

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Platt and another v. The Attorney General of New South Wales, from the Supreme Court of New South Wales ; delivered January 23rd, 1878.

Present:

SIR JAMES W. COLVILLE.

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

THIS is an appeal from a judgment or sentence of the Supreme Court of New South Wales on an information instituted by the Attorney General of that colony, for the recovery of certain legacy and succession duties which he alleges were due in consequence of the testator John Donald McLean's having been domiciled at the time of his death in New South Wales. A majority of the Court held that McLean was domiciled in New South Wales at the time of his death, and, in consequence, that his executors were liable to pay the succession and legacy duties which were claimed by the Attorney General. One of the learned judges, however, differed in opinion, and thought that it was not established that McLean was domiciled at that place.

The facts are set out in a special case which was settled under the Common Law Procedure Act of New South Wales. From that case it appears that McLean was born in Scotland in the year 1820; that in the year 1837, when he was about 17 years of age, he emigrated to New South Wales to join his brother who had

previously gone there; and that from the time of his arrival in New South Wales, up to the time when he became of age, he was a squatter and carried on the business of a sheep farmer. In the year 1848 he took up a station at Acacia Creek on the Darling Downs, in that part of the colony of New South Wales, which afterwards became, and is now the colony of Queensland. No importance can be attached to his having taken up that station. He subsequently purchased a station or run on Crown lands called Westbrook, situate in the Darling Downs aforesaid, and occupied the house which was on the said station, and made it his home and place of residence. That was in the year 1851. At that time he was unmarried, and had no establishment elsewhere.

Their Lordships are of opinion that he abandoned his domicile of origin, which was in Scotland, the place of his birth and of his father's domicile, and that he gained a new domicile in New South Wales.

He continued to occupy the house at Westbrook down to the time of his marriage, which took place in Sydney in September 1855. After his marriage he resided with his wife at Westbrook for about four months, and then left Australia for Europe with the expressed intention of returning to Westbrook. He spent about three years in Europe, accompanied by his wife, and returned to Australia in April 1859. After his return, and between the month of April 1859 and the month of December in that year, when the colony of Queensland was separated from the colony of New South Wales, he resided with his wife and his then only child, first at Westbrook for about three months, and then as a lodger at the Royal Hotel, Sydney, for about three months; and subsequently, until the occupation of Quiraing, as herein-after men-

tioned, his wife and family resided, and he also, when in Sydney, resided at a house called Hawthornden, near Sydney, which he had taken on lease for five years, and furnished. It also appears that in the month of April 1859 he sold one-third share in the Westbrook station to the Defendant William Beit, the principal portion of the purchase money being unpaid at the time of his death, and he and the said William Beit thereupon became partners in the station for a period of five years, and it formed part of the arrangement connected with the partnership that the said William Beit should during the continuance of the co-partnership reside at Westbrook in order to manage the station, subject to the inspection of the said John Donald McLean.

In December 1859 a portion of the colony of New South Wales was by proclamation separated from that colony, and became the colony of Queensland, Westbrook being in that portion which became Queensland.

It is unnecessary to decide whether at the moment of the separation the domicile of McLean was transferred to and became a domicile in Queensland, or continued to be a domicile in New South Wales. Their Lordships have not to decide what was the domicile of McLean at the time of the separation of the two portions of the colony, but what was his domicile at the time of his death in 1866, seven years afterwards. The status of McLean at the time of the separation might have been a little uncertain, for at that time he was residing with his wife, or at least his wife was residing at Hawthornden, which he had taken for a period of five years; and there might have been a question, if he had died whilst his wife was residing at Hawthornden, whether, that residence having been taken for a limited period of

five years only, he had acquired a new domicile by virtue of that residence. But he continued to live beyond the expiration of the lease of Hawthornden; and it is stated in the 22nd paragraph of the case that in the year 1861 or 1862 he purchased from three or four different persons the then unexpired terms of over 90 years of several leases for 99 years of land situated at the Edgcliffe Road, near Sydney; and that in January 1863 he commenced to build a mansion house, known as Quiraing, which was finally completed at a cost of about 16,000*l.*, and furnished in January 1865. The wife and family of McLean resided at Hawthornden until Quiraing was completed, and they commenced to occupy Quiraing on the 1st day of October 1864, the lease of Hawthornden having then expired; and they continued to reside at Quiraing until the death of McLean.

