STATUTORY DOMICIL

Position at Common Law

In 1857 the English Legislature ousted the control of the Ecclesiastical Courts in matrimonial matters and transferred jurisdiction to a newly created Divorce Court. This Court found itself increasingly confronted with problems concerning the extent of its jurisdiction in relation to the parties who were endeavouring to utilise its services. To solve the conflict of laws issues that arose, the Court eventually adopted the concept of domicil as the test of its jurisdiction. The seal was set on this doctrine by the Privy Council in Le Mesurier v. Le Mesurier [1895] A.C. 517, which gave its opinion that divorce, being primarily a matter of status and not contract, is determinable by the court of the current common domicil.

This fixation with the concept of domicil when coupled with the further rule that a wife takes her husband's domicil for all purposes, caused unnecessary hardship to wives: as Professor Graveson has stated, 'the married woman may dispose of her own property, make her own contracts, commit her own torts, but never acquire her own domicil'.[1] Truly the law regarded a woman's place as in the home and not in the Divorce Court.

New Zealand follows England

In New Zealand jurisdiction to grant decrees of divorce was conferred on the Supreme Court by The Divorce and Matrimonial Causes Act 1867. This Act in its scope and application faithfully followed the English legislation. The Bill introducing the Act was regarded as so controversial that it was introduced into the House by a private member, the Government of the day not being prepared to face the storm of protest that it was thought would result. The Act was passed despite strong objection. The Legislature however did not concern itself with jurisdictional requirements, and this was left to the courts which of course followed the common law concept of domicil. Over the period 1867 to 1928 New Zealand's Legislature exhibited a gradual movement towards the desirability of amendment to the Divorce Laws in this respect. However, as late as 1894 it was remarked

1. Graveson, Capacity to acquire a Domicile, (1950) 3.I.C.L.Q. 149, 157.

in the Legislative Council that the tendency of a part of the female community had been in the direction of legislation of this kind, 'ever since the very great mistake was made of conferring the franchise upon them.'[2]

Reform

The years 1928 and 1930 saw the New Zealand Legislature take the bit between its teeth and pass legislation to mitigate the hardships caused by the Le Mesurier doctrine, by giving to the wife in certain circumstances a notional or statutory domicil. In the present note we are concerned only with section 12(4) of the Divorce and Matrimonial Causes Act 1928 which was introduced into the 1928 Act as s.12(3) by an amending Act in 1930. Section 12(4) in its present form, as enacted by s.9(2) of the Divorce and Matrimonial Causes Amendment Act 1953, is as follows:

> 'Where a wife who is living apart from her husband is living in New Zealand and has been living there for three years at least, and has such intention of residing permanently in New Zealand as would constitute a New Zealand domicil in the case of an unmarried woman, she shall be deemed for the purposes of this Act to be domiciled in New Zealand and to have been domiciled there for two years at least, notwithstanding that her husband is not domiciled in New Zealand'.

Section 12(4) substituted for the Le Mesurier doctrine a quasi-domiciliary form of residence independent of the residence or domicil of the husband. The automatic application of New Zealand law once the terms of the subsection are complied with is presumably based on the assumption that a period in excess of three years would only result in the hardships inourred by the common law rule, while a shorter period would not warrant the application of the lex fori and would tend to turn our Divorce Courts into a commercial enterprise. Nevertheless the measures taken by the Legislature to mitigate the Common Law doctrine are themselves founded on the acceptance of the concept

2. 94 New Zealand Parliamentary Debates, 274

of domicil as the test of jurisdiction and on the principle that husband and wife have the same domicil i.e. the husband's for the duration of the marriage.

