

10/1/1959.

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

{ Appellate (Provincial Division.)
 (Provinsiale Afdeling).

Appeal in Civil Case.
Appel in Siviele Saak.

ZENA SENIOR & ANO. Appellant,

versus

COMPTROLLER FOR INLAND REVENUE Respondent.

Appellant's Attorney S. M. A. Rosendorff Respondent's Attorney
Prokureur vir Appellant Prokureur vir Respondent

Appellant's Advocate B. H. Billings & Co. Respondent's Advocate G. J. Steyn & Co. & C. M. Nathan
Advokaat vir Appellant Advokaat vir Respondent

Set down for hearing on Monday, 30th November, 1959.
Op die rol geplaas vir verhoor op

(WLD)

A
13275

bonam: de Beer, Ransbottom, Botha, Holmes et van Wyk.

p. 17.

Obdunant

30/11/59

Partea: Monday 14th December 1959

Appeal dismissed with
costs.

Practitioner
Rip

107/59.

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

ZENA SENIOR, and

BORIS SENIOR. Appellants.

and

THE COMMISSIONER FOR INLAND REVENUE. Respondent.

Coram: de Beer, Ramsbottom JJ.A., Botha, Holmes et van Wyk JJ.A.

Heard: 30th November, 1959.

Delivered: 14-12-1959

J U D G M E N T

RAMSBOTTOM J.A. :- The appellants are the executors testamentary of the late Aaron Senior who died in the Transvaal on December 17th 1954. In his lifetime, Aaron Senior was married to the first of the two appellants, Mrs Zena Senior, whom he had married in Russia in the year 1921. The second appellant, Boris Senior, is his son. Aaron Senior left a substantial estate on which estate duty was payable, and the Commissioner for Inland Revenue levied the duty on the basis that Aaron Senior and his wife had been married ^{out of} in community of property and that the estate was that of Aaron Senior alone. Mrs Senior contended that although she and her late husband were married in Russia, he was domiciled in the Union at the time of the marriage, that
the/.....

the marriage was in community of property, that the estate was a joint estate, and that estate duty was leviable only on one half of the joint estate. The difference between the amount assessed by the Commissioner and that which would be payable, if Mrs Senior's contention is correct, is considerable.

In order to resolve the conflict, the appellants, as executors, brought an action in the Witwatersrand Local Division in which they claimed a declaration in terms of Mrs Senior's contention, namely that estate duty is payable on the basis that Aaron and Mrs Senior were married in community of property.

It was common cause that Aaron Senior was born in Russia where he lived until he was twenty-three years of age. In January 1913 he came to the Transvaal and resided there until March 1914. He then returned to Russia, and remained there until 1925 when he came back to South Africa and settled in the Transvaal where he lived until his death in 1954. The appellants contended that during his residence in the Transvaal in 1913 and 1914 Aaron established a domicile of choice in the Union which he never abandoned, and that the marriage in 1921 was, therefore, a marriage according to South African law and was in community of property.

The onus was on the appellants to

prove/.....

prove that a domicile of choice had been established in the Transvaal in 1913 or 1914. HIEMSTRA J. found that they had not discharged that onus and he dismissed their claim with costs. The appellants have appealed.

Before dealing in detail with the facts upon which the parties rely in support of their respective contentions, I think it will be useful if I give a general outline of the facts which form the background of the dispute.

The late Aaron Senior was born in Russia, of Jewish parents, in the year 1889. His father was a shopkeeper at Koningov in the Ukraine. The family does not appear to have been well-off, although Aaron, who was the third son, went to a gymnasium or secondary school in a different town. There were other sons, Jacob and Woolf, who were older than Aaron, and Grisha who was younger, and a daughter. At some date before the year 1896, the eldest son, Jacob, left Russia and came to South Africa. He settled in Johannesburg where he lived until his death in 1933. The name of the family, in Russia, was Genier. Phonetically, the nearest English equivalent was Senior, and Jacob adopted that name. In 1896 Jacob persuaded his parents to send the next son, Woolf, then a boy of 14 years to join him in South Africa, and Woolf, like Jacob, made his home in Johannesburg/.....

