

IN THE SUPREME COURT)
 OF THE TERRITORY OF)
 PAPUA NEW GUINEA)

CORAM : O'LOGHLEN, A.J.
 Thursday,
 26th February, 1970.

MICHAEL TRISTAM COTTAM

v.

Petitioner

JENNIFER ANN MARGARET COTTAM

Respondent

REASONS FOR DECISION

1969

Dec 23

1970

Feb 26

RABAUL.

O'Loghlen
 A.J.

At the conclusion of the hearing, this Petition was dismissed in the following terms:-

"Under the Matrimonial Causes Ordinance 1963, the primary obligation of the Petitioner is to prove domicile in the Territory and the onus of proof of that is on him. I am not satisfied that he has discharged that onus and I will put my reasons for saying that in writing and hand them down. However, my decision is that the Petitioner has not satisfied me that he is domiciled in the Territory and in that case I have no jurisdiction to entertain the Petition. The Petitioner must await future events or apply for relief to the Court of his domicile. The Petition is dismissed."

I regret that pressure of business has caused delay in giving my reasons.

The Petitioner was 27 years old and was born in the County of Essex. His domicile of origin was English. He therefore does not obtain the benefit conferred by Section 18(6) of the Matrimonial Causes Ordinance which deems a person who is domiciled in Australia to have a Territory domicile for the purposes of the Ordinance. He had to establish that he had abandoned his English domicile and acquired a domicile of choice in the Territory of Papua and New Guinea.

Counsel for the Petitioner, Mr. Smythe, summarized the evidence in his favour in the following terms:-

"It is submitted that Mr. Cottam has clearly acquired a domicile of choice in the Territory in the light of all these authorities. The evidence which demonstrates his intention to reside in the Territory indefinitely may be summarized as follows:-

1. His moves to establish a permanent business in the Territory which will obviously involve him in the Territory
2. His special interest in and expertise concerning the coffee industry in the Territory. The Petitioner, over the last five years, has acquired extensive knowledge of the coffee-growing industry in the Highlands of the Territory of Papua and New Guinea. He has built up a valuable contacts amongst the growers evidenced by the letters tendered earlier from growers interested in Mr. Cottam's

business venture. This is a field in which he is a specialist where obviously there would be very few specialists and he has the opportunity of making his future in the industry in the Territory. He has availed himself of his opportunity.

3. His abandonment of his original vocation as a draughtsman. The Petitioner gave evidence that he would be seriously disadvantaged if he had to return to his former occupation as a draughtsman as he has not practiced as such for the last five years and would therefore be sacrificing his present occupation. Obviously his future is in tropical agriculture.
4. His financial commitment to the Territory. For example, his proposed interests in Plantation Supply and Services Company Pty Limited and the impending purchase of a trade store lease.
5. The absence of a home or investments abroad.
6. His statement in evidence that he intends to remain in the Territory indefinitely.

In view of the evidence given and of the favourable decisions of Mann C.J. in Bowyer v. Bowyer and Rowles v. Rowles and Minogue J. in Douglas v. Douglas and of the High Court of Australia in Hague v. Hague it is submitted that the Petitioner has abandoned his English domicile and acquired a domicile of choice in the Territory."

The passage from the judgment of the High Court in Hague v. Hague(1) upon which Counsel relied was as follows:-

".....and intention to remain permanently or at all events 'indefinitely' in the country where he has taken up residence must be established to show that a man has acquired a domicile of choice in exchange for his domicile of origin. In Ramsay's case, 1930 A.C. at p.597, there is a passage in Lord Macmillan's opinion which brings out the point and shows how the standard must be applied. His Lordship said: "The acquisition of a domicile of choice is a legal inference which is drawn from the concurrence of evidence of the physical fact of residence with evidence of the mental fact of intention that such residence shall be permanent. So far as physical residence is concerned the evidence in the present case is amply sufficient. The deceased left Scotland between thirty and forty years before his death and never again set foot on his native soil. During all these years, with the exception of a short visit to the United States and a holiday trip to the Isle of Man, he lived continuously in Liverpool where he ultimately died. But residence alone is not enough. The real question in the case is whether this prolonged residence in England was accompanied by an intention on the part of the deceased to choose England as his permanent home in preference to the country of his birth. The law requires evidence of volition to change. Prolonged actual residence is an important item of evidence of such volition but it must

(1) (1962) 36 A.L.J.R.179 at p.184.

be supplemented by other facts and circumstances indicative of intention. The residence must answer a qualitative as well as a quantitative test."

