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*May 15.
*June 13.

THOMAS M. TAYLOR (DEFENDANT).....APPELLANT;

AND

FRANK SCOTT TAYLOR (PLAINTIFF)...RESPONDENT.

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

Domicile—Intention of the party—Marriage outside of the province—Circumstances—Change of domicile—Matrimonial status—Whether common or separate as to property—Evidence—Burden of proof—Art. 80 CC.

The appellant was born on June 30, 1865, in Mosquito, Newfoundland, where his parents were domiciled. He remained there until 1886, when he went to La Have River, in Nova Scotia, in order to seek better

*PRESENT:—Anglin C.J.C. and Mignault, Newcombe, Rinfret and Smith JJ.

employment as a mechanic. Then he worked his way on a ship to Sidney, Cape Breton and from there went to Montreal in October, 1886. He obtained employment in the Grand Trunk Railway Company's shops and boarded with a distant relative of his father. Some months later, he changed to one of the shops of the Canadian Pacific Railway Company in Montreal. He went to Toronto, worked there for a time and returned to Montreal, obtaining employment in another shop of the Canadian Pacific Railway. He then represented to his father and mother the advantages they would secure by coming to Montreal. The result was that, in 1887, the whole family came to Montreal, with the exception of a married sister who remained in the homestead; but she also came to Montreal the following year, the family home being rented to a neighbour. The father took a house in Montreal and the appellant boarded with him. In 1889, the father and mother decided to return to Newfoundland but failed to do so on account of the father's illness and subsequent death. In July, 1889, the appellant went to Newfoundland and married at Carbonnear the respondent's mother. He told the officiating minister that he came from Montreal and the marriage certificate describes him as "of Montreal, P.Q." After the marriage, the appellant and his wife went to Halifax; and, there being no work there, they both came on to Montreal where they lived until the death of appellant's wife. It is also in evidence that, after her death, the appellant caused an inventory to be made before a notary "of the community of property which formerly existed between him and his said late wife."

Held, affirming the judgment of the Court of King's Bench (Q.O.R. 45 K.B. 184), Newcombe and Smith JJ. dissenting, that all the circumstances of the case point to the fact that the appellant had abandoned his domicile of origin and had made Montreal his new domicile. (Art. 80 C.C.).

Per Newcombe and Smith JJ. (dissenting).—Upon the evidence, it must be held that, up to the time of the marriage, there had been no change of domicile. The burden of establishing as a fact the acquisition of a new domicile and the abandonment of the domicile of origin by the appellant was on the respondent and he has not discharged it. The evidence must be "unmistakable * * * that the party who has the domicile of origin intends to part with it * * *." (*The Lauderdale Peerage,* 10 App. Cas. 692).

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, Surveyer J.—The appeal to the appellate court was upon leave of appeal granted by that court (2).

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

Charles Laurendeau K.C. and *E. G. Place K.C.* for the appellant.

T. Fortin K.C. and *Lorenzo Prince* for the respondent.

(1) (1928) Q.O.R. 45 K.B. 184. (2) (1928) Q.O.R. 44 K.B. 204.

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The judgment of the majority of the court (Anglin C.J.C. and Mignault and Rinfret JJ.) was delivered by

MIGNAULT J.—This is a suit between father and son, the latter asking for an account of the administration of his father who had been appointed his tutor during his minority. The father confessed judgment, agreeing to render an account, but the account set up by him denied that he owed anything to his son, claiming on the contrary that the latter was indebted to him for maintenance and education until he reached the age of majority, for which the father reserved all his rights. This account was contested by the son.

The whole point in dispute is whether the appellant (the father) married his first wife, Dame Jael Davis, the respondent's mother, under the matrimonial *régime* of community of property, and that question in turn depends upon whether the appellant had lost his domicile of origin in Newfoundland and had acquired a domicile in the province of Quebec at the date of his first marriage.

At the trial the parties requested the court to decide first what was the domicile of the appellant at the time of his first marriage, and they admitted that according to the law of Newfoundland, at that date, the consorts would have been separate as to property, and that if, at the same date, the appellant had acquired a domicile in the province of Quebec, his matrimonial status would be that of community of property under the laws of that province. The Superior Court (Surveyer J.) found that the appellant had acquired a domicile in Montreal at the date of his first marriage, and maintained the respondent's contestation of the account. This judgment was affirmed by the Court of King's Bench, Mr. Justice Hall dissenting (1).

