavy onus lies upon a person alleging that such a domicile has been acquired to show that the necessary intention to acquire a domicile in that country does exist." This passage marks a development in the law of England in regard to serving soldiers, but it is a development which reflects the changes which have taken place in the conditions of military service in the transition from the Victorian era to a less settled age. The recent English case of *Donaldson* accepts the development and, moreover, proceeds on the acceptance by the Judge of first instance of the plaintiff's evidence as to intention. Accordingly I am prepared to hold, though I regard the case as narrow and difficult, that the pursuer has established a Scots domicile. LORD PATRICK.—It has never been considered a matter of small moment, or one capable of being established by a light proof, that a man has abandoned his domicile of origin and acquired a domicile of choice. Others than the man are affected by a decision to that effect. The law regulating such grave matters as his domestic relations and the succession to his estates may vary as his domicile is changed. The matter is of particular moment in this case, for it may be that the

Courts of the pursuer's domicile of origin have no jurisdiction to grant a decree of divorce. The domicile of origin of the pursuer was Newfoundland. He has no longer any home in Newfoundland and, upon the evidence, would appear to have abandoned that country. Nevertheless it remains his domicile, unless he has discharged the onus of proving that he has acquired a domicile of choice elsewhere. A domicile of choice is lost by mere abandonment, whereupon the domicile of origin revives until a new domicile of choice is acquired. A domicile of origin is not lost by mere abandonment, but only by abandonment and the acquiring of a domicile of choice— *Udny v. Udny* . It seems necessary to state this, though it is trite law, since in the course of the argument it was suggested that the pursuer's abandonment of Newfoundland made it in some ill-defined way easier for him to discharge the onus of proving that he had acquired a domicile of choice in Scotland. In that case, also, Lord Westbury said (at p. 99): "Domicile of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with the unlimited intention of continuing to reside there. This is a description of the circumstances which create or constitute a domicile, and not a definition of the term. There must be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief of illness. And it must be residence fixed not for any defined period or particular purpose, but ... general and indefinite in its future duration." As I understand, Lord Westbury is here stating the character of the residence which a man must acquire in order to carry into effect his intention of acquiring a domicile of choice. Of the characteristics he states, those of prime importance for the decision of this case are (1) that the residence must not be dictated by the duties of office, and (2) that the residence must not be for a defined period or particular purpose, but general and indefinite in its future duration. In this case the Lord Ordinary has held that from about November 1947 the pursuer had formed the intention of settling in Scotland, so far as the requirements of military service might permit. The pursuer has therefore discharged the onus of proving that he formed the intention of settling in Scotland permanently or for an indeterminate period. It remains for him to prove that he has carried that intention into effect by acquiring a residence in Scotland which possesses the above characteristics. When he left Newfoundland in the year 1944, his wife remained there. She subsequently removed to Canada. Since 1944 the pursuer and his wife have never lived together. Since 1944 the pursuer has never had a home, in any ordinary sense of the term, either in Scotland or elsewhere. He has been an officer on the active list, living in military quarters now in England, now in Italy, now in India, now in the Far East, and for the last fifteen months in Scotland. He founds (first) upon the fact that in the latter part of the year 1952, when about to return from service abroad, he requested that he might be posted to Troon, and transferred from the Royal Field Artillery to an anti-aircraft unit so that he could get such a posting. The authorities agreed. He was posted to Troon in the end of 1952 and was still stationed there at the date of the proof, 12th March 1954, living in military quarters. Now, in general, the residence of a soldier in a particular country, such residence being dictated by the necessities of his appointment, will not be enough to establish that he has carried

