face. The pursuer averred that "the defenders or their managers, roadsmen, or other servants (whose names the pursuer does not know, but for whom the defenders are responsible)" had, in violation of the special rules framed under "The Mines Regulations Act 1872," failed properly to support and prop the roof of their pit, and to have a supply of timber for props always ready at the place in the pit where the miners were.

There was a conflict of evidence as to whether there was timber at the working faces, but it was proved that there was plenty of timber at the pit mouth, and that the manager had received no complaint of want of timber.

The Sheriff-Substitute (GUTHRIE) found that the pursuer had been injured, but not through the fault of either of the defenders.

The Sheriff (CLARK) on appeal recalled this interlocutor, and gave the pursuer £100 damages.

The defenders appealed.

At advising—

LORD ORMIDALE and LORD GIFFORD substantially adhered to the judgment pronounced by the Sheriff-Substitute.

LORD JUSTICE-CLERK—I do not differ from the proposed judgment. But for the series of decisions relative to the conditions which are implied in every contract of service, I should have been inclined to hold that, in so far as these regulations related to matters in which any individual servant had an interest, they constituted the counterpart of the obligations incumbent on the servant, and were things which the master, by himself or his servants, undertook to do as his part of the contract. It would not have occurred to me that it made the slightest difference whether the work was a large or a small one, or whether the master was or was not expected to do these things personally. But it has now been conclusively fixed that the obligation incurred by the master under such a contract is one of an entirely different description, namely, to appoint competent servants to discharge these duties; and that there was no obligation whatever to supply these miners with prop-wood on the part of the only persons with whom the pursuer contracted, so that, as the law now stands, the miner is bound to work, and the master is not bound to supply him with the necessary materials to enable him to work in safety, but only to appoint persons fairly competent to do so.

But, then, it is said this duty is placed on others with whom the miner has no contract, and that his remedy lies against them. The present case is not a bad practical example of the security thereby afforded, if the defenders' argument be sound. The manager throws it on the oversman, the oversman on the fireman, the fireman on the drawer, until, however gross or glaring the neglect, it is impossible to fix liability on anyone. It comes to this, according to the defenders, that no one contracted with the miner to give him prop-wood—that there were persons who had undertaken to do this by a separate contract with another, but that who these persons are it is impossible to say.

This is the result of the decisions, and they are quite conclusive on the present case as far as the Coltness Company is concerned. The company never undertook to furnish the pursuer with prop-wood, and therefore cannot be responsible for not having furnished it; and, as far as they are concerned, they must be assoilzied if the servants appointed were competent, and there is no proof that they were not.

The case against the manager stands somewhat differently. If I were to hold it proved that prop-wood was not duly supplied, I have no doubt whatever that, *prima facie* at least, the manager is responsible, and must discharge himself. If the manager's obligation comes in place of that of the master, it must be read as part of the conditions of the service. Now, the manager was bound to see that prop-wood was supplied to the miners, not to do it himself, but to see it done. This is plain from regulation No. 2. It was therefore for the manager to show that this duty was performed, and on that matter I should have no doubt, had it been proved, as it lay on the pursuer to prove, that the prop-wood was not supplied. But the evidence on this hand is so conflicting that, rather reluctantly, I am obliged to concur in the judgment, although remaining under the impression that the regulations were most imperfectly carried out in this work.

The Court assoilzied the defenders.

Counsel for Pursuer (Respondent)—Asher—Lang. Agents—J. & W. C. Murray, W.S.

Counsel for Defenders (Appellants)—Balfour—Alison. Agent—John Gill, S.S.C.

Saturday, June 23.

SECOND DIVISION.

SPECIAL CASE—WAUCHOPE'S EXECUTOR *v.* MRS WAUCHOPE.

Domicile — Succession — Where an Anglo-Indian Domicile had been acquired before the Act 21 *and* 22 *Vict. cap.* 106, *and the Indian Succession Act* 1865.

A Scotchman joined the Civil Service of the East India Company in 1841, and, with the exception of two short absences, resided in India from 1842 to 1873. He was on leave of absence on furlough in Europe when he died in 1875. In a question as to the domicile of the deceased, *held* that it was Anglo-Indian, and therefore, for the purposes of succession, English, and that neither the Act 21 and 22 Vict. cap. 106, vesting the territories of British India in Her Majesty Queen Victoria, nor the provisions of the "Indian Succession Act 1865," operated any change when an Anglo-Indian domicile had been acquired before these Acts came into operation.

