SEPARATION AS TO BED AND BOARD AND AS TO PROPERTY IN THE QUEBEC CONFLICT OF LAWS

by Walter S. Johnson, Q.C., LL.D.

EDITOR'S NOTE: *Mr. Johnson's major treatise on the Conflict of Laws, published in three volumes, in 1934, 1935 and 1937, has long been out of print and is constantly in demand. He is now preparing a revision, brought up to date, in one volume, to be published by Wilson & Lafleur, Ltd., Montreal. We are happy to be allowed to reproduce here one of the shorter chapters, dealing with separation as to bed and board and as to property.*

Chapter VII

SEPARATION

A. FOREIGN DECREE

Effect of foreign decree

A decree of separation as to property or as to bed and board, pronounced by a competent foreign court having, in our view, jurisdiction over the parties, would be recognized in Quebec. Both forms of separation are recognized in our law, so that our courts could not logically refuse to recognize the authority of the foreign court of the domicile. In *Gourdon v. Lemonier*[1], the consorts, resident in Quebec when the issue arose, were originally of France where the wife had secured a separation as to property. Her separate status was maintained: she could carry on business here in her own name, and acquire property against which her husband's creditors could have no recourse. In the present state of our jurisprudence it is doubtful that our courts would recognize the competence of foreign courts to decree the separation of consorts domiciled here[2]. Nor is it probable that, a decree of separation from bed and board having

[1](1883) M.L.R. 1 S.C. 160, and authorities there cited. And see *Bauron v. Davies* (1897) 6 Q.B. 547; (1896) 11 S.C. 123. *X v. Rajotte* (1938) 64 K.B. 484; if by the foreign law of the domicile at marriage the consorts are separate as to property, the wife may sue in her own name for damages for personal injuries; authorized by husband; confirming 74 S.C. 569; reversed by *Trottier v. Rajotte* [1940] S.C.R. 203.

[2]*Dicey*, Ed. 1958, 338:

"There is only one English case in which the recognition of foreign decrees of judicial separation has been discussed. In that case it was held that a decree granted in the domicile of the parties would be recognized in England, . . ."; citing *Tursi v. Tursi* [1957] 3 W.L.R. 573 (Canada), following *Ainslie v. Ainslie* (1927) 39 C.L.R. (Commonwealth L.R.) 381; and, *ibid*:

"Whether foreign decrees . . . granted by the courts of the parties' residence would be recognized in England is an open question."

been granted by the court of the foreign domicile, the court of a later Quebec domicile acquired by the husband would order restitution of conjugal rights[3].

B. JURISDICTION OF QUEBEC COURTS:

Separation as to Bed and Board

(a) Domicile in Quebec

By article 6 our laws as to status and capacity do not apply to persons not domiciled here; and as we have seen, the wife's domicile is that of her husband. If that rule is applied rigorously, a husband domiciled here and threatened with an action in separation as to bed and board, could by deserting his wife and establishing a domicile elsewhere, frustrate her remedy. Article 96 P. permits her, in such a case, by derogation from article 6, to acquire a special forensic domicile for the purpose of her action:

> In an action for separation from bed and board, or for separation of property only, the defendant must be summoned either before the court of the domicile of the husband, or, if he has left that domicile, before that of the last common domicile of the consorts.
>
> In the case where the defendant cannot be found, the action may be instituted before the court of the domicile of the consort applying for separation and in such case the defendant must be summoned through the newspapers[4].

Though the husband has left his domicile here, the court assumes jurisdiction[5]. And the rule applies whether the husband who has left the domicile is plaintiff or defendant[6].

Article 96 P. is a law of exception and must be restrictively applied. It applies when the husband has "left" the domicile. The word in the French version is *abandonné*, in the English sense of *deserted*. The husband, it must be remembered, is free to take a new domicile, and ordinarily his wife's domicile goes along with his. But if he has deserted the common domicile, the wife may sue for separation in the court of that last common domicile. If he has disappeared and cannot be found after reasonable inquiry, the last common domicile remains the domicile of the wife, her forensic domicile, and there she may sue, effecting service upon her husband by summoning him through the newspapers.