-nesburg and has lived there ever since. The brothers earned a living and in 1912 they were in employment in Johannesburg, each earning a salary of about £30 a month. They were unmarried and lived frugally and saved money, and they regarded themselves as comfortably situated. In that year, 1912, according to Woolf Senior, who was a witness at the trial, the younger brother, Aaron, wrote to them saying that he would like to leave Russia and settle in South Africa. Woolf Senior says that Aaron, who was then a young man of 23, was at a commercial gymnasium at Kiev. What he was doing for a living and what he was earning is not known. After correspondence on the subject, the two elder brothers provided a third class steamship fare and Aaron set out for South Africa. He arrived in Cape Town in January 1913 and entered the Union under the name of Aaron Senior. Notes made by the Immigration Officer on the declaration form which he signed on arrival show that he spoke a little English and that he was going to his two brothers. He gave his occupation as "merchant". Employment was found for him as ~~seen~~ an assistant in a shop at Hekpoort, a hamlet some miles north of Krugersdorp; he was given board and lodging by his employer and was paid £5 a month.

It appears that Aaron had fallen

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in love with a girl called Sonia who had promised to marry him and whom he had left behind in Russia. Woolf Senior said that he often spoke of her to his brothers whom he visited about once a month; he told them that he was unhappy and lonely, that he wanted to be with them, and that he wanted to go back to Russia to marry Sonia and bring her to South Africa. In March 1914 he returned to Russia.

Very little is known of Aaron Senior's life for several years. He reached Russia safely, but the date of his arrival is not known; he did not communicate with his brothers. It is thought that he went to Priluki, a town in the Ukraine, where Sonia and her parents lived. How he earned his living we do not know. At some date, which is also not known, he married Sonia, and shortly afterwards he took his bride to visit his sister and her husband, a Mr. Lipschitz, a shopkeeper at Gluchov in the Ukraine. Mr. Lipschitz now lives in Johannesburg. He gave evidence at the trial and described that visit. He thinks that Aaron's marriage to Sonia took place some time between the outbreak of war in 1914 and the Revolution in 1917 - possibly in 1915. He thinks that Aaron was then earning his living by teaching. In 1919 Aaron, Sonia, and their child were living in Priluki where Aaron was then employed as manager of a tobacco factory. In 1919 or 1920 Sonia and their child both died/.....

died. During Sonia's illness Aaron Senior had become acquainted with a lady whom was a qualified pharmacist employed in Priluki. After the death of Sonia and her ^{child} the friendship ripened, and on August 23rd 1921 Aaron married this lady who became Mrs Zena Senior, the first of the two appellants. After the marriage Aaron and his wife remained in Priluki where they continued in their respective employments. In April 1923 a son was born whom they named Boris and who is the second of the two appellants.

During all this time there seems to have been no communication between the brothers in South Africa and their relatives in Russia. Their parents had died in 1919 or 1920, and the family in Russia consisted of Mr and Mrs Lipschitz and their three children, the younger brother Grisha, and Aaron, his wife and child. Towards the end of 1924 Mr. Lipschitz received a letter from Jacob and Woolf Senior asking him and his family to leave Russia and emigrate to South Africa; the other members of the family seem to have received similar letters. Woolf Senior thinks that his elder brother Jacob Senior undertook to finance the scheme. The invitations were accepted, arrangements were made, passports were obtained, and in 1925 the whole family left Russia and travelled to South Africa via England; they arrived in Cape Town in July 1925. At that time Jacob and Woolf Senior ^{who had prospered} owned a farm near Krugersdorp. They put Aaron and

his/.....

his family on the farm where he remained for 18 months or two years and where he carried on farming operations. Meanwhile, they looked for a business opening for him, and in due course a partnership was acquired in a furniture business in which he remained until his death in 1954.