Observations on the case of *Bruces* v. *Bruce*, M. 4617, H. of L. 3 Pat. App. 163.

This was a Special Case presented by David Baird Wauchope, Esq., wine merchant in Leith, executor-nominate *quoad* estate in Great Britain of the deceased Samuel Wauchope, C.B., under his will, dated 21st July 1875, of the first part; and Mrs Catherine Baldock Fagan or Wauchope, widow of the said Samuel Wauchope, of the

second part. The case set forth that the deceased Samuel Wauchope, C.B., was born legitimate in Scotland, of Scottish parents, in the year 1822. In the year 1841 the said deceased entered the Civil Service of the East India Company (Bengal Presidency); in 1842 he went to British India; and at the time of his death, which took place at Engelberg, Switzerland, on 23d July 1875, he was in the service of the Crown in British India, which became vested in Her Majesty by the Statute 21 and 22 Vict. cap. 106. During the period of his service he had visited Scotland twice on short leave and once on furlough, and returned to India. In the year 1873 he left British India, having obtained leave of absence on furlough for two years, together with five days subsidiary leave, from October 23, 1873, and returned to Scotland, where he resided in a house rented by the year, the lease of which to Whitsunday 1876 was current at his death. During the summer of 1875 he went abroad on account of his health, and died of the date above mentioned. At the time of his death he had served the requisite number of years to entitle him to retire from service, but he had not retired from service, and was in receipt of furlough allowance at the time of his death. In 1843 the deceased married at Calcutta the party of the second part. Of the marriage three children only, daughters, survived. The deceased had entered into no contract of marriage, either antenuptial or postnuptial, with the party of the second part.

The deceased left no heritable property in Great Britain, but he died possessed of moveable estate in Scotland, moveable estate in England, and moveable and real estate in British India. He executed a will two days before his death. A question had arisen between the parties to the case as to the right of the second party *jure relictæ* to the moveable estate left by the deceased. It was maintained by the first party hereto that the deceased had lost his domicile of origin, and acquired an Anglo-Indian domicile. If the domicile of the deceased at his death was Anglo-Indian, it was admitted that his succession must be regulated by the law of England, and that by that law his widow was not entitled to any portion of his moveable estate disposed of by the will, but was entitled to one-third of the moveable estate not disposed of, besides the legacy of furniture thereby bequeathed to her. On the other hand, it was maintained by the second party hereto that, under the provisions of "The Indian Succession Act '1865,' the domicile of the deceased was Scotch, and that the succession must be regulated by the law of Scotland, and that she was entitled *jure relictæ* to one-third of his moveable estate. In the event of its being found that she was entitled to *jus relictæ*, the second party also claimed the legacy of furniture bequeathed to her by the will. But in the event of its being found that the deceased's domicile at his death was Anglo-Indian, the second party claimed the said legacy of furniture and one-third of the moveable estate not disposed of by the will.

The following questions were submitted:—"(1) Was the domicile of the deceased Samuel Wauchope Scotch at the time of his death? (2) Is the second party entitled to one-third of the moveable estate of the deceased *jure relictæ*? (3) Is the second party entitled to claim both *jus relictæ* and the legacy of furniture bequeathed to her by the will?"

The main provisions of the Indian Succession Act 1865, entitled "An Act to amend and define the law of intestate and testamentary succession in British India," founded on by the parties, were as follows:—

"PART I.—PRELIMINARY.

"(2) 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 succession.

"PART II.—OF DOMICILE.

"(5) Succession to the immoveable property in British India of a person deceased is regulated by the law of British India, wherever he may have had his domicile at the time of his death. 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.

"6. A person can only have one domicile for the purpose of succession to his moveable property.

"9. The domicile of origin prevails until a new domicile has been acquired.

"10 A man acquires a new domicile by taking up his fixed habitation in a country which is not that of his domicile of origin.

"*Explanation.*—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.

"*Illustration.*

"A, whose domicile of origin is in France, comes to reside in British India, under an engagement with the British Indian Government for a number of years. It is his intention to return to France at the end of that period. He does not acquire a domicile in British India.

