

**DOMICILE AND JURISDICTION AS CRITERIA IN
EXTERNAL CONFLICT OF LAWS WITH PARTICULAR
REFERENCE TO ASPECTS OF THE SOUTH AFRICAN
LAW OF PERSONS**

by

Elsabe Schoeman

submitted in accordance with the requirements

for the degree of

DOCTOR OF LAWS

at the

UNIVERSITY OF SOUTH AFRICA

PROMOTER: PROFESSOR AB EDWARDS

JANUARY 1997

I would like to thank my promoter, Professor Edwards, for his invaluable guidance throughout the writing of this thesis. I am also greatly indebted to him for painstakingly checking the final draft. It was indeed a privilege to have as my promoter the person who first introduced me to this branch of the law and who has been my mentor ever since.

I would like to thank Mrs Christa Cromhout for her friendly assistance with the technical preparation of the manuscript.

Finally, I would like to thank my family and friends for their love, patience and support. I dedicate this thesis to my parents and Maarten.

SUMMARY

This thesis explores the use of *domicilium* as a criterion in choice of law and jurisdiction in South African law with special reference to private-law status. In this area of the law adherence to the status theory has, in the recent past, resulted in the use of domicile as an exclusive *ratio jurisdictionis*. This has impacted negatively on choice of law issues in status matters: since domicile constituted the sole jurisdictional criterion, little attention was devoted to choice of law. Even though the *lex domicilii* was, in actual fact, applied to choice of law issues concerning private-law status, it happened only as a result of the assumption of jurisdiction by the *forum domicilii*. With the emergence of alternative jurisdictional criteria, such as ordinary residence, choice of law issues will have to be addressed from a conflict of laws perspective, since the jurisdictional criteria will no longer ensure the application of the appropriate *lex causae*. In this regard recognition of the functional diversification of jurisdictional and conflicts connecting factors is crucial: different principles and policies underlie the fields of jurisdiction and choice of law and this must be borne in mind when a connecting factor is selected.

In view of the prominence of *domicilium* as a connecting factor, problem areas in regard to the interpretation and ascertainment of domicile, especially the domicile of choice, is investigated within the context of the Domicile Act 3 of 1992 and with a view to future reform. It is submitted that the subjective *animus* requirement for the acquisition of a domicile of choice remains uncertain and undefined. Since domicile constitutes such an important connecting factor in issues pertaining to private-law status, as well as other non-status matters, it is essential that it should be readily and easily ascertainable. In this regard certain concrete proposals for future reform are advanced. Ultimately the domicile of an individual should indicate the community to which he/she truly belongs: only then will domicile constitute a conflicts connecting factor which satisfies the demands of conflicts justice.

Key terms: Domicile; Private-law status; Conflicts connecting factor; Jurisdictional connecting factor; Conflicts justice; Divorce; Nullity; Legitimacy; *Animus manendi*; Habitual residence.

UNICA
BIBLIOTEK / LIBRARY

346.1068 SCHO

ANNOVI



0001701182

	Page
2.3 Preliminary conclusions	53
3 Status and nullity actions	54
3.1 Jurisdiction and choice of law in nullity actions	57
3.1.1 Void marriages	57
3.1.1.1 <i>Locus celebrationis</i>	58
3.1.1.2 <i>Domicile</i>	59
3.1.1.3 <i>Other grounds</i>	61
3.2 Voidable marriages	61
3.3 Preliminary conclusions	66
4 Status and issues of legitimacy	68
4.1 Legitimacy	68
4.1.1 Jurisdiction	69
4.1.2 Choice of law	72
4.1.2.1 <i>The lawful wedlock theory</i>	72
4.1.2.2 <i>The lex domicilii originis</i>	74
4.2 Legitimation	78
4.3 Preliminary conclusions	79
5 Recognition of foreign judgments relating to status	80
6 Conclusion	86

CHAPTER THREE

DOMICILE AS A CONNECTING FACTOR IN CERTAIN MATTERS OTHER THAN STATUS

Introduction	87
1 Jurisdiction	87

	Page
1.1 The relevance of domicile	87
2 Conflict of laws	91
2.1 Law of persons and family	92
2.1.1 Essential validity of a marriage	92
2.1.2 Personal consequences of a marriage	93
2.1.3 Proprietary consequences of a marriage	95
2.2 Law of obligations	96
2.3 Property	97
3 Conclusion	98

PART II : THE CONCEPT *DOMICILIUM* IN SOUTH AFRICAN LAW

CHAPTER FOUR

PROBLEM AREAS IN REGARD TO DOMICILE

Introduction	100
1 The Domicile Act	101
2 The domicile of the wife	108
2.1 The wife's domicile of dependence	108
2.1.1 Exceptions to the wife's domicile of dependence	110
2.1.1.1 <i>The case of the vagabundus husband</i>	110
2.1.1.2 <i>A separate forensic domicile for the wife</i>	117
2.1.1.3 <i>Preliminary conclusions</i>	124
2.1.2 <i>Ubi uxor, ibi domus</i>	126
2.2 The domicile of a married woman and the conflict of laws	130

	Page
2.3 Preliminary conclusions	132
3 Freedom of choice	133
3.1 Members of the armed forces	134
3.2 Deportees, prohibited immigrants and prisoners	141
3.2.1 Deportees	142
3.2.2 Prisoners	144
3.2.3 Prohibited immigrants	145
3.3 Certain classes of employees	147
3.4 Preliminary conclusions	149
4 Proof of change of domicile	151
5 Conclusion	156

CHAPTER FIVE

THE SUBJECTIVE ELEMENT OF DOMICILE

Introduction	158
1 The common law interpretation of the requisite <i>animus</i>	158
2 The <i>animus</i> requirement in South African law	164
2.1 South African case law	165
2.2 The meaning of "indefinite" in the Domicile Act	181
2.2.1 Report of the English and Scottish Law Commissions on Domicile	185
2.2.2 Towards an interpretation of the term <i>indefinite</i>	189
2.2.2.1 <i>Indefinite period</i>	190
2.2.2.2 <i>Time factor</i>	191
2.2.2.3 <i>Contingencies</i>	192

	Page
2.2.2.4 Preliminary conclusions	196
3 Determination of the requisite <i>animus</i> for a domicile of choice: subjective or objective?	197
3.1 Declarations by the <i>propositus</i>	197
3.2 Domicile of choice without reference to <i>animus</i> ?	201
3.3 Factors determining domicile	203
3.3.1 Residence	204
3.3.2 Employment	206
3.3.3 Other factors	207
4 Conclusion	208

