ERNEST TROTTIER (DEFENDANT).....APPELLANT;

AND

DAME LIONEL RAJOTTE (PLAINTIFF)..RESPONDENT.

1939
* March 1, 2, 3.
* Dec. 22.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Domicile—Marriage in foreign country between persons previously living in Quebec—Matrimonial status—Action for damages by wife for personal injuries—Whether common or separated as to property—Conditions necessary to determine whether domicile of origin or of birth is changed and new domicile acquired.

The respondent, a married woman describing herself in her statement of claim as being separated as to property from her husband and having been duly authorized by him, brought an action for personal injuries against the appellant, the latter pleading *inter alia* that the respondent was *commune en biens* and that therefore any right of action belonged exclusively to her husband. There was no marriage contract between the consorts and by the law of Quebec they are presumed to have intended to subject themselves, as regards their rights of property, to the law of their matrimonial domicile, i.e., the domicile of the husband at the time of the marriage. And the principal question at issue in this case is whether such domicile was in Quebec where in the absence of a marriage contract community as to property is presumed or was at another place where in such a case separation as to property would be presumed. The husband, born at St. Germain, Quebec, in 1894, went to the United States in quest of work in 1923. In the fall of that year, his father, mother, brothers and sisters followed him, but they returned to Quebec in 1928, several months before the marriage. The respondent born at the same place in 1905, went in 1922 to Bristol, in the State

* PRESENT:—Duff C.J. and Rinfret, Cannon, Kerwin and Hudson JJ.

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of Connecticut, also in quest of work and remained there except for a period of eleven months during which she lived with her family in Quebec. The marriage took place at Bristol in September, 1928, and two years later, the respondent and her husband returned to St. Germain, with the intention of building a home somewhere in Quebec. The husband also testified that he had taken out some papers connected with American citizenship; but these papers were not produced and the nature of the representations made for the purpose of obtaining them were not disclosed. The trial judge maintained the respondent's action, which judgment was affirmed by the appellate court.

Held that it was incumbent upon the respondent to establish the existence of a regime of non-community of property in the matrimonial domicile. The only evidence as to foreign law consisted of an admission that the regime of community of property did not prevail in the state of Connecticut. It was, therefore, incumbent upon the respondent to establish a domicile in Connecticut. The evidence did not establish by strict and conclusive proof a fixed settled intention on the part of the husband to make his permanent residence in the state of Connecticut or, in other words, a residence there, not merely for a particular purpose, not merely for the purpose of getting work there, but a permanent residence "general and indefinite in its future contemplation," and, therefore, from the facts and circumstances of the case, inference should be drawn that the husband had not acquired at the time of his marriage a domicile in the state of Connecticut. If so, the law of his former domicile, i.e., the law of Quebec, must determine the matrimonial status of the respondent, and according to that law the respondent is presumed to be *commune en biens*. Therefore the respondent cannot sue in her own name for recovery of damages for personal injuries and her action should be dismissed.

The principles by which the courts are governed when it is alleged that a domicile of origin, or a domicile of birth, has been changed and a new domicile has been acquired are, first, that a domicile of origin cannot be lost until a new domicile has been acquired; that the process of the acquisition of a new domicile involves two factors,—the acquisition of residence in fact in a new place with the intention of permanently settling there: of remaining there "for the rest of his natural life," in the sense of making that place his principal residence indefinitely. In other words, a domicile of origin is not lost by the fact of the domiciled person having left the country in which he was so domiciled with the intention of never returning; but it is essential that he shall have acquired a new domicile, that is to say, that he shall in fact have taken up residence in some other country with the fixed, settled determination of making it his principal place of residence, not for some particular purpose, but indefinitely.

Quaere as to admissibility of direct evidence as to intention.—*Dictum* of Mignault J. in *Taylor* v. *Taylor* ([1930] S.C.R. 26) ref.

The strict rule as to concurrent findings of fact is not applicable to the circumstances of this case.

Judgment of the Court of King's Bench (Q.R. 64 K.B. 484) reversed.

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APPEAL from a judgment of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, Denis J. and maintaining the respondent's action for $3,000 damages.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgment now reported.

John T. Hackett K.C. for the appellant.

