JOHN MICHAEL GUNNING

Plaintiff

and

ELVIRA ALICE GUNNING

Defendant

and

DARCY SMITH

Co-Defendant

JUDGMENT OF THE CHIEF JUDGE (MR. JUSTICE F.B. PHILLIPS)
DELIVERED ON 31ST OCTOBER, 1953

In this Action, which is undefended, the Plaintiff John Michael Gunning seeks the dissolution of his marriage with the Defendant Elvira Alice Gunning on the grounds of her desertion and of her adultery with the Co-Defendant Darcy Smith.

The Plaintiff and the Defendant were married at St. John's Presbyterian Church, Muswellbrook, New South Wales, on 22nd June, 1940, at which time he was a member of the 2nd Australian Imperial Force. They lived together until he left Sydney to proceed overseas on active service on 1st August, 1940. After his return to Australia on 8th August, 1945, they again lived together, he says, but not for long: she left him on the 20th of that month and has never since returned to him. He further alleges that since that date she has been living in adultery, "as man and wife," with the Co-Defendant.

The explanation given for the interval of approximately eight years between the date she left him and the date of the present petition (which is 29th June, 1953) is as follows:- The Plaintiff states that when his wife left him on 20th August, 1945, she did not tell him to what address she was going, and, despite his efforts and inquiries, he had not succeeded in

tracing her before he came to Lae in the Territory of New Guinea towards the end of 1949: in 1950, however, his sister wrote to him giving him his wife's address. At that time, he says, no barrister or solicitor was practising in Lae; but, when Mr. James did commence to practise there, the Plaintiff saw him and instructed him to take proceedings for a divorce; such proceedings were actually instituted in 1951, though the action did not come to trial until December, 1952, (when it was adjourned to enable further evidence to be got). At length, on 5th March, 1953, a decree nisi for divorce on the ground of his wife's desertion was granted by Mr. Justice Bignold. After the decree nisi was granted, however, and before it was made absolute, Mr. Kirke, (who was acting for the present Plaintiff by that time and who is appearing for him in the present proceedings), noticed that Mr. Gunning, at the time of the filing of his petition in the earlier proceedings, had not been "domiciled or resident (in the Territory of New Guinea) for two years at least;" in other words, he noticed that the requirements of Section 14 of the Divorce and Matrimonial Causes Ordinance 1934-1951 of the Territory of New Guinea had not been fulfilled. He rightly, and in accordance with the strictest ethics of the profession, brought this to light, with the result that the Crown Law Officer intervened and had the order nisi rescinded. A new start was made, hence the present action, and the present petition alleging desertion and adultery on the part of the Plaintiff's wife.

The present action for divorce is one instituted under the Divorce and Matrimonial Causes Ordinance 1934-1951 of the Territory of New Guinea and the jurisdiction of this Court under that Ordinance in such a matter is founded on domicil, as Section 14 of that Ordinance clearly shows:- "Any married person who is domiciled in the Territory and at the time of the filing of the petition has been domiciled or resident there for two years at least, may present a petition to the Court praying for a divorce

from the other party to the marriage on any of the following grounds existing or occurring after the marriage:-": the grounds then set out include adultery and desertion for three years.

It is contended for the Plaintiff that he came to the Territory of New Guinea in late 1949 and acquired a New Guinea domicil, that is to say, a "domicil of choice" in New Guinea.