PART III : EVALUATION OF DOMICILE AS A CONNECTING FACTOR

CHAPTER SIX

THE FUNCTIONAL DIVERSIFICATION OF CONNECTING FACTORS: DOMICILE COMPARED WITH OTHER CRITERIA

Introduction	211
1 Conflict of laws	211
1.1 The position of the connecting factor in the conflict of laws	211
1.1.1 The traditional approach	211
1.1.2 Modern approaches	215
1.2 The function of the connecting factor in the conflict of laws	221
2 Jurisdiction	230
2.1 The position of the connecting factor in the law relating to jurisdiction	230

	Page
2.2 The function of the connecting factor in the law relating to jurisdiction	231
3 The conflicts connecting factor versus the jurisdictional connecting factor	236
4 Other connecting factors	240
4.1 Nationality	240
4.2 Residence	243
4.2.1 Residence <i>simpliciter</i>	243
4.2.2 Ordinary residence	245
4.2.3 Habitual residence	247
4.2.4 Preliminary conclusions	256
4.3 Should domicile be replaced?	257
5 Conclusion	263

CHAPTER SEVEN

DOMICILE IN SOUTH AFRICAN LAW: THE WAY AHEAD

Introduction	265
1 The true meaning of domicile	265
1.1 Does domicile bear a single meaning?	268
1.1.1 Different domiciles for different purposes?	268
1.1.2 Different inferences - different results	270
1.1.3 Preliminary conclusions	273
1.2 Domicile means home	274
1.3 Preliminary conclusions	277

	Page
2 The <i>animus</i> requirement for a domicile of choice: should it be retained?	277
2.1 Rebuttable presumptions	278
2.2 Most significant connection	283
2.3 Conclusion	286
3 Domicile as a jurisdictional and a conflicts connecting factor in South African law: future directions	288
3.1 Status-related issues	289
3.2 Issues other than status	295
3.3 Conclusion	302
CONCLUSION	303
BIBLIOGRAPHY	304

INTRODUCTORY

Domicilium is not a concept unique to South African law. It is a concept which is widely used in the common law world as a connecting factor in the fields of jurisdiction and choice of law. However, the apparent uniformity regarding the use of the concept in the common law family is deceptive, for *domicilium* has acquired an own identity in the several jurisdictions constituting this family of laws in respect of the interpretation and development of the concept.

Domicilium had its early origins in Roman law and was developed and adapted to meet the needs of a growing Roman Empire. However, the prominence of the concept declined with the upsurge of nationalism and the advent of codification on the European continent from the nineteenth century onwards. This did not mean that the concept *domicilium* was dead and buried.

On the contrary, expositions on *domicilium* found in the nineteenth and early twentieth century English and Scottish law reports bear testimony to the revival and reappraisal of this concept in order to meet the demands of a burgeoning international trade, as well as the regulation of the private lives of and interaction between individuals which, with the increasing movement of people across international boundaries, stretched across different jurisdictions. Wars especially had a great impact on the lives of individuals: soldiers stationed abroad often fell in love and married, only to leave their wartime brides behind when they were recalled to their countries of origin and, in many cases, they never returned. The discovery of diamonds and gold in Africa also left a trail of deserted wives: many a fortune seeker travelled to this continent and even though many did not find wealth, they found wives, whom they deserted as soon as they had exhausted whatever they had accumulated. This resulted in much hardship and confusion regarding the private-law status of these deserted wives. In this context *domicilium* played a prominent role as a connecting factor in jurisdiction as well as choice of law.

As a result of its close relationship with Britain (the Southern African colonies initially forming part of the British Empire, as well as the Union of South Africa being part of the British Commonwealth) South Africa received a rich heritage from English law into its essentially Roman-Dutch law. The area of the law relating to domicile was no exception. English and Scottish cases constituted the basis for the interpretation and development of the concept by our courts.

However, with the promulgation of the recent Domicile Act 3 of 1992, South African law has overtaken English law and it may be said that the interpretation of domicile in South African law is, in many respects, unique. We have to a large extent succeeded in developing a concept, which had its origin in Roman law, and which was extensively investigated and adapted to a changing world by the nineteenth and early twentieth century English and Scottish courts, to meet the demands of the twentieth century and beyond. So far, surprisingly little has been written on the merits and demerits of *domicilium* as a connecting factor in South African law, whether it be in the field of jurisdiction or choice of law. One of the reasons for this state of affairs may be found in the strict division which is maintained in our law between adjective law (which includes the law relating to jurisdiction) and substantive law (which includes choice of law). Since the existence of such a distinction cannot be denied and the diversity of the principles and policies underlying the fields of jurisdiction and choice of law should be recognised, the use of a concept, such as *domicilium*, as a connecting factor in both of these fields merits further investigation. It is indeed one of those strange paradoxes that most of the cases dealing with the interpretation of the concept *domicilium* in South African law concerned jurisdictional issues, yet, those decisions serve as authority for the interpretation of *domicilium* when it is used as a connecting factor in a conflict of laws context. It is this phenomenon that will be explored in this thesis and therefore the focus will be on the viability of *domicilium* as a connecting factor in South African law in the areas of choice of law and jurisdiction, with particular emphasis on problem areas regarding the interpretation of the concept in this context. The emphasis will be on the Southern African case law of the last century or so, as

well as legislation that has had an effect on the concept *domicilium*. Where deemed necessary, historical antecedents and comparative analyses will be provided in order to present a complete picture.

Considerable attention will be devoted to matters concerning private-law status since this area of the law constitutes the true domain of the personal connecting factor, *domicilium*. In the conflict of laws it is of paramount importance that a personal law be assigned to each individual with reference to which matters concerning his or her status will be decided. In South African law domicile constitutes the connecting factor for the ascertainment of a person's personal law. Furthermore, it is within the area of private-law status that the issues of jurisdiction and choice of law have become conflated. It has sometimes become difficult to separate these two issues which has led, in turn, to confusion regarding the connecting factor *domicilium*. There is no doubt that the future of *domicilium* as a connecting factor will ultimately be decided within the sphere of private-law status.