The appellants' contention is that in 1913-1914 Aaron Senior abandoned his Russian domicile and established a domicile of choice in the Union. Unless that domicile of choice was abandoned after Aaron returned to Russia, it was still his domicile at the time of his marriage in 1921 and that marriage, therefore was in community of property. It was not disputed that the onus was on the appellants to prove the establishment of a domicile of choice in the Union, and if that was proved then the onus was on the respondent to prove that Aaron Senior had abandoned that domicile and had reverted to his domicile of origin before his marriage in 1921.

What the appellants had to prove is set out in the following passage in the judgment of De VILLIERS C.J. in Johnson v. Johnson (1931 A.D. 391 at page 398) :-

"Both in the Roman law and in our own and the English law a person sui generis is free to choose for himself a domicile of choice animo et facto by establishing for himself in fact a residence in the territory in question combined with an animus manendi in that territory - Westlake, Private International Law/.....

Law (4th Edition, paragraph 256). Without going into the history of what that has been held in English cases to imply, it is sufficient for our purposes to adopt the question framed by LORD MACNAUGHTON in Winans v. Attorney General (1904 A.C.287): 'The 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 determining what exactly constitutes a permanent home. But I agree with Westlake in paragraph 264 (Private International Law) when he says as a result of the English cases 'the intention for acquiring a domicile of choice excludes all contemplation of any event on the occurrence of which the residence would cease. ' This statement satisfies Voet's propositum illic perpetuo morandi (cf. Hollandsche Consultatien, III, 2, Cons. 317 (really 217)). The question then which I have to put myself in the present instance is the following: 'Has it been proved with perfect clearness and satisfaction to myself that Johnson at the date of the marriage had formed a fixed and settled purpose, a determination, a final and deliberate intention to abandon his Swedish domicile and settle in the ^tate of New Jersey ? ' "

In Ley v. Ley's Executors and

Others (1951(3) S.A. 186) it was held that :

"no matter how serious an allegation of fact may be, the onus of proving the fact is, in civil cases, discharged on a preponderance of probability and there is no reason why the same rule should not apply when the question at issue is whether a domicile/.....

domicile of choice has been required. I am therefore of opinion that the rule laid down in Johnson's case, if it is to be construed as laying down a higher standard of proof than obtains in other civil cases, should not be followed". (per CENTLIVRES C.J. at page 192).

The meaning of Westlake's statement "the intention necessary for acquiring a domicile of choice excludes all contemplation of any event on the occurrence of which the residence would cease" was explained. With regard to the expression "excludes all contemplation" the learned Chief Justice said :

"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 ~~of choice~~ 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 to 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 at once have 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 ~~mind~~ domicile."

Subject to this explanation, what has to be proved is as stated in Johnson v. Johnson (supra) and the standard of proof is proof

on/.....

on a preponderance of probability.

The appellants rely on evidence of three kinds. First, the direct evidence of Woolf Senior as to the circumstances in which his brother Aaron came to South Africa in 1913, what he did here, and what he said about his intention of remaining here. Second, the inferences to be drawn from the circumstances under which he came to the Union. Third, what he said after his return to Russia in 1914.

The evidence of Woolf Senior, in chief, was that Aaron wrote from Russia in 1912 suggesting that he should join his brothers in South Africa "for permanent residence". He said that he and his brother Jacob financed Aaron's journey. On Aaron's arrival, Jacob got him the position at Hekpoort where he got wages of £5 a month and was provided with board and lodging. He thinks that Aaron visited the brothers in Johannesburg "practically once a month", that he explained expressed a great liking for the country and said, on more than one occasion that "his bones will be here." On the other hand, Aaron often spoke of the lady he wished to marry and said that he felt lonely and unhappy and said he wanted to go back to Russia and bring her to South Africa "to his home". Woolf said that it was arranged that Aaron should go back to Russia "for one purpose/.....

purpose and that is to get married and come back - return."

Woolf says that he was satisfied in his own mind that Aaron intended to return.