What his domicil was before 1949 was not clearly adverted to, much less established, by his Counsel at this trial; in the end, I asked the Plaintiff some questions bearing on this myself. The Marriage Certificate showed him as having been born at Cambewarra, New South Wales, and as having been 22 years old at the time of his marriage in June, 1940. The Plaintiff corroborated this. He said he <u>thought</u> that his father had been born in Queensland and he <u>thought</u> that his father was living in New South Wales when he, Plaintiff, was born. He said his father died in New South Wales in 1950, when he (the Plaintiff) was thirty-two. Yet the Marriage Certificate records both the Plaintiff's father and the wife's father as "deceased" at the date of the marriage in 1940. Obviously there is a mistake somewhere. Asked whether his father was living in New South Wales from the time Plaintiff was born until his father died, the Plaintiff replied:- "So far as I know, yes." On that scanty and unsatisfactory material, it is not possible to say, with certainty, what the father's domicil was at the time Plaintiff was born: it may, possibly, have been Queensland, or, perhaps more probably, New South Wales. Whatever his father's domicil was, at the time Plaintiff was born, that would also be the Plaintiff's "domicil of origin;" and any change in the father's domicil while the Plaintiff was an infant would automatically change the Plaintiff's domicil also. Once the Plaintiff became <u>sui juris</u> he was, of course, free to acquire a domicil of choice, if he wished to do so: but, until he did so, his domicil of origin clung. As I have already mentioned, he left New South Wales on overseas war service in 1940, when he was twenty-two,

and returned in 1945, remaining in New South Wales until he came to the Territory of New Guinea in 1949. There has been no suggestion that he abandoned his domicil of origin, whatever it was, and acquired a domicil of choice before coming to New Guinea. The suggestion is, that he acquired a domicil of choice on or after coming to New Guinea, and before the present petition had been filed.

A man may abandon his domicil of origin and acquire a domicil of choice, or he may abandon one domicil of choice in favour of another domicil of choice. Cheshire, in his "Private International Law," (3rd edition), at pages 218-219, succinctly states the effect of the authorities in this way:- "There is a "presumption in favour of the continuance of an existing domicil. "Therefore the burden of proving a change lies in all cases on "those who allege that the change has occurred. This presumption "may have a decisive effect, for if the evidence is so conflicting "that it is impossible to elicit with certainty what the "resident's intention is, the Court, being unable to reach a "satisfactory conclusion one way or the other, will decide in "favour of the existing domicil. As compared with domicil of "choice it has been said of the domicil of origin that 'its "character is more enduring, its hold stronger, and less easily "shaken off.' (Winans v. A-G., 1904, A.C. 287 (H.L.)). It follows "from this that stronger evidence should be required to establish "a change from a domicil of origin than a change from one domicil "of choice to another and such, indeed, is clearly the view of "English judged."

How is a domicil of choice acquired? In The Attorney-General v. Rowe, (1862) 1. H. & C., 31, a case concerning the domicil of a Chief Justice of Ceylon, Pollock C.B. cited with approval the following observations made by Lord Wensleydale in the earlier case of Aikman v. Aikman (3 Macqueen, 854, 857):- "The rule of law is perfectly settled. Every man's domicil of "origin must be presumed to continue until he has acquired another

"sole domicil by actual residence, with the intention of "abandoning his domicil of origin. The change must be animo et "facto, and the burthen of proof unquestionably lies on the party "who asserts that change." (See also Lord Chelmsford, L.C., in Whicker v. Hume, (1858) 7 H.L.C., 124 and 147; 11, E.R., 50, at 59.) In other words, to acquire a domicil of choice two elements must be clearly proved, residence in the country of the proposed domicil, and intention to abandon an existing domicil and acquire a new domicil in the country of the proposed domicil.

As to residence;- residence being a physical fact, is not difficult to prove. Residence in a country may be prima facie evidence of an intention to remain in that country, and, the longer the residence, the stronger that prima facie effect may become. But that prima facie effect may be rebutted by the circumstances of the particular case, even though the residence has continued for many years: e.g. in Winans v. A.-G., already cited, it was held that an absence of nearly fifty years from America,- thirty-seven of them in England,- had not, in the circumstances of that case, displaced Mr. Winans' American domicil of origin. The mere fact, that a person who has, say, a New South Wales domicil, comes to New Guinea to work for the Administration or a company and remains in New Guinea for many years or until retiring age, does not, of itself, confer on him a New Guinea domicil or automatically end his New South Wales domicil. On the other hand, once an intention to acquire a domicil of choice is firmly and definitely formed, the period of residence necessary, coupled with that intention, to produce a change of domicil may be brief; as, for example, where a man winds up his affairs in the country of his origin and migrates with his family to another country with the intention of settling there permanently: (see Brabender v. Brabender, 1949 V.L.R., 69: 23 A.L.J., 481).

