

STUDIES IN SOUTH AFRICAN LEGAL SOURCES,
CONSTITUTIONAL LAW, THE ADMINISTRATION OF
JUSTICE AND THE CONFLICT OF LAWS

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NATURAL PERSONS

THE SOUTH AFRICAN LAW OF DOMICILE OF NATURAL PERSONS

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I GENERAL PRINCIPLES

The concept. The concept of domicile plays an important role in the choice of the governing territorial system of law in the South African conflict of laws (private international law), in relation to the ascertainment of 'international jurisdiction' of a foreign court the judgment of which is sought recognition and possibly enforcement, and in the delimitation of the curial area - the establishment of jurisdiction ratione domicilii or through the defendant's being an incola of a provincial or local division of the Supreme Court of South Africa (an issue which may be, and it is submitted, should be regarded not only as part of the South African law of civil procedure but also of its conflict of laws²). It is also of significance in other branches or sub-branches of law, in particular taxation and immigration.³

No effort will be made to explore the Roman law on the subject, albeit that 'domicile' is derived from 'domicilium', home, a place of residence, a dwelling. Suffice it to say that that legal system distinguished between origo, a citizenship by birth of the urban community, obtained from the place of which a person's father or, if he were illegitimate, his mother, was a citizen, and domicilium, residence coupled with the intention of staying permanently in the urban territory. One could be innocent of a domicilium,⁴ which was of most significance in jurisdiction.⁵ In the event of a person's origo and domicilium being in different places, according to Savigny⁶ the legal system obtaining in the area of origo prevailed. Obscurity veils most other choice-of-law rules, so far as they could arise after the Constitution of Caracalla of AD 212,⁷ under which Roman citizenship was extended to peregrini.

When the post-glossators drew a distinction between statuta realia and statuta personalia (real and personal local legal rules), the latter being governed by the domiciliary law of the propositus, detailed solutions for the ascertainment of domicile had to be teased out of the Roman texts. The personal law, governing such matters as the matrimonial proprietary regime, aspects of capacity to perform an act in law (juristic act, Rechtsgeschäft, acte juridique), and intestate succession to movables, was universally recognized in the western Europe of the era of the Roman-Dutch law as being the lex domicilii of the propositus.

Regrettably, the old authorities in their analysis of domicile hardly distinguished themselves by reflecting legal acumen or foreseeing and trying to cope with unsolved problems. And not infrequently they prove unrealistic or out of keeping with modern notions. In the result numerous of the technical rules are far⁸ from clear. In hardly exaggerated terms that learned judge, Shippard J, once said that 'the question of domicil² is confessedly the most difficult to decide in the whole range of jurisprudence'; and fifty years later Selke J⁹ bewailed the fact that the 'principles are

complicated, some of them are far from clear, and often prove to be difficult of application in a given set of facts'. Guidance and assistance, especially on points on which the old writers are silent, ambiguous or contradictory, can frequently be found in English law, for, in the words of Innes ¹⁰⁾ CJ, '[t]he principles regulating domicile, founded as they are upon the civil law, have been developed in England and in Holland upon very similar lines'. But circumspection must be observed, not only because some of the differences in rules of substantive law between the two legal systems, such as those relating to parent and child, necessarily lead to divergencies in rules of domicile; but also because certain English decisions, notably on the meaning of the requirements of animus non revertendi for loss of a domicile and of animus manendi for the acquisition of a domicile of choice, display so unrealistic an attitude as to warrant their being scrupulously avoided. Fortunately there are signs that our tribunals have seen the danger signals. ¹¹⁾

Continental legal systems, as far as can be ascertained, have not exercised any persuasive influence on the decisions of our courts. Of course, most countries outside the orbit of the English common law switched allegiance from the individualistic lex domicilii to the emotionally appealing lex patriae as the personal law in the era of nationalism that was heralded by the rise of Napoleon and waxed in the second part of the nineteenth century; though it does not follow that these lands have no concept of domicile. But even with those States, such as Denmark, Norway, the Argentine, Brazil, Paraguay and Peru, that still espouse the domiciliary connecting factor pointing to the personal law, there is no uniformity as to the meaning of domicile. By and large 'habitual residence' ¹²⁾ is meant, a less demanding test than that applied by Anglo-American or South African law. It is a notion invoked by the legislature in s 3bis ¹³⁾ of the Wills Act 1955 for two of the testing laws for the formal validity of a will - the law of the testator's habitual residence at the time of execution of the will or his death. As the statute also invokes the testator's domiciliary law at execution or death as alternative testing laws, it clearly is distinguishing between habitual residence and domicile. ¹⁴⁾ Sometimes in Continental laws merely 'ordinary residence' is called for. ¹⁵⁾ Outside the Anglo-American and Roman-Dutch legal orbits, 'there seems to be a tendency for domicile to mean the principal, non-transitory location of the individual - his geographical "centre of gravity"'. ¹⁶⁾

'[D]omicile only means home.' This definition, taken out of context, from a judgment of an eminent South African judge, ¹⁷⁾ is what the layman understands by the concept. It is, however, not only distressingly nude but also unfinished, for it does not take account of the circumstances under which the law assigns a domicile to a propositus in a country or area in which he does not have his home. More accurate and yet hardly satisfying is: 'Domicile means ... the country which is considered by the

law to be a person's permanent home.'¹⁸⁾ Considering a number of attempted definitions, including the famous Code 10,40(39).¹⁹⁾ Lord Cranworth concluded:²⁰⁾ 'In fact, none of them is, properly speaking, a definition. They are all illustrations in which those who have made them have sought to rival one another by endeavouring, as far as they can, by some epigrammatic neatness or elegance of expression to gloss over the fact that, after all, they are endeavouring to explain something clarum per obscurum'. In truth, as Jessel MR once said,²¹⁾ an absolute definition is unattainable: for we are concerned with an abstraction, a 'legal relation between a person and a place, created by the law and not by the person, and designed altogether to serve the law's purposes'.²²⁾ Oliver Wendell Holmes J's elegant formulation runs:²³⁾

'... what the law means by domicile is one technically pre-eminent headquarters, which as a result either of fact or fiction every person is compelled to have in order that by aid of it certain rights and duties which have been attached to it by the law may be determined.'

Unavoidably, however, this description is vague. So is that of Dicey & Morris:²⁴⁾

- '(1) A person is, in general, domiciled in the country in which he is considered by English law to have his permanent home.
- '(2) A person may sometimes be domiciled in a country although he does not have his permanent home in it.'

Nor does the American Restatement of the Conflict of Laws Second fare any better:

'Domicil is a place, usually a person's home, to which the rules of Conflict of Laws sometimes accord determinative significance because of the person's identification with that place.'²⁵⁾

'Home is the place where a person dwells and which is the center of his domestic, social and civil life.'²⁶⁾

None of the definitions of the Roman-Dutch writers assists, for they all essay to define domicile of choice only, voluntarily acquired by residence coupled with the animus manendi, whereas there are also two domiciles by operation of law, those of origin and dependence.

The 'country' or area of domicile. [run on] →

→ The space comprehended by a man's domicile may be of significance. Basically, so far as choice of law goes, one searches, in the words of Dicey & Morris,²⁷⁾ for 'the whole of a territory subject under one sovereign to one body of law'. For this territory they assign the traditional though ambiguous English word 'country'. More exact are the Latin 'territorium legis', the Roman-Dutch 'rechtskring' and the German 'Rechtsgebiet'.²⁸⁾ But the only English equivalents of these terms that have been suggested 'law district' and 'law area', do not run trippingly on the tongue and have not gained wide acceptance. Faute de mieux, reference shall have to be made to 'country'. But in the 'application of law in space', to use Cardozo's phrase,²⁹⁾ the boundaries of such a country may vary with the issues of which the court may be seised. In a federation there are two overlapping systems of law, State and federal, and the country which is

sought will depend on the system involved.³⁰⁾ Nor is this possibility confined to a federation. If it be asked: Is South Africa one country or several countries in this sense? the answer can only be, it depends on the circumstances. Provincial councils, except possibly through the exercise of implied ancillary powers,³¹⁾ cannot legislate on private law. The central legislature has been busy wiping out the inherited pre-Union differences in this area, though some obstinately remain³²⁾ and there is the occasional statute that provides for special rules of private law in a particular province.³³⁾ → Further, although in theory there is only one common law of South Africa,³⁴⁾ some disagreement exists among the seven provincial divisions of the Supreme Court as to what it is on various topics.³⁵⁾ True, in theory the Appellate Division will have the last word, but decades may pass before the right card in the lottery of litigation falls, and by then new inter-divisional differences of view will have emerged that may well not be resolved because of the judicial attitude to stare decisis as between provincial divisions: none is bound by the decisions of another. The areas of the provincial divisions with their satellite local divisions thus constitute rechtskringen that in the case of the Cape do not have boundaries that coincide with those of the province.

Large tracts of private law, however, are identical throughout the Republic. For instance, it is settled that succession to movables of a deceased who died intestate is governed by the law of his last domicile.³⁶⁾ In principle there would appear no need to look at each province or area of a provincial division as a separate 'country'. Say A, hitherto domiciled all his life in England, settles in South Africa under such circumstances that it can be said he is domiciled in the Republic as a whole but not in any particular province or the area of any particular provincial division. He subsequently dies intestate in Johannesburg. What law governs the succession to his movable estate? The answer surely is the law of South Africa wherein at the time of his death he was domiciled.

Thus, depending on the nature of the issue, 'country' for purposes of choice of law could mean the whole of South Africa or a province or the area of a particular division of the Supreme Court. And a similar attitude should be taken to domicile in an overseas 'country' to which our choice-of-law rule points.

These possibilities are illustrated by the three choice-of-law provisions resting on domicile emanating from our legislature. In terms of s 1(2) of the Prohibition of Mixed Marriages Act 1949³⁷⁾ a marriage entered into by a male domiciled in the Republic that could not be solemnized there is void and of no effect. Republic-wide domicile is also found in the choice-of-law rules of the Matrimonial Causes Jurisdiction Act 1939,³⁸⁾ that schizophrenic enactment. Section 1(3)³⁹⁾ says: 'Any issue in proceedings relating to an action referred to in subsection (1A) shall be determined in accordance with the law that would be applicable if both parties were domiciled in the Republic

at the time of the proceedings.' (Section 1(1A) creates a new ground of divorce jurisdiction: the defendant husband is not domiciled in South Africa, the plaintiff wife has been ordinarily resident there for a year immediately preceding the institution of proceedings and immediately before the marriage was either a South African citizen or domiciled in South Africa.) But section 6 of the statute provides inter alia that a division hearing a divorce action under jurisdiction conferred by s 1 or 4 or, armed with such jurisdiction, determining the spouses' property rights under s 5, must apply the practice and law of the division of the Supreme Court in the area of which the husband is or was domiciled, as the case may be. (Presumably s 6 is not intended to cover the ground of s 1(3).⁴⁰) The jurisdictional requirements under s 1(1) are: (a) the plaintiff wife has been ordinarily resident in the court's area for a year immediately preceding the institution of proceedings; and (b)(i) at that date her husband was domiciled in South Africa or (ii) he has deserted her and departed from South Africa and immediately before the desertion was domiciled there or (iii) he has been deported and immediately before deportation was domiciled in South Africa. Section 4 gives competency to a court with jurisdiction under s 1 to hear a counterclaim for divorce by the husband.)

What is a court to do that is trying to comply with s 6 only to find that the husband is not or was not domiciled in any division but only in South Africa as a whole? The suggestion has been made that it will apply its own law and practice.⁴¹ The primary object of the remedial legislation, to widen jurisdictional grounds, cannot be allowed to be frustrated by a minor difficulty of this type.

But now as we move from choice of law to jurisdiction the cloud begins to grow from the size of a man's hand to menacing proportions. Say that A, our immigrant who has a domicile only in South Africa as a whole, wishes to sue his wife in this country for divorce. He cannot find a competent court,⁴² as the 1939 Act does not cater for him in an action in convention - a nice example of discrimination against males - and every division of the Supreme Court will insist on domicile within its area.⁴³ Would the High Court of England assume jurisdiction on the ground that despite his departure animo non revertendi and settlement in South Africa, his English domicile of origin has revived? This would involve the court's holding that at one and the same time a de cuius can have different domiciles for different purposes. Pollak considered that the English court would probably hold itself competent.⁴⁴ The matter would become even more complex if the English court applied the domiciliary law to divorce. Fortunately, it applies English domestic law.⁴⁵ But in other contexts it is not inconceivable that this two-dimensional domiciliary problem could arise.

The situation in Australia affords an illustration of this. The Matrimonial Causes Act 1959-1966 s 23(4)(5) (Com) states that a divorce action may be brought only by a person domiciled in Australia, and this legislation, read with the Marriage Act

1961 (Com), has been claimed by Australian text-writers⁴⁶⁾ to create an Australian domicile by implication and unity of matrimonial law. This view was upheld by Barry J in Lloyd v Lloyd,⁴⁷⁾ who found that the court of Victoria was competent to hear the divorce action of a person domiciled in New South Wales. What if he, being a 'new Australian', were domiciled only in Australia as a whole and not in any particular State ('country') therein? Barry J was sympathetically disposed to the assumption of jurisdiction.⁴⁸⁾ But there would still remain the question of choice of law in other contexts. It arose in the Supreme Court of South Australia in In re Benko, Deceased,⁴⁹⁾ where the court was asked, for purposes of succession (where the law differs from State to State), to hold that the deceased had been domiciled within its area of jurisdiction on 5 August 1950. Although he had arrived from a displaced persons' camp in Germany in Melbourne, Victoria, on 25 April 1950 and had moved to Adelaide, South Australia, in June and lived there continuously until his death, Mitchell J refused to find domicile in the State on the critical date, though he then had a settled intention of living permanently in Australia. Commentators have suggested that Australian courts in such circumstances should hold that domicile is acquired in the State in which the de cuius makes his immediate headquarters⁵⁰⁾ or has his present domicile or abode.⁵¹⁾ There is little prospect, however, of a South African court's being prepared in similar circumstances to relax the test for acquisition of a domicile of choice. There certainly appears to be no authority for such an attitude. In short, to the question posed by a leading American conflicts writer,⁵²⁾ 'does domicil bear a single meaning?', the answer for South African law is Yes.

The possibility remains of a propositus's being domiciled for purpose A (say divorce jurisdiction) in country X and for purpose B (say succession to movables on intestacy) in country Y. Surely it is not one which we should shun.

Splitting or consolidation of domiciliary areas by a foreign land, however, may have international repercussions, and cause grievous dilemmas. If H, hitherto domiciled from birth in Cape Town, emigrates to Australia and acquires a domicile there but not in any State therein, will his wife still be able to sue him for divorce in the Cape Provincial Division on the ground that he remains domiciled in the Cape? (It is assumed that unless H has acquired a domicile elsewhere he will retain his Cape domicile, despite his having left that country animo non revertendi.) This was the issue that arose, with Rhodesia substituted for the Cape, in Smith v Smith.⁵³⁾ Goldin J gave no definite answer, as the Australian legislation and its interpretation had not been proved. He stressed, however, that foreign legislation could not change our common-law rules of domicile. As will be shown, it is perfectly true that the connecting factor of domicile for the ascertainment of 'international jurisdiction' must be characterized by South African law as the lex fori. But no change in the definition

of domicile is effected by the Australian statute. The answer must lie in the nature of a 'country' and that must depend on the legal rules of the foreign system involved.⁵⁴⁾ Therefore, it is believed, the Rhodesian court did not have jurisdiction qua court of the domicile.⁵⁵⁾

There is no South African authority on the effect on domicile of a change of borders of a State or its absorption in another State or its combination with another State or other States to form a new State. It would appear in principle that the domicile, including the domicile of origin, changes accordingly.⁵⁶⁾

It is necessary only to establish that the propositus has his permanent home within the particular country or area, not at any particular place therein. If it is established that he resides in Natal with the animus manendi, there is no need to go further and fix his domicile in Durban.⁵⁷⁾ He may, for instance, be fickle and alter his affections from time to time among the resorts along the Natal coast. Naturally, in the vast majority of instances the evidence does establish the acquisition of a permanent home in a particular town or spot and such evidence is of value, for it will strengthen the contention that he has settled in the country or area in which it is situate. This reasoning may be taken a stage further. The propositus need not have a 'home', a dwelling house or establishment of his own in the country or area in question. He may live in an hotel or lodgings,⁵⁸⁾ a boat, a motor-drawn caravan or other vehicle, a tent or even a cave.⁵⁹⁾ He may conceivably do his daily work in another country or area⁶⁰⁾ or on the high seas as a mariner or in naval service.⁶¹⁾ True, the maintenance of an establishment of his own may be of evidentiary value, for it normally strengthens the submission that the propositus did acquire a domicile, as it shows the planting of deep roots; but the age, state of health and marital status of the propositus may be such that it could not be expected of him or her.⁶²⁾

Domicile is determined by South African law.

[run on] →

→ Like other connecting factors in the conflict of laws, domicile is assigned a meaning by the lex fori. Whether or no it exists in a particular country or area will be determined by South African law.⁶³⁾ This rule applies not only to the selection stage in choice of law, where the lex domicilii may have to be ascertained⁶⁴⁾ - if according to South African law the de cuius was domiciled in France, to allow French law to say he was not would be to abandon our rules of choice of law; but also (obviously) to the issue whether a South African court has jurisdiction ratione domicilii and whether a foreign court has 'international competency' on this basis, thus making its judgment deserving of recognition and, if needs be, enforcement in South Africa.⁶⁵⁾

That the lex fori characterizes the connecting factor of domicile in all contexts appears to be the simple answer to a problem that some writers have found vexed: that of capacity to acquire a domicile. Say a South African wife lives apart from her

husband in New York, by the law of which she can acquire a separate domicile. It has been argued by Graveson⁶⁶⁾ that there are six possible testing laws of her capacity. He once favoured the law of the existing ('old') domicile, so if the facts were reversed, and it was a New York wife who was living in South Africa, she would be held to have capacity to acquire a South African domicile. But this is manifestly unacceptable, for it denies the nature of domicile as a connecting factor.⁶⁷⁾ No more convincing is the statement of the High Court of Australia⁶⁸⁾ that capacity to acquire a domicile is governed by the law of the alleged new domicile.⁶⁹⁾ Graveson now believes that there may be different choice-of-law rules applicable to different issues, such as the capacity to acquire a domicile of a married woman, a minor and an insane person. But it is submitted that the alleged problem is really a mirage - if the issue of capacity is considered to arise at all, it is governed by the lex fori, South African law. Quite another question is whether the propositus is a married woman⁷⁰⁾ or is a legitimate or illegitimate child: here the forum determines her or his status by its appropriate choice-of-law rules and then applies the lex fori to decide on the domicile of a person of that status.⁷¹⁾

Everyone has at all times a domicile that will operate in respect of choice of law and (save possibly in exceptional circumstances) in respect of domestic jurisdiction.

The preservation in this suggested rule caters for the possibility raised in the discussion of Smith v Smith.⁷²⁾ Even then, this proposition may well express only lex ferenda, not lex lata.⁷³⁾ There is some authority, as has been seen, in the Corpus Juris⁷⁴⁾ that a person can be without a domicile, such as one in itinere who has quit his previous domicilium and intends fixing it elsewhere.⁷⁵⁾

The question arises in two contexts in the Roman-Dutch institutional works. The first relates to the vagabundus, unknown to the Corpus Juris,⁷⁶⁾ who makes his first appearance in the writings of the post-glossators - the commentators - of the Middle Ages.⁷⁷⁾ He is one who has no certain domicile. The closest description of this nomad, tramp, jolly swagman or 'Weary Willie' appears to be that of Boey:⁷⁸⁾

'Vagabunden, is een onduitsch woord, dat een dolende en zwervende beteekent; men verstaat 'er door de luye leediggangers, die zonder beroep of handwerk omzwerven, en agter 't Land loopen, zonder vast domicilium of verblyf....'

Of him little can be found in the Roman-Dutch texts. Rodenburg⁷⁹⁾ says that a wife does not follow the domicile of her husband who is a vagabundus. There is an opinion in the Vervolg op de Hollandsche Consultation⁸⁰⁾ on to which our courts could pin a formative jurisdiction. It states that a vagabundus keeps his last domicile.

Our case law is neutral. In his minority judgment in Mason v Mason Shippard J⁸¹⁾ concluded 'with much doubt and hesitation' that the husband in the case was a vagabundus. The possibility of there being such a creature was not rejected in Ex parte

Kaiser,⁸²⁾ Ex parte Sandberg⁸³⁾ or Ex parte Gordon,⁸⁴⁾ but in none of these decisions was a definite pronouncement made as in each instance it was held that in any event the husband did not fit the description. If the vagabundus ever does make an appearance, the passage in the Vervolg on de Hollandsche Consultatien could dispose of any problem concerning his domicile.

The second problem is concerned with other persons who have abandoned their domiciles, such as the classical Roman law example of one en route to his new country of settlement. That very illustration is given in the Hollandsche Consultatien⁸⁵⁾ and he is left domicileless. Merula⁸⁶⁾ also holds that a person can be without a domicile. J Voet⁸⁷⁾ by implication concurs, as he alludes to the Roman-law rule without suggesting that the position in his time was different. It has been pointed out,⁸⁸⁾ too, that Groenewegen in his Tractatus de legibus abrogatis et inusitatis in Hollandia does not list this as one of Roman law rules no longer in operation. There is an interesting passage in the Responsa juris electoralia of the celebrated seventeenth-century German jurist Benedict Carpzovius⁸⁹⁾ in which it is stated that one who abandons his domicile of origin animo et facto without acquiring a domicile of choice is by a fiction deemed to retain his domicile of origin. This view, however, does not appear to have been taken by the Roman-Dutch writers.⁹⁰⁾

Ad ius constituendum, however, an intolerable situation will arise if a person in modern South African law could be found to be without a domicile. The lex domicilii is the operative law in a number of situations, such as succession to movables on intestacy, capacity generally, several circumstances in the law of wills and the matrimonial proprietary regime in the absence of an antenuptial contract. It might just be feasible for a legal order to allow a person to be without a domicile for jurisdictional purposes, for normally at least there would be some alternative ground of competency - though the situation of a man seeking a divorce will be impossible. It cannot be, however, that this prospect be allowed to present itself with choice of law.⁹¹⁾ For as Beale puts it:

'Many legal relations are based on domicil, and many legal obligations rest upon it.... A domicil for everyone is therefore part of the legal scheme. Whether, therefore, one actually has a home or not, it is essential to the legal order that he should have a domicil; no one can be without a domicil. Even a gypsy, a tramp or an outcast, has a domicil, however homeless and vagrant he may be in fact.'

A legal system that espouses the domiciliary law as the personal law cannot permit a lacuna of this character.⁹²⁾ There must be some rule that fulfils a gap-filling function. Our law must in this regard, be like English law, of which a German jurist has said;⁹³⁾ 'No man without a shadow and no Englishman without a domicile.' And in real life there can be no Peter Pan who can divest himself of his shadow. The Vervolg mentioned one residuary rule relating to the vagabundus and Carpzovius another relating

to the continuance of the domicile of origin, and it will be argued that this solution should be universally applied as advocated by Savigny⁹⁴⁾ - the continuance of the last domicile whether it was of origin, choice or dependence (the latter with reservations to be dealt with later), that has been abandoned, until it is replaced by a domicile of choice or dependence.

No person can simultaneously have more than one operative domicile for the same purpose.⁹⁵⁾ [run on] →

→ Were it not necessary to cover the exceptional situation considered in the discussion of Smith v Smith,⁹⁶⁾ it is believed that the last four words could be eliminated from this suggested rule; though it must be conceded that on the authorities the proposition might then only state jus constituendum, not jus constitutum.

In the Roman law the doubts of early jurists were eventually dispelled and it was accepted that a person could have more than one domicile if, to use the words of Bar,⁹⁷⁾ 'he indifferently selected several places as centres of his activity'.⁹⁸⁾ It has been contended, however, that only one domicile was possible for one purpose.⁹⁹⁾

The Roman rule was accepted by the Roman-Dutch writers.¹⁰⁰⁾ Some of them, none the less, were aware of the problems of choice of law and jurisdiction that could ensue. Choice of law would be insoluble without a subsidiary rule operating where two or more concurrent domiciliary laws obtain. Van der Keessel¹⁰¹⁾ simply jettisons the lex domicilii for testing capacity to contract in this event, applying the lex loci contractus. In a case of intestate succession to movables, J Voet¹⁰²⁾ contends that each movable is governed by the law of the place where it is found according to the design of the deceased or is regarded as being at one domicile or another. If the deceased's design is not clear, it would be governed by the law of the area of domicile in which he was living with his family at his death. But what if there were none?

The internal jurisdictional problem is not so acute, for, save for the remote possibility of international recognition of the judgment being denied, it does not matter much if two or more South African courts have concurrent jurisdiction.¹⁰³⁾ Yet even here some of the old writers are troubled. True, Faber¹⁰⁴⁾ and Merula¹⁰⁵⁾ say that the propositus with two domiciles can be sued in either. The domicile of origin is plumped for by Schomaker.¹⁰⁶⁾ Wesel¹⁰⁷⁾ looks to the place where the propositus has settled the major part of his property and in which he is accustomed to resort more frequently and for longer periods - a solution that strikes so sharply at the notion of animus manendi as to make suspect the practicability of a dual domicile. Others say he must be sued where he and his family reside at the time.¹⁰⁸⁾

Presumably the same attitude would have been taken to domicile as a test of international competency had the old writers considered the matter, for there is no reason in principle for any difference in approach.

On two occasions obiter dicta have fallen from the lips of South African judges, opposed to the possibility of the existence of more than one domicile.¹⁰⁹⁾ But recently in Eilon v Eilon¹¹⁰⁾ the Appellate Division refused to commit itself. Not much significance need be attached to this avoidance of a pronouncement, for the facts did not call for one.

A solution has been propounded by a South African writer,¹¹¹⁾ following that of J Voet.¹¹²⁾ Invoked in aid are eight South American civil codes admitting multiple domiciles, where frequently a provision is to be found similar to that of Voet's, that in a matter having a special connection with one of the domiciles it alone operates. However, closer examination reveals that at least in the bulk of these countries the concept of animus manendi is less stringent than in our law;¹¹³⁾ and the persuasive force of their statutory provisions must be slight indeed. The rule proposed is that multiple domiciles are possible in South African law, that domicile then being selected in a particular instance in which the event or transaction occurred or in all the circumstances must be taken as having occurred. If, for instance, a father had two domiciles at the time of the birth of his legitimate child, the domicile of origin of the child is where the father was or must be regarded as having been at his birth. To determine which of the domiciliary laws of a deceased applies to the distribution of his movables on intestacy, recourse must be had to the place of domicile where he died or must be regarded as having died.

The proposed rule receives slender support among the institutional writers and depends ultimately on a fiction. Say the father was present at the birth of his child, or the deceased died, in a foreign country on a holiday visit. Van der Keessel¹¹⁵⁾ threw in his cards in a case of contracting in none of the places where the de cuius was domiciled.

Even if the possibility of a multitude of domiciles be conceded in deference to the old writers, heart can be taken from the realization that it is a very remote possibility in the light of our notion of animus manendi. In every instance of an indifferent selection of several places as centres of the activity of the propositus, it will be found that he has not lost his previous domicile as the animus non revertendi is missing, and he has not acquired a domicile of choice elsewhere, for he has not the requisite animus manendi - 'a fixed and deliberate intention to abandon his previous domicile, and to settle permanently in the country of choice'.¹¹⁶⁾

II THE DOMICILE OF ORIGIN

(a) General principles. In understandable exasperation, Shippard J once described the expression 'domicilium originis' as a 'barbarous phrase ... which confuses place of domicil with place of birth'.¹¹⁷⁾ But though [a]ccording to Roman usage, this collocation of words is contradictory, as these expressions indicated two different,

independent grounds of subjection¹¹⁸⁾, in modern usage 'domicile or origin' has acquired a precise, technical meaning. It is the domicile of dependence that is assigned a person at the time he is born.¹¹⁹⁾

Mere fortuitous birth in a country or on a journey does not establish a domicile of origin in the place of birth.¹²⁰⁾ On the other hand, as will appear, a person may have a domicile of origin in a country where he has never been. The domicile of origin that a child is assigned when born is his father's domicile at the time if he was legitimate¹²¹⁾ and his mother's if he was illegitimate¹²²⁾ or legitimate posthumous.¹²³⁾ Three minor special cases are those of a post-divorce legitimate child: his domicile of origin will be that of his father at birth unless the court awards in advance the (sole) guardianship¹²⁴⁾ or (it is submitted) the (sole) custody of the child, when born, to his mother or to a third person - here, it is believed,¹²⁵⁾ the domicile of origin will be that of his mother or the third person at his birth; of a posthumous or illegitimate child whose mother dies before his birth: his domicile of origin is the last domicile of his mother; and of a posthumous or illegitimate child of whom the guardianship (or, it is submitted, tutorship) has been awarded by the court before his birth to a person other than his mother: here it is difficult to think of any answer other than that the domicile of origin is the guardian's (tutor's) domicile at the birth of the child.¹²⁶⁾

Further problems are raised by the legitimated or adopted child and the foundling. The view has been put forward¹²⁷⁾ that the legitimated child's domicile of origin should be assigned retrospectively to that of his father's domicile at the time of the child's birth if the act of legitimation is retrospective to then, as, it seems clear, with legitimatio per subsequens matrimonium in South African law.¹²⁸⁾ This appears sound.¹²⁹⁾ But the reasoning should not be applied, as it has been contended,¹³⁰⁾ to a child born of a putative marriage, simply because, so it appears, the court's pronouncement of legitimacy is declaratory and not constitutive of the status of the child. Very likely the mother is the natural guardian of the child from its birth,¹³¹⁾ and if this is so, it would be a strange thing to assign the father's domicile at the birth of the child as his domicile of origin.

It would be most convenient if the domicile of origin of an adopted child were to be that of his adoptive parent or parents at the time of adoption, which is specifically provided for by legislation in three Australian States;¹³²⁾ and for that domicile to be deemed to have existed from the child's birth until his adoption. For while sometimes it is clear what the domicile of origin of a child was immediately prior to his adoption - thus, for instance, where an orphan is adopted by a relative - in many instances the child adopted is an illegitimate babe in arms, of whose parentage the adoptive parents are unaware and of which evidence may be available only with great difficulty, if at all. But the Children's Act¹³³⁾ contains no express provision in this case and on a proper construction will be seen to make the adoption order constitutive and non-retrospective in effect. It must follow that the adopted child follows as domicile

of dependence the domicile of his adoptive parents from the time of adoption. Up to then he retains all his previous domiciles, and consequently his domicile of origin is unchanged.¹³⁴⁾ This may result in difficulties of proof, but, as will be seen, in case of need to ascertain a domicile the court will grasp virtually at anything as a tabula in naufragio; and if pushed to the point will say that his domicile of origin is his first known domicile.¹³⁵⁾

No Mr Allworthy¹³⁶⁾ has awakened in South Africa to find a new-born infant in his bed and been concerned with his domicile; no child has been found by the porter of the Nazareth House in a pram outside the front door on his opening the building in the morning, and subsequently posed domiciliary problems for the courts. But the possibility exists. It is generally accepted that a foundling has his domicile of origin in the country in which he is found and¹³⁷⁾ so too a child, not strictly a foundling because he is not abandoned, but whose parentage is veiled in mystery.¹³⁸⁾ There may, however, be evidence to the contrary effect, for instance, where a small child babbling in Swedish is discovered as a stowaway on a ship that has just put in to a South African port from Stockholm.

One thing may be said with confidence of the domicile of origin, that it continues until it is abandoned animo et facto,¹³⁹⁾ a quality it shares with the domicile of choice. The mystery is whether in our law, as in English law, it is always latent, ready to fill a void where the de cuius has lost his previous domicile and not replaced it with a domicile of choice or dependence.

It has been seen,¹⁴⁰⁾ the vagabundus excepted, that the probable Roman-Dutch rule was that he who abandoned his domicile was left domicileless, and this apparently applied as much to abandonment of the domicile of origin¹⁴¹⁾ as abandonment of the domicile of choice. The domicile of origin had no gap-filling function and the concept was of value primarily in fixing the first domicile and possibly secondarily (and very much so), in all probability being more difficult to discard in the eyes of the court.

It was submitted in the first section of this article that the notion of a person without a domicile is not to be endured and that our courts should boldly go for a universal rule of the continuance of the last domicile, be it of origin, choice or dependence, that has been abandoned, until it is replaced by a domicile of choice or dependence - the Roman-Dutch position, apparently, with that odd creature, the vagabundus. But that is not what our trial courts have done hitherto: they have adopted the English law rule of the revival of the domicile of origin. (The Appellate Division has not as yet pronounced on the matter.) The upshot is the emergence of two associated principles of the domicile of origin, the second of which, it is submitted, is unwarranted: (a) it persists, even though abandoned animo et facto, until replaced by either a domicile of choice or a domicile of dependence;¹⁴²⁾ (b) it revives on the loss of a domicile of choice or dependence without the simultaneous acquisition of a new domicile

of choice or dependence. 143)

Whence does the English rule of the revival of the domicile of origin derive? In 1820 Sir John Leach V-C, basing himself on civilian writers, found against the rule, holding that there is no difference in principle between a domicile of origin and one of choice in respect of loss or reacquisition, and that any abandoned domicile continues until replaced by a newly acquired one, 'unless the party die in itinere toward an intended domicil'. Burge and Story, however, who shortly thereafter wrote their leading works on the conflict of laws, and the latter of whom had a marked influence on English judges, subscribed to the two principles set out above. The House of Lords settled the matter on those lines in the great case of Udny v Udny, electing in favour of the revival of the domicile of origin. Although it was a Scottish appeal, it has never been doubted that it holds goods for English law. Lord Hatherley LC reasoned thus: As a domicile of choice can be acquired so it must be able to be abandoned 'and though a man cannot, for civil reasons, be left without a domicil, no such difficulty arises if it be simply held that the original domicil revives'. To Lord Westbury 'as the domicil of origin is the creature of law, and independent of the will of the party, it would be inconsistent with the principles on which it is by law created and ascribed, to suppose that it is capable of being by the mere act of the party entirely obliterated and extinguished. It revives and exists whenever there is no other domicil....' Thus, so Lord Chelmsford put it, it 'always remains, as it were, in reserve...'

In the United States it was generally accepted that a domicile persists until superseded by a new domicile. This, it was argued, was more appropriate to a land in which there was continual movement from one constitutive State to another. It has been seen that the Roman-Dutch writers were prepared to leave a person without a domicile. Only with a vagabundus is there any authority for the continuance of the last domicile, and one has to turn to the German jurist Carpzovius for a mention of the continuance of an abandoned domicile of origin. Of the civilians only Savigny can be found to express a preference for the general rule accepted in America, the continuance of the last domicile. When the matter finally came up for crisp decision before a South African court in Ex parte Donnelly it was felt that, it being necessary that a person always have a domicile, an election had to be made between the English and American principles. It has been argued, however, that both are equally arbitrary and that any gap should be filled with the present residence or if there be none the last-known residence. Apparently - though this is not clearly stated - the choice-of-law rule invoking the lex domicilii is to be so supplanted. But for this there is no warrant. Furthermore, the application of the law of the last-known residence is also arbitrary.

True, in the absence of any other evidence the court will in appropriate circumstances find the de cujus to have been domiciled there, but this is a vis aller of evidentiary law. It is very unlikely that this proposal to invoke the present residence will meet with judicial acceptance and it will be assumed that our judges will find themselves compelled to follow either the path of the Americans or that of the Britons.

The problem before Mason J in Donelly had not had to be squarely faced before, but there were a number of obiter dicta ¹⁵⁸⁾ in favour of the doctrine of English law, which Mason J, in an interesting piece of judicial law-making, adopted as part of our legal system. The learned judge, while sensible of the 'many arguments of convenience in favour of the persistence of the domicile of choice, especially in countries like the United States and the Union', concluded that they could not 'prevail against the objections to adopting on a question of international law [sic] an interpretation differing from the rest of the Empire'. ¹⁵⁹⁾

'Where there are definite legal decisions or particular statutes dealing with the subject, these naturally bind the local tribunal, but where such definite compulsion is absent, it is most important that these questions should as far as possible be dealt with on principles which are generally accepted amongst civilized nations.

'The difficulties of any other course may well be illustrated by the present case. If in South Africa the rule be adopted that the domicile of choice persists notwithstanding abandonment, whilst a different rule prevails in other countries, our courts would attribute to the plaintiff's husband one domicile, and other courts would attribute to him another domicile. The result would be that a divorce pronounced in this case would be regarded as invalid in England, and the wife marrying again in England might be convicted of bigamy.

'Or if the succession to the husband's property were being decided, his movable property would be distributed and be liable to taxation in different ways in accordance with the accident of situation.' ¹⁶⁰⁾

These sentiments are understandable in the context of the time and place. But, despite our continued close economic links with Britain and the considerable immigration from that country, they seem quaint today now that the Republic is out of the Commonwealth. If the American doctrine is more convenient, as Mason J thought, and if in general it produces less arbitrary and more equitable and socially justifiable results, which it will be argued is the case, the time has come to give Donelly its quietus. Fortunately the rule it expounds has not been pronounced on by the Appellate Division ¹⁶¹⁾ or been applied in any other reported case, though admittedly it may have been invoked in many unreported suits.

The English rule has been the subject of considerable criticism because it so frequently leads to eccentric consequences - a domicile in a country the links with which may have become superannuated or are slight, and which may never have been seen. It was found to be 'undesirable' by the Private International/^{Law}Committee of England, which proposed the rule 'A domicile, whether of origin or of choice, shall continue

until another domicile is acquired',¹⁶³⁾ which was taken over into the abortive Domicile Bills of 1958 (s 7) and 1959 (s 2) in the form 'A person's domicile in any country continues until he acquires a domicile in another country (but no longer)'.

The rule of English law was formulated on the premiss, sometimes expressed but mostly tacit, that the average man has an abiding relationship with his domicile. If an abandoned domicile of choice is held to continue until replaced by the acquisition of a new domicile of choice, says Lord Hatherley LC in Udny,¹⁶⁴⁾

'one is driven to the absurdity of asserting a person to be domiciled in a country which he has resolutely forsaken and cast off, simply because he may (perhaps for years) be deliberating before he settles himself elsewhere. Why should not the domicil of origin cast on him by no choice of his own, and changed for a time, be the state to which he naturally falls back when his first choice has been abandoned animo et facto, and whilst he is deliberating before he makes a second choice.'

The answer to the query is that the domicile of origin might long before have been forsaken; indeed, being acquired without any volition on the part of the propositus, it could be a country with which at no time did he have any tie at all. Assume A had been born in Natal, his father's domicile at the time being in Scotland, and that a year later his father became domiciled in Natal. If sixty years after A leaves Natal with the intention of seeking some new place in which to settle in his years of retirement, according to the law of England his Scottish domicile of origin revives and its law becomes his personal law, though he may never have visited the country. If he wishes to obtain a divorce, he must resort to the courts there; if he dies intestate, his movable estate is distributed according to its legal rules, of which he is profoundly and happily ignorant.¹⁶⁵⁾ In this far from outré illustration the propositus may have quit the country of his domicile of choice, but his social links remain infinitely stronger with it than with the country of his domicile of origin. And the law should maintain as far as possible 'the rational justification for domicile ... the need to ensure conformity by the individual to a social pattern, to the pattern of law and morals of the society in which he has made his home'.¹⁶⁶⁾

In his much-criticized judgment in Winans v Attorney-General Lord Macnaghten issued this warning:¹⁶⁷⁾ '...[I]n these days, when the tendency of the educated and leisured classes is to become cosmopolitan ... you must look very narrowly into the nature of the residence suggested as a domicile of choice before you deprive a man of his native domicile.'

The result he arrived at was by no means satisfactory. Yet attachment to the domicile of origin may have been broadly true of mid-Victorian Britons - or at least Englishmen - who on landing on foreign shores in search of better opportunities in life often looked forward to their ultimate return to their native land. There is a saying of the French that they do not emigrate - they merely travel. Possibly it had

more than a germ of truth when applied to the Englishman of a hundred years ago. 168)
'Once an Englishman, always an Englishman.'¹⁶⁹⁾ But though he and his offspring may for long have continued to speak of England as 'home', it was an expression that finally came to be mere habit, possibly unconsciously ingrained because of the irritation it caused in the breasts of those with a longer South African ancestry. 'It is a well-known fact', said Rumpff JA in his dissenting judgment in Eilon v Eilon,¹⁷⁰⁾ 'that thousands of first-generation emigrants from the so-called old countries maintain family and cultural relationships with their domicile of origin, having at the same time the intention to live indefinitely in their new country.'