So where a husband, resident and apparently domiciled in Quebec, took a new residence in Ontario to better his position, rented and furnished a home,

---

[3]Dicey, *ibid.* cites *Ainslie v. Ainslie*, *supra*, in which the High Court of Australia held that a separation decree in Western Australia barred a claim for restitution in New South Wales. *Lord v. Lord* (1902) 28 V.L.R. (Victoria Law Reports, Australia) 566.

[4]Art. 96 P. replaced arts. 192 C.C. and 35 P., which required the suit to be brought before the court of the domicile of the husband only, and is equally imperative. *Bouchard v. Simard* 16 Q.L.R. 348; *Irwin v. Gagnon* 23 R.L.n.s. 47, 264; art. 1099 P.; Codifiers' Report, art. 90; *Brown v. Waldman* (1929) 32 P.R. 199.

[5]*Galna v. McCord* (1923) 29 R.L.n.s. 454.

[6]*Brown v. Waldman*, supra.

secured there a new position for his son, his wife accompanying him, he had not "left" – he had acquired in good faith a new domicile. The law of Ontario does not provide an action for separation. The wife returned to Quebec and sued as in the "last common domicile". The action was dismissed on a declinatory, "saving her recourse before the proper court."[7].

The "last common domicile" has a certain vagueness suggestive of residence. In one case, the judgment notes that the draft article 96 prepared by the Commissioners revising the Code of Procedure, used the words *dernière résidence*, which were changed to read *dernier domicile commun des époux*. The actual legal domicile of the husband was difficult to fix, but for eight months he lived with his wife and children in a rented home in Montreal where he was employed, after which they parted company, he going to New York to work and live, and she remaining here. She sued for separation and alimony. A declinatory was dismissed: "There is no doubt that Montreal was the place of the last common domicile of the consorts"[8] – about equal to saying "the last common residence", and too lenient a judgment.

In another case, the wife was a French national, the husband an American aviator both during the war and by profession. His work as a pilot took him to many distant places and he seemed to settle permanently nowhere. On the facts, he had not lost his American domicile of origin. The consorts evidently lived apart. She found him in Montreal, living in a hotel, and she sued him for a separation, accompanied by a seizure in the hands of a local bank. Her action was dismissed – there was no "last common domicile" here[9].

But a wife may sue for separation before the court of the last common domicile even though she had left the home and her husband had then decided to "pull up stakes" and go and live with his son in another district of the province[10].

If the consorts are domiciled abroad, though resident in Quebec, our courts have not jurisdiction, for the intention of article 6 is that their status and capacity cannot be altered by our law[11]. Nor would our courts take jurisdiction, even under article 96 P., if domicile could be seen as taken *ad nutum*, (nutus – suivant la volonté, implying an act revocable at the will of the person) in Quebec. For example, may a husband whose domicile has been, say, in Ontario, establish a domicile in Quebec for the purpose of suing for separation *a mensa et toro* his wife who refuses to join him in Quebec? In *Brown v. Waldman*[12] the court held that it had no jurisdiction because the consorts were actually

[7]*Morris v. King* (1942) 47 P.R. 8.

[8]*Mills v. Morrison* [1947] P.R. 282.

[9]*Duval v. Pangborn* (1942) 47 P.R. 120.

[10]*Martel v. Bertrand* (1941) 45 P.R. 237. An invalid foreign divorce is not a defence: *Rexford v. Fraser* (1942) 45 P.R. 24.

[11]*Brown v. Waldman*, note (4); *Irwin v. Gagnon* (1917) 23 R.L.n.s. 264; *Tanguay v. Caron et vir* (1924) 26 P.R. 71.

[12]*Supra*, note (4).

domiciled in Ontario, but went on to consider whether, supposing that the husband (the plaintiff) had established a domicile here, his wife who had failed to follow him, was amenable to our laws.