In **Part I** of this thesis the most important areas where domicile features as both a jurisdictional and a conflicts connecting factor in South African law will be canvassed. Against this background, the interpretation of the concept, *domicilium*, in South African law will be investigated in **Part II**. Specific emphasis will be placed on those aspects which create difficulties in regard to the interpretation of domicile as a connecting factor. In **Part III** the viability of domicile as a connecting factor in the fields of jurisdiction and choice of law will be assessed on the basis of a functional diversification of connecting factors. Finally, the future of *domicilium* will be considered and specific areas for future reform will be identified.

PART 1 : DOMICILE AS A CONNECTING FACTOR IN SOUTH AFRICAN LAW

In **chapter one** a brief introduction to the origin of domicile as a connecting factor in the field of jurisdiction, as well as the conflict of laws, will be given. Where deemed necessary, terminology, which will be used throughout this thesis, will be clarified.

In **chapters two** and **three** the use of domicile in South African law as a jurisdictional and a conflicts connecting factor will be explored. In certain areas of the law, especially in status-related issues, jurisdiction and conflict of laws are often inextricably interwoven whereas other areas of the law do not reveal the same phenomenon. Therefore status-related matters are dealt with in a separate chapter, **chapter two**, while **chapter three** covers those matters which are not strictly related to status.

CHAPTER ONE

DOMICILE: A CONFLICT OF LAWS AND A JURISDICTIONAL CRITERION

Introduction

In South African law domicile is used as a connecting factor in the conflict of laws¹ as well as in the law relating to jurisdiction. These two fields, the conflict of laws and the law of jurisdiction, are related to the extent that different commentators wish them to be. In general, European continental works on the conflict of laws do not include a discussion of domestic civil jurisdiction,² while Anglo-American treatises normally do.³ Apart from the importance of establishing internal (or domestic) jurisdiction before an action with foreign connections may be heard by the forum, international competence plays an important role in regard to the recognition and enforcement of foreign

1 In this area of the law we have a number of possible titles for our subject, ie *choice of law*, *private international law* or *conflict of laws* (or simply *conflicts*). Although I regard both *choice of law* and *private international law* as academically sound, the use of the term *conflicts* has become especially popular in the Anglo-American sphere. *Choice of law* as a title for our subject certainly has its shortcomings since it seems to cover the choice of law aspect of the subject, but not jurisdiction or the recognition and enforcement of foreign judgments. The main point of criticism against the use of the term *conflicts* is that this area of the law should definitely not be seen as a battleground for different legal systems, each vying for its own application. The aim of our subject is to ensure that the most appropriate legal system is applied to a given problem. Again, the term *private international law* (a most suitable title for our subject used mainly on the Continent and also in South Africa), does not lend itself to flexibility as regards the generation of terminology for our subject as is the case with *conflicts*, eg conflict rule, conflicts process, conflicts justice, etc. Therefore, I succumb to the pressures of convenience and brevity and use the term *conflicts*, although *choice of law* and *private international law* is also used whenever they are found to be more suitable within a specific context.

2 "Domestic" (or "local" or "internal") jurisdiction is used to refer to the jurisdiction of a country's own courts, while "international" competence is used to refer to the jurisdiction of a foreign court when it comes to the recognition and enforcement of foreign judgments. Therefore "domestic" jurisdiction is not limited to local issues; it also pertains to actions involving foreign elements which are brought before the local court. On the use of the terms *jurisdiction* and *competence* in common law and civil law countries respectively, see Smit 1961 *Am J Comp L* 164, as well as Smit 1972 *ICLQ* 335 338ff.

3 See Kahn *Domicile* 2 fn 3.

judgments, an aspect traditionally allocated to the province of the conflict of laws. However, whether jurisdiction (domestic or international) is regarded as part of the conflict of laws or not, the fact that the conflict of laws and jurisdiction share the same concept, domicile, as a connecting factor, has had an important impact on the interpretation of the concept by South African courts.

1 Early origins of domicile as a connecting factor⁴

The concept, *domicilium*, had its origin in Roman times as an administrative concept: it served, alongside the more ancient concept of *origo*,⁵ to subject a person to the burdens (*munera*) of a specific community (*municipium*⁶), as well as the jurisdiction of its courts and its special laws (apart from Roman law to which all Roman citizens were subject).⁷ The jurisdictional nature of the concept is clearly evident from the following text:

"Birth, manumission, a call to public office, or adoption renders a man a citizen (*civis*), but his domicile makes him a resident (*incola*), as the Divine Hadrian clearly stated in his Edict."⁸

After the fall of the western half of the Roman Empire in 476 AD the principle of

4 For a general overview of the origin and development of the concept domicile as a connecting factor in the conflict of laws, see De Jager *Domicilium as Koppelfaktor*; Schoeman 1994 *THRHR* 204.

5 *Origo* denoted (Roman) citizenship: see Phillipson *International Law and Custom* vol I 90ff; Von Savigny *Private International Law* 90ff; Nygh 1961 *Tasm ULR* 555.

6 For more information on this concept see Von Savigny *Private International Law* 89, as well as 94-95.

7 Von Savigny *Private International Law* 88, 110ff.

8 C 10 40(39) 7pr (Scott's translation). The Latin text reads as follows:

"Cives quidem origo manumissio adlectio adoptio, incolas vero, sicut et divus Hadrianus edicto suo manifestissimo declaravit, domicilium facit."

personality, in terms of which every individual was subject to the laws and customs of his or her tribe, superseded *origo* and *domicilium* as connecting factors.⁹ In the wake of the upsurge of feudalism from the tenth century onwards the principle of personality was replaced by the principle of territoriality.¹⁰ It then became necessary again to link a person to the laws and customs of a specific territory. This was initially achieved by means of jurisdictional rules: a court in a feudal community applied its own law (*lex fori*), but would only exercise jurisdiction if it had a link or connection with the case, for instance, if the defendant was resident within its area.¹¹

With the development of the statist theory¹² from the twelfth century onwards by the glossators and the commentators, the concept of *domicilium* was adapted to the needs of the growing number of independent cities or states, each with its own laws and customs. In order to define the limits of operation of each city or state's laws (*statuta*) domicile acquired, in addition to its jurisdictional character, a conflicts nature: rules concerning the law of persons and family law, as well as rules concerning movables, were regarded as personal statutes that followed the domiciliary wherever he went. Thus domicile became more than a jurisdictional factor, it became a connecting factor for matters of status as well as movables (*mobilia sequuntur personam*). The concept of domicile grew in stature, no doubt helped along by a feudal heritage where residence within a particular community outweighed citizenship by descent (*origo*).¹³

9 On the principle of personality see Guterman 1961 *New York Law Forum* 131. See also Nygh 1961 *Tasm ULR* 555; Vitta 1970 *Israeli LR* 170. For a historical account of the development of a system of personal laws, see Von Bar *Theory and Practice* 17ff.