That many homesick immigrants return whence they came is undeniable, and very likely the figures are higher today with assisted passages and officially encouraged immigration than at certain other recent times, say between the two World Wars. It may be that an eminent legal scholar went rather far in saying that '[t]he archaic and feudal idea that a man belongs to the land to which his ancestors belonged has long lost its meaning in an age of migratory populations'. But basically the condemnation is sound, and particularly so in the case of a single State in the political sense, such as the United States and South Africa, that constitutes several countries or areas for choice of law or domestic jurisdiction, and where State or provincial or other local loyalties are not strong, ties of life are often with more than one territorial area and movement within the land is frequent.¹⁷²⁾

An adaptation of the illustration already given will show the heights of unreality which the English rule can reach. Let us say that A leaves Natal in order to settle in Rhodesia, where his daughter, his only child, lives with her husband. He decides before going to Rhodesia, which has accepted him as an immigrant, to go to Mauritius for a ten-day holiday. On that island he dies. His last domicile according to English law is in Scotland, and it is the law of that country that governs the order of intestate succession to his movables, all of which are in South Africa or Rhodesia.

It is not denied that the American rule can also produce socially untenable consequences. This could happen, for instance, if the propositus had lived for many years with the animus manendi in his domicile of origin, then settled in a new country, decided after a few weeks that he preferred life in the 'old country' and died en route there. But such an unfortunate working-out of the American rule would appear to be less likely than in the case of the English rule. There is, of course, the outlet of saying that while in general the rule of the continuance of the last domicile applies, it will give way to the revival of the domicile of origin rule if this will produce a result more in accord with social realities. This apparently takes the suggestion of certain American jurists of a variable domicile a stage further, for they are thinking primarily of different juridical contexts, such as taxation, divorce and intestate succession.¹⁷³⁾ But there has been an elasticity in American jurisdictions in

adapting domiciliary rules to different situations, as shown by their gradual extension of the circumstances in which a wife has the capacity to acquire her own domicile.¹⁷⁴⁾ On balance, however, it is felt that the suggestion must be rejected. Not only will the enunciation of the proposed rule demand of the courts a law-creating jurisdiction of a scope they will almost certainly not assume, but it will result in a number of instances of uncertainty as to a person's domicile, with their attendant expenditure on legal advice and possibly litigation. Better certitude here at the expense of an occasional unfortunate result.

There is also another situation in which the solution of the United States seems to produce a whimsical result: that of the deportee, exemplified by Donelly, or person leaving with an exit permit.¹⁷⁵⁾ As will be seen, it is generally accepted that on departing from our shores he loses his domicile of choice in this country, for the animus revertendi cannot be carried into effect without transgressing the law. But while it may appear odd that a deportee, until he acquires a new domicile, retains his last domicile of choice, albeit he cannot acquire it animo et facto, it must be remembered that if the rule of English law is applied the same result may follow, for his domicile of origin may have been in that very country. Both rules can in peculiar circumstances evoke strange answers,¹⁷⁶⁾ as with one who would set foot on the ground of his country of last domicile of choice or of origin at the risk of his liberty or even life, like the German refugee during the Nazi regime. But such a price will occasionally be demanded by a fiction necessary for the legal order. It can only be hoped that the courts will take a generous attitude to the interpretation of the animus manendi, for which a plea will be made, because this will reduce the ranks of those sui juris but with attributed domiciles.

The adoption of the American rule could help a South African wife whose husband has a foreign domicile of origin and who has abandoned her without acquiring a domicile elsewhere. At common law she would have to sue him for divorce in the court of his present domicile. But admittedly her position has been progressively improved under the Matrimonial Causes Jurisdiction Act 1939,¹⁷⁷⁾ under which, as has been seen, she is enabled to bring a divorce action in South Africa if her husband is not domiciled there and it was her pre-nuptial country of domicile or citizenship; or if her husband has deserted and left the country, or has been deported, and immediately before the desertion or deportation was domiciled there.

The difficulties over the recognition of South African divorce decrees and judgments relating to succession adverted to by Mason J in Ex parte Donelly do not seem so grave today. First, they would be recognized in the United States if its doctrine were invoked but possibly not if the English one were. Secondly, in the United Kingdom under recent legislation¹⁷⁸⁾ a South African divorce would be recognized where the

American rule was applied. Thirdly, our legislature has boldly and wisely shown that it is not prepared to allow the prospect of 'limping marriages' to deter it from extending divorce jurisdiction beyond the court of the present domicile or notional domicile in the interests of justice to wives - witness the General Law Amendment Act 1968,¹⁷⁹⁾ which amended the Matrimonial Causes Jurisdiction Act 1939¹⁸⁰⁾ to allow a plaintiff wife to sue for divorce in any division if her pre-nuptial domicile or citizenship was South African. Finally, in many Continental systems, wedded to the national law governing status, the judgments would in no case be recognized.¹⁸¹⁾

As to the theoretical objection of Lord Hatherley in Udny,¹⁸²⁾ that the American doctrine flies in the face of the principle that a domicile of choice cannot exist if it is abandoned, the answer is that it is as question-begging as Goodrich's¹⁸³⁾ objection to the English doctrine, that it is irreconcilable with the principle that a domicile once acquired is retained until a new domicile is secured. The fallacy lies in the elevation to basic principles, with which all subsidiary rules must comply, of propositions that in reality are not a priori, but a posteriori generalizations from existing rules of law.

In the result then, a strong case can be made for the continuance of the last domicile until its replacement by a new one, rather than the domicile of origin acting in subsidio. As, however, it is by no means clear in which direction our courts will ultimately go, in what follows account will have to be taken of both possibilities.

(b) Loss of domicile of origin. Abandonment of a domicile of origin, through loss of residence coupled with the animus non revertendi, must be proved on a balance of probabilities.¹⁸⁴⁾ The old authorities speak of a presumption in favour of its existence.¹⁸⁵⁾ South African case law holds that the burden of proof is on him who alleges¹⁸⁶⁾ otherwise and that in case of doubt the domicile of origin will be taken to continue. Such statements perhaps should not be given much weight because it is also said of a domicile of choice that he who alleges a change from the previous domicile must prove it and that the domicile of choice is presumed to continue in the absence of proof of such change, which will not lightly be concluded.¹⁸⁷⁾ Yet the impression remains on an analysis of the South African decisions that there has been some infection of the impossibly rigorous and untenable approach taken by the English and Scottish courts, referred to by the English Private International^{Law} Committee as 'serious defects ... hard to defend'.¹⁸⁸⁾ There, so it will be shown, in practice the domicile of origin has proved remarkably tenacious, its character more enduring, its hold stronger, and less easily shaken off'.¹⁸⁹⁾ A leading English writer has concluded that 'almost overwhelming evidence is required' to shed the domicile of origin¹⁹⁰⁾ and that there is an 'abnormal reluctance of the courts ... to find an intention in favour of its abandonment'.¹⁹¹⁾

'[T]he court', said Innes CJ in Webber v Webber,¹⁹²⁾ 'must in each case be satisfied that the person for whom a domicile of choice is being claimed, deliberately decided to give up his home in the old country and to make his permanent home in the new.' In the common run of cases, as appears from this quotation, the decision whether a domicile of origin has been lost is bound up with the associated question whether a new domicile of choice has been acquired. To decide whether there is an absence of animus revertendi, it is insufficient to look at a vague intention to return in abstracto; it must be tested against the strength of the roots in the new country. The norm is that

'[t]he choice of a new domicile ... involves the abandonment of the old one; and the prominence given to this aspect of the matter by the courts has resulted in a demand for strict proof of an intention to give up the old home and to acquire the new'. 193)

The abandonment of the domicile of origin means departure animo non revertendi.¹⁹⁴⁾ Of course, the two requirements may not come into existence simultaneously but until they co-exist abandonment does not take place. Animo non revertendi is not the same thing as sine animo manendi. One does not ask afresh, Has the departed propositus the animus manendi in the old country?, with all the difficulty of proof that involves. The touchstone is the positive resolve not to return in order to remain,¹⁹⁵⁾ subject to the possibility of a change of mind on the contingency of an unforeseen event.¹⁹⁶⁾ In a sense, it is the obverse of the test of the acquisition of an animus manendi. The matter will be adverted to again in the treatment of the loss of a domicile of choice.

Exceptionally it is clear that the propositus has quit his domicile of origin and the only problem is whether he has acquired a domicile of choice elsewhere. This is what happened in Ley v Ley's Executors,¹⁹⁷⁾ an important decision, particularly on the acquisition of a domicile of choice, the facts of which may conveniently be stated at this stage:

England was Ley's country of domicile of origin. There he was born in 1880. As early as the age of 14, when he commenced his apprenticeship as a stone-mason, he formulated the intention of emigrating to South Africa, where wages for such an artisan were much higher. In 1899 Ley finished his apprenticeship and shortly thereafter became engaged to his future wife. He sailed unmarried for Cape Town in 1903. For over three years he worked in southern Africa, mostly in Cape Town, at other times in the Orange River Colony. He informed friends that he intended to stay in southern Africa. In 1905 Ley caught a ship to England in order to marry his fiancée. Almost immediately on disembarking he booked a single return passage to Cape Town. The couple were married in England, where they spent their honeymoon and Ley practically his last penny. Later in 1905 Ley left for Cape Town without his wife, because he could not afford her fare, and also because he could move more easily alone around the country from one job to another. The arrangement was that he would send for his wife as soon as he could afford her fare. The hapless Mrs Ley had to wait until 1910; and by 1909 Ley had settled in Pretoria. Where he had worked between his return to the Cape late in 1905 and 1909 was not clear.

One witness did state that he had seen Ley frequently in Cape Town during 1905-6.

The critical issue was Ley's domicile at the time of his marriage, so that the matrimonial proprietary régime could be established.

On the score of the relinquishment of the English domicile of origin, Centlivres CJ, delivering the judgment of the court, said: ¹⁹⁸⁾

'...[I]t is clear on all the evidence that at no time after leaving England for South Africa in January 1903 did Ley contemplate returning to England for the purpose of remaining there. When he left England in 1903 he intended to abandon his English domicile irrevocably and to settle in South Africa and the only question is whether he in fact acquired a domicile of choice in the Cape Colony.'

A similar decision should have been but was not reached on the facts of another earlier leading case on domicile, especially the domicile of choice, Johnson v Johnson, ¹⁹⁹⁾ where again the crucial question was the ascertainment of the domicile of the propositus at the time of his marriage in order to settle the law governing its proprietary consequences:

In 1879, at the age of 12, Johnson ran away from Sweden, his native country of domicile, and became a cabin-boy on a ship. For short periods at the ages of 13 and 16 he visited his home in Sweden. From the age of 16 to 21 he first worked in a coal mine in Scotland and thereafter became a sailor once more, visiting the United States for the first time at the age of 19. When 21 years of age he went to Sweden to qualify for his master's and captain's certificates, which he gained two years later. He then obtained employment in the State of New Jersey, in the United States, where he took up residence in a flat. A year later he wrote to the future Mrs Johnson asking her to come to America with a view to eventual matrimony. She arrived in November 1891. The couple married in the State of New York in June 1892. In January that year Johnson had made a declaration to become a naturalized citizen of the United States. Some six weeks after his marriage Johnson met with an accident, lost his job in New Jersey and left that State, never to return to it. At the time of his marriage he 'would have gone anywhere in America to improve his prospects'. ²⁰⁰⁾

While Stratford JA, the sole dissentient member of the court, had little difficulty in concluding that Johnson had proved that he had lost his Swedish domicile of origin ²⁰¹⁾ and considered that the only real problem was whether he had acquired a domicile of choice in New Jersey at the time of the marriage, ²⁰²⁾ the majority decided that he had not established that his domicile of origin was not still operative. Their reasoning can hardly be considered satisfactory. De Villiers CJ, it is true, expressed difficulty in believing that at the date of marriage Johnson 'had made up his mind to make his permanent home in America'. ²⁰³⁾ The evidence and his letters showed he had always been and still was attached to Sweden. ²⁰⁴⁾ The learned judge then asked: ²⁰⁵⁾ 'Do these facts clearly prove that he had decided to remain permanently in Jersey City? The case would have been much stronger if it had been possible for him, which it was not, to obtain a domicile in the United States of America.' This fatally weakens the previous conclusion of the retention of mental links with Sweden. For the fact that the establishment of



a domicile in the United States as a whole would not have been enough to fix the area of domicile to settle the law governing the matrimonial proprietary regime can hardly affect the resolution of the question of the abandonment of the Swedish domicile. That seems clearly to have been established on a balance of probabilities and the court should then have had to put its mind to the issue considered vital by Stratford JA. 206) 207)

The latest Appellate Division decision, Eilon v Eilon,²⁰⁸⁾ was really concerned with an alleged abandonment of a domicile of choice in Israel, but it was of a type that has been called a 'well-settled domicile of choice' and there a similar reluctance to find abandonment is shown. On the facts, which do not lend themselves kindly to simple statement, the majority three judges of appeal could not find 'proved that the de cuius had at the relevant time a fixed and deliberate intention to abandon his previous domicile'.²⁰⁹⁾ There are, however, two striking statements in the dissenting judgments that express what is believed to be the correct view. Rumpff JA said that²¹⁰⁾ there was no need for 'a desire to turn one's back on the country of origin or to sever all connections with that country or a desire never to return there'. And Williamson JA²¹¹⁾ said that 'the inquiry does not involve ... a scrupulous and solicitous investigation as to whether perhaps in the future he might not in certain circumstances decide to remove his permanent home to Israel'.

On the associated matter of the meaning of animus manendi Williamson JA considered that 'it has become desirable to check the course which our courts have been taking in regard to the development of this topic. Are we to continue to take the course plotted, for instance, by the House of Lords in the case of Winans v Attorney-General [1904] AC 287...?' Equally the question can be posed in relation to loss of the domicile of origin - the animus non revertendi.

An examination of Winans that has had so baneful an effect in this country also on the judicial formulation of animus manendi, is now called for.

Born in 1823 in the United States, Winans^{on the completion of his education} was in business there continuously to 1850. After that he apparently never saw the country again. For the following nine years he was resident in Russia, employed by the Government there to equip railways and make gunboats in anticipation of the Crimean War against England. There he married a British subject. On his doctor's advice in 1860 he began to winter in England for his health's sake. For the next decade he spent four months of the winter in Brighton, where he had hired two houses that he joined structurally, and the rest of the year in Russia. From 1870 to 1883 he spent over half the year in England or Scotland and the balance in Russia and Germany. From 1883 to 1893 his year was divided between England, Scotland and Germany. The last four years of his life he lived entirely in England.

The manner of his residence for the last 37 years of his life pointed strongly to the acquisition of a domicile of choice in England. There was no hesitation on the part of five judges in the lower courts in arriving at this conclusion.²¹²⁾ Nor was

Lord Lindley, the dissenting law lord, in any doubt. 'Where was Mr Winans' home - his settled permanent home? He had one and only one, and that one was in this country; and long before he died I am satisfied that he had given up all serious idea of returning to his native country. He was an American citizen permanently settled in this country.' ²¹³⁾

Lord Macnaghten was not so satisfied. After warning himself, as we have seen, of the need to look closely at the nature of residence in these cosmopolitan days, he found no direct evidence of Winans's intention. Thus he felt compelled to a careful dissection of Winans's mode of life, his projects and his hopes. In the lapidary style for which he is justly famed, Lord Macnaghten found that the deceased had had three aims. The first was the care of his health. 'He nursed and tended it with wonderful devotion. He took his temperature several times a day. He had regular times for taking his temperature and regular times for taking his various waters and medicines.' ²¹⁴⁾ This, of course, did not signify. The second was the construction of spindle-shaped boats, called 'cigar-ships', which would not pitch or roll, would restore to the United States the world's carrying trade and insure her against loss in a naval engagement with Britain. On this project very large sums were spent right up to his death. The third was the acquisition of a property in Baltimore for the construction of these ships and in which Winans would dwell as supervisor of the scheme. That property he secured only in the dying days of his life and that was why he had not moved back to the United States. Lord Macnaghten was 'unable to come to the conclusion that Mr Winans ever formed a fixed and settled purpose of abandoning his American domicil and settling finally in England. I think that up to the very last he had an expectation or hope of returning to America and seeing his grand schemes inaugurated.' ²¹⁵⁾ But why did this man, of wealth beyond the dreams of avarice, never return to his beloved land of birth? Since Lord Halsbury in a typical laconic speech announced simply that ^{as} he could not infer Winans's intention from the evidence, the Crown had not proved a change of domicile of origin, in fact Lord Macnaghten's views established the law of England. Winans's visionary optimism was allowed to prevail over the facts of his life, and the course was finally set for future examination in great detail, at heavy expense, of every trivial detail in a man's life to ²¹⁶⁾ establish his true intention, with all the concomitant uncertainty for legal advisers. In the words of Cheshire, ²¹⁷⁾ which apply equally to loss of a domicile as to its acquisition, 'one of the defects of English law is that the evidence adduced in a disputed case of domicile is often both voluminous and difficult to assess. This is due to the over-scrupulous manner in which the courts attempt to discover a man's exact intention. The tendency is to investigate his actual state of mind, rather than to rest content with the natural inference of his long-continued residence in a given

country. This, indeed, is to set sail in an unchartered sea.' 218)

An even harsher reception has met the unanimous decision of the House of Lords in Ramsay v Liverpool Royal Infirmary,²¹⁹⁾ which fortunately does not appear to have had an impact on our courts. It is worth analysis as a warning.

George Bowie, a work-shy Scotsman of 'inert character', was born in Glasgow in 1845, his domicile of origin being in Scotland. Up to the age of 37 he was employed as a commercial traveller, but work did not appeal to him, and he did not perform it for the rest of the 45 years of his life. In 1892 he went to Liverpool to live on the bounty of his brother. On the latter's death in 1912 Bowie moved into his house, and there he resided, a sister staying with him up to 1920, when she died, until his death in 1927.

Thirty-six years continuous existence in England immediately before his demise was not enough to secure for Bowie the loss of his domicile of origin in Scotland; not the facts that he had not set foot in that country for the whole period, had said on several occasions that he refused to do so, had declined to attend his mother's funeral there and had arranged for his own burial in Liverpool. On the positive side there was only an oft-repeated statement that he was proud to be a Glaswegian and that he had left a holograph will, valid in form according to Scots law if that was the lex ultimi domicilii but not by English law, by which he had bequeathed the bulk of his assets to certain infirmaries in Glasgow and which concluded 'These infirmary legacies (to be anamous [sic], say a Glasgow man)'. But to quote Lloyd-Jones J in the recent case of Turczak v Turczak,²²⁰⁾ of another propositus, his 'lachrymose and nostalgic referen-ces to his native country [were] ... purely transient'. It is almost with a sense of disbelief that one reads in the speech of the Scottish lord of appeal in ordinary, Lord Macmillan:²²¹⁾ 'I doubt if there was ever a case in which the court has been asked to infer the acquisition of a domicil of choice from such slender evidence of intention as is relied on in this case.'

Why was Bowie held not to have lost his Scottish law of domicile? In essence not because he had any real desire to return home - that simply could not be said - but negatively, because the reason for his remaining in England was that his source of supply came from there. Motive was allowed to distort intention. On the facts, it was as strong an illustration of animus non revertendi as could be looked for. There was not even a vague wish to return. And a 'fond hope' or, in Story's words,²²²⁾ a 'floating intention', as opposed to a 'definite intention' to go back,²²³⁾ ought not to be sufficient to justify retention of the domicile of origin...'. By 'fond hope' is meant something that does not square with the facts of a man's life that point to his acquisition of a domicile of choice in a foreign country. There has been a string of United Kingdom cases, mostly Irish (is it significant that the Irish emigrated in such large numbers from their inhospitable land from the great famine of the late 1840s?), that give the correct guidance. Doucet v Geoghegan²²⁴⁾ appears to be first of these:

A was born in France, his country of domicile of origin. He lived there until the age of 27, when he went as a hosier to England, where he married twice, and made his will in English form. On numerous occasions, however, he had stated that he intended to return to France when he had made his fortune.

It was held that A had lost his domicile of origin in France and acquired a domicile of choice in England.

'He is reported to have said, that when he had made his fortune he would go back to France. A man who says that is like a man who expects to reach the horizon.... Nothing can be imagined more indefinite than such declarations. They cannot outweigh the facts of the testator's life.' 225)

The Irish case of Davis v Adair²²⁶⁾ is an even more striking illustration of what is conceived to be the true approach, which will achieve the real purpose of domicile, namely, the close association of a propositus with a law district. It passes the test well set by an American judge, did he 'identify himself with the community?' 227)

The de cujus left England for the United States at the age of 25, and remained there until his death 40 years later. He twice married American women. At all times, however, he refused to be a United States citizen. He had bought property in that country, but some years before his death sold most of it. Two years before his death he bought a property in England. Often he had expressed the desire of returning to England.

← It was held that he had lost his English domicile of origin.

This is the attitude that should be taken by our courts, as it was by Stratford JA in Johnson.²²⁸⁾ The animus manendi is 'not merely that latent intention which pretty generally exists as a sort of natural feeling of "panting for his native home"'.²²⁹⁾ Further aspects of the question will be discussed in the analysis of the loss of a domicile of choice.

There are gratifying dicta indicating that South African judges do not look unsympathetically at an allegation of a loss of domicile in one area of the Republic coupled with its replacement by a domicile of choice in another area of the State. As early as the beginning of the century, before even the emergence of Union, Mason J said:²³⁰⁾ 'Here in South Africa - a new country - where circumstances alter very rapidly, the strong presumption against a change of domicile which was demanded by the circumstances of prior periods and different countries, does not exist to anything like the same extent. It is a matter of common knowledge that in South Africa a man readily moves his home from one State to another, and during even a comparatively limited period may have acquired several domiciles.' In the words of De Villiers AJA,²³¹⁾ '... when the competition is between two domiciles, both within the ambit of one and the same kingdom or country, the presumption in favour of the retention of the domicile of origin is less strong than when one of the two is altogether foreign...'

III THE DOMICILE OF CHOICE

(a) General principles. A domicile of choice is acquired by an independent person with capacity to acquire it, animus et facto, that is by actual lawful residence coupled with the animus manendi.²³²⁾ As with a domicile of origin, it is lost only if both factum and animus cease to exist.²³³⁾ Thus a person may be absent from his domicile of choice, yet so long as he retains the animus revertendi, in the hyperbolic phrase, 'etiam per mille annos',²³⁴⁾ he has not lost his prior domicile. Conversely, even though he has ^{lost} the animus manendi he retains his domicile so long as he retains his residence.²³⁵⁾ He must be without residence animus non revertendi.²³⁶⁾

Acquisition of a domicile of choice is proved on a balance of probabilities,²³⁷⁾ the onus of proof being on him who alleges a change from the previous domicile.²³⁸⁾ There is said to be a presumption against a change of the domicile of choice,²³⁹⁾ difficult to rebut, though, as with the domicile of origin, easier with competition between two alleged domiciles in the same political unit, particularly so, it would seem, where the one alleged to have been acquired was the domicile of origin.²⁴⁰⁾²⁴¹⁾

The acquisition of a domicile of choice presupposes the loss of a previous domicile, which may be a domicile of choice, a domicile of origin or a domicile which a formerly dependent person has not lost animus et facto on becoming independent. The reluctance of the courts to find an abandonment that was observed in the analysis of the domicile of origin is repeated, though perhaps not to the same degree, with a domicile of choice, in particular a 'well-established' one.²⁴²⁾ 'Stronger evidence is generally required to establish a change from a domicile of origin than from a domicile of choice', said Millin J in Lewis v Lewis,²⁴³⁾ 'but there can hardly be much difference between a domicile of origin and a domicile of choice which endured so long and became so firmly established as the defendant's Witwatersrand domicile.' What was said of the loss of a domicile of origin applies mutatis mutandis here.

One dictum goes beyond the high-water mark and causes a flood that drowns the present domicile. It fell from Murray J in Mason Gordon v Estate Mason Gordon:²⁴⁴⁾

'[T]here must be proof of the deliberate and permanent abandonment of the settlement.... It must be shown positively ... that when leaving the country of the domicile of choice or at some point of time thereafter the individual formed the definite intention of never returning thereto for the purpose of again making his home and settling there.'

The word 'permanent' in the first sentence is undesirable, but it can be given a limited meaning, as will be seen in the discussion of animus manendi. From that discussion, however, and from what was said of the loss of the domicile of origin, it will appear that the word 'never' towards the end of the second sentence is unacceptable.²⁴⁵⁾ Better is the subsequent statement of the learned judge:²⁴⁶⁾ 'It has not been proved that he definitely decided not to return to the Transvaal as his

permanent home.' 'Animus non revertendi' must not be given too drastic a connotation or else no one will be able to lose his domicile.

Even at this stage, however, before one actually comes to animus manendi, one has to struggle with the language used by the court to get precision in the expression of their views. The resolution of the various dicta striving to achieve clarity calls for the gifts of a genius in linguistics, a lawyer-like Noam Chomsky, and of which the writer is entirely devoid. In Ley v Ley's Executors²⁴⁷⁾ the court cited with approval the well-known dictum of Bramwell B in Attorney-General v Pottinger.²⁴⁸⁾ The question was whether Sir Henry Pottinger, born in Ireland, but who had lived for many years in India, had died domiciled in England. Bramwell B conceded that he contemplated the possibility of returning to India; however, he dismissed it:

'But is it to be said that a contingent intention of that kind defeats the intention which is necessary to accompany the factum in order to establish a domicile? Most assuredly not. There is not a man who has not contingent intentions to do something that would be very much to his benefit if the occasion arises. But if every such intention or expression of opinion prevented a man having a fixed domicile, no man would ever have a domicile at all except his domicile of origin.'

In Ley the application of these words to the loss of a domicile did not arise for, as has been seen, the court concluded that the propositus in leaving England in January 1903 had 'intended to abandon his English domicile irrevocably and to settle in South Africa' and at no time thereafter did he 'contemplate returning to England for the purpose of remaining there'.²⁴⁹⁾ But Bramwell B's words did come up for consideration in Eilon v Eilon.²⁵⁰⁾ There again it is said that there can be the animus manendi although the propositus has not 'excluded from his mind all possibility that in future he might leave the country' and even though 'it is contingent upon an unforeseen [sic] event'.²⁵¹⁾ This can only mean that there can be a loss of the previous domicile even though the de cuius is of a mind that he might return to it on the happening of a vague possibility. 'A contemplation of any certain or foreseeable [sic] future event', said Potgieter AJA,²⁵³⁾ 'on the occurrence of which residence in that [sc the new] country would cease, excludes such an intention [animus manendi].'²⁵⁴⁾ As the problem is so intimately bound up with the acquisition of the animus manendi, further discussion must be postponed. Provisionally, however, one may conclude that the previous domicile - whatever type it be - is abandoned even if the propositus intends going back to it on the chance happening of an unrealistic event, such as winning the 'jackpot' on the horse-races and collecting at least R200 000 in winnings or, as was seen in the discussion of the loss of the domicile of origin, making a fortune when he is working as an artisan or is eking out a living as a small shop-keeper. In Howard v Howard²⁵⁶⁾ the court held that H had acquired a domicile of choice in Rhodesia, although it found that he had thoughts 'at times of stress to

escape from the strife and burdens of life to a place of peace and tranquillity' and return to Australia and buy a boat in which he would roam the world. 'This type of wishful thinking does not ... affect the evidence that he had decided to make Rhodesia his home.'²⁵⁷⁾ It is abandoned, too, if his attitude is that he might decide to go back on the happening of a realistic event, such as the death of his father in the previous domicile and the family business there then requiring his services. But it is not abandoned, according to the case law, if he actually intends going back on the happening of a realistic event, even though its likelihood is remote. This is what happened in O'Mant v O'Mant which,²⁵⁸⁾ however unpalatable a flavour the decision leaves in the mouth of one seeking for a legal solution that smacks of down-to-earth common sense, must be considered as correctly decided:

O's domicile of origin was in South Africa, where he was born, but it was not in the area of the court, the Witwatersrand Local Division. In 1934 he settled in that area. At the beginning of 1946, up to which time he had spent all his years in South Africa, he decided that he could no longer tolerate living with his wife and made up his mind to emigrate in order to leave her. He went to Southern Rhodesia in January 1946, having received a permit admitting him as a permanent resident, and took up employment of a permanent nature in Bulawayo, His wife having traced him there, O left his job and went to Salisbury, where he found other employment. Some time later he went to Durban - whether to avoid his wife or on a holiday visit is not clear. After O had stayed six weeks his wife located him there, whereupon he immediately decided to return to Southern Rhodesia. He obtained Government employment, of a temporary nature but with the prospect of its becoming permanent - actually, he was considering a permanent position that had been offered to him. O stated that he had a complete desire and intention to continue residing in Southern Rhodesia. The court found, however, that the probabilities were 'that the intention of the respondent to live for ever in Rhodesia was subject to the qualification that his wife must be nowhere near him, and always at the back of his mind he seems to have had the intention that if she did follow him he would be prepared to leave any country to which he had gone'.²⁵⁹⁾

O'Mant, who, like the protagonist in Francis Thompson's The Hound of Heaven, was prepared in order to avoid his wife to lead an existence fleeing 'down the arches of the years ... /Across the margin of the world...', was held by Clayden J not to have acquired a domicile of choice in Rhodesia and to have still retained his Witwatersrand domicile of choice. It appears from the judgment, which is not at all specific on the point, that the court did not find that the Witwatersrand domicile of choice had been abandoned and that, because no new domicile of choice had been acquired, the old one must be taken by a fiction to continue. On the contrary, the ratio seems to be that the Witwatersrand domicile had not been abandoned. That can only have been on the ground that if necessity drove O would have been prepared to return to the Witwatersrand to avoid his wife.

The case shows how frequently the question of the existence of the animus non revertendi is wrapped up with the question of the acquisition of the animus manendi, for both may depend on the same factual situation. Occasionally, however, as happened with the loss of the domicile of origin in Ley's case, it may be clear that the domicile of choice has been abandoned and the problem may revolve purely around the animus manendi in the alleged new country of domicile of choice.

(b) The factual element - residence. 'Residence' has not the technical meaning attached to it in the other branches of law such as the law of jurisdiction. It signifies habitual lawful physical presence, not merely casually or as a traveller.²⁶⁰⁾ No minimum period of presence must be satisfied before a domicile of choice can be acquired.²⁶¹⁾ On the other hand, residence, no matter for how long, does not lead to the acquisition of a domicile of choice in the absence of the animus manendi.²⁶²⁾ The Roman law rule of ten years' residence in certain circumstances producing automatically a new domicile of choice did not apply in Roman-Dutch times and certainly does not apply in modern law.²⁶³⁾ The length of the residence, however, may be material in deciding whether there is an animus manendi.²⁶⁴⁾ 'Residence in a country is important as a ground from which to infer intention, but is not, however long continued, a conclusive proof of domicile.'²⁶⁵⁾ Again, '[i]n the absence of any circumstances to the contrary it is not an unreasonable inference that if a man has lived for a long time in a particular country he intends to go on living there. And the longer the residence continues the stronger ... the inference becomes.'²⁶⁶⁾ But all will depend on the circumstances.²⁶⁷⁾ Even very long continued residence may not yield a domicile, for 'the residence must answer a qualitative as well as a quantitative test'.²⁶⁸⁾

The residence must be that of the de cujus personally. It cannot be of a vicarious nature. A husband is unable to acquire a domicile through the residence of his wife alone.²⁶⁹⁾ Further, there must be an actual taking up of 'permanent' residence in pursuance of the animus.²⁷⁰⁾ In Jooste v Jooste the defendant, whose domicile of origin was in the Transvaal, was held to have acquired a domicile of choice in Natal. Some years later he made up his mind to settle in the Transvaal again. It was held that his temporary appearances there were not enough for him to lose his Natal domicile, for, as Selke J said,²⁷¹⁾ 'at this time he was residing in Natal, and remained physically present here ... at all times save on the occasion or occasions on which he went to the Transvaal solely for the temporary purposes of visiting, or of taking his belongings, or of fetching plaintiff [his wife] and the child to Natal. It seems clear that he never went there to begin his permanent residence, for at all relevant times he had his timber-cutting contracts still running in Natal, and these necessitated his return to attend to them and carry them on It strikes me as being, at the most, conduct preparatory to his taking up residence there.'

On the other hand, the moment such 'permanent' residence has been taken up in pursuance of the animus a domicile is acquired²⁷²⁾ and it does not signify that almost immediately thereafter the propositus left his new domicile for a temporary purpose. This may be illustrated by a celebrated American decision, White v Tennant:²⁷³⁾

There was a family farm, part in West Virginia - the home farm - and part in Pennsylvania, hitherto let. W, previously farming on his own elsewhere in West Virginia, sold his farm there and arranged with his family to take over the Pennsylvania part of the family farm. He moved with his wife and household goods into the house there. The same evening, the house proving damp and his wife feeling ill, W and Mrs W went to spend the night with the family in the mansion house on the home farm, intending to return to the Pennsylvanian farm house the next morning. In fact W did not do so as he had to look after his ill wife, though he did go daily to that farm in order to feed his stock. A fortnight later W himself took ill and died in the mansion house. His last domicile was held to be in Pennsylvania, the court finding he had settled in the farm house there.

Of course, it does not follow that the concurrence of the two elements, factum and animus, to produce a domicile of choice necessitates both having come into existence at the same time. Coincidence is requisite but not contemporaneity in origin. Whereas an emigrant from England to South Africa may formulate an intention to settle here before he is physically able to acquire a residence by setting foot on the soil of this country, a political refugee may well acquire a residence before he acquires the animus manendi.²⁷⁴⁾ In Story's words,²⁷⁵⁾ an 'intention of permanent residence may often be ingrafted upon an inhabitancy originally taken for a special or fugitive purpose'. Williamson JA stated the possibility in a striking passage in his dissenting judgment in Eilon v Eilon:²⁷⁶⁾

'I can find nothing strange or odd in the respondent's coming to so like the Cape and his mode and conditions of life there that, like many another before and since, he gradually became enamoured of it. Is it not, after all, that Cape of which Sir Francis Drake wrote, in 1580, "it is the most stately thing and the fairest Cape we saw in the whole circumference of the earth" (Richard Hackluyt English Voyages of Discovery vol 8 p 74)?

'It is not required, nor is it to be expected, that at some particular date a layman should come to a fixed and settled intention to stay and abandon his previous domicile. It is usually an almost unperceived or subconscious development of the mind, culminating in the general attitude that "this place is my home and I have no present intention of leaving it".'

(c) The mental element - animus manendi. This requirement, for the analysis of which so many mental gyrations and contortions are called for, should, strictly speaking, be examined separately from the residential requirement, but in practice for evidentiary reasons it is frequently impossible to keep the two apart. Moreover, as has been shown, the determination of the existence of the animus manendi is very often bound up with the logically anterior query, whether the previous domicile

has been lost.

If an allegation is made of the existence of a domicile of choice at a particular time, such as the institution of divorce proceedings, it is not strictly necessary to show the animus at that time; if it can be proved that it and residence coexisted previously, and the residence remains, then the domicile of choice will have continued, not having been lost animo et facto. ²⁷⁷⁾

The intention is not that of acquiring a domicile. A layman would be an exceptional person were he to know the technical meaning of that concept. ²⁷⁸⁾ What then, is meant by the animus manendi? The starting point is the famous passage in Justinian's Code 10.40(39).7:

... in eodem loco singulos habere domicilium non ambigitur, ubi quis larem rerumque ac fortunarum suarum summam constituit, unde rursus non sit discessurus, si nihil avocet, unde cum profectus est, peregrinari videtur, quod si rediit, peregrinari iam destitit. ²⁷⁹⁾

This definition, stressing the negative side of the intention, is repeated almost word for word in passages in Vinnius, ²⁸⁰⁾ J Voet (5.1.92) ²⁸¹⁾ and other civil-law writers. ²⁸²⁾ Elsewhere (5.1.94) Voet put it more succinctly: [run on]

→ '... proprie dictum domicilium est, quod quis sibi constituit animo inde non discedendi, si non aliud avocet.' ²⁸³⁾ Similar passages are found in Van Leeuwen's Censura Forensis ²⁸⁴⁾ and Schrassert's Consultation. ²⁸⁵⁾

Some definitions are couched in apparently extreme positive terms. Voet 5.1.98 says a domicile of choice cannot be acquired 'sine proposito illic perpetuo morandi'. ²⁸⁶⁾ Other writers speak in similar vein: the slightly earlier Brunneman, with his 'animus ibidem permanendi' ²⁸⁷⁾ and 'animus ibi perpetuo mansurus'; ²⁸⁸⁾ Schomaker and Carpzovius, ²⁸⁹⁾ with their 'propositum illic perpetuo morandi'; Schrassert, with his 'animus ibidem perpetuo permanendi institutum' ²⁹¹⁾ - like Voet, he manages, without apparently finding anything untoward in it, to define domicile in terms of both the negative and positive aspects. Similarly one finds opinions such as 'omme aldaar voorts altijd te verblijven'. ²⁹²⁾ Loenius, however, in his positive definition ²⁹³⁾ makes no mention of an intention to remain for ever. He states that a domicile is acquired when a person 'syn vaste wooninge heeft gestabilieert, met intentie om daar te blijven'.

Then there are authors who manage, without any pretence of critical self-examination, in one and the same breath to use both the negative and positive definitions. Van Leeuwen, whose negatively couched passage in Censura Forensis has been quoted, in Het Roomsche Hollandsche Recht ²⁹⁴⁾ says:

'Ik seg een vaste woonplaats, om dat niet het enkel verblijven van yemand, het welk dikmaals maar voor een tyd geschied ... maar het vaste voornemen om daar te zyn en blyven, sonder mening van wederkeren, yemands woonplaats maakt.'

²⁹⁵
Donellus speaks of the intention 'ut ibi perpetuo constitat, non temporis causa: nisi aliquid inde avocet'. This type of definition is well brought out in two passages in Vromans's Tractaat de foro competenti,²⁹⁶⁾ the first of which states that a person acquires a domicile of choice in a place in which he resides 'met de meininge om aldaar altijd te blyven, ten sy hy door op-komende saken daar van daan word geroepen'. With all these writers it may be said that the gloss they put on the intention to reside permanently places them in the negative camp. That was how Rumpff JA read this passage of Vromans in Eilon.²⁹⁷⁾

Still, there remains an apparent world of difference between residence with the present intention not to depart unless something untoward befalls, and residence with the intention of remaining for ever. The few examples given by the Roman-Dutch jurists do not clarify matters much, for, following Roman law precedent,²⁹⁸⁾ they cite clear cases of the non-acquisition of a domicile of choice, where the propositus obviously regarded his residence as temporary, such as the student studying in another country,²⁹⁹⁾ the officer stationed abroad,³⁰⁰⁾ the merchant overseas on a business trip,³⁰¹⁾ the politician at the seat of government, the emissary and consular official, the advocate who appears elsewhere,³⁰³⁾ the mariner on a journey to India,³⁰⁴⁾ the woman fleeing to another country to avoid a pestilence in her country of domicile.³⁰⁵⁾

The Roman-Dutch authorities can hardly be said to have distinguished themselves as jurists in their analysis of animus manendi. None, it seems, used his imagination to think out various combinations of facts that could bring the question to a knife edge. All that can be said in their favour is that they spoke in such contradictory or vague terms as to leave an inheritance that was not damnosa, that could be moulded by our courts into a workable, realistic and equitable set of rules as far as this can be achieved in so fluid a sphere. Instead of seizing this opportunity, the Appellate Division in Johnson³⁰⁶⁾ encoiled our judges with Lord Macnaghten's views in Winans, that have proved as leech-like as the old man who twisted his legs around the neck of Sinbad the Sailor on his fifth voyage.

