

Walter Humphrey James - - - - - *Appellant*

*v.*

Richard John Barry, in his capacity as the Master of the Supreme  
Court, Natal Provincial Division - - - - - *Respondent.*

FROM

THE SUPREME COURT OF SOUTH AFRICA.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 28TH APRIL, 1921.

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*Present at the Hearing :*

VISCOUNT HALDANE.

LORD BUCKMASTER.

LORD SHAW.

[*Delivered by* LORD BUCKMASTER.]

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The question in this case is as to the domicile at the date of his death of one Andrew Hutchison, who died in Manchester, unmarried, on the 1st September, 1914. His domicile of origin was undoubtedly Scotch, but it has been found both by the Appellate Division of the Supreme Court of South Africa and the Supreme Court (Natal Provincial Division), that he had changed his domicile before his death and died domiciled in Natal. The circumstances in which this dispute has arisen need not be restated. The controversy is due to a claim made by the respondent, the Master of the Supreme Court of South Africa, against the appellant, the executor dative of the deceased's estate claiming that the domicile was in Natal.

The principles properly applicable to determine a change of domicile have been correctly apprehended and stated by both Courts. A domicile of origin is not easily shaken off. Mere absence from home, roving and wandering, however long pursued, are not in themselves sufficient to effect a change. There must be a fixed and settled purpose to abandon the domicile of origin

and to settle in the country of choice in order that the change may be effected. There is no need to examine again the authorities by which this proposition has been established; a reference to the recent case of *The Attorney-General v. Winans* (1904, A.C. p. 287) is sufficient for the purpose.

The appellant alleges that these conditions were never satisfied by Andrew Hutchison, and it is necessary to examine the facts, not in dispute, which constitute his life's history in order to see if this contention is well founded.

He was born of Scotch parents in 1834, being the son of a farmer in Kinross-shire. In his early youth he was apprenticed to a draper in Alloa, and from thence he went to Manchester, and subsequently to London. In 1861 he left this country for Natal, and there, after trading for some time through the country with an ox-wagon, he settled down and carried on a general store business in Ladysmith under his own name. A firm known as Randles, Brother & Hudson, assisted him in this enterprise, and received a share of the profits. In 1876 he had so prospered in his work that he was able to sell his business and retire upon a competence. He then made a short trip to New Zealand where his brother was living and returned to Scotland, where he lived with his father and sister until his father's death in 1885, living from 1881 at a place called Highfield in Dollar, which he had bought. His father's death appears to have snapped the ties that bound him to Scotland, and in 1886 he went to Manchester, where one of the partners in Randles, Brother & Hudson had his residence, and in 1888 he acquired an interest in the business of Randles, Brother & Hudson, under which he received 10 per cent. of the firm's profits. The business of this firm was carried on in South Africa, the head office being at Durban, with branch offices at Johannesburg and elsewhere, the branch at Manchester being only established for purposes of buying. The exact nature of his interest in the business it is not necessary to ascertain, but there can be no doubt that from 1888 until the time of his death, apart from his affection for his brother and sisters and their families which was strong and sincere, the chief interest of his life lay in Durban. Neither in Durban nor in Scotland did he ever acquire a residence for himself, but in 1905 he purchased a small property known as "Harelaw" in Kinross-shire, and spent considerable sums on its improvement. The reason for this was one of strong family sentiment. It was the place where his father had originally lived, which had been in the possession of his ancestors for generations, and it had been sold many years before owing to money difficulties in which his father had been involved. He was anxious that on his father's grave there should be inscribed the statement that he was of Harelaw, and this pious wish he gratified. He never had any intention of living in Harelaw himself, and when the property became vacant he put his brother into possession. At Durban he always lived at the Royal Hotel, and he seems to have spent his time in going down to the place of business of Messrs. Randles, Brother & Hudson, where he was in constant

attendance, sitting and smoking his pipe and talking to the people who came in and out. He was a man kindly and reticent, not given to the use of trifling language, but of a shrewd judgment, and there seems no doubt that, little as he interfered with the active management of the business of Randles, Brother & Hudson, his presence and his advice were considered fully worth the 10 per cent. that he had in their profits. He appears to have had no banking account, although he died worth upwards of £158,000, but he drew from the firm whatever money he wanted, and what remained undrawn accumulated to his credit until of his total estate at the date of his death, £150,374 represented his interest in the firm.

