45, 1947

In the Privy Council.

No. 68 of 1946.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC (APPEAL SIDE).

BETWEEN

LEO WILFRID VEZINA (Defendant) *Appellant*

AND

DAME ALINE TRAHAN (Plaintiff) *Respondent.*

APPELLANT'S CASE.

Record.

1. This is an appeal as of right from a majority Judgment of the Court of King's Bench for the Province of Quebec (Letourneau, C.J., St-Germain, Gagné, Pratte, JJ., and McDougall, J. (dissident)) dated 30 November 1945, confirming, while modifying in part, a judgment of the Superior Court for the District of Montreal (Loranger, J.) dated 26 June 1944, maintaining Respondent's action for separation from bed and board.

2. By action instituted on 3rd August 1942 before the Superior Court for the District of Montreal, Respondent sued Appellant for a judgment of separation from bed and board, custody of their five children, use of the conjugal residence and an alimentary allowance. p. 9, l. 46, at p. 11, l. 15 *et seq.*

3. By Interlocutory Judgment (Cousineau, J.) dated 11 September 1942, Respondent was refused custody of the children and use of the common residence; was granted a temporary alimentary allowance and ordered to reside elsewhere than at the conjugal residence. p. 16, l. 17 *et seq.*

4. Appellant pleaded to the said action admitting his marriage to Respondent and parentage of their five children, admitting also that Appellant and Respondent were contractually separate as to property, denying the grounds of separation, and alleging further that the action is unfounded in fact and in law. p. 17, ll. 10–27

5. Respondent filed formal Answer to Plea. p. 17, l. 42.

6. On 24th December 1943 Respondent was duly served with Divorce Proceedings instituted by Appellant before the Court at Reno, Nevada, U.S.A., which service Respondent admits but which she ignored. p. 18, l. 20. p. 18, l. 26.

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7. On 25th January 1944 Appellant and Respondent were divorced by Decree of the said Reno Court, and a copy of the said Decree was
p. 18, l. 36. delivered to Respondent as she admits.

8. On 1st February 1944, Respondent filed a supplementary
p. 18. Declaration entitled "Incidental Demand" setting up the Divorce Proceedings and Decree as additional grounds of separation and seeking
p. 19, l. 4. a declaration of nullity against the said Divorce Decree.

9. On 7th February 1944, Appellant pleaded to the Incidental
p. 19, l. 30. Demand alleging the Divorce Decree to be lawful as between two American citizens, Appellant and Respondent. 10

10. On 19th February 1944 Respondent garnished Appellant's salary, Appellant having refused to pay Respondent a greater alimentary allowance than that awarded by the said Divorce Decree.

11. On 28th February 1944, Appellant contested the seizure of his
p. 19, l. 45. salary alleging that by Respondent's own admission Appellant and Respondent were married and domiciled in Massachusetts and that the
p. 20, l. 7. parties are consequently subject to the laws of the United States as to
p. 20, l. 15. matrimonial status.

12. On 2 March 1944, Respondent answered the said contestation
p. 20, l. 50, to of seizure alleging that before their marriage Appellant and Respondent 20
p. 21, l. 5. were domiciled in Massachusetts but shortly thereafter came to establish
p. 21, l. 12. their domicile in Montreal, Province of Quebec, and have retained their domicile in Montreal since 25 years.

13. On 9 March 1944 Appellant filed Reply to the said Answer to
p. 22, l. 20. Contestation, alleging by paragraph 2 that Appellant admits paragraph 3 of the Answer which reads as follows:

p. 20, ll. 50 *et seq.* "3. Les parties, avant leur mariage, étaient domiciliées aux Etats-Unis, à Worcester, Mass., mais ceci eut lieu il y a 25 ans environ, et le jour même ou les jours suivant immédiatement la cérémonie du mariage, les parties en cette cause sont venues 30 établir leur domicile dans la cité de Montréal, province de Québec."

p. 22, l. 26. The said Reply also contained the following allegation by Appellant:

"4. Il nie le paragraphe 6 et ajoute qu'il n'a plus son domicile dans la province de Québec."

