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Thursday, January 10.

FIRST DIVISION.

[EXCHEQUER CAUSE.]

[Lord Johnston, Ordinary.]

H. M. ADVOCATE v. BROWN'S TRUSTEES.

*Domicile — Abandonment — Acquisition — Ceylon.*

Circumstances in which held that a Scotsman abandoned his domicile of origin in Scotland, and acquired, *animo et facto*, a domicile in Ceylon.

Observations by Lord M'Laren upon (1) the value of authorities in questions of domicile, (2) the comparative amount of evidence required to establish the *animus manendi* in colonies in temperate and in tropical regions.

In this action the Lord Advocate, for and on behalf of the Commissioners of Inland Revenue, sued Marcus John Brown and others, the testamentary trustees\* of the deceased Robert Lewis Maitland Brown, merchant, Colombo, in the island of Ceylon, and sometime residing in Musselburgh, for the sum of £200 alleged to be due by them under the Legacy Duty Acts.

Whether or not legacy duty was payable depended solely upon the question whether or not the deceased Robert Lewis Maitland Brown was at the time of his death a domiciled Scotsman.

A proof was taken before the Lord Ordinary in Exchequer Causes (JOHNSTON), the result of which is sufficiently set forth in the opinion of Lord M'Laren, *infra*.

On 26th July 1906 the Lord Ordinary issued the following interlocutor:—"Finds that the domicile of the deceased R. Lewis M. Brown at the date of his death was in Ceylon, and therefore assoilzies the defenders from the conclusions of the action, and decerns."

*Opinion.*—[After dealing, *inter alia*, with the circumstances which had rendered a proof necessary]—"Accordingly, to bring the matter to a conclusive judgment, the Inland Revenue were obliged to raise the present action for recovery of duties, which the executors have defended, in order to establish that the domicile of Mr R. Lewis M. Brown was truly in Ceylon. On a proof I think that they have succeeded, for the proof led carries them a great way further than anything contained in the affidavits above referred to.

"I do not think that I should serve any good purpose by going into the details of the proof. I think it sufficient to say that I find it proved that the late Mr Lewis Brown originally went to Ceylon, like many other Scotsmen, merely to push his fortunes, and with no idea of abandoning

his domicile of origin and acquiring any new one; and that he engaged in mercantile pursuits, in which he was keenly interested to the date of his death. So many Scotsmen have gone to Ceylon that it is common knowledge that the planting industry is the basis of Ceylon trade and Ceylon prosperity, and that it is the exception for anyone to be engaged in business in Ceylon without becoming interested in planting and other local industries, which involve the acquisition of interest in real estate. Formerly these undertakings were more of the nature of joint adventures, but these have largely given place to the small limited company. The fact of the late Mr Brown being thus interested, through such adventures, in real estate in Ceylon does not weigh much with me. Nor do I think that it is conclusive that he made the bungalow of his plantation, which was exceptionally near to Colombo, his preferable residence for many years before his death. In this he was probably merely a pioneer in suburban residence, and early utilised the railway as a means of connecting his business with his country house. Were the facts of his business engagements, his financial ventures and interests, and his actual residence and mode of life in Ceylon, all that I had to go upon, I should not have found anything conclusively to distinguish him, at the comparatively early age of 53, from the preponderating majority of Ceylon merchants, and even planters, who notoriously do not go to Ceylon to settle, but only to trade or cultivate, and when possible to return. It must be remembered that Ceylon is a tropical climate. But though none of these matters, singly or together, are conclusive, they are all material to the consideration. What has chiefly determined me in holding a Ceylon domicile established, is, not so much the facts of the late Mr Brown's life, as his personal attitude to them, as disclosed in the evidence of his friends and acquaintances, both in Ceylon and at home. I am satisfied that Mr Brown had before his death abandoned his Scottish domicile of origin, and acquired a domicile of choice in Ceylon, which, though he died in this country, dying, as he did, with a return ticket for his passage back to Ceylon in his possession, he retained until his death. The most satisfactory piece of evidence is his own letter of 18th November 1898 from Falmouth to his friend Mr M'Martin. I refer to the whole letter, but particularly to the passage in which, after describing his difficulties in relation to one of his businesses, he says—"However, I hope the way will be smooth now, and though I propose returning to Ceylon, I don't intend to go in for the active life of the past." While this betokens an intention to draw out of more active business, a course which his health demanded, it indicates an intention, contrary to the course pursued by almost all Ceylon business men in similar circumstances, to continue his residence in Ceylon.

