ORIGINAL CIVIL.

Before Mr. Justice Pontifex.

1878
June 7.

IN THE GOODS OF ELLIOTT.

Domicile—Service under East India Company—Succession Act (Act X of 1865), ss. 2, 5, 10—21 and 22 Vict., c. 106.

A Scotchman who entered into the service of the East India Company, and continued in that service after the Act of 1858 (21 and 22 Vict., c. 106), transferring the Government of India from the East India Company to the Crown was passed, died in the year 1878, leaving a holograph will, which was not attested according to the provisions of the Indian Succession Act, but which was admittedly good according to Scotch law.

Held, upon an application for a declaration that the document was a good will, and for a grant of probate, that the deceased had acquired an Anglo-Indian domicile, which he had not lost at the time of his death, notwithstanding the Act of 1858 and the Succession Act, and therefore, the will not having been properly executed, probate was refused.

Wauchope v. *Wauchope* followed (1)

THIS was a petition for an order declaring a certain document purporting to be the last will and testament of Surgeon-Major John Elliott, deceased, to be good and valid as such, and that probate thereof might be granted to the petitioner, one of the executors named therein.

The petitioner stated that the deceased died at Calcutta in the month of January, 1878, having first made and executed a document dated the 28th day of November, 1874, purporting to be his last will and testament in writing; that the document in question was entirely in the handwriting of the deceased, but had not been executed and attested with the formalities and in manner required by English law or by the Succession Act, 1865, so as to be a valid will under such law. It was admitted that the document was a good and valid holograph will under Scotch law; the only question was whether the deceased retained his domicile of origin or had acquired an Anglo-Indian domicile. A caveat was entered by some of the next-of-kin.

(1) 4 Ct. of Sess. Cases, 4th series, 945.

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The *Advocate-General* (The Hon'ble *G. C. Paul*) for the petitioner.—In *Bruce* v. *Bruce* (1) and *Forbes* v. *Forbes* (2) it was held, that so long as an officer in the East India Company's service remained in the service he had an Anglo-Indian domicile. But I contend that the principle upon which those cases was decided has not been followed in the later cases, and moreover that questions of domicile must now be governed by the Succession Act. The second section says, that "except as provided by this Act, or by any other law for the time being in force, the rules herein contained shall constitute the law of British India, applicable to all cases of intestate or testamentary successsion." The words "any other law" do not mean any principle of law, but any statutory or common law. The question in this case is, how is the estate to be administered? The fifth section of the Succession Act says, that "succession to the moveable property of a person deceased is regulated by the law of the country in which he had his domicile at the time of his death." Here there is a holograph will which is good according to Scotch law, and I maintain that Dr. Elliott's domicile was Scotch at the time of his death. The tenth section of the Act shows how a new domicile may be acquired. It says, a man acquires a new domicile by taking up his fixed habitation in a country which is not that of his domicile of origin;" and the explanation says, that "a man is not to be considered as having taken up his fixed habitation in British India merely by reason of his residing there in Her Majesty's Civil or Military service, or in the exercise of any profession or calling." Can it be said that Dr. Elliott took up his fixed habitation in this country? This case must be governed by the Succession Act, and setting aside *Bruce* v. *Bruce* (1) and that class of cases, it is clear that Dr. Elliott did not lose his domicile. [PONTIFEX, J.—Do you say that the Act is retrospective?] I first say that it is retrospective, and if not then that this case is governed by the law as it stands now. *Moorhouse* v. *Lord* (3) is a leading case on the subject of domicile. There, the testator, a Scotchman, came to India, and

(1) 2 B. & P., 229 note. (2) 1 Kay, 341.
(3) 10 H. L. C., 272.

