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SIMEON JONES ..... APPELLANT;

\*Nov. 7.

AND

\*Nov. 29.

THE CITY OF SAINT JOHN..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW  
BRUNSWICK.*Municipal assessment—Domicile—Change of domicile—Intention—59 V.  
c. 61 (N.B.)*

By the St. John City Assessment Act (59 Vict. ch. 61) sec. 2 "for the purposes of assessment any person having his home or domicile, or carrying on business, or having any office or place of business, or any occupation, employment or profession, within the City of Saint John, shall be deemed \* \* an inhabitant and resident of the said city."

J. carried on business in St. John as a brewer up to 1893 when he sold the brewery to three of his sons and conveyed his house and furniture to his adult children in trust for them all. He then went to New York where he carried on the business of buying and selling stocks and securities having offices for such business and living at a hotel paying for a room in the latter only when occupied. During the next four years he spent about four months in each at St. John visiting his children and taking recreation. He had no business interests there but attended meetings of the directors of the Bank of New Brunswick during his yearly visits. He was never personally taxed in New York and took no part in municipal matters there. Being assessed in 1897 on personal property in St. John he appealed against the assessment unsuccessfully and then applied for a writ of certiorari with a view to having it quashed.

*Held*, reversing the judgment of the Supreme Court of New Brunswick, that as there had been a long continued actual residence by J. in New York, and as on his appeal against the assessment he had avowed his *bonâ fide* intention of making it his home permanently, or at least for an indefinite time, and his determination not to return to St. John to reside, he had acquired a new home or domicile and that in St. John had been abandoned within the meaning of the Act.

\* PRESENT:— Sir Henry Strong C.J. and Gwynne, Sedgewick, King and Girouard JJ.

APPEAL from a judgment of the Supreme Court of New Brunswick discharging a rule nisi for certiorari to quash an assessment against the appellant.

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The only question raised on this appeal was whether or not the appellant, Jones, had abandoned his domicile in St. John by acquiring one in New York, and consequently whether or not he was liable to be personally assessed in the former city. The facts upon which the decision of the question depended are sufficiently stated in the above note and fully set out in the judgment of the court on this appeal.

*Currey Q.C.* for the appellant.

*C. J. Coster* for the respondent.

The judgment of the court was delivered by :

KING J.—The question in this case is whether or not the appellant was an inhabitant of the City of St. John, N.B., in the year 1897, within the meaning of the Act of Assembly, 59 Vict. ch. 61, sec. 2. The section is as follows :

(114.) For the purposes of assessment, any person having his home or domicile, or carrying on business, or having any office or place of business, or any occupation, employment or profession within the City of Saint John, shall be deemed and taken to be and is hereby declared to be an inhabitant and resident of the said city, any law to the contrary notwithstanding, and any person assessed as such inhabitant and resident shall be deemed and taken so to be, unless upon appeal to the Common Council, such person shall have been found to have been within the said city for a temporary purpose unconnected with business and shall have proved to the satisfaction of the Common Council that he possesses, or has acquired, a home or domicile at some other place designated by him, and that he has not during the year for which said assessment was made, had any office or place of business, or any occupation, employment or profession, within the City of Saint John, or carried on any business therein ; provided that any person whose actual home or domicile is out of the city, shall not be assessed on a poll tax within the city ; provided also that any person temporarily employed in the city as a labourer or

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journeyman mechanic, whose home or domicile is out of the city shall not be assessed as a resident.

In the year 1897, Mr. Jones having been assessed as an inhabitant in respect of personal property of the assessed value of \$150,000, appealed to the Common Council, as provided by the Act, claiming that he was a resident of the City of New York, and not of St. John. The appeal was dismissed, and Mr. Jones then applied to the Supreme Court of New Brunswick for a certiorari to bring up the assessment against him with the view of quashing it. The present appeal is from a judgment dismissing such application.