his intention of settling in that country into effect. But there may be circumstances which establish that, although his appointment dictates that he should reside in that country, he has freely and voluntarily settled in that country— *Sellars v. Sellars* . In that case, as in this, the pursuer gave evidence that during the period of residence in Scotland upon which he founded he had the intention of settling in Scotland. The Lord Ordinary (Lord Keith) dealt with the case upon the footing that that was so. In the Inner House the question for decision was whether the pursuer had proved that he had in fact settled in Scotland. It was held that he had not. If, however, the appointment, with the accompanying necessity of residence, could have been given up at any time, but has been retained for a long time, if he has acquired some interests in the country of a permanent or quasi -permanent nature, if he has put down some roots which would not readily be torn up, it may be possible to say that the soldier has settled in the country permanently or at least for an indeterminate period and has acquired a domicile of choice in that country. *Clarke, v. Newmarsh* was such a case. Governor Trapaud, whose domicile of origin was English, retained the appointment of Lieutenant-Governor of Fort Augustus for fifty years, living in the Governor's house until his death. He married a Scotswoman. He leased and cultivated a farm in the neighbourhood. He was a Justice of the Peace for the county. In short, as Lord Mackenzie said (at p. 500): "He occupied himself with other duties indicative of a fixed residence." It was held that he had acquired a Scots domicile of choice. It is in this matter of the character of the residence which will establish settlement in a country that the dictum of Lord Westbury is of critical importance. It must be residence freely chosen, not dictated by the duties of office, not for a defined period or particular purpose but general and indefinite in its future duration. The pursuer's residence in military quarters at Troon for fifteen months does not seem to me to satisfy these requirements. It was the residence of a soldier on the active, list for a particular purpose, the fulfilment of his military duties at Troon. It would last only so long as his appointment at Troon subsisted. The duration of that appointment was dependent on the exigencies of the service, and might well be terminated at short notice. Meantime he has acquired no interests and has put down no roots which would embarrass his leaving to-morrow if orders to that effect arrived. The second element on which the pursuer founds is the fact that since the end of 1952 and on occasions before that he has lived during his leaves in the house of a friend in Glasgow, where he is always welcome, and who, when he comes, places a room at his disposal. Now, it has been said that, if a man has formed the intention of settling in a country, the fact of his settling there might be established even if he lived in a hotel or in lodgings. All would depend on the circumstances of the man and the case. Whatever the circumstances, the "residence" would still have to be the man's sole or chief residence, taken for no particular purpose, and with the unlimited intention of continuing to reside there. I cannot regard the pursuer's living with a friend as her guest when he goes on leave as possessing these characteristics. It is for a limited purpose, for short periods, and is dependent on the goodwill of his hostess, not upon his own determination. The other matters upon which the pursuer founds are that his friend stored his surplus kit and cared for his dog when he went abroad on service, and that he has given the address of his

friend to the military authorities as his home address. These seem to me to be trivialities of no significance. He has in fact no home, and no home address, in the true sense of the words, to give. Nor, upon the question at issue in this case, am I able to attach any significance to the fact that in 1944 the pursuer resigned his commission in the Newfoundland forces and accepted a commission in the British Army. The Queen reigns over many jurisdictions. The fact that a man joins Her Majesty's Army cannot, in my opinion, be evidence that he has settled in a particular one of them. The question was asked: "What more could the pursuer, a serving soldier, have done to evidence that he has in fact settled in Scotland?" It is more difficult for a serving soldier to lose his domicile of origin and acquire a domicile of choice than it is for many people. That is because of the exigencies of his profession, which render him liable to be moved from country to country at the orders of his superiors. Nevertheless, though the burden of proof of the fact is heavy, it is possible for him to settle during his service in a country other than that of his origin, and the fact that he has done so may be proved by acts which evidence that he has acquired a permanent settlement or one for an indefinite period in that other country. In this case the pursuer seems to me to have done, not the maximum, as the question suggests, but less than the minimum necessary to constitute a settlement in Scotland. He has acquired no home. There is no evidence of his acquiring any local interests or taking part in any local activities, such as a man who had settled in a country and made it his home might be expected to have done. Stripped of irrelevancies and trivialities, all he has done is to ask that he be posted to a military station in Scotland and to spend his leaves as a guest in the house of a friend in Scotland. That is insufficient to satisfy the legal requirement that he should have acquired a permanent or quasi -permanent settlement in Scotland. I agree with the Lord Ordinary's reasoning and conclusion. LORD BIRNAM .— This action of divorce is undefended, but the Lord Ordinary after a proof found that the pursuer had failed to establish a Scottish domicile. He accordingly held that the Court had no jurisdiction and dismissed the action. The pursuer's domicile of origin was in Newfoundland, where he was born thirty-one years ago. After his marriage in 1944, however, he decided to leave Newfoundland for good and joined the British Army. His parents, one of whom (his mother) was of Scottish extraction, are dead, and his wife lived in Canada. In the course of the past ten years the pursuer, who has now attained the rank of captain, served with the British forces in various parts of the world, including India and Korea, and since 1952 he has been resident in Scotland at a military camp near Troon. The law is clear that a man's domicile of origin clings to him until he has not only abandoned it but has acquired another, and the difficulties in the way of a soldier acquiring a domicile of choice *animo et facto* are obvious. In the present case the evidence is very clear to the effect that the pursuer has definitely abandoned his domicile of origin. The Lord Ordinary was also satisfied (and I agree with him) "that by November 1947 the pursuer had formed a genuine intention of settling in Scotland, so far as the requirements of military service might permit." He has held, however, that "the circumstances here are, as regards residence, not sufficient" to warrant him in holding Scottish domicile established. In Dicey's Conflict of Laws, (5th ed.) pp. 131-132, there appears the following passage:— "A