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returned to Scotland, where he took possession of the family dwelling-house, where he resided for some time. Then he went abroad and resided abroad for the rest of his life, and it was held that he retained his Scotch domicile. Lord Cranworth says "in order to acquire a new domicile according to an expression which I believe I used on a former occasion, and which I shall not shrink on that account from repeating, because I think it is a correct statement of the law, a man "must intend *quatenus in illo exuere patriam.* It is not enough that you merely mean to take another house in some other place, and that on account of your health or for some other reason you think it probably certain that you had better remain there all the days of your life. That does not signify; you do not lose your domicile of origin or your resumed domicile merely because you go to some other place that suits your health better, unless indeed you mean either, on account of your health, or for some other motive to cease to be a Scotchman, and become an Englishman, or a Frenchman or a German. In that case, if you give up everything you left behind you and establish yourself elsewhere, you may change your domicile." And Lord Kingsdown says, 'Upon the question of domicile I would only wish to say this, that I apprehend that change of residence alone, however long and continued, does not effect a change of domicile as regulating the testamentary acts of the individual. It may be and it is a necessary ingredient; it may be and it is strong evidence of an intention to change the domicile, but unless in addition to residence there is intention to change the domicile, in my opinion no change of domicile is made. A man must intend to become a Frenchman instead of an Englishman. I can well imagine a case in which a man leaves England with no intention whatever of returning, and not only with no intention of returning but with a determination and certainty that he will not return. Take the case of a man labouring under a mortal disease. He is informed by his physicians that his life may be prolonged for a few months by a change to a warmer climate—that at all events his sufferings will be mitigated by such change. Is it to be said that if he goes out to Madeira he cannot do that without losing his character of an English subject,

without losing the right to the intervention of the English laws as to the transmission of his property after his death, and the construction of his testamentary instruments. My Lords, I apprehend that such a proposition is revolting to common sense and the common feelings of humanity." The meaning of this judgment is, that if I come out to Calcutta, and have an intention of returning to England, my domicile is not altered. There must be the intention of altering the place of residence with no intention of returning. Lord Kingsdown's judgment is irrespective of property. Again in *Whicker* v. *Hume* (1) Lord Cranworth said, that "all Courts ought to look with the greatest suspicion and jealousy at any of these questions as to change of domicile into a foreign country. You may much more easily suppose, that a person having originally been living in Scotland, a Scotchman, means permanently to quit it and come to England, or *vice versâ*, than that he is quitting the United Kingdom, in order to make his permament home where he must for ever be a foreigner, and in a country where there must always be those difficulties which arise from the complication that exists, and the conflict between the duties that you owe to one country and the duties which you owe to the other. Circumstances may be so strong as to lead irresistibly to the inference that a person does mean *quatenus in illo exuere patriam*. But that is not a presumption at which we ought easily to arrive, more especially in modern times, when the facilities for travelling, and the various inducements for pleasure, for curiosity, or for economy, frequently lead persons to make temporary residences out of their native country." These two cases are sufficient for the purpose of my argument to show the present notion as to what constitutes change of domicile; (namely) that there must be an absence of intention to return, that there must be intention of settling out of the country. The principle upon which the older cases was decided does not apply now that the East India Company has ceased to exist, and all questions of domicile must be decided according to the principles laid down in the Succession Act. In *Craigie* v.

(1) 7 H. L. C., 124.

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Lewin (1), it was held that the domicile of a Scotchman, who had by employment in the service of the East India Company acquired domicile in India, did not by his return to Scotland *animo manendi* revive, as he still held his commission and was liable to be called upon to return to India, and intended to return if called upon to do so. That case has two branches: *first*, the testator by going out to India changed his domicile; *secondly*, when he returned to Scotland, he was bound to go back to India, and therefore was incapable of acquiring a new domicile. In the course of argument, p. 440, the proposition in *Bruce* v. *Bruce* (2) was not questioned, and therefore I submit this case is not now an authority. To go back to *Bruce* v. *Bruce* (2): The principle of that decision is that the East India Company was a trading company, and that service with it was equivalent to, if not idential with, service with a foreign Government. In *Jopp* v. *Wood* (3) however, Lord Justice Turner said: "There are considerations connected with that class of cases" (cases decided as to covenanted servants of the East India Company) "which have no bearing on a case like the present. At the time when those cases were decided the Government of the East India Company was in a great degree, if not wholly, a separate and independent Government foreign to the Government of this country; and it may well have been thought that persons who had contracted obligations with such Government for service abroad could not reasonably be considered to have intended to retain their domicile here."

With regard to the Act being retrospective, it could never have been intended that the Act should apply only to persons who came out to India after it came into force. Assuming that *Bruce* v. *Bruce* (2) was rightly decided, it must be treated as a fiction of law: the East India Company does not exist for governing purposes. The earlier cases were decided where the testators died in the East India Company's service. The presumption held to be applicable to that class of cases does not apply now; *cessante ratione cessat ipsa lex*. In *Hoskins* v. *Matthews* (4),

(1) 3 Curt. 435.
(2) 2 B. & P., 229 note.
(3) 4 De. G. J. & Sm., 616.
(4) 8 De. G. M. & G., 13.

although the testator described himself as "of Florence," and seemed to have intended to change his domicile, it was held that no new domicile had been acquired. All these cases show that the principle applied in the earlier cases was erroneous, and that the presumption upon which they proceeded does not apply. The learned Counsel also referred to Patteson's Compendium, p. 222.