"I shall find that the domicile of the deceased R. Lewis M. Brown at the date of

his death was in Ceylon, and shall therefore assize the defenders. . . .”

The Lord-Advocate reclaimed, and argued—The onus of proof always lay upon the party who maintained that the domicile of origin had been abandoned and another chosen—*Vincent v. Earl of Buchan*, March 19, 1889, 16 R. 637, 26 S.L.R. 481; that onus the respondents had not discharged, having failed to establish two essential facts, viz., (1) that Brown had definitely and intentionally abandoned his domicile of origin in Scotland, and (2) had formed the *animus manendi* in Ceylon—*Donaldson v. M'Clure*, December 18, 1857, 20 D. 307, at 321; *Steel v. Steel*, July 13, 1888, 15 R. 896, at 908; *Winans v. Attorney-General*, (1904) A.C. 287; *Munro v. Munro*, 1840, 7 Cl. and F. 842, at 876; *Udny v. Udny*, 1869, L.R. 1 H.L. Sc. 441, at 445; *Douglas v. Douglas*, (1871) L.R. 12 Eq. 617, at 645; *Brooks v. Brooks*, July 19, 1902, 4 F. 1014, 39 S.L.R. 816; *Bell v. Kennedy*, (1868) L.R. 1 H.L. Sc. 307, at 311; *Aikman v. Aikman*, 3 Macq. 854, at 877; *Jopp v. Wood*, 34 L.J. Ch. 212; *Brunel v. Brunel*, 1871, L.R. 12 Eq. 298. The only fact the respondents had proved was a prolonged period of residence in Ceylon, but it was settled by numerous authorities (*vide supra*) that mere lapse of time was *per se* ineffectual. It was a significant fact that the books contained no case in which anyone was ever held to have acquired a domicile in a tropical country such as Ceylon.

Argued for the defenders and respondents—Brown had clearly abandoned his domicile of origin in Scotland, and chosen a domicile in Ceylon. The facts, which were not in dispute, were all in favour of that view. There was not the usual difficulty of a double residence, for Brown had lived continuously in Ceylon for thirty years, with the exception of a few flying visits to Scotland, and there was no evidence in the case to show that he looked upon Scotland with feelings of even ordinary interest, far less that he regarded it as home. His business, friends, property, were in Ceylon, where his whole life was clearly centred. On much less convincing evidence a change of domicile had been held to be proved in *Haldane v. Eckford*, L.R., [1869] 8 Eq. 631; *in re Craignish*, *Craignish v. Hewitt*, L.R. [1892] 3 Ch. 180; *Donaldson v. M'Clure*, *ut supra*; *in re Steer*, [1859] 28 L.J., Exch. 22; *Clarke v. Newmarsh*, February 13, 1886, 14 S. 488; *Fairbairn v. Neville*, November 30, 1897, 25 R. 192, 35 S.L.R. 178, *sub nom. Fairbairn v. Shepherd's Trustees*; *Commissioners of Inland Revenue v. Gordon's Executors*, February 2, 1850, 12 D. 657; *Armitage's Trustees v. Armitage and Others*, February 26, 1904, 41 S.L.R. 504.

At advising—

LORD M'LAREN—This is an action for payment of legacy duty directed against the representatives of a deceased Scotsman, who for the whole or nearly the whole period of his adult life was a resident in Ceylon, dying at the age of fifty-three, but

who, on the part of the Crown, is alleged to have died domiciled in Scotland. It is settled by a judgment of the House of Lords, *Advocate-General v. Thomson* (12 Cl. & Fin. p. 1) that the liability of personal estate to legacy duty depends on the domicile of the defunct at the time of his death. From this it follows that for the decision of the present case the only question we are required to consider is the question whether Mr Lewis Brown died domiciled in Scotland.

