JOYCE MAE SANDERS *v.* BRUCE FITZROY SANDERS

[Divorce Jurisdiction (Hyne, C.J.) April 23rd, 1953]

Divorce—domicile of petitioner—whether residence creates domicile.

The petitioner who resided in Fiji was married to the respondent, an Australian, who had come to work in Fiji on 10th August, 1946, at Suva. The petitioner was deserted by the respondent in December, 1946, and therafter the petitioner instituted divorce proceedings, which failed on the ground that the respondent's Fiji domicile had not been proved. The petitioner then later again petitioned for a divorce.

HELD.—(1) Entry of appearance in proceedings is not evidence of domicile.

(2) Mere permanency of residence does not create domicile.

Cases referred to:—

Le Mesurier v. Le Mesurier (1895) A.C. 532.
Jack v. Jack, 24 Court Sess. Cas. 2nd Series.

Ann Bernard for the petitioner.

P. Rice for the respondent.

HYNE, C.J.—It is now necessary to consider whether the petitioner was domiciled in Fiji at the commencement of the proceedings, and whether the Court has jurisdiction to entertain the petition.

On her marriage the petitioner acquired the domicile of her husband. A married woman is always domiciled in the country where her husband has domicile, though she has never lived there, and any change of domicile of the husband during marriage results in an automatic change in the domicile of the wife.

It is contended by the petitioner that her husband has acquired a Fiji domicile. What is the evidence on this point? First of all it is said that he is living in Fiji. This is not disputed, but the mere fact of living in Fiji does not create a Fiji domicile. It is said that since coming to Fiji in June, 1946, from Australia—it is not disputed that his domicile of origin is Australia, and it is immaterial whether this be derived from a particular State—apart from a short leave in Australia in 1950, the respondent has been continually resident in Fiji. Mere residence, however, does not give him a Fiji domicile. It must be shown that in relation to Fiji he has the *animus manendi ;* that is, that he has formed the intention of remaining in Fiji permanently. The petitioner said in evidence that the respondent, on being told of the reason for the failure of the previous proceedings, said to her that Fiji was his permanent home, and that he would never leave Fiji except for a holiday. That he said so to the petitioner is not for one moment doubted, but it must be remembered that the respondent himself had expressed the desire to be freed from the marriage tie, and his statement to the petitioner might quite conceivably have been guided by motives of self-interest. I cannot therefore place any particular reliance on this statement nor regard it as conclusive evidence of an intention to acquire permanent residence in Fiji and thus obtain a Fiji domicile. To the petitioner's mother the respondent said before his marriage that he liked Fiji and that it suited him very well. This statement, too, cannot in my opinion be considered as an intention to remain in Fiji permanently.

Since his arrival in Fiji, according to the evidence before the Court, the respondent has had three different employers. First of all, he was with Millers' at Lautoka; then he worked for some time at the Lautoka Hotel, and now is employed by Burns Philp (S.S.) Co. Ltd. at Lautoka. He lives in lodgings and, in my opinion, has made no attempt to settle in a manner which suggests an intention to remain permanently in the Colony.

If I understand petitioner's Counsel correctly, it is contended that, since the respondent submitted to the jurisdiction of this Court by entering an appearance in these proceedings, this suggests an intention to remain in Fiji. I am afraid I cannot accept this as any evidence of domicile.

Learned Counsel has referred to the case of *Le Mesurier v. Le Mesurier* (1895) A.C. at p. 532, with special emphasis on the case of *Jack v. Jack* 24 Court Sess. Cas. 2nd Series, mentioned therein. This is a Scottish case in which the Court of Session for the first time formulated the idea of a matrimonial domicile " resting upon a somewhat indefinite permanency of residence ". Counsel submits that the observations of the *Lord President Inglis* (*then Lord Justice Clerk*) apply in the present case.

The case of *Jack v. Jack* and other Scottish cases were carefully reviewed by their Lordships, and at p. 536 *Lord Watson* said:—

> " When carefully examined, neither the English nor the Scottish decisions are, in their Lordships' opinion, sufficient to establish the proposition that, in either of these countries, there exists a recognized rule of general law to the effect that a so-called matrimonial domicile gives jurisdiction to dissolve marriage."

The concluding sentence of the headnote to this case sums up succinctly the decision of their Lordships on the question:—

> " A so-called ' matrimonial domicile ', said to be created by a bona fide residence of the spouses within the territory, of a less degree of permanence than is required to fix their true domicile, cannot be recognized as creating such jurisdiction."

While one cannot but have much sympathy for the petitioner, it is impossible, on the evidence, to come to any conclusion other than that she has failed to establish a domicile in Fiji at the commencement of the proceedings.

Although Counsel did not refer to the matters following, consideration has been given to section 32 of the Supreme Court Ordinance, Cap. 2, which confers divorce jurisdiction on this Court. The section provides that divorce jurisdiction may be exercised in conformity with the law and practice for the time being in force in England, but such jurisdiction is subject to the provisions of the Supreme Court Ordinance and any other Ordinance and to rules of Court. In view of section 35 of the Supreme Court Ordinance, Cap. 2, it is not possible, therefore, to invoke the provisions of section 1 (i) (*a*) of the *Law Reform (Miscellaneous Provisions) Act,* 1949, the material words of the section being:—

> " The High Court in England shall have jurisdiction in proceedings by a wife for divorce, notwithstanding that the husband is not domiciled in England, if the wife is resident in England, and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings."

Whether this marriage comes within the *Matrimonial Causes (War Marriages) Ordinance of* 1945 has not been argued before this Court. If the Ordinance does apply to this marriage, then the Court must be satisfied that the wife was domiciled in Fiji at the date of the marriage, and that since the celebration of the marriage the parties have not resided together in the country in which the husband was domiciled. There is not sufficient material before this Court to determine whether the Ordinance is applicable to the present proceedings.

The petition must again be dismissed because the petitioner has failed to prove a Fiji domicile.