The relevant passage of De Villiers CJ in Johnson runs thus:³⁰⁷⁾

'...[I]t is sufficient for our purposes to adopt the question framed by Lord Macnaghten in Winans v Attorney-General [1904] AC 287 [at 292]: "[T]he question which your Lordships have to consider must, I think, be this: Has it been proved 'with perfect clearness and satisfaction to yourselves' that Mr Winans had at the time of his death formed a 'fixed and settled purpose' - 'a determination' - 'a final and deliberate intention' - to abandon his American domicile and settle in England?" That is in accord with our own law as laid down by Voet (5.1.98) and others, who require a propositum illic perpetuo morandi. Voet's perpetuo morandi brings us back to the same difficulty which there is in determining what exactly constitutes a permanent home. But I agree with Westlake in para 264 (Private International Law) when he says that as a result of the English cases "the intention necessary for acquiring a domicile of choice excludes all contemplation of any event on the occurrence of which

the residence would cease".³⁰⁸⁾ This statement satisfied the test of Voet's propositum illic perpetuo morandi (cf Hollandsche Consultation III(2) cons 317 (really 217))).

'The question then which I have to put to myself in the present instance is the following: "Has it been proved with perfect clearness and satisfaction to myself that Johnson had formed a fixed and settled purpose, a determination, a final and deliberate intention to abandon his Swedish domicile and settle in the State of New Jersey?"'

The many Roman-Dutch passages setting out the much more liberal negative test of a person's intending to remain resident unless something untoward happens to cause him to leave might just as well not have existed, so far as this passage is concerned. Nor was the slightest attempt made to reconcile Voet's endorsement of this test in 5.1.92 and 94 with his 'propositum illic perpetuo morandi' in 5.1.98. Such unscientific an exposition of the historic sources of law should not be allowed to hobble the courts in the future until such time as the legislature feels compelled to intervene.

It has been seen³⁰⁹⁾ that De Villiers CJ was not satisfied that Johnson had abandoned his Swedish domicile of origin. He went on to hold³¹⁰⁾ in a passage that is apparently obiter because it dealt with a matter that could not have affected the decision as to Johnson's domicile already arrived at, that Johnson was not domiciled in New Jersey because he did not make it his permanent home. Had he been offered a better post immediately before or after marriage in the adjoining State of New York 'he would not have hesitated for a single moment' to accept it. '... I cannot doubt that he would have gone anywhere in America to improve his prospects.... I cannot have any doubt, upon the evidence, that there was nothing at any time so attractive to him in the State of New Jersey or that his prospects in that State were of such a nature, that he had made up his mind to settle for good in that State.'

Stratford JA found that Johnson had quit his Swedish domicile of origin, as his break with his homeland was complete except for the probable hope in his mind of making a fortune or accumulating a competency enabling him to return there, which had to be disregarded. Thus as far as his judgment is concerned not only is this pronouncement part of the ratio decidendi but also the decision that had to be made whether Johnson had acquired a domicile of choice in New Jersey at the time of his marriage. Stratford JA did not actually state, as did De Villiers CJ, that Johnson would have gone anywhere in the United States to improve his prospects. But he spoke of his 'ready willingness' to be blown by the winds of fortune, which comes to the same thing. The critical passage runs:³¹¹⁾³¹²⁾

'As to the respondent's ambition to find a wider scope for his energies, that ambition surely must inspire a very great number of men in lowly walks of life and especially those who are sufficiently venturesome to become emigrants. If much importance is attached to aspirations of this kind, it will be difficult to assign a domicile of choice to any emigrant of the working-man type, for in the case of each of them we must assume a ready willingness to leave one locality for another which offers better and more remunerative employment. A state of mind of that kind, much more prevalent in the lowly than in the well-to-do, should not, in my view, avoid the acquisition of a domicile.'

The learned judge invoked in aid a much-quoted passage from the speech of Lord Westbury in Udny v Udny:³¹³⁾ 'Domicil of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time.... There must be a residence ... not for a limited period or particular purpose, but general and indefinite in its future contemplation.'

But though it would find favour in at least certain American jurisdictions,³¹⁴⁾ Stratford JA's decision, for all its air of reality, cannot be regarded as reflecting South African law. No subsequent decision of a trial court or the Appellate Division has suggested that it should be.

The judgment of De Villiers CJ in Johnson caused great difficulty to Clayden J in the court a quo in Ley's case.³¹⁵⁾ The learned judge held that Ley had abandoned his domicile of origin and by the time of his marriage had settled in the Cape Colony. But he had not excluded one of the other colonies of southern Africa as his eventual home. 'Where opportunity best presented itself there he would have gone, and in fact later he did so.' The nature of Ley's intention thus did not satisfy De Villiers CJ's test based on Westlake, based on Lord Macnaghten, of excluding 'all contemplation of any event on the occurrence of which the residence would cease'. Though Clayden J would have preferred to hold that an emigrant acquired a domicile where he first settled, he reluctantly felt compelled to apply the rigorous test and held that Ley had not acquired a Cape domicile of choice.

The Appellate Division reversed the decision. It would appear to have rejected Clayden J's view of the evidence that Ley was willing to go anywhere where there was an opportunity of better work. His visits to the Orange River Colony, said Centlivres CJ,³¹⁶⁾ were of a temporary nature. On a balance of probabilities it had been proved that Ley had intended to settle (as the Appellate Division understood the meaning of that word) in the Cape Colony. As regards the view of Clayden J that Ley had not been shown to have excluded as his home one of the other colonies, it is not necessary 'to prove that the de cujus has excluded from his mind all possibility that in the future he might emigrate to another country'.³¹⁷⁾ Centlivres CJ then cited with approval/of the statement³¹⁸⁾ of Baron Bramwell in Attorney-General v Pottinger, already quoted, that a contingent intention cannot prevent the emergence of an animus manendi, though he took pains to state that there was no evidence of such a contingent intention on the evidence.³¹⁹⁾ Then he had to dispose of the phrase 'excludes all contemplation' used in Johnson's case.³²⁰⁾ This he did in a passage since invoked twice by the Appellate Division with approval:³²¹⁾

'As I understand the expression, it means that if the state of mind of the de cujus is something like this, "I may settle here permanently and anyhow I'll stay for a time; but perhaps I'll move to another country" the intention required to establish a domicile is not present. But if his state of mind is like this, "I shall settle here", that is enough,

even though it is not proved that if he had been asked "Will you never move elsewhere?", he might not have said something like, "Well, never is a long day. Who knows? I might move if I change my mind or if circumstances were to change." Any doubt actually present in his mind as to whether he will move or not will according to Westlake's statement exclude the intention to settle permanently, but the possibility that, if the idea of a move in the future had been suggested to him, he might not have at once scouted it does not amount to contemplation of an event on which the residence would cease. It is only the former that has to be disproved by the person alleging a change of domicile.'

This fine piece of homespun prose ³²²⁾ has certainly gone some way towards expounding a liberal view of the requisite intention, but it has not cleared up all problems - not that it was intended to do so. ³²³⁾ Nor did the court advert to the negative definition of the old writers. The objection has been raised ³²⁴⁾ that the passage is difficult to reconcile with the learned Chief Justice's previous statement that it is not necessary to prove that the de cujus excluded from his mind at the critical time that in the future he might emigrate to another country. The answer seems to be that the test of settling envisaged is that of making one's headquarters in the new country, to put down roots there, without committing oneself irrevocably to staying there for the rest of one's life.

The latest word has been said by Potgieter AJA in delivering the majority judgment in Eilon v Eilon. ³²⁵⁾ 'Excludes all contemplation', he repeated, 'can never mean and were never intended to mean that the de cujus has excluded from his mind all possibility that in future he might leave the country.' ³²⁶⁾ Contingency upon 'an unforeseen event' is in order. ³²⁷⁾ An intention to settle permanently is needed. 'A contemplation of any certain or foreseeable future event on the occurrence of which residence in that country would cease, excludes such an intention. If he [the propositus] entertains any doubt as to whether he will remain or not, intention to settle permanently is likewise excluded. That appears to be in accordance with our common law.' ³²⁸⁾ The learned judge could not read Voet 5.1.98 or Vromans I.4 in any other sense. ³²⁹⁾ Again, the negative definitions of the old writers were not explored.

A respectful regret must be expressed that the chance composition of the court - the rub of the judicial green - resulted in the judgment of Potgieter AJA being concurred in by Steyn CJ and Wessels JA, leaving Williamson JA with his more liberal views supported only by Rumpff JA in a special concurring judgment. While Williamson JA did not profess to state the final word, he did open up new vistas. The apposite passage in his judgment merits citation in extenso: ³³⁰⁾

'The tendency of English judges not to follow too rigidly in all cases the very narrow interpretation of the requirement of permanent residence formulated as a result of the Winans case can be illustrated from a quotation from the judgment in the well-known case of Gulbenkian v Gulbenkian [1937] 4 All ER 618.... Langton J ... at 626 came to

the conclusion ... that ... the ... use of the word "indefinite" was justified.... "In other words, the intention must be a present one to reside permanently, but it does not mean that such intention must necessarily be irrevocable in character."

'It is interesting to note that the legal system which most closely follows the English principles of private international law, viz the American law, does not seem to have followed that law in its apparent deviation about the time of the Winans case. For instance, Story Conflict of Laws ch III § 46 states his eighth rule in regard to the acquisition of a new domicile as follows: "If a person has actually removed to another place, with an intention of remaining there for an indefinite time and as a place of fixed present domicile, notwithstanding that he may entertain a floating intention to return at some future period." The more modern American Restatement of the Law, Conflict of Laws [First] ch 2 §§ 18-20 indicates no departure from Story's statement.

'In the light of this but comparatively brief examination that it has been possible to give to the matter in this case and in the absence of full argument, it may be neither desirable nor possible to attempt to formulate in a completely positive and satisfactory form the exact meaning to be attributed under Roman-Dutch law to the phrase "perpetuo morandi" or "perpetuo manendi"; but I am at any rate convinced that by the use of that phrase Voet neither contemplated nor anticipated the strict and rigid interpretation involved in the decisions of the courts of England in such cases as Moorhouse v Lord (1863) 10 HLC [272 at] 286³³¹) and Winans' case.... I think that the phraseology used ... by Langton J ... can be accepted as doing no violence to the principles of our own law. It may not solve all aspects of the problem relating to the necessary intention which may have arisen as a result of this court's approval of what I consider the unrealistic approach (and what Cheshire has termed the "astigmatic" approach) of the later Victorian English judges, but in time we may evolve or develop the principles with greater clarity.... I think the inquiry is whether, on a balance of probabilities, the appellant showed that in October 1962 the respondent then had a present intention to reside permanently in South Africa in the sense that he had no intention of limiting the period of such residence; the inquiry does not involve, in my view, a scrupulous and solicitous investigation as to whether perhaps in the future he might not in certain circumstances decide to remove his permanent home to Israel.'

The requirement to settle 'permanently' insisted on by the Appellate Division need not give rise to difficulty, if 'permanent' is given its true signification as being in contrast to 'temporary'. The Shorter Oxford English Dictionary defines it as 'lasting or designed to last indefinitely without change; enduring; persistent; opp. to temporary'. It has not the meaning of perpetual, 'forever, come what may'.³³²⁾ The animus manendi does not mean, as Lord Chelmsford said it did in Moorhouse v Lord,³³³⁾ 'no other idea than to continue there, without looking forward to any event, certain or uncertain, which might induce him to change his residence'. It does not signify what Martin Wolff³³⁴⁾ interpreted it/signify in English law, 'animus semper manendi ... the will to "live and die" in that country'. It does not require, as De Villiers CJ³³⁵⁾ thought it did in Johnson, to make up one's mind 'to settle for good to remain [for] ... the rest of [one's] days'. In the mid-nineteenth century a Scottish judge,

Lord Fullerton, pointed out that 'if in order to constitute a domicile, there were required an animus remanendi so permanent and so absolute, as to be independent of any possible change of circumstances, I do not understand how, in the constant uncertainty and transition of all sublunary events, a domicile ever could be established'.³³⁶⁾ As McGregor J once so aptly put it,³³⁷⁾ 'we ought not to give the word "permanent" too drastic, too absolute a connotation; man is not a prescient being and cannot predicate an inflexible course of life'.

Two types of mental intention are clearly insufficient in modern South African law to constitute the animus: to remain for a fixed period, say for six months on a visit to a son or daughter; and to remain until a particular limited purpose is achieved, for instance, the completion of a particular piece of work,³³⁸⁾ exemplified by the Roman-Dutch writers in the illustrations already alluded to. It must, in the words of Lord Westbury in Udny v Udny,³³⁹⁾ 'be a residence not for a limited period or particular purpose, but general and indefinite in its future contemplation'.

According to Eilon the animus can exist despite its 'contingency' [sc dependency] → upon 'an unforeseen event'. But there must not be the determination to cease residence on the happening 'of any certain or foreseeable future event'. Semantic troubled waters are now encountered and it is necessary to bear in mind what Dr A L Goodhart has warned against, the tendency to dissect judicial dicta with the same razor-sharp scalpel that is used for the wording of statutes. Scarman J has explained why it is difficult to reconcile the dicta.³⁴⁰⁾ 'Naturally enough in so subjective a field different judicial minds concerned with different factual situations have chosen different language to describe the law. For the law is not an abstraction: it lives only in its application, and its concepts derive colour and shape from the facts of the particular case in which they are studied, and to which they are applied. Thus the relationship of law and fact is a two-way one: each affects the other.' Suffice it to say that 'foreseeable' does not mean foreseen at the one pole nor within the range of being imagined on the other. The occurrence must bear some relationship to reality. The law as it is believed to exist at present has already been adumbrated in the analysis of the loss of a domicile of choice and may, it is suggested, be put thus: The animus manendi calls for the intention to reside, of a permanent character,³⁴¹⁾ in the sense of without limitation of time, indefinite in duration. It will exist even if the propositus has the present intention of leaving - perhaps for the previous country of domicile, being that of origin or choice, or an entirely new country - on the remote chance happening of a highly uncertain event, such as his winning a lottery with a very large prize, or an obscure relation of great wealth dying in a foreign country and instituting him as heir, or his returning to his native Prussia if West Germany unites again with East Germany,³⁴²⁾ or his making a fortune despite his

work being of a character to render this the dimmest of hopes.³⁴³⁾ Ex hypothesi,
the animus will exist if the present intention of the propositus is that he merely
might leave on this contingency.³⁴⁴⁾

It will not exist if the propositus has the present intention of leaving on
the occurrence of a feasible event,³⁴⁵⁾ such as his being offered a more lucrative
position or making a better living,³⁴⁶⁾ continued employment by and success of the
branch of a foreign company in the country,³⁴⁷⁾ his wife's discovering his whereabouts,
as in O'Mant, or the death of his brother in the domicile of origin, leaving the
family business bereft of its guiding hand. But if his present intention is only
that he might leave in such a situation the requirements for the animus manendi
will still be satisfied.

The foregoing submissions, it is hoped, will have the effect that reflection
on the meaning of animus manendi will no longer induce the conviction that there is
on display what the eminent jurist Rabel - with reference, admittedly, to the 'British
doctrine' - castigated as 'the prevalence of tendentious casuistry',³⁴⁸⁾ albeit admittedly
factual situations will always be found teetering on the edge between the one rule or
the other.³⁴⁹⁾

(d) Domicile of choice of those without 'free will' to acquire or lose a domicile.
Residence under some form of physical or mental constraint or which is precarious
may not qualify as being of that voluntary nature which allows for the acquisition
of an animus manendi.³⁵⁰⁾ In the words of Gregorowski J.,³⁵¹⁾ 'in order to create a new
domicile you must not only have residence but you must have intention to remain
permanently and indefinitely, and you must also have the power to carry out that
intention'. This question arises particularly in relation to persons in gaol
(prisoners); members of the armed forces and others subject to compulsory orders;
diplomats, public servants and employees of foreign firms; immigrants, deportees and
those subject to a deportation order; refugees, fugitives from justice and persons
living abroad because of ill health.

Prisoners. The generally held view is that as a prisoner is under legal
constraint he lacks the free will to acquire a domicile of choice and retains the
domicile he had immediately prior to imprisonment, even though he is in gaol in another
country.³⁵²⁾ Dicey and Morris are not dogmatic,³⁵³⁾ saying that this is the normal result since
even if residence can be considered to exist at the place of imprisonment, the prisoner
is 'unlikely to reside there permanently or indefinitely'. This explanation is of
no help.³⁵⁴⁾ Cheshire concludes from the English cases that 'there is no doubt that a
prisoner, except perhaps one transported for life, retains the domicil he possessed
before his confinement'. Life transportation, however, is hardly likely to engage
the attention of our courts.³⁵⁵⁾ Graveson, referring to one sentenced to gaol for life

or a very long period in another country, says it is possible to 'bring evidence of a resigned and settled intention on the part of the prisoner to make his home permanently in the new country, in which case a domicile of choice might be acquired'. The majority decision in Nefler v Nefler,³⁵⁶⁾ the only South African case in point, has been read to mean that life-long imprisonment confers domicile, but it is submitted that what the court really did was to assume divorce jurisdiction ad misericordiam without finally pronouncing on the issue of domicile.³⁵⁷⁾

The view was expressed in the sixth edition of Dicey that there is no valid reason why a prisoner cannot formulate the animus manendi and acquire a domicile of choice where and while he is being imprisoned. The liberal attitude taken in the past thirty years by the courts to the acquisition of a domicile of choice by members of the armed forces and immigrants with temporary residential permits gives support to this contention, but the proviso must be added that the propositus can continue to reside indefinitely after release, which would not be the case, for instance, if the implementation of a deportation order was simply awaiting that date or his very presence in the country was unlawful. The counter-argument cannot be addressed to the animus aspect of the domicile of choice, it would appear. After all, if a convict can formulate the mental intention to desert his wife, there seems to be no reason why the attractions of the surroundings of his place of detention - say Kroonstad in the Orange Free State as compared with his previous area of domicile - say Pretoria - may not cause him to make up his mind to settle in the vicinity on his release. Proof of intention could be supplied in many ways, such as his arranging for his family to move into a residence in the area now, his purchasing land there or his accepting an offer of employment there to date/^{from} the termination of his imprisonment.³⁵⁹⁾

The argument contra, it seems, must rest on the involuntary nature of his present residence; and this seems to be the decisive factor in American law.³⁶¹⁾ But once it is held - as it must be -³⁶²⁾ that a soldier or policeman can acquire a domicile of choice in the country in which he is stationed, the argument falls away. In truth the requirement of residence is satisfied by habitual lawful physical presence.³⁶³⁾

By parity of reasoning, a prisoner must be able to formulate the animus non revertendi to the domicile he had on entering gaol, without acquiring an animus manendi in the different area in which he is confined. The court would then have to decide which of the two doctrines it wished to apply - the continuance of the last domicile or the revival of the domicile of origin.

Members of the armed forces and others subject to compulsory orders. In Roman law the rule appears to have been that in general a soldier acquired a domicile in the country in which he served, but that he might retain his previous domicile if he

owned immovables there or if his family resided there. ³⁶⁴⁾ But 'in view of the changed conditions of military service in modern times the law of Rome is not a useful guide to the law of South Africa on the point'. ³⁶⁵⁾

One thing is clear about the domicile of a member of the armed services under conditions of service that do not allow for his resignation at will (the latter embracing a possible pecuniary penalty): ³⁶⁶⁾ a soldier does not change his domicile simply by being stationed, under his Government's orders, in a country other than his country of origin and this is so however long the service abroad may last'. ³⁶⁷⁾ At one time it was commonly claimed that a member of the armed forces, not being a free agent, that is, not being able voluntarily to decide on his place of residence, could not while such a member acquire a domicile of choice anywhere, not where he was stationed because his residence there was compulsory, and not elsewhere because it was precarious, and that he retained his last domicile prior to entering the armed service. ³⁶⁸⁾ He could not even have an animus non revertendi, it appears.

It is now settled law in South Africa that it is possible for a soldier, even in war time, to acquire a domicile of choice in a country in which he is not stationed. (The caveat must be added that the animus manendi will be able lawfully to be carried ³⁶⁹⁾ into effect.) This was established by the Appellate Division case of Baker v Baker:

B's marriage took place in 1936 in India, where he had served in the army for a number of years. In 1938 Mrs B went to England, and B followed in 1939. He then decided to resign his commission and settle in South Africa as a farmer, but before he could take steps to this end he was recalled to India, war being imminent. His wife followed him there, but in 1941 went to Cape Town with all the family possessions, where she set up a home, and where B visited her for a few weeks on leave in 1943 and 1945. B intended to make his home in the Cape on the termination of the war. At no time was he stationed in South Africa.

It was held that B had acquired a domicile of choice in the Cape - semble, from 1943:

'During his leave he was a free agent, entitled to select and establish his home wherever in the world he pleased, outside the limits of enemy territory.... When ... he arrived in Cape Town he came as a settler, and none the less so because he knew that during the continuation of hostilities he would be obliged to be generally absent from his home.' ³⁷⁰⁾

Baker's case has sometimes been read as authority for the proposition that a soldier on active service can acquire a domicile in the country in which he is ³⁷¹⁾ stationed. But there are not even clear-cut obiter dicta to this effect in the case. What can be said, however, is that there are statements which indicate that the Appellate Division, when finally seised of the issue, will come to this conclusion. ³⁷²⁾ The present position in this regard, however, is not yet settled, and appears to differ in the various divisions of the Supreme Court.

In the earliest Cape cases the decision was reached, though without full discussion of the authorities, that in principle there is nothing to prevent a soldier acquiring a domicile of choice in the country in which he is stationed.³⁷³⁾ In Fozard v Fozard,³⁷⁴⁾ however, Gardiner J came to the opposite conclusion on the ground that a soldier is not a free agent for acquisition of a choice of a domicile, as he can be compelled at any time to remove from one part of the world to the other. But since then the Cape Court has come to the conviction that the earlier line of decisions is correct.³⁷⁵⁾ The position was reviewed in a convincing judgment, based on principle and an analysis of the case law rather than an exploration of the old authorities, of Ogilvie Thompson AJ in Nicol v Nicol.³⁷⁶⁾ Dealing with the reasons advanced for the decision in Fozard's case,³⁷⁷⁾ the learned judge said:³⁷⁸⁾

'On principle the circumstance that the factum of residence is liable to be terminated as the result of service orders to proceed elsewhere does not appear to me to be necessarily fatal to the acquisition of a domicile during the period of service. Pending any such order the serviceman intends to remain; and, should such order supervene, he - always postulating due proof - ex hypothesi intends to return.'

The notorious Johnsonian dogmatism of exclusion of 'all contemplation of any event on the occurrence of which the residence would cease' was 'restricted to a contemplation of cessation of the residence by voluntary action'. This has rightly been applauded³⁷⁹⁾ as a necessary gloss, on two grounds: first, that otherwise the concept of domicile will become even more artificial with a widening gap between 'domicile' and 'home' - if 'a man has made his home in a place in the sense that he is settled there, with his family and goods about him, and means to stay there if he can, the possibility of his being so able being not too remote, a sound legal policy should hold him domiciled there'; and secondly, because Westlake appeared to envisage not external and involuntary events but personal occurrences such as amassing a fortune or being restored to health.

It has also been argued³⁸⁰⁾ that if a soldier can acquire a domicile of choice in the country in which he is not stationed, it follows virtually a fortiori that he can do so in the country in which he is stationed, for his service residence is an aid instead of an obstacle to the effectuation of his objective. This view can be supported, provided in the process any notion is exorcised that the area of residence itself has to be freely chosen in the sense that the propositus voluntarily elected originally to go there and is free to leave it at will. It has already been argued, in the analysis of the domicile of choice of a prisoner, that the residence requirement of the domicile is neutral, calling only for habitual lawful presence. The prospect of continuous presence in practice is much more likely in the country in which a soldier is stationed than in one which he visits only on furlough - indeed,

the judicial attitude to the requirement of residence in pursuance of the animus is generous in the extreme in the last-mentioned situation. To hold that a serviceman can acquire a domicile of choice only in the country in which he is not stationed could produce an extraordinary result. A, a serviceman, hitherto domiciled in country X, is stationed in country Y, where he buys a house in which his wife and children live and in which he stays when on leave. He has made up his mind to settle in Y. If it is to be held that he cannot acquire a domicile in the country in which he is stationed but only in a country in which he is not stationed, then if he is transferred to country Z without his changing his intentions as regards settling in Y, where his wife and children remain, he secures a domicile in Y as soon as he visits it on leave.

The decision arrived at in Nicol was reached once more by the Cape Court in Ex parte Readings.³⁸¹⁾ What makes the judgment of particular interest is that for the first time an attempt was made to canvass the Roman-Dutch writings on the subject.

De Villiers AJ found two passages lending support to his view. The first, an opinion of Grotius 'dated 31 October 1613, and reported in 3 Holl. Cons. C. 196, deals specifically with the domicile of a soldier, one Johann van Cornput ...'.³⁸²⁾ The learned acting judge is referring to what is generally known as the Rotterdamsche Derde Deel of the Hollandsche Consultation (called by Voet 'III.2').

Now this opinion as translated by De Bruyn in his Opinions of Grotius makes no allusion to a soldier. Piercing its rather cryptic paragraphs as translated by De Bruyn together, what was said was that one Johann van Cornput left his birthplace at Leeuwarden seventeen years before his death, carrying on in this period a partnership business at Embden, but actually living in the last three years of his life with his family at Groningen. He did not return to his birthplace even when he 'had leave to absent himself from his partnership'. He was held to have lost the domicile at Leeuwarden and to have acquired one at Groningen - not at Embden 'for although the business place of his partnership was there, it was nevertheless stated that he himself had no residence in the place' (no 15).

De Villiers AJ, however, without making reference to the De Bruyn translation, gives the rendering that Johann van Cornput was a soldier, who did not return to his birthplace even on leave, and who took up residence in Groningen 'without his company having been stationed there'.

Reference to the original text shows that the translation of the learned acting judge is clearly the correct one. De Bruyn's error lies in his allocating the meaning of 'partnership' to the word 'Compagnie' instead of the other meaning, a company of soldiers. But from internal evidence the latter must be what was meant: for instance, the phrase 'want hoewel sijne Compagnie daar heeft gelegen' (no 15 of

the opinion) cannot really be rendered, as De Bruyn has it, 'although the business place of his partnership was there', but must refer to his company of soldiers being quartered there. So, too, the phrase 'ten tijde als hem by Dispensatie vry heeft gestaan sich te absenteeeren van sijne Compagnie' (no 3) cannot refer to his having 'leave to absent himself from his partnership'. South African legal science is thus indebted to De Villiers AJ for putting an end to another long, long trail of a mis-translation - even though, rightly going to the primary and not the secondary source, he was probably unaware that he did. It will be observed, as the learned acting judge indeed pointed out, that this opinion is direct authority for the decision in Baker's case. ³⁸³⁾

The significance of the Grotius opinion in this present case lay in the word 'nochtans' in the phrase in no 15: 'want hoewel sijne Compagnie daar [Embden] heeft gelegen soo werd nochtans geposeert dat hy daar geen woonplaats gehad heeft.'

The other passage quoted by De Villiers AJ was from 'Schrassert, Consultation, Advysen, Vol. 2, C. 90'. ³⁸⁴⁾ Either the typist's devil or the printer's gremlin has had a hand in this citation. There is, as far as is known, only one edition of Schrassert's Consultation, advysen en advertissemerten (Hardewyck 1740-54), and there the passage appears in cons 94 of volume 2. It is cited in the judgment of De Villiers AJ and reads: ³⁸⁵⁾

'Want of wel een Officier in de plaets van sijn guarnisoen sig moet voorsien van een logement geduyrende zyn verblijf aldaer; soo maeckt dog een soodanig logement danselven niet tot een inwoonder der Stadt voor soo verre andersints een Officier geen gedachten heeft om daar altoos syn fixum domicilium te houden; maer behoud syn voorige woon- plaets. ...'

De Villiers AJ rightly stresses the significance of the latter part of this extract.

There is another passage in the old writings which, being possibly even stronger than the Schrassert excerpt, might also have been cited. Strangely enough, it has not been mentioned in any South African decision. It is an 'advys instructoir', dated 7 April 1758, in Schomaker's Selecta consilia et responsa juris VI cons 25 no 2. The passage reads:

'Zonder, dat het temporeel verblyft (waar van een Militair, gedurende zyn guarnizoen, zig moet voorzien, en hem alleen aan den militairen, en niet aan den polityquen Rigter van die plaatze, ad exemplum Clericorum, onderwerpt) eenig nadeel aan de regten, uit zyne geboorte- ofte vaderstad voortvloeyende, kan toebrengeen, veel minder hem tot een inwoner van die Stad, buiten een gedeclareert voornemen van een fixum et permanens domicilium, maken....'

The divisions which have hitherto taken the view opposite to that now held by the Cape Court should have no qualms in coming to the Cape standpoint. Not only is there old authority in its favour, but it is supported by decisions in England, Scotland, Australia and Canada, and by leading text-writers in Anglo-American and Scots law. Moreover, if the courts hold that a 'prohibited person' present on a temporary residence permit can acquire a domicile of choice in the area - and the Transvaal courts certainly so hold - why should they deny this to a serving member of the forces who, if removed by orders of a superior, can have an animus revertendi which, unlike that of the prohibited person, is capable of being carried into effect without the prospect of flying in the face of the law?

This said, it must be acknowledged that at present not all the divisions are of the Cape view. The Natal Court, since the full-bench decision in Brace v Brace, has set its face against the proposition that a serviceman can acquire a domicile in the country in which he is stationed. The High Court of Rhodesia is in favour of the proposition. The attitude of the Eastern Cape Division is not clear. In Frankenberg v Frankenberg it was held that a member of the armed forces cannot acquire a domicile where he is stationed, as he cannot declare a present and binding intention to settle there. On the other hand, in Paterson v Paterson it was held that he could acquire such a domicile. But Paterson purports to rest on Baker, which is not authority for such a rule. The position in the Eastern Cape Court remains uncertain.

The Transvaal rule appears to be that a domicile cannot be acquired. The earlier cases to this effect were upheld by the full-bench decision of McMillan v McMillan:

'[T]he ... intention [to settle] remains in abeyance ... and only becomes operative as one of the factors establishing acquisition of a domicile of choice, when the plaintiff is discharged and is no longer under disability as regards his freedom of action... A mere intention to reside permanently at the proposed domicile effects no change of domicile until such intention is carried into effect by actual assumption of residence.'

It is submitted that this reasoning is erroneous, and that, as Ogilvie Thompson AJ put it in Nicol's case, provided there is due proof, there can be a 'sufficient combination of residence ... and intention ... to constitute domicile'.

The Transvaal authority contrary to McMillan v McMillan is either obiter or is based on a misapprehension as to the ratio of Baker's case. There is, however, a later decision of a single judge, Ex parte Glass, which, whilst purporting to follow McMillan, is really inconsistent with it, and shows the judicial trend towards holding that there is no legal bar to the acquisition of a domicile of choice in these circumstances.

The issue in Glass was whether the applicant was domiciled in the court's area at the time of his marriage. Until he joined the army in 1939 he was domiciled in Scotland. In 1943 he was sent to South Africa as a convalescent and told that he was no longer required for military service and would be discharged when restored to health. On his expressing a desire to settle in the Transvaal he was promised that he would be demobilized there. Meantime he was allowed to take up employment and wear civilian clothing, which he did. A month after he had taken up a job of a permanent character in Johannesburg he married there. Six months later he was discharged from the army. Nesor J, sitting in the Witwatersrand Local Division, by a neat sidestep⁴⁰⁴⁾ distinguished McMillan, holding that in the exceptional circumstances Glass was a free agent. It was an adroit avoidance of the full-bench decision, but, with respect, the distinction is untenable.

The passage in Schomaker's Consilia cited above, which states that a soldier does not acquire a domicile in the area in which he is stationed unless he has an express intention of making it his fixed and permanent home, draws attention to what is generally accepted, namely, that the court should not lightly conclude on the facts that such a domicile has been acquired. Assuming the South African rule is that such domicile can be acquired, said Schreiner JA in Baker's case,⁴⁰⁵⁾

'it will no doubt be necessary to examine the evidence in each case with special care to ensure that, before a change of domicile is found to have taken place, there has been clearly proved "a final and deliberate intention" to abandon the former domicile and establish the new one.... In particular, care would have to be taken lest a mere inclination to settle in the country where the soldier is stationed, after the termination of his service, be treated as a present exercise of the choice of a permanent home in that country.'⁴⁰⁶⁾

In the leading Scots decision of Sellars v Sellars the Lord President (Lord Normand)⁴⁰⁸⁾ said that mere proof of a 'service residence' is not enough: what is required is that there

'co-exist with a residence, which has begun and is continued under military orders, facts and circumstances which establish a residence voluntary in character and chosen by the soldier, although it is a residence in the place in which he is stationed by the order of his military superiors'.⁴⁰⁹⁾

Facts and circumstances which have played their part in persuading the courts that such a residence has been acquired include the purchase or hiring of land in the area⁴¹⁰⁾ and application for registration as a voter.⁴¹¹⁾ 'The absence of the physical manifestation of the averred intention to settle permanently which is afforded by the purchase of a house, etc, may perhaps in practice often prove fatal to the establishing of the contention that a domicile ... has been acquired',⁴¹²⁾ but this will not always follow.⁴¹³⁾ It is a question of evidence, not of substantive law.

In one South African case, Jordaan v Jordaan,⁴¹⁴⁾ on the analogy of certain of the 'soldier cases' it was held that a member of the police force, being subject to compulsory removal from province to province, is unable to exercise any election and so acquire a domicile of choice. It appears to follow from the decision that his domicile antecedent to joining the police force would remain. As far as his acquiring a domicile of choice in a country other than the one in which he is stationed is concerned, the decision has by implication been overruled by Baker's case. As regards the acquisition of a domicile of choice in the country in which he is stationed, it is submitted that the decision is incorrect. Not only do all the arguments advanced in favour of the view that a soldier can acquire such a domicile apply in this case, but in addition it may well be asked whether in any event the service of a policeman is analogous to that of a soldier, whether he can really be said to be subject to compulsory orders in the same sense. His position would appear to be closer to that of an ordinary civil servant who can resign, possibly subject to a monetary penalty.

Diplomats and other public servants; employees of foreign firms. It is now clear that a public (civil) servant has the capacity to acquire a domicile of choice while he is in the public service and that he is a free agent - there is no question of a compulsory residence. There were early obiter dicta to this effect scattered through the reports,⁴¹⁵⁾ but when the question first arose crisply for decision it was held that he is unable to exercise a choice, that he cannot acquire a new domicile and that (semble) he retains his last domicile prior to joining the service.⁴¹⁶⁾ (No attempt was made to meet the problem whether he could not have an animus non revertendi, in which event a gap-filling domicile would have had to be attributed to him.) The most recent decision, however, Naville v Naville,⁴¹⁷⁾ follows the trend in the 'soldier' cases. The propositus, in the service of the Government of Switzerland as consul in Cape Town for the past six years, contended that he had lost his Swiss domicile and acquired a Cape one. When in Switzerland two years before he had sold his house there and arranged with the Government that on his retirement four years later his pension would be paid to him in Cape Town, which he made clear he regarded as his permanent home. The Swiss Government undertook not to transfer him before his retirement. Had they broken their undertaking he would have resigned. It was held that he had acquired a Cape domicile of choice.

Naturally, the court will not lightly conclude that a public servant, especially an alien one of and coming from a foreign State, has the necessary animus manendi. But it is submitted that it could exist even though the servant would not be prepared to resign if moved by his Government, provided he retained his intention of settling as shown by his having the fixed resolve of coming back: his home must be here and

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his move in his eyes temporary.

What was said of public servants must apply equally to employees of foreign firms who are sent to the alleged new country of domicile.⁴¹⁹⁾ The decisions to the contrary effect seem manifestly wrong.⁴²⁰⁾

Immigrants, deportees and those subject to a deportation order. A person whose entry into the Republic was and has remained unlawful is unable to acquire a domicile in the country or any area of it. While there are several South African cases in which this rule has been pronounced in relation to the acquisition of a statutory domicile under the immigration legislation by one who has evaded its provisions,⁴²¹⁾ there does not appear to be a crisp decision on the matter in relation to the acquisition of domicile at common law,⁴²²⁾ though there are obiter dicta that⁴²³⁾ the answer is the same. In Rhodesia, however, it has been the subject of judicial pronouncement.⁴²⁴⁾ The first case, Abelheim v Abelheim, was subsequently considered by the Federal Supreme Court in Smith v Smith⁴²⁵⁾ not to be a case of initial unlawful entry but rather one in which A subsequent to entry and only after the critical period for testing domicile, viz the date of institution of proceedings, became a prohibited immigrant. Thus it fell within the class of 'precarious residence' cases, and Russell J's holding that A was domiciled in the court's area at the institution of proceedings had been correct. But Briggs ACJ, delivering the judgment in the appeal in Smith, stated plainly that if, as in Smith itself, the entry and entire subsequent residence of the de cujus in Abelheim had been unlawful, the case had been wrongly decided.⁴²⁶⁾

The judgment of the Federal Supreme Court is undoubtedly correct and is in conformity with the rule now expressed by our courts that a deportee who is actually removed from the country and is a prohibited person whose return is illegal cannot in law have the animus revertendi.⁴²⁷⁾ But, with respect, some of reasons given in the judgment of Briggs ACJ are open to question. The learned judge first of all distinguished those cases where the illegality of entry or residence has been expressly or implicitly condoned by the authorities, for here it is possible for a domicile of choice to be acquired, no issue of illegality being involved.⁴²⁸⁾ He then said that legal rights and privileges cannot be obtained by illegal means and the acquisition of a domicile can be considered as the acquisition of a right or privilege, such as in the very case, that of suing in the court. 'The status of domicile necessarily confers a nexus of rights, just as it may impose a nexus of obligations. A person acquiring a domicile of choice must ... be deemed to have in mind the rights and obligations which spring from it. He must be taken to intend the natural consequences of his acts....'⁴²⁹⁾

To speak of a 'status' of domicile is to give the word 'status' an unusual and unnecessary connotation. Further, domicile is only a connecting factor, flowing

from residence and the animus manendi, which is not the intention to acquire rights and privileges flowing from domicile but to settle. Thus reference to acquisition of rights and privileges does not appear to be relevant. ⁴³⁰⁾

Briggs ACJ went on to say: ⁴³¹⁾

'... [I]t is not possible ... for a person sui iuris to acquire a domicile of choice in this country if his initial entry and his residence at all times thereafter have both always been unlawful in terms of the Immigration Act 1954.... Acquisition of a domicile of choice requires both residence and animus manendi. Not every kind of de facto residence will suffice. It must usually be residence of one's own free will or, at least, if it is not, the residence can be of no value as evidence of an animus manendi. The animus manendi must be both genuine and honest. An intention to persist indefinitely in a course of unlawful conduct may be genuine: but it cannot be honest. Fears that the worst may happen do not necessarily preclude a sufficient animus. But knowledge that one is residing only in defiance of the law, and will so continue indefinitely, makes it impossible to have an animus manendi of the requisite quality. I think also that the matter may properly be put in another way. The animus manendi, though it does not require an absolute intention to reside permanently, must at least be an unconditional intention to reside for an indefinite period.... In this case the intention of the appellant, putting it at the highest, can only have been, "I will stay in Rhodesia if I can escape the attention of the authorities, whose statutory duty is to deport me, and who will at once do so if they learn the true facts about me". I think a conditional or provisional intention of this kind cannot amount to an animus manendi necessary to establish a domicile of choice.'

It may respectfully be asked whether this dictum does not raise avoidable difficulties. That knowledge of the prospect of a summary termination of one's residence can subjectively prevent one from having the requisite animus is of course a possibility, but there can be the necessary intention despite the anticipation. This possibility does not appear to have been alluded to. The simple ground of the decision, it is believed, is that the law does not permit of an illegal factum or an animus manendi that must result in an illegal act. In the words of Pollak, ⁴³²⁾ 'the residence must be lawful and the animus manendi or the animus revertendi must be capable of being carried into effect without transgressing the law'. ⁴³³⁾ As it was put by Griffith CJ in the Australian High Court in Ah Yin v Christie, ⁴³⁴⁾ '[t]he acquisition of a domicile of choice by a person coming from abroad to any country depends ... upon the permission given by that country to enter it and make it his home'.