"11. Any person may acquire a domicile in British India by making and deposing in some office in British India (to be fixed by the local government) a declaration, in writing under his hand, of his desire to acquire such domicile, provided that he shall have been resident in British India for one year immediately preceding the time of his making such declaration.

"13. A new domicile continues until the former domicile has been resumed or a new one acquired.

"19. If a man dies leaving moveable property in British India, in the absence of proof of any domicile elsewhere, succession to the property is regulated by the law of British India."

Argued for first party—(1) The domicile of the deceased was Anglo-Indian, and the right to *jus relictæ* was therefore excluded—*Bruces* v. *Bruce*, Mor. 4617, and April 15, 1790, 3 Paton App. 163, and 2 Bos. and Puller 230. An acquired domicile continues till a new one is acquired, which can be done only *animo et facto*—*Munroe* v. *Douglas*, July 3, 1820, 5 Maddoch's Ch. Rep. 379; *Craigie and Craigie* v. *Lewin and Others*, Feb. 28, 1843, 3 Curteis Eccles. Rep. 435; *Bell* v. *Kennedy*, May 14, 1868, 4 Macph. (H. of L.) 69, Law Rep. 1 Scot. and Div. App. 307; *Forbes* v. *Forbes*, Feb. 9, 1854, 23 L.J. (N.S.) Ch. 724; *Allardice* v. *Onslow*, Jan. 23, 1864, 10 Jurist (N.S.) 352;

Moorhouse v. *Lord*, March 1863, 32 L.J. Ch. 295, and 9 Jurist (N.S.) 677; *Aikman* v. *Aikman*, March 12, 1861, 21 D. 757, and 3 Macq. App. 854; *Udney* v. *Udney*, June 3, 1869, 5 Macph. 164, and 7 Macph. (H. of L.) 89; *Hamilton* v. *Dallas*, Nov. 9, 1875, Law Rep. 1 Ch. Div. 257; *in re Capdevielle*, June 13, 1864, 2 Hurlstone and Coltman 985; Savigny's Conflict of Laws (translated by Guthrie), p. 59, note D. (2) No change on the common law rule has been made by the Acts transferring the territories of Hindostan from the East India Company to the Crown—3 and 4 Will. IV. c. 85; 16 and 17 Vict. c. 95; 21 and 22 Vict. c. 106; 24 and 25 Vict. c. 67; 28 and 29 Vict. c. 17. (3) The Indian Succession Act 1865 makes no real change in the law of domicile, at least as regards civil servants who had at its date acquired an Anglo-Indian domicile. (4) The claim to the legacy of furniture is inconsistent with the claim of *jus relictæ*.

Argued for second party—(1) The case of *Munroe* v. *Douglas* was decided with reference to service under a private company, not the Crown. The doctrine of suspended domicile is extended by *Udney* v. *Udney*; *Munro* v. *Munro*, Nov. 15, 1837, 16 S. 18 (Lord Moncreiff's opinion, at p. 35), and Aug. 10, 1840, 1 Robinson's App. 492; *M'Donald* v. *Lang*, Nov. 27, 1794, Mor. 4627; *Drevon* v. *Drevon*, June 13, 1864, 34 L.J. Ch. 129; *Hook* v. *Hook*, Feb. 7, 1862, 24 D. 488 (Lord Kinloch's judgment). (2) This is altered by the Act 21 and 22 Vict. c. 106. (3) The Act of 1865 applies to all except the persons mentioned in section 331. (4) No intention to exclude the widow from her legal rights appears on the face of the will—*Howden* v. *Crighton*, May 18, 1821, 1 S. 18; *White* v. *Finlay*, Nov. 15, 1861, 24 D. 38; *Henderson* v. *Henderson*, 1782, Mor. 191.

At advising—

Lord Justice-Clerk—[*After stating the facts*]—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 (No. 10) of 1865 of the Indian Council, entituled "An Act to amend and define the law of intestate and testamentary succession in British India?"