The appellant was born in Mosquito (now Bristol's Hope), Newfoundland, on June 30, 1865. He remained in Newfoundland until 1886, having worked at different places as a mechanic. He then, when aged 21, left that colony, seeking better employment, for, he says, he was a good mechanic, and he started at the bottom of the ladder and climbed up; that was his intention. On leaving Newfoundland he went first to Nova Scotia, at La Have River,

(1) Q.O.R. 45 K.B. 184.

and from there worked his way to Sidney, Cape Breton. He came to Montreal in October, 1886, where he obtained employment in the Grand Trunk shops and boarded with a distant relative of his father, a Mr. Edgecombe, on St. David street. Some months later, he changed to one of the shops of the Canadian Pacific Railway in Montreal. He says he also went to Toronto and worked there a couple of weeks, and then returned to Montreal, obtaining employment in another shop of the Canadian Pacific. From that time he remained in Montreal. He was in communication with his father and mother, brothers and sisters, and he told them of the advantages they would secure by coming to Montreal. The result was that the whole family came to Montreal, with the exception of a married sister who remained in the family home which the family continued to keep in Newfoundland, and sold some years later. The father took a house in Montreal and the appellant boarded with him.

In July, 1889, while still in the employment of the Canadian Pacific, the appellant went to Newfoundland and married at Carbonnear his first wife, Jael Davis, the respondent's mother. He told the officiating minister that he came from Montreal and the marriage certificate describes him as "of Montreal, P.Q." After the marriage, the appellant says he and his wife went to Halifax. There was no work there, so they both came on to Montreal where they lived thereafter until the first wife died. The children of the first marriage were born in Montreal. Some point is made in the evidence of the fact that the appellant's mother returned to Newfoundland, the father having died in Montreal. The mother however died in Montreal some years later. I do not think that the movements of the appellant's family are very material, but perhaps some significance may be placed on the fact that the appellant had caused them to come on to Montreal shortly after he had established himself there. He was apparently ambitious and eager to succeed, and he remained where work was available.

The testimony at the trial was mainly that of the appellant himself, as well as of his sister, Mrs. Peacock, and his brother, J. L. Taylor. Mrs. Peacock, who was in Montreal when the appellant went to Newfoundland in the summer

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of 1889, says he went there to be married to a girl whom he had known all his life, that he was absent from Montreal about three weeks, and that while he was away the family moved into a larger house in Montreal so as to be able to accommodate him and his wife on their arrival. This testimony is corroborated by the brother. The appellant denies in his testimony that he went to Newfoundland with the intention of marrying, but perhaps more weight may be placed on what he actually did, than on what he now states was his intention.

Some years after his marriage, the appellant opened a grocery business in Montreal which appears to have prospered, for he was able to purchase a corner property on Rosel street.

After the death of his first wife, the appellant caused an inventory to be made, before Cushing, N.P.,

of the community of property which formerly existed between him and his said late wife.

This the appellant did in his own name and also as tutor of his minor children among whom the respondent was the eldest. It is not necessary to treat this inventory as an admission by the appellant of what is really a question of law, namely, the legal effect of his first marriage, but it is a circumstance which along with others may help to show that the appellant had chosen Montreal as his home when he brought his first wife there.

On the evidence adduced the two courts have found that at the time of his first marriage (he remarried after his first wife's death), the appellant had changed his domicile from Mosquito, Newfoundland, to Montreal. Change of domicile involves a question of fact and requires actual residence in another place coupled with the intention of the person to make it the seat of his principal establishment (art. 80 C.C.). Proof of intention results from the declarations of the person and from the circumstances of the case (art. 81 C.C.).

Obviously the declarations must be contemporaneous ones, and not those which a party may make as a witness at the trial. It is argued that a declaration of intention may be found in the marriage certificate which states that Thomas Munden Taylor was " of Montreal ". But standing by itself it is not conclusive or unequivocal, for it may indicate a mere residence.

The circumstances of the case, however, all point to the fact that the appellant had chosen Montreal as his new home, and his bringing his wife there, after an unsuccessful attempt to find work in Halifax, strongly points to an existing intention on his part to abandon his domicile of origin. After his first marriage, he says he went three times to Newfoundland, the first time, he thinks, in 1910, the other times in 1914 and 1916, but as he was then in business in Montreal, these trips are without significance and do not weaken the inference that his home was in Montreal. Upon what is a question of fact, to wit, the abandonment by the appellant of his domicile of origin and his choice of a new domicile in Montreal, the two courts are in agreement. They do not appear to have taken an incorrect view of the problem before them, and I would not feel justified in interfering with their judgments.

The appeal fails and should be dismissed with costs.

