WINDRUM *v.* WINDRUM & OR.

[In Divorce (Corrie, C.J.) April 26, August 12, 1938.]

Petition for divorce—petitioner born in Guernsey—appointed to post in Fiji in 1929—issue as to domicil—whether finding as to domicil in former divorce proceedings by same petitioner is conclusive as to acquisition of domicil of choice—whether confession of adultery in other proceedings is admissible—evidence as to connivance considered.

J. E. Windrum the petitioner in this case was born in Guernsey in 1895 and came to an appointment in Fiji in 1929. In 1929 he obtained a decree of of dissolution of this marriage and, in 1930, he married the present respondent. In 1935 petitioner filed a petition against the present respondent but abandoned it for lack of evidence. In January 1939 the present petition was filed. In March 1938 in civil proceedings which were not of a matrimonial character both respondent and co-respondent gave evidence admitting mutual adultery.

HELD.—(1) A decree of dissolution of marriage being a judgment *in rem* to which a finding that the petitioner was domiciled within the jurisdiction is essential and ascertainable by inevitable inference from the decree itself is conclusive as to domicil at the date of the decree.

(2) Admissions of adultery by the respondent in other proceedings are admissible evidence in a petition for dissolution of marriage.

Cases referred to :—

(1) *Castrique v. Imrie* [1870] L.R. 4 H.L. 414 ; 39 L.J.C.P. 350 ; 23 L.T. 48 ; 30 Dig. 127.

(2) *Barrs v. Jackson* [1842] 62 E.R. 1028 ; 21 Dig. 165.

(3) *Concha v. Concha* [1886] 11 Ap. Cas. 541 ; 56 L.J.Ch. 257 ; 55 L.T. 522 ; 21 Dig. 170.

(4) *Wilson v. Wilson* [1872] L.R. 2 P. & D. 435 ; 41 L.J.P.M. 74 ; 11 Dig. 422.

(5) *Le Mesurier v. Le Mesurier* [1895] App. Cas. 517 ; 64 L.J.P.C. 97 ; 72 L.T. 873 ; 11 T.L.R. 481 ; 11 Dig. 422.

(6) *Bell v. Kennedy* [1868] 1 Sc. & Div. 307 ; 11 Dig. 312.

(7) *Ross v. Ross* [1930] A.C. 1.

(8) *Bowie or Ramsay v. Liverpool Royal Infirmary* [1930] A.C. 588.

(9) *Hodgson v. Beauchesne* [1858] 14 E.R. 920.

(10) *Hartley v. Hartley & Fleming* [1919] 35 T.L.R. 298 ; 27 Dig. 300.

(11) *Robinson v. Robinson* [1858] 1 S. & T. 362.

(12) *Gifford v. Gifford & Freeman* [1926] 43 T.L.R. 141.

PETITION FOR DISSOLUTION OF MARRIAGE. The facts are fully set out in the judgment.

The issue of petitioner's domicil having been raised by the co-respondent was set down for trial, judgment on the issue being pronounced on April 26, 1938.

J. S. M. Park, for the petitioner.

R. A. Crompton, for the respondent.

D. M. N. McFarlane, for the co-respondent.

Petitioner gave evidence to the effect that he had elected Fiji as his domicil of choice and a decree of August 1, 1929 in previous divorce proceedings was put in.

D. M. N. McFarlane, for the co-respondent, submitted that the decision of a court whereby it gave itself jurisdiction was always open to examination and was not conclusive in other proceedings (*Castrique v. v. Imrie* ; *Barrs v. Jackson*). He pointed out that the earlier proceedings were undefended and the co-respondent unknown—there was nothing to show that the question of domicil was even in issue. He referred to *Ross v. Ross* ; *Bowie or Ramsay v. Liverpool Railway Infirmary* ; *Hodgson v. Beauchesne.*

J. S. M. Park, for the petitioner : The earlier decree was a decree of this Court. The Court must presume that its own proceedings are regular. Where domicil is the basis of jurisdiction it must be presumed that the Court satisfied itself as to this before exercising jurisdiction. He referred to *Concha v. Concha* ; *Wilson v. Wilson* ; *Le Mesurier v. Le Mesurier* ; *Bell v. Kennedy.*

CORRIE, C.J.—On the 3rd March, 1939, this Court upon the application of Colin Woollam Anderson, who is named as co-respondent in the petition presented by James Edward Windrum for the dissolution of his marriage with Neville Windrum, ordered that an issue be tried as to whether the petitioner and the respondent are domiciled within the jurisdiction of this Court.