10 Hahlo & Kahn *South African Legal System* 439ff; De Winter 1969 III *Hague Recueil* 349 362.

11 Lipstein *Principles* 4ff.

12 See in general Von Bar *Theory and Practice* 26ff; Cheshire-North 17ff; Juenger *Choice of Law* 11ff; Lipstein *Principles* 8ff; Yntema *Historic Bases* 35ff.

13 Nygh 1961 *Tasm ULR* 555 560.

By the seventeenth century domicile was well and truly established as a connecting factor for conflict of laws purposes¹⁴ and amongst the seventeenth and eighteenth century Dutch writers we find a wealth of definitions and explanations of domicile.¹⁵ Most of these definitions hark back to the definition of domicile found in the *Corpus Iuris Civilis*:

"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."¹⁶

Johannes Voet's definition of domicile is almost a repetition of C 10 40(39) 7:

"Everyone can also be sued by virtue of domicile, in the place, that is to say, 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."¹⁷

14 This is evident from the cases dealt with in the *Hollandsche Consultation*: see eg Part 2: 21 (p 43-44); Part 3(2): 3,4,6 (p 11).

15 See Kahn *Domicile* 41ff for an exposition of these definitions, as well as **Chapter 5** *infra* under **1 The common law interpretation of the requisite *animus***.

16 C 10 40(39) 7 *lex* 1 (Scott's translation). The Latin text reads as follows:

"Et 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."

17 *Commentarius* 5 1 92 (Gane's translation). The Latin text reads as follows:

"Domicilii quoque intuitu conveniri quisque potest, in eo scilicet loco, in quo larem, rerumque ac fortunarum suarum summam constituit, unde rursus non sit discessurus, si nihil avocet, undeque cum profectus est, peregrinari videtur."

With the advent of codification on the Continent during the nineteenth century,¹⁸ most European codes opted for nationality (as a result of the emergence of strong feelings of nationalism) as a connecting factor, instead of domicile.¹⁹ However, English and Scottish law remained uncodified. As a result of the reception of the comity doctrines of the Roman-Dutch era into English and Scottish law, domicile had by then become firmly established as a connecting factor in these legal systems.²⁰ Therefore it was, strangely enough, the nineteenth century English and Scottish courts that were faced with the interpretation of the Roman law concept of *domicilium*, as expounded and developed by the Roman-Dutch writers. In South African case law this process is all too evident: definitions of the Roman-Dutch writers on domicile, based on the definitions of the *Corpus Iuris Civilis*, are subjected to the expositions on domicile found in nineteenth and early twentieth century English and Scottish cases.²¹

This brief historical survey shows that domicile has, through the ages, established itself as one of the most enduring and versatile connecting factors. It is the inherent localising character of domicile that has secured its position as a jurisdictional as well as a conflicts connecting factor.

2 Domicile as a connecting factor²² in current South African law

Domicile is employed extensively as a connecting factor in South African conflicts

18 The Code Napoléon (France) was promulgated in 1804. Other countries followed: the Austrian code appeared in 1811, the Dutch code in 1829 and the Italian code in 1865.

19 See in general Rabel *Conflict: Comparative* 109ff.

20 *Cheshire-North* 23ff; *Juenger Choice of Law* 22ff; *Lipstein Principles* 17ff.

21 Kahn *Domicile* 41ff. See further **Chapter 5** *infra* under **1 The common law interpretation of the requisite animus**, as well as **2.1 South African case law**.

22 For a discussion of the position that the connecting factor occupies within the theoretical structure of the conflict of laws and jurisdiction, see **Chapter 6** under **1.1 The position of the connecting factor in the conflict of laws** and **2.1 The position of the connecting factor in the law relating to jurisdiction** respectively.

matters: issues in regard to status are for the most part referred to the *lex domicilii*;²³ the proprietary consequences of a marriage are governed by the *lex domicilii matrimonii*²⁴ and in the field of succession most issues relating to movables are determined with reference to the *lex domicilii*.²⁵ The role of domicile as a connecting factor in the conflict of laws has recently been endorsed by the Domicile Act²⁶ where it is stipulated that *renvoi* is excluded in instances where domicile is the (conflicts) connecting factor.²⁷

Domicile is one of the most commonly used connecting factors in the law relating to jurisdiction. Apart from everyday civil actions, such as money claims, domicile is an important jurisdictional connecting factor in matters pertaining to private-law status. Domicile was established as a domestic jurisdictional connecting factor for divorce actions at common law²⁸ and that has once again been endorsed by the Domicile Act.²⁹ The Domicile Act also reaffirms the role of domicile as a connecting factor in

23 See Spiro *Conflict* 136ff.

24 Edwards *LAWSA: Conflict* par 441.

25 According to the *maxim mobilia sequuntur personam*: see Kahn *Appendix: Succession* 636ff.

26 3 of 1992.

27 S 4 states explicitly:

If a court, in the application of the choice of law rules, finds that a question before the court should be decided in accordance with the law of a foreign state or territory on account of someone's domicile in that state or territory, the court shall decide that question in accordance with that law, even though a court of that state or territory, in the application of the choice of law rules, would have found the South African law or any other law to be applicable with respect to the question concerned.

On the issue of *renvoi* in the conflict of laws, see, in general, *Cheshire-North* 58ff; *Dicey-Morris* 70ff; *Forsyth Private International Law* 75ff.

28 *Le Mesurier v Le Mesurier* [1895] AC 517: see **Chapter 2** under **2.2.1 Common law**.

29 3 of 1992 s 6(a) which replaced s 2(1) of the Divorce Act 70 of 1979: see **Chapter 2** *infra* under **2.2.2 Statutory intervention**.

regard to the recognition of foreign divorce orders.³⁰

The fact that the same concept, namely *domicilium*, is used as a connecting factor in both the conflict of laws and the law relating to jurisdiction, raises important questions: can the same concept be used as both a conflicts and a jurisdictional connecting factor? Do the same principles underlie the fields of jurisdiction and choice of law? Is domicile a suitable connecting factor in both these areas? These are the kinds of questions which will be addressed in this thesis with a view to clarifying the status of domicile as a connecting factor in South African law. But, first of all, the most prominent areas where domicile features as a jurisdictional and a conflicts connecting factor in South African law must be investigated.

