RECENT DECISIONS.

1. Supreme Court of Canada.

On appeal from the Court of King's Bench, Appeal Side, Province of Quebec.

Present: Idington, Duff, Anglin, Brodeur and Mignault, JJ.

BEDARD v. DAWSON, ATTORNEY-GENERAL OF QUEBEC INTERVENANT.

October 8, 1923.

Constitutional law — Disorderly house — Provincial statute ordering their closing—Intra vires—Quebec Statute, 10 *Geo. V.* 1920, *ch.* 81.

The Quebec statute entitled "An Act respecting the Owners of Houses used as Disorderly Houses," providing that after two convictions the Court may order the house to be closed for a year is *intra vires* the provincial legislature, as it deals with the matter of property and civil rights by providing means for suppression of a nuisance and not with criminal law by aiming at the punishment of the crime.

Judgment of the Court of King's Bench (1922, Q. R. 33 K.B. 246) affirmed.

Appeal dismissed with costs.

2. Province of Ontario.

Second Appellate Division, Supreme Court of Ontario.

TOWNSHIP OF MONTAGUE v. *CANADIAN PACIFIC RAILWAY COMPANY.*

October 29, 1923.

Assessment and taxes—Railway—Ice house—Ontario Assessment Act—R. S. O. Cap. 195, *section* 47 (3)*—Appeal—Question of fact—Section* 81*—"Warehouse."*

The ice-house of a railway company on railway lands used exclusively for railway purposes or incidental thereto is not a

warehouse within the meaning of section 47 (3) of the Assessment Act R. S. O. 1914, Cap. 195.

Whether an ice-house is used exclusively for railway purposes or incidental thereto, and whether it is a warehouse within the meaning of section 47 (3), are questions of fact as to which no right of appeal from the finding of the County Court Judge is given by section 81 as amended by Statutes of Ontario, 6 George V, Cap. 41, section 6.

The County Court Judge of the County of Lanark reversed the finding of the Court of Revision of the Township of Montague, that the ice-house of the Canadian Pacific Company at Smiths Falls was assessable. He found that it was on the lands of the railway company and used exclusively for railway purposes or incidental thereto, but was not a warehouse in the meaning of section 47 (3) and, therefore, not assessable under the Assessment Act.

Held, by the Appellate Division, that the findings of the County Judge as to the use of the ice-house and whether it was a warehouse within the meaning of the Assessment Act, were questions of fact upon which no right of appeal is given by section 81 of the Act as amended by 6 George V, Cap. 41, section 6.

Held also that the judgment of the County Judge as to the meaning of the word "warehouse" was correct.

Appeal dismissed.

---

3. PROVINCE OF ALBERTA.

Supreme Court, Appellate Division.

COOK v. *COOK.* October 12, 1923.

Husband and wife — Divorce — Domicile — Jurisdiction of Court—Wife having obtained judicial separation—Right thenceforward to establish domicile independently of husband's domicile.

If a wife obtains a judgment for judicial separation (and for such a judgment domicile is not an essential foundation) she is thenceforward in a position to establish a domicile for all purposes independently of that of her husband, and if she has in fact done so the appropriate Court exercising jurisdiction over her domicile has jurisdiction to grant her a divorce,

subject to this, that she is able to effect service upon the husband according to the practice of the Court.

In an action by a wife for divorce, the plaintiff, who had obtained a decree of judicial separation, and who on the facts was held to have acquired, if legally capable of doing so, a separate and independent domicile in Alberta, was held entitled to judgment. Judgment of Walsh, J. (1923) 1 W. W. R. 929, reversed. CLARKE, J.A. dissented.

NOTE.—STUART, J.A., expressly guarded against his decision herein being taken as a precedent for deciding that a wife who has been judicially separated owing to her own misconduct at the suit of an innocent husband should be held, therefore, capable of acquiring a separate domicile even though afterwards the husband may have been guilty of misconduct. Such a case should be kept open until it arises. He suggested that a sound principle to follow, in order to avoid the inconvenience and confusion which might result from a separate domicile, might be to declare that the spouse upon whose application or suit a decree of judicial separation had been made, who was therefore not at fault, should control the domicile of both.[1]

---

4. YUKON TERRITORY.

In the Territorial Court of the Yukon Territory (in Divorce and Matrimonial Causes).

Before John Black, Esquire, Judge *pro-tempore*.

October 22nd, 1923.

Margaret Erskine Thornback, Petitioner,
and
Charles Rodney Thornback, Respondent,
and
Ruth Thomson, Co-Respondent.

Divorce—Jurisdiction of Yukon Territorial Court—Petition of wife—Domicile of husband.

