Arnott v Groom

(1846) 9 Court of Sess Cas (2nd Series) 142

A lady who was born in India, and whose father (a Scotchman by birth) died in India, in the service of the East India Company, came, on her father's death, in her infancy, to Scotland, with her mother, and resided in this country for fourteen years. She then, when at the age of fifteen, went with her mother to the Continent, where she resided for a year, and after that she went to England, where she continued for two years. She returned to Scotland for a few months, and then went to England a second time, where she resided till her death, three years afterwards. She never had any permanent residence after first leaving Scotland, but resided in furnished lodgings and hotels, and sometimes with friends, both when on the Continent and in England; and her mother retained, undisposed of, the furniture which she had in her house in Scotland,—Held, (in a question relative to her succession,) that she had acquired a Scottish domicile before leaving Scotland for the first time; and that this domicile remained her domicile at her death, and had not been lost by acquisition of a new one *facto et animo* in England, notwithstanding residence there, and notwithstanding that she was under engagement to be married, to a gentleman resident in England, a considerable time before she died.

George Arnott Walker Arnott raised a process of multiplepoinding, for the purpose of distributing a sum of £2000, forming part of the succession of the late Miss Jane Stewart, and which was contained in a bond and disposition in security, granted by Mr Walker Arnott of Arlary, in favour of Miss Jane Stewart and her curators. In the course of this process, the question was raised as to the law by which the succession should be regulated, which depended on the question, Whether, at the time of her death, Miss Stewart was domiciled in Scotland or in England? Her mother, Mrs Jane Moncreiff or Stewart, averred, that she was domiciled in England; that her personal succession, therefore, fell to be regulated by the law of that country, by which she, as her mother, would be entitled to claim the half of her daughter's moveable estate. On the other hand, it was averred by Mr Walker Arnott, the raiser of the process, and by James Foster Groom, as official assignee in the bankruptcy of John David Stewart, brother of Miss Stewart, that she died domiciled in Scotland, by the law of which country, therefore, the right to her moveable succession must be regulated.

To enable the Court to determine this question of domicile, a joint minute of admissions was lodged in process, stating the facts as to which the parties were agreed. This minute contained the following statements and admissions:—

"1. That Miss Stewart's father and mother were natives of Scotland, and that her father was possessed of a Scotch estate (Stenton, Perthshire) at and prior to his death, which he inherited from his father:. That her father and mother were married in Scotland, under a contract of marriage in the Scotch form: That her father, previous to his marriage, was in India, in the military service of the East India Company, and returned to India to that service after his marriage.

"2. That Miss Stewart was born in India, and when she was in infancy her father died in India while still in the service of the East India Company: That, after her father's death,

Miss Stewart, while still in infancy, came to Scotland with her mother: That she resided with her mother, who took up house in Edinburgh upon her return to Scotland in the year 1821, and continued to reside with her in Edinburgh down to the summer of 1835.
"3. That in that year, when she was about fifteen years of age, Miss Stewart left Scotland with her mother for the Continent of Europe, where she resided until about the month of September 1836, when she came to England: That she resided in England till the winter of 1838, when she returned to Scotland, where she resided (in Edinburgh) till June or July 1839, when she again returned to England, where she resided till her death in June 1841.
"4. That, after leaving Edinburgh in the summer of 1835, neither Mrs Stewart nor Miss Stewart took up house, or had any permanent residence, but lived as above, sometimes in furnished lodgings and hotels, and sometimes with friends. Mrs Stewart, during all that time, retained the furniture of the house she had in Edinburgh before leaving it in 1835, partly in a room which she hired in Edinburgh for the purpose, and partly in the houses of friends.
"5. That in September 1839, when Miss Stewart was about twenty years of age, an English merchant, resident in Bristol, paid his addresses to her, which were accepted of, and at the time of her death they were engaged to be married."