In view of the weight which is so often attributed to authorities in such questions, it may not be superfluous that I should begin by stating what is almost a truism, that every question of domicile is essentially a question of fact. Judicial expositions, I need hardly say, may be of great value as guides to the relative weights to be attributed to different elements of a life-history in the question of domicile; but in the determination of the whole question of the domicile, each case, I think, must be considered by itself, and in the light of the facts proved.

In the present case I ought to notice that Crown counsel have offered no evidence, but have confined themselves to cross-examination of the defender's witnesses. There is therefore no conflict of evidence, but only a question of the sufficiency of evidence to establish a Cingalese domicile. The issue is not by any means a complicated one, and I shall proceed to state the facts which I conceive to be established by the proof.

Mr Lewis Brown, according to the evidence of his brother, was born in 1845. He went to London about 1865 to be trained as a clerk in a mercantile house, and in 1868 he proceeded to Ceylon, where he established himself in business and fixed his residence for the actual remaining term of his life, extending to about thirty years. During this period, according to the brother's evidence, Mr Lewis Brown made six visits to the mother country. On a fair reading of the proof these must be regarded as visits to England rather than to Scotland. I refer especially to the evidence of (1) Mr M'Martin, a retired Ceylon merchant and one of the more intimate friends of the deceased gentleman; (2) of Mr Taylor, formerly in business in Ceylon, now a London merchant; and (3) Mr Bickerdyke, whose firm were mercantile agents in London for Mr Brown's Ceylon house. Mr Taylor's evidence is to the effect that Mr Brown never came to this country except on business, and that he always seemed to be glad to get back. Mr Bickerdyke, whose agency dates from 1877, says that from that year Mr Lewis Brown visited this country three or four times, that his visits were of short duration, and that he came over entirely on business. Then he adds—“He (Mr Brown) was ill on two of these occasions, but nevertheless he engaged in business. He came about our office every day.”

When in this country Mr Brown seems to have made a point of always visiting his father (while he lived) and his brother.

But these were visits of affection, and were not prompted by any interest in Scotland or Scottish society, to which, on the contrary, he seems to have uniformly expressed his dislike. Mr Bickerdyke describes the visits to Scotland as "week-end" visits, only on one occasion extending to a fortnight.

In contrast with his somewhat attenuated relations with the parent country, there is ample evidence that Mr Brown entered heartily and energetically into colonial life. He went to Ceylon in 1868, and after seven years' experience as an assistant with Messrs Fowlie, Richmond, & Company he set up in business for himself, at first in partnership with Mr Law, and soon after as sole partner. According to Mr M'Martin, a friend of Mr Brown, and apparently a reliable and independent witness, Mr Brown had by this time risen to a position of good mercantile and social standing in the colony. His business continued to prosper, and the money he saved was invested wholly or very largely in Ceylon undertakings, such as the Ceylon Cold Storage Company, the Mount Lavinia Hotel Company, and another hotel, and, to a smaller extent, in real estate in Ceylon. Mr M'Martin says—"Mr Brown's business interests were almost all in Ceylon; he did an import business, but his local business was greater than it." In this connection I note that a letter written by Mr Brown a few weeks before his death to Mr M'Martin is chiefly filled with details as to what he was doing for the development of these Ceylon industries, and expressions of confidence in their ultimate success.

We do not find much in the proof relative to Mr Brown's home life in Ceylon. He was unmarried, and apparently did not desire marriage. His brother says—"When I asked him the reason, he said that when one got married out there they were obliged to leave Ceylon, and to come home for the sake of the wife and children, and evidently the thought of having to leave the place was very distasteful to him."