BLACK, J.—The prayer of the petitioner in this case is for dissolution of the marriage had between the petitioner and the respondent on the ground of desertion for a period of two years

[1] See *ante* (p. 443) for a commentary on this case at first instance.

or upwards coupled with adultery, and the petitioner asks that she be given the custody of the two infant children, the issue of said marriage.

Neither the respondent nor the co-respondent were represented and no appearance has been entered by either of them.

This being the first divorce proceeding brought in the Yukon Territory reference should be made to the law under which this court has jurisdiction in divorce and matrimonial causes.

The Maritime Provinces of New Brunswick, Nova Scotia and Prince Edward Island, and the Province of British Columbia have for many years had duly constituted courts exercising jurisdiction in divorce and matrimonial causes; and, until recently, the practice in the other provinces of Canada was to apply for divorce to the Senate of Canada.

In 1917, however, an application for divorce was brought in the Court of King's Bench in the Province of Manitoba, and the case of *Walker* v. *Walker* (see (1918) 28 Man. L. R. 495) was heard before Gault, J., who found that the grounds on which the application was founded were sufficient to entitle the applicant to a dissolution of the marriage, if the court had jurisdiction.

Being the first case of the kind to come before a Court in the Province of Manitoba, the application was dismissed so that an appeal might be had to a higher court for a decision on the question of jurisdiction. The appeal was heard by the Court of Appeal for Manitoba and was allowed. An appeal from this decision was then made to the Privy Council where such appeal was dismissed and, by the judgment of the Privy Council, it was held that the provincial court had the jurisdiction (1919) 48 D. L. R. 1; (1919) A. C. 947.

Then in 1919 the same question arose in the Province of Alberta in the case of *Broad* v. *Broad,* on a reference by Walsh, J. (at one time a leading member of the Yukon bar) to the appellate division of the Alberta court, of a motion to quash a petition for divorce on the ground of lack of jurisdiction. This case also came before the judicial committee of the Privy Council where it was held that the Supreme Court of Alberta had jurisdiction in such cases.

The constitution of the Province of Saskatchewan and its courts being parallel to that of Alberta, the decision in *Broad* v. *Broad* is being followed in Saskatchewan also.

By Section 3 of Chap. 25. Statutes of Canada, 1886, being an Act amending the law respecting the North-west territories,

it was enacted that (subject to certain provisions of the Act) "the laws of England relating to civil and criminal matters as the same existed on the 15th day of July, 1870, shall be in force in the (North-west) territories" in so far as applicable, and in so far as the same had not been repealed, etc.

By Chap. 6 of the Statutes of Canada passed in the year 1898, known as "The Yukon Territory Act," that portion of the then North-west Territories which had, by proclamation of the Governor-in-Council, been declared a judicial district known as the Yukon Judicial District, was constituted and declared to be a separate territory under the name of the Yukon Territory, and, from that date (13th June, 1898) ceased to form part of the North-west Territories.

Under Section 9 of said Act the laws relating to civil and criminal matters, and the ordinances as they existed in the North-west Territories, remained in force in the newly constituted territory of Yukon as far as applicable thereto, until amended or repealed by the Parliament of Canada or other proper authority, and are still in force.

By said Chapter 6 of the Statutes of Canada, 1898, and continued by "The Yukon Act" (Chap. 63 R. S. C. 1906) and amending Acts, it is provided that, subject to the provisions of the Act,

> "the laws relating to civil and criminal matters and the ordinances in force in the North-west Territories on the 13th day of June, 1898, shall be and remain in force in the (Yukon) territory, in so far as the same are applicable thereto, and in so far as the same have not been or are not hereafter repealed," etc., etc.,

and by said Acts the Territorial Court of the Yukon Territory is, for the administration of the laws in force in the territory, possessed of all the powers and authority as by the laws of England are incidental to a superior court of record, and all other rights, incidents and privileges, as fully to all intents and purposes as the same were, on the 15th day of July, 1870, exercised in England by any superior court of common law, or by the Court of Chancery or by the Court of Probate.

"The Divorce and Matrimonial Causes Act," Chap. 85 of the Imperial Statutes, 1857, with amendments thereto existing on the 15th day of July, 1870, is in force in this territory, and this court has the same jurisdiction in divorce matters as has been decided by the Privy Council in the cases referred

to, pertains to and is held by the courts of Alberta and Saskatchewan.

Following these decisions and pursuant to the provisions of the law, rules governing the practice and procedure in Divorce and Matrimonial Causes in this court were, on the 22nd day of March, 1922, duly promulgated by the Honorable Mr. Justice Macaulay, Judge of said Court.