An intention to remain indefinitely in the Territory was relied upon by the Petitioner to support his acquisition of a new domicile. He gave this answer to Counsel:-

"Q. Do you intend to continue to reside permanently in T.P.N.G.?"

A. I do, and in fact have taken steps to form my own Company in the Territory."

In coming to my decision in this case, I have relied heavily on the reasoning of the late Chief Justice Sir Beaumont Phillips in his unreported judgment in Gunning v. Gunning & Anor (2) delivered in Port Moresby on 31st October 1953. In this judgment, His Honour analysed in detail the authorities bearing on the question of abandonment of a domicile of origin and acquisition in its place of a domicile in the Territory.

At Page 5 of his typewritten judgment, His Honour states:-

"In other words, to acquire a domicile of choice two elements must be clearly proved, residence in the country of the proposed domicile, and intention to abandon an existing domicile and acquire a new domicile in the country of the proposed domicile.

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 domicile of origin. The mere fact, that a person who has, say, a New South Wales domicile, 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 domicile or automatically end his New South Wales domicile. On the other hand, once an intention to acquire a domicile of choice is firmly and definitely formed, the period of residence necessary, coupled with that intention, to produce a change of domicile 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). "

I find myself unable to conclude from the evidence that the Petitioner had at the time of the filing of the Petition deliberately abandoned his English domicile and deliberately acquired a domicile in

the Territory by residence here coupled with a "fixed and settled purpose" on his part to adopt the Territory as his permanent home without any intention of further change apart from temporary purposes.

He was 23 years old when he left England and he came to New Guinea on a two year written contract of employment. He was employed for approximately two years in Rabaul in the cocoa machinery industry by some Company which has since been taken over by Steamships Trading Co. Ltd. Thereafter, he continued in the employment of Steamships in Goroka in the coffee machinery industry. The written contract of employment was not extended. His period of residence in the Territory at the date of filing the Petition was a little more than four years. He lived in furnished accommodation provided by his employers, first in single quarters, then for the brief period of his marriage in a flat and thereafter again in single quarters. He has no assets of any importance in the Territory, except for a current account and a Savings Bank account and a motor vehicle. His departure from England was clearly related to the employment available to him in New Guinea and there is nothing to show that he has turned his back on England: indeed, he has returned there once in 1967 to do a training course.

At the time of the hearing of the Petition, Petitioner was negotiating with the English company whose agricultural machinery he deals in with a view to that company cancelling the agency which it currently has with Steamships in the Territory and allotting it to a company to be formed by him in the Territory.

This company had not been formed at the date of the dismissal of the Petition: it was hoped that it would commence on 1st June, 1970, but finance was a consideration, as was the winning of the agricultural machinery agency from Steamships. It was proposed that the company would operate from rented premises in Goroka: the initial stake of the Petitioner in the company would be \$1000 and six other shareholders would be expected to find \$12,000.

However attractive the future prospects of this company might be, I consider it too speculative to be of assistance to the Court in coming to the conclusion that the Petitioner had lost his English domicile and gained a Territory one.

"There is a presumption in favour of the continuance of an existing domicile. 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 domicile": *Cheshire, Private International Law, 3rd Ed., 218.*

There is no particular conflict in the evidence in this case: rather it is lacking, were it not for Petitioner's assertion of his

intention to continue to reside permanently in T.P.N.G. Such a statement can be easily made in order to found jurisdiction in a matrimonial suit but in my view the circumstances attendant on Petitioner's stay in the Territory do not support it with any persuasiveness.

As stated above, I am not satisfied either that Petitioner has abandoned his English domicile or that he has gained a Territory one: I accordingly lack jurisdiction to entertain the Petition.

Solicitor for the Petitioner : P.G. Lefevre Hickey & Co.