C. A. Séguin K.C. and *G. Ringuet K.C.* for the respondent.

The judgment of the Court (Mr. Justice Cannon taking no part in it) was delivered by

THE CHIEF JUSTICE—The respondent is a married woman and, by the law of the province of Quebec, the right of action for damages for personal injuries suffered by a married woman *commune en biens* belongs exclusively to her husband and she cannot sue for recovery of such damages in her own name, even with the authorization of her husband. An objection based upon this rule is raised by the defendant who appeals, and who alleges that the plaintiff comes within it, and, consequently, has no right of action against him.

The answer to these questions, admittedly, depends upon the matrimonial domicile for in this case there was no marriage contract and by the law of Quebec the consorts are presumed to have intended to subject themselves, as regards their rights of property, to the law of their matrimonial domicile. In the present case it is not disputed that the matrimonial domicile is the domicile of the husband at the time of the marriage.

It will be convenient, first, to state the undisputed, pertinent facts. The husband, Lionel Rajotte, was born at St. Germain de Grantham on the 22nd of July, 1894. In February, 1923, he went to the United States in quest of work. In the autumn of that year his father, mother, brothers and sisters followed him. They returned to St. Germain in May, 1928, several months before the marriage of Rajotte to the plaintiff. The plaintiff, whose name was also Rajotte, was also born at St. Germain de Grantham in March, 1905. In 1922 she went to Bristol,

(1) (1938) Q.R. 64 K.B. 484, reported as *X v. Rajotte.*

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Connecticut, also in quest of work. She remained there except for a period of eleven months during which she lived with her family at St. Germain. She married her present husband at Bristol on the 4th of September, 1928. The members of her family went from St. Germain to Bristol and remained for a time but eventually returned to St. Germain where they were living at the time of the trial. Two years after the marriage, they returned to St. Germain. In the declaration her husband is described as "Lionel Rajotte de St. Germain de Grantham."

The respondent, by her pleading, alleges:

Qu'elle est l'épouse séparée de biens de Lionel Rajotte de St. Germain de Grantham, autorisée par ce dernier aux fins des présentes;

and, in support of this allegation that she is separate as to property, evidence was adduced intended to establish a matrimonial domicile in the state of Connecticut. The conclusions of the learned trial judge as to this point are stated in his judgment in the following two *considérants:*

Considérant que l'objection du défendeur, à l'action de la demanderesse, basée sur la prétention que cette dernière ne serait pas mariée sous le régime de la séparation de biens, doit être rejetée pour plusieurs raisons; tout d'abord, parce qu'il est prouvé que la demanderesse est réellement mariée sous le régime de la séparation de biens; ensuite, parce que l'état matrimonial de la demanderesse ne concerne pas le défendeur qui n'y a aucun intérêt; enfin, parce que si l'action n'appartenait pas à la femme, parce que mariée en communauté de biens, ce moyen aurait dû être plaidé par exception à la forme, alors qu'il n'est plaidé ni à la forme, ni au fonds la défense au mérite;

Considérant que le choix de l'état matrimonial des époux, irrévocable après le mariage, reste soumis à leur seule volonté avant le mariage, d'où il résulte que les tiers n'ont ni l'intérêt nécessaire ni le droit de discuter l'intention pré-nuptiale et les circonstances qui, dans la présente cause, ont fait que les époux ont été mariés sous le régime de la séparation de biens;

And the conclusion of the Court of King's Bench is expressed as follows:

Considérant qu'il ressort des faits et des circonstances rapportés, que le 4 septembre 1928, alors que la demanderesse et son époux se sont mariés à Bristol, dans le Connecticut, l'un des Etats-Unis d'Amérique, tous deux, et spécialement la mari, y avaient établi déjà leurs domiciles; que, n'ayant pas fait de contrat de mariage, ils se sont donc mariés sous le régime de la séparation de biens, suivant l'admission des parties concernant la loi du lieu; qu'en conséquence la demanderesse, assistée de son mari, a capacité d'ester en justice en la présente cause;

Before proceeding to examine the evidence, it is desirable, perhaps, first, to state some settled principles by

which the courts are governed when it is alleged that a domicile of origin, or a domicile of birth, has been changed and a new domicile has been acquired.