In regard to the first of these questions, I assume it to have been conclusively decided in the case of *Bruce*, (cited *supra*) and the other decisions which followed on Lord Thurlow's judgment in that case, that residence in India in the service of the East India Company, either in the civil or military capacity, constituted an Indian, and therefore, for the purposes of succession, an English domicile. 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 was there held that a civil servant, covenanting with the East India Company and residing in India in the discharge of that contract, had sufficiently indicated his intention of establishing his domicile there, although, no doubt, he probably entertained the intention, more or less remote, of returning to the country of his birth. I do not think it necessary to enter at any length into the principle on which the combination of residence and intention—the *factum* and *animus*—are held to denote and determine a change of the domicile of origin. This principle has been considered of late in a great many instructive cases. It is enough that it has been conclusively held that service as a civilian with the East India Company, and continuous residence in that country, does obliterate the domicile of origin, and create what was called an Anglo-Indian domicile.

In the present case, the deceased Samuel Wauchope entered the East Indian Company's service as a civilian in the year 1841, and, with the exception of two short absences, he resided in India from 1842 to 1873, a period of thirty-one years. In 1858, more than fifteen years after Mr Wauchope had taken up his residence in India, the Act of that year was passed, transferring the functions of the East India directors and the government of the East Indian provinces to the Crown. 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 Company was a trading company, and that service with it was equivalent to, 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 concidence 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. This Act, which is in substance and effect a codification of the law of intestate and testamentary succession for British India, contains a series of legal definitions and propositions, accompanied with illustrations applicable to the subject-matter treated of. Among other propositions is this one—"10. A man acquires a new domicile by taking up his fixed habitation in a country which is not that of his domicile of origin." Then follow these words—"Explanation

—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." It is 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—and 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"—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 adjected to 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 had 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 causa* as well as *inter vivos*, of all the civil servants in India at the date at which the Act passed. I am therefore of opinion that Mr Wauchope had acquired an Anglo-Indian domicile, and that he never lost it.

Second, it follows that the widow's claim to her *jus relictæ*, so far as it depends on the law of Scotland, is excluded.

It is hardly necessary for us to answer the question put to us on the other alternative, but my opinion is, that this is a settlement of the whole of Mr Wauchope's estate, and that the widow could not claim her *jus relictæ*, and at the same time take advantage of the bequest in her favour contained in the deed.

Lord Ormidale—The first question to be answered is—"Was the domicile of the deceased Samuel Wauchope, Scotch at the time of his death?"

After careful consideration I have come to be of opinion that this question must be answered in the negative. It is true that the late Mr Wauchope was born in Scotland; and therefore that his domicile of origin was Scotch. But in early life he went to India, where he entered the Civil Service of the East India Company, and continued in that country and service upwards of 30 years, during which time he visited Scotland twice on short leave and once on furlough.

Such being generally the state of matters, I think it so clear on the authorities, and especially the decision of this Court and the House of Lords in the well-known case of *Bruces* v. *Bruce*, in 1790 (Mor. 4617, 3 Pat. Appeals 163) that it is impossible not to hold that the late Mr Wauchope, by entering and continuing in India in the service of the East India Company till 1858, when that Company ceased to exist and its interests were transferred to the Crown, had then lost his domicile of origin and acquired an Anglo-Indian domicile.

It was contended, however, that the extinction of the East India Company in 1858, and the circumstance of the late Mr Wauchope becoming on that event a servant of the Crown, distinguishes the present case from that of *Bruces* v. *Bruce*, and renders the principle of the judgment in that case inapplicable. I am unable to think so. It is true that one of the reasons assigned for the judgment in *Bruce's* case was that the party whose domicile formed the subject of dispute was in the service of the Company, and not in a British regiment which might have been in India only occasionally; but the position of the late Mr Wauchope was precisely of the same nature after as well as before 1858, when the East India Company ceased to exist and the Crown came into its place. It could no more be said of him, after his service was transferred to the Crown in 1858 than it could previously, that his service in India was only occasional. The reason and principle of the decision in the case of *Bruces* v. *Bruce* appears therefore, so far, to be clearly applicable to the present.

Neither can I see anything in the "Indian Succession Act 1865" that can be held to affect the matter. The "explanation" which follows article 10 in that Act, to the effect 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," appears to me to be no more than an announcement in a concentrated form of the settled law on the subject as exemplified by the case of *Bruces* v. *Bruce*, for, according to the terms of the judgment in that case, besides the circumstance of the party going to India and entering the service of the East India Company, there were the further circumstances of his not having declared any fixed or settled intention of returning to Scotland to remain there.