The rule applies equally to a person deported from the Republic and who is a prohibited person whose re-entry is unlawful. No cognizance could be taken of any animus revertendi that he entertained. ⁴³⁵⁾ But the position was for long obscure. ⁴³⁶⁾

In the Digest it is stated that a banished person acquires in the meantime a domicile in the place to which he is banished. Voet is in similar vein, though he speaks of the exile's also retaining his original domicile if he has the animus revertendi. ⁴³⁷⁾ Van Leeuwen says that he who is banished with loss of civil rights (a deportatus ⁴³⁸⁾

loses his domicile, but not he who is banished without such loss (a relegatus). Care must be taken not to equate certain types of ancient banishment or exile to a particular place with modern deportation, for with deportation there is either no definite destination or else no compulsion on the deportee to remain in the place of destination. But in principle the animus revertendi should be treated in the same way. ⁴³⁹⁾

In modern law banishment or deportation to a country does not confer a domicile there. ⁴⁴⁰⁾ Among the later writers on the civil law there is some authority in favour of the retention of the original domicile ⁴⁴¹⁾ - Burge on the ground that the propositus is presumed never to have given up all hope of return, Story on the ground that the new residence is under constraint, like that of a prisoner. Neither view is at all persuasive.

Three South African cases up to 1930 ⁴⁴²⁾ support the contention that retention of the animus revertendi leads to retention of the domicile in the country, despite return being illegal. The contrary and, it is believed, correct view, has been taken in five other decisions. The first was Ex parte Donnelly, ⁴⁴³⁾ already encountered in its holding in favour of the revival of the domicile of origin doctrine. Mason J considered that the authorities favouring retention of domicile by exiles were contemplating the domicile of origin and in any event were not laying down a rule applicable to life-long exile. The learned judge held that the propositus could not retain his South African domicile of choice as he was liable to instant punishment and deportation on his return. The next decision was Ex parte Fraser, ⁴⁴⁴⁾ containing a most unsatisfactory judgment, which could ^{even be read to lend} some support for the contention that a deportee may retain his domicile of choice. ⁴⁴⁵⁾ Then came Ex parte Gordon, where Greenberg J followed Ex parte Donnelly but said that '[d]ifferent ... considerations ... apply to the question whether an exile loses his domicile of origin and the question whether a person deported from his domicile of choice loses such domicile'. ⁴⁴⁶⁾ According to Greenberg J, to speak of voluntary residence is inept, and it could be said that the deportee had the purpose of leaving the country - an explanation that will not cover the case where he has an intention to return.

A detailed examination of the question was embarked upon by a three-judge Cape Provincial Division bench in Ex parte Macleod, ⁴⁴⁷⁾ which sustained Pollak's argument ⁴⁴⁸⁾ that 'the animus revertendi must be capable of being carried into effect without transgressing the law'. De Villiers J, delivering the judgment of the court, said:

'The expression of an intention to return in the future cannot in the case of a person deported from this country, unless it rests upon some legal foundation, carry the question of the continued retention of a domicile any further: for such legal foundation cannot exist while the order of deportation is still operative. The effect of the order of removal is to terminate his further residence and at the same time to render vain any expression of intention to return during the operation of such an order which is unlimited in time.' ⁴⁴⁹⁾

This passage contemplates the possibility of an operative animus revertendi if return is not actually unlawful, which is the position in English law.⁴⁵⁰⁾ It was a rule that was also accepted in the latest South African decision, Drakensbergers Bpk v Sharpe,⁴⁵¹⁾ which followed the principle of Ex parte Macleod. Only when the deportee's return ceases to be illegal, that is, when he is no longer a prohibited person (formerly 'prohibited immigrant'),⁴⁵²⁾ will he 'be in a position to re-establish a domicile of choice in the Republic'. Of course, this would require his actual residence coupled with the animus manendi.

What has been said must be subject to the principle that no one can be without a domicile. Despite deportation and a prohibition on return, a domicile in South Africa (or a province or area therein) may be retained simply because the deportee has not as yet acquired a new domicile and the old domicile remains either qua domicile of origin or last domicile of choice,⁴⁵³⁾ depending on which gap-filling rule is finally accepted. In the event what has been written may prove to be much ado about very little.

When does the person subject to a deportation order lose his domicile of choice? According to Dickey and Morris⁴⁵⁴⁾ 'he does not lose it merely because a deportation order has been made against him;⁴⁵⁵⁾ he only loses it when he is actually deported'. For the last proposition they cite the South African cases of Ex parte Donnelly and Ex parte Gordon.⁴⁵⁷⁾ But both cases were concerned with actual deportation and there are not even obiter dicta dealing with the problem. The answer must depend upon when the residence became illegal. Should the person involved escape the authorities and stay in the country after it became illegal for him to do so, he would lose his domicile of choice albeit he was physically present. This was stated obiter by De Villiers J in Ex parte Macleod.⁴⁵⁸⁾ 'If he in some way successfully evades the order and remains in the Union, his continued residence would be illegal and in defiance of the laws of this country. Could such illegal residence ensure the retention of a Union domicile? The question posed carries with it its own refutation.' In fact, however, it would appear that where a person has a domicile of choice only his actual removal from the Republic makes him a prohibited person whose residence is illegal.⁴⁵⁹⁾ That explains the dictum of Henning J in the Drakensbergers case:⁴⁶⁰⁾ 'The carrying into effect of the deportation order made him a prohibited immigrant and extinguished his domicile of choice within the Republic.' The dictum of Murray J in Van Rensburg v Ballinger⁴⁶¹⁾ goes too far.

More involved questions arise with immigrants. In principle, it is clear that one who may lawfully reside in South Africa as long as he pleases provided he does not commit one of a list of scheduled offences upon which he becomes liable to deportation can acquire a domicile of choice here, because it is within his own power to ensure that his animus manendi can be carried into effect. This appears to be

the decision of the English Court of Appeal in Boldrini v Boldrini.⁴⁶²⁾ further
in principle, however, that if the propositus is lawfully present in the country
but under only a temporary residence permit or one freely revocable by the executive
or renewable by it in its unfettered discretion, then he cannot acquire a domicile
of choice, for the animus manendi can at any stage be frustrated by the authorities,
whereupon it will fly in the face of the law.⁴⁶³⁾ But except in one Natal case, Neaves
v Neaves,⁴⁶⁴⁾ this reasoning has had only a slender appeal to South African courts. The
present position is that the de cujus can formulate the requisite animus, provided
the prospect of implementing the intention is not too remote.⁴⁶⁵⁾ It may be said to have
been so with Neaves, bandmaster on a ship plying between England and South Africa,
who wished to settle permanently in Natal, but who was refused the requisite permit
by the immigration authorities and had to content himself with living with his wife
in Durban on temporary visits.⁴⁶⁶⁾ On this practical basis the case can perhaps be distin-
guished from five cases of immigrants with temporary residence certificates, in each
of which the protagonist was held to have acquired a domicile of choice - Joosub v
Salaam,⁴⁶⁷⁾ Gwambe v Gwambe,⁴⁶⁸⁾ Fenner v Fenner,⁴⁶⁹⁾ Van Rensburg v Ballinger⁴⁷⁰⁾ and (presumably)
Ex parte Pekola.⁴⁷¹⁾ In the light of realities the liberal attitude taken by the court
is commendable.⁴⁷²⁾ Having regard to the stringent South African laws governing deporta-
tion, it would be difficult indeed for an immigrant to acquire a domicile of choice,
if the test were that it had to rest in his own hands whether his intention to stay
permanently could be carried into effect. Inter alia, it lies in the unfettered
discretion of the executive to deport any alien, armed with a permanent residence
certificate or not.⁴⁷³⁾

Unfortunately, the legal basis of these generous decisions is unclear. In
Joosub v Salaam and Gwambe v Gwambe the court purported to follow Boldrini, which,
it has been submitted, is a case of an immigrant with a permanent residence permit
who could be deported only if he committed one of a number of specified crimes. In
Fenner v Fenner, Van Rensburg v Ballinger and Ex parte Pekola the rule that a soldier
can acquire a domicile of choice was found to be in point,⁴⁷⁴⁾ but it was held - rightly
'clearly not in point' in Gwambe v Gwambe. As has been stated, the servicemen cases
could be read as subject to the reservation that the requisite animus manendi can
ultimately be carried fully into effect, and not on sufferance, which is the very point
at issue here.

In Joosub v Salaam the respondent was a prohibited immigrant holding a temporary
residence permit, which could be renewed or not or cancelled at the discretion of the
Minister of the Interior at any time. Greenberg JP held that the rule enunciated in
Johnson does not refer 'to an alien who wishes to settle in the country, who intends
to do all in his power to bring this about, and who in all probability will not be

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disturbed and who believes that he will not'. Fenner was in a similar position: technically a prohibited immigrant on a temporary permit but who in all probability would be permitted by the executive to remain when the special war legislation designed to meet an emergency unemployment situation came to an end. To Tredgold J the intention to reside permanently could exist although it was 'difficult or uncertain of attainment. To contend otherwise is to confuse intention with expectation.' It could subsist although its fulfilment 'is liable to be postponed, interrupted, or even wholly frustrated by the military or immigration authorities, or by the intervention of other circumstances'. This statement seems rather strong and must be read secundum subjectam materiam, for surely there must be a firm foundation of realism in the intention. One could hardly attribute an animus manendi to a prohibited persona non grata with the Government who was allowed a fortnight's stay to be with his mother in her dying days.

The judgment in the leading case, that of the full bench of the Transvaal Court in Van Rensburg v Ballinger, is, with all respect, of an unhappily wavering nature, for Murray J, who delivered the principal judgment, seems to swing from holding that it lay in the propositus's own hands to determine his destiny and that it lay in the hands of the executive. But, as pointed out by Turpin, on the facts it was really a case of executive discretion. B had arrived in South Africa in 1928 as a prohibited immigrant with a three-month residence permit. After two months the Minister of the Interior extended his temporary permit 'for an unspecified time', provided that he would have to leave on timely notice, and said that he could remain permanently subject to behaviour satisfactory in the eyes of the Minister. B resided in the country continuously thereafter, acquired land, registered as a Parliamentary voter, married a Union national, was appointed a commissioner of oaths by the Minister of Justice and participated actively in public life. The court concluded that he had the animus manendi and had acquired a South African domicile. Murray J said:

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'... [A]s the alien cases show, domicile is lost only when the higher authority has actually invoked [the] right of termination [of residence]. The individual is, in fact ... the master of his own destiny. He can decide to have his home in the particular place and he can carry that decision into effect.

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... The power of a higher authority to terminate a person's residence in a particular area cannot per se affect the question whether that person intended to make his permanent abode there. If the power of termination is actually exercised, then naturally with the disappearance of physical residence the domicile thus acquired is brought to an end. Until such termination the only effect of the possibility of that power of deportation being exercised by a higher authority is that the person may (I do not say he must) be taken to realize the precarious character of his residence and consequently may not be held to have formed the intention of making his permanent home in such area.'

Disregarding the unacceptable wideness of the statement relating to deportees, which slurs over the position where the propositus evades the officials attempting to execute the deportation order and commences living illegally in the country, the reader may consider that the cases concerning the deportee in which it has been held that he cannot have an operative animus revertendi, far from strengthening the position of the prohibited person physically present under temporary permit, weaken it by showing that attention must be paid to the question whether the intention to remain permanently can be carried into legal effect. But niceties are out of place in a South Africa whose law permits the summary deportation of an alien admitted as an immigrant. In practice a certificate of permanent residence may yield a precarious presence, while one of temporary residence may turn out to allow ^{for} remaining continuously. The rule as expounded by our courts today is realistic and fair, and to question the respectability of its ancestry is unnecessary.

Refugees, fugitives from justice and persons living abroad because of ill health.

It is sometimes claimed that the residence must be voluntary, that there must be a freedom of choice, before a domicile of choice can be acquired. ⁴⁸¹⁾ With physical coercion, such as the movement of a convict to another country, this statement may broadly speaking be apposite. But it is inapplicable to so-called mental pressure.

A political refugee, a debtor fleeing from his creditors or a fugitive from the police always had the alternative of remaining where he was. The mental pressure was not so great as to have precluded any act of volition, unless insanity intervened. The motive for moving, of course, may be a material indiciu showing an absence of animus manendi in the new country. ⁴⁸²⁾ But it cannot be decisive. If a political refugee desires to return to his homeland, normally he will not have lost his domicile there. Even then, '[o]bjective factors may sometimes override subjective hopes', ⁴⁸³⁾ as with a 'White Russian' intending to go back to a 'Free Ukraine'. ⁴⁸⁴⁾ If he wishes never to go back, or even if he has the wish to return but admits to himself that it will never be possible, ⁴⁸⁵⁾ he may be held to have acquired a domicile of choice in the country in which he has sought refuge, provided it can be shown that he intends remaining there indefinitely. ⁴⁸⁶⁾ Failure to return to his native land when it is safe to do so will be ⁴⁸⁷⁾ important evidence.

488)

Similar considerations apply to a fugitive from justice and a debtor. The natural conclusion would be that the fugitive has no wish to make the fatal journey back. But again the facts would always have to be carefully examined. If the fugitive debtor intends repaying his creditors and then returning or the criminal has committed a venial offence or one the prescriptive period of which is short, the decision could well be the opposite.

Most troublesome are the cases where movement is for reasons of health. If the intention is simply to spend a short time abroad because of, or in order to recuperate from, an illness, no new domicile is acquired. So too if the object was to avoid the possibility of infection. When in the mid-fourteenth century the ten protagonists of Boccaccio's Decameron fled Florence, three-fifths of whose inhabitants had been wiped out by the pestilence, the Black Death, and spent their time regaling one another with their immortal and racy stories in a villa garden on the slopes under Fiesole, they did not lose their Florentine domicile.⁴⁸⁹⁾ Nor, in principle, would a domicile be acquired through residence abroad for an uncertain period in the hope of finding a cure and then returning home, as with the one time tuberculotics in sanatoria in alien lands, immortalized in Thomas Mann's The Magic Mountain.⁴⁹⁰⁾ More difficulty is experienced with two other types of case. The first is where the invalid lives in a foreign country permanently or indefinitely because his health suffers in what was, up to then at least, his domicile. The intention to alleviate suffering or retard the progress of a disease is entirely compatible with the intention of settling that the law calls for.⁴⁹¹⁾ 'Such a motive for permanent residence in a place is ... fully consistent with the exercise of a free choice.'⁴⁹²⁾

The other awkward case is where a person is assured by his medical advisers that he has but a brief spell of life left and he would be advised to spend it in another country, where he would suffer less. Lord Kingsdown's well-known view was that it would be 'revolting to common sense, and the common feelings of humanity' to hold him domiciled on the alien soil, with succession to his movables governed by the law prevailing there. Principle, however, drives to the opposite conclusion, because/^{his} intention is to remain there permanently -⁴⁹⁴⁾ the faint hope he might perhaps entertain that the diagnosis was wrong or a revolutionary medical discovery leading to a cure will be found before his death, allowing for his return, could not signify. Strictly speaking, again it cannot be correct to say that 'he is compelled by sheer necessity to live away' and 'such compulsion would exclude the element of free choice which is necessary to found a change of domicile'.⁴⁹⁵⁾ Many, however, will feel that such a conclusion will give concrete expression to Cardozo's belief that in the conflict of laws logic has 'been more remorseless, ... more blind to final causes, than it has been in other fields'.⁴⁹⁶⁾ It would not be surprising if the courts, utilitatis causa, would hold against a change of domicile in this situation, relaxing the rules as to acquisition of a domicile of choice. The danger, naturally, lies in not firmly drawing the line after this extreme case. What, for instance, of a person who is told by medical advisers that he will die shortly if he remains in his domicile, but that if he moves to a more temperate clime or to the coast, his life expectancy will be lengthened?⁴⁹⁷⁾

IV THE DOMICILE OF DEPENDENCE

The domicile of dependence or dependency is one arising ipso jure, and is founded on the notion of maintaining family unity in the law governing personal relations.⁴⁹⁸⁾ These persons are or may be dependent persons in the law of domicile: (a) married women; (b) minors; (c) those insane.

Some of the rules of the domicile of dependence may be thought to breathe the musty air of yesteryear. Most scathing in his criticism has been Lord Denning MR:⁴⁹⁹⁾ 'The tests of domicile are far too unsatisfactory. In order to find out a person's domicile, you have to apply a lot of archaic rules. They ought to have been done away with long ago. But they still survive. Particularly the rule that a wife takes the domicile of her husband. And the rule that a child takes the domicile of its father.'

Yet the formative jurisdiction that will be assumed by our courts will undoubtedly and understandably be limited. If what appears to follow may to some seem to lean on the side of conservatism and ultra orthodoxy, it is because it is believed that radical reform must emanate from the legislature.

(a) Married women. The general rule is that immediately on conclusion of a marriage recognized by our law - which would not include a polygamous union - the wife takes the husband's domicile, and, subject to the possible exception where a decree of judicial separation is granted, follows it as it changes stante matrimonio.⁵⁰⁰⁾ This rule, which was once said by a South African judge, too widely for the circumstances of today, to be a 'universal rule of law',⁵⁰¹⁾ obtains irrespective of the nature of the marriage, whether it be at common law or with antenuptial contract, and if the latter, whether the marital power is excluded or not.⁵⁰²⁾

On dissolution of the marriage by death of the husband or divorce the broad rule is that the widow or divorcee does not revert to her pre-nuptial domicile or domicile of origin but retains her last domicile until she changes it.⁵⁰³⁾ She may continue to live in the same area with the animus manendi, in which event it becomes her domicile of choice. Otherwise it continues pro tem. There is a danger in conceiving of this rule of continuance of a domicile of dependency as a fictional domicile of choice, resulting in a sub-rule that the woman must at the critical time have a new residence and acquire a new animus manendi to obtain a different domicile of choice. The proper approach, it is believed, is that both the factum and the animus in relation to another area may be proleptic or, if it be preferred to put it another way, in a state of suspended animation that becomes operative from the date of the death of the husband or the divorce, even if the woman be unaware of it or be then insane or in a state of unconsciousness from which she never recovers. The facts of certain English cases may be adapted to illustrate this proposition. If W, a domiciled French woman,

comes from France to marry a South African domiciliary in Johannesburg, but never had the independent wish to settle in this country and on the death of her husband, being penniless and despairing of ever getting back to France, committed suicide, she dies domiciled in the area in which her husband was domiciled at her death. 505) Twist the facts radically, so that many years before H's death W left him and returned to France with the intention of settling there. Two weeks after his death, of which she has not become aware, she dies in France. There she dies domiciled. 506) But say she had become insane a week before H's death, or was run down by a motor car, rendered unconscious and died without regaining consciousness, so that at his death she had not the capacity to formulate the requisite intent to settle in France. It has been argued with much cogency that she should still be held to have died domiciled there, for this will produce an answer that accords with common sense and the realities of the situation. '... [S]he should not retain her dead husband's domicile by operation of law, if she has already de facto a domicile of choice elsewhere.' 508)

If a marriage is declared null and void ab initio, ex hypothesi the woman at no time took the man's domicile qua wife. Nevertheless, if she was a major spinster at the time of the ceremony, looked at as one sui juris for the acquisition of a domicile of choice, she might have acquired it animus et facto in the same area as the man. 509) Here the motive, that of living with the man she believed to be her husband, must not be allowed to detract from a possible finding of intention to remain permanently. If she was a dependent person at the time of the ceremony, say because she was a minor or already married, her domicile of dependence will continue. It may in fact coincide with that of the man. 510)

If the marriage is annulled as voidable, since the union subsisted until it was set aside, the wife followed the husband's domicile until the decree was granted. Once it is granted, will its general retroactivity be taken to apply also to the quondam wife's domicile? There is some persuasive authority that it will not, in which event the woman could acquire a new domicile only after the annulment of the marriage, either through dependence or as one sui juris. 511)

The rule that a wife follows her husband's domicile has been said to be 'a consequence of the union between husband and wife brought about by the marriage tie'. This is mere verbiage, however, and expresses no rationale. Pothier says husband and wife are regarded as one person. This old fiction again affords no explanation of the rule. 512) In some systems the reason was once said to lie in the incapacity of a married woman to manage her own affairs, but this could never have been applicable to Roman-Dutch law, where the husband's marital power could always be excluded by antenuptial contract. 513) A Louisiana appeal court has ventured the justification that 'the social and economic doctrine of marital unity and public policy demand that the 514) 515)

civilized concept of the family unit be protected and made secure by permitting one family (husband and wife) to have ⁵¹⁶⁾ only one domicile'. Herein must lie the true reason. As the Royal Commission on Marriage and Divorce 1951-5 said, 'to have two laws regulating the mutual rights and obligations of husband and wife will introduce ⁵¹⁷⁾ uncertainty in a matter where certainty is essential'. The practical difficulties flowing from allowing a wife to have a domicile different from that of her husband lie primarily with choice of law, not with jurisdiction.

It would appear - there is no authority on the matter - that unity of domicile will exist even though the wife is a prohibited immigrant (person) or has been deported, for the rule is one that flows ipso jure, irrespective of the legality of the residence of the wife. The weight of old authority opposes a clause in an antenuptial contract that the husband shall not change his domicile without his wife's consent. ⁵¹⁸⁾ It is very unlikely that our courts which, like the English courts, ⁵¹⁹⁾ have been applying the unity of domicile of spouses concept with increasing strictness, would do anything than uncompromisingly condemn such a stipulation, were it ever to arise for judicial consideration, an unlikely happening in these days of standard-form antenuptial contracts.

Nor can a wife acquire a separate domicile merely because she lives apart from ⁵²⁰⁾ her husband or he has committed ⁵²¹⁾ a matrimonial offence or the spouses have entered ⁵²²⁾ into a deed of separation.

⁵²³⁾ Voet states that if the husband is an exile, a galley slave, a prisoner of war, insane or a declared prodigal, so that he is considered to have suffered civil death, the wife is regarded as a widow. The inference is that she can acquire a domicile of her own. There is no South African case in which Voet's views were followed, and it must be considered that they do not form part of South African law, so far as the situations they deal with are conceivable today. The ensuing problems of jurisdiction in matrimonial suits and the domicile of dependence of minor issue of the union will be so difficult if at all possible of solution that this exceptional case of Voet's must be disregarded.

There have been occasions in the past, however, when South African judges have felt chafed by the tight bond on the principle of common domicile of spouses and tried to loosen it. The view was expressed obiter by Buchanan J in Mason v ⁵²⁴⁾ Mason that the wife should not be held to follow her husband's domicile where he 'has illegally abandoned his wife and left her in the former home, while he has chosen for himself a new residence where his wife cannot follow him'. The reason advanced was that the rule of the unity of domicile of spouses rests on 'the legal duty of the wife to dwell with her husband wherever he goes'. When he makes this impossible, then she should be able to establish, 'if not a separate domicile in the

full sense of the term, at least as against him a separate forensic domicile'. The fallacy in this dictum lies in the supposed reason for the unity of domicile principle, which, if it were true, would allow every deserted wife to bring divorce proceedings in the court of the area of her own separate domicile, which is manifestly incorrect.⁵²⁵⁾ Further, while, as has been shown,⁵²⁶⁾ the notion that domicile can exist for certain purposes and not for others will have to be conceded in certain exceptional cases, it should not be pressed further than absolute necessity drives. The legislature, albeit somewhat tardily, has come to the relief of the deserted wife who wishes to bring an action for divorce or judicial separation elsewhere than in the area of the common domicile.⁵²⁷⁾

Rodenburg, as was seen, held that a wife does not follow the domicile of a vagabundus husband. According to the Vervolg op de Hollandsche Consultatie,⁵²⁹⁾ a vagabundus keeps the last domicile he had before, like the protagonist of Robert Louis Stevenson's The Vagabond, he said 'Wealth I ask not, hope nor love, / Nor a friend to know me; / All I ask, the heaven above, / And the road below me'. If modern law is possibly prepared to concede the possibility of the existence of such a person,⁵³⁰⁾ it is not prepared to endorse certain judicial suggestions⁵³¹⁾ that the law endow his wife with the capacity to acquire a domicile of her own.⁵³²⁾

On two occasions⁵³³⁾ Kotzé JP expressed the view obiter that the wife might be able to acquire a separate domicile (at least for the purpose of divorce proceedings) where the husband came on a visit from abroad, married her in South Africa, her domicile of origin, and then deserted her, leaving the country. A South African court on one occasion⁵³⁴⁾ went so far as to hold that a deserted wife can acquire a domicile of her own in a country in which the spouses were not domiciled at the time of desertion and in which the husband was not at present domiciled, for the purpose of suing there for divorce.

The decision of the Privy Council on appeal from Ceylon in Le Mesurier v Le Mesurier⁵³⁵⁾ is incompatible with all these suggested exceptions to the principle of the unity of spouses' domicile, which are contrary to Roman-Dutch principle and amount to no more than a succumbing to an appeal ad misericordiam and have been rejected in later cases.⁵³⁶⁾ Hardship to the deserted wife desirous of instituting action for matrimonial relief has been relieved to a considerable measure by recent legislative measures.

The 'presumption' against a change of domicile may afford some help to the deserted wife too. Again, if a husband changes his residence with the object of adversely affecting his wife's interests, as, for instance, in bringing a divorce suit, the court might be chary of concluding that there was a genuine change of animus on his part that would result in a change of his domicile.⁵³⁷⁾ Of course, the law does not

prevent a husband from changing his domicile even though his wife's interests may be prejudiced, and the court must not be read in Steytler v Steytler as requiring a bona fide change of domicile by the man. The position is correctly stated by Schomaker that a change of domicile in fraudem legis is not presumed.

Finally, the frequently referred to maxim ubi uxor ibi domus may give relief where the husband has deserted his wife, quit the area of domicile and disappeared. The supposition is that if a man leaves his wife behind he does not intend to change his domicile, and the court may be prepared to hold that he continues domiciled in the area in which he last had a home. But the maxim, which does not furnish a criterion per se of the husband's domicile but furnishes an element in deciding that domicile, must not be pressed far, for it 'loses much of its force when the gulf between husband and wife has so widened as to be impassable'.

This leaves the vexed question whether the judicially separated wife is competent to acquire her own domicile of choice. First, as to the authorities. U Huber and Pothier hold that she is. But it is significant that many writers, including J Voet, do not allow for any qualifications to the rule that a married woman follows her husband's domicile. The court in two Natal decisions expressed grave doubts, obiter, as to the existence of the alleged exception. In Steytler v Steytler it was held that though the judicially separated wife might be able for certain purposes to acquire a separate 'jurisdictional domicile' and be sued there, she always follows her husband's domicile in matters pertaining to the marriage tie and status. But in the Roman-Dutch law, which the court did not explore, there is no warrant for such 'divisible domicile'. Somewhat similar was the recommendation of the Royal Commission on Marriage and Divorce 1951-5 of England that a wife, whether judicially separated or not, should be capable of claiming her own domicile, but only for the purpose of bringing proceedings for divorce or annulment of a voidable marriage. This restrictive view has been criticized.

In Scots law the judicially separated wife continues to follow her husband's domicile. The position would appear to be the same in English law, though while the Privy Council has pronounced to this effect a House of Lords and even a Court of Appeal ruling is still wanting. The Private International Law Committee in its First Report in 1954 wished to give the judicially separated woman the capacity to acquire her own domicile for all purposes. The abortive Divorce Bill 1959 was bolder, allowing a married woman generally to acquire a separate domicile, which goes somewhat further than does the apparent United States rule, which would require her to live apart from her husband unless there are special circumstances making such a result unreasonable. In its Seventh Report, however, the Committee included that 'legal complications' would outweigh any advantages yielded by such a step. But it did not

retract its original recommendation regarding a judicially separated wife. Almost all the alleged legal complications would arise in this situation too. ⁵⁶⁰⁾

What advantages and disadvantages would emerge in South Africa if our courts were to allow a judicially separated wife to acquire her own domicile? The advantages would lie mainly in the sphere of choice of law. Where the domiciliary law is applicable to a wife it will be that law which is most closely connected with her through her own will and volition. There would not be any problems with the determination of the domicile of minor children, for it would continue to be governed by the present rules. ⁵⁶¹⁾ As regards the matrimonial proprietary régime, this is fixed by the husband's domiciliary law at marriage, applies to all property and is immutable, so that no difficulties appear to emerge there. ⁵⁶²⁾ The personal consequences of marriage, however, are governed by the present domiciliary law, ⁵⁶³⁾ and here we encounter a rule that, at least as regards legal relations between the spouses themselves, presupposes unity of matrimonial domicile. What law, for instance, would govern donations between spouses or determine whether they could sue each other in delict if they had different domiciles? There may be other situations as well in which, as the Private International Law Committee put it, ⁵⁶⁴⁾ the existing rules would not work if the husband and wife had separate domiciles. Legislation would then have to provide that the personal law of one or other of the spouses should prevail.

Jurisdictional problems would emerge. If the appropriate court to set aside a subsisting decree of judicial separation is the court with jurisdiction in the divorce action, ⁵⁶⁵⁾ which court is that for this purpose? More important, which court is it for the purpose of assuming competency at common law to grant the actual divorce decree? It is not easy to see our courts developing the common law, as have the courts of the United States, ⁵⁶⁶⁾ to vest jurisdiction in a divorce suit in the court of either party's domicile.

In fine, it seems probable that the acceptance of a rule that a judicially separated wife is capable of acquiring her own domicile will be attended with a number of consequential legal difficulties, and coping with some of these will tax the courts' law-formative powers beyond the breaking-point. Legislation will be necessary, and in that event there is a strong argument for going all the way and granting the capacity to acquire her own domicile to every married woman. ⁵⁶⁷⁾ There may then be one or two additional legislative provisions called for. One could well be that a married woman is presumed to acquire her husband's domicile on marriage and as it changes thereafter unless a contrary intention on her part is shown. ⁵⁶⁸⁾ This would enable husbands and wives to carry out their normal intentions of sharing the same personal law. ⁵⁶⁹⁾ There is nothing revolutionary in the proposal, which would amount to no more than the wife's having to prove that she has no animus manendi.

(b) Minors. The domicile of origin of a minor has already been discussed. What is of concern here is the domicile assigned by the law thereafter during the child's minority. It must be borne in mind that, for the purposes of the law of domicile, minority terminates by the coming of age, by marriage in the case of a man, by widowhood and divorce in the case of a married woman and by venia aetatis in the cases of both a man and a woman. Tacit emancipation has to be considered as an additional possibility. Marriage may also remove a woman, in the law of domicile, from the category of a dependent person through minority to the category of a dependent person through marriage. Where a marriage is void ab initio, ex hypothesi it had no effect on the capacity of the man to acquire a domicile of choice thereafter. Thus, for instance, if a marriage is entered into without the consent of the Minister of the Interior where both parties are below the marriageable age,⁵⁷⁰⁾ or the female is and the male is under 21, the male continues to be a minor and his capacity to acquire a domicile of choice remained from the start unaffected by the 'marriage'.⁵⁷¹⁾ But if the marriage is voidable only, until it is avoided though under 21 he is sui juris for the purpose of acquiring a domicile. If it is annulled, it is not clear, as has been seen, whether the decree is retroactive in operation as regards the domiciles that have been acquired during the subsistence of the union. If it is not, all domiciles acquired by the man as an independent person though under 21 stand. If it is retroactive, it must follow that until he came of age or in some other way ceased to be a minor for the purpose of acquiring a domicile the man followed the domicile of dependence assigned to him as a minor by the law. If the decree is granted when he is still not sui juris for the acquisition of a domicile, even if it is not retroactive he nevertheless must revert to his domicile of dependence as from then.

The broad principle generally accepted today is that a legitimate minor whose father is alive follows his father's domicile during minority.⁵⁷²⁾ The old authorities are by no means unanimous, however, that this is an inflexible rule and the legal position requires careful examination. There is a temptation ever before conflicts lawyers and the courts when dealing with conflicts problems, of succumbing to the lures of a simply formulated principle that yields a predictable answer. The attitude is: Better the rule

be broadly couched even if it occasionally produce a result that offends one's sense of justice than that the law be slippery.⁵⁷³⁾ But concessions to this attitude must be kept within reasonable limits. With husband and wife, as has been said, there are solid reasons of convenience why the unity of domicile notion should prevail. Is there any compelling need for a child to follow his father's domicile? One searches for it in vain.⁵⁷⁴⁾ In the words of Restatement Second,⁵⁷⁵⁾ a 'person's domicile should usually be in the place to which he is most closely related'. There is no need, with a minor's domicile, to use Roscoe Pound's phrase,⁵⁷⁶⁾ to be kept 'in the thrall of a fiction'. A strong case can be made out for giving expression to a realistic attitude by regarding the domicile of a minor, in the words of Lord MacDermott LCJ,⁵⁷⁷⁾ as 'a manifestation of parental authority and responsibility'. Recognition must be given to the claims of both the vinculum sanguinis and parental authority on the one hand and equity and the practicabilities of life on the other.

The Roman law did not say that a filiusfamilias automatically took his father's domicile during minority and appears to have allowed him to acquire a separate domicile if he ceased to belong to his father's household.⁵⁷⁸⁾ The Roman-Dutch legal treatises are not clear on the position. There are several issues.

First, does the minor's domicile change with his father's domicile if he does not accompany him to the new residence? According to J Voet⁵⁷⁹⁾ it does not, and apparently remains unaltered, though in case of doubt the child should be taken to have his father's present domicile. So broadly couched, the rule does not appear acceptable today. A domicile of origin is attributed to a child from his father's area of domicile at his birth, even though the child has never been there the old authorities cast no doubt on this rule. It would be strange if this domicile should be held to continue, though the father has changed domicile, until the child moves physically to his father's new residence. As a primary rule, it may be accepted that a father's domicile is attributed to his minor child who is living elsewhere: that much tribute can be paid to the claims of the blood tie and natural guardianship. There are some cases in support of this proposition, albeit they are weak and deficient in motivation.⁵⁸⁰⁾ Even in the United States,⁵⁸¹⁾ with its very flexible and down-to-earth rules of domicile, this starting point is accepted. But it is arguable that if the father has actually abandoned his child, even though he has not been deprived of guardianship or custody his child should no longer follow his domicile.⁵⁸²⁾

Secondly, has a minor of sufficient understanding ipso jure the capacity to acquire his own domicile? Some affirmative support is found in the Roman law, as has been seen, and also is implicit in two opinions in the

Hollandsche Consultation.⁵⁸³⁾ Pothier⁵⁸⁴⁾ says that a minor can transfer his domicile to any place where he can acquire a bénéfice or a charge (public office) or other employment of a permanent nature which demands a permanent residence. On the other hand Bynkershoek⁵⁸⁵⁾ states that minors sub cura vel parentum vel tutorum are incapable of changing their domiciles by their own will. 'Ik . . . weet dat een Weeskind of Minderjarige op zyn eigen houtje zyn Domicilie niet veranderen kan. . . .' ⁵⁸⁶⁾ It seems that this is the better answer, as a change of domicile may affect the minor's rights or future interests and it should not be left to his own free and unfettered will. It must be linked up with guardianship or custody, though not necessarily entirely controlled through it. Even in American law this is so. If a minor has been abandoned, that is, deserted, by his father, he takes his mother's domicile, and if he has been abandoned by both parents retains the then domicile of the parent who last abandoned him or of his father if both his parents abandoned him simultaneously.⁵⁸⁷⁾ This is an extreme case. Ex hypothesi, in the normal situation of parents not having abandoned their child, the child has no capacity to change his domicile.

Thirdly, it may be asked whether the father may give his child such capacity. J Voet⁵⁸⁸⁾ can be read to favour this possibility. If full tacit emancipation can endow a minor with practically the whole gamut of capacities,⁵⁸⁹⁾ including that of acquiring a domicile, there seems no reason why the father cannot simply confer on his child the capacity to acquire a domicile. This is the parallel of his being able to permit his son or daughter merely to carry on his or her own trade, business or employment, without this entailing general emancipation. Thus, it is believed, subject to the possible limitations still to be explored, the answer to the question posed is Yes.

Fourthly, as already presaged, tacit emancipation may yield a capacity to acquire a domicile. In Roman-Dutch law a tacitly emancipated minor was fully freed from the parental power save as to the contracting of marriage.⁵⁹⁰⁾ Thus he could acquire his own domicile. J Voet⁵⁹¹⁾ seems clear authority for this rule, to which the weighty support of Pothier⁵⁹²⁾ has to be added. Modern⁵⁹³⁾ South African law has come out in favour of emancipation of varying degrees, which may reach the old 'absolute' state. It seems clear, then, that it may be sufficiently extensive to confer capacity to acquire a domicile.⁵⁹⁴⁾ Admittedly this point was left open in the only South African decision in point, Ochberg v Estate Ochberg.⁵⁹⁵⁾ There it was held that 'the facts do not

point to his emancipation being of such a degree as to carry with it the power to choose a domicile of his own act, or, conversely, to deprive his father of the capacity to change his son's domicile'. But this dictum was on the assumption that emancipation should be of this range. It is submitted that in principle it can be.

Fifthly, the question arises whether a father may give his child a domicile different from his own, there being no suggestion, however, of vesting any capacity in the child to acquire his own domicile. Say the father entrusted his son or daughter to the care of relatives abroad. There is an opinion in the Hollandsche Consultation ⁵⁹⁶⁾ which suggests that the question is to be answered in the affirmative. A father sent his son from the enemy country of domicile to the court's area, to be educated in and to follow the religion of that State. There he was publicly acknowledged to be entitled to reside and no longer obliged to go back to his father's power or domicile. It was held that he was domiciled in the new State. Subject to possible limitations on the father's power to change his child's domicile that will be discussed, it is believed that the question posed must also, in the interests of a realistic solution, ⁵⁹⁷⁾ receive an affirmative answer.

Sixthly, it must be considered whether the primary rule that children follow their fathers' domiciles is subject to a limitation suggested by Cloete J in the early Cape case of Hull v McMaster, ⁵⁹⁸⁾ that it 'only applies wherever the interests of these minors are not affected or prejudiced by such a change of domicile'. While no old authority was adduced by the learned judge nor has any been found, ⁵⁹⁹⁾ the proposal is not so strange as to warrant instant dismissal. It throws up for consideration the rationale behind the general rule of the father's domicile being attributed to his minor issue. ⁶⁰⁰⁾ It cannot be, as shown, that, as with husband and wife, because of mutual rights and obligations an intolerable situation will emerge with split domiciles. The legal incapacity of the child is no explanation. And if this argument were driven to its logical end, it would produce undesirable consequences. To repeat an imaginary situation already posed with a married woman: Say a son, A, aged 20, against the will of his father who is domiciled in the Transvaal, is living in Rhodesia with the animus manendi that can be carried into effect lawfully. A fortnight before A turns 21 he is rendered unconscious in a motor-vehicle collision, a week later his father dies and three weeks thereafter A dies in Rhodesia. Where is A's last domicile? While at the time he became of age A did not have the mental capacity to formulate the requisite intention to settle in

Rhodesia, it can be strongly argued that he should be found to have died domiciled there, for that was his home in fact at the critical time. As with a married woman, factum and animus should be regarded as proleptic, operative from the ending of minority even though the former minor be unaware of his coming of age.

It has been argued⁶⁰¹⁾ that provided the father has guardianship and custody the primary rule is inexorable, flowing from the fact that in the vast majority of instances a child actually has the home of his father and the father's legal duty to give the child a home. While this reasoning is basically reconcilable with Lord MacDermott LCJ's notion of 'manifestation of parental authority and responsibility',⁶⁰²⁾ it should also be borne in mind that Lord MacDermott conceived of the law's vesting authority in the father to act in matters of domicile for the benefit of his child.⁶⁰³⁾

Accordingly, there is much to be said in favour of the reservation alluded to by Cloete J.

