

Leo Wilfrid Vezina - - - - -

Dame Aline Trahan - - - - - R.

FROM

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

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 26TH JUNE,

Present at the Hearing:

LORD DU PARCQ

LORD NORMAND

LORD OAKSEY

LORD MORTON OF HENRYTON

[*Delivered by* LORD OAKSEY]

This is an appeal from a judgment of the Court of King's Bench (Appeal Side) for the Province of Quebec affirming, by a majority, of the Superior Court which granted the respondent's petition for separation from her husband, the appellant, for separation from bed and board on the ground of cruelty.

The appellant and respondent were married in Worcester, Massachusetts, U.S.A., in 1919, lived together in Montreal in the Province of Quebec from the date of their marriage until 1924, then spent the next few years in the U.S., but returned to Montreal where they lived until the institution of the present suit on the 3rd August, 1942.

The only issue both in the Courts in Quebec and before the Board was as to the appellant's domicile. It was common to both Courts that the appellant had a domicile of origin in Massachusetts, U.S.A. The question for decision was, and is, whether he acquired a domicile in Canada and had not abandoned it in 1944 when he obtained a decree of divorce in Nevada.

After interlocutory proceedings with reference to custody of the children and an alimentary pension for the respondent, the respondent pleaded denying the appellant's allegations of cruelty.

On the 24th December, 1943, the respondent was served with proceedings instituted by the appellant in the Court at Montreal, U.S.A., but she did not contest these proceedings and on the 21st January, 1944, the appellant was granted a divorce by the Court at Montreal. An alimentary pension was ordered of less amount than that ordered by the Superior Court in Quebec. The respondent then pleaded in her demand in the Quebec proceedings that the divorce was null and void and that it was an additional ground for separation. In the course of the interlocutory proceedings the appellant pleaded denying the respondent's contention that their matrimonial domicile was in the Province of Quebec, adding that he no longer had his domicile in the Province of

At the trial in the Superior Court before Mr. Justice Loranger the appellant applied to amend his pleading by substituting the word "not" for the words "no longer". A written admission was also filed by the respondent that the appellant's divorce decree was valid everywhere in the U.S., but denying its validity in Canada. The appellant did not contest the allegations of the respondent as to cruelty, at the trial.

Both Courts in Quebec have found that the appellant had acquired domicile of choice in Quebec and that therefore his divorce in Nevada was not a bar to the respondent's petition, but their Lordships have not thought it right in the particular circumstances of the present case to apply the rule of practice as to concurrent findings of fact which was recently restated in the case of *Srimati Bibhabati Devi v. Kumar Ramendra Narayan Rao and others* (1946) L.R. 73 I.A. 246.

In the Superior Court Mr. Justice Loranger appears to have held that the oral evidence of witnesses to whom the appellant had stated that he intended to return to the United States and end his days there was inadmissible although at one part of his judgment he appears to have considered and dismissed the evidence of these witnesses. The learned judge's view appears to have been based upon the interpretation he put upon Article 80 and 81 of the Civil Code of Quebec which are as follows:—

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

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

The learned judge also based his judgment in part on the construction he put upon the ante-nuptial contract entered into by the appellant and respondent on their marriage on 26th August, 1919, which provided that " 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 . . . "

The case of *Trottier v. Rajotte*, 1940, S.C.R. 203, at page 207, establishes that the law of domicile is the same in the Province of Québec as in Great Britain and the rest of Canada and it appears to their Lordships that the words above quoted in the ante-nuptial contract are words of gift and have no reference to an intention on the part of the appellant to set up a permanent home at No. 609, Querbes Avenue, Outremont.

The Court of King's Bench (Appeal Side) did not agree with the view of Mr. Justice Loranger as to the admissibility of the evidence in question but, after a review of all the evidence, the majority—Mr. Justice McDougall dissenting on the facts—came to the conclusion that the respondent had made out her case that the appellant had acquired a domicile of choice in Canada and had never abandoned it. Their Lordships agree with the Court of King's Bench that the oral evidence of statements made by the appellant was admissible.

There is contradictory evidence on both sides as to the appellant's intentions. On the one hand there is evidence that he stated to three friends—Messrs. Churchill, Campbell and Ewens—at various times which are not specified that he intended ultimately to return to the United States. On the other hand, there is the evidence of his own children and of other witnesses

that he had told them that he intended to rebuild his house on the Île Bizard, an island in a lake some twenty miles north of the City of Montreal in the Province of Quebec, and end his days there and, as to this evidence the appellant himself stated in his evidence that his children were speaking in good faith in giving this evidence. There are also the undoubted and admitted facts that he had resided in Montreal from 1928 until the beginning of these proceedings in 1942, that he had acquired a very considerable position in the business world of Montreal, that after the divorce in Nevada he went through a second marriage and returned to live in Montreal, and that so far from having any real family home in Massachusetts his parents appeared to be living in different States, one in New York and the other in Connecticut.

Great importance is to be attached to the findings of the learned judge who saw and heard the witnesses, and it is clear that Mr. Justice Lorange was not prepared to accept the evidence of the appellant.

After hearing the detailed examination of the evidence before the Board their Lordships have come to the conclusion that the judgments of the two Courts in Quebec ought not to be disturbed, and they will therefore humbly advise His Majesty that the appeal should be dismissed with costs.

LEO WILFRID VEZINA

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DAME ALINE TRAHAN

DELIVERED BY LORD OAKSEY