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*Mar. 13, 15.

*June 22.

JANE WADSWORTH (DEFENDANT).....APPELLANT;

AND

F. A. McCORD, *et al.* (PLAINTIFFS).....RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Matrimonial domicile—Declaration in Act of Marriage—Civil status—Arts. 63, 65, 79, 80, 81, 83, *C. C.* (*P.Q.*)

In or about 1822, W., a native of Ireland, came to Canada and was employed as a shantyman on the Bonnechère, in the Province of Upper Canada. In 1827 he got out timber for himself, and in 1828, while in Quebec, where he was in the habit of going every summer with rafts of timber, he was engaged to be married to one M. Q., the widow of one McM., in his life-time of Upper Canada. W. was married to the widow in the month of September and shortly after his marriage he returned to the Bonnechère to carry on lumbering operations there as formerly, and on his way up left his wife and daughter in the neighbourhood of Aylmer, in Lower Canada. In the winter he came down for her and brought her to his home on the Bonnechère and lived there for 10 or 12 years and acquired considerable wealth.

W. declared in the presence of the priest who performed the ceremony that he was a *journalier de la Province de Quebec*, and he was so described in the certificate of marriage.

M. Q. having died without a will, W. married again, and by his will left his property to his second wife, the appellant.

The respondents, by their action, claimed there was community of property between M. Q., their grandmother, and W. according to the laws of Lower Canada and demanded their share of it in right of heirships.

The appellant disputed this claim, contending there was no community.

Held, reversing the judgment of the court below, Fournier and Taschereau JJ. dissenting, that the facts of the present case were not sufficient to prove that W. had acquired a domicile in the Province of Quebec at the time of this marriage.

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*PRESENT—Sir W. J. Ritchie C.J., and Fournier, Henry, Taschereau and Gwynne JJ.

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Also, that the certificate *Acte de Mariage*, has only relation to residence in connection with matrimonial domicile, and, therefore, has relation to the ceremony of marriage and its validity alone, and not to domicile in reference to the civil status of the parties.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1), affirming the judgment of the Superior Court in favor of the respondent.

The facts and pleadings are fully stated in the report of the case in the court below and in the judgment hereinafter given.

Laflamme Q.C. and *Fleming* Q.C. for appellants.

Barnard Q.C. *Creighton* and *Foran* for respondents.

The arguments relied on and cases cited are fully reviewed in the judgments hereinafter given.

Sir W. J. RITCHIE C.J.—The appeal is from a judgment of the Court of Queen's Bench for Lower Canada, appeal side, rendered on the 25th November last confirming the judgment rendered on the 13th day of May, 1884, by the Superior Court of Lower Canada, sitting at Aylmer, for the district of Ottawa. This latter judgment declared that James Wadsworth who married Margaret Quigley in the city of Quebec on the 23rd September, 1828, was domiciled in Quebec as stated in the marriage certificate, and that, in consequence, a community of property between himself and his wife resulted under the law of Lower Canada from the marriage, in the absence of a marriage contract to the contrary.

The law which settles questions of domicile which must determine this case is, I think, established beyond all question. In the first place, it cannot be disputed that the domicile of James Wadsworth, as distinguished from his residence at the time of his marriage, governs the rights of the parties, and I presume it will not be

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disputed that no man can be without a domicile. As to the distinction between domicile and residence, Lord Westbury, in *Bell* v. *Kennedy* (2), says:—

> Now, residence and domicile are two perfectly distinct things. It is necessary in the administration of the law that the idea of domicile should exist, and that the fact of domicile should be ascertained, in order to determine which of two municipal laws may be invoked for the purpose of regulating the rights of parties. We know very well that succession and distribution depend upon the law of the domicile. Domicile, therefore, is an idea of law. It is the relation which the law creates between an individual and a particular locality or country. To every adult person the law ascribes a domicile, and that domicile remains his fixed attribute until a new and different attribute usurps its place.

Burge on colonial and foreign laws, (3):—

> The place in which the marriage is celebrated may not be that of the domicile of either of the parties, before, or at the time of, or after the marriage. It may have been resorted to for no other purpose than that of celebrating the marriage, and they may have quitted it when the ceremony was performed.
>
> It ought always to be remembered, that the question whether the status has been constituted by means of a legal marriage, is perfectly distinct from the consideration of the rights, powers and capacities, which the status confers. The enquiry whether the status has been constituted, is answered by the law of the country in which the marriage was contracted. If, by a marriage which according to that law is valid, the status is constituted the connection of the parties with the law of that country ceases, unless that place be the domicile of the husband; and then its law governs, not because the marriage was celebrated there, but because it is the country of the husband's domicile. The parties, if they do not by an express agreement on their marriage stipulate as to their future rights and capacities, are presumed to submit to them as they have been defined by some municipal law; and the law, which it is presumed they contemplate, is not that of a country in which they have no intention to reside, and to which, therefore, their status cannot be subject, but that of the country in which, as it is the place of their domicile, their rights and capacities are to be exercised.
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> Jurists, therefore, concur in selecting the law of the domicile

(1) 2 M. L. R. Q. B. 113. (2) 1 Sc. App. 307.
(3) Vol. 1, 244, Par. 2.

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of the husband and wife, as that which determines the personal powers and capacities incident to their status, and not the law of the place in which the marriage was celebrated.

J. Voet, after laying down the rule that the wife's rights and capacities are those which are conferred by the law of her husband's domicile, however injurious they may be to her interests, treats of the effect of his change of their domicile.

Dicey on the law of domicile (1) says:

Where there is no marriage contract or settlement the mutual rights of husband and wife to each other's movables, whether possessed at the time of the marriage or acquired afterwards, are determined by the law of the husband's actual domicile at the time of the marriage, without reference to the law of the country where the marriage is celebrated or where the wife is domiciled before marriage.

And Mr. Westlake in his treatise on private international law (2) to effect of marriage on property, says:

Savigny begins by laying it down as the accepted principle "that the property of the spouse is to be regarded according to the domicile of the husband, not according to the place where the marriage was contracted."

It is equally clear that the domicile of an infant is, during infancy, the domicile of his father, which he retains on attaining majority until he changes it.—Dicey p. 7.

And again (3) Dicey says:

Residence in a country is not even *prima facie* evidence of domicile, when the nature of the residence either is inconsistent with, or rebuts the presumption of, the existence of an intention to reside there permanently (*animus manendi*).

And in the case of *Bell* v. *Kennedy*, before referred to, the Lord Chancellor says:

The law is, beyond all doubt, clear with regard to the domicile 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 domicile is acquired.

Per Lord Westbury:

The domicile of origin adheres until a new domicile is acquired.

And as the Lord Chancellor in the same case, says:

(1) At page 21. (2) At page 61, sec. 30.
(3) At page 9.

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The onus of proving the change of domicile is on the party who alleges it.

And Lord Chelmsford, in the case of *Morehouse* v. *Lord* (1) says:

Lord Chelmsford:

In a question of change of domicile the attention must not be too closely confined to the nature and character of the residence by which the new domicile is supposed to have been acquired. It may possibly be of such a description as to show an intention to abandon the former domicile; but that intention must be clearly and unequivocally proved. What was said by my noble and learned friend, Lord Wensleydale, in *Aikman* v. *Aikman* (2), lays down the rule upon this subject very clearly: "Every man's domicile of origin" (and this is to be considered as a domicile of origin resumed) "must be presumed to continue until he has acquired another sole domicile by actual residence, with the intention of abandoning his domicile of origin. This change must be *animo et facto*, and the burthen of proof unquestionably lies upon the party who asserts that change."

In *Aikman* v. *Aikman* (3) Lord Wensleydale says:

Every man's domicile of origin must be presumed to continue until he has acquired another sole domicile by actual residence, with the intention of abandoning his domicile of origin. This change must be *animo et facto*, and the burthen of proof unquestionably lies upon the party who asserts that change. This rule is laid down in the case of *Somerville* v. *Somerville* (4), and has been acted upon ever since.

In *Munro* v. *Munro* (5) the Lord Chancellor says:

Questions of domicile are frequently attended with great difficulty; and as the circumstances which give rise to such questions are necessarily very various, it is of the utmost importance not to depart from any principles which have been established relative to such questions, particularly if such principles be adopted, not only by the laws of England, but generally by the laws of other countries. It is, I conceive, one of those principles that the domicile 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 domicile and acquiring another as his sole domicile. Such, after the fullest consideration of the authorities, was the

(1) 10 H. L. Cas. 272.
(2) 3 MacQ. H. L. Cas. 877.
(3) 3 MacQ. H. L. Cas. 877.
(4) 5 Ves. 787.
(5) 7 C. & F. 876.

principle laid down by Lord Alvanley, in *Somerville* v. *Somerville* (1), and from which I see no reason for dissenting So firmly indeed did the civil law consider the domicile of origin to adhere, that it holds that if it be actually abandoned and a domicile acquired but that again abandoned and no new one acquired in its place, the domicile of origin revives. To effect this abandonment of the domicile of origin, and substitute another in its place, it required *le concours de la volonté et du fait; animo et facto;* that is, the choice of a place; actual residence in the place then chosen, and that it should be the principal and permanent residence; the spot where he had placed *larem rerumque ac fortunarum suarum summum;* in fact there must be both residence and intention. Residence alone has no effect *per se*, though it may be most important as a ground from which to infer intention. Mr. Burge, in his excellent work, 1 Comm. Col & For Laws, 54, cites many authorities from the civilians to establish this proposition. It is not, he says, by purchasing and occupying a house or furnishing it, or vesting a part of his capital there, not by residence alone, that domicile is acquired, but it must be residence with the intention that it should be permanent. In allegations depending upon intention difficulties may arise in coming to a conclusion upon the facts of any particular case, but those difficulties will be much diminished by keeping steadily in view the principle which ought to guide the decision as to the application of the facts.

Munro v. *Munro* (2) Lord Brougham says :—

Now up to 1794 it is perfectly clear that the domicile was Scotch, and it appears to be agreed on all hands that the rules which Sir William Grant, then master of the rolls, extracted, as he said, from various decisions, the Annandale case, *Bruce* v. *Bruce*, and other cases, to all of which your lordships have been referred, were correct rules. The third of those rules which he extracted from decisions is very material in the present instance, and seems undeniable as the rule of the Scotch, as well as of the English courts; and I apprehend it is the rule universally that, where a domicile has been constituted, the proof of the change of domicile is thrown upon the party who disputes it, and that you must show distinctly that there has been the animus as well as the factum; there has been a desire and intention to change the domicile, as well as the fact of leaving that place of residence, in order to alter the former domicile and to acquire a new one.

Hodgson v. *DeBeauchesne* (3), The Right Hon. Dr.

(1) 5 Ves. 787. (2) 7 C. & F. 891.

(3) 12 Moore P. C. C. 328.