Seventhly, attention must be directed to the res controversa among the old authorities, whether a father's change of domicile is reflected on to his minor child if the change was in pursuance of a fraudulent intent.⁶⁰⁴⁾ J Voet, basing himself on Rodenburg,⁶⁰⁵⁾ says that a change of domicile of a father, widow-mother or non-natural legal guardian (on whichever one a minor is dependent for purposes of domicile) from South Holland, where Schependomsrecht prevails, to North Holland, adhering to Aasdomsrecht, which on the death of a child intestate is more favourable to the surviving parent, operates so far as the child is concerned only if it was made bona fide and the parent had a justa et probabilis causa migrandi, otherwise it would be deemed a fraud on the intestate heirs who would succeed according to the law of the previous domicile. (Succession ab intestato to movables is governed by the lex ultimi domicilii. Presumably Voet's result would not follow if the child had attained the age of competency to make a will.)⁶⁰⁶⁾ Pothier refers only to dependency on the widow-mother, stating that her minor child follows her domicile as it changes provided she has altered it without fraud, and that fraud would be held to exist if there did not appear to be any reason for the change other than that of procuring an advantage to herself in the succession to the movable estate of her child on his death.⁶⁰⁷⁾

On the other hand Bynkershoek, who is supported by Van der Keessel,⁶⁰⁸⁾ rejecting the alleged rule propounded by Rodenburg and Voet, contends that⁶⁰⁹⁾

the parent or non-natural legal guardian has unfettered capacity to change the domicile of a minor. No inquiry, says Bynkershoek, can be made as to fraud, because it is very difficult, if at all possible, to prove it, and endless disputes will result. This conclusion born of despair is manifestly unsound, for it would put paid to the fraus legis doctrine which permeated the Roman-Dutch law. ⁶¹⁰⁾

The views of Rodenburg and Voet were approved by Cloete J in Hull v McMaster, ⁶¹¹⁾ who stated that the children would not take the father's new domicile if it had been fraudulently acquired to deprive them of their rights. Attention here is directed not to the position of third persons, as in Voet's example, but that of the minors themselves. But the principle must embrace both situations. Unfortunately, in Hull v McMaster Cloete J misconceived the nature of the issue before the court, which was in no wise concerned with the controverted point. ⁶¹²⁾

There is also an English case in which the passages in Voet and Pothier led to dicta that if the widow-mother changes her home fraudulently, for instance to affect the distribution of the child's estate on his death intestate, the child does not take the new domicile. As the existence of fraud was expressly negatived by the court, the decision can be hardly be considered as strong authority. The attitude of English jurists to it has been mixed. ⁶¹³⁾ ⁶¹⁴⁾

Should the question ever arise in concrete form, it may well be that a South African court will find that there was no genuine intention to settle in the new country and that therefore no domicile was acquired there. ⁶¹⁵⁾ As Schomaker says, ⁶¹⁶⁾ a change of domicile in fraudem legis is not presumed. Nevertheless, there is no assurance that the very reverse inference will not be drawn that the motive goes to show the existence, not the absence, of the animus manendi. In that event a choice will have to be made between the two Roman-Dutch schools of thought. ⁶¹⁷⁾ ⁶¹⁸⁾ Pollak and Spiro sympathize with Bynkershoek's views. It is submitted, however, that the equities point in the direction of the answer of Voet. ⁶¹⁹⁾

There is a final problem. Allowing for the foregoing exceptional circumstances, could a child take or retain (as the case may be) his father's domicile through dependence if he (the child) is unlawfully resident in South Africa or has been deported? It is believed that, as with a wife, the attribution of domicile would probably be held to continue to apply. The alternative solution is for the minor to retain his last domicile.

How far may there be a deviation from the primary rule that a legitimate minor child takes his father's domicile qua domicile of dependence? The answer to this question may also be of significance in relation to a domicile of dependency on a widow-mother or non-natural guardian. The answer rests, first, on whether the dependency flows from guardianship (or its statutory counterpart) or from custody of the child; and secondly, on how far by common law and legislation guardianship or custody can be taken away from the father.

In its full ambit guardianship embraces the entirety of the rights and duties of parents of control, care and administration over the person, property and business affairs of their minor issue.⁶²⁰⁾ In the normal course it is vested in the father, but he shares control over the child's person with the mother and her consent too is required for the minor's marriage.⁶²¹⁾ If custody is severed from guardianship the custodian parent (normally the mother, on the granting of a decree of divorce) is entitled to have the child live with him or her, controls his day-to-day activities, such as the persons with whom he may associate and his education, religious upbringing and place of residence. To that extent guardianship (if it is vested in the other parent, almost always the father) is diminished. In this narrower, residuary, sense, guardianship includes administering the child's property and running his financial affairs generally, such as making business contracts for him, investing his money, discharging his obligations; it would also cover such matters as agreeing to his antenuptial contract.

At common law, save where there are proceedings before it for, or it is granting, a decree of divorce or judicial separation, the court can deprive the father of custody only on some special ground, such as danger to the child's life, health or morals.⁶²²⁾ The possibility exists, not explored hitherto, that the court as upper guardian of all minors has an even more extended power in such extraordinary circumstances, namely, that of depriving the father of guardianship.⁶²³⁾ The legal position has now become more complex because of the provisions of the Matrimonial Affairs Act 1953 and the Children's Act 1960.⁶²⁴⁾

Under ss (1) of the critical s 5 of the Matrimonial Affairs Act the court, on the application of either of the parents of a minor, in granting a divorce, or where they are divorced or living apart, may grant to either sole guardianship (including the exclusive power to consent to a marriage)⁶²⁶⁾ or sole custody;⁶²⁷⁾ or it may order that on the predecease of the named parent, a person other than the survivor shall be guardian. In terms of ss (2), where the parents are living apart the order lapses when they become reconciled. Subsection (3) read with ss (6) provides that, subject to any court order, a parent vested with the guardianship or sole custody under ss (1) or on whom has been vested by a children's court in terms of s 60(1) of the Children's Act the exclusive right to exercise any parental powers in regard

to a minor' may, as long as he remains so vested, by will appoint a sole guardian or sole custodian, as the case may be. It also states that unless the father has had conferred on him such sole guardianship or exclusive parental power he can at most appoint by will a guardian to act jointly with the mother. Finally, under ss (5), where a parent has by will appointed a guardian or custodian under ss (3) or a father has appointed a joint guardian with the mother, the court after the testator's death may make such order as to guardianship or custody as it deems in the minor's interest.

Clearly s 5 refers to the child of both the parents, but would also govern a child legitimated per matrimonium subsequens, adopted or born posthumously.⁶²⁸⁾ It is not confined to divorce or judicial separation. Separation de facto is also catered for.

Section 31 of the Children's Act enables a children's court to order a child in need of care to be placed in the custody of a suitable foster parent. Under s 342⁶²⁹⁾ of the Criminal Procedure Act a court may order that a person under 18 convicted of an offence be placed in the custody of a named person. Tying up with these provisions, s 59 of the Children's Act provides that a parent or guardian of a pupil of an institution (ie reform school, school of industries or children's home) or who has under that statute or s 342 of the Criminal Procedure Act been placed in the custody of a person who is not one of his parents is 'divested of his right of control over and of his right to the custody' of the pupil, these being vested in the management of the institution or the named custodian. But these rights do not include, inter alia, 'the power to deal with any property of a pupil or child or the power to consent to [his] marriage'.

Section 60 of the Children's Act enables the court to deprive a father or mother of the right to exercise any parental powers over a child living with the other parent and confer on the latter the exclusive right to exercise these powers, including the power of consenting to the child's marriage or adoption. The court is empowered to rescind its order.

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Finally, s 72 of the Administration of Estates Act 1965 may come into play. It deals with the appointment of tutors and curators. A tutor is authorized to take care of the person and, possibly, the or certain of the property of a minor; a curator the, or certain of the, property of a minor. As joint tutor nominate with the minor's mother or as curator nominate must be appointed a person nominated by a legitimate minor's father who has not been deprived of guardianship under the Matrimonial Affairs Act or parental powers under the Children's Act; as tutor or curator nominate must be appointed a person nominated by the mother of an illegitimate minor or of a legitimate minor whose father is dead, where she has not been so de-

prived of guardianship or parental powers, or a person nominated by the parent so vested with sole guardianship or exclusive parental powers. There is also provision for appointment through a court order of a tutor or curator to take care of a minor's person or property. Then a person bequeathing property to a minor may nominate a curator in respect of it. Thus a minor may have a tutor and a curator or curators. For the law of domicile what is crucial is tutorship, for it concerns the care and custody of the ward's person. Similarly with the appointment by the Master under s 73 of a tutor or curator dative. But it has been held that under this section the Master is not empowered to decide who is to have custody of the person of the orphan as distinguished from guardianship of him. ⁶³¹⁾

It follows from the foregoing that the father of a legitimate minor may be deprived of the guardianship or sole guardianship of the child, as the case may be, in the following circumstances: (i) almost surely at common law, stante matrimonio and without proceedings for divorce or judicial separation having been instituted, guardianship being awarded to the mother or a third person. ⁶³²⁾ Similarly where the marriage has been dissolved through the death of the mother; ⁶³³⁾ (ii) on the granting of an order for divorce or judicial separation, both at common law and under s 5 of the Matrimonial Affairs Act. Under s 5 sole guardianship may be awarded to the mother. At common law guardianship may be awarded to the mother or, possibly, to a third person; (iii) after divorce or, it seems, at common law after judicial separation. Here the same rules apply as under (ii); (iv) where the spouses are living apart, under s 5 sole guardianship may be awarded to the mother, the order lapsing on reconciliation of the spouses; (v) under s 60 of the Children's Act exclusive parental powers may be awarded to the mother, apparently both during the subsistence of the marriage and thereafter. Under (ii) (iii) and (iv) the court may order that on the death of the mother guardianship shall be vested in a third person; and a mother vested with sole guardianship under s 5 or exclusive parental powers under s 60 may by will appoint a third person as sole guardian.

The father of a legitimate minor may be deprived of the custody or sole custody of the child, as the case may be, in the following circumstances: (i) stante matrimonio and without any proceedings for divorce or judicial separation having been instituted, custody being awarded to the mother or a third person. ⁶³⁴⁾ This is also possible where the marriage has been dissolved through the death of the mother; ⁶³⁵⁾ (ii) on the granting of an order for divorce or judicial separation, both at common law and under s 5. Under s 5 sole custody may be awarded to the mother. At common law custody may be awarded to the mother or a third person; (iii) after divorce or, it seems, at common law after judicial separation. Here the same rules apply as in (ii); (iv) where the spouses are living apart, under s 5 sole custody may be awarded to the mother, the order lapsing on reconciliation of the spouses; (v) under s 59 of

the Children's Act custody may be vested in the management of an institution or in a named third-party custodian. A mother vested with sole custody under s 5 (or possibly - the wording of s 5(3) is unclear - vested with exclusive parental powers under s 60) may by will appoint a third person as sole custodian.

Where the father is deprived of the totality of guardianship, by whatever name it be called, manifestly his minor child will no longer follow his domicile. Whether the child will have some other domicile of dependence remains to be discussed.

Where the father is deprived only of custody or sole custody, the matter becomes more contentious. The old authorities do not appear to have dealt with it. The attitude of our courts, so far as it has been expressed, is bred of a mixture of legal dogmatics and a mistaken notion of the concept of domicile. In Landmann v Mienie ⁶³⁶⁾ Van den Heever AJP said obiter: '... an order in regard to custody does not and cannot encroach upon the father's paternal power save in so far as the exercise of that power would be inconsistent with the mother's custody. The father cannot change the child's residence, consequently, but may change its domicile.' The one other decision in point, Favard v Favard, ⁶³⁷⁾ is not decisive either. Apparently only the custody of the minor had been awarded to his mother by the English court that granted her a divorce. Subsequently she came to South Africa. The question that Tredgold CJ put his mind to, though he stated it was not strictly necessary for the decision of the case, was the domicile of that child, when, as a major, he married in England, for on that decision turned the resolution of any possible future dispute as to the matrimonial proprietary régime. En passant the learned Chief Justice had to consider whether the propositus followed his mother's changing domicile. He considered that Van den Heever AJP was correct - 'the change of domicile depends more upon the intention of the guardian than of the custodian parent in cases where guardianship and custody are separated.... [A]ny question of a change of status is essentially of a nature in which the decision rests with the guardian rather than the custodian. The effect of a change of domicile in a minor as a result of action by the parent is to attribute to the minor a decision on the part of the parent to change his or her permanent residence, and a decision on such a point seems to ... be a matter ordinarily within the purview of the guardian.' ⁶³⁸⁾ With respect, this reasoning is not convincing. A change of domicile is not a change of status, though it could in certain circumstances have that effect. But more likely its effect is a change in the governing law or jurisdiction in relation to the de cuius. The reference to change of residence seems strange, for surely this lies in the hands of the custodian and not the residuary guardian. In any event, the court was concerned with uncertain facts, as the minor was a ward in chancery and Tredgold CJ considered that 'final authority rested with the [English] courts and not with any individual'. ⁶³⁹⁾ Bearing in mind that it was an English order that was involved and the issue of domicile did

not arise crisply for decision, one cannot attach much value to the views of the Southern Rhodesian court as to the effect of depriving a father of custody, so far as South African law is concerned.

⁶⁴⁰⁾ Spiro for the past twenty years has contended that domicile goes with residuary guardianship, not with custody. ⁶⁴¹⁾ Pollak, relying on American authority, submitted that the 'reasonable' view was that if the mother was given custody on the granting of a divorce decree the child should follow her domicile. Although the law of the United States does point in this direction, ⁶⁴²⁾ unfortunately it does not draw the distinction of our law between custody and guardianship. Custody would appear to be what we call full guardianship. On the other hand § 22 of Restatement Second shows that the place of residence of a minor is a significant factor, for that section states that if a minor lives with one of his parents, he has the domicile of that parent. This, it is believed, is the realistic view. Natural guardianship, as has already been stated, plays a role in determining the domicile of dependence of a minor. But should this not be full guardianship - the entire circle of powers of control and administration, not the circle minus the critical segment of day-to-day care, including choice of place of residence, that is, custody?

English law appears to be veering in this direction. Up to 1968 there was no decision and little comment by the writers, ⁶⁴³⁾ though the Draft Code of the Law of Domicile in the First Report of the Private International Law Committee of 1954 ⁶⁴⁴⁾ provided that as from the termination of the marriage of the parents of a legitimate or legitimated infant his domicile is that 'of the person (if any) in whom [his] custody ... is from time to time lawfully vested or, if it is vested in more than one person, that of such of them as they may agree'. ⁶⁴⁵⁾ However, the court could in all cases 'make such provision for the purpose of varying an infant's domicile as it may deem appropriate to the welfare of the infant'. In Scotland the Court of Session held in 1965 in Shanks v Shanks ⁶⁴⁶⁾ that even if the mother is awarded custody the child follows the domicile of his father. Three years later Lord MacDermott LCJ refused to follow Shanks in delivering his celebrated judgment in the Northern Ireland case of Hope v Hope. ⁶⁴⁷⁾ While the general rule was that the father has the parental authority and responsibility to act for his minor child, said the learned Lord Chief Justice, and this passed over to the mother on the father's death, when the father has abjured his responsibility, this resulting in custody being awarded to the mother, the latter is now the parent in charge of and responsible for the welfare of the child. In Hope the father had deserted his family - 'walked out of his child's life' ⁶⁴⁸⁾ - and the mother had been awarded custody in the divorce suit.

It is believed that this decision points the direction for our law, but does not go far enough if it is to be read as confined to a case where a father has shrugged off his domestic responsibilities - a situation, incidentally, where the mother might well ask for and be granted guardianship. In a divorce action custody

(or sole custody) is awarded basically on what is in the interest of the minor. The father may well not have quit his duties and indeed may be desirous of taking personal care of the children, but if they are girls or young boys their custody will normally be awarded to their mother.⁶⁴⁹⁾ Thus if the marriage no longer subsists but the father is alive, the granting of custody to the mother, it is submitted, should utilitatis causa carry with it the determination of the domicile of dependence. Otherwise untenable situations will arise. Say a divorce is granted when a child is a year old, and the mother, who had been awarded custody, shortly thereafter migrates to New Zealand, while the father remains domiciled in the Republic. If the child dies unmarried and intestate at the age of 20 his estate will be distributed according to the law of South Africa if he does not take the domicile of his mother. As his whole life is centred in New Zealand this should not be. In what follows it will be taken as a general rule that with a natural guardian custody carries domicile.

If the marriage has not been dissolved, the wife will continue to follow her husband's domicile. She may have had vested in her guardianship at common law, sole guardianship under s 5 of the Matrimonial Affairs Act or exclusive parental powers under s 60 of the Children's Act. Or she may have been awarded custody at common law or sole custody under s 5. What now is to be the rule as the minor's domicile? In both instances there seems no avoiding the answer that, subject to the possible limitations already outlined in the analysis of a child's dependency for domicile vesting in his father, he will follow his father's domicile at second remove, that is, through his mother's domicile of dependence. It is too artificial to reason that an analogue can be found with the remarriage of a widow-mother where, as will be shown, it has been argued (though fallaciously, it is submitted) that, despite the preservation of the vinculum sanguinis and the parental power in the mother, a minor child would not follow the domicile obtained by her through her dependence on her new husband.

The topic hereafter bristles with a bewildering variety of possible situations, difficult to arrange in any systematic order. What follows does not profess to comprehend all of the situations but only the main ones - many of which fortunately are none the less unlikely to crystallize in real life.

Let us start with the widow-mother. On the applicable law there is some learning. Or the father may be alive, but the marriage be dissolved and the mother may remarry, thus obtaining a new domicile of dependence for herself. On the score of this being reflected on to the child if she has been granted custody or guardianship there seems to be no authority.

If the father of a legitimate minor dies, in general the minor follows the domicile of his mother,⁶⁵⁰⁾ in deference to the calls of the vinculum sanguinis and of the parental authority which automatically devolves on her in the ordinary course of events.⁶⁵¹⁾

This broad principle of dependency is, of course, subject to the possible limitations already mentioned. In particular in relation to the fifth problem posed, whether the parent from whom the domicile of dependence flows can give the child a different domicile, the English case of In re Beaumont⁶⁵²⁾ is of persuasive force. Here the minor daughter of a widow was held not to follow her mother's domicile where her mother left her in the care of an aunt in Scotland, where her husband, the father of the child, had died domiciled.

At common law a father with guardianship could by will or deed appoint a third person as guardian of his minor child, to the exclusion of the mother, although she could not in this way be deprived of custody. According to the old writers, in this event the child followed his mother's domicile only if he took up the new residence with her with the guardian's consent.⁶⁵³⁾ In modern law the father's general power is restricted to the appointment of a joint guardian by will in one of the circumstances already adumbrated. This should not affect the general rule that the minor follows his mother's domicile, it is believed. Naturally, if a stranger is vested with sole guardianship or sole custody, in accordance with the legal rules here propounded, the minor will not be attributed the domicile of his mother. The principle would also hold in the reverse situation, where the father is the survivor.

When the widow-mother on whom a minor is dependent for domicile remarries, the resultant legal position, according to Pothier,⁶⁵⁴⁾ is that since she thereafter ceases to be head of the family, becoming part of the family of her new husband, her children no longer follow her domicile and retain, until they become sui juris, the domicile they had on remarriage.⁶⁵⁵⁾ It is possible to read into Voet the same rule. Otherwise the Roman-Dutch writers do not appear to have considered the matter. This is surprising, because they do go into the question of the effect on a minor orphan's domicile of the appointment of a guardian. Here, as will be seen, the weightier view is that a relationship of dependency is created. South African case law is silent on the effect of the remarriage of the widow-mother. English law is in an uncertain state. It has been suggested that the child follows his mother's derivative domicile only if he lives with her at her actual place of domicile and (possibly) only if the change of domicile is not to his disadvantage and not with fraudulent design.⁶⁵⁷⁾ According to the latest version of the American Restatement,⁶⁵⁸⁾ the child does not follow the domicile of his stepfather by operation of law. He will take his mother's domicile if this is in a place 'where the mother would be domiciled by application of the rules relating to the acquisition of a domicil of choice'.⁶⁵⁶⁾

The ideal solution would appear to lie in an admixture of the Restatement rules and the gloss on the general principle that a legitimate minor follows his father's domicile during the latter's lifetime. The first question, then, would be where, were she able during her new marriage to acquire her own domicile, as is possible in American law,⁶⁵⁹⁾ the minor's mother would be domiciled. In the vast majority of cases it would be in the same place as her new husband, but not if she has

her home elsewhere (more likely if she and her new husband have parted ways, but not necessarily confined to this eventuality). If the minor's mother would on this test be domiciled elsewhere, he would not take his mother's derivative domicile. The most realistic and satisfactory answer would then be that his domicile is this hypothetical one of his mother's. That apparently would be what would be decided in the United States - assuming the Restatement correctly expresses the chimerical common law of that land - for that would be the actual domicile of his mother in that law. Would it be beyond the permissive area of creativity of our courts to fashion this suggested rule? (It should of course be glossed with the reservations tacked on to the general principle that a legitimate minor follows his father's domicile during his father's lifetime.) Other solutions would inevitably be less satisfactory because they would depart from reality. They would range from the one pole of Pothier's abiding by the last domicile principle; the one intermediate answer that the minor would continue to follow his mother's domicile even though it come through his stepfather, unless his mother's hypothetical domicile was elsewhere, in which event he would keep his last domicile; the other intermediate answer that he would follow his mother's derivative domicile only if he actually lives with her in her new country of domicile and otherwise would retain his last domicile; to the other pole of saying that he continues to follow his mother's domicile in all circumstances and thus in reality obtains a domicile of dependence through his stepfather. All would yield unfortunate results. Consider their application to the following situations: Jill, a South African-domiciled widow with a son Harry aged 2, marries Jack, a domiciliary of the State of Queensland, and goes to live with him in that State. A year later the marriage breaks down, and she returns to South Africa. For some reason (possibly a religious one) a divorce does not take place. It is bad enough that Jill continues to be domiciled in Queensland. It would be still worse if Harry did. Of course, on the Pothier rule his domicile would never have changed to Queensland. But how unsatisfactorily that rule would have worked had Jack and Jill lived happily ever after, as is still the usual course of affairs. Had Harry died intestate at the age of 19 the distribution of his movables would have been in accordance with the law of South Africa, of which distant land during his lifetime he had not the dimmest memory and of the legal rules of which he was profoundly ignorant. Apply any solution other than the one here advanced in either of the above situations and the answer will be found equally unsatisfactory.

There seems to be no reason why the submission made to govern the remarriage of the widow-mother should not be applicable also to the remarriage of the divorced mother having guardianship, sole guardianship or exclusive parental powers or custody or sole custody of her minor child.

Finally, there is the possibility of a third party's having guardianship or custody. In practice this must arise in the preponderance of cases where the

legitimate minor's mother and father have died. If no guardian or sole guardian (ie tutor) is appointed to him, the minor must in principle retain the last domicile he had until he becomes sui juris and then causes it to change. (If the orphan is a girl, she could, of course, acquire a domicile of dependence through marriage.) If a guardian, sole guardian or tutor is appointed to the minor, in terms of one of the legal provisions already mentioned, will the minor now acquire in general a new domicile of dependence through this stranger? (Clearly, the limitations on the general rule applicable to dependence on the father during his lifetime must apply here too.) According to Bynkershoek⁶⁶⁰⁾ and Van der Keessel⁶⁶¹⁾ the answer is in the affirmative. According to Christinaeus⁶⁶²⁾ and Pothier⁶⁶³⁾ the minor continues to keep the last domicile he had. The view of Bynkershoek and Van der Keessel yields a more satisfactory answer and should be adopted.⁶⁶⁴⁾ In addition it must be considered to be the prevailing attitude of the Roman-Dutch jurists, for it is significant that it is repeated in § 115 of the Ontwerp 1820. The absence of the vinculum sanguinis or its surrogate (adoption) should not be allowed undue weight. Normally the child will live with his non-natural guardian, just as he would have continued to live with his surviving parent.

Under s 5 of the Matrimonial Affairs Act sole guardianship may be granted to a stranger by will of a parent vested with sole guardianship or exclusive parental powers to the exclusion of the surviving parent; or the court may order that on the decease of a named parent a person other than the survivor shall be sole guardian (guardian). No reason is apparent why the rule should be any different in one of these situations. So too, if it can and does happen that a stranger is vested with guardianship by the court acting under common-law jurisdiction, during the lifetime of the parents or the survivor of them. Nor, though perhaps the argument is not so strong, should there be a different solution where a parent vested with sole custody appoints a stranger sole custodian in terms of s 5(3)(a); or where custody is awarded by the court, acting under common-law jurisdiction, to a stranger during the lifetime of the parents or the survivor of them. There remains the granting of custody under s 59 of the Children's Act to a foster parent or other third person or the management of an institution. Such custody is of an exceptional character and is innocent of some of the powers that custody at common-law confers. Nevertheless there is a powerful case for saying that it yields a domicile of dependency. Again, the close relationship of a person to his place of residence should be determinative of his domicile. In the case of the management of an institution, regard would be had to the area of situation of the institution.

A child legitimated per subsequens matrimonium is regarded as a legitimate child for the purposes of a domicile of dependence. This may result in a retrospective change of domicile as from birth.⁶⁶⁵⁾

An illegitimate child, as has been seen, takes as his domicile of origin the

Footnotes on page 123.

domicile of his mother at the time of his birth, and in general he continues to follow it, ⁶⁶⁶⁾ those reservations and subsidiary rules applying, mutatis mutandis, as would apply to a legitimate minor dependent on his father. A difficulty arises, however, where the woman is under age, for, unlike a widow or divorcee, an unmarried mother, until she becomes 21 years of age, cannot be the natural guardian of her minor child ⁶⁶⁷⁾ and is not sui iuris for the purpose of acquiring a domicile of her own. Until she attains majority she will normally follow her father's domicile as it changes. Will her child change domicile simultaneously - through dependency on dependency? The vinculum sanguinis is present but not the parental power. Nevertheless the answer should be Yes, for it would lead to a most undesirable position to hold that an illegitimate child of a minor woman retains his domicile of origin until his mother becomes of age. ⁶⁶⁸⁾ (Then the child will undoubtedly become dependent on her in the law of domicile.) ⁶⁶⁹⁾

If, as is contended, the natural guardianship of a child of a putative marriage vests in his mother, ⁶⁷⁰⁾ the child will follow his mother's domicile during minority.

It has already been submitted that an adopted child takes as his domicile of dependence the domicile of his adoptive parent or parents as from the time of adoption. This is because under the Children's Act 1960 the adoption order, of a constitutive character, places the minor thereafter in all respects in the shoes of a legitimate child of the adoptive parent or parents. ⁶⁷¹⁾

(c) Insane persons. On the difficult question of the domicile of those who because of unsound mind are not able to acquire a domicile for themselves, ⁶⁷²⁾ there is no old authority directly in point and South African case law is slender. A distinction is drawn in some legal systems between those who become insane while dependent persons and those who become insane when sui iuris.

As regards insane minors (the insanity may date from birth or from a time thereafter) the consensus of writers on Anglo-American law is that the child during minority follows the domicile of the natural guardian on whom he is dependent. ⁶⁷³⁾ Most of them also agree that the insane child after reaching the age of majority continues to do so, and does not simply retain the last domicile he had before turning 21. ⁶⁷⁴⁾ This solution seems most in accord with the realities of life, even though it could lead to a child of the insane person being attributed a domicile through a remote cause. There could not often be such a dependant. What if a child's natural guardian die during his minority or thereafter? Should the child follow the domicile of a non-natural curator, if any, appointed to his person and not, as is the rule, only to his property? There is no authority. ⁶⁷⁵⁾ Following what was submitted on the issue of a sane minor similarly circumstanced, it is believed that he should. The foregoing submissions are all subject to the appropriate reservations applicable to the domicile of dependency of a legitimate minor on his father, in particular that the guardian does not act with fraudulent intent and (possibly) that no prejudice is caused to the ward.

Footnotes on pages 123, 124.

When a person sui juris becomes insane, there is some authority that he retains the last domicile he had before becoming insane and does not follow the domicile of the curator, if any, to his person, whether the latter be his father or someone else. The argument used in one English case was that the interests of others could be prejudiced. This is not convincing, for reasons already given. Four other solutions have been arrived at. The first is that the lunatic follows his curator's domicile: thus the law of France and Louisiana. The second goes even further: that the curator has the capacity to give the lunatic a domicile different from his own. The third is that the domiciliary court may give the curator the capacity to change the lunatic's domicile. The fourth is that the curator may shift the lunatic's domicile if that was in the lunatic's interest and not to serve a selfish purpose of the curator. None of these variants from the rules submitted as applicable to insane minors appears to be necessary. Those rules should obtain in this situation. It has to be borne in mind that the lunatic may have dependants himself, who could then automatically at a double remove follow the curator's domicile if the lunatic does.

What has been said would apply to a person whose insanity extended through minority into majority and who then had a sane interval, only to relapse into madness.

If a married woman becomes insane, she will continue to follow her husband's domicile. The rule is a sound one, by analogy with that applicable to an insane minor and in view of the awkward questions of choice of law and jurisdiction that, as has been shown, could arise if the doctrine of unity of domicile were breached without a statute's taking care of the resultant situation. If the marriage is dissolved by death or decree of the court this domicile of dependence will end, and the woman will retain her last domicile unless a curator is appointed to her person. In that event, she should follow his domicile in accordance with the rule proposed above.

V ESTABLISHMENT OF DOMICILE

Questions of the onus and the requisite degree of proof of abandonment of a domicile of origin or choice or acquisition of a domicile of choice have already been considered. Reference has also been made to the maxim 'ubi uxor ibi domus' and the presumptio hominis in favour of the last domicile, but neither maxim nor 'presumption' will assist when the last domicile is unknown. As was mentioned in the discussion of the domicile of origin, the necessity of settling the issue may drive a court to say that a domicile of origin is the first known domicile.

The importance of residence as a factor from which animus manendi can be inferred has been pointed to; but it has also been stressed that the strength of the inference depends on the particular circumstances. The Roman-Dutch texts frequently refer to persons such as business men, diplomats and consuls who live abroad under such circumstances that a conclusion of the existence of the required

intention is unwarranted, however long the residence. Here the mode of residence is the significant factor. In many other situations, naturally, length of residence would be important evidence of domicile, for the establishment of which 'no circumstance is too small to be taken into consideration'.⁶⁹⁰⁾ The evaluation of each fact would depend on the context, as each case is unique, and what may be decisive in one may be unimportant in another, having regard, in Burge's words,⁶⁹¹⁾ to 'the quality and station of the person'.

A person may acquire a domicile in an area whatever his motive be. But his motive may be an important element in determining whether his residence is coupled with the necessary animus manendi. As was said in a leading American case,⁶⁹²⁾ '[m]otives are immaterial, except as they indicate intention. A change of domicile may be made through caprice, whim or fancy, for business, health or pleasure, to secure a change of climate, or a change of laws, or for any reason whatever, provided there is an absolute and fixed intention to abandon one and acquire another and the acts of the person affected confirm the intention.... No pretence or deception can be practised, for the intention must be honest, the action genuine....' A special motive must be scrutinized carefully lest it be tacked on to a residence that is to cease when the purpose is accomplished. But it could well be concluded in appropriate circumstances that a special motive aids in drawing the inference that the animus manendi exists: as, for instance, to have the freedom to will one's property as one pleases,⁶⁹³⁾ even perhaps to sue for divorce,⁶⁹⁴⁾ to allow one's troupe of performing chimpanzees to enjoy a salubrious climate.⁶⁹⁵⁾

'All the facts, incidents and events of a man's life are both relevant and admissible indications of his state of mind.'⁶⁹⁶⁾ The following circumstantial factors, inter alia, are mentioned in the old authorities or have influenced a court in concluding that a new domicile has been acquired: sale of property in the former country of residence;⁶⁹⁷⁾ acquisition of land or a dwelling house in the new one;⁶⁹⁸⁾ removal of the propositus and his family with their goods and effects to the new;⁶⁹⁹⁾ application for a certificate allowing permanent residence;⁷⁰⁰⁾ hiring of accommodation;⁷⁰¹⁾ payment of income tax;⁷⁰²⁾ movement of the bulk of one's business interests and fortune;⁷⁰³⁾ marriage in the area;⁷⁰⁴⁾ presence of wife and children; education of children in the area;⁷⁰⁵⁾ investment of savings in a business;⁷⁰⁶⁾ service on a jury;⁷⁰⁷⁾ life insurance with a local company;⁷⁰⁸⁾ executing the local form of will;⁷⁰⁹⁾ learning the new country's language.⁷¹⁰⁾ Generally close association with the community will be a positive indiciu.⁷¹¹⁾

The taking out of citizenship normally will point strongly in favour of local domicile,⁷¹²⁾ but failure to apply for citizenship does not preclude the acquisition of domicile, nor does the application for and obtaining of it necessarily lead to the inference that local domicile has been obtained.⁷¹³⁾

The need for a court at times to make a positive finding as to the domicile of the de cuius - which would probably arise more often in questions of choice of

law than in questions of jurisdiction - may result in its allowing a factor intrinsically of little weight to be decisive.⁷¹⁶⁾ If all that is known of a man is that he lived in a certain place at about the critical time, it might be decided that he was then domiciled there.⁷¹⁷⁾ If nothing is known of a deceased person other than that he died at a particular spot,⁷¹⁸⁾ or that he set sail from port X,⁷¹⁹⁾ he could be held to have had his last domicile at that spot or port.

The existence of the animus manendi may be derived from statements at the trial by the propositus of his present state of mind and from past express declarations by him.⁷²⁰⁾ Such declarations made a time ago 'must be examined by considering the person to whom, the purposes for which, and the circumstances in which they [were] made, and they must further be fortified and carried into effect by conduct and action consistent with the declared expression.'⁷²¹⁾ Despite issuing warnings of this sort, the courts, if necessity presses, will accept a statement brought to the surface from the depths of the pool of memory. For instance, in Von Falkstein v Von Falkstein⁷²²⁾ the plaintiff wife in a divorce suit gave evidence that the marriage had taken place sixteen years before in Mafeking in the Cape Colony. After the couple had lived there for a month the husband, who was employed by the Transvaal Republic, had left for Johannesburg. He had stated that he was living there and on arrival had sent the plaintiff a telegram asking her to join him. On arrival she had failed to find him and had not succeeded in tracing him since. It was held that the husband was domiciled in Johannesburg at the commencement of the divorce proceedings.

In particular a statement made some time by the propositus that he intended to acquire a domicile must be treated with considerable reserve, for '[o]ne may well doubt whether [he] was acquainted with the meaning of the word'⁷²⁴⁾ Furthermore, a formal past declaration as to the then domicile may be suspect because of its self-serving nature.⁷²⁵⁾ And statements at the trial by the propositus as to his present state of mind must fall into the same low scale of values where he is an interested party.

⁷²⁶⁾ In a few cases hoary with age it was said that where the domicile of the defendant is in issue some weight can be attached to his failure to deny an allegation that he is domiciled in the area stated. More recently, however, Horwitz AJP⁷²⁷⁾ 'craved leave to doubt whether any real cogency can be attached to the non-appearance by a defendant, especially where, as here, a divorce appears to be desired by both parties'. Possibly the courts might be prepared to be influenced by non-denial by the defendant in a matter of choice of law (at least where the interests of minors are not involved) or jurisdiction not involving an issue of status.

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FOOTNOTES

1. Many years have passed since the late Mr Walter Pollak QC published his admirable articles on the subject ('Domicile' (1933) 50 SALJ 449, (1934) 51 ibid 11). In the intervening period many important judgments have been handed down, a number of statutes touching on domicile have been passed, new problems have been revealed and a large literature of the subject has accumulated. Thus a re-examination appears warranted.
2. The Roman-Dutch writers considered that the conflict of laws embraced only choice of the appropriate legal system and the recognition and enforcement of a foreign judgment. See eg the treatment of J Voet 1.4 Pt II and Huber Praelectiones juris civilis, ad Dig 2.1.3, entitled De conflictu legum and cited henceforward as 'De Con'. In modern Anglo-American law as a rule domestic superior court jurisdiction is also dealt with, so as to determine which internal court is competent to hear a case with a foreign element. Normally Continental treatises do not cover this topic. I Szászy International Civil Procedure (1967) 9, 15-19, 26 would include it in international civil procedure, which he considers the twin of private international law (ie conflict of laws). It seems to be a Siamese twin. In South Africa, with each provincial and local division of the Supreme Court, a few exceptional instances apart, being treated as separate from its fellows, and each province and the area of each provincial division to some degree having a separate system of law, it would be useful to consider the jurisdictional rules of the Supreme Court as part of the conflict of laws. It would also be extremely artificial to exclude domestic jurisdiction from the purview of that branch of law, as with certain topics, notably matrimonial law, questions of choice of law and jurisdiction are closely connected.
3. It was of importance at one time for the acquisition of Union nationality. See Van Rensburg v Ballinger 1950 (4) SA 427 (T). This study is not concerned with the statutory definition of domicile under the Admission of Persons to the Union Regulation Act 22 of 1913, s 30, which differs from the common-law meaning. See eg In re Feeda Hoosen (1915) 36 NLR 381, Hassen Mia v Immigrants Appeal Board (1915) 36 NLR 620, Kajee v Immigrants Appeal Board (1916) 36 NLR 42, Parker v Principal Immigration Officer 1926 CPD 255, Pillay v Principal Immigration Officer (1926) 47 NLR 520, Limbada v Principal Immigration Officer 1933 NPD 146.
4. D 50.1.27.2. And see below, n 75.
5. See generally F C von Savigny System des heutigen römischen Rechts VIII (1849), translated by W Guthrie sub tit Private International Law: A Treatise on the Conflict of Laws → (Edinburgh 1869; 2 ed 1880) §§ 351ff; L von Bar The Theory and Practice of Private International Law 2 ed, translated by G R Gillespie (Edinburgh 1892) 119-20; L Wenger Institutes of the Roman Law of Civil Procedure, translated by O H Fisk (New York 1940) § 4n59; H F Jolowicz Roman Foundations of Modern Law (1957) 38-43; Cheshire's Private International Law 8 ed (1970) by G C Cheshire and P M North 16-18.

6. § 357. He says that where a defendant belonged to more than one municipality by origo or domicilium, he was subject to the jurisdiction of each; but clearly only one law could be applicable to him and 'indubitably' this was determined by the origo rather than by the domicilium and the origo by birth rather than by adoption, manumission or election. If he had no principal citizenship, which Savigny, unlike many jurists, holds was possible (§ 351), the lex domicilii applied. What happened if the defendant had then no or more than one domicilium is not clear.
7. See Coleman Phillipson The International Law and Custom of Ancient Greece and Rome I (1911) 273ff.
8. Mason v Mason (1885) 4 EDC 330 at 342.
9. Jooste v Jooste 1938 NPD 212 at 213.
10. Webber v Webber 1915 AD 239 at 242. See also Innes CJ at 243; Solomon J at 249. Cf De Villiers AJA at 258: 'our law does not differ from the English law, largely derived as it is from the civil law', which is couched too dogmatically. See too Ex parte Donnelly 1915 WLD 29 at 32-3.
11. See eg Eilon v Eilon 1965 (1) SA 703 (AD). See text following nn 187, 306. One can but sympathize with the sentiments of Rumpff JA in his dissenting judgment (at 704) that in relation to the test for animus manendi 'Westlake [Private International Law] and the English cases referred to are best left alone'. See too the warning by Williamson JA in his dissenting judgment that English law may not always be a reliable guide (at 706). But, alas, the Roman-Dutch writings often afford scant help.
12. eg § 82 of the Portuguese Civil Code of 1966: 'A person takes the domicile of the place of his habitual residence....'
3. Act 7 of 1953, as inserted by the Wills Amendment Act 41 of 1965. Section 3bis came into operation on 4 December 1970: Proc 306 of 1970.
4. See E Kahn in 1965 Annual Survey 477.
5. See Szászy op cit 119-21. In France ordinary residence: D von Landauer in (1964) 13 ICLQ 6. The German BGB § 7 speaks of 'Wohnsitz', which cannot be translated as 'domicile' but only as 'habitual residence': E J Cohn Manual of German Law I 2 ed (1968) § 106. In Sweden the 'severe criteria' of English (and, semble, South African) law are not applied: Hilding Eek The Swedish Conflict of Laws (1965) 75; see too 129ff. Generally on the domiciliary, nationality and 'mixed' systems of law, see Ernst Rabel The Conflict of Laws: A Comparative Study I 2 ed (1958) 117-29. For a discussion of the meaning of 'habitual residence' see Bhadra G Ranchod 'The Concept of Domicile in South African Law' 1970 Acta Juridica 53 at 73-5.
6. Ian F G Baxter Essays on Private Law, Foreign Law and Foreign Judgments (1966) 124.
7. Innes CJ in Gunn v Gunn 1910 TPD 423 at 427.
8. Per Barry JP in Mason v Mason (1885) 4 EDC 330 at 337. See too Solomon J in Webber v Webber 1915 AD 239 at 249.
9. Below, text to n 279.