It is a circumstance that was much founded on in the argument for the defenders that Mr Brown had purchased a small property, Orange Hill, which he farmed, and on which he built a residence. This is said to be an unusual thing in Ceylon; but whether unusual or not, the establishment of a country residence which might not be readily saleable is a step not likely to be taken by a colonist who contemplated returning to Great Britain as soon as he had saved money to retire on. Along with this we have another fact indicating an interest in Ceylon, that Mr Brown had studied the two principal native languages, and was able to converse freely in them. Orange Hill is near the line of the railway from Colombo to Candy. And latterly Mr Brown resided almost constantly there, only going to Colombo by train (a distance of about ten miles) for business purposes. His medical adviser Dr Craib says that just before Mr Brown's last voyage to England he was in treaty for the purchase of a country residence near Candy, apparently

for the sake of the hill air, for by this time he was beginning to suffer from the effects of the tropical climate. He then left for England apparently under some pressure from Dr Craib, who considered change of climate necessary. Although cut off by illness during his stay in England in 1898, it is quite certain that when leaving Ceylon Mr Brown contemplated a speedy return, because he took a voyage return-ticket for England, the value of which is entered in the inventory of his estate.

In this summary of the facts concerning Mr Lewis Brown's residence in Ceylon I have purposely excluded from my narrative such evidence as bears only on the question of an intention on his part to make Ceylon a permanent home.

I think it is convenient in cases of domicile to consider the proof as to *animus manendi* apart from the proof as to the general character of the residence which naturally precedes considerations as to motive and intention. The two elements of course cannot be completely separated, because the fact of residence in the new country, begun and continued from choice, is itself evidence of *animus manendi* to be considered along with the more direct proof as to intention. If we were here considering the case of a Scotsman who had gone out in early life to Canada, or to one of the Australian Colonies, who had established himself in business, and as a director of various industrial enterprises in which the bulk of his money was invested, and who had bought a residential property in the colony where he spent the greater part of his time, in such a case it appears to me that the external facts of the case might point so strongly to the acquisition of a colonial domicile as hardly to require the support of direct evidence of intention. But then, in the case supposed, it is matter of common knowledge that the great majority of migrants to the British Colonies in temperate regions, go there with the intention of establishing a permanent home; and the prevalence of a lifelong colonial residence in the case of emigrants to Canada and Australia raises a presumption of fact which cannot be altogether disregarded in considering individual cases. In the case of settlers in a tropical colony there is not the same presumption. Indeed, it is proved in this case (at least as matter of opinion) that the European population of Colombo consists largely of men who have gone there in the hope of making a competence, and eventually returning to the mother country. There is in this case absolutely no evidence from which we can infer such an inclination on the part of Mr Lewis Brown. But then, it is said, colonial experience does not raise any presumption of fact favourable to the acquisition of a Cingalese domicile by a person in Mr Brown's position. This, I think, is sound, and it is therefore very necessary to weigh carefully such evidence as is available of Mr Lewis Brown's declarations bearing on this subject. Now, it is a remarkable point in the case that if we leave out William Millar (who was only

called to prove the preparation of the inventory) every one of the witnesses examined appears to have formed the opinion or impression that Mr Brown meant to spend the rest of his life in Ceylon. Mr M'Martin, the first witness examined, and an intimate friend of the deceased, gives as his reasons for his belief—(1) a preference on the part of Mr Brown for the climate of Ceylon; (2) that Mr Brown would not be contented to live a life of idleness here; (3) that he regarded Orange Hill as a home; (4) that he never spoke of leaving the Colony; and (5) that he had many friends in Ceylon, was much respected there, and knew all the influential people.

The next witness is Mr Anderson, a retired Ceylon merchant, who says he spoke to Mr Brown in 1896 about returning to settle in Scotland. Mr Brown's reply was to the effect (6) that he neither liked the climate nor the people; that if he did retire from actual business, he had interests in Ceylon which would occupy him; and (7) that he had no intention of leaving the island.

