affairs of the Society, and also Mr. J. P. Kruger, as co-liquidators. The order I shall make is that the Society is placed in liquidation, and Messrs. Romyn and Kruger appointed liquidators, with the powers defined in the Companies Act, 1909, sec. 127, except those in paras. (*g*) and (*h*), the winding-up of the Society to be with all the powers and subject to all the provisions of the Companies Act, 1909, in the same manner as if the winding-up had been under that Act. The liquidators to give security to the satisfaction of the Master.

With reference to Mr. *Davis'* contention that the Court should not appoint liquidators, but should allow the creditors and contributories to appoint liquidators as provided by the Companies Act, I see no reason to depart from the procedure which has been followed since 1910, in the case quoted by Mr. *Tindall—Ex parte Transvaal Co-operative Dairy* (1910, T.P. 1006)—and the various subsequent cases. On more than one occasion the Court has referred the matter to the Master for his report on the practice, and for his suggestions as to the appointment of liquidators, and in all the cases to which my attention has been called the Court has appointed liquidators, and not left it to the contributories and creditors to appoint them. I, therefore, see no reason to depart from the course which has been adopted in other cases. The costs of the application will come out of the estate.

Applicant's Attorneys: *Rooth & Wessels;* Respondent's Attorneys: *Pienaar & Niemeyer.*

[J. M. M.]

MONTAGU WINE CO., LTD., v. RABIE.

1915. *September* 30, *November* 1. DE VILLIERS, J.P., BRISTOWE and GREGOROWSKI, JJ.

Prescription. — Debt incurred when debtor a peregrinus. *— Commencement of prescription.—Act* 26 *of* 1908, *sec.* 11 (2).

Laws of prescription are laws of procedure and are governed by the *lex fori.*

Sec. 11 (2) of Act 26 of 1908 provides that if a debtor be absent from the Province when a right of action accrued against him prescription shall not begin to run until he has returned to the Province. *Held,* that where an *incola* has

incurred a debt while still a *peregrinus* prescription only begins to run from the date of his change of domicile.

Semble: A debt once prescribed remains prescribed in any *forum* to which the debtor may subsequently remove.

Louw v. *Skead* (4 S.C. 109), dissented from.

Appeal from a judgment of the assistant magistrate of Middelburg at Witbank.

The appellant (plaintiff in the Court below), who carried on business at Montagu, Cape Province, sued the respondent for £11 10s. for goods sold and delivered to him while residing at Aberdeen, Cape Province, during May and July, 1910. Subsequent to such sale the respondent came to the Transvaal where it was admitted he had not been domiciled for three years prior to the issue of summons on 23rd July, 1915. He pleaded (1) that the debt was prescribed by Act 26 of 1908, sec. 6 (*b*); (2) that he was entitled to the benefit of the Public Welfare and Moratorium Act, No. 1 of 1914 (Special Session), sec. 5 (5). The magistrate upheld the plea of prescription and gave judgment for the respondent with costs.

A. Davis, for the appellant: Prescription is governed by the *lex fori: African Banking Corporation* v. *Owen* (4 O.R. 253). The prescriptive period in the case of goods sold and delivered is three years (Act 26 of 1908, sec. 6); the only question is whether that period runs from the date of sale, when respondent was still a *peregrinus*, or from the date when respondent became domiciled here. I submit from the latter date. "Absent" and "return" in secs. 11 and 13 (3) of the Act apply to a *peregrinus* as well as to an *incola: vide Otto* v. *Grove* (1871, N.L.R. 32), dealing with Natal Act 14 of 1861, sec. 10. "Return" corresponds to "being in England" in the English Acts, and has been held to apply to a foreigner: *Pardo* v. *Bingham* (L.R. 4, Ch. App. 735). Prescription relating to *lex fori* can only begin to run in this Province when the debtor comes here and the aid of the Courts of this Province can be invoked: the date when the right of action accrued elsewhere is immaterial: *Ruckmaboye* v. *Mottichund* (8 Moore P.C., at pp. 35, 36), followed in Natal in *In re Savage's Estate* (29 N.L.R. 397); Halsbury's *Laws of England* (vol. 19, p. 56, and vol. 6, p. 306). *Garlicke and Holcroft* v. *Currie* (27 N.L.R. 154).