As to the intention that has to be proved, in addition to residence, to establish the acquisition of a domicil of choice,-

the rule is strict and is not new, as the cases show. In Moorhouse v. Lord, (1863) 10 H.L.C., 272; 11 E.R., 1030) the House of Lords considered questions similar to those that arise in these proceedings before me. In that case, Vice-Chancellor Kindersley had proposed a definition of "acquired domicile" that, on appeal to the House of Lords, prompted the following remarks by Lord Chelmsford:- "The difficulty of getting a satisfactory definition "of domicile which will meet every case has often been admitted, "and every attempt to frame one has hitherto failed. With every "respect for the Vice-Chancellor's precision and accuracy of "judgment, I cannot adopt the one which he proposes. The definition "of an acquired domicile which he suggests is, 'The place in which "a person has voluntarily fixed the habitation of himself and his "family, not for a mere special and temporary purpose, but with a "present intention of making it his permanent home, unless and "until something which is unexpected or the happening of which is "uncertain, shall occur to induce him to adopt some other "permanent home.' My Lords, I pointed out, in the course of "argument, that this definition would reach the case of a person "in delicate health going to a milder climate, with a determination "to remain there until his health was completely restored, and that "Lord Campbell, in Johnstone v. Beattie (10 Clark & F. 139), had "put that very case as one in which an existing domicile could not "be lost and a new one acquired. The learned counsel for the "Appellants contended for a definition of domicile far less "precise and exact than any which has ever been suggested. They "argued that a domicile was acquired whenever a person went to "reside in a place for an indefinite time. Now, this definition "and that of the Vice Chancellor appear to me to be liable to "exception, in omitting one important element, namely, a fixed "intention of abandoning one domicile and permanently adopting "another. The present intention of making a place a person's "permanent home can only exist where he has no other idea than to "continue there, without looking forward to any event, certain or

uncertain, which might induce him to change his residence ... ..." In Bell v. Kennedy, (1868) 1 Sc. & Div. 307) the Lord Chancellor (Lord Cairs) said, (at p. 311), that the question was, whether the Appellant, whose domicil of origin was Jamaica, at the relevant time "had determined to make, and had made Scotland his "home, with the intention of establishing himself and his family "there, and ending his days in that country:" and Lord Westbury, (at p. 321), told their Lordships that unless it had been shown, "with perfect clearness and satisfaction to" themselves, that the Appellant "had a fixed and settled purpose to make Scotland his "future place of residence, to set up his tabernacle there, to make "it his future home," his Jamaican domicil of origin continued.

That passage was approved in Lord Macnaghten's speech in Winans v. Attorney-General, (1904 A.C. 287, at 291 and 292): and Lord Lindley, in that case (at p.299) put the matter very clearly in these words:- "I take it to be clearly settled that no person who is sui juris "can change his domicil without a physical change of place, "coupled with an intention to adopt the place to which he goes "as his home or fixed abode or permanent residence, whichever "expression is preferred. If a change of residence is proved, "the intention necessary to establish a change of domicil is an "intention to adopt the second residence as home, or, in other "words, an intention to remain without any intention of further "change except possibly for some temporary purpose." See, also, Ramsay v. Liverpool Royal Infirmary, 1930, A.C. p. 588 (H.L. (Sc.)) where, incidentally, Lord Thankerton, (at p. 596), observed that the "law on this subject is well fixed; the difficulty is found in "its application to oft varying combinations of circumstances;" and Lord Macmillan observed, (at p. 598), that the "residence must answer a qualitative as well as a quantitative test."