If I am right in those views, it follows there is nothing in the present case to distinguish it

from that of *Bruces* v. *Bruce*. In the present case it is no doubt the fact that the late Mr Wauchope was absent from India, and it may be said was in Scotland for a short time before his death, but he had not retired from the service in India, but on the contrary was in the receipt of furlough allowance down to his death. He had therefore kept up to the last his connection with India, and must, I think, be held to have intended to return thither to resume the discharge of his active duties. And it does not appear that he ever declared his intention of ultimately and finally returning to Scotland.

It results from my answer to the first question as now given that the second and third questions, if it be necessary to answer them at all, must be answered in the negative.

Lord Gifford—I assume that the information stated in this Special Case, although I feel it to be very meagre, contains the whole facts now attainable by the parties material to the question at issue. Upon the facts so stated, I am of opinion that the late Samuel Wauchope, at the time of his death on 23d July 1875, had an Anglo-Indian domicile, and that his succession must be regulated accordingly.

In the year 1841 Mr Wauchope, then only about 19 years of age, entered the Civil Service of the East India Company, and in that service he next year went to British India. At that time the East India Company was a private company; its rights and interests were not transferred to or vested in the Crown till the Statute of 1858.

Mr Wauchope appears to have entered the Company's service in the usual way and on the usual terms. His appointment was of a permanent nature and indefinite as to its duration. In point of fact, that employment lasted till Mr Wauchope's death, being a period of about 34 years. He was in the same service at his death, although, as the rights and powers of the Company had been transferred to Her Majesty, he was at his death in the service of the Crown.

During that long period of service Mr Wauchope resided in British India, only visiting Scotland three times in all. He married in India in 1843, and he never took up any permanent domicile anywhere else. He died in Switzerland during an absence from his service, but he contemplated returning to it, for he was only absent from India on furlough, which had not expired at the time of his death.

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. A mere indefinite intention ultimately to return to Scotland when a sufficient fortune is made, or an adequate retiring pension is earned, will not *per se* prevent the acquisition of an Anglo-Indian domicile. The present case is a stronger case than usual for holding that an Anglo-Indian domicile was acquired, for not only did Mr Wauchope marry and settle in India for 34 years, but he had no residence in Scotland or anywhere else than in India, and he had no patrimonial estate or real estate of any kind in Scotland by means of which his connection with that country might be kept up. 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. I think this is the result of the authorities bearing on such a question, and to which your Lordships have referred. But it was contended that Mr Wauchope's becoming a servant of the Crown in 1858 raised a different presumption at least from and after that date, and the Indian Succession Act of 1865 was strongly founded on, particularly the explanation annexed to section 10, which provides 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."

Now, 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. At least in a case where the facts are so bare as those set forth in this joint case, and where there are no indications of change of domicile except the mere circumstance of residence and service, I think the abandonment of the domicile of origin would not thereby be presumed. 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 personel then serving the East India Company in British India. I cannot give any such effect either to the transference of the East India Company to the Crown or to the Indian Succession Act of 1865.

I feel compelled therefore to decide the present case just as if it had arisen in 1858, and if I find upon the facts stated, as I do, that in 1858 Mr Wauchope was a domiciled Anglo-Indian, and if I find upon the facts stated, as I do, that nothing has occurred since 1858 whereby Mr Wauchope has lost his Anglo-Indian domicile and has acquired a new one, then I must conclude, as I do, that Mr Wauchope's domicile at his death was Anglo-Indian.

The Court pronounced the following interlocutor:—

> "The Lords having heard counsel in the Special Case, are of opinion and find that the late Samuel Wauchope's domicile was in

British India; and therefore find it unnecessary to answer the other question; and decern: Allow the expenses incurred by both parties to this Special Case to be paid out of estate."

Counsel for the party of the First Part — Kinnear—W. J. Mure. Agents—J. & F. Anderson, W.S.

Counsel for the party of the Second Part—Asher—Hunter. Agent—R. B. Ranken, W.S.

Tuesday, June 12.

FIRST DIVISION.

[Lord Gifford, Ordinary.

PETITION—ALEXANDER GOW.

Judicial Factor—Appointment—Partnership—Dissolution and Winding-up.