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Lushington says:—

In *Munro* v. *Munro* (1), Lord Cottenham said: "To effect this abandonment of the domicile of origion and substitute another in its place, it required *le concours de la volonté et du fait*; *animo et facto*; that is, the choice of a place; actual residence in the place then chosen, and that it should be the principal and permanent residence; the spot where he had placed *larum rerumque ac fortunarum suarum summum*; in fact, there must be both residence and intention. Residence alone has no effect *per se*, though it may be most important as a ground from which to refer intention. Mr. Burge (2), in his excellent work cites many authorities from the civilians to establish this proposition."

In *Collier* v. *Rivaz* (3), Sir Herbert Jenner Fust said: "Length of time will not alone do it; intention alone will not do; but the two taken together, do constitute a change of domicile."

In *Munro* v. *Douglas* (4), Sir John Leach observed: "A domicile cannot be lost by mere abandonment. It is not to be defeated *animo* merely, but *animo et facto*." It was clearly the opinion of that learned judge, that, to constitute domicile, intention and residence must concur. Denisart (5), quotes authority to the same effect, that neither the intention without the fact, nor the fact with the intention, can create a domicile.

Dicey (6) says:

D., a domiciled Englishman, leaves England with the intention of never returning there, and travels about the world without settling anywhere. He is domiciled in England.

In *Udny* v. *Udny* (7) the Lord Chancellor says:

It appears to me that sufficient weight was not given to the effect of the domicile of origin, and that there is a very substantial difference in principle between an original and an acquired domicile. I shall not add to the many ineffectual attempts to define domicile. But the domicile of origin is a matter wholly irrespective of any *animus* on the part of its subject. He acquires a certain *status civilis*, as one of your lordships has designated it, which subjects him and his property to the municipal jurisdiction of a country which he may never even have seen, and in which he may never reside during the whole course of his life, his domicile being simply determined by that of his father. A change of that domicile can only be affected *animo et facto*; that is to say, by the choice of

(1) 7 C. & F. 877.
(2) 1 Comm. Col. & For. Laws, 54.
(3) 2 Curt. Ecc. Rep. 857.
(4) 5 Madd. 40.
(5) Tome 1 Title Domicile.
(6) At p. 60.
(7) I. Sc. App. 449.

another domicile, evidenced by residence within the territorial limits to which the jurisdiction of the new domicile extends.

The Lord Chancellor (1):

I have stated my opinion more at length than I should have done were it not of great importance that some fixed common principles should guide the courts in every country on international questions. In questions of international law we should not depart from any settled decisions, nor lay down any doctrine inconsistent with them. I think some of the expressions used in former cases as to the intent *exuere patriam*, or to become "a Frenchman instead of an Englishman," go beyond the question of domicile. The question of naturalization and of allegiance is distinct from that of domicile. A man may continue to be an Englishman, and yet his contracts and the succession to his estate may have to be determined by the law of the country in which he has chosen to settle himself. * * *

Lord Westbury (2):

The law of England, and of almost all civilized countries, ascribes to each individual at his berth two distinct legal states or conditions; one by virtue of which he becomes the subject of some particular country, binding him by the tie of natural allegiance, and which may be called his political status; another, by virtue of which he has ascribed to him the character of a citizen of some particular country, and as such is possessed of certain municipal rights and subject to certain obligations, which latter character is the civil status or condition of the individual, and may be quite different from his political status. The political status may depend on different laws in different countries; whereas the civil status is governed universally by one single principle, namely, that of domicile, which is the criterion established by law for the purpose of determining civil status. For it is on this basis that the personal rights of the party, that is to say, the law which determines his majority or minority, his marriage, succession, testacy, or intestacy must depend. International law depends on rules which, being in great measure derived from the Roman law, are common to the jurisprudence of all civilized nations. It is a settled principle that no man shall be without a domicile, and to secure this result the law attributes to every individual as soon as he is born the domicil of his father, if the child be legitimate, and the domicile of the mother if illegitimate. This has been called the domicile of origin and is involuntary. Other domiciles, including domicile by operation of law, as on marriage, are domiciles of choice. For as soon as an individual is *sui juris* it is competent to him to elect and assume another

(1) P. 452. (2) P. 457.

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domicile, the continuance of which depends upon his will and act. When another domicile is put on, the domicile of origin is, for that purpose, relinquished, and remains in abeyance during the continuance of the domicll of choice; but as the domicil of origin is the creature of law, and independent of the will of the party, it would be inconsistent with the principle on which it is by law created and ascribed, to suppose that it is capable of being by the act of the party entirely obliterated and extinguished. It revives and exists whenever there is no other domicil, and it does not require to be regained or reconstituted *animo et facto*, in the manner which is necessary for the acquisition of a domicil of choice.

Domicil of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time. This is a description of the circumstances which create or constitute a domicil, and not a definition of the term. There must be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the the relief from illness; and it must be residence fixed not for a limited period or particular purpose, but general and indefinite in its future contemplation. It is true that residence originally temporary, or intended for a limited period, may afterwards become general and unlimited, and in such a case so soon as the change of purpose or *animus manendi*, can be inferred the fact of domicil is established.

In Mr. Justice Story's Conflict of Laws (the last edition) it is stated that "the moment the foreign domicile (that is the domicile of choice) is abandoned, the native domicile or domicile of origin is re-acquired."

And such appears to be the just conclusion from several decided cases, as well as from the principles of the law of domicil.

Lord Colonsay (1):

I regard this case as one of very considerable importance, inasmuch as it has afforded an opportunity for bringing out, more clearly than has been done in any of the former cases, the radical distinction between domicile of origin and domicile of choice.

Lord Chelmsford (2):

It is undoubted law that no one can be without a domicile.

Lord Chelmsford (3):

But in a competition between a domicile of origin and an alleged subsequently acquired domicile there may be circumstances to shew

(1) p. 461. (2) p. 453.

(3) p. 455.

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that however long a residence may have continued no intention of acquiring a domicile may have existed at any one moment during the whole of the continuance of such residence. The question in such a case is not whether there is evidence of an intention to retain the domicile of origin, but whether it is proved that there was an intention to acquire another domicile. As already shown, the domicile of origin remains till a new one is acquired *animo et facto*.

What will constitute a change of domicile has been frequently enunciated in the highest courts. Thus in *Lord* v. *Colvin* (1) the Vice Chancellor:

I would venture to suggest that the definition of an acquired domicile might stand thus: "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 some other permanent home."

I am disposed to think that the definition thus modified would be found to be in accordance with most, if not all, of the leading decisions on the subject of acquired domicile.

But whatever may be the most correct and proper terms in which to frame a definition of domicile, this at least is clear and beyond controversy, that to constitute an acquired domicile two things are requisite, act and intention, *factum et animus*. To use the language of an eminent jurist, to whose admirable writings I have before referred, "two things must concur to constitute domicile (of course he is speaking of acquired domicile); first, residence; and secondly, the intention of making it the home of the party." There must be the fact and the intent; for, as Pothier has truly observed, a person cannot establish a domicile in a place, except it be *animo et facto*.

Jopp v. *Wood* (2).

Marginal note.

(1) 4 Drew. 376. (2) 34 Beav. 88.

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A domiciled Scotchman went to India, where he was engaged in merchantile pursuits for nine years. Held, that this residence and occupation in India did not in the absence of any expression of intention change his domicile. Held, that the domicile of J S. at his death was Scotch, and that the domicile of his children, who were born in India and died infants there, was that of their father.

Sir J. Romilly, the Master of the Rolls:

It is quite settled that two things are necessary to constitute a change of domicile; first, the factum of the change of residence; and next, the *animus manendi*. In other words, in order to effect a change of domicile, the person must have settled in a residence out of his former domicile, whether it be the domicile of origin or an acquired domicile; and he must also have the intention of making that residence his permanent home.

On appeal, *Jopp* v. *Wood* (1), the Lord Justice Turner says:

But nothing is better settled with reference to the law of domicile than that the domicile can be changed only *animo et facto*, and although residence may be decisive as to the factum, it cannot when looked at with reference to the animus, be regarded otherwise than as an equivocal act. The mere fact of a man residing in a place different from that in which he has been before domiciled, even although his residence there may be long and continuous, does not of necessity show that he has elected that place as his permanent and abiding home. He may have taken up and continued his residence there for some special purpose, or he may have elected to make the place his temporary home. But domicile, although in some of the cases spoken of as "home," imports an abiding and permanent home, and not a mere temporary one. The effect of residence or domicile is well explained by Dr. Lushington in his very able judgment in *Hodgson* v. *DeBeauchesne* (2), and I entirely agree in the opinion which is there expressed upon the subject.

In considering cases of this description it must be borne in mind that the acquisition of a new domicile involves an abandonment of the previous domicile; and in order, therefore, to effect the change, the animus of abandonment, or, as Lord Cranworth has strongly expressed it, the intention *exuere patriam*, must be shown.

Lord v. *Colvin*, February 14th, (3), Vice-Chancellor Kindersley's Court, domicile:

That place is properly the domicile of a person in which he has

(1) 4 DeG. J. & S. 621. (2) 12 Moo. P. C. C. 285.
(3) 5 Jur, N. S. 351.

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 uncertain) shall occur to induce him to adopt some other permanent home.

To constitute an acquired domicile two things must concur, residence, and the intention of making it the home of the party.

The two last cases on the subject that I saw were both decided in 1885 affirming the same principles.

In re Patience, Patience v. *Main* (1).

Marginal note:

P. was born in Scotland, in 1792. of Scotch parents. In 1810 he obtained a commission in the army, and immediately proceeded with his regiment on foreign service, and served abroad till 1860, when he retired from the army. From 1860 till his death he resided in lodgings, hotels, and boardings houses in various places in England, dying in 1882, intestate and a bachelor, in a private hotel in London, leaving no real estate in England, and no property whatsoever, in Scotland. From the year 1810 till his death he never revisited Scotland, and for the last twenty-two years of his life never left the territorial limits of England.

Held.—That the domicile of the intestate at his death was Scotch.

The Lauderdale Peerage (2):

A change of domicile must be a change of residence *sine animo revertendi.* A temporary residence for the purposes of health, travel, or business does not change the domicile. Also (1) every presumption is to be made in favor of the original domicile; (2) no change can occur without an actual residence in a new place; and (3) no new domicile can be obtained without a clear intention of abandoning the old.

Page 739, Earl of Selborne:

The onus of proving a change of domicile, *animo et facto*, lies upon those who assert it.

Page 758, Lord Fitzgerald:

The extent to which the evidence must be carried to put an end to the domicile of origin is explained in clear terms in the Countess of Dalhousie's Case (3), and in *Munro* v. *Munro* (4), both of which were in this house, and reported in Clark and Finelly. It is not upon light evidence or upon a light presumption that we can act, but it must clearly appear by unmistakable evidence that the party

(1) 29 Ch. D. 976.
(2) 10 App. Cas. 693.
(3) 7 C. & F. 817.
(4) 7 C. & F. 842.