The Code requires, the court said, that the defendant be summoned before the court of the domicile of the husband, or, if he has left that domicile, before that of the last common domicile. The domicile had been in Ontario, and the plaintiff had abandoned it. He must sue before the court of the last common domicile if he has left that domicile. The rule was laid down for the protection of the wife, and it obtains whenever the husband has left the conjugal domicile. It does not authorize him to change his domicile *ad nutum* for the purpose of suing in the new domicile a wife who, rightly or wrongly, has refused to follow him.

Doubts have been raised as to the meaning and effect of article 96 P., and it is advisable to discuss them here. Briefly, the question is whether a Quebec court, despite the words of that article, has or may take jurisdiction to decree a separation as to bed and board on the basis of the *bona fide* residence, as distinct from domicile, of the consorts in the province. The *dictum* of Lord Watson in *LeMesurier v. LeMesurier*[13] is well-known and was available before our article took its present form:

> "If, for instance, a husband deserts his wife, although their residence be of a temporary character, those courts (*i.e.* of the residence) may compel him to aliment her; and, in cases where the residence is of a more permanent character, and the husband treats his wife with such a degree of cruelty as to render her continuance in his society intolerable, the weight of opinion among international jurists, and the general practice is to the effect that the courts of the residence are warranted in giving the remedy of judicial separation, without reference to the domicile of the parties."

As we saw above, our Commissioners at first used the word "residence" as the basis of jurisdiction, but "common domicile. . ." was finally chosen; so that the article became an express rule that the defendant "*must* be summoned before the court of the domicile . . . or, . . . before that of the last common domicile. . .". The emphasis on domicile is all the more intentional for being a considered choice as against residence; and it must be presumed that the choice was deemed imperative in view of articles 6 and 79 of the Civil Code, and because the separation affects both status and capacity. And by article 1099 P.: "No suit for separation from bed and board can be brought except within the jurisdiction stated in article 96 of this Code of Procedure".

In *Irwin v. Gagnon*[14], a majority judgment of the Court of Review, confirming Lamothe J. (afterwards C.J. in Appeal), held that the court of the domicile is alone competent in an action in separation as to bed and board, the incompetence of any other court being *ratione materiae*. In a very interesting dissent, Judge Archibald A. C. J. gave article 96 a different meaning. Gagnon, the very distinguished Canadian artist, of Quebec domicile originally, had lived so long

[13][1895] A.C. 517; 64 L.J. (P.C.) 97. Lafleur, *op. cit.*, p. 89, quotes Lord Watson's *dictum*, and the tenor of his remarks suggests that he favoured the opinion expressed.

[14](1917) 23 R.L.n.s. 264 (Rev.) *confirming* (1917) 23 R.L.n.s. 47, (1915-16) 17 P.R. 402.

in France that the court conceded that the domicile of the consorts was there, though they made long visits to Quebec. And here they were estranged. She sued for a separation. His defense, *inter alia*, was that his domicile being in France, a Quebec court was without jurisdiction and our courts agreed. Briefly stated, the dissenting opinion was that article 96 P. is a rule of public order, purely provincial and domestic, intended to relate the inhabitants of the province each to a fixed place therein, so that the word domicile in the article has a local function — the relating of a person to a certain locality or commune, whereas in international law, the intent of the use of the word is to enable a decision as to the country, — France, Canada, England, as the case may be, by the laws of which his status and capacity can be judged on an international level. That is a very reasonable argument, backed by cited French authority. Further, said his Lordship — and this also is impressive:

> "It is well to appreciate at once what the result of this judgment is. It is, so far at any rate, as the wife is concerned, a matter of impossibility for her to appeal for justice to the courts of France. She would require her husband's consent and authority; and it would be physically and financially impossible for her without means, to go to France for the purpose of obtaining justice. Even if she went there, she would not be a subject of France, nor is her husband, and she would be denied to complain before a French court of acts committed by her husband against her within this province justifying a demand that she should be authorized to live separate from her husband. If, then, this judgment is correct, the wife, supposing her to have a good ground of action, has no possible remedy to obtain her rights. Our Code provides that the courts of this Province have jurisdiction over all the persons who are living therein. No exception is made . . ."