It appears that Mr. Jones was born in York County, N.B., about the year 1829, and when twenty-two years of age moved to St. John, where he lived and carried on the business of a brewer for upwards of forty years. During the latter part of this period he had business transactions in New York, chiefly in the buying and selling of stocks, bonds and other securities on his own behalf, and in 1892 he contemplated retiring from his business in St. John and going to New York to live and engage more actively in the business he had been carrying on there.

In pursuance of this intention he leased the brewery to three of his sons, and in 1893 sold it to them. At this time Mr. Jones was a widower, his wife having died five years previously, and he so continues. His family then consisted of six sons and two daughters, all unmarried, and residing with him, or at school.

In 1893 he conveyed the house in which he resided and the furniture to those of his children who were of age, in trust for all the children. This was done in pursuance of an expressed intention to quit St. John as a place of residence and to live permanently, or for an indefinite time, in New York. He accordingly left St. John and went to New York, where he has lived,

in the main, ever since, and where he has carried on his entire business. In New York he did not maintain a house, but lived in a single room in the Plaza Hotel, and paid for the room only when he occupied it. He was accustomed to spend the Christmas holidays with his children in St. John, and also was accustomed, in the summer season, to spend several months with them, usually leaving New York about the middle of June and returning about the middle of September. On the occasions of his return to St. John he lived with his unmarried children in the house already referred to. In 1897, the time spent in St. John amounted to thirteen or fourteen weeks. At this time two of his sons were married and lived in houses of their own, in St. John, and the elder daughter was married and lived in Scotland. The other children were living in the original family residence or were at school. From the testimony of Mr. Jones and his son Keltie, before the appeals committee of the Common Council, it appears that the St. John establishment was maintained partly by the members of the family residing in it who were carrying on business for themselves in St. John, and partly through gifts of money by Mr. Jones.

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When he left St. John in 1893, he was a director of the Bank of New Brunswick, a local institution, and continued such until his resignation in February, 1898. On his visits to St. John he regularly attended the board meetings, but the business of the board formed no part of his object in visiting the place. In 1897 the number of these attendances was thirty-one, the allowance for which was \$4 for each meeting.

He has never been personally taxed in any way in New York, and has taken no part in its municipal affairs.

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In his examination before the committee of the Common Council, Mr. Jones was questioned by the respondent as to his intentions, and he testified that since leaving in 1893, he always had the settled intention of not again returning to St. John to reside, and that his intention was to remain in New York indefinitely, although prior to 1898 (at which time he was giving his evidence) he had thought that he might yield to pressure from his daughter in Scotland and go there when he should close up his business, but that he had since abandoned the idea.

In *Thorndike v. Boston* (1), a case, like this, of municipal domicil for taxation purposes, Shaw C.J. says:

The questions of residence, inhabitancy or domicile,—for although not in all respects precisely the same, they are nearly so and depend upon much the same evidence,—are attended with more difficulty than almost any other which are presented for adjudication. No exact definition can be given of domicile; it depends upon no one fact or combination of circumstances; but, from the whole taken together, it must be determined in each particular case. It is a maxim, that every man must have a domicile somewhere; and also that he can have but one. Of course it follows that his existing domicile continues until he acquires another; and, *vice versa*, by acquiring a new domicile, he relinquishes his former one. From this view it is manifest that very slight circumstances must often decide the question.

And in *Lyman v. Fiske* (2), the same learned judge says:

It is manifest that it (habitaney) embraces the fact of residence at a place, with the intent to regard it and make it his home. The act and intent must concur, and the intent may be inferred from declarations and conduct. It is often a question of great difficulty, depending upon minute and complicated circumstances leaving the question in so much doubt that a slight circumstance may turn the balance. In such a case, the mere declaration of the party made in good faith, of his election to make the one place rather than the other his home, would be sufficient to turn the scale.

While the circumstance is not conclusive, it is held in *Platt v. Attorney General of New South Wales* (3) that:

(1) 1 Met. 242.

(2) 17 Pick. 231.

(3) 3 App. Cas. 336.

It is always material in determining what is a man's domicile to consider where his wife and children live and have their permanent place of residence, and where his establishment is kept up.

