D v C

THE HIGH COURT

1983 No. 3M.

BETWEEN:

K.E.D. (OTHERWISE K.C.)

Petitioner

and

M.C.

Respondent

JUDGMENT of Miss Justice Carroll delivered the 26th day of September 1984

This petition is for a decree of nullity on the grounds that the respondent was already married according to the laws of this State at the time of his second marriage to the petitioner.

The facts are as follows.

The respondent was born in Dublin on the 7th October 1918. He lived in Dublin with his parents and then was sent to school in England during the years 1930 to 1937. After school he spent the years 1937 to 1940 at Trinity College Dublin. In 1940 he joined the British Army and served during the war. He left the army in 1946.

On the 28th November 1946 he married G.N. in County Meath and there were two children of the marriage born in 1947 and 1950.

In 1955 G.N. left the respondent and went to live in England. The respondent continued to live in Ireland with his two daughters.

On the 24th July 1959 divorce proceedings were instituted by G.N. in England. The petition recited that the respondent did not have U.K. domicile and his address in Ireland was given. He filed an answer on the 8th February 1960 which did not contest the statement as to his domicile. He did not defend the suit at the hearing.

There is some confusion in the documentation produced about the divorce. The certified copy order of the decree nisi refers to it being granted on the 19th January 1962. One certificate of making the decree nisi absolute refers to the decree nisi being granted on the 19th January 1961 and the decree absolute being granted on the 25th April 1962. Another certificate of making the decree absolute refers to the decree nisi being granted on the 19th January 1962 and the decree absolute on the 26th April 1962.

The petitioner was born in Dublin on the 12th April 1927. She became friendly with the respondent in the year 1959 and they began to see each other regularly. The petitioner used to get temporary work for the Summer (usually in England) and returned to her family home in County Carlow every Winter.

The respondent was dismissed from his job in July 1961. At the time the petitioner was working in London on one of her temporary jobs.

The respondent tried to get employment in Ireland but failed He decided to sell up and move to London. His elder daughter had already been a pupil at bording school in England and his

younger daughter joined her that September. After the two girls started school, he sold his house and moved his furniture over to London into storage about October 1961.

The respondent hoped to get employment in the City in London through his army connections. He was a member of the Guards' Club in London since his army days. He also kept on his membership of the Kildare Street Club. He commenced proceedings against his former employers. Litigation extended over a number of years and the case was ultimately decided in his favour in 1966.

It was the Spring of 1962 before he got a job with an American firm based in London, through answering an advertisement. This job involved a lot of travelling including trips to Ireland.

On the 21st July 1962 the petitioner and the respondent were married in a Registry Office in London. There was one child of this marriage born in October 1963.

The petitioner, as an only child, was to inherit her family home which was an old country house with 250 acres. She was also entitled in reversion to a one-third share in a trust fund on the death of her grandmother.

After their marriage the parties lived in a flat in London. When the house next door came up for sale early in 1963, they decided to buy it. The petitioner raised money against her reversionary interest in the trust fund and the house was bought. The petitioner said she wanted a place even for a few years but it was always on a temporary basis.

The petitioner's English solicitor, who was involved in the administration of the trust fund, knew the petitioner and

the respondent and acted for the petitioner in the purchase of the house. He said he was aware it was merely a temporary move and that it was their intention to return to Ireland. He said he gave his evidence not from a perusal of correspondence but from what he learned from them himself. He said he was left firmly with more than an impression that they were a couple based in Ireland and going back there.

After about a year, in mid-1963, the respondent gave up his job with the American firm and got a job in the City on a trial basis.

The parties travelled to Ireland to visit the petitioner's parents and grandmother approximately twice a year. In addition the respondent travelled over in connection with his court case and on business. During this period the respondent looked at three or four houses in Ireland with a view to purchase, including a house in County Kildare which was ultimately bought.

The petitioner's grandmother became ill at the end of 1964. According to the petitioner (whose evidence I accept) the respondent suddenly decided to give up his job in the City and to return to Ireland. They returned in January 1965 and went to live in the petitioner's family home. The petitioner's grandmother died in the Spring of 1965 and the petitioner came into her inheritance in the trust fund. Instructions were given to her solicitor to sell the house in London in April 1965 and to purchase the house in County Kildare.