On considering this minute, and hearing parties on the question of domicile, the Lord Ordinary pronounced the following interlocutor:—"The Lord Ordinary having heard parties' procurators on the question of domicile, and considered the joint minute of admissions on that subject, Finds, that at the period of her death on 20th June 1841, Miss Jane Joanna Stewart must be held to have been domiciled in Scotland, and consequently that her succession must be regulated by the law of Scotland: Therefore, finds that the claim of her mother, Mrs Stewart, which is rested on an alleged domicile in England, and founded on the English law of succession, cannot be supported: Repels the said claim to the balance of the heritable bond in question: Finds Mrs Stewart liable in the expenses incurred in this branch of the cause; allows an account thereof to be given in, and, when lodged, remits the same to the auditor to tax and report; and appoints the case to be enrolled, in order that such further findings be pronounced as may be considered necessary."

Mrs Stewart reclaimed, when the Court ordered minutes of debate.

Pleaded for Mrs Stewart;—Two things must be combined to constitute a domicile—the fact of residence, and the intention that that residence shall be permanent. Miss Stewart, before she went to England, had only a derivative domicile, which is not attended with all the consequences of an original domicile, acquired by a party *sui juris;* nor has the former all the effects, or so strong effect in law, as the latter. The intention to abandon it may, therefore, be more readily inferred. Miss Stewart, though a minor, could change her domicile, and acquire a new one; and the earliest indication of choice on her part, as to this matter, was in favour of England, where she died. *Prima facie*, the place of residence is that of domicile; and it is not enough to say, that she went to England with no intention of permanent residence there, seeing that a residence, temporary in its character, may, by change of intention merely, become such as to create a domicile. Now, Miss Stewart had been two years resident in England; she was under a matrimonial engagement, the fulfilment of which required her domiciliation in England; and this must be regarded as the strongest indication of her intention to make that country the land of her domicile.

Pleaded for Foster and Arnott;—After the death of the father, the mother becomes the head of the family, and while she continues a widow, her domicile becomes that of her children, so long as they continue to live with her, and until they have chosen and established a new domicile for themselves. Up to 1839, the domicile in this case was in Scotland; and it is a settled rule, that the intention to change the domicile is never to be presumed. This Scottish domicile, moreover, could not be considered as a derivative domicile, seeing that, after Miss Stewart ceased to be a pupil, it became her domicile of choice. Now, there was neither residence in England, or intention to change, of such a character as to create a new domicile. There was no permanent home acquired in England; it was a residence in hotels and furnished lodgings—a kind of residence insufficient. Nor does the matrimonial engagement indicate intention to change, for it is a mere intention to change *de futuro*, and that has no effect till it is actually accomplished; and it is fallacious to imagine, that the engagement to marry an English merchant at some future time, is equivalent to an engagement to settle permanently in England.

Lord President.—

I am for adhering to this interlocutor, after an examination of the cases which have been referred to in this discussion.

We must proceed in determining the question of domicile, on the admitted statement of facts as given by the parties; and, keeping them in view, I must hold that Miss Stewart had her domicile in Scotland, which was that of origin of her father, who, though he died in India, had an estate in this country. To Scotland, his widow, accompanied by Miss Stewart, returned, and remained domiciled here till they went to England in 1835. I do not see any reason to doubt that Mrs Stewart must be held as retaining her domicile in Scotland; and that is evinced by her retaining her furniture there, and having only gone abroad and remaining in England without any fixed residence, or merely living in lodgings or in the houses of friends, with her daughter, for the period of two years before her death. Is there evidence, then, *facto vel animo*, of Miss Stewart having fixed her domicile in England?

Now, notwithstanding her engagement to marry an English gentleman, which can only be viewed as amounting to an intention to make his domicile in England, hers, which, according to Burge, being merely betrothment, cannot be sufficient to fix a domicile; and, considering the cases of Somerville, Macdowall, and Munro, I don't feel myself warranted in dissenting from the interlocutor of the Lord Ordinary, though this, like other questions of domicile, is by no means unattended with difficulty.