Instead of continuing the narrative of the evidence, it may suffice to say, with reference to the enumerated points, that No. 1 is corroborated by Taylor, Charles, Marcus Brown, Dr Craib, and Mrs Brown. "He could not come to Scotland to live because it was too cold; if he came home, it would be to go to the south of England or France; but it was his intention to stay in Ceylon." No. 2 is confirmed by Marcus Brown—"He would not lead a life of idleness, and would not live in Scotland"; Sir William Mitchell—"I feel sure that, long before his death, the deceased had finally determined to make Ceylon his home; and his habits and actions all pointed to this." As to Nos. 3 and 4, I refer to Bowie, Taylor, Bowie, and Craib—"Ceylon is my home, and Orange Hill estate my residence." On the 5th point, in speaking to Mrs Marcus Brown about his intention to stay on in Ceylon, he added that "there he was somebody, while here he was nobody." As to the 6th point, if there is one thing on which all the witnesses are agreed, it is that Mr Lewis Brown took no interest in Scottish society, and did not like the opinions and ways of his countrymen. He may have been unfortunate in his experiences, but the fact is not the less relevant as bearing on his choice of a domicile. Lastly, every witness, to whom Mr Brown ever spoke on the subject, agrees that he never spoke of leaving Ceylon except with the intention of returning there as soon as the cause of absence, business, or health would permit.

Now, if it were legally or materially impossible for a European to fix his domicile in equatorial latitudes, all this evidence would go for nothing. But in view of the parallel case of the West India islands, where European families have lived for successive generations, to say nothing of New Orleans and other southern towns of the United States, I am not prepared to subscribe to the proposition that a Scotsman cannot effectively make choice of a

domicile in Colombo. If the case were so, the case must be very exceptional, for it would be difficult to find any other inhabited region in the world in which my countrymen have not from time to time established permanent lodgments. But, granting the possibility of a Cingalese domicile for a Scotsman who had never heard of the *forum originis*, and who preferred the citizenship of the Greater Britain to that of the community from which it sprung, then the evidence, as it appears to me, points only one way. A domicile of choice is constituted *animo et facto*. As to the *factum*, Mr Lewis Brown, from the age when he had a choice, never lived anywhere but in Ceylon, and his mode of life was consistent with the choice of a home in that colony. His death in England during a temporary visit does not affect the question.

As to the *animus* there is no contradictory evidence. I have already noted that the Crown call no witnesses, and I must assume that Crown counsel were satisfied with the way in which the defender's witnesses gave their evidence. In fact, the argument of the Solicitor-General proceeded to a large extent on a review of the authorities. It may be, as he contended, that there is no reported case in which an Englishman or a Scotsman has been held to have lost his domicile of origin and to have established a domicile of choice in a colony. But this can only be because (in the ordinary case of an acquired colonial domicile) no one ever thought of disputing that a life spent in a colony, by one whose business and residence lay there, determined the domicile. It would only be in cases of ambiguous residence, or of business relations with various parts of the world, that the question would arise. In such cases the domicile of origin will continue unless displaced by clear evidence of election, and this, I think, is the only general conclusion which can be drawn from such cases on domicile as that of *Mr Winans*, 1904, A.C. 287; and *Sir William Cunliffe Brooks*, 1906, A.C. 56. There are cases, however—and I need only cite *Haldane*, 8 Eq. 631, and *Fairbairn*, 25 R. 192—where the evidence of election has prevailed over the presumption in favour of origin, even when the person whose domicile was in question had kept up a certain connection with his birthplace.

For the reasons which I have stated I do not consider this to be at all of the nature of a case of ambiguous residence. If, as was said by an eminent English judge, "time is the grand ingredient in the acquisition of a domicile," the observation is very relevant to the facts of the present case. Indeed the only substantial question is, whether the evidence of an intention to fix a domicile in Ceylon is sufficiently clear, because, if we cannot infer such intention, the domicile of origin will prevail. But there, as I have already pointed out, the evidence of Mr Brown's intention to make a permanent home in Ceylon is strong and clear, and there is not a scintilla of evidence

to the contrary. I am therefore of opinion that the defenders have proved their case, and that the claim of the Crown for legacy duty has failed. This opinion leads to an affirmance of the Lord Ordinary's interlocutor on the merits. The defender's counsel raised no question as to expenses in the Outer House, and I express no opinion as to whether there are sufficient reasons for departing in this case from the usual rule that expenses follow the decision.