There is a further argument: that whether a separation is justified on any of the grounds listed in articles 187-8-9 P., a determination of the existence of sufficient grounds to untangle the consorts by enabling them to live separately, is a matter of marriage discipline, of penalizing the erring party, and penal or disciplinary laws are essentially of the *lex fori*. So that, the argument goes, it is more a matter of public order and good morals that our courts should assume jurisdiction to discipline and often relieve consorts, resident though not domiciled, whose conduct is perhaps a public scandal, rather than refuse jurisdiction.

If we accept jurisdiction and declare the wife separate as to bed and board, have we not assumed jurisdiction to alter her status and capacity as a married woman under her foreign domiciliary law, freed her to choose a separate international domicile, made her separate as to property though by her domiciliary law she is in community, altered her capacity to contract and administer her property? Have we not also given her a judicial hypothec? Rather gratuitously?

It is possible that the Commissioners when drafting article 96 did not see the woods for the trees, thinking only of good order in a provincial way and oblivious to the wider international implications of the rule. As between the provincial judicial districts it has been rigidly enforced. Thus, if the husband's domicile or the last common domicile is in the City of Quebec in the District of Quebec, the action is not properly brought in the City of Montreal in the District of Montreal. The reason is simple and reasonable — that the court of the place where the consorts have been living and where witnesses are available,

is the court best qualified to pronounce upon their disagreements and behaviour. The old French authors, for that reason, treated the rule as one of public order and an action taken in the wrong jurisdiction as void of an absolute nullity; and our courts have followed that view where the consorts have resided here but been domiciled in a foreign country, by refusing to accept jurisdiction as a *forum conveniens*.[15].

In the recent case of *Ryan v. Pardo*[16], an action on exemplification of a New York judgment to collect accumulated arrears of alimony, it was pleaded *inter alia* that the New York court was without jurisdiction to decree the separation and award alimony, the consorts being only resident there and domiciled in Peru. The judgment on that point concluded that our court could not rule that the foreign court was without jurisdiction based on residence as allowed by New York law, and that in Quebec:

> "It is . . . in no way certain that the legal concepts accepted in this province . . . are so clearly established as to be definitely antagonistic to an action in separation between persons not domiciled in this province, before a tribunal having jurisdiction *ratione materiae* and *personae* irrespective of the question of their domicile. Indeed, the provisions (art. 96 P.) . . . require, in principle, that in an action for separation the defendant be summoned before the court of the domicile of the husband, but they apply solely and exclusively to persons domiciled within the territory of this province, and the place where such action must be instituted refers, consequently, to the judicial district, in this province, in which the husband is domiciled."

And his Lordship, M. Justice Brossard, was of opinion that the second paragraph of article 96 gives weight to the dictum of Lord Watson, that a residence short of domicile would, under certain circumstances, be recognized as affording jurisdiction.

Even if article 96 did not exist, our courts are without jurisdiction to affect the status and capacity of consorts of foreign domicile, and a decree of separation as to bed and board does (at least in our view) affect status and capacity.

Offence committed outside the province

The Civil Code declares that separation from bed and board may be obtained for certain specific reasons. It makes no exception as to parties who may have been married outside the province, nor does it take any account of the law of, or of the reasons for which a separation may be granted in, any other province or country. Two conditions only are necessary: the defendant must be in our jurisdiction — *i.e.*, the domicile or the last common domicile must be here; and the specific offence charged must be one of those mentioned in our Code — it matters not where it was committed[17].

Judicial hypothec

A wife who obtains a separation from bed and board, with a monthly alimentary pension, may register her judgment against her husband's immove-

[15]See the old French authors cited in *Molleur v. Déjadon* (1874) 6 R.L. 105.

[16][1957] R.L. 321.

[17]*Church v. Hamilton* 21 R. de J. 88; *Hamilton v. Church* (1914) 24 K.B. 26.

ables, and so obtain a judicial hypothec[18]. Of course a foreign judgment could not be registered, but only the further judgment obtained here declaring it executory. Yet the foreign judgment declared executory cannot carry judicial hypothec in Quebec unless it carried judicial hypothec by the foreign law[19].