Judicial Attack

It was not long before s.12(3) (now s.12(4)) was under attack in the Courts. In Worth v. Worth [1931] N.Z.L.R. 1109, the parties were married in Cape Town and subsequently separated in 1911, the husband going to England and the wife to New Zealand. In 1931 the wife petitioned for a divorce relying on s.12(3) to bring her within the jurisdiction. The submissions made by counsel for the respondent were that the subsection was ultra vires the New Zealand Legislature as being repugnant to the rules of private international law and as being contrary to the peace, order and good government of New Zealand. The Court of Appeal unanimously rejected the submissions. However it is quite apparent from the judgments that the subsection did not find favour in the court's eyes. The statement of Herdman J. (supra, at p.1132) though more forceful than those of his fellow Judges, aptly expresses the general sentiments of the court:

> 'It may be that in legislating as it has done Parliament has paved the way for scandal, injustice, and the suffering of innocent people; but no matter how strange and fantastic may be the legislation which Parliament enacts, our sole duty is to interpret it....'

Although the Court assumed that the petitioner had fulfilled the requirements of s.12(3) MacGregor J. (supra, at p.1133) gave a strong indication of how the Court should approach the application of this subsection, for he stated that it was the court's duty to grant a divorce to any petitioner who came clearly within the scope of the subsection. The emphasis on the word 'clearly' is significant in the light of some recent cases which will be discussed later. It can be seen from the decision in Worth v. Worth that in its early days s.12(3) did not receive a particularly warm reception from the New Zealand courts.

Practical Application of Section 12(4)

Up to 1958 it appears that New Zealand courts had little difficulty in applying s.12(4) to petitioners who relied on it. In the last three years however there have been three cases in which practical difficulties have arisen.

In Boorman v. Boorman [1958] N.Z.L.R. 354, a wife petitioner relied on s.12(4) in the following circumstances:

(1) The petitioner arrived in New Zealand in 1948.
(2) She went to Australia on holiday in May 1951.
(3) She married the respondent on 30th June 1951 in Brisbane, Australia.
(4) They made their matrimonial home in Australia.
(5) In September 1953 the respondent deserted the petitioner.
(6) After desertion in September 1953 the petitioner continued to reside in Australia until February 1955.
(7) She returned to New Zealand in February 1955.

On the above facts the second period of residence in New Zealand dating from February 1955 was insufficient to bring the petitioner within s.12(4). Counsel for the petitioner therefore submitted that to fulfil the residential qualification the earlier period of residence extending from 1948 to May 1951 could be taken into account. Turner J. rejected this submission holding that the three-year residence qualification must be of a substantially continuous nature. The petitioner, by acquiring a new domicil, changing her place of residence, and failing to return immediately to New Zealand on the desertion of her husband, could not rely on the first period of residence in New Zealand to assist her. In the course of his judgment Turner J. said (at p.355), obiter, that some temporary absence from New Zealand might not be fatal to the application of s.12(4) but that he did not decide this as there were two quite separate and distinct periods of residence in New Zealand; the intervening period of absence being itself substantial and having the characteristics not of a temporary absence, but of turning the back on New Zealand.

It is interesting to note that by his remarks on the question

of a temporary absence, Turner J. anticipated the situation that arose in Rowley v. Rowley [1959] N.Z.L.R. 213, the facts of which were:

(1) Mr. Rowley's domicil of origin was New Zealand but the Court took it for granted that he had acquired a domicil of choice elsewhere.
(2) The petitioner arrived in New Zealand on 1st May 1955 from Norfolk Island where she had been living with her husband.
(3) On 29th July 1955 the petitioner learnt that her husband had deserted her.
(4) The petitioner decided to establish permanent residence in New Zealand on 29th July 1955.
(5) Early in August 1955 the petitioner went to Norfolk Island to finalise her affairs.
(6) The petitioner returned via Australia where an unsuccessful attempt was made by her daughter to effect a reconciliation with her husband.
(7) The petitioner returned to New Zealand towards the end of August 1955.
(8) She filed a petition for divorce on 29th July 1958.

Counsel for the petitioner was immediately confronted with the difficulty that the petition had been filed less than 3 years after Mrs. Rowley's return from Norfolk Island and Australia. To overcome this initial difficulty counsel submitted that, as the court's jurisdiction was determinable at the hearing, then the time that had elapsed from the date of the filing of the petition to the date of the hearing, could be taken into account in determining whether the petitioner had been living in New Zealand for three years. F.B.Adams J. held that the opening words of s.10 of the Act clearly made it a condition of the right to present a petition that the necessary domicil qualification should have existed when the petition was filed. This reliance on s.10 would appear to be sound, as the opening words of that section read:

> 'Any married woman who is domiciled in New Zealand and at the time of the filing of the petition has been domiciled there for two years at least....'