20. Whicker v Hume (1858) 7 HLC 124 at 159-60, 11 ER 50 at 64.
21. Doucet v Geoghegan (1878) LR 9 ChD 441 (CA) at 456.
22. Robert A Leflar American Conflicts Law (1968) 17.
23. Bergner & Engel Brewing Co v Dreyfus (1898) 172 Mass 154 at 157, 51 NE 531 at 532, 70 Am St Rep 251 at 254.
24. Dicey & Morris on the Conflict of Laws 8ed (1967) Rule 3 p 78.
25. § 11(1).
26. § 12.
27. At 9. See also at 12. See too H E Read Recognition and Enforcement of Foreign Judgments in the Common Law Units of the British Commonwealth (1938) 6.
28. J D Falconbridge Essays on the Conflict of Laws 2ed (1954) 3 approves it.
29. The Paradoxes of Legal Science (1928) 67.
30. See R H Graveson The Conflict of Laws 6 ed (1969) 187-8. This is clear from Johnson v Johnson 1931 AD 391, where the issue was the domicile of the husband at the time of marriage in order to establish the matrimonial proprietary régime. The court made it clear that domicile in a particular State in the USA had to be established, not in the USA as a whole (at 406).
31. Such as an ordinance on town-planning forbidding certain types of sale of land.
32. Such as the peculiar rules governing the matrimonial proprietary régime in Natal. See H R Hahlo The South African Law of Husband and Wife 3 ed (1969) ch 22.
33. Notably the Notarial Bonds (Natal) Act 18 of 1932.
34. Webster v Ellison 1911 AD 73 at 82, 92-3, 98-9.
35. eg the Orange Free State Provincial Division holds a minor's marriage without consent of guardians void (Van der Westhuizen v Engelbrecht 1942 OPD 191), the other divisions voidable only.
36. See the authorities cited by E Kahn in (1956) 73 SALJ 312.
37. 55 of 1949. See my analysis in the Appendix to Hahlo Husband and Wife 580-1.
38. 22 of 1939. The notion of South African domicile was also employed in the Matrimonial Causes Jurisdiction Act 35 of 1945, but that remedial measure for war-time marriages is to all intents and purposes defunct. See Kahn op cit 532n78.
39. Inserted by s 21 of the General Law Amendment Act 70 of 1968.
40. See Kahn op cit 625.
41. The suggestion is mine; op cit 626.
42. Admittedly this contingency is remote. There are cases where the court has bent the bough - beyond breaking point, it is believed, if domicile means the same thing for every purpose - to find the husband domiciled in its area, where otherwise no South African court would be competent. See Ricketts v Ricketts 1929 EDL 221; Croft v Croft 1930 WLD 201.

43. ... [T]he four provinces [are regarded] as so separate and distinct as to give rise, not to a Union domicile, but a purely provincial one. Each province must be deemed in this respect to be "another country", one might almost say, a "foreign country": per Horwitz AJP in Smith v Smith 1952 (4) SA 750 (O) at 756.
44. (1933) 50 SALJ 458-9.
45. Dicey & Morris Rule 39 p 307.
46. Zelman Cowen & Derek Mendes da Costa Matrimonial Causes Jurisdiction (1961) 30-1 and 'The Unity of Domicile' (1962) 78 LQR 62; P-E Nygh Conflict of Laws in Australia (1968) 67.
47. [1962] VR 70 at 71.
48. At 72.
49. [1968] SASR 243, discussed by 'D St L K' in (1969) 43 Australian LJ 26.
50. Nygh 68.
51. 'D St L K' op cit 26. Mericka v Mericka [1954] SASR 74 at 82-3 lends some support for simple residence.

52. Willis L M Reese 'Does Domicil Bear a Single Meaning?' (1955) ———
55 Columbia LR 589, reprinted in (1955) 2 ———→ Nederlands Tijdschrift voor International Recht 15.

The first person to raise the possibility of an affirmative answer was the iconoclastic American jurist Walter Wheeler Cook. See his The Logical and Legal Bases of the Conflict of Laws (1942) ch VII. He said (at 196): ... as new combinations of facts have presented themselves, more and more unlike the simpler cases from which the development started (ie clearly a "home" and only one "home") the meaning given to the symbol "domicil" has varied with the nature of the problem presented: taxation, divorce, intestate succession, etc, etc.' He contended strenuously that his 'relative' as opposed to the 'single conception' theory of domicile allowed for the meeting of social and economic requirements. Reese argues that for in personam / ^{jurisdiction} domicile of choice should be more easily found to have been acquired than for personal property or inheritance tax. He adduces various American decisions to show there the court manipulated the stated requirements in order to produce an equitable result, through variations in the quantum of proof required to establish a domicile and the drawing of different inferences of fact in the light of the issue involved. Leflar op cit 17 is not unsympathetic. The Private International Law Committee of England in its Seventh Report, Cmd 1955 (1963) § 12, rejected a variable test for domicile.

On the ill-fated suggestion by Buchanan J in Mason v Mason (1885) 4 EDC 330 at 354-5 (see too Kotzé JP in Hooper v Hooper 1908 EDC 474) that an abandoned wife should be able to establish, if not a full, at least a separate forensic domicile, see below § IV.

On the suggestion in Jooste v Jooste 1938 NPD 212 at 216 that the revival of the domicile of origin principle apply only in certain circumstances, see below, n 161. On this principle generally see text following n 141.

R H Graveson 'The Law of Domicile in the Twentieth Century' in The Jubilee Lectures of the Faculty of Law University of Sheffield ed O R Marshall (1960) 85 at 90-1 finds the answer to the query, 'Why should there not be different domiciles for different purposes?' to lie in the need for general concepts and the ability of the courts by admitting and giving weight to different facts in a person's life, to make domicile a fixed legal concept with a variable factual content.

Taking a realist attitude, the Australian writer Nygh (at 65-6) submits:

'Though in formal reasoning our courts have/never suggested that different criteria should be applied depending on the purpose for which domicil is required, it is probably true to say that in actual fact the purpose does often influence the finding. Our courts have, in general, shown reluctance to make a finding of domicil which would result in the invalidity of a will [citing Ramsay v Liverpool Royal Infirmary [1930] AC 588], or the liability of a taxpayer [citing inter alia Winans v A-G [1904] AC 287], but they have been much more ready to find domicil in order to assume jurisdiction in matrimonial causes.'

(Private International Law 2 ed (1950)
Martin Wolff/§ 107) much earlier suggested that in Ramsay 'the decision was influenced by the unexpressed wish of the court to uphold the deceased man's will'.

The 'inarticulate major premiss' suggested for the much-criticized Winans (to be discussed in § II below) can hardly be accepted. It resulted in a loss to the British Treasury of legacy duty on the foreign-situated estate of an American who had been long resident in England. (Admittedly, estate duty had been paid on his English property of over two million pounds.) The decision was probably the result of an aberration on the part of Lord Macnaghten. Professor B A Wortley (Jurisprudence (1967) 80) says that the majority were influenced by the eloquence of counsel, H H Asquith. On matrimonial jurisdiction, however, the realist approach could find support in the South African cases of Croft and Ricketts (above n 42). It would not be unfair to say that in undefended divorce actions judges are (or were) often content with slight evidence of domicile: eg Hawkes v Hawkes (1882) 2 SC 109, Mason v Mason (1885) 4 EDC 330 at 344, McCurrach v McCurrach (1892) 6 HCG 256, Ex parte Hamman (1894) 1 Off Rep 306, Gquiba v Gquiba (1901) 10 EDC 4, Knox v Knox (1907) 24 SC 441 at 443 (but cf Deane v Deane 1922 OPD 41 at 44), Davies v Davies 1922 CPD 323, Bishop v Bishop 1923 CPD 414. [run on]

And could not subliminal forces have been at work ad misericordiam in the decision of the majority in Johnson v Johnson 1931 AD 391 (see § II below) that Johnson at the time of his marriage had not lost his Swedish domicile of origin? It beat out the pathway that was to lead to a finding in favour of the ill-used Mrs Johnson that she had been married in community of property.

54. Cf Dicey & Morris 83-4. See also J H C Morris The Conflict of Laws (1971) 14.
55. No final decision was reached by Goldin J as he held that in any event domicile in Australia had not been proved by the defendant husband.
56. Dicey & Morris 80; Nygh 68, 70.
57. Wolff § 98; Herbert F Goodrich Handbook of the Conflict of Laws 3 ed (St Paul, Minn, 1949) § 31; Pollakin (1933) 50 SALJ 454-5; American Restatement of the Conflict of Laws Second Proposed Official Draft Part I May 1967 (hereafter called Restatement Second) § 11 Comment f.
58. Hutchison's Executor v The Master (Natal) 1919 AD 71 at 76-7, where a bachelor of advanced years was living in the Royal Hotel, Durban; Ley v Ley's Executors 1951 (3) SA 186 (AD) at 195, where a bachelor artisan had to find work in different places and could not be expected to have a dwelling house or permanent lodgings.
59. See Restatement Second §§ 12 Comments d and j, 16; Joseph H Beale A Treatise on the Conflict of Laws (New York, 1935) § 17.1; Wolff § 98.
60. He may have his home in Johannesburg but work in Pretoria. In that event he is domiciled in the area of the WLD as well as that of the TPD. In the reverse situation he is domiciled only in the area of the TPD.
61. Restatement Second § 12 Comments e and f.
62. See Hutchison's Executor v The Master (Natal) 1919 AD 71, esp at 76-7; Ley v Ley's Executors 1951 (3) SA 186 (AD) at 195.
63. Cf Dicey & Morris Rule 3 p 78, Rule 15 p 117; Restatement Second § 13; Falconbridge 130-1. This was possibly decided implicitly (sub silentio?) in Carvalho v Carvalho 1936 SR-219, the argument being advanced that a Portuguese civil servant was domiciled in Southern Rhodesia, where he was resident and stationed, because Portuguese law so held. Lewis J simply applied the law of Southern Rhodesia, according to which he was not domiciled in the colony.
64. In re Annesley [1926] 1 Ch 692; Dicey & Morris 30-2; Cheshire 46-7; Graveson 63; Falconbridge 130-1, 728; Nygh 80; Beale § 10.1; Goodrich § 21; G W Stumberg Principles of Conflict of Laws 2 ed (Brooklyn 1951) 53; A E Anton Private International Law: A Treatise from the Standpoint of Scots Law (Edinburgh 1967) 54.
65. Falconbridge 728-9; Kahn in Hahlo on Husband & Wife 632. See Simons v Simons [1939] 1 KB 490. In the well-known case of Torlonia v Torlonia (1928) 108 Conn 292, 1942 A 843 (E E Cheatham, E N Griswold, W L M Reese and M Rosenberg Cases and Materials on Conflict of Laws 5 ed (1964) 70) the Supreme Court of Connecticut held that the plaintiff wife could bring a divorce suit as she had acquired a separate domicile in the forum according to its law, although according to the lex domicilii of her husband, that of Italy, she followed the domicile of her husband (the rule of South African law too).
66. R H Graveson 'Capacity to Acquire a Domicile' (1950) 3 ILQ 149. See also his Conflict of Laws 195; E M Clive ⁱⁿ 1966 Jur Rev 1 at 9-12.
67. See Dicey 107-8; Cheshire 180; Nygh 80-1; Restatement Second § 13, especially Comment d.
68. Haque v Haque (1962) 108 CLR 230 at 240.
69. Conflict of Laws 195.

- 70. Or a man. See Banubhai v Chief Immigration Officer, Natal (1913) 34 NLR 251. The son of B, a Natal domiciliary, at the age of 9 entered into a marriage in India, where he then resided, but it was held that immediately thereafter he still took his father's domicile. Though no express reason was given for this decision, from the remarks of Gardiner AJ at 266-7 it appears that the marriage, though it may have been valid by the lex loci celebrationis, was not recognized, as child marriages are against our public policy.
- 71. Cf Restatement Second § 13 Comment d.
- 72. Above, text to n 53.
- 73. See Mason v Mason (1885) 4 EDC 330 at 337; Dicey & Morris Rule 4 pp 81-2; Cheshire 159; Graveson 193; Leflar 16; Restatement Second § 11(2); Nygh 65. Article 1(1) of the abortive Draft Code of the Law of Domicile in the First Report of the Private International Law Committee of England, Cmd 9068 (1954) read: 'Every person shall have a domicile but no person shall have more than one domicile at the same time.' It is, however, a rule that requires qualification, as has been seen.
- 74. But cf Goldin J in Smith v Smith 1970 (1) SA 146 (R) at 147: 'It has frequently been laid down that no person can be without a domicile because the law will attribute a domicile to him.' But he cited only Dicey and Wille's Principles.
- 75. D 50.1.27.2. See Pothier Pand 50.1.18; Savigny System VIII § 354; Bar § 46.
- 76. See Savigny op cit § 354nd.
- 77. eg Bartolus ad Cod 3.15.1, 11.48(47).2; Calvinus Lexicon Iuridicum sv vagabundus: 'vagabundum intelligit, cui nec certum domicilium, nec constans habitatio est.' See also Helen Waddell's fascinating The Wandering Scholars 6 ed (1932), dealing with the vagantes, the roaming Latin poets of the later Middle Ages.
- 78. Woorden-tolk sv vagabonden.
- 79. De iure conj, Prael 2 (pars alt) 1.2 p 105. See further below, text to n 528.
- 80. II-Ne 302 p 136.
- 81. (1885) 4 EDC 330 at 354.
- 82. 1902 TH 165 at 175.
- 83. 1912 TPD 805 at 807-8.
- 84. 1937 TPD 35 at 37.
- 85. III(2) (ie Rotterdamsche Derde Deel) cons 317 (sc 217) n9. See also ibid 138 and 196 (Gr Opinions (De Bruyn) no 9).
- 86. Manier van Procederen 4.24.15.6.
- 87. 5.1.92, 50.1.3.
- 88. Erwin Spiro 'Domicile in South African Law: A Critical Study' 1962 Acta Juridica 62 at 65.
- 89. 6.4.40.2,3. See William Burge Commentaries on Colonial and Foreign Law 1 ed (London 1839) I 34. According to A A Roberts A South African Legal Bibliography (1942) 73, 'although he was a German jurist he is freely quoted by practically all the well-known Roman-Dutch writers'. See further H von Weber 'Einige Bemerkungen

Uber Benedict Carpov' (1963) 26 THR-HR 40. Spiro (1962 Acta Juridica 72) contends that the 'domicilium originis' mentioned by Carpovius is the origo of Roman law.

90. Holl Cons III(2) cons 138, 196 (Gr Opinions (De Bruyn) no 9), 317(217); J Voet 5.1.98,99.

91. § 11.1.

92. See Pollak in (1933) 50 SALJ 474-5. That this does not apply to Continental countries that invoke the lex patriae as the personal law (Wolff § 99) is perfectly understandable.

It is significant that our courts, if need drives, will find a domicile on the slightest evidence. See below, § V.

93. L Raape Internationales Privatrecht 5 ed (1961) 73.

94. System VIII § 359.

~~The~~ last four words cater for the situation raised in Smith v Smith above, text to n 55.

The word 'operative' is used if our law adheres to the rule of the revival of the domicile of origin on the loss of a domicile of choice or dependence without its replacement by such a domicile. In that event everyone has a latent domicile of origin.

For persuasive material see Dicey & Morris Rule 5 pp 82-4; Cheshire 160; Graveson 193-4; Draft Code of the Private International Committee of England art 1(1) (above, in n 73); Leflar 16; Restatement Second § 11(2); Nygh 65; Pollak / (1933) 50 SALJ 474.

In French law (Code civil § 7(2)) and all Continental legal systems derived from it only one domicile is permitted. German law, however (BGB § 7(2)), allows a plurality of domiciles. So too Portuguese law: Civil Code § 82. But it must be borne in mind that domicile plays a very minor role in the German conflict of laws and has the meaning of headquarters or principal home.

What follows is based on my note 'Multiple Domiciles' (1965) 82 SALJ 147.

96. See text to n 55 above.

97. § 46.

98. See D 50.1.5, 50.1.62, 50.1.27,2; C 10.39.5,6; Savigny System VIII § 354.

99. By Coleman Phillipson The International Law and Custom of Ancient Greece and Rome (London 1911) I 248, relying on D 50.1.5, and comparing 50.1.6.2.

He also contends that in later Roman law it was less common to find two concurrent domiciles.

100. See Radelant Dec Cur Ult 126 n 4; Faber ad Cod 2.2.2nl; Peckius Verhandelingh van besetten 39.4; Van Zutphen Practyck Ned sv Domicilie no 4; Merula Manier van proced 4.24.15.5, 4.40.3.14; → Van Leeuwen Cens For 2.1.125, → RHR 5.6.1; Rodenburg De jure conj, Tract nrael 2.2.1 → p 33, 2.5.16 → p 93; P Voet De statutis 9.1.9; Christinaeus Comm in leg munic 5.4.3; Wesel De con bon soc I 103 p 37; J Voet ad Pand 38.17 → App 34, 5.1.92; Vromans De foro compet I 4 p 134; Holl Cons

III(2) (Rott ed) cons 138n 23; Bynkershoek Obs Tum II no 1371; Schomaker Cons IV cons 36 nn 44-5; Van der Keessel Dictata ad Gr 1.2.27 → (Pret ed I pp 138-9, Meijers ed p 32).

101. loc cit.

102. Ad Pand 38.17 → App 34, citing Rodenburg De jure conj, Prael 2.2.1 → in fine and 2.5.16 → in med and P Voet De statutis 9.1.9.

103. Even so, with concurrent residences, which is not a remote contingency, probably the only operative one is the home where the propositus is present at the time - see Ngudi v Temba (1905) 22 SC 574. But again there is the possibility that he is present in none of them.

104. loc cit.

105. op cit 4.40.3.14. See also J Voet 5.1.92.

106. loc cit.

107. loc cit.

108. eg Van Zutphen loc cit; Peckius loc cit; Vromans De foro compet I 4 p 135; Van Leeuwen Cens For 2.1.12.5, → R.H.R. 5.6.1; Radelant loc cit; Peckius loc cit. See too J Voet 5.1.92.

109. Ex parte Donelly 1915 WLD 29 at 32; Webber v Webber 1915 AD 239 at 242.

110. 1965 (1) SA 703 (AD). Speaking for the majority of the court, Potgieter AJA said (at 721): 'In the case of Webber v Webber 1915 AD 239 at 242, Innes CJ, in an obiter dictum, referring to the law of England, pointed out that no man can at any particular time have more than one domicile. On the facts of this case, it is, however, not necessary to decide whether or not in our law the possibility of dual domicile exists.' Speaking for the dissenting two judges of appeal, Williamson JA also expressly left the matter open (at 706).

111. Erwin Spiro in 1962 Acta Juridica 66-9.

112. Ad Pand 38.17 App 34.

113. Those of the Argentine, Brazil, Chile, Columbia, Ecuador, Nicaragua, Peru and Uruguay.

114. See eg Phanor J Eder American-Columbian Private International Law (1956) ch IV.

115. loc cit: 'Nam cum statuta utriusque domicili contraria sint, non potest eorum ratio haberi.'

116. Eilon v Eilon 1965 (1) SA 703 (AD) at 721, per Potgieter AJA.

117. Mason v Mason (1885) 4 EDC 330 at 349.

118. Savigny System VIII § 359.

119. The crucial time is birth, not majority: Henderson v Henderson [1967] P 77.

120. D 50.1.1pr; C 10.38.3; Christinaeus Dec V dec 33 and Comm in leg munic 5.9.5; J Voet 5.1.91; Holl Cons III(2) cons 317(217) n 8.

121. See Govu v Stuart (1903) 24 NLR 440 at 442. Cf C 10.31.36; Nieuw Ned advysboek (Kop) no 32 p 170; J Voet 5.1.91; Holl Cons III(2) → cons 317(217) n 8; Savigny System VIII § 353. There appears to be a suggestion in Robarts v Robarts (1903) 17 EDC 132 at 135 (and John Westlake A Treatise on Private International Law 7 ed (1925) § 261 is unequivocally of this view) that if the father changes his domicile during the minority of his child the child's domicile of origin changes accordingly. But this cannot be supported. See Dicey & Morris 85; Wolff § 117; Cheshire 177; Graveson 198; J Foster in (1935) 16 BYBIL 87.
122. See Govu v Stuart (1903) 24 NLR 440 at 441. See too D 50.1.9; Voet 5.1.91; Savigny System VIII § 353; Erwin Spiro Law of Parent and Child 3 ed (1971) 125; Dicey & Morris Rule 6 p 84; Cheshire 176; Graveson 197; Restatement Second § 14(2).
123. There is no South African authority. This is the view of Dicey & Morris Rule 6 p 84; Cheshire 176; Graveson 197; Wolff § 100; Nygh 69; Restatement Second § 14(2), and seems reasonable. See Pollak in (1934) 51 SALJ 12n103.
124. Spiro 124.
125. See below § IV (b).
126. At 125: '... one cannot ignore the order of court for which there must have been very strong reasons.' Originally Spiro plumped for the mother's domicile at birth: [run on], 'Domicile of Minors Without Parents' (1956) 5 ICLQ 196 at 197.
127. By Wolff § 114; Goodrich § 37. Graveson 199 is sympathetic but doubts if the English courts would so hold. The original American Restatement of 1934, § 34 Comment c. was to the same effect, but Restatement Second is silent. Many English writers state flatly that although the father's domicile will be followed by the child after legitimation, the child's domicile of origin remains that of the mother; eg Dicey 85; Westlake §§ 246-7; Clive M Schmitthoff The English Conflict of Laws 3 ed (1954) 93.
128. See s 11 of the Births, Marriages and Deaths Registration Act 81 of 1963, which allows for registration of the birth 'as if such person's parents had been legally married to each other at the time of his birth'. See generally Spiro 42, 116.
129. It is the view of Spiro. See at 125. See also at 42.
130. By Spiro 19, 41, 125.
131. See H R Hahlo and Ellison Kahn The Union of South Africa: The Development of its Law and Constitution (1960) 369.
132. New South Wales Adoption of Children Act 1965 s 39(2), Victoria Adoption of Children Act 1964 s 35 and Queensland Adoption of Children Act 1964 s 31(2).
133. 33 of 1960. See especially s 74(2).
134. See Erwin Spiro The Children's Act 1960 (1965) 68 and Law of Parent and Child 3 ed (1971) 125. See too Wolff § 117; Dicey & Morris 85; Restatement Second § 14 Comment d, esp Illustration.
135. See Restatement Second ibid.

136. See Fielding's Tom Jones.
137. Savigny System § 359 in fine can be read in support. Also supported by Spiro Westlake § 248; Dicey & Morris Rule 6 pp 84-5; Cheshire 476; Graveson 198; Nygh 69.
138. Re McKenzie, Deceased (1951) 51 ER (NSU) 293. See too Westlake § 248.
139. ie by loss of both residence and the animus manendi or, more strictly, animus manendi aut revertendi. Mere loss of residence does not suffice. Thus in Briscoe v Briscoe 1944 GWL 4 twelve years' absence from the domicile of origin was held not to constitute abandonment of it, owing to the presence of the animus revertendi.
140. § I.
141. See Holl Cons III(2) cons 138, 196 (Gr Opinions (De Bruyn) no 9), 317(217); J Voet 5.1.98,99. Cf Carpzovius's view - text to n89 above.
142. Mason v Mason (1885) 4 EDC 330 at 337, 347; Laughlin v Laughlin (1903) 24 NLR 230 at 239; Moncrieff v Moncrieff 1934 CPD 208; Dreyer v Dreyer 1936 EDL 384. This rule is supported, as was seen by Carpzovius Resp jur elect 6.4.40.2,3.
143. Mason v Mason (1885) 4 EDC 330 at 337, 347; Laughlin v Laughlin (1903) 24 NLR 230 at 239; Forster v Forster and Wheeling (1905) 26 NLR 124 at 125; Gunn v Gunn 1910 TPD 423 at 427; Ex parte Sandberg 1912 TPD 805 at 809 (all the forgoing dicta being obiter); Ex parte Donnelly 1915 WLD 29. See too Hutchison's Executor v The Master (Natal) 1919 AD 71 at 74. See further n158 below.
144. In Monroe v Douglas (1820) 5 Madd 379 at 405, 56 ER 940 at 949.
145. Op cit I 34.
146. Joseph Story Commentaries on the Conflict of Laws § 47.
147. See eg Cheshire 34-5; Nygh 60.
148. (1869) LR 1 Sc App 441.
149. Followed eg in King v Foxwell (1876) 3 ChD 518; Harrison v Harrison [1953] 1 WLR 865; In the Estate of Fuld (No 3) [1968] P 675. See Dicey Rule 10(2) pp 105-6; Cheshire 174-5; Graveson 199; Anton 167, 169-70 (who points out that it is the rule applied by the Scottish courts).
150. At 450.
151. At 458.
152. At 454-5. These words were used by Barry JP in Mason v Mason (1885) 4 EDC 330 at 337.
153. Beale I § 23.1; Goodrich § 25; Stumberg 33; Leflar § 10; the first Restatement § 23; Restatement Second § 19. See In re Estate of Jones 192 Iowa 78, 18 NW 227 (1921). (Cheatham et al 25).
154. System VIII § 359.
155. 1915 WLD 29.

156. By Spiro in 1962 Acta Juridica 69-75. He invokes as persuasive matter the identical or a similar rule in the legal systems of Switzerland, Turkey, Venezuela, Japan, Chile, Colombia, Ecuador, Nicaragua, Peru, Uruguay, Portugal and the Netherlands (see BW § 74). But again it must be said that the persuasive force of these Code provisions in countries which have a different notion of domicile and some of which espouse the lex patriae as the personal law cannot be great.
157. This is the explanation of Van Leeuwen Cens For 1.3.12.5 → and RHR 3.12.10 of the domicile of a traveller whose domicile was not known and who died on the East Indies route being deemed to be at the place of departure. Spiro uses it as support for his theory (at 74-5).
158. Mason v Mason (1885) 4 EDC 330 at 337, 347; Laughlin v Laughlin (1903) 24 NLR 230 at 239; Forster v Forster^{and} Wheeling (1905) 26 NLR 124 at 125; Gunn v Gunn 1910 TPD 423 at 427; Ex parte Sandberg 1912 TPD 805 at 809; but cf McCurrach v McCurrach (1892) 6 HCG 256, which can be cited in support of the American doctrine (see Pollak (1934) 51 SALJ 23-4n158a). This case, however, was criticized by Kotzé JP in Ex parte Standing 1906 EDC 169 at 179 on the ground that the domicile of origin should have been held to be assumed as a rule of law.
159. At 33.
160. At 30-1.
161. Several reported decisions are indecisive, as they in effect hold that the last domicile, which happened to be the domicilium originis, has continued, despite its abandonment: eg Smith v Smith 1970 (1) SA 146 (R) (here it was common cause between counsel that Rhodesia was the domicile of origin (see at 147C-D) though the court alluded to the possibility that it was his domicile of choice (at 147E-F). But Goldin J seems to veer in the direction of Donnelly: 'It is not sufficient to prove that he has abandoned his domicile of origin but he must prove on a balance of probabilities that he has acquired a domicile of choice' (at 147). In Jooste v Jooste 1938 NPD 212 Selke said (at 216) that he was not satisfied that in deciding what was a person's provincial domicile within South Africa one was bound 'to have regard to their entirety to the principles of International Law which regulate the revival of a domicile of origin'. If, as appears, the learned judge was thinking of a different rule to fill the gap in different situations (eg whether the domicile of origin is South African or foreign, reviving in the latter but not the former case) it is an interesting via media, but one not really acceptable, because of the superior overall merits of the continuance of the last domicile rule. En passant, one may ask what principle of international law compels our courts to acknowledge the revival of the domicile of origin. In Massey v Massey 1968 (2) SA 199 (T) at 204 Jansen J simply assumed for the purpose of his decision that the doctrine of the revival of the domicile is part of South African law. He specifically made no pronouncement.

162. Dacey & Morris 106; Cheshire 174-5 and (1945) 61 LOB 363-4; Wolff § 105; Graveson 200-1.
163. First Report, Cmd 9068 (1954) § 14 and Draft Code art (5). Unfortunately, no reasons were given for the conclusion. The Seventh Report (Cmd 1955 (1963)) does not disapprove, but the matter was not squarely before the Committee then.
164. (1869) LR 1 Sc App 441 at 450.
165. See In re Estate of Jones 192 Iowa 78, 178 NW 227 (1921) (Cheatham et al 25):
'... a person who in these days abandons his domicile of origin and acquires a legal domicile in another jurisdiction is, presumably, at least, familiar with the laws of the jurisdiction of the latter jurisdiction....'
166. Ronald H Graveson 'The Comparative Evolution of the Principles of the Conflict of Laws in England and the U.S.A.' (1960) I Recueil des Cours, Academie de Droit International (vol 99) 21 at 43.
167. [1904] AC 287 at 294.
168. See Cheshire 175; Graveson Jubilee Lectures 86, 95.
169. See In re Estate of Jones (supra).
170. 1965 (1) SA 703 (AD) at 705.
171. Wolff § 100.
172. Cf Stumberg 34-5. J Willis (1936) 14 Canadian Bar R 5-6 argues that the American rule is more appropriate to Canadian conditions. Leflar § 9 says: 'In the United States, increasing mobility of the citizenry is decreasing the importance attached to the socio-political idea of each person's having a preeminent headquarters at some one place.... Most of the states are becoming used to the fact that a large proportion of the human beings who at any given moment are working, playing or loafing within their borders will have ties with other states as well.'
173. See above text preceding n 52.
174. See below, n 566.
175. Under s 6 of the Departure from the Union Regulation Act 34 of 1955 a person who leaves the country on a 'no-return' exit permit becomes a prohibited person under the Admission of Persons to the Union Regulation Act 22 of 1913 and in terms of the South African Citizenship Act 44 of 1949 s 15 loses his citizenship.
176. The illustration of 'bizarre results' of the American rule by Morris 16 is not convincing, however.
177. 22 of 1939.
178. The Recognition of Divorces and Legal Separations Act 1971 s 3(2). Previously recognition would have been afforded under Indyka v Indyka [1969] 1 AC 33, the rule in which has been abolished by this statute.
179. 70 of 1968.
180. 22 of 1939. See s 1(1A).
_{in}
181. Cf E Kahn/(1953) 70 SALJ 63.
182. (1869) LR 1 Sc App 441 at 450.
183. § 25.

184. Ley v Ley's Executors 1951 (3) SA 186 (AD), overruling Johnson v Johnson 1931 AD 391. It is true that Ley was concerned only with the acquisition of a domicile of choice, but the court laid down that the standard of proof in all civil matters is a balance of probabilities. Smith v Smith 1970 (1) SA 146 (R) was probably concerned with a domicile of origin (see at 147C-D but cf 147E-F). Howard v Howard 1966 (2) SA 718 (R) was not really concerned with loss of a domicile of origin (that must have been in England - see at 719) but with a domicile of choice following on a long domicile of dependence. Thus the dicta at 721 on the standard of proof of a loss of domicile or origin are really obiter.
185. Alciatus Op om XXI p 1119 (ed 1617); Mascardus De probacionatis II conclusio 535 n 1; Christinaeus Dec V dec 31 nn 12, 13; J Voet 5.1.92,97; Holl Cons III(2) cons 138 nn 21, 22; Schomaker Consultatien I cons 1.1. See too Johnson v Johnson 1931 AD 391 at 398. This will be a rebuttable presumption of law of the type that places an onus of disproof on the other side. Cf L H Hoffmann The South African Law of Evidence 2 ed (1970) 372.
186. Hull v McMaster (1866) 5 Searle 220 at 224; Webber v Webber 1915 AD 239 at 242, 258; Hutchison's Executor v The Master (Natal) 1919 AD 71; Nash v Nash 1935 (1) PH B4 (C); Ochberg v Ochberg's Estate 1941 CPD 15 at 38. See too Schrassert Consultatien cons 94 n 3; Ex parte Hamman (1894) 1 Off Rep 306 (apparently domicile of origin); Clear v Clear 1913 CPD 835 at 839; Eilon v Eilon 1965 (1) SA 703 (AD) at 719.
187. Menochius De praesumptionibus 6.42.12, De arbitrariis iudicium II cas 86; Christinaeus Dec V dec 31 n 12; Schrassert Consultatien cons 94 n 5; Schomaker Consultatien I cons 1 n 1, V cons 21 n 4; Mason v Mason (1885) 4 EDC 330 at 337; Etheridge v Etheridge (1902) 23 NLR 180 at 184; Ex parte Standring 1906 EDC 169 at 174; Wooldridge v Ellemor 1909 TH 158; In re Gandu (1910) 31 NLR 428 at 432; Van Straaten v Van Straaten¹⁹¹¹ TPD 686 at 689; Webber v Webber 1915 AD 239; Deane v Deane 1922 OPD 41 at 43; Ex parte Gibson 1936 SR 71; Jooste v Jooste 1938 NPD 212 at 215-16; Lewis v Lewis 1939 WLD 140 at 142-3; Cook v Cook 1939 CPD 314 at 316; Thompson v Thompson 1940 SR 187; Smith v Smith 1952 (4) SA 750 (O), esp. at 753; Eilon v Eilon 1965 (1) SA 703 (AD) at 719. See too Mason Gordon v Mason Gordon 1945 TPD 62 at 64-5.
188. First Report, Cmd 9068 (1954) §§ 9, 10.
189. Per Lord Macnaghten in Winans v Attorney-General [1904] AC 287 at 290.
190. Cheshire 173.
191. Cheshire (1951) 4 ILQ 56. In Henderson v Henderson [1967] P 77 at 82 Sir Jocelyn Simon P spoke of 'the tenacity [of the domicile of origin] which tends to produce some anomalies in contemporary conditions - for example, procuring that a married man's fortune is taxed in accordance with the fiscal code of a society with which he may for long have ceased to identify himself, to the detriment of the society the benefits of which he may have enjoyed for many years...'

192. 1915 AD 239 at 243. Italics added. Cited with approval by Sutton J in Ochberg v Ochberg's Estate 1941 CPD 15 at 38. '... [Had] ... Johnson at the date of the marriage ... formed a fixed and settled purpose, a determination, a final and deliberate intention to abandon his Swedish domicile and settle in the State of New Jersey?': per De Villiers CJ in Johnson v Johnson 1931 AD 391 at 399.
193. Per Sutton J in Ochberg v Ochberg's Estate 1941 CPD 15 at 38.
194. Megarry J has objected to animus non revertendi as too rigorous a requirement because departure sine animo revertendi is not catered for: Re Flynn [1968] 1 All ER 49, [1968] 1 WLR 103. But the distinction he draws between a positive intention not to return and (what he considers correct) a 'merely negative absence of any intention' is, with respect, non-existent. See Cheshire 173.
195. See Gantlives CJ in Ley v Ley's Executors 1951 (3) SA 186 (AD) at 193 - 'contemplate returning to England for the purpose of remaining there'. Also at 194: 'leaves his country of origin intending never to return to it....'
196. See below, text following n 244.
197. 1951 (3) SA 186 (AD). See esp at 194, where this occurrence is specifically adverted to. See too Smith v Smith 1970 (1) SA 146 (R) at 150, where the domicile of origin was probably involved.
198. At 193. The concurring judges were Schreiner JA and De Villiers AJA.
199. 1931 AD 391.
200. Per De Villiers CJ, delivering the majority judgment, at 407.
201. He found (at 409-10) that save for the probable hope of accumulating a fortune or a competency and so being able to return to his native land, his break with Sweden when he disembarked at New York in November 1890 was complete - Johnson never entertained the idea of employment in Sweden thereafter and he gave up the seafaring life for ever. 'The difficulty does not lie on the side of his severance from his native home, it lies rather in the possible doubt as to his intention to settle in New Jersey where he was living at the time of his marriage' (at 410).
202. At 409-10.
203. Gantlives CJ rightly points out in Ley v Ley's Executors 1951 (3) SA 186 (AD) at 193 that 'the finding that it had not been proved that the de cuius had ever intended to abandon his domicile was, of course, decisive'. What De Villiers CJ said thereafter about the non-acquisition of a domicile of choice in New Jersey would seem to be obiter. Pollak is wrong when he says that on the facts as found 'Johnson had no intention of returning to Sweden' ((1933) 50 SALJ 466).
204. At 404.
205. At 406.

206. Unfortunately the court may have laid down a higher degree of proof and if so it was incorrect, it was held in Ley v Ley's Executors 1951 (3) SA 186 (AD) at 192-3.
207. For an even more striking refusal to find an abandonment of a domicile of origin see Andrew v Andrew 1905 ORC 40.
208. 1965 (1) SA 703 (AD).
209. Per Potgieter AJA at 721.
210. At 705.
211. At 709, 707.
212. Kennedy J and Phillimore J/ⁱⁿ(1900) 83 LT 634; Collins MR, Stirling LJ and Mathew LJ/ⁱⁿ (1901) 85 LT 508 (CA). This was adverted to in Ley v Ley's Executors 1951 (3) SA 186 (AD) at 191.
213. [1904] AC 287 at 300.
214. At 295.
215. At 298.
216. See First Report of the Private International Law Committee of England, Cmd 9068 (1954) § 9.
217. At 164. Cited in an earlier edition by Williamson JA in Eilon's case (supra) at 707.
218. The only author I have discovered to praise Lord Macnaghten is Nygh: 'This decision can be defended on the ground that the contingency which may impel a return to one's homeland must in the first instance be assessed subjectively' (at 72). But what of the realities?
219. [1930] AC 588.
220. [1970] P 198 at 208
221. At 598. 'Winans and George Bowie (Ramsay) were dead when the House of Lords pried into their earthly pilgrimage and so were unable to speak for themselves' ('IDW' in (1961) 73 Jur Rev 260). → The facts should then be allowed to speak.
222. § 46 eighthly.
223. First Report of the Private International Law Committee of England, Cmd 9068 (1954) § 12.
224. (1878) 9 ChD 441 (CA).
225. Per James LJ at 457. See too Rankin v Rankin 1960 SLT 308 at 310, per Lord Guest.
226. [1895] IR 379.
227. ^{Per} Frazer CJ in In re Dorrance's Estate 309 Pa 151, 163 A 303 (1932) (Cheatham et al 55 at 60).

228. The English Private International Law Committee in its First Report § 10 spoke of 'the modern tendency of the courts [in England and Scotland] to avoid the strict application of the rules laid down in Winans' and Ramsay's cases ...'. But it is not easy to find much proof of relaxation of judicial attitudes. 'It has never been considered a matter of small moment, or one capable of being established by light proof', said Lord Patrick in Willar v Willar 1954 SC 144 at 151, 'that a man has abandoned his domicile of origin and acquired a domicile of choice.' See too Jenkins LJ in Travers v Holley [1953] P 246 (CA) at 252, who said that the loss of a domicile of origin is 'a serious step which is only to be imputed to a person upon clear and unequivocal evidence'. But Rankin v Rankin 1960 SLT 308 does veer away from the rigidity of Winans and Ramsay.
229. Per Sir John Nicholl in Stanley v Bernes (1830) 3 Hagg Ecc 373 at 438, 162 ER 1190 at 1217.
230. ← Moreland v Moreland (1901) 22 NLR 385 at 387.
231. ← Webber v Webber 1915 AD 239 at 265, citing Lord Macnaghten in Winans's case (supra) at 291. Cf Davis J in the Saskatchewan Court of Queen's Bench in Gunn v Gunn and Savage (1955) 16 WWR 44 at 46, who 'inclined to the view that stronger evidence would be required to establish a change of domicile from one province to another than in the case of moving to a foreign state. One does not lightly sever relationship with one's homeland, and the reasons are usually apparent, whereas it is not unusual to move about one's homeland in the pursuits of business or in search of employment.' This view is criticized as being against the prevailing attitude in Canada, England and Australia by M R K Hossie in (1956) 34 Canadian Bar R 210.
232. D 50.1.20 → ('domicilium re et facto transfertur, non nuda contestatione'); 50.1.27.1; → C 10.39.2,3,4; → Weatherley v Weatherley (1879) Kotzé 66 at 76-7; Mason v Mason (1885) 4 EDC 330 at 345; Forster v Forster and Wheeling (1905) 26 NLR 124; Webber v Webber 1915 AD 239 at 242; Johnson v Johnson 1931 AD 391 at 398; Ochberg v Ochberg's Estate 1941 CPD 15 at 37-8; Eilon v Eilon 1965 (1) SA 703 (AD) at 719-20.
233. D 50.1.20; Mason v Mason (1885) 4 EDC 330 at 337; Seebratan v Fakira (1907) 28 NLR 529 at 530; Wooldridge v Ellemor 1909 TH 158; Jooste v Jooste 1938 NPD 212 at 217.
234. Holl Cons III(2) cons 138 n 27. There are many South African cases in which long absence from a domicile of choice was held not to constitute an abandonment of it, owing to the existence of the animus revertendi eg De Senan v De Senan (1908) 18 CTR 759; Ex parte Record 1936 SR 1 (six years' absence); Warren v Warren 1942 (2) PH B58 (W) (six years' absence).