Provisional residence

The judgment in *Jones v. Warman*[20] decided that article 195 gives the court absolute discretionary power to fix, even in a foreign country, the provisional residence of a wife suing for separation from bed and board.

Desertion by wife to a foreign country

In *Abbott v. Doble*[21] it was held by the Court of Review that the conduct of a wife leaving her husband's domicile in Quebec and going to reside in the United States for the purpose of establishing a domicile entitling her to a divorce, does not constitute desertion nor grievous insult justifying her husband's action for a separation from bed and board:

> "Considering that the parties were residing in the United States when the marriage took place and were married under the provisions of the law of that country which authorize divorce".

The judgment is unsatisfactory. There is a suggestion of the doctrine of an "acquired right" to a divorce discussed in Chapter IX. The conjugal domicile was here. The wife was not separate from bed and board, and therefore not free to establish a separate domicile. The fact that the consorts may have been "residing" in the United States at their marriage, if the husband's domicile was then here, did not, so far as our laws are concerned, do more than validate their marriage as to form; and surely could not qualify the wife to desert the husband's domicile here. Her desertion may or may not have constituted ill-usage or grievous insult; but to justify it on the ground of mere residence at marriage under a law which countenances divorce, seems to beg the entire question.

C. JURISDICTION OF QUEBEC COURTS:

Separation of Property

(a) Foreign domicile bars action here

By article 96 P., the action for separation of property must also be brought before the court of the domicile of the husband, or, if he has left that domicile, before that of the last common domicile of the consorts. We have only the

[18]*Chevrier v. Aubertin* (1922) 61 S.C. 343.

[19]Surville: Dr. Int. Pr. No. 382.

[20]17 R.L.n.s. 97; (1910) 12 P.R. 187.

[21](1920) 59 S.C. 572; *Carter v. Lemoine* (1923) 26 P.R. 56, where it was held that a wife domiciled in Quebec, not separate from bed and board, cannot establish a domicile in the United States for the purpose of securing a divorce and return here and marry again. *Cf. Pilon v. Duclos* (1924) 36 K.B. 411; *Mondor v. Hervieux* (1923) 35 K.B. 59.

old judgment in *Molleur v. Déjadon*[22] to illustrate the rule. The consorts, originally domiciled in Quebec, had for ten years been domiciled and had lived in the State of New York. The wife returned here and brought an action for separation of property, describing herself as of this province and her husband as of the State of New York. It was held that the separation thus obtained before a court other than that of the actual domicile, was radically null and could be attacked even by creditors, though the husband had acquiesced therein.

The argument that residence might give jurisdiction could not be raised in that case, because the consorts were domiciled and resident abroad, and the wife could not by coming here alone establish a separate forensic residence or domicile. So that the judgment is not a precedent against the view that residence of the consorts here should give jurisdiction. If, as Lafleur says,[23] "a residence short of domicile would justify a separation from bed and board, it should *a fortiori* warrant the court of the residence in decreeing a separation as to property only"; for the former, besides separating the consorts, entails separation of property as well. But, as already indicated above, it is very doubtful that residence is sufficient. However, suppose this case: Consorts are married here common as to property. The husband is in business and accumulates property. They remove their domicile to Vermont. Without a further change of domicile, they return to Quebec on an extended visit, during which the husband's affairs become so disordered as to give reason to fear that his property will not be sufficient to satisfy what the wife has a right to receive or get back[24]. What that is, is wholly determined by Quebec law. The business and the property are here. The consorts are here. The issue is not one of status and capacity, but a mere incident, not of the essence of the marriage. Yet under the jurisprudence, the wife must return to Vermont, take an action there if the foreign law permits, and have only such rights as the foreign law upon such a separation accords her. That result seems unjust.

(*b*) *Consorts separate by foreign law*

Where consorts are already separate by their foreign matrimonial law, may the wife, the consorts being domiciled here, obtain a separation in Quebec when her interests are imperilled by the disordered state of her husband's affairs? We have three judgments which by no means exhaust the issue. In *Wiggins v. Morgan*[25] and *Dalton v. King*[26], decided in 1879, it was apparently held (in each case the report consists merely of a head-note) that an action for separation as to property could not be maintained by a wife in this province if the consorts were married under a law which did not create community

[22]Note (15).