The subject came before this Court in the case of *Wadsworth* v. *McCord* (1) in the year 1886; and the rules and principles by which the courts must be guided in deciding such questions under the law of Quebec were very fully considered. There was an appeal to the Privy Council which was dismissed (2); and the judgment of the Board delivered by Sir Barnes Peacock implies that the rules for determination of international domicile do not differ from the generally recognized rules which are fully stated and illustrated in the judgment of Sir William Ritchie in this court. After quoting fully from the judgments of the Peers in *Bell* v. *Kennedy* (3), *Udny* v. *Udny* (4) and the *Lauderdale Peerage* case (5), the learned Chief Justice proceeds (p. 478):

> 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 judgments of Henry J. and Gwynne J. proceed upon the same principle.

The principles which ought, I think, to be kept steadily in view and rigorously applied in this case are, first, that a domicile of origin cannot be lost until a new domicile has been acquired; that the process of the acquisition of a new domicile involves two factors,—the acquisition of residence in fact in a new place and the intention of permanently settling there: of remaining there, that is to say, as Lord Cairns says, "for the rest of his natural life," in the sense of making that place his principal residence indefinitely.

It will be necessary, I think, to consider rather carefully the evidence as to the change of residence in fact, but before going into that, it will be useful, I think, to discuss more fully the point of intention.

(1) (1886) 12 S.C.R. 466.
(2) (1889) 14 App. Cas. 631, *sub nomine McMullen* v. *Wadsworth.*
(3) (1863) L.R. 1 Sc. App. 307.
(4) (1869) L.R. 1 Sc. App. 441.
(5) (1885) 10 App. Cas. 692.

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As Lord Westbury says in *Udny* v. *Udny* (1) (page 457) the residence for the purpose

must be residence fixed not for a limited period or particular purpose, but general and indefinite in its future contemplation.

Again, it was laid down in the *Lauderdale Peerage* case (2) (I am quoting from the head-note)

a change of domicile must be a 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 favour 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.

In this case two things must be established, first, a residence in Connecticut, not merely for a particular purpose, not merely for the purpose of getting work there, but a permanent residence "general and indefinite in its future contemplation."

In *Winans* v. *Attorney-General* (3), Lord Macnaghten quotes from Lord Westbury with approval to the effect that the *animus manendi* necessary to change the domicile of origin to a new domicile means a fixed and settled purpose and on the same page he quotes the language of Lord Cairns as follows:

To the same effect was the inquiry which Lord Cairns proposed for the consideration of the House in *Bell* v. *Kennedy* (4). It was this: Whether the person whose domicil was in question had "determined" to make, and had, in fact, made the alleged domicil of choice "his home with the intention of establishing himself and his family there, and ending his days in that country?"

And again, on page 292, Lord Macnaghten says:

My Lord, if the authorities I have cited are still law, the question which your Lordships have to consider must, I think, be this: Has it been proved "with perfect clearness and satisfaction to yourselves" that Mr. Winans had at the time of his death formed a "fixed and settled purpose"—"a determination"—"a final and deliberate intention"—to abandon his American domicil and settle in England?

I think it is important also to emphasize this: the requirement of strict and conclusive proof is one which is naturally exacted owing to the very grave consequences entailed by a change of domicile. Lord Buckmaster says in *Ramsay* v. *Liverpool* (5):

The law upon the matter is settled. A domicile of origin can be changed and in its place a domicil of choice acquired, but the alteration

(1) (1869) L.R. 1 Sc. App. 441.
(2) (1885) 10 App. Cas. 692.
(3) [1904] A.C. 287, at 291.
(4) (1868) L.R. 1 Sc. App. 30.
(5) [1930] A.C. 588, at 590.

is a serious matter not to be lightly assumed, for it results in a complete change of law in relation to two of the most important facts of life, marriage and devolution of property. This is admirably expressed by Lord Curriehill in *Donaldson* v. *McClure* (1) in words unnecessary to repeat, which were expressly approved by Lord Halsbury in *Marchioness of Huntly* v. *Gaskell* (2).

And, to quote once more from Lord Macnaghten's judgment in *Winans* v. *Attorney-General* (3), he says: "And," says his Lordship (referring to Lord Westbury in *Bell* v. *Kennedy* (4))

"unless you are able to shew that with perfect clearness and satisfaction to yourselves, it follows that a domicil of origin continues." So heavy is the burden cast upon those who seek to shew that the domicil of origin has been superseded by a domicil of choice! And rightly, I think. A change of domicil is a serious matter—serious enough when the competition is between two domicils both within the ambit of one and the same kingdom or country—more serious still when one of the two is altogether foreign. The change may involve far-reaching consequences in regard to succession and distribution and other things which depend on domicil.