SMITH J. (Newcombe J. concurring and both dissenting):—This case turns entirely on the determination of the question of fact as to whether or not the appellant, Thomas M. Taylor, had changed his domicile at the time of his marriage to the respondent's mother in 1889 from Newfoundland, where he was born, to Montreal, in the province of Quebec. His parents were domiciled in Newfoundland, where the appellant was born on 30th June, 1865, and where he remained until 1886, when he went to the La Have river, in Nova Scotia, and worked his way on a ship to Sydney, Cape Breton, and from there went to Montreal in October of that year. He obtained work in Montreal on the Grand Trunk Railway and the Canadian Pacific Railway; but went to Toronto and worked there for a time, and returned to Montreal.

He represented to his father and mother that work could be had in Montreal, and in 1887 the father, mother, one sister and five brothers went up to Montreal and took residence there. The homestead in Newfoundland was left in possession of a married sister, but she also came to Montreal the following year, and the homestead was then rented to a neighbour until it might be required. In 1889 the father and mother resolved to return to Newfoundland and to take some of the family with them. The mother started back in June, but took ill on the way, and returned to

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Montreal, but she and two younger brothers and the appellant proceeded to Newfoundland some time in July of that year. The father was unable to go with them, because he had fallen ill, and the mother later on had to return to look after the sick husband, who died in October at Montreal.

The married sister who came up in 1889 remained in Montreal. The other sister apparently remained with the sick father, and became Mrs. Peacock, but at what time we are not informed. One brother had gone to the United States prior to 1889, two had returned to Newfoundland with the mother; there is no definite information as to the other two, but presumably they remained in Montreal. What seems definite and undisputed is that the father and mother had decided to return permanently to Newfoundland in 1889 with the members of the family still dependent on them, and that this intention was not carried out solely because of the father's illness, and subsequent death in October of that year. It is clear, therefore, that when the mother and two younger brothers went to Newfoundland along with the appellant, there was a definite intention, so far as the father and mother were concerned, to return permanently to their home in Newfoundland with the members of the family then dependent on them.

It is necessary, however, to examine other evidence in order to arrive at a conclusion as to the intentions at that time of the appellant. It is contended, on behalf of the respondent, that when leaving for Newfoundland he left with the definite intention of marrying the plaintiff's mother and bringing her back to Montreal, to resume his residence there, and that therefore, before the marriage, he had elected to change his domicile to the city of Montreal. The examination for discovery of the defendant was put in as evidence on behalf of the plaintiff, and at p. 22 of this evidence there is the following:

Q. Did you go to Newfoundland about the 28th, 29th, 30th or 31st of July, 1889?

A. I got it marked down in my bible at home the year I was married, and I went down there, but I did not intentionally go to get married, although I got married when there, and I saw that there was no work there.

By the court:—

Q. Between 1886 and July 1889, did you return to Newfoundland?

A. No, I did not go back; I went back in 1889 when I got married, but I did not know I was going to get married. I went down with my mother and two younger brothers.

His evidence is also that, after arriving at St. John's by boat, he stayed there about a week, then went to Carbonear, where he met the lady that he married, and where he remained probably a week. Then there is the question:

Q. How long before getting married did you propose to your lady?

A. I just met the girl, I had gone to school with her, and I said, "Will you marry me?" She said "Yes."

After the marriage, he went immediately to St. John's. On cross-examination, he testified that on going back to Newfoundland prior to being married, he tried to get work in Angel's Foundry in St. John's, and after his marriage he tried to get into the dry-dock, but failed; that then he decided to take the *Peruvian* for Halifax and endeavour to do better there, but he failed to find work there, and went back to Montreal. He says that he had gone to school with the respondent's mother, but during the three years that he was away before returning to Newfoundland in 1889, he had only written one letter to her.

The respondent then puts in the evidence of Mrs. Peacock, the appellant's sister, which is the evidence mainly relied on to sustain the respondent's case. She apparently lived with her father and mother up to the time of the father's death in October, 1889, after the appellant's marriage, and no doubt had it not been for her father's illness she would have returned with him and the mother to Newfoundland in 1889, but she is not asked as to this, and there is no evidence upon the point beyond the inference that may be drawn from the fact that she was living with him as a member of his household. She states that the mother and two younger brothers went down to Newfoundland with the appellant in July, 1889, with the intention of remaining there, and that the father intended to go back but was prevented by his illness, and died in October. She says that the appellant had known the respondent's mother all his life and that she had one letter from her in two years.