Mr. *Jackson* and Mr. *Evans* for the next of kin.—The point in this case is concluded by *Wauchope* v. *Wauchope* (1) decided on the 23rd of June, 1877. There a Scotchman entered the Civil Service of the East India Company in 1841, and remained in it until his death in 1875, when he was on a two years' furlough to Europe. It was held that although the servants of the East India Company were transferred to the Crown in 1858 by the Act of 21 and 22 Vict., c. 106, and notwithstanding the explanation to s. 10 of the Succession Act, the domicile acquired by the deceased before these Acts were passed was not affected by them, and that his domicile was in British India. Lord Justice Clerk said,— "the questions which here arise as to the domicile of the late Mr. Samuel Wauchope have not, as far as I am aware, been made the subject of any authoritative judgment. They are, first, whether the transference of the territory and administration of British India from the East India Company to the Crown has altered the status or domicile of the Civil Servants of the Crown in that country; and secondly, whether, if it be not so, that status and domicile is affected by the recent Act of 1865 of the Indian Council, intituled "an Act to amend and define the law of intestate testamentary succession in British India," and his Lordship, after stating the decision in *Bruce* v. *Bruce* (2), said: "It may no doubt be a question whether the views on which this result was arrived at were altogether unimpeachable; but it has been confirmed in so many subsequent cases that it seems to me to be too late now to raise any contention on that subject. It has been suggested in one or two recent cases that the decision in the case of Bruce proceeded on the fact that the East India Com-

(1) 4 Ct. of Sess Cases, 4th series, 945. (2) 2 B. & P., 229 note.

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pany was a trading company, and that service with it was equivalent, if not identical, with service with a foreign Government; and that now that the service, whether in a civil or military capacity, in that country is service under the Crown, the principle of the judgment no longer applies.

"I do not think it necessary to express any opinion on these doubts, excepting to say that I should be slow to hold that the coincidence of residence and intention on which the case of Bruce proceeded was in any degree altered by the transference of the Government from the East India Company to the Crown. The Government took over the public obligations of the Company, and continued the services of those who had been previously employed by the Company on substantially the same terms. It is nearly twenty years since that transference was made, and as far as I know, it has not as yet been found that any alteration on this question of domicile was thereby introduced. But, however, this question may be solved, it can have no application to the present case. There can be no doubt that Samuel Wauchope acquired an Indian domicile; the question is whether he has lost it, and as domicile can only be lost by an intention to abandon it accompanied by abandonment, I think it clear that no such elements are to be found in the present case.

"The second question raises some considerations of interest and novelty. It depends upon the terms of the Act of the Indian Council of 1865."

His Lordship then stated the provisions of the tenth section, and continued: "It was maintained that these words of themselves had the effect of abrogating the Anglo-Indian domicile of Samuel Wauchope, and of reviving his domicile of origin. I cannot, however, read them as having any such effect.

"It is not necessary to dispute that, if by a law passed by competent authority, a person resident in any country is declared not to be domiciled there, the provision must receive effect in whatever *forum* it is pleaded, for every country has the right of determining for itself under what circumstances a domicile within it shall be acquired; and if Mr. Wauchope had continued to live in India under a law which

enacted that he should not be domiciled there, it would have been very difficult to resist the conclusion that the intention to abandon the domicile of origin had ceased. It might be different if the law of the foreign country prescribed certain elements which should constitute a domicile within it. For in such a case it might quite well be that the *forum* in which the question was tried might, notwithstanding an international principle, apply its own law of domicile in any question occurring before it. But I imagine that no such conflict can arise in the present case, mainly because the words of this provision cannot in my opinion affect a domicile already acquired. Whatever be its true construction, the words are far too popular and wanting in precision to make its interpretation altogether satisfactory. It is plain that the provision relates to the acquisition, and not to the retention, of a domicile. Indeed, it is provided by No. 13 of the same Code, that 'a new domicile continues until the former domicile has been acquired,'(1)—a proposition not very philosophically expressed, but in substance manifestly true. The existing domicile must continue until something has been done by the person leaving the domicile to abandon it, in fact and in intention, and therefore, as the explanation adopted by article 10 only defines in what circumstances a man is not to be considered as having acquired a new domicile and lost an old one, it cannot be applied to the case of a person who has already acquired an Indian domicile. I think this sufficiently plain upon the words of the provision; and it would be contrary to all principles of legislation, and a most mischievous precedent, to apply these words inferentially to a case they do not express and indeed exclude, and to give them a retrospective effect on the status personal and domestic relations, deeds and conveyances, *mortis causâ*, as well as *inter vivos*, of all the Civil Servants in India at the date at which the Act passed." Lord Ormidale also considered that the reason and principle of *Bruce* v. *Bruce* (2) was applicable to Mr.