HIEMSTRA J. attached little importance to Woolf's evidence. He says "He knew very little of his brother's circumstances during those fifteen months. He was anxious to embellish his evidence. " On one point the learned judge found that Woolf's evidence was untruthful. I entirely agree with the opinion that HIEMSTRA J. formed of Woolf/ Senior's evidence. *at the time of the trial he was 77 years of age and a* perusal of his evidence shows that he had little or no recollection of any of the matters to which he deposes.

~~It seems that he had completely lost touch with and interest in his family.~~ He knew nothing about his parents, he did not know when they had died, and he does not remember ever enquiring about them when Aaron arrived from Russia in 1913 or at any time. As far as Aaron himself is concerned the brothers - or Woolf Senior at any rate - seem to have taken very little interest in him. Having found him a billet in the shop at Hekpoort they left him there. Woolf has no knowledge of how he lived. It is not surprising that the young man was lonely. In cross-examination Woolf says that Aaron had said that he wanted to be with his brothers. That is natural, but the brothers seem to have shown no enthusi-

-asm for his company. To them he was a stranger. He was seven years old when Woolf left Russia, and younger still when Jacob emigrated.

Mr. Ettlinger argued that Woolf's evidence must be considered against the background of historical facts relating to the position of Jews in Russia under the Tsarist regime. This brings me to the second kind of evidence on which the appellants rely. The argument was that it is a matter of history, of which the Court can take notice, that Jews in Russia were oppressed, and were subjected to cruel persecutions and even massacres, and that a large number of Jews left Russia to escape oppression and persecution and to find freedom in new surroundings. He argued that as Jacob had brought Woolf to South Africa, so the brothers brought Aaron to these shores to make a new home. This picture of the plight of Jews in Russia may be a true one. But there is no evidence that the Genier family were the victims of oppression or persecution. The father was a small business man; he may not have been well-off, but there is no evidence that he and his family lived in poverty; as I have said, Aaron went to a gymnasium and seems to have had a fair education. Mr. Lipschitz, who married the daughter, was a shop-keeper; he says that he started from small beginnings and worked himself up. It would seem that it was/.....

was only during the revolution that the wrath of the revolutionaries fell upon him. There is no evidence of great poverty or of oppression or persecution in the personal background of Aaron Senior to show any compelling reason for a determination on his part to leave his home-land for good and to settle in a new country. I do not find that the inferences to be drawn from the circumstances of Aaron Senior's Russian background do much to support Woolf Senior's evidence. They certainly do not lead me to think that HIEMSTRA J. was wrong in rejecting it. Woolf Senior tried to show that the family in Russia were oppressed by saying that his parents were compelled to live in different towns and that Aaron was not allowed to be with them. It is clear that Woolf Senior had no knowledge of how his parents were living in 1912 and Mr. Lipschitz does not support him. If Woolf is correct in saying that at that time Aaron was at Kiev at a commercial gymnasium, there is nothing strange in the fact that a young man of 23 was living apart from his parents. Woolf's evidence was that Aaron was a poor boy, that the brothers financed his journey to South Africa, and that he had no option save to remain here permanently; he described him as a school boy. This is not necessarily the true position. In fact Aaron was no longer a ~~school~~ school boy. He was not uneducated and the probability is that he

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had earned a living in Russia. No doubt he did not come to the Union for a holiday, but it is quite probable that his state of mind was that he would come to South Africa and that if he liked the life he would remain and make his home here, otherwise he would return to Russia. The fact that he wished to marry Sonia is of considerable importance. His decision to live in the Union would depend upon whether he could make a living and a home, not for himself alone but for himself and his bride, and on whether she would be willing to leave Russia for a strange country where she could not speak the language and where she had no friends or relatives. I find Woolf Senior's evidence that Aaron ~~experienced~~ ^{expressed} an intention of remaining here permanently quite untrustworthy. The impression I have of his evidence is that he was most anxious to assist the appellants and was prepared to state as facts things about which he knew nothing at all.