14. On 21st March 1944, at the opening of the trial (before
p. 33, l. 20 *et seq.* Loranger, J.) Appellant moved to amend Appellant's said Reply as follows
p. 23, l. 25. in part:

p. 33, l. 50. "1. By replacing paragraph 2 of the said pleading with the following:

"2. Il admet le paragraphe 3 sauf quant aux mots 'leur 40 domicile' de la cinquième ligne lesquels sont niés. Le défendeur admet cependant que les parties sont venues à Montréal y établir leur résidence."

p. 34, l. 4. "2. By striking the word 'plus' in paragraph 4 of the said pleading and replacing the same with the word 'pas.'"

15. Likewise on 21st March 1944, at the said opening of trial, Appellant asked and was granted leave to file a Supplementary Plea alleging the said Divorce Decree and seeking instantaneous dismissal of Respondent's (Plaintiff's) action. p. 30, l. 10 *et seq.* p. 23, l. 18.

16. During trial, on 22nd March 1944, Respondent filed Answer to Appellant's Supplementary Plea alleging Appellant's domicile to be and always since 1917 to have been in the Province of Quebec and that in consequence the said Divorce Decree is null and void and that it be so declared. p. 31, l. 8 *et seq.*

17. On 23rd March 1944, Appellant filed Reply to Respondent's Answer to the Supplementary Plea alleging among other things that the Superior Court is without jurisdiction to try the issues. p. 30, l. 10 *et seq.*

18. At trial Respondent filed a written admission admitting the validity of the Divorce Decree everywhere in the United States, though denying its validity in the Province of Quebec or in Canada. p. 27, l. 13 *et seq.*

19. At the opening of trial counsel on behalf of Appellant took exception to the jurisdiction of the Court, *rationæ materiæ*, an exception which under Quebec law can be raised at any stage of the proceedings. p. 45, l. 16 *et seq.*

20. The evidence reveals the following facts:

Appellant was born in Worcester, Mass., on 17 January 1894 of parents then living in the United States since 26 years. p. 124, l. 36. p. 270, l. 30. p. 125, l. 25.

Appellant's father was born in Canada, Appellant's mother in the United States.

Appellant went to school in Worcester to the age of 14 then commenced to work there. Appellant was 23 years of age when he first came to Montreal (January 1917) on a vacation, but found a job and stayed. p. 270, l. 41 & l. 43.

21. In Montreal, except for a short period, Appellant worked for an American company, L. J. Heinz, of Pittsburgh, Pennsylvania. p. 128, ll. 1–15.

22. Having decided to marry Respondent, an American living in Worcester, Mass., Appellant consulted the U.S. Consul in Montreal respecting immigration matters, and was advised to consult a Notary in Montreal concerning marriage laws. The Appellant did and the Notary drew up a form of ante-nuptial contract in which Appellant is described as "Mr. Léo Wilfrid Vézina, of the City of Montreal, commercial traveller," . . . and which also recites, "In consideration of the said intended marriage, the future husband hereby doth give unto the future wife, thereof accepting, the household furniture and goods garnishing and ornamenting actually the future common domicile of the said consorts, situate at No. 609 of Querbes Avenue, Outremont, near Montreal, Canada . . . " p. 126, ll. 45–50. p. 127, ll. 4–15. p. 262, l. 1 *et seq.* p. 262, ll. 28–34.

23. Appellant and Respondent were married in Worcester, Mass., on September 1, 1919, and a few days later came to Montreal. Appellant continued in the employ of the L. J. Heinz Company as travelling salesman for Quebec, eastern Ontario and the Maritime Provinces. p. 270, l. 20. p. 127, l. 31.

p. 127, l. 40. p. 128, l. 47. p. 128, l. 42. p. 129, l. 19. p. 129, l. 33. p. 129, l. 40 *et seq.*

24. Both Appellant and Respondent visited the United States during their sojourn in Canada, but in October 1924, they gave up their home in Quebec City, where they had been living since 10 months, sold all their furniture at a sacrifice and returned to Worcester to go into partnership with Respondent's brother. The latter being found to be in bankruptcy, Appellant instead bought up the bankrupt estate and went into business for himself. This business was carried on for about one year and a half and abandoned in favour of employment with the Palmolive Company of Springhill, Mass.

p. 129, ll. 47 *et seq.*

25. Appellant's second period of residence in the Province of Quebec commenced in 1928, four years after returning to Worcester. While on a visit to Montreal in October 1928 Appellant was offered employment with the Borden Company of Canada which he accepted.

p. 131, l. 19. p. 131, l. 33.