The petitioner's mother became ill and the parties stayed on in the petitioner's family home until she died in

November 1965.

The parties resided in the house in County Kildare for seven to eight years before moving again. The respondent started another business in Ireland with the help of the petitioner's money and in conjunction with his former employers in the City in London. This business has since been sold.

The parties have resided continually in Ireland since 1965.

The basic issue on which other issues depend is whether the domicile of the respondent changed when he left to live in England in October 1961.

The respondent claims that he changed his domicile when he left Dublin in October 1961. He said he found it difficult to get a similar position to the one he had held and he decided he had a better chance in England. He held a British passport since the war. He opted in 1952 to be a British subject under the British Nationality Act 1948.

He said he had cut all links with Ireland (or had them cut for him) in 1961 and he was going to make his life in London. He said he envisaged that he would gravitate from the City to politics. He said the pattern, if one was "in the swim", was to progress from the army to the City and then to parliament. He said he had met Ted Heath at a seminar and he said to him (the respondent) that he was the sort of person they wanted in the Tory party. He agreed he had never discussed the question of staying permanently in England with the petitioner. He said he loved Ireland and was a keen fisherman. He envisaged living in England and commuting to Ireland.

The petitioner, on the other hand, said the only reason he moved to London was because he could not get a job in Ireland and that he never discussed with her any intention of staying permanently in England. She said that she never intended to stay permanently there and he knew that. She said he knew exactly what she was going to inherit and that there was no reason not to go back when she got the money.

The domicile of origin of the respondent is Irish. The onus is on him to establish that he lost his domicile of origin and established domicile of choice in England. He must prove that he had a fixed and settled purpose of establishing a new permanent home abroad in 1961 and of abandoning the old.

Domicile is a mixed question of law and fact. A change in domicile depends on whether the proper inference to be drawn from the established facts and from the person's conduct is that he had abandoned his domicile of origin and had chosen in its place a different domicile.

The question arose in the case of M.T.T. .v. N.T. (1982 I.L.R.M. 217). There it was held that employment and residence per se do not prove a change in domicile.

Henchy, J. said at pages 220/221:

"A man's sojourn abroad with his wife and children for two years even in a position of permanent employment, is not, without more, capable of displacing the presumption that the domicile of origin has been retained. The period lived abroad may be no more than the external manifestation of a temporary compulsion of circumstances."

In relation to the evidence given by the respondent as to his intention in 1961, I consider that the correct approach is that indicated by Budd, J. in Re Sillar, Hurley and anor. .v. Wimbush and anor. 1956 I.R. 344 at 350:

> "Where he has made a declaration touching on the matter it must be weighed with the rest of the evidence. Such a declaration may be a determining factor, but will not be permitted to prevail against established facts indicating more properly a contrary conclusion."

In my opinion the respondent has failed to establish that he lost his domicile of origin at any stage. I am not satisfied (to paraphrase the words of Budd, J. in the same case) that the proper inference to be drawn from a consideration of all the known circumstances in this case is that the respondent has shown unmistakably by his conduct, viewed against the background of the surrounding circumstances, that he had formed at any time the settled purpose of residing indefinitely in the alleged domicile of choice.

He failed to discuss with the petitioner either before their marriage when such discussion could be expected, or at any time, an intention on his part to remain permanently in England. He must have known of the petitioner's intention to return home on gaining her inheritance and that she had no intention of remaining permanently. There was no reason why they could not return home when she got her inheritance. They did, in fact, return home when her grandmother was ill. The respondent was actively concerned with looking at houses for purchase in Ireland before he gave up his job in London.

I accept the petitioner's evidence that the house in London, which was bought with her money, was bought on a temporary basis and not as a permanent home.

The fact that the respondent commenced a court case for wrongful dismissal in November 1962 and having lost in the High Court in 1964, prosecuted an appeal in the Supreme Court (in which he was successful) is another factor and, in my opinion, it is a factor from which the inference to be drawn is that he intended to retain his domicile of origin and not abandon it.

The fact that he never resigned his membership of the Kildare Street Club does not support his contention that he "cut his links" with this country in 1961.