235. Van Leeuwen RHR 3.12.10; Schrassert Consultation cons 54 nn 75-7; Forster v Forster and Wheeling (1905) 26 NLR 124.
236. In Re Flynn [1968] 1 All ER 49, [1968] 1 WLR 103 Megarry J said that the domicile of *choice* is ended when residence ceases with the termination ('withering away') of the intention to return. There need not be the formation of a positive intention not to return. 'In short, the death of the old intention suffices, without the birth of any new intention' (at 58 All ER). Cheshire 173 finds this suggested distinction between animus non revertendi and absence of an animus revertendi fallacious. '[T]here must always be a positive intention not to return... Irresolution effects nothing.' Some writers (eg Graveson 212) find the distinction tenable. A comment in (1964) 41 Australian LJ 466 says that the distinction exists but is very rarely relevant, and the more lenient test advocated by Megarry J allows more scope for the much-criticized rule of the revival of the domicile of origin. If our rule is, as suggested, the continuance of the last domicile, the distinction, if it is tenable (which is doubtful), will be of little significance in practice.
237. Ley v Ley's Executors 1951 (3) SA 186 (AD); Eilon v Eilon 1965 (1) SA 703 (AD) at 719. See too Burge I 55 - 'preponderating intention to acquire a domicile'.
238. See above, n 187.
239. See the authorities cited in nn 186, 187 above.
240. See Lewis v Lewis 1939 WLD 140 at 143; also Moreland v Moreland (1901) 22 NLR 385 at 387. In Smith v Smith 1952 (4) SA 750 (O) Horwitz AJP said (at 755) that this was at best a subsidiary point, constituting an 'inducia' [*sic: sc indicium*] of minor import, which might be helpful in weighing the scale one way or another when more important 'induciae' [*sc indicia*] create a doubt.
241. See Henderson v Henderson [1967] P 77 at 82-3.
242. Per Millin J in Lewis v Lewis 1939 WLD 140 at 143. Cited with approval in O'Mant v O'Mant 1947 (1) SA 26 (W) at 28.
243. *Ibid.*
244. 1945 TPD 62 at 64-5.
245. Cf the passages from the judgments of Rumpff and Williamson JJA in Eilon (*supra*) at 705 and 709, cited above, text to nn 210, 211.
246. At 68. See too Ex parte Rowland (1937) 54 SALJ 254 (T); Ex parte Gibson 1936 SR 71.
247. 1951 (3) SA 186 (AD) at 194-5.
248. (1861) 30 LJE 284 at 292. (The passage does not appear in 6 H & N 733.)
249. At 193.
250. 1965 (1) SA 703 (AD).
251. My italics.

252. Per Potgieter AJA at 720.
253. At 721.
254. My italics.
255. See In the Estate of Fuld, Deed (No 3) [1968] P 675 at 684-5.
256. 1966 (2) SA 718 (R) esp at 722, per Goldin J.
257. At 722.
258. 1947 (1) SA 26 (W).
259. Per Clayden J at 30.
260. Dicey & Morris 87; Wolff § 102. See J D McClean in (1962) II ICLQ 1157-60.
261. Utr Cons II cons 97 n 3; Cook v Cook 1939 CPD 314 at 316.
262. U Huber Prael II 5.1.44 p 216; J Voet 5.1.98; Holl Cons I cons 294, III(2) cons 4,5, IV cons 271; Utr Cons I cons 73 n 12; v d Berg Ned Advysboek III no 113 p 268; Savigny System VIII § 353. See eg Ex parte Standring 1906 EDC 169 at 175; Banubhai v Chief Immigration Officer, Natal (1913) 34 NLR 251 at 262.
263. C 10.39.2.
264. Nieuw Ned Advysboek (Kop) no 32 p 165; U Huber Prael II 5.1.44 → p 216; Vromans De fore connet I 4 p 133; Ontwerp 1820 § 107. See too Bernburg Pandekten I § 46. Cf Holl Cons III(2) cons 138 nn 22, 24, where it is stated that two years' habitation is presumptive evidence, but can be rebutted if the animus revertendi is shown to exist.
265. Van Straaten v Van Straaten 1911 TPD 686 at 689; Cook v Cook 1939 CPD 314 at 316; Smith v Smith 1952 (4) SA 750 (O) at 754.
266. Per De Villiers AJA in Webber v Webber 1915 AD 239 at 264.
267. Per Bristowe J in Van Straaten v Van Straaten 1911 TPD 686 at 688-9.
268. Per Lord Macmillan in Ramsay v Liverpool Royal Infirmary [1930] AC 588 at 598. For the facts see above, text following n 219.
269. Shapiro v Shapiro 1914 WLD 38; Clayton v Clayton 1922 CPD 125. See too Beale I § 16.4. There are some USA decisions contra: see Cheatham et al 30-1.
270. 1938 NPD 212.
271. At 216.
272. Pothier Intro général aux contumes X; Beale I § 15.2: 'If the fact and the intention concur, even for a moment, the change of domicil takes place,'
273. (1888) 31 W Va 790, 8 SE 596, 13 Am St Rep 896 (Supreme Court of Appeals of West Virginia). See Cheatham et al 10; Ernest G Lorenzen Cases and Materials in the Conflict of Laws 4 ed (St Paul, Minn, 1937) 13.
274. See Lord Westbury in Udny v Udny (1869) LR 1 Sc App 441 at 458; Wolff § 109; Goodrich § 26. As Wolff points out (p 114n5), it is analogous in this respect to the acquisition of possession corpore et animo, in which the one element may follow the other.

275. § 45.
276. 1965 (1) SA 703 (AD) at 714.
277. See Donaldson v Donaldson [1949] P 363; Wolff § 109; Graveson 206.
278. See Dicey & Morris 90; Graveson 206. Cf Voet 5.1.98, below, n 286.
279. Translated by Scott thus: 'There is no doubt that individuals have their domicile where they have placed their household goods and the greater part of their property and fortunes, and no one shall depart from thence unless something requires him to do so, and whenever he does leave the place, he is considered to be on a journey, and when he returns, to have completed it.'
280. Ad Cod 10.40(39).2.
281. Gane's translation reads: '... domicile ... the place ... in which he has set up his home and the main body of his property and fortunes, from which he is not likely to depart if nothing calls him away and which when he has left he appears to be travelling abroad.'
282. Brissonius Lexicon sv domicilium; Vicat Vocabularium juris sv domicilium.
283. Gane's translation reads: '... domicile ... properly so called ... is that which one establishes for oneself with the intention of not leaving it if nothing calls one away....'
284. 2.1.12.5: 'Domicilium quis habet, ubi laerem, rerumque ac fortunarum suarum summam constituit, unde non sit discessurus, si nihil avocet.'
285. Cons 94 n 8, where he speaks of 'cum animo inde rursus non discedendi, si nihil avocet'.
286. Gane's translation of the full relevant passage reads: 'It is certain that domicile is not established by the mere intention and design of the head of the household; nor by mere formal declaration without fact or deed; nor by mere getting ready of a house in some country; nor by mere residence without the purpose to stay there permanently.'
287. Ad D 50.1.20.
288. Ad D 50.1.17.1.
289. Cons I cons 7.
290. Defin For 1.3.18, 3.38.18.
291. Consultation cons 94 n 11. See too Vattel 1.19.22.
292. Holl Cons II cons 173 p 345. Likewise Nieuw Ned Advvsboek (Kop) no 32 p 167. See too Holl Cons III(2) cons 317 n 5; Utr Cons I cons 73.
293. Loenius (Boel) Decisien en observatien cas 50 p 328, citing a Hooge Raad decision of 1676.
294. 3.12.10. Kotzé's translation reads: 'I say a fixed abode, because not the bare residence of a person, which often last only for a time, ... but the fixed resolve to be and continue in a place without intention of returning constitutes his domicile.'

295. Ad D 17.12, p 978.
296. 1.4.1 n 1 (p 129), 1.4.2 n 9 (p 132).
297. Eilon v Eilon 1965 (1) SA 703 (AD) at 704.
298. D 50.1.
299. eg Donellus ad D 17.12; Vinnius ad C 10.39.4; Van Leeuwen RHR 3.12.10; J Voet 5.1.98; Holl Cons IV cons 174; Vromans De foro compet I 4 132.
300. eg Van Leeuwen RHR 3.12.10; Schrassert Consultation cons 94 n 8.
301. eg Donellus ad D 17.12; J Voet 5.1.98; Holl Cons V cons 85.
302. eg Donellus ad D 17.12; Van Leeuwen Cens For 1.3.12.5; Nieuw Ned Adysboek (Kop) I no 32 p 165; J Voet 5.1.98; Vromans De foro compet I 4 p 132; Holl Cons III(2) cons 4, 5.
303. eg Van Leeuwen Cens For 1.3.12.5; J Voet 5.1.98; Holl Cons IV cons 271.
304. Obs Tum II no 1178.
305. Vromans De foro compet I 4 p 131.
306. 1931 AD 391.
307. At 398-9.
308. This statement is a direct quotation from Lord Macnaghten's speech in Winans.
309. Above, text following n 201.
310. At 406-7.
311. At 410. Pollak ((1933) 50 SALJ 468) puts the position too weakly in saying that 'he contemplated the possibility of leaving New Jersey if he were offered a better position anywhere else'.
312. At 410.
313. (1869) LR 1 Sc & Div 441 at 458. Cf Story's definition (§ 43): 'That place is properly the domicile of a person in which his habitation is fixed without any present intention of removing therefrom.'
314. See Restatement Second § 18 Comment c Illustration 3.
315. Ley v Ley's Executors 1951 (3) SA 186 (AD). See at 190-1. What follows is partly based on the writer's note 'Domicile: An Important Decision' (1951) 68 SALJ 360.
316. At 194.
317. At 194. My italics.
318. Above, text to n 248.
319. At 195.
320. At 195. My italics.
321. Senior v CIR 1960 (1) SA 709 (AD) at 714; Eilon v Eilon 1965 (1) SA 703 (AD) at 720.
322. The curious reader will find a passage remarkable for its anticipation of these views in the judgment of Mason J in Moreland v Moreland (1901) 22 NLR 385 at 387-8.

323. Walter Pollak in 1951 Annual Survey 283 calls it a 'gloss' on Westlake's words, though it seems more of a discarding of them, and says it is lacking in clarity.
324. Pollak loc cit.
325. 1965 (1) SA 703 (AD).
326. At 720.
327. At 720.
328. At 721.
329. The reference to Voet 5.1.89 on p 721 is clearly a misprint.
330. At 708-9.
331. Cited below.
332. Story § 43; De Bruyn Opinions of Grotius pp 63-4.
333. (1863) 10 HLC 272 at 285-6, 11 ER 1030 at 1035-6.
334. § 104.
335. 1931 AD 391 at 407. See too Shoosmith v Shoosmith 1936 EDL 129 at 131.
336. Inland Revenue Commissioners v Gordon's Executors (1850) 12 D 657 at 662. Cited by Anton 178.
337. Deane v Deane 1922 OPD 41 at 43-4.
338. See eg Pauw Obs Tum Nov I no 477; Weatherley v Weatherley (1879) Kotzé 66. See too Nash v Nash 1935 (1) PH B4 (C); Beale I § 22.2, 22.4.
339. (1869) LR 1 Sc & Div 441 at 458.
340. In the Estate Fuld, Decd (No 3) [1968] P 675 at 682-3.
341. '[P]ermanent or indefinite residence': Mason v Mason (1885) 4 EDC 330 at 337, 354. See too Gunn v Gunn 1910 TPD 423 at 427; Udny v Udny (1869) LR 1 Sc & Div 441 at 458, per Lord Westbury; In the Estate of Fuld, Decd (No 3) [1968] P 675 at 684, per Scarman J; Dicey & Morris Rule 7 p 86 and pp 89-90; Cheshire 154-9; Anton 178; Graveson Jubilee Lectures 97: 'We must realize the temporary nature of many of our best intentions in this life of uncertainty and movement, and we must not deny local domicile to a man who has settled in a place without, as a realist, intending to remain there for ever, but simply to make his life there as long as circumstances allow him to do so.' Cf the position of immigrants under temporary visas and aliens, all of whom are subject to deportation, below n 473. In Smith v Smith 1962 (3) SA 930 (FC) at 936 Briggs ACJ, delivering the judgment of the Federal Supreme Court, said: 'The animus manendi must be both genuine and honest.... [T]hough it does not require an absolute intention to reside permanently, [it] must at least be an unconditional intention to reside for an indefinite period.' By 'unconditional' the learned judge connoted settling: he gave the example of a chronic invalid's saying, 'I will settle if the climate suits my health'. A domicile of choice would not have been acquired if he were to die a few days later. 'There would at least have to be a trial period, after which the unconditional

See too

intention might come into existence.' /Howard v Howard 1966 (2) SA 718 (R) at 721; Smith v Smith 1970 (1) SA 146 (R) at 151.

342. In Osvath-Latkoczy v Osvath-Latkoczy 1959 SCR 751 the Canadian Supreme Court held that a Hungarian refugee had acquired a domicile of choice in the Canadian province of Ontario where he had resided for eighteen months, was employed in his line of work, intended setting up his own business and had made an application under the Canadian Citizenship Act, although he said he would return to Hungary if it ceased to be Russian-controlled, as this was a contingency so remote and uncertain that it should be disregarded.
343. The old authorities cite the case of a merchant who goes abroad to make his fortune and then return to his domicile of origin in the Netherlands. They say he does not acquire a domicile of choice in the oversea country, eg Donellus ad D 17.12; Holl Cons VI cons 153. See too Vinnius Ad Cod 10.39.5. One can get this situation, eg Brunswick v Brunswick 1902 TH 223, where the husband wished to return to his domicile of origin in France when he had made sufficient money in the Transvaal. He did not take up citizenship in that country, and though the marriage was solemnized there, it was registered with the local French consulate, and the marriage settlement was drawn up in France and stated that the spouses' property rights were to be governed by French law. The husband said that he had 'no intention of living and dying in South Africa'. It was held that in the circumstances he had not acquired a domicile of choice in the Transvaal. But then one has the Doucet v Geoghegan (1878) 9 ChD 441 (CA) type of situation, discussed earlier, where the facts of a man's life outweigh his fond ambition to return to his homeland.
344. Cf Quayle v Quayle 1949 SR 203.
345. Cf the wording of the minority members of the English Private International Law Committee, First Report, Cmd 9068 (1954) § 16: 'a definite intention of ceasing to live there upon the occurrence of some specified event in the future that will happen in the normal course of things.' Cf too Smith v Smith 1952 (4) SA 750 (O) at 752, 754 (no regard had to the husband's statement some seven months earlier that if his wife's divorce went through and this was 'talked about' in the neighbourhood he would leave the alleged domicile in Welkom and seek employment in Durban).
346. Leviny v Leviny (1908) 25 SC 173 illustrates this. L, whose domicile of origin was in Australia, had come to South Africa on a military expedition five years earlier, had taken a short lease of a country store, was eking out a precarious living and was quite prepared to go back to Australia or to any other country if anything better offered.
347. Noyes v Schulz (1911) 32 NLR 318.

348. I 150. The US test, according to Restatement Second § 18 (see too Leflar 19) is much looser - to make one's home for the present. A self-supporting adult, for instance, who goes to another country to take a law degree at a university there will be domiciled there if he intends making his home there while at university. It does not matter that the propositus intends changing his home on the happening of a future event.

349. At this stage reference to the views of the First Report of the Private International Law Committee, Cmd 9068 (February 1954) would be apposite. The Committee defines the domicile of a person as 'the country in which he has his home and intends to live permanently' (§ 6 and Draft Code art 2(1)). The Committee refused to redefine domicile as 'habitual residence', on the ground that Britons living abroad would then have 'no method whereby they could continue to regulate their lives according to the familiar British conceptions. It should also be remembered that a country which does not apply nationality as a yardstick in matters of private international law is bound to substitute for it a strict test involving a measure of permanence' (§ 7). The majority of the Committee also rejected a definition of animus manendi in terms of an intention to reside in the new country not permanently, but only for an indefinite period. Some members wished 'to make it clear that a person acquires a new domicile in the country in which he voluntarily establishes his home, if he does so, not for a mere special and temporary purpose, but with a present intention of living there for an unlimited time' (§ 7).

In the end the Committee, to overcome 'the difficulty and inconvenience, as the law now stands, of proving an intention to change a domicile' (§ 15), advised the statutory creation of 'three presumptions which would in many cases make resort to litigation unnecessary and, where this is impossible, would at any rate facilitate proof of intention to live in a given country' (§ 15). The recommendations appear in art 2 of the Draft Code as follows:

'(2) Unless a different intention appears, the following are rules for ascertaining a person's intention to live permanently in a country : -

Rule 1: Where a person has his home in a country, he shall be presumed to intend to live there permanently.

Rule 2: Where a person has more than one home, he shall be presumed to intend to live permanently in the country in which he has his principal home.

Rule 3: Where a person is stationed in a country for the principal purpose of carrying on a business, profession or occupation and his wife and children (if any) have their home in another country, he shall be presumed to intend to live permanently in the latter country.

'(3) Paragraph (2) shall not apply to persons entitled to diplomatic immunity or in the military, naval, air force or civil service of any country, or in the service of an international organization.'

Rule 1, if it were to meet the view of the majority who would define the animus manendi in terms of an intention to live for an unlimited time, would have to be recast: 'Where a person has his home in a country and no home in any other country, his intention to live there for an unlimited time shall be presumed, unless it is proved that he has a definite intention of ceasing to live there upon the occurrence of some specified event in the future that will happen in the normal course of things' (§ 16).

For a comment on the above presumptions, see R H Graveson in (1954) 70 L.Q.R. 500. The Private International Law Committee's recommendations when introduced in the House of Lords in May 1958 in the form of a Bill led to criticism on the ground that they would prejudice Commonwealth or foreign businessmen in Britain, especially as regards the incidence of income tax and estate duty. The Bill was not proceeded with. In January 1959 a fresh Bill was introduced in the House of Lords in which the doctrine of the revival of the domicile of origin was repealed and a domicile of choice was to be acquired in a country 'by [one] residing in that country with the settled intention of making it his permanent home', disappointing to those who favoured the presumptions of the first Bill, but still not satisfactory to the foreign business community. The Bill passed the Lords but was not pursued in the Commons. The Lord Chancellor referred its recommendations to the Private International Law Committee in November 1959 for reconsideration in the light of these objections, and also to consider the legal difficulties that might follow the implementation of its recommendation that married women for domicile be considered sui juris. The Committee in its Seventh Report, Cmd 1955 (1963) found the House of Lords' difficulties exaggerated. But to meet them it simplified the rules in what it called the 'businessman's formula' (Appendix A): 'A person's domicile is in the country where he ordinarily resides and where he intends to live permanently' (clause 2) and (clause 3): '[A] person who ordinarily resides in a country is presumed to intend to live there permanently; but the presumption may be displaced by evidence of a different intention.' It then went on to state certain cases where the presumption would not apply - to a person engaged in employment or services in a country in which he did not ordinarily reside before doing so, or is employed by any such person. → [run on] →

(For a review of the report, see M Mannⁱⁿ (1963) 12 ICLQ 1326. See further W Raeburn in (1963) 12 ICLQ 133, M Mannⁱⁿ (1959) 8 ICLQ 457, A J Blandⁱⁿ (1958) 7 ICLQ 753, E I Cohnⁱⁿ (1955) 71 LQR 562.) There the matter rests for the nonce. The South African Law Revision Committee at its eighth meeting on 27 June 1956 rejected out of hand the Code of the Law of Domicile annexed to the First Report of the English Private

International Law Committee. It found the draft incomplete; that its adoption would make substantial changes in the law; and that the proposed changes in the rules governing the domicile of persons under orders of custody, lunatics and infants (these are considered later in this article) were questionable. (See 1956 Annual Survey 414-15.) The matter has not come before the Law Revision Committee since then.

In 1970 the English Law Commission provisionally recommended that the domicile of a wife should be determined independently from that of her husband, for the purpose of divorce jurisdiction (Working Paper No 28).

350. See generally C C Turpin 'Freedom of Choice in the Acquisition of a Domicile of Choice' (1957) 74 SALJ 201.
351. Ex parte Quintrell 1922 TPD 14 at 15. At 18 Mason J said: '... the expression "domicile of choice" implies a capacity to make a choice and carry it into effect....'
352. Story § 47; Fawkes J dissentiente in Nefler v Nefler 1906 ORC 7 at 10; Beale I § 21.3; Restatement Second § 17.
353. At 99.
354. At 168.
355. At 207-8.
356. 1906 ORC 7. Craven v Craven (1923) 2 PH B13 (W) does not appear to be of any assistance.
357. Zelman Cowen in Dicey 6 ed (1949) 118n25. In Dicey & Morris 99n89, however, it is said (by G H Treitel) that 'it is not clear whether the husband was domiciled in the place of imprisonment or whether the court took jurisdiction on some other ground'. Turpin in (1957) 74 SALJ 204 concludes that the majority decision was that life imprisonment constitutes domicile so as to confer divorce jurisdiction, although there was no animus manendi. He thinks this is not an unreasonable type of domicile by operation of law, but would prefer legislation to create it.
358. (1949) 118.
359. Aldred v Aldred 1929 AD 356 at 363.
360. Turpin in (1957) 74 SALJ 204.
361. Restatement Second § 17.
362. See below, text following n 373.
363. See the analysis of J D McClean in (1962) 11 ICLQ 1157-60.
364. D 50.1.23.1. See too Voet 5.1.93.
365. Per Schreiner JA in Baker v Baker 1945 AD 708 at 712.
366. The same reasoning would hold for a member of the navy or air force.
367. Per Schreiner JA in Baker v Baker 1945 AD 708 at 711-12. See too McMillan v McMillan 1943 TPD 345 at 349. See also L D Thames 'Domicile of Servicemen' (1963) 34 Mississippi LJ 160 at 161.

368. Dicey 2 ed (1908) 154-5; Burge 2 ed II 76; Pollak in (1934) 51 SALJ 17. The English dicta cited in favour of this proposition were all obiter, however: In re Steer (1858) 28 LJ 22 at 25, per Watson B (there is no relevant passage in the report in 3 H & N 594); Ex parte Cunningham: In re Mitchell (1884) 13 QBD 418 (CA) at 425; In re Macraight (1885) 30 ChD 165 at 168. Nor is there any Roman-Dutch authority or South African case which is in support of so wide a statement.
369. 1945 AD 708. The court found highly persuasive the decision of the Scottish Court of Session in Sellars v Sellars 1942 SC 206, described in Cruickshanks v Cruickshanks [1957] 1 All ER 889 at 891, [1957] 1 WLR 564 at 567 as 'the most illuminating modern authority'. The same conclusion was reached by Millin J in the earlier case of Commin v Commin 1942 WLD 191. Baker was followed in England in Stone v Stone [1959] 1 All ER 194, [1958] 1 WLR 1287.
370. Per Schreiner JA at 715.
371. Thus in Paterson v Paterson 1946 EDL 67; Moore v Moore 1945 TPD 407.
372. See the judgment of Schreiner JA at 712-15.
373. Sullivan v Sullivan 1912 JWR 312; King v King 1914 JWR 225, 282; Davies v Davies 1922 CPD 323; Bishop v Bishop 1923 CPD 414.
374. 1924 CPD 62.
375. See Phillips v Phillips 1937 CPD 54; Powell v Powell 1943 (1) PH B2 (C); Murphy v Murphy 1943 (1) PH B8 (C); Flack v Flack 1944 (2) PH B66 (C); Nicol v Nicol 1948 (2) SA 613 (C); Hibbs v Wynne 1949 (2) SA 10 (C), esp at 13; Ex parte Readings 1958 (4) SA 432 (C). It should be observed, however, that there is no full-bench decision.
376. 1948 (2) SA 613 (C).
377. Reasons advanced, too, in numerous other cases, eg Ex parte Quintrell 1922 TPD 14; McMillan v McMillan 1943 TPD 345.
378. At 617.
379. By Turpin in (1957) 74 SALJ 206.
380. loc cit.
381. 1958 (4) SA 432 (C). What follows is based on the writer's note 'Acquisition by Soldier of Domicile in Country Where He is Stationed' (1959) 76 SALJ 13. It may be noted that to the same effect is the law of England (Donaldson v Donaldson [1949] P 363; Cruickshanks v Cruickshanks [1957] 1 All ER 889, [1957] 1 WLR 564; Dicey 101-2), many of the Australian States and Canada (see the cases cited in Dicey 102n12), Scotland (Sellars v Sellars 1942 SC 206).
382. At 436.
383. It was not cited to the court therein or by learned counsel in the case, Mr (later Mr Justice) I L Horwitz KC, whose penchant for wandering in the old works was well known. Was this a result of the De Bruyn rendering?

384. At 436.
385. At 436.
386. Donaldson v Donaldson [1949] P 363; Cruickshanks v Cruickshanks [1957] 1 All ER 887, [1957] 1 WLR 564. See note in (1950) 3 ILQ 74.
387. Clarke v Newmarch (1836) 13 S 488; Sellars v Sellars 1942 SC 206.
388. eg Cox v Cox [1945] VLR 105; Pumpa v Pumpa [1946] VLR 55; Walton v Walton [1948] VLR 487; Auld v Auld [1952] VLR 455; Armstead v Armstead [1954] VLR 733; Wilkinson v Wilkinson [1949] 1 WWR 246. See J G Fleming in (1950) 3 ILQ 87-8.
389. Young v Young (1959) 21 DLR (2d) 616.
390. Dicey & Morris 101-2; Cheshire 171; Westlake § 273; Halsbury's Laws of England 3 ed VII (1954) § 42; Beale I § 21.2. But cf Restatement Second § 17, which has great reservations; L D Davis 'Domicile of Servicemen' (1963) 34 Mississippi LJ 160.
391. Anton 177.
392. (1904) 25 NLR 52.
393. Lea v Lea (1902) 23 NLR 91; Baxter v Baxter 1943 NPD 85.
394. Evans v Evans 1942 SR 12; Pickford v Pickford 1943 SR 6.
395. 1943 EDL 147, esp at 149.
396. 1946 EDL 67.
397. Van Niekerk v Van Niekerk 1941 TPD 59; Ex parte De Lange 1941 (2) PH B82 (W). In Ex parte Quintrell 1922 TPD 14 Gregorowski J said in the court a quo (at 15):
- In order to create a new domicile you must not only have residence, but you must have intention to remain permanently and indefinitely, and you must also have the power to carry out that intention.... [H]e had not the free choice of residence ...; he was bound to go wherever he was ordered; he was not a free agent.' On appeal the question was left open, but Mason J expressed the following difficulty (at 18): '... the expression "domicile of choice" implies a capacity to make a choice and to carry it into effect, which is not possible in the case of a soldier still on service and subject to compulsory removal to any part at the discretion of the military authorities.'
398. 1943 TPD 345.
399. Per Murray J at 353.
400. 1948 (2) SA 613 (C) at 618.
401. Commin v Commin 1942 WLD 191, which in any event was not followed by the same judge in Davel v Davel 1944 (2) PH B49 (W). But there is a strong obiter dictum in Van Rensburg v Ballinger 1950 (4) SA 427 (T) at 437-8.
402. Moore v Moore 1945 TPD 407.
403. 1948 (4) SA 379 (W).

404. Very fitting for a famous rugby player in his youth.
405. 1945 AD 708 at 714-15. See too Sellars v Sellars 1942 SC 206 at 212.
406. This statement shows that in many of the cases in which, it is suggested, the wrong rule of law was applied, the correct result was arrived at on the facts.
407. 1942 SC 206.
408. At 211.
409. See too Lord Moncrieff at 213.
410. Clarke v Newmarsh (1836) S 488; Hibbs v Wynne 1949 (2) SA 10 (C) at 13.
411. Hibbs v Wynne ubi cit.
412. Per Ogilvie Thompson AJ in Nicol v Nicol 1948 (2) SA 613 (C) at 620.
413. See eg Nicol v Nicol (supra); Donaldson v Donaldson [1949] P 363.
414. 1939 OPD 197.
415. Ex parte Quintrell 1922 TPD 14 at 16; Fozard v Fozard 1924 CPD 62 at 63. Later in McMillan v McMillan 1943 TPD 345 at 349-50.
416. Bothma v Bothma 1940 (1) PH B9 (O) (South African railway employee, the question being whether he retained the domicile he had on joining the Administration: so held); Carvalho v Carvalho 1936 SR 219 (Portuguese civil servant stationed in Southern Rhodesia, from which country it was unlikely he would be moved prior to retirement and where he desired to make his permanent home: held that he had no power to carry out his intention).
417. 1957 (1) SA 280 (C). No reference was made in the judgment to earlier decisions on the domicile of public servants.
418. Cf Naville v Naville 1957 (1) SA 280 (C) at 283.
419. Cf Cohill v Cohill 1938 (2) PH B41 (C).
420. eg Meade v Meade (1928) 12 PH B25 (W) (see Pollak in (1934) 51 SALJ 18). See also Moncrieff v Moncrieff 1934 CPD 208, analysed by Turpin in (1957) 74 SALJ 207-8.
421. In re Feeda Hoosen (1915) 36 NLR 381; Hossen Mia v Immigrants Appeal Board (1915) 36 NLR 620 at 625; Pillay v Principal Immigration Officer (1926) 47 NLR 520; Parker v Principal Immigration Officer 1926 CPD 255; Manchoo v Principal Immigration Officer 1931 NPD 229; Essop v Commissioner for Immigration 1932 AD 223; Ismail Mia v Commissioner for Immigration 1933 TPD 338; Chow See v Minister of the Interior 1951 (3) SA 848 (T).
422. Neaves v Neaves 1936 NPD 682 was not clearly decided on this score. Hathorn J appears to have been influenced by the fact that N did not intend to reside permanently in Natal, as he recognized the prohibition by the immigration authority on his doing so (see at 688). He distinguished Abelheim v Abelheim 1918 SR 85 on the ground that A had this intention (see at 686).

423. By Greenberg JP in Josub v Salaam 1940 TPD 177 at 180, in relation to whether the respondent was an incola; by De Villiers J in Ex parte Macleod 1946 CPD 312 at 315. See too Dar § 44. D 50.1.31 clearly suggests that a person cannot acquire a domicile in a place prohibited to him.
424. 1918 SR 85. See the present writer's analysis in (1948) 65 SALJ 224.
425. 1962 (3) SA 930 (FC) at 931-2.
426. It is supported by the New South Wales decision of Solomon v Solomon (1912) 29 WN (NSW) 68, noted by Briggs ACJ at 935, but not relied on heavily by him as the report was inaccessible to him.
427. See below, text following n 435.
428. Briggs ACJ at 933, citing as illustrations Principal Immigration Officer v Madh 1928 AD 451 and Kara v Principal Immigration Officer 1931 CPD 149.
429. At 935-6.
430. See Erwin Spiro 'Domicile of Illegal Immigrant' (1963) 12 ICLQ 680 at 683.
431. At 936.
432. (1934) 51 SALJ 20, cited in Smith at 934. See also Turpin in (1957) 74 SALJ 210; Dicey & Morris 88.
433. Whether a South African court would be concerned with such illegality in relation to an alleged acquisition of a domicile in a foreign country has been questioned. Pollak op cit 20 says No, on the analogy of non-application of the penal laws of another country, which is not a very convincing explanation. Dicey & Morris 88 say it is an open question in English law. Spiro in (1963) 12 ICLQ 684 points out correctly that the lex fori determines whether a foreign domicile has been acquired and considers that possibly the illegality of the animus there will be disregarded either because it is 'repugnant to the public policy of the lex fori or not being capable of the recognition because of its nature ...'. One wonders whether this chauvinistic attitude is warranted. Is not the understanding of domicile in South African law that the animus manendi should not fly in the face of the law? What reason is there for not applying this notion to a foreign domicile?
434. (1907) 4 CLR 1428 at 1431-2.
435. The position would be identical with a South African domiciliary who while outside South Africa was declared a prohibited person under s 4 of the Admission of Persons to the Union Regulation Act 22 of 1913. Say A, an immigrant from Ireland who had acquired a South African domicile, while on a temporary visit to Rhodesia committed a crime there that led to his deportation from Rhodesia to Ireland. The crime causes the South African Minister of the Interior to deem him a prohibited person in South Africa. The result is that he immediately loses his South African domicile, even if he has an animus revertendi to this country.

437. Ad Pand 5.1.93. Erwin Spiro 'Deportation and Domicile' (1964) 81 SALJ 173 points out that this is an instance of a person with two domiciles.
438. Cens For 2.1.12.7, 2.5.1.46.
439. Spiro in (1964) 81 SALJ 173.
440. Ebert & Co v Goldman (1900) 17 SC 530 at 532. See too Bar § 44, who says that an exile's shadowy hope of return does not signify and banishment to a penal settlement where the prisoner may establish a household and dwelling results in domicile there.
441. Burge 1 ed I (1838) 46, 2 ed I (1907) 73; Story § 47.
442. Olwage v Buntman 1910 WLD 44, holding that deportation did not change domicile, no express reason being given (Greenberg J in Ex parte Gordon 1937 WLD 35 at 36 thought that the ground apparently was that voluntary intention of abandonment of domicile is necessary, and with deportation it does not exist); applied in Hitchcox v Hitchcox (1930) 2 PH B33 (C), where there was evidence of animus revertendi; similarly Taylor v Taylor 1931 CPD 98.
443. 1915 WLD 29. The court was, it seems, unaware of the decision in Olwage v Buntman (supra).
444. 1934 SR 35. Apparently the court felt there might be an animus revertendi, applying the maxim ubi uxor ibi domus.
445. 1937 WLD 35.
446. At 37.
447. 1946 CPD 312.
448. (1934) 51 SALJ 20. See the judgment at 317.
449. At 317.
450. Thiele v Thiele (1920) 150 LTJ 387.
451. 1963 (4) SA 615 (N).
452. Per Henning J at 617.
453. A deportee may have a South African domicile of origin. This is not inconsistent with the grounds of deportation set out below, n 473.
454. At 99-100.
455. Here they cite Cruh v Cruh [1945] 2 All ER 545.
456. 1915 WLD 29.
457. 1937 WLD 35.
458. 1946 CPD 312 at 315.
459. See eg Admission of Persons to the Union Regulation Act 22 of 1913 ss 4, 6, 22. No attempt is made to explore the repercussions on domicile of (a) a restriction order under s 355bis of the Criminal Procedure Act 56 of 1955, the Riotous Assemblies Act 17 of 1956 or the Suppression of Communism Act 44 of 1950; (b) the Bantu (Urban Areas) Consolidation Act 25 of 1945 and other enactments applying to Bantu; (c) the restriction by regulations under the Admission of Persons to the Union Regulation Act 22 of 1913 of the movement of Asians from one province to another; (d) other legislation controlling or prohibiting movement of persons from one area of the Republic to another.
460. 1963 (4) SA 615 (N) at 617.
461. 1950 (4) SA 427 (T) at 441, cited below. text to n 470

462. [1932] P 9 (CA). But Turpin is by no means certain that the circumstances under which the alien B could be deported were under his control: (1957) 74 SALJ 210.
463. See E Kahn in (1948) 65 SALJ 220.
464. 1936 NPD 682. Millin J in Shumba v Pieterse NO 1950 (2) SA 646 (T) at 652 left open the question 'whether a prohibited immigrant who enters or remains in the Union under a temporary permit can acquire a Union domicile'. But the same learned judge had already held that he could in Chryssoulis v Chryssoulis 1944 (1) PH B27 (W).
465. Joosub v Salaam 1940 TPD 177; Van Rensburg v Ballinger 1950 (4) SA 427 (T).
466. This appears to be the distinction drawn by Caney AJ in Ex parte Pekola 1951 (3) SA 793 (N) at 796.
467. 1940 TPD 177.
468. 1950 (2) SA 643 (T).
469. 1943 SR 188.
470. 1950 (4) SA 427 (T).
471. 1951 (3) SA 793 (N). The word 'presumably' is used because there is no mention in the report of a temporary residence permit being issued to P.
472. It is taken by the English courts, the decisions of which have been of persuasive force in South Africa. See especially May v May [1943] 2 All ER 146, Cruh v Cruh [1945] 2 All ER 545 and Zanelli v Zanelli (1948) 64 TLR 556, [1948] WN 381.
473. The deportation powers of the executive are as follows: (a) The Minister of the Interior may cause to be deported in terms of s 22 of the Admission of Persons to the Union Regulation Act 22 of 1913 (i) a person not a citizen by birth or descent, sentenced to imprisonment for committing a scheduled offence and deemed an undesirable inhabitant; (ii) a person not a citizen by birth or descent, convicted of any offence committed in the Republic after admission thereto and before acquisition of a statutory domicile there (being lawful continuous residence for three years not under a conditional or temporary permit - s 30) and deemed an undesirable inhabitant; (iii) an alien, if he considers it in the public interest - observe the range of this power. (b) The Minister of Justice may cause to be deported in terms of s 14 of the Suppression of Communism Act 44 of 1950 a person not a citizen by birth or descent deemed an undesirable inhabitant by the State President (ie executive) because he is a communist. (c) The Minister of Justice may cause to be deported in terms of s 5 of the Riotous Assemblies Act 17 of 1956 a person convicted under s 2 or 3 of the Act (dealing with prohibited gatherings and publications) deemed an undesirable inhabitant by the State President and born outside the Republic. (d) The Minister of Bantu Administration and Development may cause to be deported in terms of s 29 of the Bantu Administration Act 38 of 1927 (i) any person not born in the area of the present Republic, deemed by him an undesirable inhabitant because (1) he has been convicted under a racial hostility law or (2) he is a Bantu whose presence is deemed not to be in the general public interest. The responsible Minister may cause to be deported in terms of s 12 of the Abuse of Dependence-producing Substances and Rehabilitation Centres

Act 41 of 1971 a person not a citizen by birth or descent convicted under the Act of dealing in a prohibited or dangerous dependence-producing drug or failing under s 6 to report to the police his suspicion that anyone at a place of entertainment possesses, uses or deals in any dependence-producing drug. The exercise of certain of these powers would conflict with public international law.

474. It was also so considered in the American case of Gosschalk v Gosschalk 28 NJ 73, 145 A 2d 327 (1958) (1959 Ann Sur Am L 45, noted in (1959) 16 Washington & Lee LR 226), where the Supreme Court of New Jersey, by a majority of four to three, held that a Hollander with a temporary visa that had been extended several times was capable of acquiring a domicile in New Jersey, voluntary presence and the requisite state of mind sufficing, the case of a serviceman intending to establish a home where he is stationed being found in point.
475. At 181.
476. At 189.
477. See at 439-41.
478. (1957) 74 SALJ 215n70.
479. At 441.
480. ie the case relating to deportees.
481. Cf Schmitthoff 80.
482. See Dicey & Morris 100; Cheshire 168-9; Restatement Second § 18 Comment f. From Vervolg op de Holl Cons II cons 32 p 136 it appears that the motive of avoiding creditors shows that there is no intention of settling in the new country.
483. Nygh 75.
484. Cf Pletinka v Pletinka (1965) 109 Sol J 72.
485. Cf Wolff § 110.
486. Dicey & Morris 100; Goodrich § 30 pp 69-70.
487. Cheshire 168.
488. See Dicey & Morris 100; Cheshire 168-9; Schmitthoff 81; Beale § 22.9.
489. Cf Vromans De foro compet I 4 p 134.
490. Cf Dicey & Morris 101.
491. See Dicey & Morris 101; Cheshire 170. But see Beale § 22.7.
492. Per Millin J in Lewis v Lewis 1939 WLD 140 at 142. See too Hutchison's Executor v The Master (Natal) 1919 AD 71 at 77, 79; Smith v Smith 1962 (3) SA 930 (FC) at 936.
493. Moorhouse v Lord (1863) 10 HLC 272 at 292, 11 ER 1031 at 1038.
494. Dicey & Morris 101; Cheshire 169.
495. Per Millin J in Lewis v Lewis 1939 WLD 140 at 142. See too Schmitthoff 81; Graveson 208. One is constrained to disagree with Turpin ((1957) 74 SALJ 210) that 'he cannot really be said to have intended to make his earthly home where he has gone to die'.
496. The Paradoxes of Legal Science (1928) 68.

