MATRIMONIAL REFERENCE.

Before Sir Shadi Lal, Chief Justice, Justice Sir Alan Broadway and Mr. Justice Fforde.

MURPHY, Petitioner

versus.

MURPHY AND ANOTHER, Respondents.

1929

Jan. 25.

Matrimonial Reference No. 2 of 1928

Indian Divorce Act, IV of 1869, section 2 (as amended by Indian Divorce (Amendment) Act, XXV of 1926, section 2)—Suit for dissolution of marriage—Domicil—should be shewn in petition and decided by Court— Jurisdiction of District Court—Indian and Colonial Divorce Jurisdiction Act, 16, 17 Geo. 5, chapter 40—English soldiers—Domicil of origin—change of—burden of proof—expression of intention—whether sufficient.

Held, that it is the duty of the District Judge, when a petition for dissolution of marriage comes before him, to satisfy himself that the parties to the marriage were domiciled in India at the time when the petition was presented and to see that the petition itself contains a declaration to that effect; and, before hearing the suit, to satisfy himself that the parties are in fact domiciled in India.

Held further, that the mere expression of intention to acquire a new domicil is not enough to prove the change of domicil. There must be in addition such conduct on the part of the person claiming to have acquired the new domicil as to leave the Court in no doubt as to the reality and irrevocable character of his expressed intention.

Winans v. *Attorney General* (1), and *In* re *Macreight* (2), followed.

Case referred by Lt.-Col. W. A. Garstin, Divisional Judge, Peshawar, with his No. 1829, dated the 5th December 1927.

FAIRLIE and KAHAN CHAND, for Petitioner.

Nemo, for Respondents.

(1) 1904 A. C. 287. (2) (1885) 30 Ch. D. 165.

JUDGMENT.

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FFORDE J.—This is a suit for dissolution of marriage brought under the provisions of the Indian Divorce Act of 1869 as amended by the Indian Divorce (Amendment) Act, 1926. The suit was brought in the Court of the Divisional Judge at Peshawar who granted a decree *nisi* dissolving the marriage. When the decree came up for confirmation to this Court, under the provisions of section 17 of the Indian Divorce Act, it was observed by the Court that there was no finding as to the domicil of the petitioner, which *prima facie* would appear to the British. The case was accordingly remanded to the Divisional Judge for a finding upon the issue whether the petitioner was at the time of the presentation of the petition domiciled in British India. The Court on the trial of that issue, after hearing evidence, found that the petitioner's domicil at the time of the presentation of the petition was English.

The petitioner has again come up to this Court for confirmation of the decree of dissolution of marriage contending that the finding of the learned Divisional Judge on this matter of domicil is erroneous and that his domicil is in fact British India. To this contention, I regret, I am unable to accede.

The petitioner is a Sergeant in the 1st Battalion of the Rifle Brigade. He came out to India with a draft of his battalion in December, 1922, and has remained with that battalion in India up to the present time. He admits that his domicil of birth was English, but claims that he has abandoned his domicil or origin and adopted a new domicil in British India. The only evidence he has been able to produce in support of this alleged change of domicil in addition

to his own statement is the evidence of two corporals of his battalion who have deposed that they have heard him express a resolve to settle down and live permanently in India after he had finished his time in the Army.

I am in agreement with the conclusion of the learned Divisional Judge that this evidence of the expression of an intention to adopt India as a permanent home is not sufficient to prove that a new domicil of choice has been acquired in substitution for the domicil of origin. In *Winans* v. *Attorney-General* (1), it was held that " the domicil of origin continues unless a fixed and settled intention of abandoning the first domicil and acquiring the second domicil is clearly shown." Lord Halsbury L.C. observed as follows :—"Now the law is plain, that where a domicil of origin is proved it lies upon the person who asserts a change of domicil to establish it, and it is necessary to prove that the person who is alleged to have changed his domicil had a fixed and determined purpose to make the place of the new domicil his permanent home." Lord Macnaghten in the course of his judgment has expressed himself as follows :—" In *Munro* v. *Munro* (2), Lord Cottenham observed that it was one of the principles adopted, not only by the law of England, but generally by the laws of other countries, ' that the domicil of origin must prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicil and acquiring another, as his sole domicil.....Residence alone,' he adds, ' has no effect *per se*, though it may be most important as a ground from which to infer intention.'