LORD PEARSON—In many of the cases—I think in most of the cases—on this branch of the law there has been either a conflict of evidence or else a proof of facts, some tending to show an intention to preserve the domicile of origin, and others tending to show its abandonment and the acquisition of a new domicile. In these cases the judgment has been arrived at on a balance of considerations, some pointing one way and some another. Of that class of cases the recent decision in the *Cunliffe Brooks* case is a notable example. The peculiarity of the present case is that the evidence is all one way, and the case for the retention of Mr Brown's domicile of origin stands, not upon a balance of considerations arising on the evidence, but solely on the strength of the presumption in favour of the domicile of origin as against the alleged domicile of choice. The question here is not whether the facts tending to show that Mr Brown acquired a domicile in the colony outweigh the facts which tend in a contrary direction. Speaking broadly, there are here no facts tending in a contrary direction. The question rather is, whether the uncontradicted fact of this gentleman's career and intentions are sufficient to displace the presumption that his domicile of origin persisted. That question I think must be answered in the affirmative, for the reasons fully set forth in Lord M'Laren's opinion, which I have had an opportunity of reading, and in which I agree.

LORD KINNEAR concurred.

The LORD PRESIDENT was not present at the hearing.

The Court adhered.

Counsel for the Pursuer and Reclaimer—The Solicitor-General (Ure, K.C.)—A. J. Young, Agent—The Solicitor of Inland Revenue.

Counsel for the Defenders and Respondents—Guthrie, K.C.—C. D. Murray, Agents—M. J. Brown, Son, & Company, S.S.C.

Friday, January 11.

## SECOND DIVISION.

[Lord Salvesen, Ordinary.]

### GORDON'S EXECUTOR v. MACQUEEN AND OTHERS.

*Succession—Will—Revocation—Terms of a Holograph Will which was Held not to Revoke an Earlier Trust-Disposition and Settlement.*

A testator, who died in 1904 aged eighty-three, and possessed of about £8000, left a formally executed trust-disposition and settlement dated 1852, by which she disposed of her whole means and estate in a rational way, and also a holograph writing dated 1865, with alterations dated 1879, which as altered read as follows:—“Having made two wills when suffering from decay of memory, both of which are registered in the Books of Session in Edinburgh, I do hereby cancel them, and in place of which I make the following statement of my wishes:—I retain in my own name the money such as I require and wheresoever invested. I wish to remember my friends but have little to do it with. I commend myself to the care of the Almighty. My deathbed, sickbed, household, and church debts are to be liquidated, and my affairs are to be wound up and brought to a conclusion by my legal adviser at the period of my decease.” No will was registered in the Books of Session, but the settlement of 1852 contained a clause authorising registration. There was nothing in the settlement to suggest decay of memory, and there was no evidence that the testator, of whom little was known, had ever suffered from it.

*Held (reversing a judgment of Lord Salvesen) that the writing of 1865 or 1879 had not the effect of revoking the disposition of 1852.*

*Stoddart v. Grant and Others*, February 27, 1849, 11 D. 860, and June 28, 1852, 1 Macq. 163, followed.

This was an action of multiplepounding raised by William Rose Gordon, Durban, Natal, South Africa, executor-dative *qua* next-of-kin of Georgina Gordon, to determine the manner in which her estate fell to be divided, the parties entitled to share therein, and the meaning and effect of two testamentary writings left by her. The defenders called were Mrs Mary Jane Gordon Macqueen and others, being so far as could be ascertained the whole persons interested or who might claim to be interested in the succession of the testator.

Miss Georgina Gordon died in 1904 at the age of eighty-three, leaving personal estate in the United Kingdom to the amount of £7977 8s. 5d., the bulk of which was invested in heritable securities in Scotland and in Belgian Government 3 per cent. bonds in England. She was prede-