26. From October 1928 Appellant was continually employed and resided at Montreal. Until 1931 he worked for the Borden Company, then for ten years he was General Manager of W. Clark Ltd., canners, and in December 1942, accepted employment with Canadian Industrial Alcohol Limited because he wanted to enter a company that " had vast interests in the United States, with the idea that I would be eventually transferred to the United States."

p. 256, l. 23.

27. As early as 1930 Respondent first sued Appellant for separation from bed and board and Appellant was awarded custody of the eldest son by Interlocutory Judgment dated 30 October 1930 (Boyer, J.) on condition " qu'il le garde à Montréal ou dans les environs, mais non aux Etats-Unis."

p. 180, ll. 25-31. p. 181, l. 44.

28. Respondent sued Appellant for separation again in the same year, 1930. Both suits were settled by reconciliation.

p. 143, ll. 20-34. p. 147, ll. 28-31. p. 178, ll. 31-36.

29. Appellant testified repeatedly that it was always his " avowed intention some day to return to the United States to live."

30. In corroboration of his own testimony Appellant adduced three witnesses, Churchill, Campbell and Ewens.

p. 156, l. 1 *et seq.* p. 157, l. 33.

31. Churchill, an insurance broker, President of G. U. Price Limited, a past President of the Kiwanis Club, who had known Appellant for 8 or 10 years, testified that in his presence and that of others, Appellant justified his retention of U.S. citizenship by the reason that he " expected ultimately to go back to the United States." This witness was not cross-examined.

p. 53, ll. 36-42.

32. Campbell, Secretary-Treasurer of W. Clark Limited, food canners (Appellant's former employer), who had known Appellant since 1931, testified that " quite frequently " Appellant had stated in his presence " . . . he was proud of the fact that he was an American, and that he expected to return there at some time." This witness also was not cross-examined.

33. Ewens, in the service of the Ministry of Transport of the United Kingdom, who had known Appellant 18 or 19 years, testified that Appellant's " expressions always were that he would return to the United States at [a] future date," and that such declarations had been made in his presence " a number of times." p. 160, l. 33.

Cross-examined on behalf of Respondent, and pressed for dates of such declarations, Ewens answered, " No, I could not give definite dates; the last would have been at the time of his sister's visit last July or August " in 1943. p. 160, l. 47.

Pressed further, Ewens adds that Appellant had said that he would not remain here (in Montreal) all his days; he was eventually going back to the United States, but how soon he (Appellant) would not like to say. p. 160, l. 10 *et seq.* p. 161, l. 14 *et seq.*

34. Appellant's testimony is uncontradicted as to the following:

Appellant never purchased a house in Montreal (or Westmount) where he resided. He did buy " a piece of land at Ile Bizard " in the country, on which he built a small summer residence, consisting of a living-room, bedroom and kitchen, to which Appellant's son refers as " un camp d'été," a summer camp. p. 144, l. 40, to p. 145, l. 15. p. 159, ll. 20–40. p. 93, l. 1 & l. 40.

During the pendency of the present suit Appellant sold the place at Ile Bizard and bought another at Laval-sur-le-Lac, also in the country, as a speculation in real estate, and in the hope that having been awarded the custody of his children, they would spend the summer months with him. p. 145, ll. 31–45.

Appellant had no investment in Canadian securities other than small stock holdings in the companies by which he was from time to time employed. p. 154, ll. 26–38.

Appellant, since 1928, has returned to the United States approximately four times each year. p. 148, l. 11.

Appellant educated his children in both English and French. p. 146, ll. 38–48.

Appellant never voted in any but municipal (local) elections in Canada. He did vote in the United States when he was there at election time. p. 146, ll. 7–18.