The petitioner was born in Guernsey and on the 10th June, 1919, was married in Guernsey to Margaret Emma Crowden.

In 1921 the petitioner joined the Colonial Administrative Service and was appointed to a post in Fiji where he has since served.

On the 29th April, 1929, this Court granted the petitioner a decree *nisi* of dissolution of his marriage with Margaret Emma Windrum, formerly Margaret Emma Crowden : and on the 1st August, 1929, the decree was made absolute.

On the 22nd April, 1930, the petitioner was married in Fiji to the respondent, then Neville Scott.

On the 26th of January, 1938, the petitioner presented a petition to this Court praying for the dissolution of his marriage with the respondent and that the costs of the proceedings be paid by the present applicant.

On behalf of the petitioner it is argued that, so far as any proceedings before this Court are concerned, the decree issued in 1929 establishes conclusively that at that time the petitioner had acquired a domicil of choice in Fiji ; as, had such not been the case, this Court would not have had jurisdiction to grant the decree. The petitioner further maintains that the domicil of choice then established has persisted.

A decree of dissolution of marriage is a judgment *in rem* and hence is binding upon strangers as regards the status which it establishes ; but in order that a judgment *in rem* may conclude strangers as to any finding of fact besides the status of title which it establishes, it is necessary that the finding should be essential to the judgment and ascertainable without ambiguity from the judgment itself.

The decree of dissolution of marriage issued in 1929 did not contain an express finding as to domicil.

The validity of that decree, however, cannot be questioned in this Court, and a finding that the petitioner was then domiciled in Fiji was essential to the validity of the decree and is ascertainable by inevitable inference from the decree itself.

There is no evidence that would suggest that the petitioner has since lost the domicil of choice then acquired.

Even, however, if the decree of 1929 were not conclusive, there is evidence that the petitioner has acquired a domicil in Fiji.

His family home in Guernsey has been sold with his consent : his health, to which the climate of Fiji is beneficial, will not permit him to live in Guernsey or the United Kingdom : and he has stated on oath before this Court that it is his intention upon retirement to remain in Fiji and to live and die there.

The Court therefore finds that the petitioner has acquired a domicil of choice in Fiji.

The facts and arguments on the hearing of the petition appear from the judgment.

J. S. M. Park, for the petitioner.

Grahame, for the co-respondent.

Respondent unrepresented.

CORRIE, C.J.—The petitioner, James Edward Windrum, is seeking to have his marriage with the respondent, Neville Windrum, dissolved on the ground of her adultery with the co-respondent, Colin Woollam Anderson.

The respondent has not entered an appearance.

The co-respondent has filed an answer in which he does not deny the adultery alleged, but sets up other defences.

Evidence has been given that in other proceedings in this Court, which were not of a matrimonial character,[1] the respondent and co-respondent each admitted on oath the commission of adultery.

The co-respondent's counsel has objected to these statements being given in evidence on the ground that as the co-respondent has not denied the adultery, he could not have been asked in cross-examination any question tending to prove that he had committed adultery ; and hence that an answer to a question of that nature in other proceedings ought to be excluded.

[1] *Anderson and Windrum* [1938] 3 *Fiji L.R.— is a report of an application in the action referred to.*

It is clear, however, that a confession of adultery made in other proceedings is admissible in evidence. Thus in *Hartley and Fleming*, 35 T.L.R., p. 298, evidence was admitted that the respondents wife had been a witness at the trial of the petitioner for attempting to murder her and had admitted in cross-examination that has had been living with the co-respondent.

