



IN THE HIGH COURT OF MALAWI
AT BLANTYRE
CIVIL CAUSE NO. 35 OF 1978

ANNE ELIZABETH WHITELOCKPETITIONER

versus

JOHN FREDERICK WHITELOCK RESPONDENT

Coram: **Mead, J.**
Savjani of Counsel for the Petitioner
Raval of Counsel for the Respondent
Official Interpreter - Machisa
Court Reporter - Warr

JUDGEMENT

The petitioner Anne Elizabeth Whitelock petitions for the dissolution of her marriage with the respondent John Frederick Whitelock on the ground of his adultery with a woman named as Jean -Peacock. The respondent entered appearance under protest on the ground that he is not domiciled in Malawi, and therefore the court has no jurisdiction to entertain the proceedings. The issue of jurisdiction has been heard as a preliminary issue. The petitioner, as plaintiff, and the respondent, as defendant, gave evidence on which each was cross-examined. Neither party called a witness,

The following facts are common ground. The respondent was born in a suburb of Liverpool, England on the 25th September, 1931 of English parents. The respondent's father John Halifax Whitelock was born in Manchester, England, in 1904 and the respondent's mother Dorothy Margaret Whitelock was born in Liverpool, England in 1900. The respondent's father, now retired, is a research engineer, his domicile as being English is not challenged. The respondent was educated in England, obtaining degrees in engineering, he is a member of the Institute of Mechanical Engineers, London. In 1952 the respondent went with his brother to South Africa where they both sought employment. The respondent found employment as an engineer with a gold mining company, for which company he worked in areas outside Johannesburg from 1952 to 1958. In 1952, after the respondent had gone to South Africa, the respondent's father and mother and two sisters went to live in South Africa. where the respondent's father is still living; his mother having died meantime. There is no evidence that the respondent's father has abandoned his English

domicile for a South African domicile. It is not necessary to consider that point. The respondent became of age on the 25th September, 1952, at that date he was domiciled in England. There is no evidence that the respondent acquired a South African domicile of choice. On the 7th November, 1959, the parties were married in Johannesburg. The petitioner, born in South Africa of English parents, holds dual British and South African nationalities. In 1963 the respondent obtained employment in Malawi with it The Imperial Group Limited as an engineer, by which company the respondent is still employed, working and living at Limbe. There are three children of the marriage, Christopher John born 14th July, 1963, Richard Gordon born 23rd March, 1965 and Jennifer Mary born 3rd May, 1969. The petitioner and respondent decided that due to a shortage of qualified teachers in Malawi at the material time to send the two boys to school in Rhodesia. The petitioner was strongly of the view that it was in the interests of the family that the children should be at school near to the parents, and urged the respondent to try to find employment somewhere where it would be possible for the family to live together. The respondent made efforts to find employment out of Malawi. It is his evidence, unchallenged, that he was not able to find employment with remuneration and conditions comparable to that he was receiving in Malawi. The petitioner said that the reason the respondent gave for not leaving Malawi was that the respondent said he liked his work and he liked living in Malawi.

The issue is whether the respondent has abandoned his English domicile of origin and has adopted a Malawi domicile. The petitioner's evidence amounts to no more than an expression by the respondent that he was unwilling to leave Malawi because he liked the work he was required to do in Malawi and because he liked living in Malawi. On that evidence I cannot find any intention on the respondent's part to abandon his domicile of origin, England, and to adopt a Malawi domicile.