From time to time in the spring and summer months he came over to Manchester, first in every two or three years, and latterly about once a year. He was under no obligation to go to England, but he used to go and take up his residence in an hotel near to the branch office of the firm and assist with the buying. He also paid visits to his relations in Scotland, but he never took up his residence there again. It was on one of these visits to Manchester that he died. He acquired in 1906 the business of a bankrupt brother-in-law in Dollar, and transferred one-third of it to his niece, but this he bought back for £1,500, and he had a two-thirds' interest in this business at the date of his death. In 1910 he instructed a solicitor in Dunfermline to prepare his Will, and he was there described as of Harelaw in the county of Kinross, and also of Durban and Natal, South Africa. There is evidence which was accepted by the Courts in South Africa, and which there is no reason to question that he intended to end his days in Durban, and he was proposing building himself a house.

Mr. Pepworth, who knew him very well, saw in the "Field" newspaper that he had purchased the family property in Dollar, and he said to him, "Are you going to settle down?" His reply was characteristic; he said he had bought some old trees on the property that he used to play under when a boy, that he had a longing for it and he bought it, and said it was simply an old man's sentiment; he added, he would never live there. Mr. Koch, a former Master of the Supreme Court of Natal, spoke to the same effect. At a conversation in Durban, he said, "It is my intention to stay here." Mr. Koch said that he had made Natal his home, and Mr. Hutchison answered, "I am doing the same." The fact that he never did build himself a home, but that he lived permanently at the hotel in Durban, does not shake the conclusion to be drawn from these statements. Greatly attached as he was to his relations, proud of his Scotch birth and of his Scottish ancestry, his real life's work had been done in Natal. There was the firm in association with which he had so long worked; there were the friends he knew and the business in which he was interested. His intention not to live in Scotland is plain. It cannot be suggested that he intended to change his Scotch domicile for an English one. But for his annual visits to Manchester the selection of Natal as his domicile of choice would be plain beyond argument, and those visits are explained partly by his desire

for change, partly no doubt to see his relations, and partly by his interest in the buying branch of the business with which he was associated.

There are, in addition to these facts, two other circumstances which, in their Lordships' opinion, are of great importance in the determination of this case. He was enrolled on the Voters Roll for Durban from 1902 to 1914, and on the Burgesses Roll for the years 1903, 1904, 1905 and 1907 to 1915, though it does not appear that he actually voted. Further, he paid income tax in Durban, and he not only did not pay income tax in this country, but he successfully resisted the attempts of the authorities to render him liable for such payment. This fact is important in connection with the man's character. He was a man upright and trusted in all his business dealings. He had felt acutely the shadow of the trouble which had caused his father to leave his home; all the evidence about his life shows him to have been a trustworthy and honourable man, and their Lordships are satisfied that it was not a mere evasion of an obligation to pay tax over here, nor an adroit confusion of the real facts, that enabled him to resist the claims for payment, but the fact that he satisfied the authorities that he was not ordinarily resident in this country, and that his presence here was that merely of a visitor.

Their Lordships have not pursued every detail of his life, for they have all been the subject of careful examination in the Courts in South Africa. The outstanding and salient facts to which they have referred are sufficient to show the reasons which lead them to the conclusion that the judgment appealed from is correct, and that this appeal ought to be dismissed with costs. They will humbly advise His Majesty accordingly.



In the Privy Council.

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WALTER HUMPHREY JAMES

vs.

RICHARD JOHN BARRY, IN HIS CAPACITY AS  
THE MASTER OF THE SUPREME COURT,  
NATAL PROVINCIAL DIVISION.

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DELIVERED BY LORD BUCKMASTER.

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