1964

*Oct. 13, 14
Dec. 21

ABRAM SCHWEBEL ....(*Plaintiff*) APPELLANT;

AND

HAVA UNGAR ....(*Defendant*) RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Conflict of laws—Status—Parties whose domicile of origin was Hungary married in that country—Jewish bill of divorcement obtained in Italy—Parties later acquiring domicile of choice in Israel—Divorce not recognized in Italy or Hungary but recognized in Israel—Female party subsequently married in Ontario while continuing to be domiciled in Israel—Whether Ontario marriage valid.

In 1945 the defendant was married to W in Budapest, Hungary, which country was their domicile of origin. Before their marriage they had decided to leave Hungary permanently for Israel and in furtherance of this intention they left Budapest three weeks after the marriage and, having put themselves in the hands of a Jewish deputy, started for Israel in company with many thousands of other Hungarians. In 1948, while still *en route* to Israel, they obtained a Jewish bill of divorcement in Italy in conformity with rabbinical law by appearing,

*PRESENT: Cartwright, Martland, Judson, Ritchie and Spence JJ.

[1] [1938] S.C.R. 52, 1 D.L.R. 104. [2] [1943] S.C.R. 366, 3 D.L.R. 305.
[3] [1950] 1 D. L. R. 303 at 304.

in the presence of witnesses, before a rabbi at which time a formal document entitled a "gett" was delivered to the defendant. This document was not recognized either in Italy or in Hungary as bringing the marriage to an end, but it was so recognized in Israel, where the defendant and W finally arrived a few weeks after the "gett" was delivered.

As to W's life and activities after his arrival in Israel the evidence was sketchy; as to the defendant, the evidence disclosed that she remained in Israel and lived with her parents. Some years later, while on a trip to Ontario for the purpose of visiting relatives, the defendant met and married the plaintiff in Toronto. Subsequently, the plaintiff obtained a declaration in the Supreme Court of Ontario that the marriage solemnized between the parties at Toronto was null and void because there was a valid and subsisting marriage then in existence between the defendant and W. On appeal by the defendant the judgment at trial was set aside. With leave of the Court of Appeal, an appeal by the plaintiff was then brought to this Court.

Held: The appeal should be dismissed.

The manner of their coming to Israel was such as to justify a finding that immediately upon their arrival W and the defendant acquired a domicile of choice in that country, where the dissolution of their marriage was recognized from the moment when the "gett" was delivered to the defendant, and where each of them therefore had the status of a single person with full capacity to enter into a valid and binding contract of marriage. The defendant was thereafter free to continue and did continue to be domiciled in Israel as an unmarried woman until the time of her marriage to the plaintiff. Accordingly, at the time of her marriage in Toronto the defendant had the capacity to marry according to the law of the country where she was then domiciled.

Although, as a general rule, under Ontario law a divorce is not recognized as valid unless it was so recognized under the law of the country where the husband was domiciled at the time when it was obtained, the Court of Appeal was correct in its conclusion that, for the limited purpose of resolving the difficulty created by the peculiar facts of this case, the governing consideration was the status of the defendant under the law of her domicile at the time of her second marriage and not the means whereby she secured that status.

Bell v. Kennedy (1868), L.R. 1 Sc. & Div. 307, referred to.

APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing an appeal from a judgment of McRuer C.J.H.C. granting a declaration of nullity of marriage. Appeal dismissed.

H. W. Silverman, for the plaintiff, appellant.

G. D. Finlayson, Q.C., and *J. H. Francis,* for the defendant, respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal brought with leave of the Court of Appeal of Ontario from a judgment of that

[1] [1964] 1 O.R. 430, 42 D.L.R. (2d) 622.

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Court[1] setting aside the judgment rendered at trial by McRuer C.J.H.C. which had declared that the marriage solemnized between the parties at Toronto on April 6, 1957, was null and void because there was a valid and subsisting marriage then in existence between the respondent and one Joseph Waktor.

At the time of his marriage to the respondent, the appellant was a bachelor domiciled in the Province of Ontario and the couple thereafter lived together in Toronto where their daughter was born in 1958, but differences appear to have developed between them which culminated in the present litigation.

In essence the argument advanced on behalf of the appellant is that the validity of the bill of divorcement granted before a rabbinical court at Trani, Italy, which purported to dissolve the respondent's first marriage was not, at the time when it was granted, recognized in Hungary which was then the country of Waktor's domicile and accordingly that it should not be recognized in the Province of Ontario. It is further contended, as the learned trial judge has found, that the evidence does not justify a finding that Waktor had acquired a domicile of choice in Israel, where his marriage was regarded as having been legally dissolved, and that the respondent therefore never lost her status as Waktor's wife according to the law of his domicile of origin in Hungary which should be recognized in the Courts of Ontario as the status which she had at the time of her marriage to the appellant.