None of the witnesses acquainted with the respondent and called by the petitioner, were aware of any intention of the respondent at the time to stay permanently in England. On the contrary, they all had the opposite impression.

The respondent's holding of a British passport does not act as corroborative evidence of a change of domicile. The respondent opted for British citizenship in 1952. This long pre-dated his change of residence. Nationality and citizenship, while relevant, are not the determining factors in deciding domicile.

In my opinion the respondent's sojourn in London was residence of a temporary nature which was forced by circumstances. It was never intended to be, and was not in fact, permanent. The respondent, therefore, at all times retained his domicile

of origin. Accordingly, the question of whether a change in domicile after the presentation of the petition and before the granting of the decree absolute affects the validity of the divorce, does not arise.

The law is settled that the domicile of the respondent is the relevant factor in this divorce. The divorce granted by the English Courts is not valid in this jurisdiction as it was not based on domicile. It was stated by Walsh, J. in Gaffney .v. Gaffney 1975 I.R. 133 at 150:

> "In the course of his judgment in Mayo-Perrott .v. Mayo-Perrott Kingsmill-Moore, J. stated the Irish law to have been that the recognition of foreign divorces in Irish courts depended upon establishing that the domicile of the parties was within the jurisdiction of the court pronouncing the decree. Recognition and application of this principle of private international law was part of the common law in Ireland and like Kingsmill-Moore, J. in the Mayo-Perrott case and Mr. Justice Kenny in this case, I am satisfied that it is still part of our law. It follows therefore that the courts here do not recognise decrees of dissolution of marriage pronounced by foreign courts unless the parties were domiciled within the jurisdiction of the foreign court in question. Insofar as the courts of this country are concerned, the marriage remains as valid and as subsisting in this country as it would have been but for the intervention of the purported decree of dissolution."

Since the divorce granted in April 1962 is not a divorce which will be recognised in this country the respondent was not free to re-marry. The respondent's capacity to marry is determined by the law of his ante-nuptial domicile. Since he was not free to re-marry in this country, he therefore was

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not free to re-marry in England (see Reg. .v. Brentwood Superintendent Registrar of Marriages 1968 2 Q.B. 956).

In his judgment Sachs, L.J. says at page 968:

"The fact that the parties to a proposed marriage cannot marry according to the law of the country in which they are domiciled is as a normal rule, a lawful impediment to their being married in this country. That follows from what in Dicey and Morris Conflict of Laws Eighth Edition page 254 is stated as Rule 31:

"Capacity to marry is governed by the law of each party's ante-nuptial domicile"."

It is therefore my opinion that the marriage between the petitioner and the respondent is not valid in this country. There is no reason to suppose the marriage would be held to be valid in England, even though the divorce is considered to be valid there. By granting a divorce which was not based on domicile, the English courts could not confer on the parties a capacity to re-marry where the law of their domicile did not allow re-marriage. Accordingly, it appears to me that "the scandal which arises when a man and woman are held to be man and wife in one country and strangers in another" (see Le Mesurier -v- Le Mesurier 1895 Appeal Cases 517 at 540/541) does not arise in this case.

The only remaining issue raised by the respondent is whether the petitioner is estopped from petitioning for a decree of nullity as she knew she was marrying a person who, having been married in Ireland, was divorced in England.

There is no estoppel of record where there was no jurisdictional competence to make the order. In Gaffney -v- Gaffney (1975 I.R. 133) Henchy, J. says at p. 155.

"I am satisfied that there can be no estoppel by record

"when the record arose in proceedings, domestic or foreign upon which the court in question had no jurisdiction to adjudicate."

In this case I am satisfied that the decree of divorce was invalid for lack of jurisdiction and, therefore, the petitioner's marriage with the respondent was void ab initio. This is not a case where a marriage is voidable.

There is, in my opinion, no basis for refusing a decree of nullity on the grounds that the petitioner has acquiesced for many years in the marriage. If a marriage is void ab initio, no lapse of time or acquiescance can make it valid. Accordingly, the petitioner is entitled to a decree of nullity.

Thella Carroll.

26-9-84.

Approved.

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and

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Respondent

Alan Shatter, solicitor, for the petitioner.

Michael Moriarty, S.C., and John McMenamin for the respondent.

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