Where a contract of copartnery has expired, both partners surviving, the Court will not interfere with the winding-up of the concern by appointing a judicial factor, except in very special circumstances.

Observations (*per* Lords Deas and Shand) on the distinction between such an application in the case of a going business and in the case of a dissolved company.

This was a petition presented by Alexander Gow, one of the partners in the dissolved firm of Schulze, Gow & Company.

The following narrative is taken from the Lord Ordinary's note:—"The petitioner in this case seeks sequestration of the copartnery estate of Schulze, Gow, & Company, and the appointment of a judicial factor thereon, with certain special powers mentioned in the prayer. The petition is resisted by Mr Schulze, who was the only other partner of the now dissolved firm. The copartnery of Schulze, Gow & Company was dissolved by expiry of the agreed-on term so long ago as 31st July 1875, and both parties have been engaged since that date in winding up its affairs. Its whole stock-in-trade and corporeal moveables have been sold and realised; all the debts due by the concern have been paid and discharged, and the only assets still outstanding are certain debts which were due to the company at its dissolution, and which have not yet been recovered. It seems that the business was carried on in two branches—one branch at Dundee under the charge of the petitioner, and the other branch at Galashiels, under the charge of the respondent. The debts due to the Dundee branch still unrecovered are said to amount to £5047, 6s. 3d., and hitherto the petitioner has been doing what he can to recover these. The outstanding debts of the Galashiels branch are said to amount to £7890, 9s. 5d.; and hitherto the respondent, who had managed the Galashiels branch, has been attempting to recover these. The recovery of these two sets of debts is the only thing wanted for the complete realisation of the whole assets. The parties, however, are at issue as to an accounting *inter se*. In particular, the petitioner says that the respondent has failed to account for his intromissions, and to exhibit proper balances and states of affairs of the Galashiels branch. The petitioner also says that he has various claims against the respondent, including apparently claims of damages—that he has entirely lost confidence in the respondent—that he mistrusts his action in the further realisation of the debts—that he has asked in vain a full accounting; and he now seeks sequestration of the estates and the appointment of a judicial factor. The Lord Ordinary, after hearing parties, continued the case for eight days that the petitioner might examine, with what assistance he chose, the Galashiels books, which it appears he had never yet done. On 9th current, however, he intimated that he declined to look at the books or to say what should be done with any of the outstanding debts, or to give any assistance or advice either in recovering the debts of his own branch or those of the Galashiels branch, but that he simply insisted in the prayer of his petition."

Thereafter the Lord Ordinary refused the prayer of the petition.

In his note the Lord Ordinary, after the narrative given above, added:—"The Lord Ordinary after full consideration is of opinion that the petitioner is not entitled *hoc statu* to the sequestration of the debts and the appointment of a judicial factor.

"One of the main grounds—indeed the principal ground—on which the petitioner relied was, that the accounts between the two partners—that is, the count and reckoning *inter socios*—were in a state of confusion; that the books, and especially the Galashiels books, had not been properly kept; and that the respondent had failed to account for his intromissions; and he insisted that the first duty of the factor, if appointed, would be to call the respondent to account, to examine into the respondent's whole intromissions, both during the partnership and since its dissolution, and to ascertain and fix the balance now due by the respondent to the petitioner.

"The Lord Ordinary cannot concur in this view. He thinks that when a judicial factor is appointed to wind up a company estate, his primary duty is to realise outstanding assets, and not to settle past questions of accounting *inter socios*. No doubt his actings in realising may often facilitate accounting *inter socios*, and when there is no dispute he will also distribute among the partners; but where serious disputes arise between the partners as to their shares, or as to their past actings, especially as to claims of damages, a factor is no judge of such matters. He has no power to give any binding deliverance or to take proof of any kind as between partners; and his probable course would be, in the case of serious differences, simply to consign the net funds recovered. and allow the partners to compete for them *inter se* by a multiplepoinding or otherwise. Accordingly, if in any case there are no outstanding assets at all to recover—if, for example, in the present case there had been no outstanding debts, the Lord Ordinary, as at present advised, would never sequestrate and appoint a judicial factor merely because there are unsettled disputes between the partners.

"The only ground therefore upon which, in the Lord Ordinary's opinion, the present application can rest is, that a judicial factor is