LESLIE OSVATH - LATKOCZY (*Plaintiff*) ..... APPELLANT;

1959
Jun. 10
*Jun. 25

AND

CLARA OSVATH-LATKOCZY and PAUL GUNTHER SCHNEIDER (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Domicile—Divorce—Whether domicile of choice acquired.

The plaintiff, a Hungarian refugee, residing in Ontario, was refused a divorce on the ground that he was not domiciled in the Province. He had been residing in Ontario for eighteen months, had obtained employment in his own line of work and had expressed the intention of setting up his own business in the province. He also had made an application under the Canadian Citizenship Act.

Held: The action for dissolution of the marriage should be maintained. There was a preponderance of evidence that the plaintiff came here as an immigrant intending to settle. The contingency of his return to Hungary was so remote and uncertain that it should not prevent the Court from declaring that he had acquired a domicile of choice in Ontario.

APPEAL from a judgment of the Court of Appeal for Ontario, affirming a judgment of Ferguson J. Appeal allowed.

R. P. Rendek, for the plaintiff, appellant.

No one appearing for the defendants.

The judgment of the Court was delivered by:

JUDSON J.:—The appellant's action for divorce was dismissed on the ground that he was not domiciled in the Province of Ontario. This dismissal was affirmed on appeal, MacKay J. A. dissenting. The marriage took place at the City of Budapest on October 31, 1955, where the husband and wife lived together until November 4, 1956. They then left Hungary for a refugee camp in Vienna where they lived until January 17, 1957. They left there for Canada on that date and arrived in Halifax on February 9, 1957. From Halifax they went to Toronto and lived together in a refugee centre until March 1, 1957. They

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separated when they left this centre and have not lived together since that date. The wife is now living with another man, who is her co-defendant in the action.

The husband, who had been trained as a forester in Hungary, obtained employment in his own line of work at Shelburne, Ontario. He was still so employed when he commenced this action on April 2, 1958, and at the date of the trial, November 3, 1958. He stated that he expected to continue to follow this occupation in Ontario and that he hoped eventually to get some land of his own and get into the business for himself. Up to a certain point in the evidence he made it very clear that he intended to remain in Ontario permanently or for an indefinite period. His expressed intention is strongly supported by the fact of his having secured work for which he was trained and by his early filing, under s. 10(1) (*a*) of the *Canadian Citizenship Act*, of the necessary declaration of intention to become a Canadian citizen.

The learned trial judge put to him the following questions and received the following answers:

Q. If the Russians were out of Hungary, you would go back to Hungary?
A. No, the Russians come in 1945.
Q. I mean, would you go back to Hungary if the Russians were out of Hungary?
A. Yes.

The learned trial judge then expressed the opinion that these answers ended the case. The witness, however, after further questioning by counsel, did state that he had no hope or expectation that political conditions would permit of his return.

With respect, in my opinion there was error in the judgment in attributing this conclusiveness to the one answer given by the plaintiff and in putting aside the other evidence of intention to reside permanently in Ontario, supported, as it was, by a residence of eighteen months at the time of trial and the declaration of intention filed under the *Canadian Citizenship Act*. In spite of the circumstances in which this man left his native land, there is a preponderance of evidence in this case that he came here as an immigrant intending to settle. Even if the answer does amount to a

declaration of intention to return to Hungary for permanent residence, of which I have serious doubt in view of qualifications subsequently made, the contingency of his return was, in his opinion, so remote and uncertain that it should not prevent the Court from declaring that he had acquired a domicile of choice in Ontario.

The principle to be applied is that stated in *Lord v. Colvin*[1], which was adopted in *Wadsworth v. McCord*[2], and followed in *Gunn v. Gunn*[3]:

> That place is properly the domicile of a person in which he has voluntarily fixed the habitation of himself and his family, not for a mere special and temporary purpose, but with a present intention of making it his permanent home, unless and until something (which is unexpected or the happening of which is uncertain) shall occur to induce him to adopt other permanent home.

I would allow the appeal without costs and direct that judgment be entered for the dissolution of the marriage with costs against the male defendant.

Appeal allowed without costs.

Solicitor for the plaintiff, appellant: F. Vass, Toronto.

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[1] (1859), 4 Drew. 366 at 376, 62 E.R. 141.
[2] (1886), 12 S.C.R. 466 at 475.
[3] (1956), 18 W.W.R. 85, 2 D.L.R. (2d) 351.