[23]*Op. cit.* 89.

[24]Art. 1311.

[25](1879) 9 R.L. 546.

[26](1879) 9 R.L. 548.

between them. *Sweet-apple v. Gwilt*,[27] in a contrary sense, decided in 1862, was a default judgment. The parties were married separate as to property in Toronto, their domicile, where they continued to reside for several years, the defendant administering the plaintiff's estate. They later removed to Quebec, where the wife sued for a separation, alleging her husband's insolvency. It was held, in the terms of the prayer:

> "That the plaintiff shall and may from the date of her demand, hold, possess, use, administer and enjoy separately and apart from the defendant, all and every her estates and property . . . as well those which belonged to her before her marriage . . . as those which have accrued or shall hereafter accrue to her, without molestation, trouble or hindrance . . .; and doth adjudge and condemn the defendant to guarantee, acquit and indemnify the plaintiff from and against all and every the debts . . . for which he may have caused plaintiff to be jointly with him liable."

As the judgments are not reasoned it is difficult to elucidate them. The first two possibly were based on the view that as the consorts were already separate, a judgment declaring them separate could not help them. In the *Sweet-apple* case, there is the allegation that in Ontario the husband had the administration of his wife's estate, though they were separate, and apparently the wife wished the free administration permitted by our law.

Consorts in community, or separate by their foreign matrimonial law, remain so though they acquire a domicile in Quebec. If in community, however, a judgment of separation from bed and board entails separation of property, and the wife may obtain a judgment of separation of property if her husband's insolvency is alleged. Separation of property flowing from a separation from bed and board, or based upon the husband's insolvency, would be a separation with all the incidents and consequences known to our law.

But assuming that the consorts are already separate as to property by their foreign matrimonial law, would a judgment of separation from bed and board entail separation of property as known in our law, a difference being granted to exist? Under her foreign law, the wife's separate property rights and her rights of administration might be greater or less than under ours. The proper view may be that rights she already possessed would not be curtailed, and that additional rights accorded by our law she should have; because the spirit of the law is to give her protection, to extend, not to curtail her freedom.

It would seem reasonable and logical, therefore, that where a separation of property is sought because of the insolvency of the husband, it might well be granted, though the consorts are already separate under a foreign law, upon it being proved that as between the foreign and the domestic law there is an advantage to the wife under the latter.[28].

And even where it cannot be shown that there is a difference between the foreign and the domestic law, may there not be an advantage to the wife, and even to the creditors, in her asking that, in view of the husband's disordered

---

[27](1862) 7 L.C.J. 106; *Dalton v. King*, Note (26), *supra*.

[28]And see Lafleur, *op. cit.* 90-1.

affairs, it be now declared beyond a doubt that by virtue of the domestic and of her foreign law she is separate as to property, rather than to be left to make oppositions at a later date when her husband's resources and his creditors are more deeply involved?

D. RAISING THE ISSUE OF LACK OF JURISDICTION

A matter of public order

The lack of jurisdiction being, under the jurisprudence, a matter of public order and hence a cause of radical nullity, the issue may be raised at any stage. In *Molleur v. Déjadon*[29], it was held that the radical nullity need not be pleaded; it need only be brought to the attention of the court for the latter to take judicial cognizance thereof. In *Irwin v. Gagnon*[30] it was held that the incompetence of any court but that of the domicile is *ratione materiae*, and may be raised at any stage of the case and by any appropriate procedure. And in *Galna v. McCord*[31], that the jurisdiction being *ratione materiae*, the issue could be properly raised either in a plea to the merits or by a declinatory exception.

[29]Note (15) *supra*.

[30]Note (14) *supra*.

[31]Note (5) *supra*. And see *Bouchard v. Simard* 16 Q.L.R. 348; *Bonin v. Bergeron* 18 R. de J. 355.