The respondent, who was born in Hungary, was married to Waktor in Budapest in 1945 when she was 19 years of age. Before her marriage she had decided to leave Hungary for Israel, and Waktor's position in this regard can best be gathered from the following excerpts from the respondent's examination for discovery:

Q. Where were you born? A. I was born in Hungary.

Q. And you lived there all your life prior to this marriage with Joseph Waktor? A. Yes.

Q. What about Joseph Waktor? Do you know where he lived? A. He once went to Israel and after came back.

Q. Was he in business in Hungary, or was he a teacher? What was his occupation? A. He was in the army and after in a forced labour camp.

[1] [1964] 1 O.R. 430, 42 D.L.R. (2d) 622.

Q. But, he always had lived in Hungary? A. He went to Israel for two years previous to our marriage.

Q. When was that he went to Israel? A. Before he was in—it must be in the service.

Q. That was in the early thirties? A. I don't know.

Q. And then he came back to Hungary? A. *Yes, he could'nt get back.*

Q. And he continued to live in Hungary? A. He was in the labour camp, yes.

And again in her examination-in-chief:

Q. And what happened after you were married? Did you decide to leave Hungary? A. We decided to leave Hungary after we got married.

Q. You had made up your mind to leave before you got married? A. I made up my mind when the Germans was in, that I will leave Hungary after the War.

Q. And was Mr. Waktor of the same mind? A. Yes.

Q. Where did you intend to go? A. To Israel.

Q. And is that where your husband intended to go? A. Yes.

In furtherance of this intention, the newly married couple left Budapest a few weeks after the marriage and started for Israel in company with many thousands of other Hungarians. For the purpose of the journey the respondent testified that they put themselves "in the hands of a Jewish deputy, an Israeli deputy" who appears to have been representing "a few Jewish people who arranged to get people out of Europe to Israel" of whom the respondent says: "They was only organized to take people from all over the world, but mostly from European countries to Israel".

It is to be inferred from the evidence that the Waktors left Hungary having already decided that they would never return, but it does not appear to me that they are to be characterized as "political refugees" in the sense of being people who left under the fear of political oppression. In the case of refugees of the latter type, the possibility of the return of a political climate which would make it safe and practical for them to come home is always a factor to be considered before drawing the inference that they have formed a permanent intention to remain in another country. In the case of the Waktors, however, it appears to me that the dominant motive in their departure was not so much a desire to get away from Hungary as it was their decision to become a part of the new community then in the process of development in Israel which was the country of their racial origin.

For nearly three years the couple moved from one displaced persons camp to another in Germany and Italy *en route* to Israel and in October 1948, when they had reached a camp at Trani in Italy, which proved to be the last stage of their journey, they obtained a Jewish bill of divorcement in conformity with rabbinical law by appearing, in the presence of witnesses, before the rabbi in the camp at which time a formal document entitled a "gett" was delivered to the respondent. This document was not recognized either in Italy where it was delivered or in Hungary which was the Waktors' domicile of origin as bringing the marriage to an end, but it was so recognized in the State of Israel and a few weeks later, when the Waktors finally landed there, they were recognized as having had the status of unmarried persons under the law of that county from the time when the "gett" was delivered.

As I have indicated, there is evidence to the effect that Waktor had lived in Israel for two years before his marriage and that on his return to Hungary he had not been able to get back to Israel because he was placed in a forced labour camp. This affords some ground for the suggestion that when he left Hungary for Israel after his marriage he was returning to a country where he had already established a domicile of choice, and that he was therefore domiciled in a jurisdiction which recognized the validity of a Jewish bill of divorcement at the time when the "gett" was delivered to the respondent at Trani. I do not, however, think that the evidence is sufficiently clear and precise to justify a finding to this effect.

The evidence as to Waktor's life and activities after his arrival in Israel is sketchy but in the course of proving that he was still alive at the time of the respondent's second marriage, the appellant's counsel led evidence to show that, as far as was known, he had remained in Israel from the time that he arrived there, and an extract was introduced from a registration in the census book at Tel Aviv which is dated August 16, 1962, and which states that Waktor is single, that his religion and nationality are Jewish and that he is a resident of Israel from November 20, 1948.

The respondent's evidence discloses that she lived in Israel with her parents for seven and a half years after her arrival and that it was on a trip to New York and Toronto

for the purpose of visiting relatives that she met and married the appellant.