Proof of personal service at Los Angeles, in the State of California, upon the respondent on the 10th of November, and upon the co-respondent on the 13th November, 1922, of the Petition herein and the Order for service thereof *ex-juris*, being read, and it being made to appear to the Court that all proper steps had been taken therefor, as provided by the rules, the Court proceeded to the hearing of this cause by *viva voce* testimony, including the testimony of one John B. Gillham duly taken and certified at Los Angeles pursuant to a commission issued out of this Honourable Court on the 13th day of July, 1923.

The evidence adduced by and on behalf of the petitioner establishes the following facts:—

That the petitioner and the respondent were lawfully married in the parish church, Holy Trinity, Southampton, England, on the 22nd of October, 1916:

That the petitioner, whose maiden name was Margaret Erskine McCarter, was born at Ingersoll, in the Province of Ontario, Canada, and that her parents are and always have been British subjects resident in Canada:

That the petitioner resided with her parents at Dawson in the Yukon continuously from 1902 until she went to England in 1916 to be married to the respondent, whom she had met in Dawson, and to whom she had become engaged in 1914:

That the respondent was born in England of English parents and lived there until he left his home in England in 1907, when about 14 years of age, and came to Canada where he resided until February, 1916, when he went to England, enlisted in the British army and served in the war:

That after their marriage the parties resided in England until the respondent was demobilized in 1919, when they returned to Canada and took up their residence at Dawson, Yukon (and though it is not disclosed by the evidence, I have ascertained that the respondent was retired with the rank of Acting Captain):

That there are two children, the issue of said marriage,

viz.: a son, Alexander, born in England January 25th, 1918, and a daughter, Helen, born in Dawson on the 5th of December, 1919:

That when in England, during and after the war, the respondent frequently declared that he would not live in England, for various reasons stated, and that his desire and intention was to make his home in Canada at Dawson, in the Yukon Territory, and this intention he carried into effect by returning to the Yukon with his wife (the petitioner) and child in the spring of 1919, and establishing a home in Dawson with the intention of remaining there permanently. The Yukon Territory then became his domicil of choice, and the petitioner with her two children has since continued to reside in Dawson, and is still residing there.

It is shown that the respondent never had any home in England except that of his parents, which he left when 14 years of age.

In February, 1920, the respondent went away from Dawson, proceeding to Vancouver, British Columbia. While there he entered a hospital for treatment and there met the co-respondent, Ruth Thomson, at that time a nurse in the said hospital.

Shortly afterwards the respondent and the co-respondent went off to the United States together, and for some time the whereabouts of the respondent was unknown to the petitioner. After a lapse of several months a letter (Exhibit No. 1) was received at Dawson by the petitioner dated June, 1920, but giving no address. The letter is brief and is as follows:— "Peg, I have had to go away into the world. I have done wrong. You will hear from me again. God take care of you and the dear little ones. God forgive," and signed "Charlie."

Later it was learned on inquiry that the respondent and co-respondent had been in various parts of the United States together. The evidence is that in August last they were living together in an apartment in Los Angeles, California, and that they had been cohabiting in different parts of the United States since their departure from Vancouver in 1920.

Other letters of later date were put in evidence, in which both the respondent and the co-respondent, in their own handwriting and over their respective signatures, acknowledged their wrong-doing and urged that the respondent be taken back and given another chance.

The evidence is that since going to Vancouver, in 1920, the respondent has in no way whatever contributed to the support of the petitioner or of his said children.

There is nothing to indicate collusion between the parties and the evidence is that there has been none.

Thus the grounds which, under the law, would entitle the petitioner to a dissolution of the marriage, viz.: desertion for a period of two years or upwards and adultery by the respondent with the co-respondent, have been fully established.

Before, however, this Court can exercise its jurisdiction to decree a dissolution of the marriage, and as a foundation for such exercise of jurisdiction, it must be established by the evidence that a domicil of the parties existed within the Yukon Territory at the time the proceedings herein were begun. (See *LeMesurier* v. *LeMesurier* (1895), A. C. p. 517, which is the leading case on the subject).

For the purposes of this case only two of the classes of Domicil recognized by the law need be considered, viz.: "Domicil of Origin," which has been defined to mean "not the place where a person happens to be born, but the home of his parents"; and "Domicil of Choice," which arises where a person, having the power of changing his domicil, voluntarily abandons his existing domicil and settles in another country with the intention of permanently residing there.

The question whether or not a person has acquired a domicil of choice is not a question of law but of fact, and must be decided by the evidence in each particular case.

The evidence here fully establishes abandonment of the domicil of origin and the acquiring by the respondent of a domicil of choice at Dawson, in the territory, as stated above; and, unless abandonment of this domicil of choice is shown, it remained and was the domicil of the parties at the time these proceedings were commenced.

