S. v. S.

HIGH COURT CIVIL CAUSE No. 9 OF 1941.

Divorce—connivance and condonation—domicil of origin—change of domicil.

The main point considered in this case was what is required to change domicil from a domicil of origin to a domicil of choice. It was held that not sufficient evidence of intention to change the domicil of origin had been adduced.

Law, C.J.: In this case the adultery alleged has been fully proved. The woman named, the petitioner's sister, was called as a witness for the petitioner and freely admitted the fact. Consequently, the respondent's counsel very properly no longer disputed that issue. He argued, however, that there had been connivance and condonation by the petitioner, and that the petition should therefore be dismissed.

With regard to the connivance: it was urged that the petitioner connived at the adulterous intercourse of the 20th December, 1939, in that she abstained from preventing it, which, it is said, she could have done. In support of this contention reference was invited to the case of *Gipps* v. *Gipps and Hume*, 11 English Reports, page 1230, where, on a husband's petition, it was held that the connivance meant not merely refusing to see the act of adultery, but also wilfully abstaining from taking any steps to prevent the adulterous intercourse, which, from what passed before his eyes, he could not but believe or reasonably suspect was likely to occur.

In the present case the petitioner says that, at about 10 o'clock on the night of the 20th December, 1939, she woke up to find that her sister had got out of the bed which they were sharing and was moving about the room. She took no notice until she heard the gauze door leading to the verandah from the adjoining room being opened. She then got out of bed, and was just in time to see her sister enter the bedroom which was occupied by the respondent and the door thereof close. She explains that this circumstance gave her such a shock that she did nothing, but remained where she was for some five minutes or so. In effect, she was rooted to the spot. She then returned to her bed where she lay awake pondering what she should do, and when her sister came back to bed about fifteen minutes later she pretended to be asleep. In cross-examination she says she could not think why her sister went to the respondent's room until the door closed, and then there was only one thing she could think. She agrees now that she might have called out to her sister, but explained that, by reason of the shock, she did not know what to do at the time.

It is extremely difficult to imagine a wife in such circumstances, not doing something drastic, such as breaking into her husband's room. The petitioner's evidence, however, is unshaken, and, from her demeanour

in the box, I feel that there is a ring of truth in her story that the shock caused her to act differently from how one might have expected her to act had she been in a normal frame of mind. There is nothing in the evidence in my opinion, which could have given her grounds for suspecting any previous undue familiarity between her sister and the respondent. In the absence of such suspicion it is perhaps not astonishing that she should have been so shocked by her experiences that she took no action. For these reasons I am not prepared to find that the petitioner was guilty of conniving at that act of adultery.

As regards condonation: there has been none. The petitioner says that after the occurrence referred to above she definitely refused to resume marital relationship with her husband, although they shared the same bed after her sister had left their house. This is difficult to understand, but the evidence was given by her on oath, and the respondent has not ventured to give evidence to the contrary. I accept what the petitioner says in this respect; also that she kept the respondent at arm's length until she left his house finally towards the end of January, 1940. But even had she submitted to a resumption of marital relationship there could have been no condonation by her, in the legal sense, if it were not coupled with complete forgiveness and full restoration of those conditions which had previously existed between them. In this connection I am referred to the case of *Cramp* v. *Cramp and Freeman*, 1920, Probate Division, page 158. At page 167, reference is made to the judgment in another case where it is said " with reference to a wife to whom the knowledge of her husband's adultery has been brought home, and who has still continued to share his bed, the rule has not been so strict. The wife is hardly her own mistress; she may not have the opportunity of going away; she may have no place to go to; no person to receive her; no funds to support her; therefore her submission to the embraces of her husband is not considered by any means such strong proof of condonation as the act of a husband in renewing his intercourse with his wife." I feel that these words could largely be applied to the circumstances of this case, assuming there had been a full resumption of marital relationship between the parties which is not so. The petitioner left the respondent about a month after the incident of the 20th December, 1939, as soon as she was able to provide herself with the means to take her out of the Territory. It is true that the petitioner's sister admits having visited the respondent's room again three nights later, but the sister says that no misconduct occurred on that second occasion. In any event, that incident is not relied on for the purpose of the petition. Nor, in my opinion, can it be said that the petitioner connived at or condoned that visit. I regard the evidence as clear on that point. For the foregoing reasons I hold that there has been no condonation on the part of the petitioner.