Lord Mackenzie.—

A complete Scotch domicile had in this case been acquired by Miss Stewart. In these circumstances, she goes to England, and there agrees to marry this English merchant, who had no doubt an English domicile when the engagement was entered into. Now, this mere proposal, accepted by her, seems to me to be too loose a ground on which we can hold that there was intention to change; and I don't see that her being in England, without having a fixed domicile there, can render the matter better. Therefore, on the whole, I think the safe side is to hold the domicile to have been in Scotland at the time of her death.

Lord Fullerton.—

This question is one of great difficulty. For, while there are arguments, certainly of great plausibility, urged on both sides, the principles involved in those arguments, do appear to lead to consequences, in some particulars so startling, as to induce one to hesitate in adopting them.

Indeed, when the case was formerly before us, I was so much moved by those difficulties, in regard to the argument in support of the Scottish domicile, that I was rather inclined to alter the interlocutor of the Lord Ordinary.

On a more deliberate consideration, however, of the point truly before us, and the decisions in analagous cases, I have now come to the conclusion that the interlocutor is right. And, in referring to decisions, I presume there can be no doubt, that, in a matter like the present, involving a question of international law, the judgments of the English courts are of equal authority with our own. I have also alluded to the stricter examination of the point now before us, as one of the causes of my change of opinion. The point nominally raised and argued is, the domicile of the party who died intestate. But that is raised only for the purpose of determining what is truly the substantial point of difference— *viz* . by what law, that of England or that of Scotland, shall the succession of the deceased be regulated.

It is the domicile in relation to succession which alone is under consideration; and succession being a matter which the deceased had the power of regulating by will, and in which the law operates only as the substitute for that expression of will, the limitation of the question is of some importance; because there are other matters often dependent on domicile, such as the validity of acts, which the individual has no power to modify by will, in which I should rather think the question of domicile might be investigated on different principles.

This being the question, then, the first thing to be considered is, the domicile of Miss Stewart before she left Scotland in 1835. In other words, by what law her succession would have been regulated, if she had died before leaving Scotland. Now, looking at the facts as established by the joint minute, I can have no doubt that, down to that period, she was domiciled in Scotland. It is true, India was her domicile of origin. But her only home was that of her mother; and as her mother's home was, and continued to be, Scotland, for fifteen years, I must hold that country to have been also hers. And even giving effect to the somewhat nice and technical view, of her retaining her Indian domicile while in pupilarity, the soundness of which, however, I must be permitted to doubt, it is clear she had outlived pupillarity for more than three years, and that, in every point of view, she must be held to have been a domiciled Scotchwoman before she left Scotland in 1835.

This being fixed, there arises the question, how the question of domicile in relation to succession, is to be dealt with after she left Scotland?

I must say that I see no evidence of any fixed intention on her part to return to it; for the circumstance of her mother keeping her furniture there, is a great deal too slight to support the inference of such intention, even on the part of the mother herself; still less is it evidence of intention on that of Miss Stewart.

Now, different views might be taken, if the question were open, of the effect of a party so leaving a domicile once established. One, and I think by no means an unwarrantable one, is that which seems to be maintained by the assignee— *viz* . that the absolutely quitting *de facto* one country, and the absence of any evidence of an intention to return to it, terminates the formerly existing domicile; and that the actual residence of the party at the time of death, might be held the domicile in regard to succession, unless there was evidence to support the existence of a true domicile some where else.

But that view is, I think, absolutely excluded by the authorities, particularly by the cases of Sommerville and Munro.

The principle there established was, that after a domicile in one country is once established, it will be held to subsist even after departure from that country, until another domicile is permanently established some where else. This was the ground of judgment in the case of Sommerville; though, from the circumstances of that case, it was not perhaps necessary for the decision to push it to its full extent. For there, it was clear enough that the party, though passing a great part of his time, and ultimately dying in England, had hence *de facto* entirely or permanently abandoned his domicile in Scotland.