Before proceeding to discuss the facts, it, perhaps, ought to be added that a domicile of origin is not lost by the fact of the domiciled person having left the country in which he was so domiciled with the intention of never returning. It is essential that he shall have acquired a new domicile, that is to say, that he shall in fact have taken up residence in some other country with the fixed, settled determination of making it his principal place of residence, not for some particular purpose, but indefinitely.

This factor is of great importance in the present case. The issue is not whether the husband had left Quebec with the intention of settling somewhere in the United States and not returning to Quebec, but whether he had taken up his residence in the State of Connecticut with a fixed, settled determination of making his permanent residence in that state.

The point is dealt with in the judgments in *Wahl* v. *Attorney-General* (5). The person whose domicile was in question there had been born in Germany and had a domicile of origin in Germany. He came to England and, after residing there for some years, applied for naturalization as a British subject under the *Aliens Act* of 1870. In his application he declared that he intended to con-

(1) (1857) 20 D. 307, at 321.
(2) [1906] A.C. 56, at 66.
(3) [1904] A.C. 287, at 291.
(4) (1868) L.R. 1 Sc. App. 321.
(5) (1932) 147 L.T. 382.

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tinue to reside permanently within the United Kingdom of Great Britain and Ireland and that he had no intention of permanently leaving the United Kingdom. The argument addressed to the courts in favour of change of domicile naturally emphasized this declaration and, indeed, the declaration was considered by Lord Macmillan as sufficient to turn the scale in discharging the onus resting upon the Attorney-General. Lords Dunedin, Warrington, Atkin and Thankerton rejected the contention and the House of Lords held that the domicile of origin had not been thrown off.

Lord Dunedin's judgment seems to me to be very useful in its application to the present case and I quote it in full:

> I have had the advantage of reading the opinion which will be delivered by Lord Atkin, and as I agree *in omnibus* with it I do not think it necessary to deliver a full opinion. Were it not for the declaration I do not think that in the light of many cases decided as to domicile anyone would say that the determination *exuere patriam* was proved. Coming to the declaration I make three remarks. First, naturalisation does not carry with it as an inevitable consequence change of domicile. Second, in signing the declaration it is extremely unlikely that the question of domicile was before his mind. Third, the declaration itself is ambiguous, for residence in the United Kingdom as an intention does not discriminate between English and Scotch domicile, though these are essentially different. It seems to me to put too great a burden on the class of residence in England which has been proved, not only to establish the factum, but to turn the ambiguity of expression as to the animus into a certainty.
>
> I think the appeal should be allowed.

I may add that the judgment of Lord Atkin, in which Lord Dunedin concurs, illustrates admirably, I think, the searching analysis to which it is the practice of the courts to subject the facts adduced in support of an allegation that a domicile of origin has been changed and a new domicile acquired.

But my immediate purpose is to emphasize the third of Lord Dunedin's "three remarks." An intention to reside in the United Kingdom, although it may be a starting point as evidence, tells us nothing *per se* as to change of domicile. So with regard to the United States, an intention indefinite as to locality to live somewhere in the United States is in itself inconclusive where the question at issue is: Has A, the person whose domicile is in dispute, taken up residence in a given state with the intention of residing permanently in that State? Residing in

Philadelphia with the intention, not of making his permanent home in Philadelphia, but of making his home in Philadelphia, Baltimore or Washington, could not be effective to displace the domicile of origin.

Lord Dunedin's judgment suggests the advisability of entering a caveat against a possible misunderstanding. There are passages in the judgments of very eminent judges which seem to lay down this: that the intention necessary to constitute a change of domicile must amount to an intention directed to a change of civil status. I do not mean, of course, a change of political status (nationality), by which one ceases to be the subject of one country and becomes the subject of another, but a change of civil status by which it may be said, for want of a better expression, that one ceases to be the citizen of one country and becomes, to borrow the expression of Vice-Chancellor Wickens in the judgment to which I am now going to refer, "the citizen of another." That view is discussed by Vice-Chancellor Wickens in *Douglas* v. *Douglas* (1) in a judgment which in some respects, at all events, is approved by Lord Macnaghten in *Winans* v. *Attorney-General* (2); and that very learned judge feels himself forced to the conclusion that that is not the rule of English law, although he thinks such a rule would be a very convenient one.