By the court:

Q. Did you know your brother intended to get married to her in Newfoundland?

A. Yes, we had all that intention.

By defendant's counsel:

Q. What did you know about his intention?

A. That is his intention, and he told us.

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By the court:

Q. Talked in the family?

A. Yes, and I was the one who got the larger house, so as he would come and live with us.

By defendant's counsel:

Q. You got the larger house?

A. My father and I.

* * * * *

By the court:

Q. When he came back, the house was all ready to receive his wife and himself?

By the court:

Q. Rented in July or August?

A. I believe in August.

By the court:

Q. After the marriage or before?

A. Just about that time, but we intended to have him come back with his wife to stay with us.

The reliability of these statements must be tested by reference to what this witness previously swore to as stated above, namely, that in June of that year the father and mother had decided to go back permanently to Newfoundland; that with that intention the mother and two younger brothers did return to Newfoundland along with the appellant in July, and that the father only remained behind because of his illness. It seems to me, therefore, that there can be no truth in her statement that in August she and the father were getting a larger house because there was going to be one more person in the family, in the person of appellant's wife. It is not possible to reconcile this story with the unquestioned fact deposed to by herself and the other witnesses that at that time the father had a fixed intention of leaving Montreal and returning permanently to Newfoundland where his wife and two young children had already gone. It was not till October that this intention was abandoned because of the father's continued illness and that a telegram was sent to the mother to come back. The father certainly moved to new premises in August, because appellant, on his return, had difficulty in locating him, but it is evident that the change was not made with the object of accommodating the larger family since he had no intention then of remaining in Montreal himself.

The story of this witness as to it being understood in the family that appellant was going to marry plaintiff's mother,

and that he left for Newfoundland in July, 1889, with that intention, seems a very improbable one in the light of her own evidence as well as the other evidence.

When appellant left Newfoundland in 1886 he was just twenty-one and had been drifting about since serving his apprenticeship, working at different places, at blacksmithing and at fishing with his father. He left seeking work with no fixed idea as to the kind of work he would take up or as to his ultimate destination. No one says he was engaged to the lady before leaving and no one is asked as to that. This sister says she and the lady were great friends and she had only one letter from her in the two years between the time she left Newfoundland and the marriage which seems a very meagre correspondence with a great friend, and prospective sister-in-law.

The appellant giving evidence for plaintiff is asked by the court if he had carried on no correspondence with his future wife, and he says he wrote her just once during the three years. It seems very improbable that if there was an understanding in the family that appellant was going to marry this lady, the correspondence should be limited to these two letters. I think this sister's evidence on this point no more reliable than her evidence that at the time her father was intending to leave Montreal and join his wife and family permanently in Newfoundland he was renting a larger house with a view of taking appellant and his wife in as boarders in Montreal.

Turning, then, to the evidence of the brother, J. L. Taylor, also called on behalf of the plaintiff, he is asked if he heard Mrs. Peacock's evidence, and if he corroborates it, and his answer is,

A. As far as I know; my brother and sister covered all the information I could render in this case.

* * * * *

By the court:

Q. Do you remember your brother leaving for Newfoundland in 1889 with your mother and two brothers?

A. Yes.

By the court:

Q. What did they leave for?

A. They went down with the intention of staying, and my father was to join them in October, but unfortunately they had to telegraph her and bring her back, and she came back two weeks before he died.

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By the court:

Q. What was your brother's intention?

A. My brother had perhaps two or three intentions; I do not just know what happened at the time. As far as I understand they covered all the information I could render.

By the court:

Q. Was there any talk of his marriage when he left?

A. Naturally, as far as I know; I could not say as much as the others.

On cross-examination:

Q. You said that your brother had perhaps two or three intentions; what do you mean by that?

A. I remember at the time, because one of my brothers had gone to the United States, and if he struck anything worth while down there, the probabilities were he would remain.

The "he" in this answer means appellant as appears from the next question and anwer.

Q. What do you mean by "down there"?

A. That is in Newfoundland or anywhere else where he might strike a position that would be of service; better than he might locate in Montreal; at that time we were all liable to move here, there and everywhere.

Q. At that time none of you were particularly settled anywhere?

A. No, we were largely boarding at home with our parents, but he had not bought any furniture or established himself anywhere.

All this evidence is by the plaintiff's own witnesses, and to my mind, if it establishes anything, it is that up to the time of the marriage there was no change of domicile. The burden of establishing as a fact the acquisition of a new domicile and the abandonment of the domicile of origin by the appellant was on the plaintiff, and the nature of the evidence required for that purpose is clearly set out in the appellant's factum in the quotation set out from *The Lauderdale Peerage* (1) (1885), as follows:

> 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* v. *McDonall* (2), and in *Munro* v. *Munro* (3). It is not upon light evidence or upon a light presumption that we must act, but it must clearly appear by unmistakable evidence that the party who has the domicile of origin intends to part with it and intends to establish his domicile elsewhere.

In my view, the appeal should be allowed with costs.

Appeal dismissed with costs.

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

Solicitor for the respondent: *Tancrède Fortin.*

(1) (1885) 10 App. Cas. 692, at p. 758.

(2) (1840) 7 C. & F. 817.

(3) (1840) 7 C. & F. 842.