absence is certainly involuntary. But I think if an Englishman is not permanently abroad, but is absent for temporary purposes in the service of his Majesty, he stands in the same situation as if he were compulsorily abroad, and therefore ought not to be compelled to find security for costs. If he had gone abroad for his own convenience merely, it would have been different."

The principle established by all these cases is, that to entitle a plaintiff to exemption from the ordinary rule, his domicile must be within the jurisdiction of the court in which he is bringing suit, and his absence from it must be occasioned (unless in the case of mere temporary absence, as for travelling) by his being engaged in the service of the Crown, it being assumed in the case of an Englishman that his domicile is in England, and his absence being looked upon as temporary.

The plaintiff here does not show that his domicile is within the jurisdiction of the court in which he is suing; and I cannot agree with his counsel that there is any presumption that it is so. His name, it is urged, is English. The presumption upon that would be that his domicile is in England; assuming that he is not a foreigner, which, I suppose, should be assumed, as he is in the service of the Crown. There can be no legal presumption that his domicile is in Upper Canada, any more than in Nova Scotia or New Brunswick. all that can be said is, that it is more probable that it is either in Upper or Lower Canada than in any other colony, or in England, from the nature of his appointment.

I desire to add, that I very much doubt whether such an appointment as the one in question, though in the name of the Crown, is of a nature that ought to exempt a plaintiff from giving security for costs. Suppose this plaintiff an Englishman, and suing in one of the courts in England, would his position be such that he could be regarded as having his domicile in England, but temporarily absent in the service of the Crown? An Englishman residing in India, in the civil service of the East India Company, has been held to be domiciled in India. This appears from the case of *Arnold* v. *Arnold* (2 M. & C. 256), and other cases referred to in the *Attorney-General* v. *Napier* (6 Ex. 217), where the question of domicile was a good deal discussed. In the latter case the language of Mr. Baron Parke is, "If a natural born subject, domiciled in England, enters into her Majesty's service, and goes abroad, at the Queen's command, into foreign service, it is quite clear that his original domicile has not been parted with by him. He goes for a temporary purpose, and is supposed to be there for a time only, but not for the purpose of fixing his permanent abode abroad." This language appears to me wholly inapplicable to a person holding such an office as the plaintiff holds, and suing in an English court, even more inapplicable than to the case of an Englishman who holds an appointment in the civil service of the East India Company; at least in this, that a permanent abode *would be much less probable in India than in Canada. There is,* of course, the difference, that the appointment of the plaintiff is under the Crown, but the force of that is only that it indicates temporary absence from England—a presumption that his original domicile there has not been parted with—a presumption that, I think, could scarcely be held good in the case of the plaintiff holding an appointment in Canada substantially under the Colonial Government. The case of an appointment in the civil service of the East India Company is, in fact, though not in name, upon much the same footing.

But the plaintiff is not (as in the case supposed) bringing suit in England, but in Upper Canada, where, as I have said, there is, I think, no presumption in favour of his domicile.

[After the matter was first argued, it was mentioned again, and and a further affidavit from the plaintiff produced.]

Spragge, V. C.—I do not think this affidavit is receivable, and did not mean to give leave to file it for use upon this application, a course which would be wholly irregular. I was asked not to give judgment until a further affidavit could be procured, and said I would abstain from giving judgment for the present, leaving it to the plaintiff to take his own course.

The question has, however, been further argued upon this new affidavit, subject to the objection to its reception. I do not think that it strengthens the plaintiff's case. He styles himself formerly a resident of Upper Canada. He says, "I resided in Upper Canada several years, say from the year 1833 until the removal of the seat of government to Lower Canada; that if I were not in the civil service of this province I would at this time, to the best of my belief, be residing permanently in Upper Canada." And he then mentions certain property which he owns in Upper Canada, but upon none of which does he appear to have resided.

I understand from this affidavit that Upper Canada was not the plaintiff's domicile of origin, but at most his acquired domicile; that he resided at Kingston from 1833 until the removal of the seat of government to Lower Canada. This first took place in 1843, I think. He does not inform us where he has been since, but, I take it, his affidavit means that he removed to Lower Canada with the government, in whose service he now is. If so, then for the last eighteen years or thereabouts his residence has been wherever the seat of government might from time to time be. He intimates no intention of making Upper Canada again his domicile, and all that we can say about Upper Canada is, that at a certain period it was his acquired domicile, and would, as he believes, have continued so if he were not in the civil service. But being as he is in the civil service, Upper Canada has ceased to be, so far as his affidavit shows, his acquired domicile.

In proceeding upon the facts stated in the affidavit, I do not mean to say that it is admissible—it is clearly not so upon this application, filed as it is after argument; but the case of *Lillie* v. *Lillie* (2 M. & K. 404) would lead me to doubt whether the plaintiff is not bound by the description of residence in his bill, and cannot amend it by affidavit, for in that case the description in the affidavit was clearly sufficient to exempt the plaintiff from giving security for costs, but he was compelled to give security, because the description in the bill was not sufficient to exempt him.

The additional case to which I have been referred, *Clark* v. *Fergusson* (5 Jur. N. S. 1155), does not seem to throw any light upon the point. The plaintiff described himself as of Longborough, near Galashiels, in Scotland, a lieutenant in her Majesty's ship *Gladiator*, now on service, and Sir John Stuart said, "The bill stated, though not perhaps with as much precision as might be wished, that the plaintiff was 'an officer in her Majesty's ship *Gladiator*, now on service,' and that averment was substantially sufficient to exempt him from giving security for costs." I cannot suppose that Sir John Stuart meant to say that an officer of a ship, not in service with his ship, was entitled to exemption—that would be at variance with the well settled rule. His reading of the allegation evidently was, that the plaintiff was on active service with his ship, and this is evident from his remarks as to want of precision in his allegation in the bill; in any other view it was precise enough. It is immaterial whether Sir John Stuart was right in his reading of the allegation—that was a mere matter of construction; but he certainly did not mean to controvert the rule, that the plaintiff must be absent on active service, or to question *the case of Lillie v. Lillie, which was cited to him.*

Upon the allegations in the bill, and upon the plaintiff's first affidavit, he proceeded upon the presumption that his domicile was in Upper Canada, a presumption for which I see no ground. The affidavit last filed does not proceed upon such presumption, but upon the fact of a former residence in Upper Canada, as a country of acquired domicile, and the continued ownership of property therein; but in either view there is an absence of that which forms in England the true ground of exemption, a temporary residence abroad from his domicile in the service of the Crown. The plaintiff does not establish, either by presumption or evidence of fact, that his domicile is now in Upper Canada.

I think it would be pushing the rule of exemption beyond its legitimate bounds to hold a person exempt from giving security for costs under the circumstances disclosed in this case, and would operate unfairly to defendants. I think the application should be refused with costs.

The plaintiff subsequently dismissed his bill and filed a new one, stating certain facts to exempt him from being called upon to give security, whereupon

Brough, for the defendants, moved upon notice for an order that the plaintiff should pay the costs of the former suit, and give security for costs in the second cause, before they could be called upon to answer the bill, referring to *Spires* v. *Sewell* (5 Sim. 193), *Budge* v. *Budge* (12 Beav. 385).