On the other hand, there is a judgment of a very great judge, Lord Justice Turner in *Jopp* v. *Wood* (3) in which he employs language at least pointing in the other direction which is quoted by Ritchie C.J. in *Wadsworth* v. *McCord* (4). Then there is the well known judgment of Lord Halsbury in *Huntly* v. *Gaskell* (5), and the passage in that judgment at pages 66 and 67 in which he approves the judgment of Lord Curriehill in *Donaldson* v. *McClure* (6), whose judgment, as Lord Halsbury says, was approved and quoted by Lord President Inglis in the case of *Steel* v. *Steel* (7). Lord Curriehill's judgment, and the passage in Lord Halsbury's judgment to which I have referred, appear to have been accepted by Lord Buckmaster in *Ramsay* v. *Liverpool* (8). It is not, in my view, necessary

(1) (1871) L.R. 12 Eq. 617, at 643 *et seq.*
(2) [1904] A.C. 287.
(3) (1865) 4 De Gex, J. & S. 616, at 621.
(4) (1886) 12 S.C.R. 466, at 476.
(5) [1906] A.C. 56.
(6) (1857) 20 D. 307.
(7) (1888) 15 R. 896.
(8) [1930] A.C. 588, at 491.

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for the purposes of this case to consider the effect of those passages. I refer to the topic only because Lord Dunedin's language, which I have quoted, suggests the possibility that his view was in accord with that of Lord President Inglis and Lord Curriehill.

You cannot of course have a change of domicile in the international sense unless you acquire a new domicile in a jurisdiction in which, having acquired it, you acquire a new civil status in the sense mentioned by Wickens, V.C. But it is unnecessary for the purpose of this appeal to express any opinion in the question whether the intention to acquire a new domicile as a factor in producing the legal result involves a specific intention to acquire a new civil status.

So far as this particular case is concerned, it must be remembered that the only change of domicile in question is that found by the Court of King's Bench, a change of domicile to Connecticut. *Prima facie,* the law of the foreign country would be the law of Quebec, that is to say, any party to an action alleging that a married woman was separate as to property would have to prove in proceedings in the Quebec courts either that there was a marriage contract, or that the law governing the several rights of the spouses in respect of their property is different from the law of Quebec; and the respondents rely upon an admission given at the trial that, by the law of Connecticut, a wife marrying without a marriage contract is separate as to property. The question with which we are strictly concerned then is: Had the husband acquired at the time of the marriage a domicile in Connecticut?

The facts in evidence are of the most meagre nature. The husband was born at St. Germain de Grantham in Quebec in 1894 and lived in that village with his parents until the year 1923 when he went to the United States. It is rather important to follow the evidence closely. The husband himself says that at the time he was married he had been in the United States since the 18th of February, 1923; that he was married in 1928; that during the period between 1923 and 1928 he had always lived in the United States; that he was a journeyman carpenter and worked on construction; that his parents were living in St. Germain and that after he went to the United States the family went there also.

D. Dans la même année, ils sont partis pour les Etats-Unis? R. Je les ai fait demander aux Etats-Unis, ils sont montés.

D. Pourquoi les avez-vous fait demander? R. Pour s'en venir rester aux Etats-Unis.

D. Parce que vous vouliez y rester? R. Oui.

D. Maintenant, est-ce que votre famille demeure encore aux Etats-Unis? R. Non.

D. Pendant combien de temps votre famille est-elle demeurée aux Etats-Unis? R. Cinq ans.

D. Au moment de votre mariage, est-ce que la famille était aux Etats-Unis? R. En Canada, depuis le mois de mai.

D. Après votre mariage combien de temps êtes-vous resté aux Etats-Unis vous-même? R. Je me suis marié dans le mois de septembre, je suis descendu au bout de deux ans, dans le mois de septembre, le 11 septembre.

D. Aviez-vous l'intention, au moment de votre mariage, de revenir au Canada ou aviez-vous l'intention de rester aux Etats-Unis? R. J'avais l'intention de rester aux Etats-Unis.

