

another State. Summoning Mr. Fisk domiciled in Canada to appear in New York is summoning him to appear before those who are not his natural judges. And his appearance, without further proceedings, does not appear to me to alter the matter.

It has been said that this action lies even if there be no divorce, and that the husband is obliged to account to his wife for her property. This is very true, but it is contended that she has brought the action as an unmarried woman and without authorization. The prohibition of our law as to the wife appearing in judicial proceedings without the authorization of the husband is express (176 C. C.), and I am not aware that there is any mode of supplying this authorization after the suit is commenced. "She cannot appear," and therefore she is not rightly before the Court, and it is not a question of amendment. To substitute an authorization by the Court is to antedate a power, and one which can only be exercised by the Court on the refusal of the husband (C. C. 178) or if he be interdicted, or absent, (C. C. 180). But it is said the want of authorization has not been properly pleaded, and a case of *Anntaya v. Dorge et al.*, (6 R. L. 727) was cited in support of the pretention that this question could only be raised by a preliminary plea. I question very much whether if the defect appears on the face of the proceedings it is necessary to plead it at all, but I think it at all events is a good plea to the merits. It is not a question of *status* only, it is a lack of power. But in addition to this, the whole of the action turns on the alleged fact that she is an unmarried woman.

I am therefore to reverse and dismiss the action *sauf à se pourvoir*.

The following is the judgment:—

"Considering that the parties in this cause were married in the year 1871 in the State of New York, one of the United States of America, where they were then domiciled;

"Considering that shortly after, to wit, about the year 1872, they removed to the City of Montreal, in the Province of Quebec, with the intention of fixing their residence permanently in the said Province;

"And considering that the said appellant has been engaged in business and has constantly

resided at the said City of Montreal since his arrival in 1872, and that he has acquired a domicile in the Province of Quebec;

"And considering that the female respondent has only left the domicile of her husband at the City of Montreal in 1876, and obtained her divorce from the appellant in the State of New York in the year 1880, while they both had their legal domicile in the Province of Quebec;

"And considering that under article 6 of the Civil Code of Lower Canada, parties who have their domicile in the Province of Quebec are governed even when absent from the Province by its laws respecting the status and capacity of such parties;

"And considering that according to the laws of the Province of Quebec marriage is indissoluble, and that divorce is not recognized by said laws, nor are the Courts of Justice of the said Province authorized to pronounce for any cause whatsoever a divorce between parties duly married;

"And considering that the decree of divorce obtained by the female respondent in the State of New York has no binding effect in the Province of Quebec, and that notwithstanding such decree, according to the laws of the said Province the female respondent is still the lawful wife of the appellant, and could not sue the said appellant for the restitution of her property without being duly authorized thereto;

"And considering that the said respondent has neither alleged nor produced any authorization, as required by law, to institute the present action, and that there is error in the judgment of the Superior Court rendered at Montreal on the 25th day of February, 1882;

"This Court doth reverse the said judgment, and proceeding to render the judgment which the said Superior Court should have rendered, doth dismiss the action of the said respondent *sauf à se pourvoir*, with costs, as well those incurred in the Court below as on the present appeal (Judges Monk and Cross *dissenting*)."

Judgment reversed.

*Kerr & Carter* for the Appellant.

*E. Lafleur* for the Respondent.