30 S 7 which replaced s 13 of the Divorce Act 70 of 1979, see further **Chapter 2 under 5 Recognition of foreign judgments relating to status.**

CHAPTER TWO

DOMICILE AS A CONNECTING FACTOR IN MATTERS OF STATUS

Introduction

Domicile occupies a very special position in the law relating to status. Most issues pertaining to private-law status are determined by the *propositus*'s personal law which, in the South African context, is the *lex domicilli*. Thus domicile is an important connecting factor in choice of law issues dealing with status. However, domicile is also an important jurisdictional connecting factor in this area of the law, since domicile was for a long time, and still is, in many instances, the predominant criterion for the assumption of jurisdiction in status-related matters.

1 The meaning of private-law status

Status is one of those legal terms that is often used, but seldom defined. In the words of Austin:

"To determine precisely what a *status* is, is in my opinion the most difficult problem in the whole science of jurisprudence."¹

Private-law status is often described as a person's standing or legal position in the eyes of the law. It is a legal condition which embraces all the rights and duties, capacities and incapacities, powers and disabilities, that are attached to a specific status.² It is a condition imposed by law and cannot be changed at the mere will of

1 Quoted by Allen 1930 *LQR* 277 278.

2 Graveson *Conflict* 226. See also Cronjé *Persons and Family* 33ff; Allen 1930 *LQR* 277; Nygh 1964 *ICLQ* 39.

the person subject to such a status.³

The statist doctrine which originated in thirteenth century Italy, gave rise to a universal principle accepted by the major legal systems of the world: in terms of the division of statutes into personal, real and mixed, matters in regard to status were regarded as personal and thus governed by the personal law of the *propositus* wherever he went.⁴ One of the characteristics of the statist doctrine was that the statisticians were *universalistic* in their approach and therefore regarded the extra-territoriality of the personal statute as being common to all legal systems.⁵ Whereas the original statisticians and their successors experienced great difficulty in categorising statutes as personal, real or mixed, it was never doubted that status belonged within the category of personal statutes, governed by the personal law of a person, whether it be domicile, or, later on, nationality.⁶ The rule that the status of a person fell to be determined by his personal law never acquired the sanction of international law in the sense that it became a rule of public international law, it was more in the nature of a universally accepted principle to which most legal systems adhered and still do today.

One of the important implications of this universal rule regarding status, was that the personal law of the *propositus* followed him wherever he went and this often resulted in a forum having to apply foreign law or recognise a foreign status. Of course, no country could be forced to apply foreign law or recognise a status acquired in terms of foreign law, but refusal to do so could result in isolation from the rest of the world, especially in regard to trade and commerce. Thus the seventeenth century Roman-

3 An unmarried woman may change her status by getting married, but then the law demands that certain requirements be met before such a change in status is recognised.

4 Anton *Private International Law* 18ff; *Cheshire-North* 19; *Lipstein Principles* 9ff; *Plescia* 1992 (1) *Labeo* 30 fn 1.

5 De Nova 1966 II *Hague Recueil* 441-477; *Lipstein Principles* 11ff.

6 See in general De Winter 1969 III *Hague Recueil* 349 361-377; *Rabel Conflict: Comparative* 117ff; *Yntema Historic Bases* 39ff.

Dutch writers sought justification for the application of foreign law by the forum of a sovereign country on the basis of what was termed "comity".⁷ It was Huber who clearly established the principle that a sovereign country was, in terms of the *ius gentium*, obliged to apply foreign law, unless it would be prejudicial to its own citizens. He recognised the extra-territorial validity of lawfully acquired rights and herein lay the origin of the vested rights theory.⁸

Thus the extra-territorial recognition of a status acquired in terms of an individual's personal law, was, and is still today, accepted. However, the distinction drawn by Huber between status and capacity, one of the incidents of status,⁹ is significant for the conflict of laws. In terms of this distinction the status of the *propositus* (as determined by his personal law) follows him wherever he goes, but the capacities of such a status are determined by the law of the country where he wishes to exercise them.¹⁰ This may be illustrated by way of a simple example. If a person, domiciled in

7 See Kahn *Territorial and Comity School* 219ff; Kollewijn *Geschiedenis* 83ff; Kusters & Dubbink *Nederlandse Internationaal Privaatrecht* 35ff; Scholten *Comitas* 53ff; Suijling *Statutentheorie* 95ff, 118ff; Yntema 1966-1967 *Mich LR* 9.

8 Juenger *Choice of Law* 20ff; Kahn *Territorial and Comity School* 226-227; Kusters & Dubbink *Nederlandse Internationaal Privaatrecht* 38ff; Scholten *Comitas* 64ff.

9 For the distinction between status and its incidents, see Graveson *Conflict* 230:

"Capacity or incapacity is merely one of the legally defined incidents of a legally imposed status. It differs from status in being merely part of a greater whole: in being the dynamic element of a static condition. While status is a legal condition, capacity is merely the sum total of powers attached by law, and not by act of the party, to that condition."

10 See *De Conflictu Legum* s 12:

"Qualitates personales certo loco alicui jure impressas, ubique circumferri et personam comitari, cum hoc effectu, ut ubivis locorum eo jure, quo tales personae alibi gaudent vel subjecti sunt, fruuntur et subjiciantur ..."

translated thus in Lorenzen *Selected Articles* 176:

"[P]ersonal qualities impressed upon a person by the law of a particular place surround and accompany him everywhere with this effect that everywhere persons enjoy and are subject to the law which persons of the same class enjoy and are subject to in that other place ..."

South Africa, is below a certain age, he is a minor and has the status of minority ascribed to him by his personal law (South African law). One of the incidents of the status of minority in South African law is, for example, that he does not have the capacity to enter into a contract without the assistance of his parent or guardian. What would happen if he went to another country where minors are allowed to enter into contracts without such assistance? According to Huber's distinction between status and capacity, the personal law (in this case South African law) will determine the status of the *propositus* (in this example minority) and this status will follow him wherever he goes, but in regard to the incidents of the status of minority he would, in a country other than that of his domicile, have the capacities that persons of the same status enjoy according to the law of that country. It is quite possible that a minor may have more capacities in one country than in another or vice versa, but the fact that he is a minor in terms of his *lex domicilii* cannot be altered. In terms of this distinction between status and its resultant incidents the personal law determines a person's status, but not necessarily the incidents thereof.¹¹ A forum may, of course, on the ground of public policy, refuse to recognise a "foreign" status.¹²

2 Status and divorce

Divorce is a prime example of an action involving a change in the status of the two parties, from that of married to single persons. It is crucial that this changed status be recognised "internationally"; either by the law of a foreign country in regard to a

S 13 of *De Conflictu Legum* is to the same effect. See Suijling *Statutentheorie* 109-110 and Von Bar *Theory and Practice* 38ff for a discussion of Huber's views, as well as Lorenzen *Selected Articles* 136-180 for a comprehensive evaluation of Huber's *De Conflictu Legum*, as well as a translation thereof.