D. de Waal, for the respondent: The *lex fori* considers merely the age of the debt: *vide Ruckmaboye* v. *Mottichund* (*loc. cit.*). The definition of perscription in section 2 implies that the debtor must be domiciled here. "Return" and "absent" in secs. 11 and

13 (3) apply only to *incolæ, vide Louw* v. *Skead* (4 S.C. 109); *Alexander* v. *Parker* (19 S.C. 115). The meaning of "return" adopted in *Otto* v. *Grove* (*loc. cit.*) is too strained. See also the dissenting judgment of BEAUMONT, J., in *Garlicke and Holcroft* v. *Currie* (27 N.L.R., at p. 171).

Davis, in reply: In *Louw* v. *Skead* and *Alexander* v. *Parker* (*loc. cit.*) the authorities were not quoted, and apparently no reference was made to the English law, on which the Cape statutory provision was modelled.

Cur. adv. vult.

Postea (November 1).

DE VILLIERS, J.P.: In July last the appellant brought an action against the respondent in the Court of the resident magistrate at Witbank for £11 10s., being for wines and brandies sold during May and July, 1910. At the date of sale the defendant was an attorney practising at Aberdeen, C.P. The defendant pleaded that the debt was prescribed seeing that it was a sale of movables which is prescribed in three years. The magistrate upheld this plea, and the decision of the magistrate is now before us on appeal. It is common cause that according to Cape Act No. 6 of 1861, sec. 3, the debt would only be prescribed in eight years, but it was contended that as the action was brought in the Transvaal the law of the Transvaal governs, and as more than three years have elapsed since the date of sale, the debt is prescribed. When the defendant came to the Transvaal we do not know, but it was admitted by his attorney at the trial that he has not been resident in this Province for a period of three years. Now, it is trite law with us that the law of the country where a contract is to be enforced must govern the enforcement of such contract: *Don* v. *Lippman* (7 *Eng. Rep.* 303). As Huber, in his *Praelectiones Juris Civilis*, part 2, *lib.* 1, *Tit.* 3 (*De Conflictu Legum*), paragraph 7, puts it: *Ratio haec est, quod praescriptio et executio non pertinent ad valorem contractus, sed ad tempus et modum actionis instituendae, quae per se quasi contractum separatumque negotium constituit, adeoque receptum est optima ratione, ut in ordinandis judiciis, loci consuetudo ubi agitur, etsi de negotio alibi celebrato, spectetur.* Laws as to prescription are laws of procedure, and are governed by the *lex fori*. As the action was brought in the Transvaal, it is the law as to prescription which obtains in this Province, and not the law of the Cape Pro-

vince which has to be applied. It only remains to ascertain what our law is. According to sec. 6 (*b*) of Act No. 26 of 1908 the period in respect of the price of movables sold and delivered is three years. But the point in dispute here was as to when the three years began to run. For the defendant it was argued that the date to be taken is the date of sale, while the plaintiff contended that prescription could only begin to run at the date of the change of domicile to the Transvaal. In order to decide this question we have to consider some of the other sections of the Act, which may possibly throw some light upon the matter. Prescription is defined in the Act as "the limitation of time within which actions may be instituted"; in other words, it is the period of time within which actions may be brought, which seems to imply that at all events during such period the action could have been brought, and the plaintiff has only himself to blame if he did not take advantage of his rights. If, therefore, during a portion of the whole of this period the defendant could not have been sued in this Province, it would also seem to follow that during such time prescription ought not to be held to run against him. The obvious objection to this view is that the debt may be long prescribed by the *lex loci solutionis*, and yet the defendant may be sued in a *forum* which which may never have been contemplated by the parties at the time of entering into the contract. But this objection is partially met by the reply that if the debt is extinguished while the parties remain domiciled within the territorial jurisdiction during the whole period, the action will not lie in any other *forum* to which the defendant may subsequently remove. (Story, *Conflict of Laws*, par. 582*b*.) But however this may be, our decision in the present case must depend upon the construction which is placed upon the last sentence of sec. 11 (2) of the Act, which reads as follows: "If a debtor is absent from the Colony when a right of action accrued against him prescription shall not begin to run until he has returned to the Colony." It was urged on behalf of the defendant that the use of the word "return" shows that this only applies to an *incola* and has no reference to a person who was not domiciled within the jurisdiction when the right of action accrued against him, and reliance was placed upon sec. 13 (3), which provides that "Prescription shall further be suspended during absence of the debtor from the Colony for a period exceeding six consecutive months." And so it was actually held by DE VILLIERS, C.J., in *Louw* v. *Skead* (4 S.C. 109) on a section similarly worded in the

