Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Susan McMullen alias *Mullen* v. *Dame Jane Wadsworth, from the Supreme Court of Canada; delivered 27th July* 1889.

Present:

LORD WATSON.
LORD HOBHOUSE.
SIR BARNES PEACOCK.
SIR RICHARD COUCH.

[*Delivered by Sir Barnes Peacock.*]

The question to be determined in this case is whether James Wadsworth, by his marriage in September 1828 with Margaret Quigley, widow of James McMullen, subjected himself to the legal community of property as then established in Lower Canada.

The majority of the learned Judges of the Supreme Court held that his international domicile was not in Lower Canada or Quebec, and the special leave to appeal to Her Majesty in Council was not granted for the purpose of reviewing that finding, which depended upon a mere question of fact, but in order to determine what was the legal effect of the certificate or *acte de mariage* signed by Wadsworth and his wife in which he was described as a day labourer, of the city of Quebec, and by which two of the learned Judges of the Supreme Court held that he was bound as amounting to a declaration that he was domiciled there.

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Mr. Justice Taschereau, one of those two Judges, in his judgment says:—

"By representing to his wife, as he must be held to have done by the *acte de mariage*, that his domicile was at Quebec when he married, Wadsworth guaranteed to her, contracted with her in law, that she would be *commune en biens* with him. Now, could he have been admitted in his lifetime, under any circumstances, in an action *en séparation de biens*, for instance, to contend that this declaration as to his domicile was a false one, or, in other words, that he had induced his wife to marry him under false pretences or representations? Would he have been received so to invoke his own fraud in order to deprive his wife of her share of the community? Undoubtedly not. Well, who is the Appellant here? Clearly, purely and simply, the representative of Wadsworth, the warrantor of his deeds, entitled to what he himself would have been entitled to, but to nothing more. How can she then invoke Wadsworth's fraud to deprive the Respondents of their share of this community? And when she does so when she avails herself of Wadsworth's fraud, is she not then herself, in the eyes of the law, committing a fraud?"

He added,—

"This is a very important case, not only for the parties thereto on account of the large amount involved, but also for the public at large. It involves an intricate question of international law, which, as pointed out by the learned Chief Justice of the Court of Queen's Bench, may hereafter often arise in this country. We expect in the near future from the United Kingdom, and in fact from all Europe, a large immigration, and evidently cases like the present one must eventually with us become more frequent. But further than that, a principle of

not less importance for the Province of Quebec is at stake, that is, whether the rules of the French law as to evidence are to govern such cases or not. For the Appellants, in the course of a most able and elaborate argument, have failed to cite a case from France in which it has been held that a different *coutume* than the one settled by the *acte de mariage* can be invoked to defeat a wife's claims or her heirs."

It was in consequence of the latter portion of this judgment, which was referred to in the petition for special leave to appeal to Her Majesty in Council, that the leave to appeal was granted. In discussing the case in the Courts below, as well as in the arguments of Counsel before their Lordships, the Civil Code of Lower Canada has been referred to as containing the law upon the subject, for, although the Code was not in existence at the time of the marriage, it is admitted that it correctly expresses the law as it then existed, so far as this case is concerned.

Article 1260 of the Code provides that, if no covenants have been made, or if the contrary has not been stipulated, the consorts are presumed to have subjected themselves to the general laws and customs of the country, and particularly to the legal community of property, but this Article is subject to Article 6, which provides that moveable property is governed by the law of the domicile of the owner, and that persons domiciled out of Lower Canada are, as to their status and capacity, subject to the laws of their country. Even if this were not expressed, it is clear that the Legislature of Quebec could not have intended to alter the international law of domicile. Much confusion has arisen from the use of the word domicile in two different senses. Sir Robert Phillimore, in his work on the Law of Domicile, page 17, remarked, and in their Lordships'

opinion correctly so, that "it might have been "more correct to have limited the use of the "word domicile to that which was the principal "domicile, and to have designated simply as "residences the other kinds of domicile; but a "contrary practice has prevailed, and the neglect "to distinguish between the different subjects to "which the law of domicile is applicable has "been the chief source of the errors that have "occasionally prevailed on this subject." He refers to the *discour* pronounced by M. Malberbe on the introduction of the law of domicile into the Code Civil. "Chaque individu ne peut avoir "qu'un domicile quoiqu'il puise avoir plusieurs "residences;" also to Mallass *v.* Mallas, 1 Robertson's Ecclesiastical Cases, page 75, where it is said, "The gradation from residence to "domicile consists both of circumstances and "intention."

Article 79 of the Civil Code of Lower Canada speaks of the domicile of a person for all civil purposes, and Article 63 of a domicile for the purpose of marriage. The latter Article is as follows:—The marriage is solemnized at the place of the domicile of one or other of the parties. If solemnized elsewhere, the person officiating is obliged to verify and ascertain the identity of the parties. For the purpose of marriage domicile is established by a residence of six months in the same place. The words "for the purpose of marriage" refer to the previous portion of the Article, and mean for the purpose of the solemnization of the marriage. The Legislature never could have intended to enact by such expressions as these that no person should be married in Quebec unless he should have his international domicile there; still less could it have intended to alter the international law of domicile, and to enact that any person having his international

domicile elsewhere should, by a temporary residence in Quebec for six months for the purpose of having his marriage solemnized there, lose his international domicile and acquire a new international domicile by election, so asto affect his status and civil rights.

Article 1260 speaks of the general laws and customs of the country. The *acte de mariage* does not say that Wadsworth was of the Province of Quebec or Lower Canada, the country of which the laws and customs established the community of property on marriage, but merely that he was of the city of Quebec.

There could have been no intention on the part of Wadsworth when he signed the *acte de mariage* describing him as of the city of Quebec, labourer, to mislead or induce his wife to believe that by the marriage she would acquire community of property, for he was a mere day labourer, and she was a partner in the firm by which he was employed, and there was no probability at that time that he would acquire the large property of which he died possessed. The argument of Mr. Justice Taschereau as regards contract, guarantee, fraud, or misrepresentation on the part of Wadsworth is not based upon any solid foundation. In fact, the *acte de mariage* was signed after the marriage had been solemnized, in accordance with the provisions of Articles 64 and 65 of the Code of Civil Procedure.

It was not drawn up by Wadsworth, though it was signed by him, and the words " de cette ville " were probably introduced from a previous representation made by him, in order to obtain the solemnization of his marriage, that he had resided six months in the city. It is clear that the question of international domicile is one of general law, and that the doctrine of the Roman law still holds good, that

" It is not by naked assertion but by deeds and " acts that a domicile is established." It certainly cannot be said that the case involves an intricate question of international law (to use the words of Mr. Justice Taschereau) if it depends upon whether Wadsworth contracted with his wife or was guilty of a fraudulent misrepresentation.

Their Lordships are of opinion that the word domicile in Article 63 was used in the sense of residence, and did not refer to international domicile. They are of opinion that a person having resided temporarily six months in Quebec would be entitled to have his marriage solemnized in that city, although he might be internationally domiciled elsewhere and might refuse to change that domicile. It would be monstrous to suppose that an Englishman, Frenchman, or American travelling in Lower Canada, and retaining his domicile in his own country, could not be married in Quebec after a temporary residence there for six months without abandoning his international domicile in his own country, and altering his status and civil rights. For the above reasons their Lordships are of opinion that the decision of the majority of the Judges of the Supreme Court is correct, and that the judgment of that Court ought to be affirmed, and this appeal dismissed. They will humbly advise Her Majesty to this effect.

The Appellant must pay the costs of this Appeal.