The respondent gave evidence. I find from his evidence that he is satisfied that he is unlikely to obtain employment out of Malawi that would provide him with better employment remuneration and conditions than he is now enjoying, and that unless he were able to find employment providing better remuneration and conditions he does not intend to leave Malawi. The respondent says his contract with his employer Imperial Group Ltd. provides for his compulsory retirement at the age of sixty years, after which he will be entitled to receive a pension. The respondent says that at the termination of that contract he has no intention of remaining in Malawi, that he has the intention of returning to England and that to enable him to receive a State Pension under the English National Health and Retirement Pension Scheme he is contributing to that scheme. In cross-examination the respondent said his intention to return to England for retirement was partly motivated by sentimental reasons, the desire of an Englishman to return to his country and partly motivated by the material benefits to be obtained by persons on retirement in England. He said also, in effect, that he regarded permanent residence in an African country as suitable only for indigenous persons. The respondent conceded the thought that the woman named in these proceedings is English, with her relations in England, might go to live in England might have some influence on his intents. I find from the respondent's evidence that he does not own any real property in Malawi. He has an interest in a cottage on Lake Malawi shared with twenty other employees of the Imperial Group Ltd for holiday purposes. I do not regard the lack of real property as fatal to the petitioner's proposition. The respondent's purpose in coming to Malawi was to take up what he considered to be remunerative employment. The respondent's intention expressed in his evidence regarding his future stay in is that he will remain here so long as that situation continues, and that if he works to the age limit of his contract, sixty years of age, he will then leave the country and return to England.

He further said, in cross-examination, that if on such retirement he were offered employment on terms comparable with those he was enjoying at the date of retirement he would not accept such employment. Learned Counsel for the respondent cited the decision in **Winans v. Attorney-General** (1904) A.C. 287 H.L. and **Ramsey v. Liverpool Royal Infirmary** (1930) A.C. 588 H.L. in support of his submission that the petitioner had failed to prove the abandonment by the respondent of his domicile of origin. By these decisions it was held that before a court would uphold a claim that a person had abandoned a domicile of origin for a domicile of choice there had to be strong evidence of a positive intention to reside permanently in the domicile of choice. **In the Estate of Fuld Deceased: Hartley and another v. Fuld and others** (1968) P. 675, **Scarman J.** as he then was, having considered the **Winans** and **Ramsey** decisions in conjunction with other leading decisions on the law concerning a change of domicile said at 684:

"In the light of these cases the law, so far as relevant to my task, may be stated as follows:

- (1) the domicile of origin adheres unless displaced by satisfactory evidence of the acquisition and continuance of a domicile of choice;*
- (2) a domicile of choice is acquired only if it be affirmatively shown that the propositus is resident within a territory subject to a distinctive legal system with the intention, formed independently of external pressures, of residing there indefinitely. If a man intends to return to the land of his birth upon a clearly foreseen and reasonably anticipated contingency, e.g. the end of his job, the intention required by law is lacking; but, if he has in mind only a vague possibility, such as making a fortune (a modern example might be winning a football pool), or some sentiment about dying in the land of his fathers, such a state of mind is consistent with the intention required by law."*

I regard that exposition of the law as applicable to the present case.

Upon the evidence of the petitioner and the respondent I find the respondent's present intention regarding his length of stay in Malawi to be that he will stay in Malawi so long as he is able to find either in his present employment or by employment elsewhere in Malawi employment that satisfies him as regards remuneration and conditions, and that when that employment ceases, either by effluxion of time on retirement or otherwise, he will return to England. The respondent's intention to leave Malawi and return to England is a clearly foreseen and reasonably anticipated contingency of the nature envisaged by **Scarman J.** In assessing the respondent's evidence, I have not overlooked that he is resisting the petitioner's proposition that he has abandoned his domicile of origin. Following the approach adopted by **Lord Penzance** in **Wilson v. Wilson** 1872. L.R. 2 P. & D. 435 at 444 to the evidence of a person whose domicile is in question, I have considered whether there are circumstances in the case, which tend to disprove what the respondent has said about his residential intentions. On the evidence as a whole I do not find any circumstances to show that what the respondent says is not true. I find that the respondent has rebutted the petitioner's assertion that the respondent has changed his domicile. I repeat, the burden of proof is

upon the petitioner. I cannot find on her evidence an intention by the respondent to remain in indefinitely.

I hold that this court has no jurisdiction to entertain the petitioner's petition. I dismiss the petition. I sympathise with the petitioner in the predicament in which she now finds herself because, as I understand, she has no personal ties or connexion with England, the place of her domicile by virtue of her marriage. This court cannot assume a jurisdiction, even by consent, from which it is precluded by law.

Learned counsel for the respondent does not ask for costs. I make no order as to costs.

Pronounced in Open Court this 10th day of March, 1978, at Blantyre.

J. W. MEAD
JUDGE