11 Falconbridge *Conflict* 751ff; Graveson *Conflict* 229ff; Allen 1930 *LQR* 277; Frames 1884 *Cape LJ* 253 301ff; Nygh 1961 *Tasm ULR* 555; Nygh 1964 *ICLQ* 39. This is why an individual's capacity to enter into a commercial contract may probably be judged in terms of the *lex loci contractus* or even the proper law of the contract, rather than the *lex domicilii*: see **Chapter 3** under **2.1.2 Personal consequences of a marriage**.

12 See Nygh 1964 *ICLQ* 39.

divorce decree obtained in a South African court, or by South African law in regard to a divorce decree obtained abroad. In many instances recognition of a divorce decree (and the resultant change in status) will determine whether the *propositus* may marry again, and it may also have a bearing on legal capacity.

2.1 The importance of "international" recognition

One of the requirements for the recognition of a foreign divorce order is that the court that granted the order must have had international competence, in other words, that court must have had jurisdiction according to the requirements set by the *lex fori* for the recognition of foreign divorce decrees.¹³ The basic underlying premise is that a foreign court will be judged internationally competent if there existed a sufficiently close connection between that forum and either of the parties to the divorce.¹⁴ In South African law *domicile*, *ordinary residence* and *nationality* are listed as "foreign" jurisdictional connecting factors for purposes of the recognition of foreign divorce orders.¹⁵ The issue of "international" recognition of divorce orders has important implications for the assumption of domestic jurisdiction. If a forum assumes jurisdiction on tenuous grounds, that divorce decree will not be recognised abroad, resulting in what has been termed a "limping marriage".¹⁶

Thus, in the process of developing criteria for internal or domestic competence, or local jurisdiction, the ever-present consideration of "international" recognition should be kept in mind.¹⁷ Although the recognition of a South African divorce decree abroad

13 See in general Edwards *LAWSA: Conflict* par 480; Forsyth *Private International Law* 383ff.

14 See *Indyka v Indyka* [1967] P 233, [1966] 3 All ER 583.

15 S 13 of the Divorce Act 70 of 1979: discussed in more detail *infra* under **5 Recognition of foreign judgments relating to status**.

16 See further Kahn 1986 *TSAR* 1.

17 *Ibid* 2.

depends on the law of that foreign country, local jurisdictional criteria should be formulated in such a manner that they evince a sufficiently close connection between the forum and the parties in order for the South African court to be considered internationally competent by the law of the foreign country where recognition of the decree is sought. This has been acknowledged by our judiciary on various occasions; thus the *caveat* sounded by Bale CJ in *Forster v Forster and Wheeling*:¹⁸

"It behoves the Court always to be extremely careful where questions of domicile are involved. They affect the status not only of the parties to the proceedings, but they may affect that of the children. It would be ... very disastrous if we were to grant a divorce which might not be recognised in some other country on the ground that we had not jurisdiction."¹⁹

Thus the proper assumption of jurisdiction in a divorce action is crucial to the subsequent recognition of the change in status brought about by the divorce. But what happens if jurisdiction is not disputed by either of the parties? Should the court assume jurisdiction without further ado, or should the court inquire into its own jurisdiction?

The pre-Union colonial courts dealt with this issue at length. This was no doubt due to the fact that, at that stage, the only accepted ground for domestic divorce jurisdiction was the domicile of the parties within the court's area of jurisdiction when

18 (1905) 26 NLR 124.

19 Cf Kotzé J in *Weatherley v Weatherley* (1879) Kotzé 66 72:

"But one of the most difficult and embarrassing questions of private international law is the question - when, and under what circumstances, will the tribunal of a given country, declaring a valid marriage dissolved, have jurisdiction to do so, in order to cause its judgment to be respected and recognised by the Courts of every other country?"

See also *Ex parte Quintrell* 1922 TPD 14 18; *Van Niekerk v Van Niekerk* 1941 TPD 59.

the proceedings were commenced.²⁰ This meant, in effect, that the domicile of the husband was decisive, since the wife followed the domicile of her husband in terms of the wife's domicile of dependence, a doctrine that was only recently abolished.²¹ It must be conceded that a fair share of "hard" cases came before the courts, especially during the period after the discovery of diamonds and gold as well as the Anglo-Boer Wars and the two World Wars. In many cases one of the spouses (in most cases the husband) had left the country without a trace and the other spouse was left with no other recourse but to approach the court within whose area of jurisdiction he or she resided. In the absence of any objection to jurisdiction, courts were sorely tempted to, and in a number of cases did, assume jurisdiction on rather shaky grounds, in order to entertain these actions for divorce. In *Hawkes v Hawkes*²² jurisdiction was assumed in an action for divorce, instituted by the wife, in the absence of any objection to its jurisdiction by the husband (defendant):

"It is not necessary to say what the Court would have done had the defendant appeared and objected to the jurisdiction: because then the question might have arisen whether the defendant had established his domicile here or not."²³

In *Weatherley v Weatherley*²⁴ the opposite view, based on Roman-Dutch authority,²⁵ was taken by Kotzé J:

20 *Le Mesurier v Le Mesurier* [1895] AC 517 540. This position was only changed in 1939 by s 1(1) of the Matrimonial Causes Jurisdiction Act 22 of 1939: see *infra* under **2.2.2 Statutory intervention**.

21 See s 1(1) of the Domicile Act 3 of 1992.

22 (1882) 2 SC 109.

23 110. In *Ex parte Hamman* (1894) 1 OR 306 307 it was decided that the court had, in that case, *prima facie* jurisdiction and therefore the burden of proving the contrary was on the husband (defendant).

24 (1879) Kotzé 66.

25 70ff.