Appellant always retained his U.S. Citizenship, and until 1942 (commencement of this suit) regularly registered his wife and children at the U.S. Consulate. p. 134, l. 41. p. 134, ll. 20–35. p. 135, l. 1 & l. 29. p. 146, l. 34. p. 170, ll. 8–30.

Appellant's father and two sisters are still living in the United States. His mother died there some two or three years before the trial. p. 182, ll. 25–36. p. 136, ll. 9–15.

Appellant maintains a bank account in the United States. p. 136, ll. 16 & 30.

Appellant has made arrangements to be buried at Worcester, Mass., in the family plot and his Will provides for such burial. p. 143, l. 40, to p. 144, l. 39.

35. As proof of Appellant's loss of his domicile of origin and acquisition of a domicile of choice Respondent relies upon the following :

(A) Appellant's description in the ante-nuptial contract, and the use of the words " common domicile " therein ;

(B) Length of Appellant's residence in Montreal, i.e., 1928 to 1944 ;

(C) Appellant's alleged statements that he would rebuild the summer camp at Ile Bizard into an all year residence ; and that Appellant proposed to spend his declining years there (which Appellant denied).

p. 145, ll. 19–26.

Even Respondent admits that if they lived at Ile Bizard, five months of the year would have to be spent in the City during " les gros froids ou quand la route n'était pas passable."

p. 96, ll. 10–20.
p. 179, ll. 23–29.

36. Appellant contends that :

(A) Appellant's domicile of origin is in the United States ;

(B) The burden of proof is upon Respondent to show substitution of a domicile of choice in the Province of Quebec, District of Montreal ;

(C) Any doubt must be construed in favour of the domicile of origin ;

(D) Appellant and Respondent are subject, as to matrimonial status, to the laws of Appellant's domicile ;

(E) The Quebec Courts are without jurisdiction to try an issue relating to the matrimonial status of Appellant and Respondent ;

(F) Appellant's Divorce from Respondent extinguished the latter's action in separation from bed and board.

37. The learned trial judge (Loranger, J.) found that Appellant had acquired a domicile of choice in the Province of Quebec " depuis vingt-cinq ans," maintained Respondent's Action, Incidental Demand and Seizure by garnishment and dismissed Appellant's Plea, Supplementary Plea, Motion to Amend, and all other pleadings.

p. 44, l. 43.

38. The learned trial judge erred in :—

(A) Rejecting proof by testimony of the witnesses Churchill, Campbell, Ewens and Appellant as to " intention " to retain the domicile of origin ;

p. 40, l. 22 *et seq.*

(B) Accepting the description of Appellant in the ante-nuptial agreement and mention of the " future common domicile " as evidence of change of domicile ;

p. 41, l. 33 *et seq.*

(C) Refusing leave to amend Appellant's Pleading on the ground that Appellant's personal declarations are inadmissible ;

p. 41, l. 33 *et seq.*

(D) Attaching undue weight to length of residence as proof of change of domicile ;

(E) Holding that jurisdiction can be acquired by acquiescence in matters affecting the matrimonial status of persons domiciled outside the territorial jurisdiction of the Court.

p. 45, l. 16 *et seq.*

39. The judgment of the Court of King's Bench confirmed the judgment of the Superior Court but modified its " dispositif " by eliminating certain orders which were " ultra petita," but do not relate to the issues of domicile and jurisdiction.

40. The notes of the learned judges in Appeal may be resumed as follows :—

LETOURNEAU, J.

Respondent has admitted the domicile of origin to be in Massachusetts. However, one cannot deny the decisive importance of the recital in the ante-nuptial contract " the future common domicile of the said consorts situate at No. 609 of Querbes Avenue, Outremont, near Montreal, Canada." p. 217, l. 48, to p. 218, l. 2. p. 218, l. 18 *et seq.*

ST-GERMAIN, J.

The principal question is whether the Superior Court had jurisdiction *rationæ materiæ*. p. 220, l. 1.

The recitals in the ante-nuptial contract and Appellant's explanations respecting same appear to show Appellant's definite intention to establish himself in Montreal.

While back in Worcester between 1924 and 1928 Appellant did not acquire any assets. p. 225, l. 30.