In fact Aaron Senior returned to Russia ~~xxx~~ after he had been in the Union for 15 months. Woolf Senior insists that Aaron went back to marry and intended to return with his bride - to use his words "to bring her here to his home." This picturesque evidence loses its force when it is remembered that the only home Aaron had known during the whole of his stay in the Union had been provided for him by his employer/.....

there was any interruption of postal services before that date. If Aaron Senior left South Africa in March 1914, one would suppose that he would have reached Russia not later than the end of May, and there would have been ample time for him to write to his brothers and tell them of his plans. In fact Aaron did not at once marry Sonie. He obtained employment and married her at a later date - presumably when he could afford to support her. It was contended that if Aaron had in fact returned with his bride that would have been strong evidence of a prior intention to do so, and that no inference adverse to the appellants can be drawn from the fact that Aaron did not return to the Union, because he would have been prevented ^{from} by doing ^s so by the war. That may be so, but the fact of his actual return which would have shown that prior intention is missing, and on the evidence as it stands the circumstances of his return to Russia and of his marriage do not support the appellant/s' case.

In addition to the evidence that has been considered so far, there is a fact upon which the appellant strongly relied both at the trial and in this Court. Before Aaron Senior left Russia he executed a general power of attorney in favour of his brothers Jacob and Woolf jointly and severally. After Aaron had left, Jacob Senior purchased, in Aaron's name, immovable property consisting of shops and native

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eating houses. This property which was situated in Benoni formed part of an insolvent estate. The price paid was £2675. A bond of £1500 was obtained, and Jacob Senior paid the balance of £1175, presumably out of his savings. The property was transferred into the name of Aaron Senior. It was a valuable property which produced, in rents, approximately £60 a month. The contention was that the property was bought at the request of Aaron Senior so that he might be assured of an income on his return from Russia. If that were the fact it would be strong evidence of an intention to return to the Union. HIEMSTRA J. found that the property was bought in the name of Aaron Senior merely as a nominee for his brothers and that he had no beneficial interest in it. I am in agreement with that finding. According to Woolf Senior, Aaron saw a notice in a newspaper advertising the sale of the property. He suggested to the brothers that they should buy it for him and all three went to Benoni to see it; it was then decided ~~xx~~ to buy. Since Aaron was leaving for Russia, he gave his brothers a power of Attorney to enable them to buy the property on his behalf and to transfer it to him. Apart from the fact that the business seems to have been handled by Jacob and that Woolf remembers very little about it, the story is inherently improbable. Jacob and Woolf Senior were ^{then} not wealthy men although their salaries were more than enough for their daily needs. They had not acquired any property for themselves, and

they had not shown any marked generosity towards their younger brother. In those circumstances it is improbable that either or both of them would have laid out the considerable sum of £1175 to provide Aaron with an asset; it is more likely that the property was bought as an investment of their savings and that it was bought in the name of Aaron Senior as a business precaution. The subsequent history of the property and the actions of the brothers in relation to it confirms this view. The property was bought at an auction sale on April 7th 1914. One would have expected that this important piece of news would at once have been communicated to Aaron, or that he would have written to enquire - the purchase of the property was vital to his plans - but no communication passed either way. The income from the property was received by the brothers in Johannesburg, or possibly by Jacob alone, and the loan was paid off and the bond cancelled on March 7th 1923. Had the property been regarded as belonging to Aaron, who was to return after the war, the brothers would, no doubt, have made provision for the accumulation of the rents on his behalf; nothing of that sort was done. Aaron in Russia, was unconscious of the fact that he was the owner of valuable property in Benoni and that wealth was being stored up for him against his return; ^{indeed, it was not.} It is true that after the opportunity of telling him of the purchase in 1914 had been lost he might,

