origin, and the other French writers to whom I have referred do not mention the revival of the domicile of origin.

Where, as is the case in many countries, nationality determines the personal law, these difficulties may not perhaps arise.

I have come upon a consideration of the authorities to the conclusion that whilst the tendency of Roman-Dutch and allied authorities is against the doctrine of the automatic revival of the domicile of origin upon complete abandonment of the domicile of choice, the question remains open for decision.

There are many arguments of convenience in favour of the persistence of the domicile of choice, especially in countries like the United States and the Union, but they do not seem to me to prevail against the objections to adopting on a question of international law an interpretation differing from that of the rest of the Empire. And those are well illustrated by the case of *in re Johnson* (1903, 1 Ch. 821).

I am fully sensible to the hardships which may be thus inflicted on deserted wives and a consideration of which led to the now exploded doctrine of a separate matrimonial domicile for divorce, but this does not justify the Court in assuming a jurisdiction which it does not possess.

I must, therefore, refuse this application.

Applicant's Attorney: *L. Japhet.*

[G. H.]

MATTERSON BROS. v. ROLFES, NEBEL & CO.

1915. *April* 29. MASON, J.

Partnership.—Moratorium.—Act No. 1 *of* 1914 (*Special Session*), *Section* 5 (5).

Under sec. 5 (5) of Act No. 1 of 1914 (Special Session) a partnership cannot be sued where one partner is on active service, although the business of the partnership is being carried on in his absence by other partners.

Application by defendants in an action to strike out portion of plaintiffs' replication.

Defendants, George Hardwick Matterson and Victor Hardwick Matterson, trading in partnership as Matterson Bros., had pleaded specially that the partner George Hardwick Matterson was on active

service with the South African Defence Force, and that consequently all civil remedies against the partnership were stayed in terms of sec. 5 of the Public Welfare and Moratorium Act (No. 1 of 1914, Special Session). The plaintiffs in their replication replied to this special plea that they were suing the partnership, and that the business of the partnership was being carried on as before by the partner, Victor Hardwick Matterson.

J. T. Barry, for the applicants: A partnership cannot be sued independently of the partners. A judgment against a partnership is a judgment against each partner individually. Hence, where one partner is on active service, the whole partnership is protected by sec. 5 of the Act. If it were otherwise, the partner on active service would be deprived of the benefit of the section.

J. Taylor, for the respondents: A partnership can be sued as an entity, although one partner is out of the jurisdiction. In such a case it is not necessary to join him. See *Meintjes & Co.* v. *Simpson Bros. & Co.* (2 M. 217), *Maasdorp* (Vol. III, p. 333). See also with special reference to this Act, *Nel* v. *Naude and Labuschagne* (1915, C.P.D. 124).

Barry was not called upon to reply.

MASON, J. (after dealing with the facts and disposing of a preliminary objection not material to this report): The application raises an important question as to the construction of sec. 5 of the Public Welfare and Moratorium Act, under which all civil remedies whatever against persons on active service with the South African Defence Force are suspended until three months after their return from active service. The exact point is whether civil remedies are suspended against a partnership one of whose members is on active service. I have come to the conclusion that they are. As Mr. Taylor has admitted, a partnership is not a *juris persona*. When it is sued, the partners are sued as individuals, though connected by a special tie, and any judgment obtained is a judgment against the individual partners jointly and severally. Each is liable for the full amount of the judgment and execution can be levied against the separate property of each of them. I cannot see how judgment can be given against a partnership, one of whose members is on active service, without depriving that member substantially of the benefit to which this section entitles him. If the judgment can be levied against the partnership property or against his property, in either case these are proceedings vitally affecting

him. And how can judgment be given against the partnership so as not to affect him? If the other partner or partners are bound by the judgment, would they have a right of contribution against him? What would be the result if in a subsequent action brought against him a different judgment were given to that pronounced in the action against the partnership?

It seems to me that every one concerned would be involved in the most hopeless confusion if such a judgment could be given as would professedly operate against a partnership without affecting the position of a partner on active service. Possibly if the point had occurred to the Legislature an attempt might have been made to provide for a case like the present, though I cannot see how this could have been conveniently done short of prohibiting a member of a partnership going on active service or depriving him of this protection. The paragraph in the replication must therefore be struck out with costs. Leave is given to amend within a week.

Applicants' Attorney: *F. C. Dumat*; Respondents' Attorneys: *Steytler, Grimmer & Murray.*

[P. M.]

JOHANNESBURG MUNICIPALITY v. KERR.

[1915. *May* 6, 18. BRISTOWE, J.]

Practice.—Declaration.—Exception.—Amendment.—Time for.—Rule 36.*—Expiry.—Fresh leave.—Sufficient cause.*

The time within which under rule 36 a declaration, successfully excepted to, must be amended, cannot be extended after the time for amendment has expired. *Pfitzer* v. *Klette* (6 E.D.C. 196) distinguished. But after such expiry the Court has a discretion to grant fresh leave to amend for reasonable cause. Cause sufficient for a removal of bar under rule 33 will suffice for the grant of fresh leave to amend.

Application for absolution from the instance in an action for damages by reason of plaintiff's (respondent's) failure to file an amended declaration in accordance with an order of Court upholding an exception and giving leave to amend, or in accordance with the Rules of Court.

The facts appear from the judgment.