As to inferences from the mode of living, Lord 1899  
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King J. Chelmsford in *Moorehouse v. Lord* (1) says :

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.

And in *Guier v. O'Daniel* (2) it is said :

The apparent or avowed intention of constant residence, not the manner of it, constitutes the domicile.

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

I do not say that in order to obtain a domicile in a country, a man must necessarily have a house of his own and reside in it. Circumstances may be so strong as to shew a fixed purpose of abandoning his own country and making his home in another, and to shew also the accomplishment of that object, though he lives in inns or temporary lodgings, but such cases are rare.

And in the same case Lord Cransworth says :

I will not say in point of law that a person may not acquire a domicile by residence at a hotel ; but it can rarely happen, as a matter of fact, that such residence is intended to be of a permanent character.

It is however to be borne in mind that in recent times a practice of living in hotels has become more common than formerly, especially upon this continent.

In *Udny v. Udny* (4), Lord Westbury says on the general subject :

Domicile of choice is a conclusion or inference which the law draws 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.

There must be therefore, as so frequently expressed, both the fact of residence, and the intention to so reside for an unlimited time. The fact and the intention must concur, and both, therefore, are relevant facts to be proved by appropriate evidence.

(1) 10 H. L. Cas. 272.

(3) 3 Macq. H. L. 854.

(2) 1 Binn. 349 note.

(4) L. R. 1 H. L. Sc. 441.

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In *Thorndike v. Boston* (1), already referred to, the plaintiff had gone from Boston to Scotland and the following direction was held to be correct :

That if the jury were satisfied that the plaintiff went abroad, not for the mere purpose of travelling, or for any particular object, intending to return when that was accomplished, but with the intention of remaining abroad for an indefinite length of time, or with the intention of not returning to Boston to live in the event of his return to the United States, then he ceased to be an inhabitant of Boston liable to taxation.

The circumstances chiefly militating against the acquisition of a domicile in New York by Mr. Jones, are two, his mode of living there, and the facts in connection with the maintenance of the family home in St. John. The materiality of these circumstances lies in their bearing upon the question of his intention to make a permanent, or indefinitely continuing, home in New York.

As to the first two things are to be taken into account, the continuance of the hotel life for a period covering five years, and the fact that Mr. Jones was a widower. And as to the second, the facts are to be regarded in the light of Mr. Jones's open and avowed purpose to divest himself of all proprietary interest in the house at St. John and its furnishings, and fall short of proving that he maintained the establishment.

The case presented upon the evidence is similar to that instanced by Chief Justice Shaw, of Massachusetts, in *Lyman v. Fiske* (2), where in a case of nicely balanced circumstances the mere declaration of the party, made in good faith, of his election to make the one place rather than the other his home, was considered to be sufficient to turn the scale. Here we have explicit and repeated declarations of Mr. Jones, before the making of the assessment in question, which can leave no reasonable doubt as to his inten-

(1) 1 Met. 242.

(2) 17 Pick. 231.

tion to abandon St. John as a place of residence and to make his home in New York (irrespective of whether he succeeded in the eye of the law in accomplishing it). His entire good faith in making the declaration has not been, and can not well be, impugned. We have therefore the fact of a long continued actual residence in New York as his chief place of abode, coupled with an avowed and *bonâ fide* intention to make it his home permanently, or, at least, for an indefinite time, and his fixed determination not to return to St. John to reside. There was, consequently, the acquisition of a new home or domicile, and the abandonment of the former one within the meaning of the Act.

As to Mr. Jones's attendance at the meetings of the Board of Directors of the Bank of New Brunswick, in 1897, while temporarily sojourning in St. John, this seems to be relied on merely as a circumstance tending to shew that there had really been no change of domicile. As such it is without real significance.

The result is that the appeal is to be allowed, the order appealed from set aside and a rule to be entered in the court below granting the writ of certiorari.

*Appeal allowed with costs.*

Solicitor for the appellant: *L. A. Currey.*

Solicitor for the respondent: *C. J. Coster.*

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