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who has a domicile of origin intends to part with it and intends to establish his domicile elsewhere.

I cannot discover that these principles are peculiar to the law of England; they are of universal application as principles of private international law, and so far as the Province of Quebec is concerned, there is nothing in the law of that province antagonistic to them. The code says, art. 79:

The domicile of a person, for all civil purposes, is at the place where he has his principal establishment.

Art. 80:

Change of domicile is affected by actual residence in another place, coupled with the intention of the person to make it the seat of his principal establishment.

Art. 81:

The proof of such intention results from the declarations of the person and from the circumstances of the case.

Art. 83:

* * * * The domicile of an unemancipated minor is with his father or mother or with his tutor.

I think, then, we may assume it to be established beyond all question:

First.—That no man can, at any time, be without a domicile.

Secondly.—That the domicile of the father is the domicile of the child during minority, and continues until changed, until a new domicile is acquired after majority.

Thirdly.—That the onus of proof of change of domicile is on the party alleging it.

Fourthly.—That domicile and residence are two distinct things, and that domicile must be ascertained to determine which of two municipal laws regulates the rights of the parties.

Fifthly.—That in order to lose a domicile of origin and acquire another, there must be a residence, and the intention of making the residence a permanent home and not a residence for a mere special or temporary

purpose; in other words, domicile imports an abiding and permanent home, and not a mere temporary one; there must be the *factum* of residence and the *animus manendi*.

Sixthly.—That the rights of the husband and wife are determined by the domicile of the husband at the time of the marriage, and not by the place where the marriage was contracted.

If this be so, then the plaintiff's claim must be founded on the contention that at the time of the marriage of James Wadsworth with Margaret Quigley, at Quebec, in the then Province of Lower Canada, he was domiciled in that province, and that by virtue of the laws thereof, in force at the time of the said marriage and still in force therein and by which the said marriage was governed, on the celebration of such marriage, there being no contract of marriage, the legal community of property was established which, on the death of Margaret Quigley, enured to the benefit of her children; and so that really the question in issue is, subject to the principles I have deduced from the cases, one of fact.

Wadsworth's history, not a very eventful one, shortly told is this. He was born of Irish parents, his father being a farmer resident and domiciled in the parish of Ematros, county of Monaghan, in Ireland. In 1822, at the age of 19 or 20, he emigrated; whether he came direct to Canada or not does not appear; if he did, which may be assumed, it is not shown in what part of Canada he landed. The first information we have of his whereabouts in Canada is from Mr. Mather, who saw him on the Bonnechere, in Upper Canada, now Ontario, in the year 1826, where he was lumbering in the employ of one McMullen. The market for the timber cut on the Bonnechere was at Quebec, to which place it was taken in rafts in the spring or summer season,

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on which rafts it is well known the raftsmen live during the progress to Quebec. Wadsworth was employed in taking rafts to Quebec, and when they were sold or disposed of, returning to the Bonnechere. His employer, McMullen, was killed in the year 1827; he had sent to Ireland for his wife, who came out to Quebec with her daughter in the spring of that year, where, on her arrival, she heard of the death of her husband, who had been killed a short time before She went from Quebec to Hull, and remained there for some months, when she determined to go back to Ireland, and for that purpose returned to Quebec on her way to Ireland. After the death of her husband the lumber business was carried on for the benefit of his partner Kelly, and his widow; in the spring of 1828 a raft in which Kelly and Mrs. McMullen were interested was brought to Quebec by Wadsworth. Mrs. McMullen, then in Quebec, boarded at Mulholland's, and for a portion of the time that Wadsworth was in Quebec on this occasion he appears to have boarded at the same house. While there Mrs. McMullen, instead of proceeding to Ireland, married Wadsworth on the third of September, 1828; immediately after Wadsworth left Quebec with his wife and returned to the Bonnechere, leaving his wife for a short time at Hull on their way up. Wadsworth in a few weeks returned to Hull for his wife and took her to the Bonnechere, where he purchased a property with a shanty on it, in which he and his wife from that time lived, until he subsequently built a house. He cleared land, farmed, lumbered, and dealt in furs with the Indians, and never again returned to Quebec with his family; nor did he himself visit Quebec for any other than the temporary purpose of taking down rafts and disposing of them there; he, with his wife and family, lived in the house on the Bonnechere, where his lumbering operations were car-

ried on; his children were born there, and one, if not two, died and were buried there; and he continued to reside there as his home for ten or twelve years, until he sold out his establishment to Mr. Egan and removed to the neighborhood of Hull, where he purchased a farm, as his sister, who was then married and settled there, says, to be near her, and subsequently left this neighborhood and resided in Ottawa several years, where his wife died. He married the defendant there, and afterwards moved, on the 9th of May, 1873, to Hull, where he resided until his death at that place.

There is no contradiction in the evidence in this case to which I will now refer. The facts are undisputed; the witnesses examined were the relatives Jane Wadsworth, sister of James Wadsworth, William Wadsworth, his brother, and Susan McMullen, daughter of his first wife by her husband McMullen and the intervenor in this case and others. (His Lordship here referred at length to the evidence of the different witnesses as establishing the facts above stated.)

How then is this apparently plain case met? Simply by the production of the marriage certificate of James Wadsworth and Margaret Quigley at the city of Quebec, in which certificate Wadsworth is described as, James Wadsworth, *journalier de cette ville.* It is as follows:

Extrait du Registre des baptêmes, marriages et sépultures de la paroisse de Notre Dame de Québec, pour l'anne mil huit cent vingt-huit:

Le vingt-trois septembre mil huit cent vingt-huit, vu la dispense de deux bans de mariage accordée par Monseigneur Bernard Claude Panet, évêque de Québec, en date du vingt du présent mois, et la publication du troisième faite au prône de notre messe paroissale de dimanche dernier entre James Wadsworth, journalier de cette ville, fils majeur de William Wadsworth et de défunte Matilda McCabe, du comté de Monaghan en Irlande, d'une part; et Mary Quigley, veuve majeure de James McMullen, du township de Napean dans le Haut Canada, d'autre part; ne s'étant découvert aucun empêchement,

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nous, prêtre, vicaire de Québec soussigné, avons reçu leur mutuel consentement de mariage, en presence de Hugh Green et de James MacAnally, amis de l'époux. et de Rebecca Donaughy et de Catherine Dupel, amis de l'épouse, dont quelques uns avec les époux ont signé avec nous, les autres ayant déclaré ne le savoir faire.

Duly signed and certified.

Now, with all respect for those from whom I am constrained to differ, in my opinion this certificate has nothing whatever to do with the matter in controversy in this case, inasmuch as it has no connection with the question of domicile. Art. 63 says:

The marriage in solemnized at the place of the domicile of one or the other of the parties. If solemnized elsewhere the person officiating is obliged to ascertain and verify the identity of the parties. For the purposes of marriage domicile is established by a residence of six months in the same place.

But surely for no other purpose.

This certificate has only relation to residence in connection with matrimonial domicile, which latter domicile is established by a residence of six months, and therefore has relation to the ceremony of marriage and its validity alone, and not to domicile in reference to the civil status of the parties which is regulated by art. 6, which declares that:

The laws of Lower Canada relative to persons apply to all persons being therein, even to those not domiciled there; subject, as to the latter, to the exception mentioned at the end of the present article.

Which exception is:

But these laws do not apply to persons domiciled out of Lower Canada, who, as to their status and capacity, remain subject to the laws of their country.

Then, as these laws do not apply to persons domiciled out of Lower Canada, there is not, that I can discover, a jot or tittle of evidence to show that Wadsworth was ever in the city of Quebec with any other than a mere temporary purpose; when in the employ of others taking their rafts to market, when lumbering for himself taking his rafts to market for sale; living either on the raft or in a boarding house, and return-

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ing, when his business was transacted, to the Bonnechere, where the lumbering operations in which he was engaged, either for others or for himself, were carried on, and to which locality, immediately after his marriage, or so soon as conveniently could be, he carried his wife and made it, for the time being, the permanent and fixed place of residence of himself and family, and the chief place where the operations of his business were carried on, and never voluntarily fixed the habitation of himself and family in the Province of Quebec.

There seems to me to be everything wanting in this case to establish a Lower Canadian domicile; that his domicile of origin was in Ireland is beyond question; the evidence shows that his visits to Quebec and temporary sojourn there were for a mere special and temporary purpose; that he was never there with the present intention of making it his permanent home; that his stay in Quebec did not an abiding and permanent home but a mere temporary one, nor had he any actual residence there with the intention of making it the seat of his principal establishment, but his principal establishment was always out of Quebec; that there was neither the *factum* of residence in Quebec, nor the *animus manendi*; and therefore there is no pretence for saying that he had changed his domicile of origin and acquired a domicile of choice in Quebec.

The real question in this case is not whether the domicile of James Wadsworth was in Ireland or in Upper Canada; what the plaintiffs have to establish to enable them to recover is, that James Wadsworth's domicile at the time of his marriage was in the province of Quebec. Having failed to establish this, but, on the contrary, it being clearly established, as I think it was, that his domicile was out of the province of Quebec,

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the plaintiffs have failed to establish the community claimed.

FOURNIER J.—Les Intimés réclament la succession de leur aïeule, Margaret Quigley, mariée deux fois, la première à James McMullen ou Mullen, et la deuxième à James Wadsworth. Ce dernier mariage a eu lieu à Québec, le 23 septembre 1828, sans contrat de mariage et aurait d'après les Intimés, établi une communauté de biens entre les conjoints. Les demandeurs intimés sont les enfants du second mariage et l'intervenante aussi intimée est issue du premier. Ils réclament la moitié des biens laissés par James Wadsworth comme ayant été commun en biens avec leur mère Margaret Quigley.

Cette demande a été rencontrée par une défense au fonds en fait et une défense en droit. Puis une exception péremptoire alléguant qu'avant et après son mariage avec Margaret Quigley, James Wadsworth résidait à Eganville, dans la province d'Ontario où il faisait des affaires et possédait des propriétés immobilières avant son mariage et diverses limites à bois qu'il tenait de la couronne ; qu'il n'avait jamais eu de domicile dans le Bas-Canada du vivant de Margaret Quigley et qu'il n'y avait point fait affaires et n'y avait pas acquis de propriétés immobilières à l'exception d'une seule à Aylmer. Dans un deuxième plaidoyer répétant le premier, l'appelante allègue que c'est par erreur que James Wadsworth a été désigné dans son acte de mariage, comme de la cité de Québec ; qu'il n'y résidait que temporairement, son domicile étant alors à Eganville, dans le Haut-Canada, où il est retourné de suite après son mariage. Par un troisième plaidoyer il est allégué que son domicile était encore en Irlande d'où il avait émigré.

