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Young v. Young

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YOUNG V. YOUNG — DOMICILE OF SERVICEMEN — ACQUISITION OF DOMICILE OF CHOICE — DECLARATIONS OF INTENTION. *Young v. Young*[1] is important as an example of the difficulty in attributing a domicile to a person in certain fact situations. Although the rules for determining domicile are simple and easily understood, great dfficulty lies in their application to particular facts.

In this case the female petitioner sought a divorce on the ground of her husband's adultery. The petition was dismissed for lack of jurisdiction in that the respondent, who did not defend this action, was not domiciled in Manitoba. The respondent's domicile of origin was Newfoundland. Evidence was given indicating that he enlisted in the Army in order to get away permanently from that province. He was stationed in Manitoba where he met the petitioner, married her and lived with her only briefly after his discharge. The parties soon separated and the respondent re-enlisted in the Army and has since been posted to Alberta or Saskatchewan. There was evidence that the respondent had said on several occasions that he intended to settle down in Manitoba with his wife.

In the Court of Appeal, Adamson C.J.M. in an unfortunately short, dissenting judgment felt that the respondent husband was domiciled in Manitoba and would have granted the decree *nisi*. His Lordship, after stating the facts, seemed to have no doubt that there was a domicile of choice established in Manitoba relying, it appears, on the marriage and residence in the province and the evidence of the

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12 "160. Where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it, a constructive trust arises."

ED. NOTE: Since this comment was written, many of the issues involved have been dealt with by the Supreme Court of Canada in *Thompson v. Thompson*, [1961] S.C.R. 3.

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1 (1960), 21 D.L.R. (2d) 616.

declarations of intention of the respondent. The judgment of the majority of the Court was delivered by Schultz J.A., Tritschler J.A. concurring, who held that the respondent was not domiciled in Manitoba and as a result there was no jurisdiction to entertain the petition.

On a close reading of the case, it would appear that the Court could have arrived at the opposite conclusion. The question of domicile is elusive and depends on the facts in each particular case. This may make it unsatisfactory as a requisite for conferring jurisdiction on the Courts in divorce matters. Such an unsatisfactory criterion is manifest by the hardship on the present petitioner, as well as many others.

In his reasons for judgment, Schultz J.A. quoted from the judgment of Duff C.J.C. in *Trottier v. Rajotte*,[2] who said on the question of change of domicile:

> "Domicile of origin cannot be lost until a new domicile has been acquired; that the process of the acquisition of a new domicile involves two factors,—the acquisition of residence in fact in a new place with the intention of permanently settling there: of remaining there, that is to say, as Lord Cairns says 'for the rest of his natural life', in the sense of making that place his principal residence indefinitely".

Therefore, it is clear that one cannot extinguish a domicile of origin. To acquire a domicile of choice in Manitoba, it must be shown that the respondent acquired this domicile both *animo et facto.* Although the respondent was in the Army most of the time that he was in Manitoba, the fact of residence in that province can be proved, in spite of Dicey's comment that, "A soldier does not, and in fact cannot, acquire a domicile in the place where he is stationed".[3] Lord Normand in *Sellars v. Sellars*[4] aptly qualifies this statement where he says:

> "Now, in my opinion, the requirement of residence is not satisfied merely by proof of a residence imposed upon a soldier by the order of his military superiors. But, then, there may co-exist with a residence, which has begun and is continued under military orders, facts and circumstances which establish a residence voluntary in character and chosen by the soldier, although it is a residence in the place in which he is stationed by order of his military superiors".[5]

Similarly, in the *Lauderdale Peerage Case*[6] where a British military officer was stationed in New York for a period of eight years, Lord Selborne L.C. said:[7]

> . . . "it is not necessary to say that a residence even under such circumstances, for several years in New York, might not possibly be sufficient. if accompanied and explained by clear proof of an intention to settle there, *sine animo revertendi*".

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[2] [1940] S.C.R. 203 at p. 207; [1940] 1 D.L.R. 433 at p. 436, (S.C.C. reversing Quebec Court of King's Bench, Appeal Side, 64 Que. K.B. 484).

[3] Dicey, *Conflict of Laws* 5th ed. 1932 at p. 131. However this view has been abandoned in later editions.

[4] [1942] Sess. C. 206.

[5] *Supra,* at p. 211.

[6] (1885), L.R. 10 A.C. 692.

[7] *Supra,* at p. 739.

The view of Lord Normand has been followed in Ontario in the case of *Wilton v. Wilton.*[8] In the case of *Wilkinson v. Wilkinson,*[9] Boyd McBride J. in an Alberta case held that a serviceman whose domicile of origin was England could, in the circumstances of the case, acquire a domicile of choice in Alberta while still in the Army. A similar view was taken by the Supreme Court of British Columbia in the case of *McBeth v. McBeth.*[10]

Therefore, there is sufficient authority to show that a serviceman can acquire a domicile of choice where he is stationed.

The petitioner in attempting to prove domicile in Manitoba, in the present case, relied on declarations of the respondent. There was evidence that the respondent had said to the petitioner's father, when courting the petitioner, that he intended to make his home in Manitoba. There was also evidence of conversations between the petitioner and her husband to the same effect. Evidence given by the respondent's brother showed that he had no intention of ever returning to Newfoundland and also that he wanted to stay in Winnipeg and settle down there.