However, since 1928 Appellant has continuously resided in Montreal, has held important positions, earns all his income, pays taxes and income taxes there, and pays none to the United States. His children, except one, were born in the Province of Quebec, and the eldest son served in the Canadian armed forces and was not called to the American Service. p. 225, l. 34 *et seq.*

Since 1928 Appellant purchased two country properties, one of which he resold, the other he still has.

Although previously sued by Respondent, Appellant did not raise any exception to jurisdiction. p. 226, l. 25.

That the allegations which Appellant seeks to amend are judicial admissions of acquired domicile; and that although Appellant's counsel sought leave to amend, such leave was refused. p. 228, l. 38.

That a party's own testimony as to intention affecting domicile cannot be admitted. p. 231, l. 32 *et seq.*

PRATTE, J.

The most important question is that of domicile. p. 235, l. 40.

There is no doubt that the domicile or origin is in Worcester, Mass.

The declarations of intention to retain the domicile of origin, as proved by the testimony of the witnesses Churchill, Campbell p. 239, l. 1 to l. 46.

and Ewens, do not carry much weight. They merely show the Appellant was proud of his nationality and nursed the hope of returning to his country; or that he liked to make believe that such was the case. Such sentiment, however, does not stand in the way of acquiring a foreign domicile.

McDOUGALL, J. (dissident).

p. 243, l. 13 *et seq.* The domicile or origin in Massachusetts is clearly established both by fact and admission.

p. 243, l. 22. Domicile of origin persists until a domicile of choice is established, and the burden is on the party alleging the change of domicile to prove it.

p. 243, l. 25. As against Appellant's long residence in Canada, Appellant's expressed intention to retain his United States citizenship and eventually return to that country, are themselves sufficient to rebut a presumption to change domicile.

p. 243, l. 35 *et seq.* As to the recitals in the marriage contract, on the authority of *Wahl* vs. *Attorney General* (1932 L.T. 382) one cannot impute to Appellant, by the mere use of the word "domicile" an intention to forsake his domicile of origin and to elect a domicile of choice. To do so would be to impute to Appellant a knowledge of juridical definitions in which even our own judges disagree.

p. 244, l. 13. Appellant is and always has been domiciled in Massachusetts.

p. 244, l. 15 *et seq.* In the light of Respondent's admission that the divorce obtained by defendant is valid in all the States of the United States, the conclusion must be, that Appellant being domiciled in the United States, and having obtained a divorce there, valid according to the laws of his domicile, that divorce will be held valid in Canada.

p. 244, l. 20. The parties being divorced, Respondent can have no action in separation against Appellant.

GAGNE, J.

p. 245, l. 39 *et seq.* The intention to acquire a domicile in Quebec is clear. How else explain the marriage contract drawn according to Quebec law.

p. 246, l. 22 *et seq.* The declarations of intention to return to the United States, made by Appellant in presence of his friends, do not reveal a real intention to return but rather a vague hope that circumstances will lead him to his country of origin.

p. 246, l. 44. Although written declarations of intention carry more weight, it does not follow that oral declarations are inadmissible.

For the law and precedents relating to the questions in issue Appellant respectfully refers to the Record at pp. 201 to 214.

The Appellant submits that the judgments of the Superior Court for the District of Montreal and of the Court of King's Bench, Appeal Side, of the Province of Quebec, are wrong and should be reversed for the following, amongst other,

REASONS.

(1) Because Appellant has never acquired a domicile of choice in the District of Montreal, Province of Quebec.

(2) Because the Superior Court for the District of Montreal lacks jurisdiction *rationæ materiæ*.

(3) Because Appellant's Divorce from Respondent, in the light of Respondent's admission as to its validity, has extinguished Respondent's action against Appellant, as well as all accessory proceeding thereto.

10 (4) Because Appellant should have been granted leave to Amend the Reply to Answer to Contestation of Seizure.

(5) For the Reasons stated in the Notes of McDougall, J.

DAVID A. SWARDS.

MAX HELLMAN SWARDS.

In the Privy Council.

No. 68 of 1946.

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BETWEEN

LEO WILFRID VEZINA
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AND

DAME ALINE TRAHAN
(Plaintiff) - - *Respondent.*

APPELLANT'S CASE.

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