Cape Act. As a rule I would have no hesitation in following the decision of so eminent an authority, especially as the meaning of the word "return" at first sight appears to be so obvious. But the matter assumes a different aspect when we come to consider the history of legislation on the subject. The meaning of the word "return" in the section must to some extent depend upon the meaning of the word "absent" in the same section, and the meaning which has actually been given to it in very similar statutes is that of the converse of being absent, *i.e.*, "ceasing to be absent, *i.e.*, present"; both in England and in Natal. To quote only some of the authorities: as far back as the year 1770, this was the meaning attached to the word "return" in the case of *Strithorst* v. *Graeme* (3 Wils. 145). Again, in *Pardo* v. *Bingham* (L.R. 4 Ch. App. 735), the LORD CHANCELLOR said that the word "return" had been decided to mean simply "being in England" and having an opportunity of suing, and as he had not brought his action within six years, his claims were barred. So also MR. JUSTICE CONNOR held in a considered judgment in the case of *Otto* v. *Grove* (1871 N.L.R. 32), which was followed in *Garlicke and Holcroft* v. *Currie* (27 N.L.R. 154), by a majority of the Court, BEAUMONT, J., dissenting. The learned Judge, who voted in the minority, strongly relied upon the decision of the Cape Court in *Louw* v. *Skead*. But in that case, while the CHIEF JUSTICE took what at first sight would appear to be the plain meaning of the word "return," the judgment was not a considered judgment, and the authorities were not quoted. We come to the conclusion, therefore, that the debt was not prescribed. The appeal is allowed, with costs, and the case remitted to the magistrate for further hearing.

BRISTOWE, J.: The natural meaning of "return" is to "come back" and if the matter were *res integra* and nothing more were in question then the natural and *prima facie* interpretation of the last paragraph of sub-sec. (2) of sec. 1 of Act 26 of 1908, I think I should feel myself bound to follow the Cape cases of *Louw* v. *Skead* (4 S.C. 109) and *Alexander* v. *Parker* (19 S.C. 115). But sec. 11 of the Cape Act 6 of 1861 on which these cases were decided, which is in identical language with sec. 10 of the Natal Act 14 of 1861 and is substantially the same as the section of our law to which I have referred, is to the same effect as, and there can be little doubt that it was adapted from, section 7 of the English prescription statute 21, Jac. 1, c. 16. Now the English section used

the expression "beyond the seas" instead of "absent," but the Court construed "beyond the seas" to mean "absent"; and by a long course of judicial decision "return" was interpreted to signify "coming in" to the country. In addition to the cases on this point cited by the JUDGE-PRESIDENT, I may mention *Williams* v. *Jones* (13 East 439), and *Lafond* v. *Ruddock* (22 L.J., C.P. 217). Curiously enough these cases were not referred to in the Cape decisions; but they were considered and followed and the Cape cases dissented from in the Natal cases of *Otto* v. *Grove* (1871, N.L.R. 32); *Garlicke and Holcroft* v. *Currie* (27 N.L.R. 154); and *Re Savage's Intestate Estate* (29 N.L.R. 397).

I think that when the Colonial legislatures adopted the English section above referred to there can be little doubt that they intended to adopt the English law on that particular point. That is, they intended to take over the section in the sense which the English Courts had given to it. And this view is strengthened by the consideration that that interpretation was an equitable interpretation and was consonant with the general doctrines of the Civil Law upon which even the English decisions themselves with regard to prescription were not infrequently based (see *Don* v. *Lippman*, 7 E.R. 303). In *Strithorst* v. *Graeme* (3 Wils. 145) the Court said: "If the plaintiff is a foreigner (as it seems he is) and doth not come to England in fifty years he still hath six years after his coming into England, to bring his action; and if he never comes to England himself, he has always a right of action while he lives abroad, and so have his executors or administrators after his death. An infant may sue before he comes of age, if he pleases; but if he does not, he has six years after he comes of age to bring his action. While any of the disabilities mentioned in the Statute of Limitations continue, the party may, but is not obliged to commence his action: the statute doth not run while any of these disabilities continue." The decision is, therefore, placed on what is the general common rule that prescription does not run against a person who cannot sue *Contra non valentem agere non currit praescriptio* (*Cod.*, 7, 13, 3), this maxim being construed from the point of view of the jurisdiction of the Court whose authority is invoked.