I therefore hold that as against both the respondent and the co-respondent adultery is proved.

The co-respondent, however, is resisting the issue of a decree upon the ground of the petitioner's connivance at the commission of adultery and of his delay in taking proceedings.

As regards connivance the co-respondent's plea is two-fold.

In the first place he alleged that it was with the full knowledge, permission and acquiescence of the petitioner and in pursuance of an arrangement made by the petitioner, through his agent Sir Henry Scott, that the respondent committed adultery with the co-respondent at Auckland in order to provide grounds for divorce proceedings.

In the second place, the co-respondent alleges that the proceedings for divorce instituted by the petitioner in 1935 were collusive, the petitioner having through his agent, Sir Henry Scott, entered into an arrangement with the co-respondent, the terms of which were :—

(*a*) that the petitioner should not claim damages :
(*b*) that the co-respondent should pay the petitioner's costs to an amount not exceeding £150 :
(*c*) that no defence should be entered by the respondent or co-respondent : and
(*d*) that the respondent and co-respondent should furnish evidence of adultery.

The co-respondent argues, in reliance upon the judgment in *Gifford v. Gifford and Freeman*, 43 T.L.R., p. 141, that, having entered into a collusive arrangement of that nature, the petitioner, in the words of the Learned President in that case, " had prevented himself from complaining any more of adultery, whether that adultery was past or future ".

It must be noted that both of these pleas are based upon arrangements alleged to have been made by Sir Henry Scott as agent for the petitioner.

Correspondence between Sir Henry Scott, who is the respondent's father, and the co-respondent has been read. From this correspondence it is clear that the former was making arrangements with the latter as to the divorce proceedings and was advising as to the best method of supplying evidence to be used in those proceedings.

In one respect the situation disclosed by this correspondence is remarkable.

The co-respondent was a married man and thus, while he may well have been in a position to support the respondent, he was not in a position to marry her.

In these circumstances it is surprising to find that Sir Henry Scott should be active in making arrangements for his daughter to be divorced, with the apparent intention that she should continue an adulterous association with the co-respondent.

This Court, however, has not heard Sir Henry Scott's explanation of his conduct, with which it is not concerned : his actions are material only in so far as they may affect the position of the petitioner.

Sir Henry Scott and the petitioner have both given evidence and have sworn that in his negotiations with the co-respondent, the former was not acting on behalf of the latter.

Against this testimony counsel for the co-respondent points to the fact that in his letter to the co-respondent dated the 15th January, 1935. Sir Henry Scott stated that there would be " no damages "; and suggested that the co-respondent should be described in the petition as " of Auckland, Gentleman "; that he was so described in the petition and that no damages were in fact claimed.

In my view, however, this is an insufficient ground for rejecting the evidence of the petitioner and Sir Henry Scott ; and on the evidence before me I hold that in his negotiations with the co-respondent Sir Henry Scott was not acting on the petitioner's behalf : and hence that the petitioner did not connive at his wife's adultery.

The co-respondent has also pleaded that the petitioner should be refused a decree on the ground of his delay in presenting his petition.

The co-respondent's case is that the petitioner was aware when he presented his petition in 1935 of the adultery of the respondent and co-respondent ; that evidence was easily obtainable ; and that there is no excuse for his failure to present another petition until nearly three years later.

The petitioner's reply is that he withdrew the petition he had filed in 1935 because he was advised that the evidence he then had was insufficient proof of adultery ; that he could not afford to employ a private detective to watch the respondent : and that while he heard many rumours, he had no further evidence to submit until he presented this petition.

Apart from the admissions by the respondent and co-respondent, which were made in proceedings in this Court in the month of March of the present year the only evidence which the petitioner has been able to bring before this Court in these proceedings is that of Miss Harcourt, which certainly would not by itself be sufficient proof of adultery.

I accept the petitioner's statement that he was not in a position to obtain further evidence ; and accordingly I hold that he has furnished a satisfactory explanation of his delay in taking proceedings.

The defences set up by the co-respondent therefore fail.

A decree *nisi* will issue with costs against the co-respondent.