Le sort de cette cause dépend uniquement de la déci-

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sion de la question de savoir où était le domicile de James Wadsworth lors de son mariage à Québec, le 23 septembre 1828. S'il était réellement à Québec comme le comporte son acte de mariage, il s'en suit d'après la loi de cette province qu'il y aurait eu communauté de biens entre James Wadsworth et Margaret Quigley et que les Intimés comme héritiers de cette dernière seraient bien fondés à réclamer leurs parts dans cette communauté. Au contraire, s'il était alors domicilié à Eganville (ou Bonnechère) dans le Haut-Canada, la loi de cette province n'admettant pas la communauté de biens entre époux, la demande des Intimés doit être rejetée. Il en serait de même s'il n'avait acquis un domicile ni à Québec, ni à Eganville et qu'il eût conservé son domicile d'origine en Irlande, car la loi de ce pays n'admet pas non plus la communauté de biens entre les conjoints.

Il paraît que la succession est assez considérable ; de là l'importance de la question de domicile.

La preuve assez contradictoire qui a été produite par les parties fait de cette cause un exemple de plus des difficultés que présente très souvent la décision des questions de domicile, surtout lorsqu'il s'agit d'en assigner un à des personnes qui ont fréquemment changé de résidences. Mais ces difficultés ne proviennent pas de l'obscurité du droit à cet égard, car, au contraire les principes qui règlent cette matière sont clairement énoncés dans le code civil qui n'a pas dérogé à cet égard à l'ancien droit français. Après avoir lu la revue si savante et si complète que l'honorable juge en chef a faite des décisi ns des tribunaux anglais sur les questions de domicile, on voit que les principes généraux dans la jurisprudence anglaise sont, à peu de chose près, les mêmes que ceux du droit français. La raison en est que dans l'un, comme dans l'autre droit, les principes sont tirés du droit romain La principale différence que j'y trouve et dont je parlerai plus loin, consiste

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dans les règles de la preuve suivie en France et dans notre droit, règles qui restreignent plus la preuve testimoniale que celles qui sont suivies dans les tribunaux d'Angleterre. C'est principalement pour cette raison, et non pour différence d'opinions sur les principes généraux du droit au sujet du domicile que j'en suis arrivé à une conclusion différente de celle de l'honorable juge en chef.

James Wadsworth qui émigra d'Irlande en 1822, n'était qu'un journalier au service d'un marchand de bois d'abord du nom de Mullen ou McMullen qui, à cette époque, manufacturait du bois l'hiver sur la rivière Bonnechère, dans Ontario, et le transportait en été au marché de Québec. C'est à ce travail que Wadsworth fut employé jusquà la mort de McMullen et jusqu'à ce qu'il pût faire des affaires pour son propre compte. Il continua pendant plusieurs années ce commerce, passant l'hiver dans la forêt à la préparation de son bois qu'il descendait ensuite au marché de Québec, où il résidait jusqu'à ce qu'il en eût disposé et obtenu de nouvelles avances pour recommencer ses opérations pour une autre année.

McMullen qui avait laissé en Irlande sa femme, Margaret Quigley, et sa fille Susan Mullen, l'intervenante, les ayant fait demander de venir le rejoindre au Canada, celles-ci arrivèrent à Québec en 1827 où elles apprirent la mort de Mullen avant d'avoir pu le rencontrer.

Après une année de résidence à Hull chez Benedict, la veuve de Mullen se rendit à Québec dans le but d'y prendre un passage pour retourner en Irlande ; mais ayant fait la rencontre de Wadsworth qui s'y trouvait pour affaire de commerce de bois, un mariage fut arrêté entre eux, et célébré en face de l'église catholique romaine, à Québec, le 23 septembre 1828. Après un court séjour dans cette ville, ils se rendirent chez Bene-

dict, à Hull, dans la province de Québec, où Margaret Quigley avait demeuré depuis son arrivée en Canada.

Les circonstances qui précédèrent ou suivirent ce mariage sont rapportées comme suit par Susan Mullen :

Mr. Wadsworth boarded in the same house with us (himself and Margaret Quigley, her mother), but when he came there, or how long he was there before the marriage, I cannot say. I cannot say if he was there a fortnight before the wedding. I think he was. We boarded at Mulholland's. Mr. Wadsworth came to Quebec on a raft of timber. We remained at olland's after the marriage until we left Quebec.

After the marriage and some time in October, Mr. Wadsworth, my mother and I came up to Hull where we stayed at George King's. Mr. Wadsworth left for the woods after settling us at King's. He went up before the ice took. My mother and I remained at King's until Mr. Wadsworth returned in January eighteen hundred and twenty-nine, when he took my mother up the Bonnechère and took me to Mr. Fulford's, in Hull.

Avant son mariage, il est difficile de dire que Wadsworth, qui ne résidait que temporairement en hiver dans la forêt pour y faire du bois, en été sur les radeaux qu'il conduisait à Québec, où il séjournait jusqu'à ce qu'il en eût disposé, et ensuite à Hull jusqu'au moment de repartir pour la forêt, ait eu un domicile dans une de ces localités plus que dans l'autre. Il n'y a pas de preuve qu'il ait fait à cette époque aucune déclaration montrant son intention de se fixer permanemment plutôt dans l'une que dans l'autre. La double condition de résidence de fait et la preuve d'intention de résider permanemment ne se rencontrant pas, Wadsworth n'y avait donc pas acquis encore un nouveau domicile.

L'Appelante a allégué dans ses plaidoyers qu'il possédait des immeubles à Bonnechère avant son mariage ; mais cette allégation n'est aucunement prouvée. Il n'est pas même certain qu'il y faisait alors des affaires pour son propre compte, car les témoins ne peuvent dire si les radeaux qu'il descendit à Québec en 1828,

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année de son mariage, était pour son propre compte ou celui de Kelly, l'associé de Mullen qui avait continué avec la veuve de celui-ci les affaires de leur société jusqu'au moment où elle se préparait à retourner en Irlande. Wadsworth, lors de son mariage, ne possédait aucune propriété à Bonnechère et n'y avait point de domicile. Il avait résidé autant à Québec qu'à Bonnechère, et s'il est difficile de dire que son domicile fut plutôt dans le Haut que dans le Bas-Canada, il n'est pas douteux cependant que par la déclaration qu'il fit de son domicile à Québec, dans son acte de mariage, il ait renoncé au domicile qu'on aurait pu lui attribuer en Irlande.

Mather, l'un des principaux témoins sur lesquels l'Appelante s'appuie pour prouver le domicile de Wadsworth à Bonnechère, donne un témoignage assez vague et qui se réduit à dire que lorsqu'il a connu Wadsworth, celui-ci vivait et faisait du bois dans le voisinage de la rivière Bonnechère, maintenant Eganville, Ontario. Il ne l'a pas vu à cet endroit, mais il l'a vu monter et descendre l'Ottawa pour aller à ses affaires et descendre des radeaux dans le printemps. Il ne sait pas si c'est la première année qu'il a fait sa connaissance, et Wadsworth faisait alors du bois pour lui-même, mais la deuxième année qu'il dit être celle de son mariage, il descendait un radeau, que lui Mather pensait appartenir à Wadsworth, mais il ne peut dire positivement si c'était à lui ou s'il n'en était que le conducteur (foreman). Il ajoute qu'il a compris de Wadsworth, que, avant et après son mariage, sa résidence (his home) était alors à Bonnechère. Lorsqu'il venait pour ses affaires à Hull, il se retirait soit chez Fulford soit chez Benedict, ou à l'hôtel Columbian. A cette époque, il n'y avait pas d'hôtel à Ottawa. Lorsqu'il venait de Québec il se retirait à Hull dans quelque maison de pension jusqu'à ce qu'il eut fait ses approvisionnements pour ses travaux d'hiver. Il ne

peut dire combien de temps il restait chaque fois à Hull, —il n'y restait que le temps nécessaire pour ses affaires —ne peut dire si c'était trois ou quatre semaines ou non. Quelques fois les approvisionnements pouvaient être expédiés par eau, d'autres fois il fallait attendre la glace. C'était dans le printemps de l'année de son mariage qu'il descendit un radeau comme je l'ai déjà dit. Il revint durant l'été ou l'automne de la même année avec sa femme. Peu de temps après il laissa l'hôtel de Benedict ou de Fulford, ne peut dire lequel, où il avait resté avec sa femme et se rendit à Bonnechère. Il pense que Wadsworth la laissa pour quelque temps et vint ensuite la chercher. Ce n'était pas plusieurs mois après, à ce qu'il pense,—ce n'était pas longtemps après. Wadsworth vécut sur la rivière Bonnechère jusqu'à ce qu'il vint exploiter une ferme qu'il avait achetée à Hull. Il continua son commerce et allait encore parfois dans la forêt. Il faisait des affaires pour lui-même et était supporté par M. Egan. Il a continué d'aller à Québec avec son bois après s'être fixé à Hull.

John Coyne ou Quyne, un des témoins les plus âgés, dit qu'il a connu Wadsworth avant son mariage, qu'il faisait alors du bois sur la rivière Bonnechère; l'a vu à Québec l'année de son mariage ; ne peut dire combien de temps il y est demeuré soit avant soit après son mariage; n'a pas vu sa femme à Québec, mais a entendu dire qu'elle y était. Après avoir laissé Québec, il retourna à Bonnechère. Il faisait un peu de bois à cette époque ; il croit qu'après avoir quitté Québec, Wadsworth laissa sa femme à Aylmer pour quelques jours. Dans le printemps de cette année, Coyne était absent de chez lui. Il laissa Québec pour Bonnechère avec sa femme peu de temps après son mariage..... Il pense que l'intention de Wadsworth lorsqu'il est parti pour Québec avant son mariage était de retourner à Bonnechère après son mariage. Ne se souvient d'aucune circonstance qui puisse

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faire voir qu'il avait l'intention de venir à Québec. Il commença à bâtir une maison à Bonnechère aussitôt après son retour de Québec avec sa femme. Ils ont vécu là jusqu'à ce qu'ils soient venus à Hull; ne sait pendant combien d'années; quelques-uns de leurs enfants y sont nés. Il faisait le commerce de bois et aussi la traite avec les sauvages. Il avait amassé quelque bien après son mariage, dans le township de Grattan et ses environs, mais il ne dit pas où cette localité est située. Il dit que Wadsworth pouvait parler un peu le français. Sa réponse à la question suivante qualifie la carrière de Wadsworth avant son mariage—tout en contredisant ce qu'il a dit de sa résidence à Bonnechère avant le mariage :—

Q. Had Wadsworth any definite place of abode before his marriage or was he like other shantymen in that respect, living in the woods during the winter season, on the river in the early summer, at Quebec after the arrival and until the sale of the timber there, and at or near Hull until it was time to renew winter operations? R. He was like any other shantyman before he was married, but was mostly on the Bonnechère.