GREGOROWSKI, J. (after dealing with the facts): Under sec. 6 of Act 26 of 1908 the period of prescription in respect of goods sold and delivered is three years. The Act defines prescription as the limitation of time within which actions may be instituted. Section

11 provides from when prescription begins to run, and in sub-sec. 1 (*a*) it is stated that the date from which prescription begins to run is the date on which such right of action first accrued against the debtor. In sec. 11, sub-sec. (2) there is a proviso in favour of the creditor, that if the creditor is a person under disability, prescription shall not begin to run until the disability has ceased, and there is a further proviso also in favour of the creditor that if the debtor is absent from the colony when a right of action accrued against him, prescription shall not begin to run until he has returned to the colony.

It is the construction of the last proviso that has been discussed in connection with the present case. If the words are taken in their ordinary meaning, then this proviso does not apply at all, because the words in their ordinary meaning only refer to the case where the debtor is resident in the colony, but is absent at the time the action accrues and subsequently returns. It is a concession made to the creditor where he is put to a disadvantage owing to the fact that the absence of the debtor hampers his institution of action when the right so to do accrues. It is not considered fair that the absence of the debtor should put the creditor in a more unfavourable position than he would be if the debtor were present in the country. Here the circumstances are entirely different and seem to me to fall neither within the words of the proviso nor within the contemplation of the legislature. When the action accrued both the plaintiff and the defendant were resident in the Cape Province. Subsequently, and while prescription was running there in favour of the debtor and against the creditor, the debtor left the Cape Province and came to reside in the Transvaal. He had never previously resided in the Transvaal and he could not be said to have "returned" to the Transvaal. When once the action accrues prescription begins to run and is not suspended except in the cases provided for in sec. 13 of the Act. It is common cause that prescription is a matter of procedure. Every State is at liberty to fix the time within which suits must be brought, and the Courts are bound by the limitation imposed by their respective legislatures (*Don v. Lippman* (5 Cl and F, page 1: 47 R.R. 1.) *British Linen Co.* v. *Drummond* (10 B and C 903), *Hunter* v. *Sonnenberg*, 1890, 3 S.A.R. 273), Story, par. 576). The Courts of one country do not take notice of the laws of prescription of any other country, and do not enforce them. In the present instance the law as to prescription of this Province has to be applied, and it is

to this law that the defendant has appealed. The difficulty arises from the fact that there is no express provision in Act 26 of 1908 for the case of an action accruing in a foreign jurisdiction and thereafter being transferred to this Province, and becoming justiciable by the Courts of this Province owing to the defendant changing his residence and coming to reside here. Act 26 of 1908, sec. 5, was intended to apply the term of three years to all cases of goods sold and delivered, and this period has to run from the date of accrual of the right to sue, and the date must be either the date when the creditor first acquired the right to sue under the jurisdiction of the foreign Court which then had cognisance of the matter or else the date when the debtor came to reside in the Transvaal and when the creditor first acquired the right to sue in the Transvaal.

In England the statute of 21 James 1 c. 16, sec. 7, provides that when the plaintiff is beyond the sea at the time the action accrues to him then prescription only begins to run against him when he returns, but there is no provision made for the case when the defendant is absent. This was supplied by 4 Anne c. 16 (5, 19) (*vide Fannin* v. *Anderson,* 14 L.J. Q.B. 282). In terms these statutes only apply to plaintiffs and defendants who are absent from the kingdom when the cause of action accrues and who subsequently return, but they have been extended so as to be of general applicability to absent persons and to include foreigners who have never been within the jurisdiction after the right of action has accrued elsewhere. A secondary meaning is then given to the word "return" not suggested by its proper signification (*Strithorst* v. *Graeme* (3 Wilson 145), *Pardo* v. *Bingham* (4 Ch. Ap. 735)), and the sections are extended to causes of action which have accrued abroad. The Natal Courts have given the same interpretation to the word "return" in sec. 10 of Act 14 of 1861, in *Otto* v. *Grove* (1871, N.L.R. 32) and in *Garlicke and Holcroft* v. *Currie* (27 N.L.R., p. 154).