But in the case of Munro the principle was clearly brought out, and was indeed indispensible for the decision of the point, in the way in which it was ultimately decided. There, Dr Munro, who had been domiciled in India, had quitted India and returned to Britain, and after passing some time in England, had gone to Scotland, where ho died. There seemed to be no reason to hold that, he had definitively fixed where he was to establish himself permanently. But nobody pretended that he had not permanently left India, or that he had any intention to return to that country.

Yet there it was held that, because he had formed no fixed resolution as to his future domicile, "his Indian domicile subsisted at his death."

I can conceive cases involving questions of domicile, in which this principle would lead to strange conclusions; but, as limited to the law of intestate succession, it is perhaps not very unreasonable. A man having the power of disposing of his property as he chooses, and the act of the law being, as it were, the substitute for any expression of his intention on the subject, the change of domicile truly operates as an alteration of his implied will; and there may be some reason for holding, that nothing shall be held so to operate, short of a clear, and definite, and complete purpose to fix himself in some other country, where a different law on the subject is in force.

But whatever be the true foundation of the rule, I must hold it now to be fixed in cases of this kind, and consequently, I think Scotland must be held to have been the domicile of Miss Stewart, even after she quitted it in 1836, unless it can be shown that she subsequently acquired a domicile in England.

Now, this part of the case is one which I have found it very difficult to determine, in a way quite satisfactory to myself. But on the whole, and looking here, too, to the authority of decisions, I am inclined to think that Miss Stewart cannot be held to have acquired a domicile in England. The statement in the minute is:—"That in that year, (1835,) when she was about fifteen years of age, Miss Stewart left Scotland with her mother for the Continent of Europe, where she resided until about the month of

September 1836, when she came to England. That she resided in England till the winter of 1838, when she returned to Scotland, where she resided (in Edinburgh) till June or July 1839, when she again returned to England, where she resided till her death, in June 1841. That after leaving Edinburgh in the summer of 1835, neither Mrs Stewart nor Miss Stewart took up house, or had any permanent residence, but lived as above, sometimes in furnished lodgings and hotels, and sometimes with friends. Mrs Stewart, during all that time, retained the furniture of the house she had in Edinburgh before leaving it in 1835, partly in a room which she hired in Edinburgh for the purpose, and partly in the houses of friends. That in September 1839, when Miss Stewart was about twenty years of age, an English merchant, resident in Bristol, paid his addresses to her, which were accepted of, and, at the time of her death, they were engaged to be married."

Now, I do think it would be difficult, on the principle of the decision in the case of Munro, to hold that a life so unsettled could argue any thing but that sort of fluctuation of mind as to domicile, which was insufficient to take off the subsistence of a domicile formerly established. Temporary visits to friends, and casual and shifting residences in lodgings and hotels, seem to fall short of the evidence which would be required, to prove the actual constitution of a fixed domicile. Indeed, upon this point, we have the authority of another case, that of the Attorney-General v. Dun. There, Mr Boone, once domiciled in England, and having property there, had quitted it in 1828, and from that period till that of his death, in 1834, had lived in Italy, with the exception of about a year, in 1831 and 1832. He had bought a residence in Italy, the Castle of Rasina, had servants there, but he himself lived rather a wandering life, sometimes in one place and sometimes in another. It was ultimately decided that he had not acquired a domicile abroad, though it was said, that the fact might have indicated an intention to make Rasina his domicile; that his English domicile therefore remained.

That seems a very strong case. The party had not only quitted England, but it seems to have been held that, in so far as intention was concerned, he did not intend to return to it. Yet it was held to subsist as his domicile, in determining the locality of his personal succession; because, whatever might be his intentions, he had not carried those intentions into effect, by establishing any where else such a permanent residence as could be regarded as a home.