Il avoue qu'il n'est pas en état de dire si Wadsworth a résidé à Hull avant et après son mariage. Avant il vivait avec ses hommes dans son chantier, en hiver, et sur ses radeaux, lorsque le bois descendait à Québec. Lorsque ce témoin a rencontré Wadsworth, avant son mariage, il faisait du bois à son propre compte. Il n'avait aucun titre de propriété près d'Eganville, car les terres n'étaient pas même arpentées. Ne peut dire si, en laissant Bonnechère avant son mariage, Wadsworth pensait à se marier. Il vivait la plupart du temps à son chantier et, au meilleur de ma connsissance, Wadsworth n'a jamais vécu dans Hull.

Susan Turner, Mde McMullin, donne une déposition presque semblable à celle de Coyne ; mais quel poids peut avoir son témoignage quand elle parle de faits qui se sont passés lorsqu'elle n'avait encore que six ans. Ce

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témoignage n'est qu'une répétition de choses qu'elle a entendu dire, et non pas de faits qui se sont passés à sa connaissance. Elle admet n'être pas allée à Québec en 1828, bien qu'elle pense que Wadsworth pensionnait à Québec. Elle ne peut dire combien de temps avant son mariage elle a connu Wadsworth. Mais cependant elle pense que lorsqu'il a laissé Bonnechère en 182 il avait décidément l'intention d'y revenir pour en faire sa demeure Elle dit qu'il n'a commencé les affaires qu'en 1830, et s'accorde à dire avec Coyne qu'il n'avait pas et ne pouvait avoir de titre de propriété à Bonnechère, et qu'il n'y avait même pas de limites à bois dans ce temps-là, mais elle a entendu dire qu'avant son mariage il vivait avec ses hommes dans son chantier. Elle dit que Wadsworth n'a résidé à Hull que peu de temps après son mariage, et jusqu'à ce qu'il eût acheté une propriété. C'est à la charpente d'une maison à peine commencée que Wadsworth avait achetée d'un nommé Boulanger qu'elle fait allusion.

En appréciant ces témoignages d'après les règles tracées par le Code civil qui, sous ce rapport, n'a pas dérogé non plus à l'ancien droit français, il faut en rejeter une partie importante comme illégale.

Après avoir défini le domicile par l'article 79, et déclaré par l'article 80 que le changement s'en opère par le fait d'une habitation réelle dans un autre lieu, joint à l'intention d'y fixer son principal établissement, le code déclare dans l'article 81 que "la preuve de l'intention résulte des déclarations de la personne et des circonstances." L'intention de fixer son domicile d'une manière permanente peut donc être prouvée de deux manières, premièrement par des déclarations; deuxièmement, par les circonstances d'où résultent cette intention ; mais pour constituer le domicile il faut la réunion des deux éléments de l'habitation de fait dans un certain endroit, jointe à l'intention d'en faire sa résidence

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permanente.

Notre code n'a pas comme l'article 104 du code Napoléon indiqué la manière ni l'endroit où doivent se faire les déclarations d'intention, mais il n'en est pas moins certain qu'elles doivent être faites par écrit pour être reçues en preuve. En admettre la preuve testimoniale ce serait violer l'article 1223. Les déclarations dont il est question dans cet article ne sont évidemment autres que celles faites incidemment dans des actes judiciaires et extra-judiciaires, dans des actes de l'état civil, dans des actes notariés et même des actes sous seing privé. La pratique en France, dit Phillimore, Domicile (1), est de faire preuve des déclarations de domicile par la production d'actes. On peut s'assurer de la vérité de cette assertion en référant aux arrêts rendus sur des question de domicile en France; ces déclarations sont toujours prouvées par des actes écrits émanant de la partie dont il s'agit de déterminer le domicile, ou contredites par d'autres déclarations en sens contraires. Aussi dans aucun des rapports ne trouve-t-on d'allusions à la preuve testimoniale de déclarations de domicile.

En conséquence, la partie du témoignage qui se rapporte à des conversations avec Wadsworth par lesquelles on prétend prouver des déclarations de domicile à Bonnechère doivent être rejetées. D'après les autorités suivantes, on ne peut prendre de ces témoignages que la partie concernant le fait pur et simple de la résidence sans aucune qualification, soit par les paroles mêmes de Wadsworth, soit par ce que les témoins disent avoir compris de lui au sujet de sa résidence.

Laurent (2).

No 431. Les faits ne se présentent pas toujours dans la simplicité que la théorie suppose. Il arrive souvent qu'un seul et même fait comprend des éléments complexes, l'un matériel, l'autre juridique. Dans ce cas, on ne peut pas procéder d'une manière absolue et dire

(1) P. 131. (2) 19 vol. No. 431.

que la preuve testimoniale est admissible à raison du fait matériel à prouver ou qu'elle n'est pas admissible à raison du fait juridique qu'il s'agit d'établir. Les divers éléments d'un fait ne forment pas un tout indivisible ; il faut donc les séparer, en appliquant à chacun les principes qui régissent les faits selon qu'ils sont juridiques ou purs et simples, c'est-à-dire à prouver par témoins l'élément matériel du fait et prouver par écrit, dans le sens de l'art. 1341, l'élément juridique.

L'autorité suivante de Dalloz contient la même doctrine (1).

Mais si le fait pur et simple dont on demande à faire la preuve se rattache à un fait juridique qui détermine la nature et l'étendue du droit réclamé, ce fait juridique ne peut être prouvé par témoins. Ainsi, celui qui prétend posséder à titre de propriétaire, ou posséder pour autrui à titre de fermier, peut bien à l'aide de la preuve testimoniale, établir les faits matériels de sa possession ; mais il ne peut invoquer ce moyen de preuve pour déterminer le caractère juridique de cette possession.

La dernière partie de cette autorité est d'autant plus applicable, que comme le fait remarquer Duranton (2), l'on compare le domicile avec la *possession* avec laquelle il a en effet quelque rapport ; il se conserve comme elle par la seule intention Il résulte de ces autorités que l'Appelante pouvait bien prouver les faits matériels de résidence par la preuve testimoniale, mais elle ne pouvait avoir recours à cette preuve pour déterminer le caractère juridique de cette résidence dont la conséquence, en complétant la preuve du domicile, serait de détruire l'existence du contrat de communauté allégué par les Intimés. Le fait pur et simple de résidence pouvait donc être prouvé par témoins, les déclarations de Wadsworth, rapportées par ces témoins ne pouvaient pas l'être. Quant à ces déclarations, l'Appelante devait en faire la preuve régulièrement soit en se procurant un commencement de preuve par écrit, soit en produisant des déclarations suivant l'art. 81.

L'on comprend facilement l'importance de la ques-

(1) P. 126, No 50, 2 vol. Dalloz, (2) 1 Dur. p. 293.
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tion d'admissibilité de la preuve dans ce cas. Si elle était reçue contrairement aux dispositions de la loi le domicile de Wadsworth se trouverait établi à Bonnechère et la conséquence inévitable serait d'enlever aux Intimés l'héritage de leur mère pour le faire passer en mains étrangères. On voit de suite la nécessité de s'en tenir à la rigueur des principes de notre droit et de ne pas aller chercher ailleurs des règles différentes qui pourraient conduire à un résultat aussi désastreux

Il faut donc en vertu des autorités citées plus haut rejeter comme illégales les parties ci-après citées des témoignages ; ainsi que toutes les autres qui sont en contradiction avec le principe qui y est développé. Je ne citerai que les extraits suivants comme exemple des parties de témoignages qui doivent être rejetées.

Mather :—

I understood from himself, both before and after his marriage, that his home—to wit, the home of the late *James Wadsworth*—was on the Bonnechère until he moved on to a farm in the township of Hull, near the line of Eardley.

As near as I can remember, the first time I was in Eganville was in the year eighteen hundred and twenty-five.

Q.—Have you a certain recollection of Mr. Wadsworth's whereabouts prior to eighteen hundred and twenty-nine ?

A.—I am sure, as far as he told me, that he made the Bonnechère his home when I first knew him.

John McMullen :—

I understood from him that he had been living there with his wife from the winter of eighteen hundred and twenty-eight. About the year fifty-four (1854) (they had returned to Hull in 1836) the late Mrs. Wadsworth got me to show her the foundation of the old house, and she then said her husband came there to live after her marriage.

John Wadsworth :—

I understood, both from James and from his first wife, that they came to the Bonnechere on the first sleighing after their marriage.

William Wadsworth :—

If I remember right my brother told me that it was during the winter previous to my arrival in the country that Mr. Wadsworth

went up the Bonnechere to live.

John Coyne et S. McMullen :—

24. Do you know whether when he left for Quebec before his marriage he intended to return to the place he had been at before ? —A. J. Q. J. W's intention was, I think, to return to the Bonnechere after his marriage. S. McM. Most decidedly he came back to make it his home.

25. What circumstances do you remember showing that the said J. Wadsworth intended to return from Quebec ? A. J. Q. I do not remember. S. McMullen, I don't know except to lumber.

Il en est autrement pour la preuve de la résidence ; comme elle est un fait matériel, elle peut se prouver par témoins ; mais s'il s'y mêle un autre élément, comme par exemple dans le cas actuel, les déclarations ci-haut citées—ces déclarations qui ne sont pas des faits matériels, ne peuvent être prouvées par témoins, d'après les autorités ci-dessus citées.

Le témoignage de l'Appelante ainsi dégagé de sa partie illégale se réduit à établir le fait pur et simple de résidence à Bonnechère, sans aucune preuve légale d'intention de la part de Wadsworth d'en faire sa résidence. Il n'y a pas non plus de preuve légale qu'il ait été propriétaire d'immeubles à cet endroit ; et il est de fait qu'il n'a jamais eu de titres de propriété—car ce fait ne pouvait être légalement établi que par la production d'un titre, et il n'en a été produit aucun. Bien que la preuve du fait pur et simple d'occupation pût être faite par témoins, celle de l'existence d'un titre, duquel on voulait tirer une conséquence légale importante, comme celle de la preuve de l'intention, ne pouvait l'être que par la production du titre lui-même. Lorsque Wadsworth, comme le disent certains témoins, a vendu, à Egan, la propriété qu'il avait défrichée, il ne pouvait alors céder que les améliorations qu'il avait faites sur un sol qui ne lui appartenait pas. S'il y a un acte de cette vente, ce qui n'est pas prouvé, cet acte n'a pas été produit, sans doute parce que cette vente aurait

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détruit toute présomption de propriété chez Wadsworth en faisant voir qu'il n'avait vendu que ses améliorations et non le sol. Les lois alors en force dans le Haut-Canada ne permettait pas d'occuper les terres publiques sans une autorisation à cet effet. Son occupation était conséquemment illégale C'est un principe consacré par une décision de la Cour du Banc de la Reine que " La simple occupation ou possession naturelle, comme celle d'un *squatter*, sans aucun titre quelconque, ne suppose aucun droit de propriété (1). Cette occupation sans titre démontre au contraire le fait que la résidence n'était que temporaire, puisqu'elle ne dépendait que de la volonté non de Wadsworth, mais de celle du propriétaire du sol qui pouvait l'en expulser à volonté. Une telle occupation étant absolument incompatible avec l'intention d'une résidence permanente, elle ne peut jamais servir à établir l'existence d'un domicile.