But, although these cases show that the "present intention," or the intention at the relevant time, must be a fixed and settled purpose and determination to make a place a permanent home, or a

home "for ever" (as Cheshire says), or a place for ending one's days in (as Lord Cairns said), this does not mean that that intention or purpose or determination is irrevocable. If that were so, one domicil of choice could never be changed for another,- and this is certainly not the law. This aspect was brought out in the case of Gulbenkian v. Gulbenkian, (1937) 4 All E.R., 618, in which Langton, J. said that "the intention must be a present "intention to reside permanently, but it does not mean that such "intention must necessarily be irrevocable. It must be an inten- "tion unlimited in period, but not irrevocable in character". Mr. Kirke, for the Plaintiff, cited passages from that judgment that might seem to support an argument that an intention to acquire a domicil of choice might be proved by proof of "indefinite" residence. Dicey's definition of domicil of choice had been cited, i.e., his Rule 7, that "every independent person can acquire a 'domicil of choice, by the combination of residence (factum) and "intention of permanent or indefinite residence (animus manendi), "but not otherwise." But Dicey's Rule had been attacked by Sir Patrick Hastings. As to this, Langton, J. said:- "As to Sir "Patrick's quarrel with Mr. Dicey upon the use of the word "'indefinite' in rule 7, there is, to my mind, the high authority "of Sir George Jessel, M.R., in King v. Foxwell, (1876) 3 Ch.D., "518, to warrant the wording of the rule. Sir George Jessel, M.R. "there said, at p.520: 'What is domicil? I have had before me a "great number of authorities, and the conclusion I draw is this, "that in order that a man may change his domicil of origin, he "must choose a new domicil - the word 'choose' indicates that the "act is voluntary on his part - he must choose a new domicil by "fixing his sole or principal residence in a new country... with "the intention of residing there for a period not limited to time.'" Langton, J. then said:- "The last words are, to my mind, the "warrant for Mr. Dicey's phrase, and give a certain shading to the "expression 'permanent', without rendering that word inapplicable "in the circumstances." This seems to me to show that Langton, J.

regarded the expressions "indefinite" and "not limited as to time" as synonymous; and I think we can see what meaning those words conveyed to him, because he said they gave "a certain shading to "the expression 'permanent', without rendering that word "inapplicable in the circumstances;" and because he then immediately went on to say:- "In other words, the intention must be a "present intention to reside permanently, but it does not mean that "such intention must necessarily be irrevocable."

With the greatest respect, I regard the expressions "indefinite period" and "a period not limited as to time" as somewhat equivocal and susceptible of more than one meaning. For instance, a person might say:- "I have come to New Guinea to stay indefinitely," or to stay for "an indefinite period," or to stay for a period "not limited as to time," without in any way meaning that he had an intention to stay permanently and for ever. I have already quoted Lord Chelmsford's rejection, in Moorhouse v. Lord, of the argument that was advanced in that case, namely, that whenever there was residence in a place "for an indefinite time", this would suffice to prove an intention to acquire a domicil of choice. Cheshire, (op. cit., p.217), comments that "it is not strictly accurate to say that an intention to reside in a country for an indefinite period is sufficient, though this is a familiar formula with judges..." For these reasons, it seems to me that the use of phrases such as "residence for an indefinite period" should be avoided, unless followed by an explanation of what, exactly, they mean.

The next question is:- "How is an intention to acquire a domicil of choice proved,- by what evidence?" Cheshire, (op. cit., p.229-231) says that "all the facts, incidents, and events "of a man's life are both relevant and admissable indications of "his state of mind... nothing is neglected which can possibly show "the direction of a man's mind. His aspirations, prejudices, "amours, health, religion, finances - all are taken into account. "As Lord Atkinson observed with reference to the case of Winans v. A-G.