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of necessity, have been kept in ignorance, but in 1924 an opportunity of telling him of his good fortune presented itself. When the Johannesburg brothers wrote to Aaron in that year suggesting that he should come to South Africa with the other members of the family one would have expected them to mention the fact that an assured income from his ~~brother's~~ Benoni property awaited him; the opportunity was not taken. Aaron, with his wife and child travelled from England to Cape Town in the third class of a ship called the Wangoni. For some reason that is not known he travelled under the name of Woolf Senior. To facilitate his entry into the ~~country~~ Union, one Beemer, a merchant of Johannesburg, made an affidavit to the effect that his firm was desirous of bringing to the Union "Woolf Berelov Genier (Senior) 43 years of age" together with his wife and child, that the said Woolf Berelov Genier had previously been in South Africa but had left for "a trip to Europe" in 1914 but had been prevented from returning by the war, and that his firm undertook to give the said Woolf Berelov Genier employment as a traveller at a commencing salary of £32. 10. -.per month. Beemer stated in the affidavit that the said Woolf Berelov Genier (Senior) was the owner of property in Benoni. It would seem that the purpose of this affidavit was to satisfy the immigration authorities. Beemer had no knowledge whatever of the facts, and everything contained in the affidavit including the fact that Aaron had assumed the name and age of

his brother Woolf must have been told him by Woolf or by Jacob. The information about the Benoni property must have come from the same source. Although Beemer was told about that property, Aaron was not; that appears clearly from the declaration that Aaron was required to sign before landing in which he made no mention of this valuable asset. It would appear from notes made by the immigration officer, who of course had Beemer's affidavit, that he was asked about it and said that he owned property in Johannesburg, not Benoni. After Aaron had landed, no property or rents were handed to him; he was put on the farm owned by the brothers, and there he stayed for 18 months or two years. On October 9th 1925 a new bond over the property was passed in favour of the National Bank for £4000. What that was for we do not know; Woolf was then in business and may have needed overdraft facilities, but that is not known. The bond was passed by Aaron who was then in the Union, but there is no evidence that he got the proceeds. The partnership in the furniture business was not acquired until at least a year later, and Woolf Senior says that that was financed by Jacob and himself. The £4000 bond was cancelled and another bond for the same amount in favour of Barclays Bank took its place in May 1926. The property was transferred to a purchaser in October 1937, but there is no reliable evidence as to when it was sold, and it is

not/.....

not known who got the proceeds; Woolf Senior says that it was sold by Jacob during Aaron's absence in Russia. Mrs Senior says that her husband used to say that he had property that his brothers had bought for him. She says that he told her that "when we came here." She says "he may even have mentioned it in Russia, but I do not remember that". Aaron Senior could not have mentioned the property while he was in Russia because it is evident that he did not know about it. If he mentioned it to his wife after their arrival, he gave her no details. She says that he may have mentioned it once or twice, but he never took her to Benoni to see it. She says she knew he was getting rent, but his books were not produced to support that statement nor was any tenant called to say that he paid rent to Aaron. Mrs Senior says that her husband told her that the property had been sold, but her evidence is so vague as to be valueless. There is no evidence that he received the purchase price.

In 1957, after Aaron's death, efforts were made to satisfy the Commissioner for Inland Revenue that Aaron was domiciled in the Union at the date of his marriage to Mrs Senior; correspondence passed and Woolf Senior made an affidavit. The fact that Aaron had bought property in the Transvaal in 1914 was not mentioned in any of the correspondence/.....

-pendence at that time. In his affidavit Woolf is at pains to prove that Aaron had established a South African domicile in 1914 and that when he went to Russia he did so with the intention of returning; yet there was no allegation that Aaron had bought a property. That important fact was not present to the minds of either Mrs Senior or Woolf Senior at a time when every effort was being made to satisfy the respondent that Aaron had settled in the Union in 1914. It was not until February 1959, after the pleadings in this action had been closed, that the purchase of the property was mentioned. On February 4th 1959 the respondent's attorney requested particulars for the purpose of trial and inter alia asked whether Aaron Senior had acquired any immovable property in the Union during the years 1912 and 1913. Then, for the first time, the fact that he had been the registered owner of lot 2626 Benoni was recalled. If the property had in truth belonged to Aaron and if he had enjoyed its rents, and if Mrs Senior had known about it, it is hardly conceivable that neither she nor Woolf Senior would have thought of it in 1957.

One more fact must be mentioned in connection with this property. In the general power of attorney which Aaron Senior gave to his brothers in 1914 he was described as being "of Johannesburg". In the circumstances of

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this case that is of no significance.