In dealing with the evidence of these declarations, Schultz J.A. referred to the oft quoted passage from Lord Buckmaster's judgment in *Ross v. Ellison or Ross,*[11] where his Lordship said:[12]

> "Declarations as to intention are rightly regarded in determining the question of a change of domicile, 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 action consistent with the declared intention".

Relying on the above quotation, Schultz J.A. felt that the declarations were casual and did not manifest any serious thought on the part of the respondent. His Lordship went on to say:[13]

> "A mere declaration of intention, made under such circumstances as existed when the respondent Young was courting his future wife. and made to a prospective father-in-law, is not sufficient on which to find a vital finding of fact".

This statement seems to suggest the unimportance of such declaration in considering a question of domicile. However, such evidence, no matter how seemingly unimportant, cannot be overlooked in considering the question of domicile. This view is well put by Kindersley V.C., in *Drevon v. Drevon,*[14] where his Lordship said:

> "There is no act, no circumstances in a man's life however trivial it may be in itself, which ought to be left out of consideration in trying the question whether there was an intention to change the domicile. A trivial

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[8] [1946] O.R. 117; [1946] O.W.N. 69; [1946] 2 D.L.R. 397.
[9] [1949] 1 W.W.R. 249.
[10] [1954] 1 D.L.R. 590.
[11] [1930] A.C. 1 (House of Lords (Sc.) affirming Scot. Sessions, [1926] Sess. C. 1038.).
[12] *Ibid.* at p. 6-7.
[13] (1960), 21 D.L.R. (2d) 616 at page 621.
[14] (1864), 34 L.J. Ch. 129 at page 133; 146 R.R. 589 at 596.

> act might possibly be of more weight with regard to determining the question than an act which was of more importance to a man in his lifetime".

Furthermore, Schultz J.A. stressed the fact that the respondent had no assets in Manitoba. Indeed, he had no assets anywhere. Does this mean that if one has no assets in a jurisdiction, he cannot be domiciled there?

With regard to the declarations as evidence of intention, it is helpful to note the contrasting opinion of Adamson C.J.M. (dissenting) who states concisely at p. 617;

> "To his wife, her father and to his brother he stated on a number of occasions that he intended to settle permanently in Manitoba and make his home here. In my view this evidence proves domicile in Manitoba. When discharged from the Army, the respondent took a job in Winnipeg for a short time. However, he again enlisted and was moved to a training establishment in Saskatchewan or Alberta. This fact does not prove that he has abandoned his Manitoba domicile and established residence elsewhere".

It is submitted that this opinion of the case is to be preferred. It is true that declarations of intention must be looked at very carefully as directed by Lord Buckmaster in the *Ross*[15] case. But the statements of the respondent were not made at a time when they could be considered as self-serving. Although the evidence of the statements made to the petitioner and her father could have been questioned by Schultz J.A., the evidence of statements made to the respondent's brother are not open to the same objection.[16] These statements would tend to be more truthful and indicative of the respondent's intention because, it would seem, they would be made voluntarily and without purpose. In any event, what motive or self-serving purpose would the respondent have had in making these statements to his brother? Furthermore, the fact that he made these statements declaring his intention before there was a *lis* between the parties substantiates the sincerity and validity of these declarations. The evidence given by the respondent's brother would also have more weight than that given by the petitioner who had an interest in the proceedings. Therefore, taking into account the intention never to return to Newfoundland, the marriage of the respondent and the residence of his brother in the same province, coupled with the several statements of his intention, all these factors go a great way in establishing a *bona fide* intention on the part of the respondent to settle permanently in Manitoba.

In this context, the case of *Donaldson v. Donaldson*[17] is of interest. The respondent husband was an officer in the Royal Air Force and was stationed in Florida. While stationed there, his wife divorced

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[15] *Supra* footnote 11.

[16] It is to be noted that His Lordship did not deal with the evidence of the respondent's brother.

[17] [1949] P. 363; [1949] L.J.R. 762 (P.D.A.), followed in *Stone v. Stone*, [1959] 1 All E.R. 194 (P.D.A.). Willmer J. in *Cruickshank v. Cruickshank*, [1957] 1 All E.R. 889; 1 W.L.R. 564 agreed with the *Donaldson* decision although coming to the conclusion that on the facts before him it had been proved that the soldier had in fact intended to establish a domicile in the country where he was posted.

him in the Florida courts. He then married an American woman and was posted back to England where his first wife brought an action for divorce in England claiming that the Florida decree was void for want of jurisdiction in that the respondent was not domiciled in Florida. Ormerod J. on the evidence of the respondent husband held that at the time of the Florida divorce the parties were domiciled in Florida and hence the decree was valid. The petition for divorce in England by the first wife was accordingly dismissed. The decision is interesting because Ormerod J. relied on the evidence of the respondent husband alone, a person who had a great interest in the outcome of the proceedings and also, whose evidence was potentially self-serving if not so in fact. The case also illustrates that one can acquire a domicile of choice in a place where he is stationed without living there after being discharged. Comparing the evidence in this case with that in the *Young* case, it would seem that there would be sufficient evidence to find a Manitoba domicile.

It might be added that the decision also creates an hardship on the petitioner, who, if her husband retained his domicile of origin in Newfoundland, can only obtain a divorce by way of a private Act of Parliament.

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