L'existence du titre même ne suffirait pas pour établir la preuve de l'intention, mais ce serait une circonstance qui pourrait la faire présumer, mais cette circonstance n'est pas prouvée légalement. C'est en s'appuyant sur une preuve illégale de déclarations d'intention de Wadsworth—et aussi sur une preuve illégale d'acquisition et de possession de propriétés que quelques-uns des juges se sont appuyés pour en conclure que Wadsworth avait son domicile à Bonnechère. Tandis qu'en faisant abstraction de cette preuve illégale, il est évident qu'il n'est pas plus prouvé que Wadsworth avait un domicile à Bonnechère lorsqu'il s'est marié, qu'il n'est prouvé que lors de son mariage il avait l'intention d'y retourner pour y fixer sa demeure.

C'est un principe incontestable que pour établir un domicile il faut le concours du fait et de l'intention, la résidence seule ne suffit pas. Où est la preuve qu'en

(1) Voir *Stuart v. Ives* vol. 1 L. C. R., p. 193.

se rendant à Bonnechère avec sa femme, Wadsworth avait alors l'intention de s'y établir d'une manière permanente? Il n'a jamais fait de déclaration d'une telle intention. L'art. 81 du code civil déclare que la preuve de l'intention résulte de la déclaration de la personne et des circonstances. La preuve des déclarations de Wadsworth fait complètement défaut et elle est essentielle pour la constitution d'un domicile. La résidence sans la preuve d'intention de s'établir d'une manière permanente ne suffit pas, le concours des deux est essentiel.

La résidence à Bonnechère, non accompagnée de preuves de la déclaration d'intention d'y demeurer permanemment, n'a pu constituer un domicile légal. Les observations de l'honorable juge Monck, résumant les principaux faits de la vie de Wadsworth, démontrent avec tant de force que son domicile était dans le Bas-Canada, que je me fais un devoir d'en donner un assez long extrait :

The legal presumption is that a man who, as a squatter, resides in the woods, on a lot which has not even been surveyed, and in connection with his lumbering operations, whether for seven years, as in this case, or for any number of years, for that matter, has no permanent settlement in view; and when it is considered that after these seven years Wadsworth bought a farm in Hull and settled there; when it is further borne in mind that it was in Hull that he had left his wife after his marriage; that it was in Hull that when his wife joined him in the winter following to share his shanty in the woods, he left his step-daughter to be educated; that it was in Hull that he caused his children who died while he was in the woods to be buried; that it was in Hull that he sent his children to school; and that it was in Hull that he must have transacted any business which as a member of a civilised community he might have had to transact, the conclusion is irresistible that his real domicile after his marriage was in Hull, in Lower Canada, and not on the Bonnechère River in Ontario.

Au soutien de cette conclusion, il y a la preuve la plus forte et la plus complète que l'on puisse faire de l'intention de l'établir dans cette province par la décla-

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ration contenue dans l'acte de mariage au sujet duquel l'honorable juge Tessier a fait les remarques suivantes que j'approuve complètement :—

Il n'y a pas, dit-il d'acte plus solennel que l'acte enregistré de la célébration du mariage en présence de plusieurs témoins. C'est par-là que les époux manifestent leur intention quant à l'existence de leur domicile et au régime des lois qu'ils adoptent concernant le mariage pour eux et leurs enfants à venir. Cela lie la femme, qui n'a pas d'autre domicile que celui du mari. (C.C. art. 83.)

J'avoue qu'il est difficile de fixer le domicile de gens qui n'ont pas encore de résidence permanente, mais il faut choisir entre Québec, Hull et la forêt de Bonnechère. Si vous dites que Bonnechère était à l'époque de leur mariage leur domicile matrimonial, *de facto et de animo*, où est la preuve de cette intention : tout montre le contraire, ils signent un acte solennel pour déclarer leur domicile à Québec : où est l'allégation ou la preuve de l'erreur ?

En vertu de l'article 65 de notre code, reproduisant la loi ancienne le fonctionnaire est tenu de constater et indiquer le domicile des époux. Il l'a fait. *Omnia præsumuntur rite et solemniter acta, donec probetur in contrarium.*

Je réfère aussi, sans les citer, aux raisons données par l'honorable juge Monk pour démontrer la force probante de l'acte de mariage d'après la loi de la province de Québec.

Pour diminuer l'effet de la preuve irréfutable de l'existence du domicile de Wadsworth à Québec, résultant de l'acte de mariage, on invoque la raison que le domicile du mariage est différent du domicile réel et on concède que Wadsworth pouvait y avoir un domicile suffisant pour y contracter mariage, puisque la validité de celui qu'il y a contracté n'est nullement attaquée. Le code civil, article 63, fixe à six mois l'habitation *continue* dans un même lieu pour y acquérir un domicile pour le mariage. Wadsworth qui, comme on l'a vu ne passait à Bonnechère, dans la forêt, que le temps qu'il ne résidait pas à Québec où il faisait ses principales affaires, avait donc à Québec une résidence de fait, un des éléments essentiels pour l'acquisition d'un domicile. Pour faire la preuve complète

du domicile réel à Québec il ne manquait que celle de l'intention d'en faire sa résidence permanente. Cette preuve on la trouve dans l'acte de mariage où il se déclare domicilié à Québec.

Cette déclaration est générale ; elle ne comporte aucune restriction dans les termes, ni par les circonstances dans lesquelles se trouvaient alors Wadsworth. Comme l'acte de mariage a la force probante de l'acte authentique, la déclaration qu'il contient ne peut être contredite que par des preuves écrites de même force. Des tiers pourraient en plaidant erreur être admis à la preuve testimoniale, mais l'appelante représentant comme légataire universelle Wadsworth qui a fait cette déclaration, n'e peut pas plus qu'il ne pourrait le faire lui-même attaquer par aucune espèce de preuve cette déclaration. Supposons par exemple que durant l'existence de ce mariage Margaret Quigley eut poursuivi son mari en séparation de biens et demandé le partage de la communauté,—celui-ci aurait-il pu attaquer cette déclaration comme frauduleuse. Evidemment il ne lui aurait pas été permis de plaider sa propre turpitude. Tout au plus aurait-il pu pendant les dix ans après la date de cette déclaration, demander a être relevé pour cause d'erreur, ce qu'il n'aurait pu établir que par des preuves écrites. L'appelante qui le représente à titre universel ne peut pas le faire plus que lui-même. Elle n'a pas tenté la preuve d'erreur, et l'eût-elle fait, l'action étant prescrite, c'eût été en pure perte. L'acte de mariage doit donc produire tous ses effets légaux, et il en résulte qu'ici le domicile réel coincide, on peut dire avec le domicile matrimonial, et il n'y a aucune objection légale à cela. Même si Wadsworth qui habitait Québec n'avait jamais auparavant fait de déclaration au sujet de son domicile, rien ne l'empêchait d'en faire une par son acte de mariage qui aurait eu alors l'effet de lui faire acquérir de suite un domicile

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réel puisqu'il avait déjà l'habitation de fait et qu'il n'avait pas d'autre domicile dans le pays (1)

Dès que la volonté est marquée la nouvelle demeure, ne fut-elle que d'un seul jour, établit le changement de domicile. C'est ce que fait très bien remarquer d'Argentrée sur l'article 449 de la Coutume de Bretagne. C'est d'ailleurs ce que décident expressément les lois 4 et 20 D. ad municipalem et l'art. 103 du Code Civil.

Cressé v. *Baby* (2).

Une personne venant dans un endroit dans le Bas-Canada avec l'intention d'y résider, acquiert un domicile immédiatement ; et son intention peut être prouvée par ses actes subséquents.

Dans tous les cas le fait du domicile, à Québec, doit rester acquis aux intimés d'après les autorités suivantes :

Toullier No 372.

Le fait doit toujours concourir avec l'intention. La résidence la plus longue ne prouve rien, si elle n'est accompagnée de la volonté, tandis que si l'intention est constante, elle opère le changement avec la résidence la plus courte, ne fut-elle que d'*un jour*, car du moment que le fait concourt avec l'intention, il forme ou change le domicile sans aucun délai.

La même doctrine a été énoncée par le conseil privé dans la cause de *Hodgson* v. *Beauchesne* (3).

Laurent, vol. 2, n° 81.

" Les circonstances variant à l'infini et pouvant recevoir une interprétation diverse d'après les nuances qui les distinguent, l'intention peut être douteuse. Que faudra-t-il décider en ce cas ? La réponse est très simple. Le législateur se contente de circonstances, mais à la condition qu'elles fassent connaître l'intention. Si elles laissent du doute, pour la seule raison qu'il n'y aura pas de manifestation de volonté, et partant pas de changement de domicile. C'est l'opinion de Pothier :—

Le changement de domicile, dit-il, devant être justifié, on est toujours, dans le doute, présumé avoir conservé le premier. A vrai dire il n'y a pas de présomption, parce qu'il n'y a pas de loi qui l'établisse. L'ancien domicile subsiste jusqu'à ce qu'il ait été changé, pour qu'il soit changé il faut la preuve de l'intention ; si l'intention n'est pas prouvée l'ancien domicile est maintenu."

(1) Merlin, Rep. vo Domicile, s. 5. (2) 10 L. Can. Jur. p. 313.
(3) 12 Moore P. C. p. 329-330.

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Pour faire perdre aux intimés le bénéfice du domicile à Québec il faudrait avoir fait une preuve légale que ce domicile a été changé, et il n'y en a pas.

Je ferai remarquer comme l'a fait l'honorable juge, Tessier qu'il n'y a aucune preuve que Wadsworth ait eu l'intention de retourner en Irlande et qu'il n'a pu y conserver son domicile d'origine. Il avait une excellente occasion de manifester ses sentiments à cet égard, lors de son mariage avec Margaret Quigley qui était en route pour y retourner; à son mariage il déclare au contraire son domicile à Québec, et après y être resté quelque temps, il se rend avec elle à Hull où elle demeurait déjà depuis un an. Je citerai encore de l'honorable juge les observations suivantes :

Il se trouve une suite de circonstances qui établissent, à part leur déclaration formelle dans l'acte du mariage, que l'intention des époux était de faire leur domicile conjugal dans la province de Québec. Ils résident quelque temps en la cité de Québec, ensuite à Hull dans la même province, ils font baptiser et enterrer leurs enfants à Hull, ils mettent à l'école les enfants survivants à Hull, ils y résident après leur retour de la forêt de Bonnechère, ils y meurent tous deux. C'est bien là le siège de leur association conjugale.