The third kind of evidence upon which the appellants relied was evidence of what Aaron Senior said to his brother-in-law Mr. Lipschitz and to his wife Zena while he was in Russia. Such evidence is admissible but it "must be carefully weighed in connection with the circumstances in which it occurred, and even if the expressions are clear and consistent they cannot prevail against a course of conduct leading to an opposite inference." (Halsbury, 3rd Edition, Vcl. 7 page 20).

In my opinion the evidence as to what Aaron said in Russia is of little value and I do not propose to spend much time in discussing it. Mr. Lipschitz met Aaron once, when he brought his bride, Sonia, to visit his sister. Mr Lipschitz in chief, was asked whether he remembered Aaron saying anything about where he had been. His answer was :

"Sure, he was swanking that he was in Africa, and he would like to go back but that circumstances were against it - war had started; but as soon as times were better it would be possible for him to return, he would take his wife and he would go back."

Mr. Lipschitz was asked whether he gained the impression that Aaron liked South Africa. He answered :

"Yes, as a matter of fact he was telling me 'What are you sitting here, there are no results in sitting here; come to South Africa, it is a good country,' that is what I remember."

This evidence was amplified in cross-examination. Mr. Lipschitz remembered/.....

remembered that Aaron had said that when he was able he would go to South Africa and make his home there, and that he "special-ly came to marry his girl with whom he was in love." Mr.

Lipschitz was asked the direct question:

"Did he say that he had established his home in South Africa?"

his answer was :

"No he told me he was happy in South Africa, he had earned money in South Africa, and wanted to go back and stay there."

"Did you ask him about South Africa ? " -

"Yes I asked him and he said he loved it."

I doubt whether Mr. Lipschitz's recollection of a conversation that took place over 40 years ago can be relied upon, but on the face of it it does not amount to a statement that Aaron had abandoned his Russian domicile and had permanently settled in the Union. When one remembers the £5 a month and the lonl^eness of Hekpoort, one cannot regard the statements that "he had earned money in South Africa" and that "he loved it" as anything more than a traveller's tale. Mrs Senior, in her evidence, said that her husband used^e to talk about the Transvaal and its be^auty and used even to sing songs about it. He said that he^y would go back and make a home there if she married him. He used to study English at night. But all this was long after Aaron had returned to Russia, and after the revolution

had/.....

had wrought its changes in the lives of the people. In fact, Aaron and his wife seem to have been reasonably well placed and even in 1924 Aaron did not try to leave; the initiative came from his brothers. It was argued that the fact that Aaron and his first wife, Sonia, lived with her parents in Piluki showed that his sojourn in Russia was of a temporary nature. There is no substance in this point; housing conditions may have made this the most convenient arrangement.

Very little more need be said, but a few small points must be mentioned. On his immigration declaration form signed in 1925, Aaron Senior described his first period of residence in South Africa as having been ^{of a "temporary nature". When he applied} for naturalisation, in 1930, he did not mention that period of residence although one of the questions put to him ~~was~~ clearly called for the information; the omission was rectified at the request of the Department of the Interior. In 1931 Mrs Senior asked her husband to buy her a stand in Germiston. He did so, and the stand was transferred to her. In relation to that transaction she evidently stated that she had been married in Russia according to the laws of Russia - that is, out of community of property. Her husband never told her that they were married in community of property. These are small points and can no doubt be explained, but they ~~are~~ all point one way and on the face of them are inconsistent/.....

-consistent with the appellants' contention. In a mutual will made on October 24th 1954, less than two months before his death, Aaron and his wife described themselves as married in community of property; in the circumstances, that statement is of no value.

The case is of considerable importance to the parties, and I have considered it with great care. I have formed the clear opinion that the appellants have not discharged the onus which rests on them and that the decision of HIEMSTRA J. was right.

The appeal is dismissed with costs.

De Beer, J.A.

Botha A.J.A.

Van Wyk, A.J.A.

Holmes A.J.A.

} Concur

W. H. P. G. G. G. G. G.