The Cape Statute governing prescription is similar in expression to the Natal Statute, but the interpretation of the Natal Courts has not been followed (*Louw* v. *Skead,* 4 S.C. 109 and *Alexander* v. *Parker,* 19 S.C. 115). Full effect was given to the word "return," and it was held that the proviso only applied to a debtor who was resident in the colony at the time of the accrual of the right of action, but who was temporarily absent and subsequently returned. In the case of any other defendant and where the right

of action "arose abroad" the period of prescription was held to run from the time of accrual of the right of action abroad. In other words, the Cape Courts apply the period of prescription fixed by the Cape Statute to causes of action which originate abroad and count the time from the date when the cause of action arose in the foreign country even although at that date there was no right to sue in the Cape Province.

Story, in sec. 582 *b*, considers the question of change of domicile, and he states that the regulations of the *lex fori* are strictly intra-territorial, and they do not affect causes of action arising abroad; and they only affect such causes of action from the date when the right of suing on them accrues within the jurisdiction. It is according to this principle that prescription statutes have to be interpreted. It appears to be generally admitted that if both plaintiff and defendant continue to reside within the jurisdiction of the foreign Court during the whole period of the foreign prescription and the cause of action is there prescribed, that this would be a good defence if the defendant subsequently changed his residence and were sued in his new residence. The term of prescription having been completed before the defendant changed his domicile, he has a *jus quaesitum* (Bar par. 281, p. 621, *Don* v. *Lippman* (*loc. cit.*); Story, par. 582), and it would be manifestly unjust if the defendant could be molested by the plaintiff under such circumstances. The position, however, is different if the defendant departs from the jurisdiction before the period of prescription is there completed and goes to reside within a new jurisdiction. In such a case the defendant cannot appeal to the prescription period of the country he has left, because the law of that country gives him nothing until the period of prescription has been completed.

According to the view expressed by Bar in the first English edition of his work on *International Law*, if a debtor changed his domicile prior to the period of prescription being completed and went to reside within a new jurisdiction, then a proportional calculation must be made based on the respective periods of prescription of the old and the new jurisdictions in order to arrive at the prescription period to which the debtor is entitled. In the second edition of the work (par. 281, p. 621) this view is abandoned, and the view is adopted that if a debtor leaves his domicile before the period of prescription is completed then he can elect either to complete the period of his old domicile or to adopt the period fixed by his new domicile according as one or other is most to his advan-

tage. He then adds "but prescription in accordance with the law of the subsequent domicile cannot be made to run from ny date further back than the moment at which that new domicile was acquired," and for this he quotes a decision of the Supreme Court of Posen.

These views of Bar as regards a proportional calculation or as regards an election by the debtor seem fantastic. A Court administering the *lex fori* could hardly adopt either of these views, but the further expression of opinion that prescription in the new domicile can only begin to run from the date of the change of domicile would seem to be the correct view. A defendant is not bound to avail himself of a plea of prescription. He can raise such a plea or waive it at his discretion. But he has no other choice. He can hardly be allowed to choose the prescription which is most favourable to himself when he has voluntarily changed his domicile and inconvenienced the creditor. In my opinion the course of action in this case only accrued when the defendant came to reside within the jurisdiction of the Courts of this Province. Previously to this the plaintiff had no right of suing the defendant in these Courts. It is admitted that when the defendant was sued, the prescription period of three years had not elapsed, and thus I think that the plea of prescription was wrongly allowed, and the appeal must be upheld, with costs.

On the second plea I think on the evidence the defendant is entitled to the moratorium claimed. Having regard to the circumstances of the case and the peculiar way in which the defendant pleaded and conducted his case, justice will be met by giving judgment in favour of the plaintiff, but suspending execution until after the expiry of the moratorium clause.

[J. M. M.]

REX v. FRICK PAULSE.

1915. *November* 1. DE VILLIERS, J.P., WESSELS and GREGOROWSKI, JJ.

Criminal law.—Juvenile offender.—Detention in reformatory.—Lashes.—Act 16 *of* 1908, *sec.* 6.—*Act* 13 *of* 1911, *sec.* 73 (1).

Where a male juvenile adult is sentenced to detention in a reformatory in terms of sec. 73 (1) of Act 13 of 1911 a sentence of lashes may be superadded in cases where the offence of which he was convicted justified the imposition of lashes.