"Nor is there anything to prevent the Court, of its own mere motion, raising the question of jurisdiction. Were this not so, the Court would be bound by the neglect or omission of the pleader, who failed to file a proper declinatory exception."²⁶

In *Thurgood v Thurgood*²⁷ Wragg J, after admitting that neither of the parties to the divorce suit had acquired a domicile in the area of the jurisdiction of the court, advanced the following substantiation for entertaining the action (on that occasion instituted by the husband):

"When, in an action for divorce, both parties are in *pari delicto*, or there is collusion, and it is evident that a divorce ought not to be granted, the Court will be justified in interposing on the question of domicile. But when, as in the present case, the action is brought by an innocent spouse and there is no appearance or defence to the action, the case seems to me to be different, and in my opinion, the Court ought not, *mero motu*, to raise the question of jurisdiction or domicile."²⁸

26 72. See also *Mason v Mason* (1885) 4 EDC 330 332. As Judge-President of the Eastern Cape, Kotzé again pointed out the importance of a proper inquiry into jurisdiction in the absence of any objection to it, see *Ex parte Standring* 1906 EDC 169 179:

"... I must hesitate to adopt, without qualification, the observation which we sometimes find in South African and English case and text-books, to the effect that as the husband does not appear to object to the jurisdiction the Court will not inquire closely into the question of domicile and jurisdiction. Once the rule that domicile alone confers jurisdiction is adopted, it must be carried out to its full and legitimate extent, because of the consequences which may ensue where a court of incompetent jurisdiction should grant a decree of divorce."

27 (1896) 17 NLR 49.

28 52. Cf also *McCurrach v McCurrach* (1892) 6 HCG 256 259:

"... the policy of the Supreme Court, ... appears to be not to inquire minutely into the question of jurisdiction with the probable result of depriving an innocent plaintiff of redress."

For a critical view of *McCurrach*, see *Ex parte Standring* 1906 EDC 169 178ff, but see *Blair v Blair* 1914 SR 111 112 where Watermeyer J came out in support of the *dictum* in *McCurrach*.

This begs the question how the blameworthiness or innocence of a party could dictate whether a court should inquire into jurisdiction or not. In *Gilbert v Gilbert*²⁹ Mason ACJ (sitting in the Durban Circuit Court) went to great lengths to distinguish the *Thurgood* case (decided by the full bench of the Natal Supreme Court) from the one before him in order to deny jurisdiction in a case where the defendant (the husband) did not appear and there had consequently been no exception to jurisdiction.³⁰ In *Moreland v Moreland*³¹ Beaumont AJ, one of the judges who had been on the bench in the *Thurgood* case, but did not express any opinion (and must, according to himself, therefore be presumed to have concurred), carefully considered the remarks of Mason J in the *Gilbert* case and decided that no court was justified in assuming jurisdiction in a divorce action where any doubt existed as to its jurisdiction, regardless of whether there had been an objection to jurisdiction or not.³²

However, in *Jacks v Jacks*,³³ De Villiers CJ (who had also decided the above-mentioned *Hawkes* case) assumed jurisdiction in a case where it was alleged that the defendant (the husband) was domiciled within the jurisdiction of the court and the

29 (1901) 22 NLR 201.

30 205ff. See also 208 of the report:

"It is upon these grounds that I have ventured to comment upon the decision in *Thurgood's* case, but I should not have been justified, if the present action could not have been distinguished, in taking upon myself, a single Judge sitting in a Circuit Court, the responsibility of giving a decision contrary to the judgment of the Supreme Court."

31 (1901) 22 NLR 385.

32 389. The *Thurgood* case was also distinguished, but nevertheless criticised with reference to the cases of *Gilbert* and *Moreland*, by Bale CJ in *Laughlin v Laughlin* (1903) 24 NLR 230 245ff. See also *Ex parte Kaiser* 1902 TH 165 169; *Ex parte Standring* 1906 EDC 169 179 and *Brace v Brace* (1904) 25 NLR 52 53:

"The case is not defended, but, according to the practice of recent years, we still look into this matter of jurisdiction before we grant the plaintiff any relief."

33 (1903) 20 SC 196.

defendant did not appear or contest this allegation.³⁴ In *Knox v Knox*³⁵ De Villiers CJ explained what the court had intended to convey in the *Hawkes* case, namely where the defendant did not put in an appearance to object to jurisdiction, *prima facie* proof of domicile was sufficient to entitle the plaintiff to relief. He pointed out that the plaintiff incurred a risk that the judgment might not be recognised by a foreign court,³⁶ but that no case had been brought to his attention in which a foreign court had directly or indirectly questioned the validity of a divorce so granted (that is, on *prima facie* proof of domicile). It is not clear whether De Villiers CJ had only in mind divorce proceedings by way of edictal citation in which case one could, to a certain degree, appreciate the difficulties involved in proving the domicile of the parties for jurisdictional purposes, but it is questionable whether these cases should be distinguished from cases where the defendant simply does not appear or where the defendant appears but does not object to jurisdiction. Furthermore it was not explained what exactly would amount to *prima facie* proof of domicile. In *Walker v Walker*³⁷ De Villiers CJ refused leave to sue by edictal citation, because the defendant (the husband) was not, *ex facie* the petition to sue by edictal citation,³⁸ domiciled in the Cape Colony.³⁹

34 The report is too brief to make an inference as to the domicile of the husband.

35 (1907) 24 SC 441.

36 443. See also *Leviny v Leviny* (1908) 25 SC 173.

37 (1896) 13 SC 363.

38 365.

39 That was the basis of the decision. According to De Villiers CJ in *Knox v Knox* (1907) 24 SC 441 444-445 the headnote to the *Walker* case, which states that where "it appears on the face of a petition for leave to sue by edictal citation that the defendant is not domiciled in the Colony, such leave will not be granted unless jurisdiction has first been founded by virtue of an arrest of the defendant or an attachment of his property", was misleading in so far as it suggested that the arrest of a defendant would supply the defect of want of domicile. In withdrawing the concluding passage of his judgment in the *Walker* case, on which the headnote was based, De Villiers CJ said:

"What was intended to be conveyed by the concluding passage was that, besides the defect of jurisdiction, which undoubtedly existed in that case by reason of want of domicile, there had not even been such arrest or attachment as would, in ordinary suits, have been necessary to confirm the jurisdiction of

Surely, if the potential effect of divorce proceedings, whether by edictal citation or otherwise, is the same, namely an alteration in the status of the parties, a thorough inquiry into the jurisdiction of the court (and therefore domicile, if this ground of jurisdiction is relevant) is required. It seems that the differences in opinion as to whether there should be a proper inquiry into jurisdiction, regardless of any objection to jurisdiction, was resolved after *Union*. With the exception of *Blair v Blair*⁴⁰ it seems as if the logical and sensible view has prevailed, namely that the court should be satisfied that it has jurisdiction before entertaining a divorce action:

"I am aware that there are expressions of opinion that a Court should assume jurisdiction in these cases and should not scrutinise too narrowly the claim of an applicant for leave to sue by edict ... Where the facts cry aloud that the Court has not jurisdiction ... I do not think that this Court is justified out of sympathy in granting a divorce which quite clearly would not have any international validity."⁴¹

Thus, the underlying consideration of international competence constitutes the driving force behind a proper inquiry into domestic jurisdiction in divorce actions by our courts. South African courts will definitely not assume jurisdiction on doubtful grounds, since "international" recognition of the change in status upon divorce is at stake.

the Court."