With regard to the question of jurisdiction. The petitioner's domicil depends on that of her husband the respondent. Both he and she agree in their pleadings that his domicil is Northern Rhodesia. In her evidence the petitioner says that the respondent was born in Scotland of Scottish parents; that he left Scotland in 1929 and came to Senkobo Siding in 1931. They were married in 1932, and went to Scotland on a four months' holiday in 1933. The petitioner says respondent had stated that he did

not desire to stay in Scotland and that he was quite satisfied with Northern Rhodesia. She speaks of an opportunity which he had of going on transfer to Southern Rhodesia and which he refused because he preferred to remain where he was.

The question for consideration is whether that evidence is sufficient to establish a change of domicil because it is not disputed that the respondent's domicil of origin is Scotland. It must be borne in mind that there is a presumption of law in favour of domicil of origin and against a change of domicil which must be proved by strong evidence, and that quality of residence must be taken into account. (*Bowie or Ramsay* v. *Liverpool Infirmary and Others*, 1930, Appeal Cases, p. 588.) Intention to change domicil is not sufficient. The intent must be followed by a definite act. Nor is residence by itself sufficient. Residence must be freely chosen and not prescribed or dictated by any external necessity, such as the duties of office, the demand of creditors or relief from illness; it must be residence fixed not for a limited period or particular purpose, but general and indefinite in its future contemplation. 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 (*Wilson* v. *Wilson*, Law Reports, Probate and Divorce Cases, Vol. 2, 1869–72, p. 435, at p. 443).

In the present case the respondent came to Northern Rhodesia for employment. He was recruited in Scotland for service with the Rhodesia Railways. There is no real evidence by or on behalf of the petitioner that he intended to remain indefinitely in Northern Rhodesia and to make it his home for the future. She says she once heard him remark to his parents that he could never settle in Scotland, but for what reasons she cannot say. Her evidence on the point is very meagre and inconclusive. The respondent's visit to Scotland in 1933 suggests a tie at that time with his domicil of origin, though subsequent holidays at Beira and Durban suggest that he had no further desire to return to Scotland. In the absence of definite evidence of the respondent's change of domicil from Scotland to Northern Rhodesia, the Court would not have jurisdiction to entertain the petition. It is true that the respondent admitted, in his answer to the petition, that he is domiciled in Northern Rhodesia, but jurisdiction in matters of divorce is not affected by consent (*Hyman* v. *Hyman*, 1929, Probate Division, p. 1 at p. 31). Because of that admission, however, though not supported in his affidavit which related to his answer, I felt it desirable that the respondent should give evidence in Court. The advocates for the parties both acquiesced in his being called as a witness by the Court. Without that consent the Court could not have examined him as a witness. (*In re Enoch* v. *Zaretzky Boch and Co.* Arbitration, 1910, 1 K.B., p. 327.) He was duly called. It is obvious from his evidence that he came to Northern Rhodesia solely for the purposes of his work as a ganger employed by the Rhodesia Railways. He denies that he has abandoned his domicil of origin, and says that his return to Scotland will depend on the state of his health when he retires on pension. He says he has no intention of remaining permanently in Northern Rhodesia, nor has he any stake in the country. He explains that it was a mistake in his answer to say that he is domiciled in Northern

Rhodesia, and that he did not then understand the meaning of domicil. Be this as it may, the facts in the case certainly do not establish a Northern Rhodesia domicil. The substance of the respondent's evidence in this connection is that he is satisfied with his work at Senkobo Siding till a better offer presents itself.

It is settled law that a change of domicil must be made *animo et facto*, the *animus* may be inferred by the *factum* of residence within the new domicil, but in order to warrant that inference the quality of the residence must be taken into account; mere length of residence is not of itself sufficient (*Bowie or Ramsay* v. *The Liverpool Royal Infirmary and Others*). Again, domicil of choice is a conclusion or inference which the law derives 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 (*Wilson* v. *Wilson, supra* at page 443).

The law is strict in these matters, and it may be said that its application in this case will operate harshly on the petitioner. But hard cases make bad law. In my opinion there is no proper evidence that the respondent is domiciled in Northern Rhodesia. On the contrary, the evidence points to his never having abandoned his domicil of origin. In the circumstances, therefore, this Court has no jurisdiction to entertain the petition, which is dismissed. The respondent will pay petitioner's costs, including the costs of the application for alimony *pendenti lite*, and the court fees which were made a first charge of any costs recovered from the respondent under the Order dated the 2nd September, 1940.