It seems to me that the residence of Miss Stewart in England, as described in the minute, is of no higher character, and entitled to no higher effect in the present question.

It only remains to notice the circumstance, on which much stress was laid in argument—I mean the contemplated marriage of the young lady with an English merchant resident in Bristol. The whole statement appears to me to be much too vague, to have any material effect on the present question. Had there been any thing to connect the removal to a residence in England, with the intended marriage—if, for instance, the fact had been that the marriage was to be immediately contracted with a gentleman fixed in England, and that the lady had gone to England in contemplation of the marriage—there might have been some ground for connecting her removal to England with the prospect of permanently remaining there. But here the two circumstances have no connexion with each other. It is not said that any time was fixed

for the marriage; the parties are said to have been engaged, but an engagement is a term of indefinite endurance; and the statement is quite consistent with the supposition, that she was to return and resume *de facto* her domicile in Scotland.

In short, taking the whole facts as admitted, including the alleged engagement to marry, I do not think that they amount to that completion of an English domicile which is necessary, in a question of this kind, to exclude the operation of the law of that domicile which she had previously acquired.

On these grounds, I think that we ought to adhere to the interlocutor of the Lord Ordinary.

Lord Jeffrey.—

This is a case certainly of considerable nicety, and though turning on principles and maxims of law perfectly familiar, I think it also a case of considerable novelty, in regard to the main feature on which the chief difficulty has been raised—I mean a matrimonial engagement, and what is productive of an alteration of domicile, though *de futuro* , concurring with actual residence in the country. It is lucky for parties, and comfortable for our brethren, that the bench is not now divided; and I must say, that I have always thought that those opinions are best worthy of consideration, which have been come to only after arriving at the conclusion that our own first views were erroneous. I have no difficulty in saying, that though it is my misfortune not to be convinced of the soundness of these opinions, my difficulty is increased by what has happened today. But, notwithstanding of this, I think it right to state the grounds on which I must adhere to my former views.

We are all agreed that, to constitute a domicile, there must be the fact of residence at the time of death, and also a purpose on the part of the defunct to have continued that residence. While I say that both must concur, I say it with equal confidence that nothing else is necessary. These are essential requisites, but they are the whole. Now, we have both requisites here. It is said to be quite clear that this lady must be held to have had a Scotch domicile, at least up to the date of the engagement with the future English husband, or at least up to the time when she went last to England, in 1839. I am not entirely of that opinion. That domicile was not one of choice, nor was it that of birth. It was the derivative domicile chosen by her mother; and I am quite clear, that such a domicile may be renounced with greater facility, than that of birth or individual election, for it is a domicile impressed by the choice of a legal guardian. Consider how absurdly early the period of pupilarity of females expires in this country, and it is hardly to be thought that this lady, as soon as she became a *minor pubes* , would assert an opinion upon the subject. After a year or two from her attaining puberty, however, there is something like a breaking up of the Scotch establishment. The furniture is distributed among friends, and mother and daughter depart from Scotland. Suppose the daughter should have indicated a wish to live out of Scotland, and the mother seeing that,—should break up her establishment, I have very little hesitation in saying, that the short residence in Scotland after Miss Stewart attained puberty, from 1839 to 1841, would not be held as indicative of her intention to make this country the domicile of her choice. But I do not go on that, so much as on the powers he certainly then had, of fixing her domicile *animo* . Her domicile was no longer necessarily that of her mother, which I rather think continued Scotch; and the two can no longer be looked on,

as a mother having power to create a domicile for her daughter. They were now only like two friends voluntarily living together, but perfectly independent of one another; and there might consequently have been a radical diversity in the *animus* of each, as to the character of their residence in England. I cannot admit what Lord Fullerton assumes to be the rule, that, in order to make a domicile, it is necessary to have some particular spot within the territory of a law—that it is not enough that the shall have an apparently continual residence there, but shall actually have a party particular spot, or remain fixed in some permanent establishment. In considering the *indiciæ* of domicile these things are important; but they are not necessary, as matter of general law, to constitute domicile. Many old bachelors never have a house they can call their own. They go from hotel to hotel, and from watering-place to watering-place, careless of the comfort of more permanent residence, and unwilling to submit to the *gêne* attendant on it. There was the case of a nobleman, who always lived at inns, and would have no servants but waiters, but he did not lose his domicile on that account.