(1) The words of the section are "a domicile has been resumed or another new domicile continues until the former has been acquired."

(2) 2 B. & P., 229 note.

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Wauchope's case, and that there was nothing in the Succession Act which could be held to affect the matter, the explanation to s. 10 being nothing more than an announcement in a concentrated form of the settled law on the subject as exemplified by *Bruce* v. *Bruce* (1). Lord Gifford said: "I think it is fixed by the authorities referred to at the bar, that a person accepting permanent private employment in British India and residing there in pursuance thereof, the employment being of indefinite duration, and involving lengthened residence in India, acquires an Anglo-Indian domicile, unless there be very strong circumstances and indications to the contrary. . . . From 1841 to 1858 the East India Company was just a private trading company with large possessions in India. If then Mr. Wauchope had died previous to 1858 and before the East India Company, and its whole interests were vested in the Crown, I think he must have been held a domiciled Anglo Indian. . . . . If Mr. Wauchope instead of entering the service of the East India Company in 1841, when it was a private company, had entered the Indian service of the Crown after 1858, and particularly if he had entered subsequent to the Indian Act of 1865, I think there would have been very strong grounds for maintaining that he had not thereby lost his Scotch domicile of origin, even although he remained in India for a very considerable time. . . . . But I cannot hold that the transference of British India to the Crown in 1858, even coupled with the Indian Act of 1865, had the effect of changing the legal domicile of all those who had gone out to India long before 1858, and who had according to the then existing law acquired an Anglo-Indian domicile prior to the change effected in 1858, and prior to the Indian Act of 1865. I do not think any such result can be ascribed either to the vesting Act of 1858 or to the Indian Succession Act of 1865. It would require some very express and explicit enactment to produce an effect so startling as would be the change, whether inversion or reversion, of the legal domicile of the whole *personnel* then serving the East India Company in British

(1) 2 B. & P., 229 note.

India. I cannot give any such effect either to the transference of the East India Company to the Crown or to the Succession Act of 1865." This is the only case in which the provisions of the Succession Act have been considered, and it concludes the point. Moreover, the cases which have been cited do not overrule *Bruce* v. *Bruce* (1), In *Forbes* v. *Forbes* (2) V. C. Wood said: "I apprehend the question does not turn upon the simple fact of the party being under an obligation by his commission to serve in India; but when an officer accepts a commission or employment, the duties of which necessarily require residence in India, and there is no stipulated period of service, and he proceeds to India accordingly, the law, from such circumstances, presumes an intention consistent with his duty, and holds his residence to be *animo et facto* in India. I think it is concluded by authority, in which conclusion my reason entirely acquiesces, that a service in India under a commission in the Indian Army of a person having no other residence, creates an Indian domicile." The case of *Jopp* v. *Wood* (3), shows that Lord Justice Turner found it impossible to get behind the rule. The object of the Succession Act was to provide that wills should be attested in a certain way before two witnesses. If the Scotch domicile of the deceased is held to have been revived, the object of the Act will be defeated.

The *Advocate-General* in reply.

PONTIFEX, J.—It being conceded by both sides that Surgeon-Major Elliott came out to India in the service of the East India Company previous to 1858, I think the case is concluded by the very careful judgment in *Wauchope* v. *Wauchope* (4), before the Court of Session in Scotland, in which I feel certainly inclined to agree; at all events I am not inclined to dissent from it. I must, therefore, hold that Surgeon-Major Elliott at his death had an Anglo-Indian domicile. The will is, therefore, not good.

Attorney for the Petitioner: Mr. *Roberts.*

Attorney for the Next-of-kin: Mr. *Morgan.*

(1) 2 B. & P., 229 note.
(2) 1 Kay, 341.
(3) 4 De G. J. & S., 616.
(4) 4 Ct. of Sess. Cases, 4th series, 945.