Whether the erection of the house at Quiraing could so far explain the residence at Hawthornden as to lead to the inference that the residence at Hawthornden was intended to be the commencement of a permanent residence in Sydney or not is not material, because when he purchased the land and built the house at Quiraing he had then got, for a period of 90 years, a house suitable to his then fortune of about 200,000*l.* At Quiraing, as well as at Hawthornden, he maintained a large establishment suitable to his then station in life, and his wife and family continued to reside there up to the time of his death, he also residing there with them whenever he went to Sydney. So that, even if at the time when Queensland was formed into a separate colony he had acquired a domicile of choice in that colony, and had not then acquired a new domicile in New South Wales by virtue of his residence at Hawthornden, there is sufficient evidence from which it is to be presumed that before his death

he acquired a new domicile of choice in New South Wales.

Lord Westbury, in the case of *Udny v. Udny*, 1st Law Reports, House of Lords, Scotch Appeals, 458, says: "Domicil of choice is a
 " conclusion or inference which the law draws
 " from the fact of a man fixing voluntarily
 " his sole or chief residence in a particular
 " place with an intention of continuing to
 " reside there for an unlimited time. This is
 " a description of the circumstances which
 " create or constitute a domicil, and not a de-
 " finition of the term. There must be a resi-
 " dence freely chosen, and not prescribed or
 " dictated by any external necessity, such as the
 " duties of office, the demands of creditors, or
 " the relief from illness, and it must be resi-
 " dence fixed not for a limited period or par-
 " ticular purpose, but general and indefinite in
 " its future contemplation." Then his Lordship proceeds to make a remark which is peculiarly applicable to this case as regards the residence at Hawthornden during the lease for five years, and the subsequent building of the house at Quiraing. He says:—"It is true that residence
 " originally temporary or intended for a limited
 " period may afterwards become general and
 " unlimited, and in such a case so soon as the
 " change of purpose or *animus manendi* can be
 " inferred, the fact of domicil is established."

Now, as soon as the house at Quiraing was built and furnished, and McLean's establishment was removed from Hawthornden to the house which he had built at a large cost; at which he kept up a large establishment suitable to his fortune; where his wife and children resided, and where he went except at times when he was engaged upon his business or political duties in Queensland,—from that time at least, as it appears to their Lordships, his change of purpose or *animus*

manendi in the colony of New South Wales is to be inferred. From that time it is to be presumed that the house at Quiriang was his home.

In the case of *Maxwell v. Maclure*, 6 Jur. N.S. 407, which has been referred to in the course of the argument, the person whose domicile was in question retained his house at Wigan, as well as the new house which he had got in Scotland; but in this case McLean had no house nor any establishment in any other place than at Quiraing. When he went to Queensland for the purpose of carrying on his political duties he resided at a club; he had no establishment. When he went to Westbrook for the purpose of inspecting the run, and the business which was carried on there by his partner Beit, Beit was living in the house. McLean went there sometimes for a few days, and sometimes for a week or two, and stopped in the house with Beit and his wife so long as Beit's wife was living, and afterwards with Beit alone; but he had no establishment there of his own; it was not his home. His residence was at Quiraing, where his wife and children were living. That is the place to which it is to be presumed he would have gone if he had been incapacitated for business or public duties. It is always material in determining what is a man's domicile to consider where his wife and children live and have their permanent place of residence, and where his establishment is kept up.

It is said that McLean at times spoke of adding to the house at Westbrook for the purpose of residing there at a future time, and that he also expressed his wish to be buried at Westbrook. But an intention not executed cannot countervail the facts already adverted to. And in this case his intention of adding to the house, if he ever had that intention,

was never executed, and he never appropriated that place to the residence of his wife and family. The expression of his wish to be buried at Westbrook does not appear to be a very important circumstance. In the case of *Douglas v. Douglas*, 12th Law Reports, *Equity*, 630, the person whose domicile was in question was buried in Scotland, but it was held notwithstanding that his domicile was in England. It must certainly often occur that a person who is permanently residing in one place may have a vault or some place where he may wish to be buried among his ancestors, but that does not affect his domicile.

McLean died suddenly at Westbrook. He had no opportunity of returning to Quiraing. His death and burial at Westbrook, therefore, do not rebut the inference that he had made Quiraing his permanent residence and his home.

Under these circumstances their Lordships are of opinion that the view taken of the case by the majority of the Supreme Court of New South Wales was the correct one, and they will humbly recommend Her Majesty to affirm the decision of that Court, with the costs of this Appeal.

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