If it is held that the domicil of choice has been abandoned then, by operation of law, no other domicil having been established, the respondent's domicil of origin, although previously abandoned, would automatically again be brought into existence; and, in that event, unless this case comes within the exception to which I shall refer later, the rule laid down in *LeMesurier* v. *LeMesurier*, that the domicil of the husband at the time of the commencement of the proceedings governs the jurisdiction, must apply, and the petitioner's recourse would then be to the court of competent jurisdiction in England.

But can it be said that there has been an abandonment by the respondent of his established domicil of choice?

In *Re Marrett*, (1887) 36 Ch.D. (C. A.) 400, Cotton, L.J.,

expresses the opinion that—"in order to lose the domicil of choice, once acquired, it is not only necessary that a man should be dissatisfied with his domicil of choice and form an intention to leave it, but he must have left it with the intention of leaving it permanently. Unless he had done that—unless he has left it both *animo et facto*—the domicil of choice remains."

There is no evidence of an intention on the part of the respondent to abandon permanently his domicil of choice, and the presumption of law is in favour of the continuance of the domicil of choice until abandonment is shown. There is, however, after the lapse of a year spent in immoral living, the plea of both the respondent and co-respondent for a reconciliation; that the prodigal be received back into the family; and I think that this court, in the circumstances of the case as revealed by the evidence, should hold that the domicil of choice established by the parties at Dawson was the domicil of the respondent at the time of the commencement of the proceedings for divorce; and this respondent should not be permitted, merely by his evil conduct, to deprive the petitioner of her established domicil within this jurisdiction and to "set up his iniquity for a stumbling-block" to that end.

If, however, it had been found that the domicil of choice had been abandoned at the time of the commencement of the proceedings the Court would, I think, be justified in holding that this case comes within the exception to the general rule, concerning which, in the very excellent treatise on the Law of Divorce in Canada, by Mr. C. S. McKee, of the Toronto Bar, in 62 D. L. R. 1922, at page 15, I find the following:—

> "The exception to this general rule is given by Dicey on Conflict of Laws at p. 363 as follows: "In the following circumstances, that is to say:—
>
> "(1) Where a husband has (*a*) deserted his wife; or (*b*) so conducted himself towards her that she is justified in living apart from him; and (2) That parties have up to the time of such desertion or justification been domiciled in England (the Province); and (3) The husband has after such time acquired a domicile in a foreign country, but the wife has continued residence in England (the Province); the Court (*semble*) has on the petition of the wife jurisdiction to grant a divorce."

This exception was applied in the case of *Stathatos* v. *Stathatos,* [1913] P. D., p. 46, 82 L. J., (P.), 34, which was an undefended petition by a wife for divorce on the grounds of adultery and desertion. It was held in this case that the

court had jurisdiction, it being pointed out that "it would be absurd to hold that a deserted wife should be obliged to follow her husband around the world in an endeavour to catch up with him for the purpose of bringing an action for divorce in the jurisdiction of his domicil."

In Halsbury's Laws of England, Vol. 6, at page 263, referring to the rule as to the domicil of the husband governing the jurisdiction, Lord Halsbury says: "But (probably) the English courts may decree a divorce in favour of a wife who had been deserted by her husband, or whose husband had so conducted himself towards her that she is justified in living apart from him; provided that at the moment the desertion or separation took place she was domiciled with her husband in England."

To adopt the language of Stuart, J., of the Alberta Court of Appeal, in *McCormack* v. *McCormack*, 2 W. W. R. 1920, at p. 719: The observations of Gorell Barnes, P., delivering the judgment of the Court of Appeal in the case of *Ogden* v. *Ogden* (1908), P. D. 46, show, it seems to me, that at any rate, the English courts were prepared to make a new rule for a special case, to meet the justice of it, although no such rule had been laid down prior to 1870. And my query is, why should not this court also be privileged to develop the law according to principles of natural justice and to lay down a rule to fit the justice of the case as well as the Courts of England, where the facts present very special circumstances of injury and wrong?

Having found, however, that the domicil of choice established by the respondent within this jurisdiction remained and was his domicil at the time of the commencement of these proceedings, it is not necessary to come to a final conclusion on this important point. Had I found that the respondent had abandoned his domicil of choice, I would have felt it my duty, in the circumstances of this case as shown by the evidence, to bring it within the exception to the rule, by finding that the petitioner had established a domicil within the jurisdiction of this Court which would entitle her to a Decree, and, in that event, the subject of the exception and the law and authorities in relation to the matter, would have been dealt with more fully.

There will be a decree *nisi* for dissolution of the marriage and giving the petitioner the custody of the children, which will be made absolute after the expiration of four months.

There will be costs against both the respondent and co-respondent.