(1) 1904 A. C. 287. (2) (1840) 7 Cl. & F. 876.

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Again, 'The Law,' said Lord Cairns, L.C. 'is beyond all doubt clear with regard to the domicil of birth that the personal status indicated by that term clings and adheres to the subject of it until an actual change is made by which the personal status of another domicil is acquired.' " And after quoting Lord Westbury's view that an intention to acquire a domicil other than the one of origin must be a fixed and settled purpose, and that unless you are able to show that with perfect clearness and satisfaction to yourselves, it follows that a domicil of origin continues—Lord Macnaghten observed: "So heavy is the burden cast upon those who seek to show that the domicil of origin has been superseded by a domicil of choice—and rightly I think, a charge of domicil is a serious matter—serious enough when the competition is between two domicils both within the ambit of one and the same kingdom or country—more serious still when one of the two is altogether foreign. The change may involve far-reaching consequences in regard to succession and distribution and other things which depend on domicil."

It seems to me clear from *Winans* v. *Attorney-General* (1), that the mere expression of intention to acquire a new domicil is not enough to prove the change. There must be in addition such conduct on the part of the person claiming to have acquired the new domicil as to leave the Court in no doubt as to the reality and irrevocable character of his expressed intention.

In the case before us there has been nothing in the petitioner's conduct to show that he had finally and irrevocably determined to make India his

(1) 1904 A. C. 287.

permanent home. The fact that he is in the Military service of the Crown in India does not suggest that his original domicil has been abandoned. In *re Macreight* (1), Pearson J. observed : "As I understand the rule of law it is that a British subject does not by merely entering into the British army abandon his domicil, and his remaining in the army is no evidence of an intention to abandon the domicil which he had at the time when he entered it, but, so long as he remains in the army, he retains that domicil which he had when he entered it." From this passage I do not understand the learned Judge to mean that a person while serving in His Majesty's forces can never acquire a new domicil, but merely that he must be deemed to retain his domicil of origin while so serving unless his conduct shows that he has intended to relinquish his original domicil for a new one. It is possible that a soldier in the British army might, while still in the service, be proved to have changed his domicil by acts which would show that he had intended to make the country in which he is serving his permanent home. For instance, if he had bought land and built a house on it and made preparations for carrying on some permanent business in the new country. Conduct of this kind might furnish evidence to show that the domicil of origin has been definitely and finally abandoned and a new one acquired. We have, however, nothing of the kind here. The result is that the petitioner must be deemed to retain his original British domicil.

The effect of this finding is that the Divisional Judge, Peshawar, had no jurisdiction to try this suit. The Indian Divorce (Amendment) Act, 1926, has

(1) (1885) 30 Ch. D. 165.

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enacted that for the 2nd, 3rd and 4th paragraphs of section 2 of the Indian Divorce Act the following shall be substituted, namely :—" Nothing hereinafter contained shall authorise any Court to grant any relief under this Act except where the petitioner professes the Christian religion, or to make decrees of dissolution of marriage, except where the parties to the marriage are domiciled in India at the time when the petition is presented."

The duty of the District Courts, when a petition for dissolution of marriage comes before them, to satisfy themselves that the parties to the marriage are domiciled in India at the time when the petition is presented, cannot be too strongly emphasized. The Court should see that the petition itself contains a declaration, to that effect; and, before hearing the suit the Court should first satisfy itself that the parties are in fact domiciled in India. The failure to take these precautions has led to very great hardship in the present case. The petitioner has incurred much expense and been put to a great deal of trouble and anxiety to no purpose.

I regret that, for the reasons I have given, this application must be dismissed.

SHADI LAL C.J. SIR SHADI LAL C.J.—I concur.

BROADWAY J. SIR ALAN BROADWAY J.—I concur.

N. F. E.

Petition dismissed.