Cette conclusion a été celle de la majorité de la cour, deux des honorables juges ont différé de la majorité, pour le motif que si Wadsworth avait un domicile dans le pays, c'était dans le Haut-Canada, et que si ce n'était pas là, c'était en Irlande. On voit quelle incertitude, il y a dans leur esprit à ce sujet ; mais je crois avec la majorité de la cour que la seule preuve de déclaration d'intention au sujet de son domicile faite par Wadsworth a été celle contenue dans son certificat de mariage suivie de sa résidence à Hull et de son retour à cet endroit après son séjour à Bonnechère. La preuve de l'Appelante ne me paraît pas assez forte pour détruire celle des intimés et dans un cas où il y a de l'incertitude comme dans celui-ci je crois que les présomptions du bien jugé sont en faveur du jugement et qu'il n'y a pas de motif

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suffisant pour le renverser.

La décision de cette cause ne reposant que sur la signification à donner aux faits des différentes résidences de Wadsworth, je n'ai pas cru qu'il fût nécessaire de référer aux autorités, car les principes du droit sur ce sujet ne sont pas contestés. J'ai cru devoir m'attacher plus particulièrement à démontrer l'illégalité et l'insuffisance de la preuve de l'Appelante au point de vue de notre droit. Je crois avoir établi d'une manière certaine que le seul fait sur lequel s'appuie l'Appelante pour établir un domicile à Bonnechère, n'a aucun des caractères légaux qui puissent permettre aux juges d'en tirer la conclusion que Wadsworth avait l'intention de s'y fixer d'une manière permanente.

Appel renvoyé.

HENRY J.—Having had the privilege of seeing and considering the two judgments delivered in this case, both of which deal exhaustively with the matter in controversy, I consider it necessary to refer but generally to the legal question upon the conclusion of which the same is to be determined. The respondent claims to recover upon the allegation that there was a community of goods existing between the ancestor, James Wadsworth, and his first wife, Margaret Quigley (who had been previously married to a man named McMullen), during the time of their coverture. The proof of that position must be established or the respondent cannot recover. That community, it is claimed, arose from the alleged residence before the marriage of the parties at Quebec, which took place in September, 1828; and, in proof of which, a marriage certificate was produced in evidence in the terms stated in the two judgments before referred to. The law is clear and beyond all doubt in England and France, as well as in Quebec, that, by the domicile of birth, a personal

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status is acquired which remains until an actual change is made by which the personal status of another domicile is acquired, the onus of proving which is on the party alleging it; and it is equally clear law that, after a second or other domicile obtained is abandoned, the domicile of birth, suspended in the meantime, is revived and the legal distribution of property determined accordingly. These positions are clearly provided for in the civil code of Quebec, and admitted on all sides.

The domicile by birth of James Wadsworth was shown and admitted to have been in the county of Monaghan, in Ireland, where he was born.

If, then, during the coverture in question, he had not acquired a domicile in Quebec or in Upper Canada, his domicile of origin was in Ireland when he was married, and during his coverture with his first wife through whom the respondent claims.

The main and, I may say, the only, question to be decided is the legal adoption of a domicile at Quebec as claimed by the respondent. If that be not shown it is quite unimportant to consider whether or not he had adopted such a legal domicile in Upper Canada as would remove or suspend his status of domicile in Ireland. It is only necessary to consider his acts and operations in Upper Canada as evidence to affect the question of the adoption by him of a domicile in Quebec. In considering the latter question the legal distinction between domicile and residence must be closely observed.

In this case there was no marriage settlement, and the mutual rights of the husband and wife to each other's movables, whether possessed at the time of the marriage, or acquired afterwards, are determinable by the law of the husband's actual domicile at the time of the marriage, without reference to the law of the

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country where the marriage is celebrated or where the wife was domiciled before marriage; and it was therefore necessary to show the establishment by James Wadsworth of a civil domicile for all legal purposes at Quebec when his marriage with his first wife was celebrated. If not, there is nothing in the evidence that, during that coverture, he ever acquired any.

Residence in a country is not even *primâ facie* evidence of domicile when the nature of that residence either is inconsistent with, or rebuts the presumption of, the existence of an intention to reside there permanently (*animo manendi*).

Up to the time of the marriage the evidence shows that he could not have been considered as having ever resided in Quebec. It is true he had gone there sometimes, not to reside in the ordinary acceptation of the term, but for a temporary purpose—that of taking there and disposing of rafts of timber, for others or himself, and returning to the Bonnechère as soon as that object was accomplished. It is shown that he had no place of residence at Quebec, but lived, while there, either on the rafts or in a boarding house. It is true that at first he was but a shanty man, so called, or, as called in the French language, *voyageur*, but his occupation, as such, differed materially from the great body of shanty men who had homes and residences in other places to which they returned during the interval of work in the woods. Wadsworth had no home or residence other than that he occupied at the site where his labor was performed—that was virtually his home; and it matters not whether it was a timber shanty or a castle, or whether it was his own or belonged to some one else for whom he was employed, but to which, when he left it, for the special purpose of taking down to Quebec and selling the rafts of timber he worked at in making, he always returned. The fact is well established by evidence and

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it was not at all necessary to show that he was the owner of movables or immovables. By the evidence, I think his residence there is shown as in contradistinction to the allegation of his residence at Quebec. In deciding this case I feel the responsibility of coming to a conclusion in opposition to that of my learned brethren from Quebec, but I feel it, at the same time, of importance that I am sustained by the views and decisions of the learned Chief Justice Dorion and those of the learned Judge Cross. Residence must be imputed, in the absence of any other, to be the place where a party is employed in the production of marketable commodities rather than to the place he visits solely to make sale of them, and in this case, if we leave out the consideration of his residence of origin, we have but a choice between the two. It must be borne in mind that I am not so much considering whether Wadsworth obtained or made a domicile in Upper Canada, but the question of his alleged residence in Quebec at and before his marriage.

Apart then from the certificate of his marriage, where is there a scintilla of proof of his residence at Quebec? Could a Quebec merchant who shipped annually to England cargoes of timber, and who spent some months there, either living on board his ships or at a boarding house for the purpose of making sale of them, be said to have his residence there? Or could the same be said of one of his clerks or other agent, that he sent there for a like purpose? Could it be said of the clerk or other agent of a manufacturer in Ontario who was sent periodically to sell his employer's manufactured goods at Montreal or Quebec, and in doing so remained at each time, it might be for months, till the special object of his mission was obtained, and then returned each time to his occupation at the manufactory, be considered for a moment as having a legal residence at either of those

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last named cities? And in such a case would it be necessary to inquire whether he lived in a house of his own or elsewhere, or whether or not he was the owner of goods movable or immovable? Such, then, is the character of the alleged residence before and at the time of the first marriage of James Wadsworth. Where then is there in the facts shown any actual residence in any way affecting the question of his domicile? And if none, the point of intention is unnecessary to be considered.

I think I have made it sufficiently clear that Wadsworth had no residence in Quebec; but admitting for argument's sake that he had, where is the evidence of that other essential, his intention to make there his permanent residence? It is truly said that under the law in Lower Canada a person coming there with the intention of residing acquires a domicile immediately, and that his intention can be proved by his subsequent acts. That doctrine, however, applies with equal force to his residence at the Bonnechère where his acts, after his first going and working there, in farming and other operations, would go to show that he fully intended from the first to make that his permanent residence, constituting as it did the place where he derived the means of living and the accumulation of property, and having at Quebec only the market where he realized money from the sale of what, by his industry and labor, he from time to time produced Article 79 provides that, "the domicile of a person for all civil purposes is at the place where he has his principal establishment." It is clearly shown that Wadsworth had no establishment whatever at Quebec. It is said that before losing his domicile at Quebec there should have been legal proof that his domicile had been changed. Such no doubt would be the case if the domicile had been shown there.

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One of the learned judges of the court below remarks upon the absence of proof that Wadsworth had had any intention of returning to Ireland and that he desired to preserve there his domicile of origin, and says that he had an excellent opportunity of manifesting his sentiments in that regard when his marriage to Margaret Quigley, who had come to Quebec on that occasion *en route* to return there, took place. No doubt before she consented to become the wife of Wadsworth she so intended. She was then a widow, having recently lost her husband, and intended, no doubt, under the circumstances to return to her native country, but for apparent reasons changed her mind. It is, however, unnecessary to speculate in reference to this matter, for it is the law that operates to continue the domicile and not the intention of the party. Allegiance to a British sovereign it is claimed cannot be changed to another by the act of the party, but domicile can be; but the status of domicile by birth is as tenacious as a man's allegiance until by his own act he changes or suspends it. The same learned judge gives great weight to the proof of marriage by the register, and he says that it is by that act that the married parties manifest their intention as to the existence of their domicile, and adds that they signed a solemn act (meaning the marriage register) to declare their domicile at Quebec and asks: "Where is the allegation or the proof of error?" The register, however, is but a certificate of marriage in the usual form. It calls James Wadsworth "*journalier de cette ville*," and so it might properly do even had he been born and had his domicile in Upper Canada. To prove such domicile would not contradict the register. Evidence of a party's domicile outside that register is not only admissible but is generally required. It is well settled by French as well as English law that a residence or domicile for the purpose of marriage is not

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necessarily a domicile affecting in any way the other civil rights of the parties. The law required a six months' residence to authorize a marriage, but in no way affected the permanent domicile of the husband. Domicile is not at all in question at marriage. Article 132 enacts that "if the last domicile is out of Lower Canada the curé is bound to ascertain that there is no legal impediment between the parties" and it is a significant fact that the register in this case contains a statement that the curé ascertained that no such impediment existed; which statement would be unnecessary if the curé had not considered that Wadsworth's domicile was out of Lower Canada. In view of that provision of the code, how can it be legitimately contended or adjudged that, as regards domicile, there was any intention on the part of those who framed, or the legislature that adopted it, that it was to be taken even as *prima facie*, not to say conclusive, evidence, and still we are asked to receive it as conclusive on the point. From the statement in question we are fully as much bound to decide that the domicile in question was out of, as to conclude from any other part of it that it was within, Lower Canada. The establishment of that status must therefore be shown by evidence of extrinsic matters.

It is quite true there is no proof of error for none has been suggested as to the register, but the legal effect of it is quite another matter. It was, and must be, admitted, that the register is proof of what it alleges but not of inferences to be drawn, and while the fact of residence at the time which is shown by it cannot be contradicted by oral evidence, it is not inconsistent with that statement, that such residence was but temporary; and that there was wanting the existence of the necessary intention of making it (Quebec) the seat of his permanent residence. The change must

be *animo et facto*. In addition to the fact of residence there must also be shown the animus — the intention to change the domicile and acquire a new one. It would, I submit with all due deference, be an unwarranted deduction from the mere fact of a residence enabling a party to be married if we decreed an intention to renounce thereby his domicile of origin and adopt another at the place where the marriage happens to be celebrated. Would it not be monstrous to decide that an Englishman—a titled nobleman if you will—who resided temporarily at Quebec for pleasure or business, and got married there, had thereby forfeited his domicile of origin and voluntarily changed it to one in Quebec? I can find nothing to justify or warrant such a conclusion and assumption, and such was virtually the position of Wadsworth at the time of his marriage. We need not inquire what position as to domicile Wadsworth occupied at the Bonnechère before his marriage. It is enough for us to know that his visits to Quebec were but transient and for special purposes, and not only independent of the question of domicile there, but under circumstances negativing the allegation of it.