If the purpose of remaining in the territory be clearly proved *aliter* , a particular home is not necessary. Suppose a person like Dr Munro, (in the case of Munro,) but not having maladies making it hazardous for him to live in his native country, had purposed purchasing a property in the Highlands, and comes home from India without the least intention of returning—pays visits in the north, and sends notice to have his house put in order—he dies before getting a home—could it be doubted that he had regained his Scotch domicile? He comes back to Scotland, the country beneath the shade of whose law and within whose bosom he means to die. It cannot be doubted that the case I have put has an application to that now tinder consideration. The nature of the occupation in England is of importance, if there were doubt as to the intention. It is said that there was a vague purpose of marriage; but we have it admitted on record, that there was a serious purpose of that kind in existence. In June 1839, the parties went to England; and in December of that year, a merchant in Bristol paid his addresses to the lady, which were accepted. I am not the least moved by the fact, that the engagement to marry might be broken off. The point is, that it was not in reality broken off. Is this purpose not an inducement to change the domicile, though it is no doubt possible that the engagement might have been disregarded, especially if there had been delay between the courtship and the marriage?

The case which illustrates best the ground on which I go, is the case of a person having received an appointment of honour and emolument, of a settled and permanent nature, in another country, and requiring residence in that country, but dying before being formally inducted into it, or entering upon its duties. Take the case of a person in orders, who receives a presentation to a living in England, sells off his furniture and house here, and moves to the south. A certain interval must happen before he can be inducted into his living. He goes to England, spends several months *animo remanendi* , looking forward to his marriage with the church as the consummation of his felicity, and with the intention of dying in a mature old age in that land of his adoption; but the ceremony is not performed, and he dies before it can be so; I ask, if that person shall not be held to have died domiciled in England? The statement of Pothier is express, that if a party changes his domicile in consequence of a permanent employment, the new domicile attaches to him, the moment he comes into the new territory. I think the present case is just like such a spiritual betrothal. But is it to be said, that perhaps such

a person before completing the union with the church might resolve to think about it—might perhaps, after some talk with Mr Newman, be induced to go still further, and take up his residence at Rome. Still he abandons his former residence, and takes up the other *animo remanendi* , in respect of his office. Not only could the rector change his intention before he was inducted, but he lies under this disadvantage, that he could change it after he was inducted. But will the contemplation of this possibility, affect the fixity of his condition, or the legal inference, from the circumstances in which he actually dies?

Now, here, nothing but the death of the party prevented the marriage; and was not this lady within the realm of England at her death? Would it have made any difference if she had been wooed in Scotland, and after the engagement she had gone up to Bristol for the sake of convenience, and in rambling about the rocks there, the parties had fallen and broken their necks, the day before their intended marriage? Her domicile would have been in England. Lord Fullerton seems to hold that it is only after the engagement is fulfilled, that her intention is irreversibly determined, and her connexion with Scotland dissolved. Would it make any difference in the case of the rector, that he had come to England before receiving any notice of the presentation which he received there, and continued his residence in England? I do not see that the mere interception of death, after a strong moral obligation to remain has been superadded as part of the purpose of remaining, would prevent the removal of the domicile to England. The necessity of the ceremony to complete the induction does not affect the matter of domicile, which would unquestionably have been constituted, had that ceremony been carried through. That appears to me to be the doctrine of all the authorities.

Therefore, I must say, that to affirm the interlocutor under review is not in accordance with my will or judgment.

Order

The Court adhered.

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