" 'the tastes, habits, conduct, actions, ambitions, health, hopes "and projects of Mr. Winans deceased, were all considered as "keys to his intention to make a home in England.'" As to "declarations of intention, especially verbal declarations of "intention,"- Cheshire considers that the authorities show that such declarations are (as he puts it) "the least reliable form evidence:" but the wide sweep of that generalisation is contracted somewhat, I think, by the authorities he then proceeds to cite, e.g., Hodgson v. De Beauchesne, (1858), 12 Moo.P.C., 285, 325:- "To entitle such declarations to any weight, the Court must be "satisfied not only of the veracity of the witnesses who depose "to such declarations, but of the accuracy of their memory, and "that the declarations contain a real expression of the intention "of the deceased;" and Lord Buckmaster in Ross v. Ross, 1930, A.C.1, at p.6;- "Declarations as to intention are rightly regarded in "determining the question of a change of domicil, but they must be "examined by considering the person to whom, the purposes for "which, and the circumstances in which they are made, and they "must further be fortified and carried into effect by conduct and "actions consistent with the declared expressions." It is, perhaps, unnecessary to add that, as the circumstances vary with each particular case, it follows that the evidence that has to be adduced to prove an intention to acquire a domicil must vary with each particular case.

Thus, the legal principles governing the acquisition of a domicil of choice are well settled, but, of course, difficulties may arise in coming to a decision on the facts of a particular case. However, such difficulties, (as Lord Macnaghten, quoting Lord Cottenham, said in Winans' Case) are "much diminished by keeping steadily in view the principle which ought to guide the decision as to the application of the facts".

What I now have to consider is this:- Has the Plaintiff discharged the onus, the burden that rests upon him, of proving

clearly and to the satisfaction of the Court that he had, at the relevant time (that is, at the time of the filing of his present petition), deliberately abandoned his former domicil (presumably his domicil of origin) and deliberately acquired a domicil of choice in the Territory of New Guinea by residence in that Territory, coupled with a "present intention" (that is to say, an intention or "fixed and settled purpose" at the relevant time), on his part, to adopt that Territory as his permanent home, without any intention of further change,- (except, possibly, for some temporary purpose such as a visit to Australia on leave or on business)?

The material available to me for arriving at a decision on that question can hardly be described as abundant: it consists entirely of statements made by the Plaintiff, the only witness at this trial.

He has told the Court that he is a "stores officer" employed by Qantas Airways at Lae and he apparently considers that he is at his zenith with that company. It is common knowledge here that Qantas Airways, regular carriers of passengers and mails to and from Australia and throughout the Territory of Papua and New Guinea, has personnel, offices and establishments at many places in Australia, Papua and New Guinea.

As to residence in the Territory of New Guinea, the Plaintiff said, in evidence:- "I came to New Guinea in 1949 - in September - for about 24 hours, but returned in October, 1949 and have been in New Guinea ever since,- except for one leave of about two months, and several short visits - a week at most - to Australia on the company's business."

His Counsel then put the following question to him concerning his intention:- "Is it your intention to make your permanent home in the Territory?" I am afraid that that question was out before I could stop it, - a thing that is liable to happen when a Judge is also his own Court reporter and is busy taking

notes. The question, in my opinion, was a leading one and, what is more, bore directly on the fundamental question of the Plaintiff's domicil, the very foundation of the Court's jurisdiction in divorce under the Divorce and Matrimonial Causes Ordinance of New Guinea. Except in well-recognised instances relating to routine and non-controversial matters, leading questions are objectionable, and this is so even in undefended divorce proceedings,- as Lord Merrivale, P., pointed out in Harland v. Harland (King's Proctor showing cause), reported in a practice note in (1951) 1 T.L.R., 699. The question put to the Plaintiff,- "Is it your intention to make your permanent home in the Territory?",- was in a form that might not unreasonably be thought to contain an element of persuasion sufficient to suggest an affirmative answer. But the Plaintiff's reply, given at once and without any hesitation, was:- "I intend to remain in the Territory for quite a long time yet." I suspect that it is possible that that reply was not quite what Mr. Kirke may have expected from the Plaintiff; but it struck me as being a spontaneous and truthful answer.