D. Etait-ce pour cela que vous aviez pris vos papiers américains? R. Certainement.

Two years after his marriage he and his wife returned to St. Germain; and he says, "Je suis revenu au Canada avec l'idée de bâtir à Drummondville".

Now, it will be observed that through the whole of this evidence there is nothing to show a residence in fact in the State of Connecticut. In cross-examination, it is true, there is this question and answer:

Q. Vous étiez menuisier, vous dites, à Bristol? A. Oui.

But there is nothing, I repeat, to show even a residence in fact in Bristol or in Connecticut. As to intention, apart from Rajotte's direct evidence as to intention, there are certainly no facts upon which an inference could reasonably be founded of an intention to settle permanently in Connecticut or anywhere in the United States. It is contended that he was domiciled in Bristol but, apart from the general statement quoted above, there is no evidence; and there are no concrete facts which would indicate the circumstances of his being there. Had he a house? Was he living in lodgings? Had he anything in the nature of permanent employment? His family, he says, were in the United States for some years, returning to Quebec before the marriage, but he does not tell us where. Nor is there anything about the circumstances or conditions of their life. I will come to his direct evidence as to intention in a moment.

As to evidence of the wife, she says that she had been living in Bristol about five years at the time of her mar-

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riage and that her family came to the United States two years after she did; that she was seventeen or eighteen years old when she left Quebec for the United States; and that she went there to work. She says that her father was a farmer and that the family had gone to Bristol in search of work but still retained the ownership of the farm. Except as to direct evidence of intention, to which I shall come in a moment, there are not facts stated in her evidence from which it could properly be inferred that she had gone to Connecticut or, indeed, to the United States with the purpose of making her permanent home there.

Before coming to the direct evidence of intention, it is desirable, I think, to refer to some judicial observations. In *Wadsworth* v. *McCord* (1), Dorion, C.J., says this:

> As Merlin, vo. Domicile, says, there is nothing more difficult to decide than questions of domicile. This was said in France where the population is sedentary, but the difficulty here is greatly increased. Here is a man who left Ireland a grown up person. His domicile was in Ireland. The law is clear that the domicile of origin is the real domicile until another domicile has been acquired. Twenty or thirty years may intervene, but if the person has not acquired another domicile the domicile of origin continues to be his domicile. There was a case lately in Ontario (*Magurn* v. *Magurn* (2)) where a man had been twelve years away from his domicile, and it was held that his original domicile was still his domicile.

To the same effect is the observation of Lord Wensleydale in *Whicker* v. *Hume* (3):

> I perfectly agree with my noble and learned friend that, in these times of visiting abroad, transferring oneself even for years abroad, you must look very narrowly into the nature of the residence abroad before you deprive an Englishman living abroad of his English domicile.

Lord Macnaghten uses similar language in *Winans* v. *Attorney-General* (4):

> * * * you must look very narrowly into the nature of a residence suggested as a domicil of choice before you deprive a man of his native domicil.

It is well, I think, to keep this consideration in mind when asking ourselves the question whether there are any facts in this case apart from the direct evidence of intention from which it can be seriously argued that an infer-

(1) (1885) 2 M.L.R. 113, at 116.
(2) (1883) 30 R. 370; (1885) 11 A.R. 178.
(3) (1858) 7 H.L.C. 124, at 164.
(4) [1904] A.C. 289, at 294.

ence arises that either husband or wife had a fixed and settled purpose of remaining indefinitely in Bristol or Connecticut or even in the United States.

I come now to the direct evidence of intention. First of all, there is a question whether such evidence is admissible. The observation of Mr. Justice Mignault, speaking on behalf of the majority of this Court in *Taylor* v. *Taylor* (1) appears to me to be an *obiter dictum.* It is not, so far as I can see, a part of or a step in the *ratio decidendi;* consequently, it is open to challenge in this Court and, when challenged, it would be our duty to examine the point on the merits. Nevertheless, it is the deliberate opinion of Mr. Justice Mignault, concurred in by the late Chief Justice of this Court and by my brother Rinfret. I do not find it necessary to decide now whether it correctly states the law of Quebec. Remembering who the learned judges were who were responsible for it, I should feel called upon to weigh the question with great care before differing from them.