We need not consider whether Wadsworth abandoned his domicile of origin and adopted one in Upper Canada, as a decision of that question is unnecessary under the issue before us.

There is, however, one legitimate consideration in regard to the position of those engaged in lumbering about the time Wadsworth first went to the Bonnechère, which distinguishes it from that of many and, at this day, the majority, of the places where lumbering has been and is carried on. The river Bonnechère falls into the Ottawa river, and at Eganville Wadsworth first operated and afterwards settled. The land was good and favorably situated for agricultural purposes,

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and access to it was comparatively easy. Timber limits had been granted, but the title to the soil remained in the crown. The matter of the improvements and cultivation made by what are known as squatters was considered when patents were subsequently issued, so that those who lived and settled upon the lands were not considered as trespassers; and, although not vested as to the possession by any act of the crown, they had a possession which the law respected against all others without title. In that way large portions of the country became improved and settled, and patents in the majority of cases followed to the parties in possession, and surveys were made to cover such possessions. A great many, therefore, who, during the winter months, worked in the woods at other parts of the year, were employed in the clearing, improving and cultivating of the land they settled on. Such was the course pursued by Wadsworth, and he, therefore, from the time of his marriage, had a residence and home, and was in the exclusive possession of land, which he continued to improve until he sold out for a considerable sum to Mr. Egan. His position was, therefore, very different from that of what is generally known as a mere shantyman. During the years he was employed in making timber he was employed in making himself a home, showing an intention of making there a civil domicile.

Article 81 of the Code provides that "the proof of "the intention results from the declaration of the per- "son and from circumstances." If, therefore, we were trying the question of the adoption of a new domicile by Wadsworth, I think his verbal declarations would be valid testimony, and if added to the other facts in evidence as to his living and working at the Bonnechère, I think as between Upper Canada and Quebec a decision in favor of the former should necessarily result.

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I can find no express, or even implied, authority for rejecting such evidence. It is, of course, not so satisfactory or conclusive as declarations contained in deeds or other solemn legal documents, but I think such evidence cannot be excluded, and must, I think, be considered legitimate in the absence of any principle to the contrary. The Code makes no distinction between verbal and written declarations. I think, in view of the evidence and the law as to domicile, the respondent has failed to prove the civil domicile of James Wadsworth to have been at Quebec, upon which rested his right to recover, and that, therefore, the appeal herein should be allowed with costs.

TASCHEREAU J.—By representing to his wife, as he must be held to have done by the *acte de marriage*, that his domicile was at Quebec when he married, Wadsworth guaranteed to her, contracted with her in law, that she would be *commune en biens* with him. Now, could he have been admitted, in his lifetime, under any circumstances, in an action *en séparation de biens*, for instance, to contend that this declaration as to his domicile was a false one, or, in other words, that he had induced his wife to marry him under false pretences or representations? Would he have been received so to invoke his own fraud in order to deprive his wife of her share of the community? Undoubtedly not. Well, who is the appellant here? Clearly, purely and simply, the representative of Wadsworth, the warrantor of his deeds, entitled to what he himself would have been entitled to, but to nothing more. How can she then invoke Wadsworth's fraud to deprive the respondents of their share of this community? And when she does do so, when she avails herself of Wadsworth's fraud, is she not then herself in the eyes of the law, committing a fraud? Without adding another word

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to my brother Fournier's judgment, in whose reasoning and conclusions I unreservedly agree, I would, with him, dismiss the appeal, and confirm the judgment of the two courts below. This is a very important case, not only for the parties thereto on account of the large amount involved, but also for the public at large. It involves an intricate question of international law, which, as pointed out by the learned Chief Justice of the Court of Queen's Bench, may, hereafter, often arise in this country. We expect in the near future from the United Kingdom, and, in fact, from all Europe, a large immigration, and, evidently, cases like the present one must eventually with us become more frequent. But further than that, a principle of not less importance for the Province of Quebec is at stake, that is, whether the rules of the French law as to evidence are to govern such cases or not. For the appellants in the course of a most able and deliberate argument have failed to cite a single case from France in which it has been held that a different *coutume* than the one settled by the *acte de marriage* can be invoked to defeat a wife's claims or her heirs.

GWYNNE J.—The simple question which this case presents is: Had the deceased James Wadsworth at the time of his marriage in September, 1828, with Mrs. McMullen, his domicile in the then province of Lower Canada? That is to say, inasmuch as his domicile of origin appears to have been in Ireland, had he in September, 1828, abandoned that domicile and acquired a new one in the province of Lower Canada by taking up his residence in that province, with the intent of establishing the seat of his principal establishment in that province permanently or for an indefinite period. The argument of the respondents that he had, seems to me to be based wholly upon the assumption that the

marriage certificate subscribed by him at the city of Quebec, where he was married, in which he is described as *journalier de cette ville*, is a solemn act and declaration made by him with the intent of, and for the express purpose of, testifying that he had then, and thenceforth intended to have, his domicile in the city of Quebec. That the certificate was in point of fact subscribed by him with any such intent, there is not only not a particle of evidence, but his subsequent acts are inconsistent with his having then had such intention, and in point of law, apart from intention, it could not have the operation of substituting the city of Quebec as his domicile of choice in the place of his domicile of origin, which must remain until a new domicile has been acquired, in the acquisition of which intention is the essential element. The certificate is valueless as having no bearing at all on the question, unless it is adequate to establish that Wadsworth had acquired a domicile of choice in the city of Quebec. The description *journalier de cette ville*, that is, the city of Quebec, could afford no evidence of Wadsworth having acquired a domicile in some place in the province of Lower Canada outside of the city of Quebec, and as the only means we have of judging of his intention of acquiring a domicile of choice in substitution for his domicile of origin consist in drawing inferences from the evidence which we have of his acts and conduct, we have in those acts and conduct the plainest evidence, in my opinion, that he had no idea of establishing his domicile in the city of Quebec. Whether he had established it in some other part of the province of Lower Canada at the time of his marriage in September, 1828, must be determined upon the evid ence of his acts and conduct, if we have any signifying his intention apart wholly from the marriage certificate, which for that purpose is valueless.

The first that we hear of him after his leaving Ire-

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land in or about the year 1822, is that in 1826 we find him to be engaged in lumbering operations in Upper Canada with two persons named Kelly and McMullen then associated together in getting out lumber on the Bonnechère river. McMullen came to his death in the woods in the spring of 1827. It would seem that in the winter of 1827-28 Wadsworth was engaged in getting out timber there on his own account, for two witnesses who knew him well then speak of his having gone to Quebec in 1828 on a raft of his own to dispose of it. Susan McMullen, a daughter of the deceased McMullen, and who came out with her mother in 1827 to join her father, and was in 1828 only about nine years of age, speaks of her mother having been interested in the raft which Wadsworth brought down to Quebec in that year; but whether she was or not, or whether it was Wadsworth's own, matters not, for the evidence shows that his sole object in going down to Quebec then was to sell the raft. While in Quebec he lived part of the time on the raft, probably until it was sold, and part of his time at a boarding house where men of his class boarded, and where in the month of August he met Mrs. McMullen, the widow of McMullen, deceased, on her way back to Ireland, from whence she had come in 1827 to join her husband, who, however, came to his death in the woods shortly before her arrival. While boarding at the house where Wadsworth met the widow he was married to her in September, 1828, and shortly after his marriage he returned to the Bonnechère to carry on lumbering operations there as formerly, and he took his wife and her daughter with him; them he left in the neighborhood of Aylmer, on the river Ottawa, in Lower Canada, while he went on to his home on the Bonnechère. That his object in leaving his wife there was for a temporary purpose only appears from the fact that when the sleighing became good in the winter he came down

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for her and brought her up to his home on the Bonnechère, and continuously from that time for at least 10 or 12 years she lived with him in Upper Canada, where he continued to carry on lumbering and farming and other business, from which he acquired considerable wealth. In the spring of 1829 he bought the right of one Baker to a house and a lot of 200 acres—a squatter's right, perhaps but in Upper Canada those rights were always respected by the Government,—and he moved into the house, added to it, cultivated the land, resided there with his wife until 1836, when he sold the place to a Mr. Egan. But although he sold that place he does not appear to have then left Upper Canada, for the evidence is that he lived there continuously for ten or twelve years after his marriage, and that all his children were born there. He did subsequently, but when does not appear, move across the river Ottawa to the township of Hull, for the purpose of being nearer a married sister, who was then living there. How long he remained there does not precisely appear, but after staying there for some years he returned to Upper Canada and resided for many years in Bytown, afterwards the city of Ottawa, where he owned considerable real estate and other property. While living there his wife died in 1872. In 1873 he married again in Ottawa, and afterwards moved across the river to Hull, but whether or not with the intention of acquiring a domicile there then does not appear, but whether he had or not such intention then is not important.

The circumstance of two of his daughters having been baptised at Aylmer, in Lower Canada, was relied upon as an item of evidence having, as was contended, the tendency to show that Wadsworth's intention ever since his marriage was to make his domicile in Lower Canada, but the account of the circumstance under which this took place shows the utter insuffici-

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ency of such evidence for the purpose for which it was relied upon. The baptismal ceremony took place in May, 1846, and under the following circumstances as Susan McMullen testifies. Mr. Wadsworth, she says:—

> Had strong objections to the children being brought up Catholics, and they had to attend the Catholic church by stealth, as it were, so strong were his prejudices; the children were afraid they had never been baptised and consequently took advantage of their father's absence to be baptised in Aylmer. They might have been baptised by their mother before that, but not by any one keeping a register.

The circumstance also of a child of the marriage which was born in 1829 and which lived only for 14 months having been brought to Aylmer to be buried was relied upon for the like purpose, but the evidence shows that at that early period there was not, where Wadsworth resided in Upper Canada or in the neighborhood or nearer than Aylmer, any church or burial place, or priest or minister of any denomination, so that it is not strange that a person although domiciled in Upper Canada should have brought the dead body of his child to Aylmer as the nearest place where it could get a christian burial. Now the sole question being whether Wadsworth at the time of his marriage in 1828 had acquired a domicile in the Province of Lower Canada, the only inference which can be drawn from the evidence, in my opinion, is that he had not, and that his domicile of origin still remained unless he had acquired a domicile of choice in Upper Canada, but that he had acquired such a domicile is, I think, the proper inference to be drawn from the evidence. It is, however, sufficient for the purposes of the present case to say that he had not acquired a domicile in Lower Canada.

The appeal therefore must be allowed with costs and the plaintiff's action in the Superior Court dismissed with costs.

*Appeal allowed with costs.**

Solicitor for appellant : *J. R. Fleming.*

Solicitors for respondent : *Barnard and Barnard.*

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