Continuing his evidence, the Plaintiff said:-

"To Mr. Kirke: Q: If you get this divorce, do you intend to marry again?

A: If I get this divorce, I intend to marry again.

To the Court: Q: To a lady here?

A: To a Sister working in the Hospital at Lae, where she has been working for three years.

To Mr. Kirke: If we were to marry we would set up a home in New Guinea.

To the Court: Q: If your Company were to offer you a better post in Australia, after that, what would you do?

A: That will have to be decided at the time. The Company could not offer me a better job than I have,- with my qualifications. If I were to

marry again, I would live in a-Company house, not my own. I have no property in New Guinea

Q: Where would you retire?

A: Probably up here.

Q: What would you do if you retired here?

A: I would have to try and find something to do and I would have to get a house; I should be able to do that within the next 30 years.

To Mr. Kirke: Q: If you were to leave your present employment with Qantas, would you return to Australia or remain here?

A: I would remain here.

To the Court: Q: If the lady you think you might marry if this divorce were granted were to go to Australia and not wish to leave it, would you still stay here and let her go?

A: I don't suppose I would."

Later on during the hearing, after there had been a mid-morning adjournment, and in his last question in examination-in-chief to the Plaintiff, Mr. Kirke revived the subject of intention by asking the Plaintiff:- "When you leave your present employment with Qantas, do you intend to return to New South Wales to take up a final and permanent residence?" (That question, of course, should have been in some such form as:- "When you leave your present employment with Qantas, what do you intend to do?"). The Plaintiff replied:- "It is my intention, whether employed by Qantas or any other organization, to remain in the Territory of New Guinea." In that answer the Plaintiff did not expressly say how long he intended, in those circumstances, to remain in that Territory; nor did he say what his intention was if he was not employed either by Qantas or by any other organization.

A number of the Plaintiff's answers referred to his state of mind as at the present time, whereas what has to be first determined is his intention about his domicil at the time of the

filing of the present petition in June last: but, if his answers "in the present tense" show light on his intention at the time these proceedings were instituted, they may be legitimately taken into account.

The statements of intention made by the Plaintiff in evidence have, of course, to be carefully scrutinized, just as all oral evidence should be; and perhaps scrutinised with special care in this instance, because the Plaintiff is seeking a divorce and seeking it quickly. As already mentioned, he has told the Court that, if he succeeds in getting a divorce, he wishes to marry a lady now living and employed by the Administration at Lae. (I do not think he mentioned how long ago it was that he became attached to her or made up his mind to marry her, if free). He told Mr. Kirke that if he were to get a divorce and re-marry, Qantas would be able to let him have newly-built married accommodation on the 16th of November next - a little over a fortnight hence - and that he did not imagine that that accommodation would be kept available for more than a month after that: if he missed getting that accommodation, he thought it would be "approximately two years, in all probability" before similar accommodation would be available. Mr. Kirke told the Court that it was intended, in the event of a decree nisi being granted, to apply to the Court for an order (under Section 26 of the Ordinance) to abridge the usual six months' interval between decree nisi and decree absolute, in order that the Plaintiff and his proposed bride should not miss the opportunity of setting up house in the married accommodation that the Plaintiff thinks that his Company will be able to provide in two or three weeks' time but that may not be available for more than a month after that.

The question, then, is:- Has the Plaintiff discharged the onus that rests upon him to prove that he had acquired a domicil of choice in the Territory of New Guinea at the time of the filing of his present petition? The Court has had the