The learned Chief Justice who presided at the trial of this action decided that the respondent was not domiciled in Israel at the time of her second marriage on the ground that while she was in Italy she still retained the domicile of her first husband which was Hungary and that the evidence necessary to support a finding that Waktor had established a domicile of choice in Israel was lacking in this case.

Although there is a presumption against a change of domicile, and the intention to remain permanently in a country other than the country of origin must be accompanied by actual residence in the new country in order to establish a domicile of choice, there may nevertheless be circumstances which so clearly indicate the existence of an intention to remain permanently in the new country that the mere fact of arrival there is enough to establish the new domicile. This proposition finds support in Dicey's Conflict of Laws, 7th ed., p. 96, where it is stated:

> It is not, as a matter of law, necessary that the residence should be long in point of time: residence for a few days or even for part of a day is enough. Indeed, an immigrant can acquire a domicile immediately upon his arrival in a country in which he intends to settle. The length of the residence is not important in itself: it is only important as evidence of *animus manendi.*

In Cheshire's Private International Law, 6th ed., at p. 174, it is said:

> On the other hand, time is not the sole criterion of domicil. Long residence does not constitute nor does brief residence negate domicil. Everything depends upon the attendant circumstances, for they alone disclose the nature of the person's presence in a country.

These views appear to me to be consistent with the observations of Lord Chelmsford in *Bell v. Kennedy*[1], where he had occasion to say:

> It may be conceded that if the intention of permanently residing in a place exists, a residence in pursuance of that intention, however short, will establish a domicile.

It would, in my view, be difficult to conceive of circumstances pointing more forcefully to the existence of an intention to permanently reside in a new domicile than those which were present in the case of the Waktors who, on leaving their domicile of origin, immediately placed

[1] (1868), L.R. 1 Sc. & Div. 307.

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themselves in the hands of a deputy of the country to which they were destined and who thereafter lived for three years in a community of Jewish people all sharing the common purpose of settling in the country of their racial origin.

As I have indicated, Chief Justice McRuer did not consider that the evidence of Waktor's movements after landing in Israel was sufficiently clear and satisfactory to warrant a finding that he had acquired a domicile of choice there, but in my view any frailties which may be thought to exist in that evidence are more than offset by the circumstances preceding his arrival which point so clearly to the existence of his long-held intention to settle in the new country. I accordingly agree with the conclusion reached by MacKay JA. in the course of the reasons for judgment which he delivered on behalf of the Court of Appeal where he says:

> On a reading of all the evidence in this case, I think the proper conclusion is that Waktor (1) had an intention to abandon his domicile of origin in Hungary, and (2) to establish a domicile of choice in Israel; and did so.

I am, however, of opinion that the emphasis which the Courts below have placed on the evidence or lack of evidence as to Waktor's movements after he came to Israel is unnecessary in the present case. In my view the manner of their coming was such as to justify a finding that immediately upon their arrival the Waktors acquired a domicile of choice in Israel where the dissolution of their marriage had been recognized as valid from the moment when the "gett" was delivered to the respondent, and where each of them therefore had the status of a single person with full capacity to enter into a valid and binding contract of marriage. The respondent was thereafter free to continue and did continue to be domiciled in Israel as an unmarried woman until the time of her marriage to the appellant.

I am accordingly of opinion that at the time of her marriage in Toronto the respondent had the capacity to marry according to the law of the country where she was then domiciled. This does not, however, solve the whole problem because as a general rule, under Ontario law a divorce is not recognized as valid unless it was so recognized under the law of the country where the husband was domiciled at the time when it was obtained, and although the validity of the Jewish divorce was at all times recognized in Israel where

the Waktors established a domicile of choice within three weeks of it having been granted, it was never so recognized according to the law of the husband's Hungarian domicile of origin.

The Court of Appeal of Ontario has treated these singular circumstances as constituting an exception to the general rule to which I have just referred. In the course of his reasons for judgment Mr. Justice MacKay has thoroughly and accurately summarized and discussed the authorities bearing on this difficult question and it would in my view be superfluous for me to retrace the ground which he has covered so well. I adopt his reasoning in this regard and agree with his conclusion that, for the limited purpose of resolving the difficulty created by the peculiar facts of this case, the governing consideration is the status of the respondent under the law of her domicile at the time of her second marriage and not the means whereby she secured that status.

For all these reasons I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitor for the plaintiff, appellant: H. W. Silverman, Toronto.

Solicitors for the defendant, respondent: McCarthy and McCarthy, Toronto.