

But the transaction between A and B is not a sale from A to B nor does the obligation from A to B arise out of a contract of sale. In the case of *Edgecombe v. Edgecombe*, (1909, L.L.R., 164) a partner purchased property on behalf of the partnership and had it transferred into his own name. The question only arose there as to the division of the profits arising from the realisation of the property. MASON, J., said: "These, *i.e.*, rights to profits, arose not by virtue of any sale but by virtue of the agreement prior to the sale making the brothers partners or joint venturers in the coming purchase. It does not seem to me tenable to suggest that A. Edgecombe could decline to recognise his brother's half interest in the venture because the parties had not both signed a contract in writing." I think this reasoning equally applies in an action for the division or transfer of the property.

With regard to the other defence I think the matter can only be determined by action and it would be inadvisable for me to discuss that portion of the case. I think there must be a temporary interdict. Action to be brought forthwith and the costs I think should be costs in the cause.

Applicant's Attorneys: *Sims & Michel*; Respondent's Attorneys: *Van Hulsteyn, Feltham & Ford*.

[G. W.]

## SHAPIRO v. SHAPIRO.

1914. May 14, 22. MASON, J.

*Husband and wife.—Domicile of Choice.—Residence by husband.*

In order to constitute a domicile of choice, there must be, *inter alia*, actual residence in the place chosen.

Where a husband and wife, domiciled outside the Transvaal, agreed that the wife should come to the Transvaal, and that the husband should join her there later, with the intention of acquiring his domicile there, and she performed her part of the agreement but he did not, it was held that he was not domiciled in the Transvaal.

Action for restitution of conjugal rights, failing which for divorce on the ground of malicious desertion. The declaration of the plaintiff, the wife, alleged that the parties were married at Johannesburg in May 1903. That they were domiciled and resided at Johannesburg, the plaintiff being still resident at Johannesburg. That in March 1911 and at Johannesburg the defendant maliciously deserted the plaintiff.

The plaintiff stated in evidence that the defendant and she lived in Oudtshoorn, in the then Cape Colony, when they were married. He became ill. It was agreed that he should go to England for an operation, and she was to go to Johannesburg. Their home was to be made in Johannesburg. He agreed to return to her in Johannesburg. She came to Johannesburg, but he never joined her. The marriage certificate showed that the marriage took place at Johannesburg by special licence. The residence of the defendant was stated to be Oudtshoorn C.C., and that of the plaintiff, Johannesburg.

*H. Kent*, for the plaintiff, referred to the following authorities on the questions of domicile and jurisdiction of the court: *Gqiba v. Gqiba* (16 E.D.C. 4); *Levin v. Levin* (18 C.T.R., 178); *Re Raffanel* (1863, 32, L.J., P. 203); Westlake, *Private International Law* (311); Foote, *International Law* (3rd Ed., 60).

*Cur. adv. vult.*

*Postea*, (May 22nd, 1914).

MASON, J.: The sole question for me to decide is whether this Court has jurisdiction to try the action. The parties were married in Johannesburg in 1903, but afterwards they went to Oudtshoorn in the Cape Province, and were domiciled there for several years. The defendant fell ill, and it was arranged that his wife should go to Johannesburg, while he went to England for an operation, after which he was to join her in Johannesburg. The defendant went to England in accordance with the arrangement and apparently underwent his operation, but he never came to Johannesburg, and has never since lived with the plaintiff.

It is quite clear that the parties intended to make their domicile in Johannesburg, but it is also quite clear that the defendant changed his mind, and now does not intend to return to the plaintiff. Can it be said that the spouses have established a domicile by virtue of the wife coming to Johannesburg with her husband's con-

sent, and on the understanding that he would join her there afterwards? I have not been able to find any decided case exactly like this one. It is true there is a maxim "Where the wife is, there is the home," but that is a maxim of evidence rather than of law. The universal rule of law is that the husband's domicile is the domicile of the spouses.

In order to constitute a domicile of choice two elements are necessary—an intention to choose it, and some actual residence in the place chosen. The question is whether the wife's residence can be held to constitute such evidence of residence as is necessary. I cannot satisfy myself that that is the law. The fact of residence by a man's wife and children is evidence as to his domicile, but it does not constitute his domicile. In the circumstances I am bound to hold—with much regret—that the plaintiff cannot obtain redress from this Court. The defendant is at present in the Cape Province; he has been served there in connection with these proceedings, and everything goes to show that if he ever intended to make his domicile in Johannesburg he has changed his mind. There must accordingly be judgment of absolution from the instance.

Plaintiff's Attorney: *E. Gluckmann.*

[G.W.]

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JACKSON v. DE WILDE.

1914. June 4. MASON, J

*Insolvency.—Law 13 of 1895, sec. 3.—Time for filing schedules.—Negligence of attorney.—Costs of voluntary surrender proceedings.*

Sec. 3 of Law 13 of 1895, enacting that "Schedules shall lie for the inspection of creditors at all times during office hours for a period of fourteen days from the date of the first publication of notice in the *Gazette*," means from 9 a.m. on the first day.

Failure by an attorney to act in accordance with this enactment constitutes negligence.

Where such negligence results in locking up an estate, which is subsequently compulsorily sequestrated, the insolvent's costs of the wasted voluntary surrender proceedings cannot come out of the estate.