However if the above reasoning is sound, which it is submitted to be, then there would appear to have been no reason why the words 'immediately preceding the filing of the petition' were not re-enacted by the 1953 Amendment Act. F.B.Adams J. refused to consider what effect such omission had and contented himself with holding that it could not have the effect of dispensing with the requirement imposed by s.10. The main question before the court was, therefore, whether the petitioner had been living in New Zealand for three years at least at the time the petition was filed.

It was held that the requirement of intention to reside permanently in New Zealand, while an essential requirement at the time of filing the petition, is not required for the whole of the three-year period, so that a married woman can arrive in New Zealand intending to depart almost immediately. However, if she remains for three years and ultimately decides to remain 'living' here indefinitely, then she is within s.12(4).

F.B.Adams J. then went on to consider whether the petitioner had been living in New Zealand for the required three-year period. Adopting the substantial continuity principle coupled with the exception of a temporary absence from New Zealand laid down in Boorman's case, he held that the short trip away to Norfolk Island and Australia did not break the continuity of living in New Zealand. A short period of absence during which the requisite animus revertendi is always present does not break the continuity. The deciding factor will be the characteristics of the absence and proof of the necessary intention.

The judgment is also interesting in that F.B.Adams J. considered the meaning of the word 'living' in s.12(4). It was held that a narrow construction of the word involving some form of intention to remain would be contrary to the purpose of the section and that all that is required is that the petitioner shall have lived her ordinary life in New Zealand for the stipulated period. So that if a married woman arrives in New Zealand with the intention of departing almost immediately, and stays in a hotel, but later decides to live there permanently, then her stay at the hotel will be regarded by the court as 'living' in New Zealand within the terms of s.12(4).

Rowley's case appears to be a thoroughly satisfactory decision, but one cannot help thinking that the Judges in Worth's case would shudder at the wide interpretation s.12(4) received at the hands of the court. It is a clear indication that the present judiciary does not regard derogations from the common law concept of domicil as scandalous and unjust.

Finally, we must consider the recent case of Griffiths v. Griffiths [1960] N.Z.L.R. 572. The facts were as follows:

(1) The respondent husband was domiciled in England throughout.
(2) The petitioner was born in New Zealand.
(3) She was married in New Zealand.
(4) An oral agreement for separation was made, and this agreement remained in full force for three years.
(5) The petitioner was an infant at all relevant times, the husband having come of age prior to the commencement of proceedings.
(6) The petitioner had formed an intention to remarry immediately after the divorce and go to live permanently in America.

The question before the Court in this case was, did the petitioner have the necessary intention to reside permanently in New Zealand as would constitute a New Zealand domicil in the case of an unmarried woman? On a first glance it is difficult to see how the necessary intention could be inferred. The petitioner had formed an adulterous association with a Mr.Long, a member of the United States Navy serving in New Zealand, and was expecting a child by him. In her evidence she expressly stated that it was her intention on obtaining a divorce to marry Long and go to live with him in the United States but that if she could not get a divorce then Long would find some way of taking her to America. F.B.Adams, J. however held that the petitioner had only formed a conditional or contingent intention of leaving New Zealand, and although some contingencies may be of such a nature as to negative the application of s.12(4), others will be remote enough to be disregarded. Having regard to the petitioner's age, her meagre comprehension of the obstacles in her path, her dependence on Long's future actions, the attitude

of the United States Naval or Immigration Authorities, and finally the divorce or marriage laws of some American States, F.B.Adams J. held that he was justified in imputing to the petitioner only a conditional or contingent intention to leave New Zealand. And as there were many obstacles in the way of fulfilling such a conditional intention it would be unfair and unrealistic to deprive her of the benefit of s.12(4) for apart from her contingent intention to depart, she undoubtedly possessed the intention required by s.12(4).