advantage of hearing and seeing the Plaintiff give evidence, and, although at times he appeared a little forgetful, on the whole he seemed to me to be truthful at this trial. This is borne out by some answers of his that hardly supported his case or supported the proposition that he had already formed the "fixed and settled purpose," at the time these proceedings were instituted, of making New Guinea his "permanent home, without any intention of further change, except possibly for some temporary purpose." Such an answer was his reply to Mr. Kirke's leading question that I have already referred to: although that question virtually put the words "permanent home" into the Plaintiff's mouth, he nevertheless replied:- "I intend to remain in the Territory for quite a long time yet." That was a clear reply and I consider that, when the Plaintiff gave it, he spoke the truth and meant just what he said. The plain English of that reply would have to be distorted to make it convey that the Plaintiff had a fixed and settled intention to settle in New Guinea permanently and without any intention of further change. I am also of the opinion that the rest of the Plaintiff's evidence relating to his intention, which evidence I have already recapitulated here, does not, when examined, really carry matters any further than that first reply, or offset it or its effect. No doubt the Plaintiff intends to remain in New Guinea "for quite a long time yet." He is only thirty-five. Although he says he has no property here, he apparently has a satisfactory job with a big Company. Further, the woman he wishes to marry, when free to do so, happens to be in New Guinea. But a present intention to remain in New Guinea "for quite a long time yet" differs from a present intention to remain in New Guinea permanently. In my view, the Plaintiff has failed to prove clearly or satisfy the Court that he, at the time this action was instituted, had the fixed and settled intention which, with residence, was necessary to establish that he had acquired a New Guinea domicil. From that,

it follows that I hold the view that, in the circumstances of this case, this Court has no jurisdiction, under the New Guinea Divorce and Matrimonial Causes Ordinance, to grant him the divorce he has prayed for. It is most unfortunate for the Plaintiff that I have had to come to this decision and that, for the second time, his efforts to obtain the matrimonial relief he would seem to merit have failed: but, on the material available to me, I have no doubt that I could not honestly have arrived at any other decision.

Such experience as I have had in the New Guinea Divorce jurisdiction has given me the impression that occasions must from time to time arise on which a married person, resident in New Guinea and desirous of obtaining a divorce, and his or her legal advisers, find themselves confronted with difficulties in proving, in a proper way, that the would-be petitioner is domiciled in New Guinea. Occasions can even be imagined on which, for various reasons that I need not now elaborate, a would-be petitioner may be tempted to swear,- shall I say, "light-heartedly" or "without thinking," - that he or she possesses a New Guinea domicil when, in fact, this is at least doubtful. If such situations have ever arisen, one wonders whether consideration was given to the question, whether it was possible to avoid those difficulties by having recourse to the procedure prescribed in Part III of the Commonwealth Matrimonial Causes Act 1945, which would seem designed to meet problems of that kind. But I cannot, at the moment, recollect any case in which the aid of that Commonwealth Act has been invoked in New Guinea, though it applies to "the Territories of the Commonwealth." An interesting attempt was made in Victoria not long ago, in the case of Staples v. Staples, 1952, A.L.R., 62, to have a petition for divorce, filed under the Victorian Marriage Act 1928, amended "in order to allege in the alternative a South Australian domicil and claim alternative relief under the Commonwealth Matrimonial Causes Act 1945. It failed for reasons given by Barry, J., as follows:- The investiture

of this (Victorian) Court with Federal jurisdiction is explicitly stated by Sub-Section 2 of Section 10" (of the Commonwealth Matrimonial Causes Act 1945) "to be to hear and determine matrimonial causes instituted under Sub-Section 1 of Section 10. The proceedings which I am asked to amend are instituted under, and depend entirely upon, jurisdiction arising under the law of Victoria, and, as the petitioner has not instituted proceedings under Sub-Section 1 of Section 10 of the Commonwealth Act, there is no proceeding before this Court which has attracted Federal jurisdiction. Thus I have no power, in the exercise of State jurisdiction, to amend this petition so as to allege a ground of relief dependent upon Federal jurisdiction, and as the proceedings stand, I have no Federal jurisdiction to exercise." Obviously, and for the same reasons, an application to amend the present petition in a similar way (had such an application been thought of and made) would have been doomed to fail, the present proceedings having been instituted under a New Guinea Ordinance and not under the Commonwealth Matrimonial Causes Act 1945.

For the reasons I have given, the Plaintiff's present action must fail.

(Sgd) F.B. Phillips

C.J.