The English rule is, no doubt, different. The rule, I think, is correctly stated on page 204 of Halsbury's Laws of England (Hailsham Ed.), Vol. 6, in these words:

> Direct evidence of intention is often not available, but a person whose domicil is in question may himself give evidence of his intentions, present or past. Evidence of this nature is to be accepted with considerable reserve, even though no suspicion may be entertained of the truthfulness of the witness.

Assuming, but not deciding, that this is the law of Quebec, it is, of course, of the greatest importance to analyse direct testimony as to intention with care and to ascertain precisely what is the nature of the intention which the witness is ascribing to himself at the pertinent period.

The two witnesses in this case are the plaintiff and her husband. I have gone through the evidence of the husband with great care and there is no statement by him that he had a fixed settled intention to make his permanent residence either at Bristol or in the state of Connecticut. He mentioned the fact that he had taken out some papers connected with American citizenship. The papers are not produced and of the nature of the representations made for the purpose of obtaining them we are not informed.

(1) [1930] S.C.R. 26, at 30.

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The fact that he made some such application is, in the circumstances of this case, not a weighty fact for the reason (if for no other) given by Lord Dunedin in the judgment quoted above, namely, that there are many jurisdictions in the United States where a separate domicile in the international sense could be acquired, and that such an act is necessarily too equivocal to determine the question whether the applicant intended to make his permanent home in a particular state.

Then, for the same reason that the declaration in *Wahl's* case (1), as to the intention to reside in the United Kingdom, was inconclusive upon the issue whether a domicile had been acquired in England, the direct evidence of Rajotte that he intended to remain the United States —and his evidence goes no further than this—can really be of no weight in determining whether or not he acquired a domicile in Connecticut or in any other state. These observations apply equally to the evidence of the respondent.

This is not a case in which, I think, the rule as to concurrent findings of fact ought to be applied, apart altogether from the question of the admissibility of direct testimony as to intention. It seems abundantly clear that the learned trial judge must have misdirected himself. He could hardly have appreciated the consideration that the domicile of origin could not be displaced until another domicile had been acquired; and that it was essential for the plaintiff to prove that her husband had a domicile in Connecticut, which was the state in which they were married, and the only state in respect of which there was an admission as to the matrimonial law. The majority of the Court of King's Bench appear also to have overlooked the fact that the direct evidence of intention, even if accepted at its face value, was inconclusive because the intention deposed to was not the only intention that could be relevant, namely, an intention to reside permanently in Connecticut.

Moreover, domicile of choice is a conclusion or inference which the law derives from certain facts (*per* Lord West-

(1) (1932) 147 L.T. 382.

bury, *Udny* v. *Udny* (1)), and I have not found a case in which the rule as to concurrent findings of fact has been applied to concurrent conclusions on the issue (usually one of mixed fact and law) that a particular domicile has been acquired or has been cast off. In *Wadsworth* v. *McCord* (2) this Court reversed the concurrent conclusions as to domicile of the Superior Court and the Court of Queen's Bench. In *Winans* v. *Attorney-General* (3), the House of Lords reversed the concurrent conclusions of Kennedy and Phillimore JJ. before whom the information was heard, and of the Court of Appeal. In *Wahl* v. *Attorney-General* (4), the House of Lords reversed the concurrent conclusions as to domicile of the King's Bench Division and of the Court of Appeal. In *Bell* v. *Kennedy* (5) the House of Lords reversed the concurrent findings of Lord Kinloch and the Second Division of the Court of Session. In all these cases the critical question concerned the proper inference to be drawn from the facts in evidence. The rule mentioned has, I think, no relevancy in this case.

As regards the suggestion made from the Court that the husband might now be added as a party respondent, we are satisfied that, since it follows from our judgment that the wife, the plaintiff of record, had no cause of action, the Court of King's Bench would not in such circumstances, under the practice prevailing in the province of Quebec, have substituted the husband as plaintiff.

It is not necessary to consider the question of prescription and we express no opinion on it.

The appeal should be allowed and the action dismissed with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *Hackett, Mulvena, Foster, Hackett & Hanna.*

Solicitor for the respondent: *Gaston Ringuet.*

(1) (1869) L.R. 1 Sc. App. 441.
(2) (1886) 12 S.C.R. 466.
(3) [1904] A.C. 289.
(4) [1932] 147 L.T. 382.
(5) (1868) 1 Sc. App. 307.