497. The view of Graveson (at 208) cannot be supported, viz that there is no freedom of choice^{and}/so no change of domicile where the choice has lain between a change of air and an untimely death, the desire for self-preservation excluding the operation of the will.
498. Graveson 212-13. See Henderson v Henderson [1967] P 77 at 79.
499. In re P (G E) (An Infant) [1965] Ch 568 (CA) at 583.
500. Nassau la Leck Register p 534, says that the wife post copulam carnalem passes directly over to the husband's domicile. This statement, however, is not borne out by the authorities adduced, and must be considered wrong. See McGregor J in Burnett v Burnett (1895) 12 CLJ 147 (OFS) at 150.
501. On non-recognition of the rule that the wife follows the husband's domicile so far as polygamous unions are concerned, see Ebrahim Mahomed v Immigrants Appeal Board 1928 TPD 439; Hamid v Minister of the Interior 1954 (4) SA 241 (T), which, accepting (as it is submitted it should be) that the validity of the foreign polygamous union was not questioned, applies this rule by implication. The contention of Wolff (§ 299) that in a valid polygamous union the woman would follow the man's domicile (a notion applicable only to polygyny, not polyandry) cannot hold good for our law.
502. D 5.1.65 and 50.1.38.3; C 10.39.9; Cujacius ad Cod 10.39.9; U Huber Prael ad D 5.1.45; J Voet 5.1.95, 101, 23.2.40, 61; Brunnemann Comm in Pand 5.1.65.8; Domat Civil Law II 1.16.3.12; Schomaker Cons II cons 23 nn 40, 41, IV cons 36 n 30; Leyser Hedit ad Pand 72; Savigny System VIII § 353; Bar §§ 45, 174; Reeves v Reeves (1832) 1 Menz 244; Bestandig v Bestandig (1847) 1 Menz 280; Weatherley v Weatherley (1879) Kotzé 66 at 72; Mason v Mason (1885) 4 EDC 330 at 336, 343; Ex parte Kaiser 1902 TH 165; Harrop v Harrop (1905) 19 EDC 341; Steytler v Steytler 1913 CPD 725; Bendell v Bendell 1914 CPD 899 at 900.
- It matters not that the spouses live apart (see authorities cited in n 520 below), that the wife has never set foot in the country of the husband's present domicile (Ex parte Bruyn (1909) 19 CTR 383), that the husband has committed a matrimonial offence (Gilbert v Gilbert (1901) 22 NLR 201; Ex parte Kaiser 1902 TH 165 esp, at 170; Laughlin v Laughlin (1903) 24 NLR 230 at 242-3; Jacks v Jacks (1903) 20 SC 196; see top Lord Advocate v Jaffrey [1921] 1 AC 145/ (HL (Sc))), that the parties have concluded a deed of separation (Huber HR 4.22.7; Laughlin v Laughlin (1903) 24 NLR 230 at 743), that the wife's interests are affected (eg Gilbert v Gilbert (1901) 22 NLR 201 at 204). In Re Cooke's Trusts (1887) 56 LJCh 637, 56 LT 737 it was held that a married woman follows her husband's domicile even if, believing him dead, she married another man and lives with that man in the country of his domicile. There is a statement in Steytler v Steytler 1913 CPD 725 at 731 by Hopley J that the husband, 'provided he be acting bona fide, may change his domicile, whereby his wife's domicile is at once changed to such new country ...'. This is not to be read as limiting the unity of domicile principle to a case where the husband is in good faith. Of course - as is submitted later - absence of bona fides may show absence of a true and genuine animus manendi.

503. Per Mason J in Shapiro v Shapiro 1914 WLD 38 at 40.
504. D 23.2.5, 50.1.22.1; C 10.39.9; Neostad Dec van den Hoor en Prov Raad no 5; J Voet 5.1.95, 96; Holl Cons III (2) cons185 n8; Schrassert Consultatien cons 54 n 67; Pothier Coutumes d'Orleans I 12. See also Henderson v Henderson [1967] P 77 at 79. In this sentence 'changes' includes 'abandons', but if the principle of the continuance of the last domicile is accepted, this will result in no alteration. If our law finally espouses the principle of the revival of the domicile of origin, it will bring that principle into operation.
505. Cf Re Wallach [1950] 1 All ER 199. Graveson would attribute her domicile of origin to her, as it is not her fault that she cannot move: (1957) 6 ICLQ 5 and Conflict of Laws 221. It has been submitted that the revival of the domicile of origin principle should not be accepted as part of our law. Even if it is, it is believed that the rule in Re Wallach will be accepted by our courts.
506. Cf Re Cooke's Trusts (1887) 56 LJCh 637, 56 LT 737, 3 TLR 558; In re Scullard [1957] Ch 107.
507. By P B Carter in (1957) 33 BYBIL 329-32.
508. op cit 332.
509. J Voet 5.1.95. See too Govu v Stuart (1903) 24 NLR 440 at 442.
510. See Voet 5.1.95; Wells v Dean-Willcocks 1924 CPD 89; De Reneville v De Reneville [1948] P 100; Dicey & Morris 109, 114; Wolff § 118; Pollak in (1934) 51 SALJ 30n189a.
511. eg De Reneville v De Reneville [1948] P 100 (CA) at 111-12; Wolff § 118; Graveson 219. See also Henderson v Henderson [1967] P 77 at 79. Possibly Pothier Coutumes d'Orleans I 16 can be read in support too.
512. Per Lord Cave in Lord Advocate v Jaffrey [1921] 1 AC 146 (HL (5c)) at 158, citing inter alia C 12.1.13. This was a House of Lords decision in a Scottish appeal.
513. Coutumes d'Orleans I 10.
514. See Wolff § 119.
515. See R L Cabes 'Louisiana Law of Domicile' (1967) 41 Tulane LR 437 at 449.
516. DuVernay v Ledbetter 61 So 2d 573 at 576 (La App 1st Cir 1952).
517. Report, Cmd 9678 § 820.
518. Wesel De con bon soc 2.1.107 p 81; Voet 5.1.101, 23.4.20; Lybreghts Red vertoog I pp 81-2; Schomaker Cons II cons23 nn 13, 14; Loenius (Boel) Dec cas 54; Schorer Note 100. But Voet 5.1.101 states that while^a husband can never have his freedom to change his domicile limited by antenuptial contract, a clause in such a contract that he shall not emigrate to another country without his wife's consent is effective to the extent that she would have an action against him in damages for any consequential prejudice to her property rights or increase in her liabilities, though this could have no application merely because the new domicile allowed donations between spouses, as these are by agreement. Rodenburg De iure

- conj, Prael 1.4.1 and Wassenaar Praxis jud II 16.87 say the clause is valid but nevertheless the husband may change his domicile for serious cause emerging after marriage. The only writer uncompromisingly in favour of the validity of such a clause is Van der Keessel in Th 228 and Dictata ad Gr 2.12.3 (Pret ed II pp 206-7).
519. See Dicey & Morris 113.
520. Huber HR 4.22.7; Schomaker Cons II cons 23 nn 40, 41; Reeves v Reeves (1832) 1 Menz 244 (W lives in original matrimonial home and refuses to join H in new domicile); Bestandig v Bestandig (1847) 1 Menz 280 (W deserted H and is living outside court's area); Harrop v Harrop (1905) 19 EDL 341; Ex parte Bruvn (1909) 19 CTR 383 (facts as in Reeves); Rooth v Rooth 1911 TPD 47; Bendell v Bendell 1914 CPD 899.
521. Gilbert v Gilbert (1901) 22 NLR 201; Ex parte Kaiser 1902 TH 165 esp at 170; Laughlin v Laughlin (1903) 24 NLR 230 at 242-3; Jacks v Jacks (1903) 20 SC 196 (H deserted W and establishes new domicile).
522. Huber HR 4.22.7; Laughlin v Laughlin (1903) 24 NLR 230 at 243.
523. 5.1.116.
524. (1885) 4 EDC 330 at 354-5. See also Kotzé JP in Hooper v Hooper 1908 EDC 474 at 476.
525. See Pollak in (1934) 51 SALJ 28n186.
526. Above, text to n 53.
527. See Kahn in Hahlo on Husband and Wife 531-9, 543-4.
528. De iure conj, Prael 2 (pars alt) 1.2, p 105. See above, text to n 79.
529. II No 302 p 136.
530. See above, text to nn 78ff.
531. Per Shippard J in Mason v Mason (1885) 4 EDC 330 at 353; per Kotzé JP in Hudson v Hudson 1907 EDC 189 at 192 and Ex parte Stevens 1912 EDL 443 at 446.
532. Ex parte Kaiser 1902 TH 165 at 172, 175-6.
533. Hudson v Hudson 1907 EDC 189 at 191-2; Ex parte Stevens 1912 EDL 443 at 446.
534. Burnett v Burnett (1895) 12 CLJ 147 (OFS), per Melius de Villiers CJ and Steyn J, McGregor J dissenting.
535. [1895] AC 517 (PC).
536. See Ex parte Kaiser 1902 TH 165 at 172-6; Laughlin v Laughlin (1903) 24 NLR 230 at 242; Ex parte Standring 1906 EDC 169 at 174; Ex parte Edwards 1933 EDL 224.
537. Cf the allegation in Smith v Smith 1970 (1) SA 146 (R) at 151A-B.
538. See eg Gilbert v Gilbert (1901) 22 NLR 201 at 204. Cf Eversley's Law of Domestic Relations 6 ed (1951) 140, where honest purpose and absence of unnecessary hardship or imperilling of her life or liberty are stated as requisites.
539. 1913 CPD 725 at 731. See n 502 above.

540. Cons II cons 23 n 45.
541. There must have been a domus: see Cowan v Cowan (1925) 6 PH B4 (T). It has been mentioned inter alia in Adams v Adams (1882) 2 SC 24 at 25; McCurrach v McCurrach (1892) 6 HCG 256; Gqiba v Gqiba (1901) 16 EDC 4; Ex parte Kaiser 1902 TH 165; Blair v Blair 1914 SR 111; Deane v Deane 1922 OPD 41 at 45; Hills v Hills 1933 NPD 84; Ex parte Rowland 1937 (1) PH B8 (T); Orton v Orton 1938 (2) PH B57 (T). See also Ex parte Fraser 1934 SR 35.
542. Per De Villiers CJ in Adams v Adams (1882) 2 SC 24 at 25.
543. Cf Dyus v Dyus (1926) 47 NLR 259 with Ex parte Edwards 1933 EDL 224. See too Orton v Orton 1938 (2) PH B57 (T).
544. Per McGregor J in Deane v Deane 1922 OPD 41 at 45.
545. Deane v Deane 1922 OPD 41 at 45; Ex parte Edwards 1933 EDL 224.
546. Per Innes CJ in Webber v Webber 1915 AD 239 at 249. Cf Massey v Massey 1968 (2) PH B10 (T).
547. HR 4.22.7 and Prael ad D 5.1.45 in fine.
548. Coutumes d'Orleans I IO. Bar 118 is of the same view.
549. eg 5.1.95.
550. Laughlin v Laughlin (1903) 24 NLR 230 at 242-3 and Gilbert v Gilbert (1901) 22 NLR 201 at 205.
551. 1913 CPD 725 at 730-1.
552. Cmd 9678 §§ 825, 894.
553. By R H Graveson in A Century of Family Law 1857-1957 (1957) 435.
554. Mackenzie v Mackenzie 1931 SLT 262 at 264. See also obiter dicta of two law lords in the Scottish appeal of Lord Advocate v Jaffrey [1921] 1 AC 146 (HL (Sc)) at 151-3, 168-71 (a wife cannot acquire her own domicile if she has grounds for divorce or separation).
555. H v H [1928] P 206.
556. A-G for Alberta v Cook [1926] AC 444 (PC), avowedly decided on principles not derived from the civil law.
557. Cmd 9068 § 18 and Draft Code art 3.
558. Restatement Second § 21.
559. Cmd 1955 (1963) § 34.
560. See the convincing analysis by Michael Mann in (1963) 12 ICLQ 1332-9.
561. The 'difficulties' raised in Cmd 1955 § 29 are non-existent. See Mann op cit 1336-7.
562. Kahn in Hahlo on Husband and Wife 613-18.
563. Kahn in Hahlo on Husband and Wife 610-13.
564. Cmd 1955 § 29.
565. See Kahn in Hahlo on Husband and Wife 539-40.

566. See Williams v North Carolina 317 US 287 (1942) and 325 US 226 (1945); A E Ehrenzweig Conflict of Laws (1962) § 72; E N Griswold (1951) 25 Australian LJ 255ff, also (1951) 65 Harvard LR 208ff; Restatement Second § 71. As to the theory that only the court (or, if one so wills, the law) of the common domicile alone should alter status, → Read Recognition and Enforcement of Foreign Judgments → 212-13 contends that the status theory warrants jurisdiction in the court of either party's domicile. If, as is sometimes objected, the American rule allows for concurrent divorce jurisdiction in more than one court simultaneously, the answer is that this is nothing novel. In South Africa the effect of the Matrimonial Causes Jurisdiction Act 1939 is the same. Internally the forum non conveniens doctrine will assist, externally the lis alibi pendens doctrine. It is interesting to see what has happened in Australia, New Zealand and Canada. The Matrimonial Causes Act 1959 (Com) of Australia vests competency in the court of the plaintiff's domicile (s 23(4)) and then uses the fictions (s 24) that a deserted wife domiciled in Australia immediately before the marriage or desertion is deemed presently domiciled there, and a wife resident in Australia at institution of proceedings is deemed domiciled there then if so resident the preceding three years. The Matrimonial Proceedings Act 1963 (NZ) makes the court competent if the petitioner is domiciled in New Zealand and states that for the purposes of the Act the domicile of a wife is to be determined as if she were an adult spinster. The Divorce Act 1968 (Can) grants a provincial court divorce jurisdiction if the petitioner is domiciled in Canada and the petitioner or respondent has been ordinarily resident in the province for a year immediately preceding presentation of the petition and actually resident there for at least ten months of the period, and then makes the same provision regarding the domicile of a married woman as New Zealand (see D Mendes da Costa in (1968) 46 Canadian Bar R 252). It is not suggested that the creation of such divisible divorce is necessarily to be commended.
567. See the various views expressed by Lord Reid, Lord Wilberforce and Lord Pearson in Indyka v Indyka [1969] AC 33 at 54, 104 and 111 respectively.
568. See Mann op cit 1334-6.
569. See Cmnd 1955 § 28.
570. Eighteen in the case of boys, 15 in the case of girls: Marriage Act 25 of 1961 s 26(1).
571. It is taken that the 'marriage' is void: Hahlo on Husband and Wife 84.
572. Holl Cons III (2) cons 317(217) n 8; Schrassert Consultatien cons 94 n 6; Nieuw Nederlands Adysboek (Kop) no 32 p 170; Hull v McMaster (1866) 5 Searle 220 at 225; Pollak in (1934) 51 SALJ 24-5. See too Dicey & Morris 110-11; Cheshire 177; Graveson 213; Wolff § 112; Beale § 30.1; Louisiana Civil Code § 39; Restatement Second § 22 Comments a and e (if not abandoned by his father; if abandoned, follows

- mother's domicile; if abandoned by both, retains last domicile). Even if the view be taken that a father under 21, despite his marriage being valid, cannot be a guardian to his children (for authorities see R W Lee An Introduction to Roman-Dutch Law 5 ed (1953) 103 and Commentary on 'The Jurisprudence of Holland' by Hugo Grotius (1936) ad Gr 1.7.6 (p 38)), it is submitted that since he is clearly an independent person in the law of domicile, his children follow his domicile, the vinculum sanguinis being sufficient for this purpose. It is not a case of dependency on dependency, as, for instance, with an unmarried woman under age and her illegitimate child, which is discussed below, text to n 677.
573. Cf Broome J in Frankel's Estate v The Master 1950 (1) SA 220 (N) at 221J.
574. See W R Duncan 'The Domicile of Infants' (1969) 4 The Irish Jurist 36, esp at 49.
575. § 22 Comment h.
576. In his famous address to the American Bar Association annual meeting in 1906, 'The Causes of Popular Dissatisfaction with the Administration of Justice'. Lord Reid has expressed this sentiment: 'During early stages of a legal system legal fictions have been invaluable.... But in this day and age I dislike them intensely' ('The Law and the Reasonable Man', being the Maccabean Lecture in Jurisprudence of the British Academy 1968, printed in the Proceedings of the British Academy vol LIV 189 at 200).
577. In Hope v Hope [1968] NI 1 at 5.
578. D 50.1.3,4,6.1,17.11. See Savigny System VIII § 353.
579. 5.1.100. The same, says Voet, applies where dependency rests on a widow-mother.
580. (a) Ex parte Bruyn (1909) 19 CTR 383. Here H sued W for a restitution order and custody of the child. Neither W nor the child had ever been in the Cape, in which H had acquired a domicile. Buchanan J enquired as to the domicile of the child. Counsel contended that it was that of his father. No authorities are cited in the report. Buchanan J, while making no firm pronouncement on this score, granted the plaintiff the relief sought. (b) R v Naran Vastha (1910) 31 NLR 151 at 158. This was an obiter statement, with no examination of the old authorities. All that Bale CJ said was: 'I take it that he [the minor] is not entitled, under the Roman-Dutch Law, to acquire a domicile for himself until he has attained the age of majority.' (c) Banubhai v Chief Immigration Officer (1913) 34 NLR 251, esp at 258-9, 264. Here there was no examination of the old authorities, but Dicey was cited. It was held that as soon as B acquired a domicile in Natal, so did his minor son who was actually resident in India.
581. Beale § 30.1; Restatement Second § 22 Comment a.
582. See Restatement Second § 22; Cheshire 177.
583. Holl Cons II cons 21, IV cons 174.
584. Coutumes d'Orleans I 16.
585. Quaest Jur Priv I 16.

586. Verhandelingen over burgerlyke rechts-zaaken (the Dutch translation of Quaestionum juris privati) I 16 (vol 1 p 261).
587. Restatement Second § 22 Comment e. This presupposes that the child has not been emancipated, adopted or given a non-natural guardian and has no close relative who stands in loco parentis.
588. 5.1.100.
589. Only engagement to marry, marriage and alienation and mortgaging of immovable appear excepted: see H R Mahlo and Ellison Kahn The Union of South Africa: The Development of its Laws and Constitution (1960) 365-6.
590. See H R Mahlo 'The Legal Effect of Tacit Emancipation' (1943) 60 SALJ 289, esp at 295, 298; Mahlo & Kahn South Africa 365.
591. 5.1.100.
592. Coutumes d'Orleans I 16. It is the rule in present-day Louisiana: Civil Code § 39. It is also the principle stated by Restatement Second § 22 Comment f, though the nature of emancipation is not precisely the same as in our law - some of the United States require court proceedings but most ask 'no more than that the minor, having attained years of discretion, maintain a separate way of life, either with his parents' consent or because they are dead or have abandoned him' (loc cit). See further Beale § 31.1; Goodrich § 38.
593. See particularly Ochberg v Estate Ochberg 1941 CPD 15 at 37; Ahmed v Coovadia 1944 TPD 364 at 366; Dickens v Daley 1956 (2) SA 11 (N).
594. See Mahlo in (1943) 60 SALJ 290; Spiro in (1951) 4 ILQ 194-5. But Spiro seems to have changed his mind: Law of Parent and Child 3 ed 126.
595. 1941 CPD 15 at 37, per Sutton J (Howes J concurring).
596. III (2) cons 32 nn 1, 2.
597. See W R Duncan 'The Domicile of Infants' (1969) 4 The Irish Jurist 36, esp at 40-1, 45, 49. Most English and American texts however, are against this submission: Cheshire 177; Wolff § 112; Beale § 30.1 p 211; Goodrich § 37; Restatement Second § 22. But it has been shown that there is no need for a rule of unity of domicile of father and child. In re Beaumont [1893] 3 Ch 490 establishes a contrary rule in regard to the widow-mother and her minor child's domicile. See below, n 603. Wolff § 113 says: 'This differentiation between the father's and the mother's domicile is particularly startling because it seems to grant the mother a "power" which it denies to the father, though in both cases the infant's interest is the same. American laws have abolished such unjustifiable differentiation - which, for that matter, is not to be found in any law of the European continent.'
598. (1866) 5 Searle 220 at 225-6.

599. Bynkershoek Ouaest Jur Priv I 16 speaks in general terms of a father, widow-mother or non-natural legal guardian having complete power to change the minor's domicile. Though he does not put his mind specifically to this issue, it must be conceded that his approach seems against the view of Cloete J.
600. See the excellent analysis of Duncan op cit.
601. By Pollak in (1934) 51 SALJ 25n162.
602. See above, text to n 577.
603. See Duncan op cit 39. Dealing with a widow-mother, Stirling J said in In re Beaumont [1893] 3 Ch 490 at 496-7 that she exercises her power to change her child's domicile 'vested in her for the welfare of the infants, which, in their interest, she may abstain from exercising, even when she changes her own domicile'. Why (Dicey & Morris 111) English law apparently does not adopt this view with the father cannot be explained.
604. 5.1.100.
605. De jure conj, Prael 2 (pars alt) 1.6 pp 110-11 and 2.2,3 pp 112-13.
606. Coutumes d'Orleans I 18, 19.
607. Possibly the alleged rule finds support in Holl Cons I cons 152 and II cons 21, which, however, are not at all clear, being interpreted by R D Kollwijn Geschiedenis van de Nederlandse wetenschap van het Internationaal Privaatrecht tot 1880 (Groningen 1937) 169 to mean that the surviving parent-guardian cannot change the child's domicile as far as the law of succession is concerned, and by other writers to mean that the widow-mother cannot change the child's domicile at all.
608. Ouaest Jur Priv I 16 pp 182-3. He admits that the question had never been crisply decided, adduces no authority and argues merely in principle.
609. Dictata ad Gr 2.26.12 (Th 341) (Pret ed III pp 8-9).
610. As Kollwijn op cit 168-9 rightly points out, it should apply equally to a marriage in fraudem legis loci domicilii. Yet it was agreed by all that such a union was void. See Kahn in Hahlo on Husband and Wife 581-2.
611. (1866) 5 Searle 220 at 225-6.
612. It is clear that the rights of children in their deceased mother's intestate estate vest at the time of her death. At that time she was domiciled in the Cape. A subsequent change of the father's domicile could not possibly, as Cloete J thought it did, change those rights. It is noteworthy that Watermeyer J, who also sat, did not advert to the question of a change of domicile.
613. Potinger v Wightman (1817) 3 Mer 67 at 79-80, 36 ER 26 at 30, per Sir William Grant MR.

614. While Dicey & Morris make no comment, in the sixth edition (1949) 106-7 it was pointed out (by 2 Cowen) that the rule, if it exists at all, must also extend to the father, which has never been suggested by the courts, and that, with the present equality of the sexes, it ought to disappear. On the other hand Schmitthoff 87 would apply the rule to both situations.
615. Wolff § 137 pp 144-5.
616. Cons II cons 23 n 45.
617. (1934) 51 SALJ 25-6.
618. (1951) 4 ILQ 198 and Law of Parent and Child 127-8.
619. Agreed that the law does not prevent a husband from changing his domicile even though his wife's interests (eg to be able to bring a divorce or annulment proceedings) are thereby affected. See above, text to nn 537-8.
620. See Hahlo & Kahn South Africa 434-5 and Hahlo Husband and Wife 452, 456-8, and authorities there cited.
621. Matrimonial Affairs Act 37 of 1953 s 5(4). Only if the father is given sole guardianship is the mother's consent unnecessary.
622. Calitz v Calitz 1939 AD 56. In very special circumstances in granting a divorce or judicial separation the court may award custody to a third party. See Hahlo Husband and Wife 455.
623. See Spiro 247.
624. 37 of 1953.
625. 33 of 1960.
626. What distinguishes 'sole guardianship' from 'guardianship' at common law is that it provides this exclusive power and in addition the power to appoint by will a third party as sole guardian.
627. What distinguishes 'sole custody' from 'custody' at common law is that it provides the power to appoint by will a sole custodian.
628. See Hahlo Husband and Wife 451.
629. 56 of 1955.
630. 66 of 1965.
631. Goodrich v Botha 1952 (4) SA 175 (T) at 181.
632. Cf September v Karriem 1959 (3) SA 687 (C) at 688.
633. Cf Short v Naisby 1955 (3) SA 572 (D) at 574-5.
634. Cf September v Karriem 1959 (3) SA 687 (C) at 688.
635. See Short v Naisby 1955 (3) SA 572 (D) at 574-5.
636. 1944 OPD 59 at 65.
637. 1953 (3) SA 656 (SR).
638. At 657.
639. At 658.
640. Parent and Child 1 ed (1950) 216, 218, 3 ed (1971) 275; (1951) 4 ILQ 201-2.

641. (1934) 51 SALJ 26 esp n 170.
642. See eg Beale § 32.1; Restatement Second § 22, esp note therein 'Alternating domicile'.
643. Only Wolff (§ 112) appears to have dealt with the matter. He found himself compelled, to his regret, to conclude that domicile did not go with custody. 'On this point American laws are well ahead of the English provisions.' Dicey & Morris (at 84) simply said that it is arguable that a legitimate child born after the divorce of his parents should take his mother's domicile at birth (which overlooks the present problem).
644. Cmd 9068 (1954) art 4(1).
645. Art 4(3).
646. [1965] SLT 330. It purported to consider English authorities. Anton at 171 is critical: 'It would follow that, when a father has been divorced on the ground that he has deserted his wife in Scotland, his children, although remaining with their mother, will nevertheless be domiciled wherever the father has chosen to establish his domicile. This widens the gap between the popular and the legal concepts of domicile and is likely to lead to hardship.'
647. [1968] NI 1. Morris (at 28) approves of the decision.
648. At 5.
649. See Hahlo Husband and Wife 452ff.
650. J Voet 5.1.100; Bynkershoek Ouaest Jur Priv I 16; Pothier Coutumes d'Orleans I 18, 19; Van der Keessel Th 341 and Dictata ad Gr 2.26.12 (Th 341) (Pret ed III 6-9); Bate v Bate 1933 NPD 258 at 260. Holl Cons I cons 152 and II cons 21 can possibly be read to mean that the mother is not able to change the child's domicile. But as Bynkershoek loc cit points out, the consultation are unsatisfactory. They do not state whether tutors had been appointed, which might make a difference, and they appear to hold that the domicilium originis is looked to, which is manifestly incorrect.
651. Cf Pothier Coutumes d'Orleans I 18. Even if the view be taken - hardly feasible today - that a widow under 21 cannot be guardian of her children (see the old authorities cited in R W Lee Commentary on 'The Jurisprudence of Holland' by Hugo Grotius (1936) ad Gr 1.7.6 (p 38)), it is submitted that since she is a major as far as the acquisition of a domicile is concerned, the vinculum sanguinis between her and her child should be sufficient for her domicile to be attributed to her child. Cf the cases of the mother of an illegitimate child, discussed below, text to n 667.
652. [1893] 3 Ch 490. See too Lord Campbell in Johnstone v Beattie (1843) 10 Cl & Fin 42 (HL) at 138, 8 ER 657 at 694, who goes out of his way to say that the child follows the domicile of the widow-mother if he lives with her. Duncan op cit 40-1, 45 supports the decision, provided there is no fraudulent intent on the part of the mother (eg in order to benefit from the law of succession: Pottinger v

Wightman (1817) 3 Mer 67 at 79-80, 36 ER 26 at 30: see above text to n 612), and the child is benefited and has a substantial connection with the area (in order to meet the argument that domicile is not really a matter of choice but of fact).

653. Implicit in Voet 5.1.100 and Bynkershoek Obs Tum II no 1259. There is no suggestion that the child follows the domicile of such a guardian.
654. Coutumes d'Orleans I 19.
655. 5.1.100.
656. Wolff § 114. See too Dicey and Morris 111.
657. Cheshire 178. Cf In re Beaumont [1893] 3 Ch 490.
658. Restatement Second § 22 Comment b.
659. Precedent is not wanting in other legal systems too for looking at a married woman's hypothetical domicile in this way (eg the Matrimonial Proceedings Act 1963 of New Zealand and the Divorce Act 1968 of Canada: see Kahn in Hahlo on Husband and Wife 533n81) and it might be necessary to do so in our law to ground jurisdiction on a plaintiff wife's assumed domicile in an action for annulment of a void marriage (op cit 548).
660. Quaest Jur Priv I 16.
661. Th 341 and Dictata ad Gr 2.26.12 (Th 341) (Pret ed III 8-9).
662. Dec Cur Belg II dec 166.
663. Coutumes d'Orleans I 17.
664. E Spiro 'Domicile of Minors without Parents' (1956) 5 ICLQ 196 and 'The Legal Position of Minors without Parents' (1956) 19 THR-HR 90 at 97ff shares this view. In his Law of Parent and Child 131 he add the qualification 'provided that such guardian did not by reason of the change of his (her) domicile cease to be guardian'.
- In English law the position is obscure. Dicey & Morris 112 point out that there is no English authority. Possibly, they say, a guardian with a blood relationship, such as a grandparent, will be able to change an infant's domicile, another guardian not. Or possibly a guardian may change an infant's domicile only to a country in which he is recognized as a guardian. On balance, however, they conclude that the safe view is that the domicile of an infant without a surviving parent (or of an illegitimate infant whose mother is dead) cannot change. In German law the answer is in accordance with the submission made here: see BGB § 11, as reworded from 1 July 1970. See Spiro 131n58.
665. See Spiro 42, 125.
666. See D 50.1.9; Savigny System VIII § 353; Govu v Stuart (1903) 24 NLR 440 at 441-2. The rule is the same in English law (Dicey & Morris 110-11) and American law (Restatement Second § 22 Comment c; Beale § 34.1).

667. Dhanabakium v Subramanian 1943 AD 160 at 166. See Spiro 421; Hahlo & Kahn South Africa 389.
668. Spiro 129n46 also answers in the affirmative.
669. This seems to be the effect of the decision of the court a quo in Von Wintzingerode v Von Wintzingerode 1963 (2) PH B18 (T) - see (1964) 81 SALJ 283.
670. Hahlo & Kahn South Africa 369.
671. See above, text following n 132. See also Spiro 67, 125; Pollak in (1934) 51 SALJ 26.
672. On the subject of a mentally incompetent person's being able to acquire a domicile because of sufficient intellect and understanding for such purpose, see Restatement Second § 23; Beale § 40.1; Goodrich § 42.
673. Dicey & Morris 116; Cheshire 179; Schmitthoff 93; Restatement Second § 23; Beale § 40.4; Goodrich § 42.
674. Dicey & Morris 116, citing Sharpe and Sharpe v Crispin (1869) LR 1 P & D 611, which is not decisive, however; In re G [1966] NZLR 1028; Wolff § 120; Graveson 226; Schmitthoff 93; Beale § 40.4. Cheshire p 179 is critical, would look to the interests of the minor and allow the Court of Protection to change the lunatic's domicile if this appears to be to his benefit. Article 5 of the Draft Code in the First Report of the Private International Law Committee of England (Cmd 9068, 1954) provides that a lunatic retains his last domicile, but with the consent of the domiciliary court his curator may be given the power to change it. Restatement Second § 423 Comment c requires him to live with his parent on whom he is dependent, otherwise he keeps his domicile at the time of separation. More complex rules, but resting on the same principle, apply where the guardian is not a parent: op cit § 22 Comment h.
675. Above, text to nn 660ff.
676. Sharpe and Sharpe v Crispin (1869) LR 1 P & D 611 at 618 (obiter); Henning's Executor v The Master (1885) 3 SC 235 at 238-9; Ex parte Fletcher 1930 WLD 231 (obiter); Rifkin v Rifkin 1936 WLD 69 at 71; Kertesz v Kertesz [1954] VLR 195 at 197; Dicey & Morris 115-16; Schmitthoff 93.
677. Henning's Executor v The Master (1885) 3 SC 235 at 239; Dicey & Morris 115-16; Wolff § 120.
678. Sharpe and Sharpe v Crispin (1869) LR 1 P & D 611 at 618.
679. Code Civil § 108.2.
680. Civil Code § 39.
681. Thus the German Civil Code § 8.
682. Art 5 of the Draft Code of the First Report of the English Private International Law Committee (supra).
683. The solution of some US jurisdictions: Restatement Second § 23 Comment f.
684. Ex parte Berry: In re Berry 1961 (4) SA 79 (D), esp at 80. See also Dicey & Morris 117.

685. Above, text to nn 184ff, 237ff.
686. Above, text to n 541.
687. Above, text to n 135.
688. Above, text to nn 265ff.
689. See eg Van Leeuwen Cens For 1.3.12.5, RHR 3.12.10; J Voet 5.1.98.
690. Per De Villiers AJA in Hutchison's Executor v The Master (Natal) 1919 AD 71 at 77.
691. Commentaries on Colonial and Foreign Law 1 ed (1838) I 54.
692. Matter of Newcomb 192 NY 238, 84 NE 950 (1908) (Court of Appeals of New York).
See Cheatham et al 15.
693. Cf Huntly (Marchioness) v Gaskell [1906] AC 56 (HL (Sc)).
694. Drexel v Drexel [1916] 1 Ch 251, esp at 259.
695. Wood v Wood [1957] P 254 (CA), esp at 274. See generally Dicey & Morris 98; Cheshire 167. See too Note 'Evidentiary Factors in the Determination of Domicil' (1948) 61 Harv LR 1232, where it is stated that in the US it is generally agreed that motivation arising from a desire for a temporary advantage based on domicile, 'such as divorce or naturalization', should be regarded as a special purpose negating a change of domicile. An intention to enjoy a continuous legal advantage, however, should not be found wanting as in some American jurisdictions, for the party's acts are 'explained by the motive rather than by an attitude of attachment'. The 'stabilising acts' and the intention to obtain legal rights may show the requisite state of mind. See further Restatement Second § 18 Comment f - motive, good or bad, is immaterial: it could even be to facilitate a life of sin and crime; but there must be a bona fide intention to change home.
696. Per Kindersley V-C in Drevon v Drevon (1864) 10 LT 730 at 732 (the wording in 34 LJ Ch 129 at 133 is different), cited with approval by Sutton J in Ochberg v Ochberg's Estate 1941 CPD 15 at 39.
697. Vromans De foro compet I 4 p 133; Holl Cons III(2) cons 138 n 22.
698. Hutchison's Executor v The Master (Natal) 1919 AD 71; Smith v Smith 1952 (4) SA 750 (O) at 756. Cf Eilon v Eilon 1965 (1) SA 703 (AD) at 719, 722, where failure to do so and the investments of earnings in the new country in the purchase of land in the old was a contra indicium.
699. Utr Cons I cons 73 n 4; Mills v Executors of Mills (1900) 18 SC 182 at 191; Ley v Ley's Executors 1951 (3) SA 186 (AD) at 195 (non-acquisition in the case of a bachelor held not to signify).
700. Van Zutphen Practyck Ned sv domicilie; J Voet 5.1.97; Vromans De foro compet I 4 p 133; Brunnemann Comm in Pand 50.1.31; Utr Cons I cons 73 n 4, II cons 136 n 2; Schomaker Cons V cons 21 n 5, Moreland v Moreland (1901) 22 NLR 385 at 387; Quayle v Quayle 1949 SR 203.

701. See Eilon v Eilon 1965 (1) SA 703 (AD) at 722-3.
702. Ex parte Pekola 1951 (3) SA 793 (N). The propositus was a United States seaman who married a South African domiciliary but continued in the service of the shipping line plying between the United States and South Africa.
703. Pothier Coutumes d'Orleans I 20; Hutchison's Executor v The Master (Natal) 1919 AD 71.
704. Seebratan v Fakira (1907) 28 NLR 529 at 530; Hutchison's Executor v The Master (Natal) 1919 AD 71.
705. Mason v Mason (1885) 4 EDC 330 at 337, 341, 356.
706. Seebratan v Fakira (1907) 28 NLR 529 at 530; Quayle v Quayle 1949 SR 203 at 205.
707. Mills v Executors of Mills (1900) 18 SC 182 at 191.
708. Pothier Coutumes d'Orleans I 20; Gunn v Gunn 1910 TPD 423 at 427.
709. Gunn v Gunn 1910 TPD 423 at 428.
710. Deane v Deane 1922 OPD 41 at 46.
711. Hutchison's Executor v The Master (Natal) 1919 AD 71.
712. Kajee v Immigrants Appeal Board (1916) 37 NLR 42 at 48-9.
713. In (1948) 61 Harv LR 1236 it is pointed out that American courts heavily emphasize membership of a local church, gifts to local charities and membership of a local club. But these facts probably signify more when the competition is between domiciles in the same political unit.
714. Cf J Voet 5.1.97; Vromans De foro compet I 4 p 133; Schomaker Cons V cons 2ln4; Gunn v Gunn 1910 TPD 423 at 427-8; Johnson v Johnson 1931 AD 391 at 406.
715. In Smith v Smith 1970 (1) SA 146 (R) at 151 it was held that the sole reason for the acquisition by a Rhodesian domiciliary of Australian citizenship was to obtain an Australian passport, and that it did not establish the animus manendi.
716. Cf Pothier Coutumes d'Orleans I 20.
717. See Van Straaten v Van Straaten 1911 TPD 686 at 688.
718. Savigny System VIII § 359. See Deane v Deane 1922 OPD 41 at 43 (obiter).
719. Cf Van Leeuwen Cens For 1.3.12.5, RHR 3.12.10.
720. The inquiry then becomes largely one of credibility. Cf Webber v Webber 1915 AD 239 at 250; Muniammah v Kullu (1917) 38 NLR 352 at 358-9; British American Assurance Co v Moretti (2) 1936 CPD 543 at 545.
721. Vromans De foro compet I 4 p 133; Holl Cons III(2) cons 138 n 22; Utr Cons I cons 73, II cons 97 n 11 (express declaration sufficient even if nothing in the nature of residence from which to infer animus, eg no moving of goods), II cons 136 n 2; Crystal v Colonial Secretary (1905) 22 SC 646 at 648.
722. Per Sutton J in Ochberg v Ochberg's Estate 1941 CPD 15 at 39-40. This passage is lifted almost verbatim from the speech of Lord Buckmaster in Ross v Ross [1930] AC 1 at 6. 'Even if expressions of intention are clear and consistent, they cannot prevail against a course of conduct inconsistent with them or leading to an opposite inference': per Goldin J in Howard v Howard 1966 (2) SA 718 (R) at 722. See too

- (1948) 61 Harv LR 1237-8; (1961) 73 Jur Rev 260-1. See too Beale § 41C:
'In any case of discrepancy between [a person's] declarations and his acts, his
declared intention yields to the conclusion drawn from his acts.'
723. 1917 WLD 67.
724. Per Mason J in Moreland v Moreland (1901) 22 NLR 385 at 388. See too Wolff
§ 108. But cf Holl. Cons III(2) cons 138 n 22.
725. Restatement Second § 20: Special Note on Evidence for Establishment of a Domicil
of Choice. Casual statements made on the spur of the moment as to one's home may
be entitled to great weight: *ibid*.
726. Hawkes v Hawkes (1882) 2 SC 109; Knox v Knox (1907) 24 SC 441 at 443-6; Von
Falkstein v Von Falkstein 1917 WLD 67 at 68.
727. In Smith v Smith 1952 (4) SA 750 at 755. See too Ex parte Standing 1906 EDC 169
at 179-80.