With all respect it is submitted that the decision of the learned Judge on the question of intention was incorrect. Section 12(4) requires such an intention as would constitute a New Zealand domicil in the case of an unmarried woman. Reference must be made therefore to the common law in order to determine whether an unmarried woman possessed of the petitioner's contingent intention would be able to acquire a New Zealand domicil. It is a general rule of the common law that in order to acquire a domicil of choice the person concerned must have an intention to reside permanently in the country in question for an unlimited time.[3]

A hundred years ago there were certain cases which decided that an intention to reside indefinitely in a place was an intention to reside there permanently notwithstanding that such intention was contingent upon an uncertain event.[4] However, during the same period there was a line of authority to the contrary, for in Moorhouse v. Lord (1863) 10 H.L.C. 272, 285-6, Lord Chelmsford expressed the view that:

> 'The present intention of making a place a person's permanent home can exist only 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.'

The opinion of Lord Chelmsford has since been affirmed by the House of Lords in Winans v. Attorney General [1904] A.C. 287, and in Ramsay v. Liverpool Royal Infirmary [1930] A.C.588. What

3. Udny v. Udny (1862) L.R. 1 H.L. (Sc.) 441,458, per Lord Westbury.
4. The best-known of which is Doucet v. Geoghegan (1878) 9 Ch.D. 441, C.A.

must be established is an intention never to leave the country for if the possibility of a change of residence is present to the person's mind then no such intention can be established.

Even if Judges are prepared at times to relax the strict application of the above rule - as for example in Gulbenkian v. Gulbenkian [1937] 4 All E.R. 618, where there was an intention to remain until compelled to leave by financial pressure exerted by a father - where the conditional intention is determinate on uncertain events or is not capable of sufficient proof, nevertheless in no case, the old cases included, has it been held where there is in existence and proved beyond question an actual contemplation of leaving the country, that the establishment of a domicil of choice has been sufficiently proved.

In the light of the position at common law, can it justifiably be said that in Griffiths' case the petitioner was possessed of the requisite intention? It is submitted that it cannot. F.B.Adams J.relied on that line of authority as expressed in Doucet v. Geoghegan which nowadays has been refuted by the two House of Lords decisions previously referred to. Furthermore even if the circumstances of the case had warranted a liberal application of the common law rule, such would not have assisted the petitioner, for the fact cannot be denied that she actually contemplated leaving New Zealand immediately on the granting of the divorce and, if the divorce were not granted, achieving her intention by some means or other. That there may have been obstacles in the way of carrying out her intention was immaterial for it has been said time and again that it is the animus of the person concerned that is relevant in this respect and nothing else. It is submitted that the petitioner did not have the necessary intention in this case. With all respect it is submitted that the learned Judge relied on a line of authority that has since been overruled and that his decision was influenced by irrelevant factors such as the age of the petitioner, her domicil of origin in New Zealand, and the corresponding divorce legislation in England and in Australia where no intention is required.

The decision in the Griffiths' case is also important in that it seems to provide an exception to the common law rule

that a minor cannot acquire an independent domicil of choice. In this day and age no objection can be taken to this exception, for as our present society sees no reason why a female should not marry qhile a minor, then surely no objection can be raised to a wife who is a minor availing herself of s.12(4) in order to obtain a divorce. Prima facie the choice whether to marry or not in the first place creates another means whereby a female minor oan change her domicil by choice i.e. the acquisition of a derivative domicil.

Much as the decision in the Griffiths' case can be criticised, it nevertheless illustrates quite clearly the change that has taken place in the courts' approach to the application of s.12(4). In the span of 29 years this approach has changed from that of a suspicious narrow interpretation of a section which was regarded as a scandalous derogation from the common law concept of domicil, to that of a genial benevolence willing to extend s.12(4) to cover circumstances in which the section's application seems doubtful in the extreme.

In the light of the above, it is clear that the law dealing with the domicil (for divorce purposes) of married women residing in New Zealand is far from satisfactory.

It is submitted that the most satisfactory reform that could be made is to delete from s.12(4) the requirement of an intention to reside permanently in New Zealand. This would bring the New Zealand legislation in line with that of England and Australia and would avoid the difficulties that arose in the Griffiths' case.