soldier (1) does not acquire a domicile in the place where he is stationed, but (2) is presumably domiciled in the territory of the sovereign whom he serves." In the light of the case of *Sellars v. Sellars*, the first of these propositions needs to be modified so as to read (in the words of Lord Moncrieff at p. 211): "A soldier does not and cannot acquire a domicile in the place where he is stationed if there is nothing more to qualify his residence there than the mere fact that he is present in it under orders." Lord Moncrieff's opinion (at p. 213) was also to the effect that Dicey's first proposition must be modified, so as to mean only that, "if there be nothing to prove a change of residence except residence dictated by military service," then a domicile of choice cannot be held proved. With regard to Dicey's second proposition that "a soldier is presumably domiciled in the territory of the sovereign whom he serves," this is not very helpful in the present case, where there are several "jurisdictions" embraced within the territory of the sovereign in whose service the pursuer is engaged. The proposition is of some assistance to the pursuer, however, in this sense, that where, as here, a man who has chosen a military career deliberately abandons that part of the British Commonwealth in which he was born, gives up the military service which he had commenced there and joins the British Army in Great Britain, the minimum of evidence will be required to show that he has acquired a new domicile in the "Old Country"—which is so often referred to as the "Homeland." Indeed, once the intention to settle in Scotland is proved, a comparatively short period of actual residence should be enough to establish the change of domicile. The question is, then, whether the evidence in the present case comes up to this minimum standard. So far as the pursuer's intention is concerned, there is no difficulty. As the Lord Ordinary puts it, the pursuer for the past seven years at least has had the genuine intention of settling in Scotland, not merely in the future after his military service is at an end but at present, so far as military service permits. This, of course, would not be enough unless during these seven years he has been able to some extent to carry out his intention. But, in my judgment, he has done quite a lot, and at least enough to satisfy the minimum standard of proof which such a case requires. He has formed and cultivated a close friendship with a family in Glasgow, where he is made to feel "at home," and where a room is made available for him whenever he requires it. He has for the past seven years spent most of his leaves in Glasgow. While serving abroad, the address of his Scottish friends was given to the military authorities as his home address. His dog and his surplus equipment and other valuables were left at that address in Glasgow, and he returned there as soon as his service abroad was over. In order that he might be able to live in Scotland, not only when on leave but while on duty, the pursuer applied for transfer to a unit of Her Majesty's forces which he knew would be stationed in Scotland for a period of years. His application was granted, with the result that he has in fact been continuously resident in this country since August 1952. The case is accordingly quite different from that of *Sellars*, to which I have referred. There is in this case something more to qualify his residence in Scotland than the mere fact that he is here in accordance with military orders. This is not a case, like *Sellars*, where residence in Scotland has been "dictated by military service," as Lord Moncrieff expresses it (at p. 213), or "thrust upon him," to use Lord Patrick's words (at p. 214) in that case. While, therefore,

the case is undoubtedly a narrow one, and the circumstances are special and unlikely to recur, I am of opinion there is enough evidence to warrant this Court in sustaining its jurisdiction.

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