40 1914 SR 111 112. *In casu* support was given to the view expressed in *McCurrach v McCurrach* (1892) 6 HCG 256 259 that the court should not inquire into jurisdiction too minutely, lest an innocent plaintiff be deprived of redress.

41 *Ex parte Quintrell* 1922 TPD 14 18. See also *Deane v Deane* 1922 OPD 41 44-45 and *Cowan v Cowan* (1925) 6 PH B4 (T); as well as a number of undefended actions (no objection to jurisdiction) where a proper inquiry was lodged into the jurisdiction of the court, eg: *Commin v Commin* 1942 WLD 191; *Frankenberg v Frankenberg* 1943 EDL 147; *McMillan v McMillan* 1943 TPD 345; *Nicol v Nicol* 1948 (2) SA 613 (C); *Smith v Smith* 1952 (4) SA 750 (O). See also *Pistorius Pollak on Jurisdiction* 139 where it is submitted that "the court is bound *proprio motu* to raise the question of jurisdiction, and it is only when that has been established that the court is entitled to grant a divorce".

2.2 Jurisdiction and choice of law

Divorce is one of the areas in our law where domestic jurisdiction and choice of law become so entwined that the traditional line of distinction between these two areas is often blurred. The impression gained from a study of both jurisdiction and choice of law in regard to divorce, is that the emphasis in South African law, in consonance with other common law systems,⁴² has been on the jurisdictional aspects of divorce, at the expense of choice of law.

2.2.1 Common law⁴³

The common law criterion for jurisdiction in divorce cases was authoritatively established in *Le Mesurier v Le Mesurier*:⁴⁴

"... according to international law, the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage."⁴⁵

42 Fleming 1952 *ICLQ* 381; Graveson 1951 *BYBIL* 273; North 1980 I *Hague Recueil* 9 77ff.

43 For a discussion of divorce jurisdiction at common law, see the excellent article by Pollak 1934 *SALJ* 312. The value of this article lies therein that it was written *before* the grounds of divorce jurisdiction were extended by statute in 1939 (the Matrimonial Causes Jurisdiction Act 22 of 1939 and subsequent legislation are discussed *infra* under 2.2.2 **Statutory intervention**) and thus provides a convincing account of the difficulties experienced in regard to the assumption of divorce jurisdiction during that period. See also, in this regard, an unsigned note in 1903 *SALJ* 382, as well as Rorke 1905 *SALJ* 399.

44 [1895] AC 517.

45 540. *Le Mesurier* was endorsed in *Gilbert v Gilbert* (1901) 22 NLR 201 202; *Murphy v Murphy* 1902 TS 179 181-182; *Lea v Lea* (1902) 23 NLR 91 92; *Brunschwik v Brunshwik* 1902 TH 223 225; *Ex parte Kaiser* 1902 TH 165 174-175; *Laughlin v Laughlin* (1903) 24 NLR 230 242; *Robarts v Robarts* (1903) 17 EDC 132 136; *Nefler v Nefler* 1906 ORC 7 8; *Ex parte Standring* 1906 EDC 169 173; *Hudson v Hudson* 1907 EDC 189 191; *Knox v Knox* (1907) 24 SC 441 445; *Steytler v Steytler* 1913 CPD 725 729; *Deane v Deane* 1922 OPD 41 43; *Johnson v Johnson* 1930 AD 101 109ff; *Thompson v Thompson* 1940 SR 187 188. For a comprehensive discussion of the common law ground for divorce jurisdiction, see Hahlo & Kahn *Husband and Wife* 539-546; Forsyth *Private International Law* 215ff.

Since divorce proceedings had the potential to alter the status of the parties,⁴⁶ "the only Court which can decree any alteration in relations between married people, or in the status of either of them as a married person, is the Court of the country in which they are domiciled at the time of the institution of the suit."⁴⁷ Although *Le Mesurier* is almost without exception always quoted in discussions on jurisdictional criteria for divorce actions, this decision has not elicited much academic discourse in South Africa.⁴⁸ There is much more to this case than simply the establishment of the common law ground for divorce jurisdiction. Although the case primarily dealt with divorce jurisdiction, the judgment treads a fine line in the distinction between jurisdiction and choice of law. In the past, the importance of this case for choice of law purposes has largely been overlooked. A proper analysis of the reasoning in this Privy Council decision is vital for an understanding of the origin of domicile as a jurisdictional

46 *Bestandig v Bestandig* (1847) 1 Menz 280 281; *Weatherley v Weatherley* (1879) Kotzé 66 71ff; *Burnett v Burnett* (1895) 12 CLJ 147 (OFS); *Ex parte Kaiser* 1902 TH 165 170; *Lea v Lea* (1902) 23 NLR 91 92; *Robarts v Robarts* (1903) 17 EDC 132 136; *Forster v Forster and Wheeling* (1905) 26 NLR 124; *Andrew v Andrew* 1905 ORC 40 41; *Hooper v Hooper* 1908 EDC 474 476ff; *Clayton v Clayton* 1922 CPD 125; *Frankenberg v Frankenberg* 1943 EDL 147. A prayer for an order for the restitution of conjugal rights (no longer available in our law: see s 14 of the Divorce Act 70 of 1979) also had the potential to alter the status of the parties, therefore such proceedings demanded a proper investigation into jurisdiction. See *Burnett v Burnett* (1895) 12 CLJ 147 (OFS) 147: "The primary purpose of an action of divorce I consider to be a declaration of future status; and proceedings for restitution of conjugal rights I hold to be simply preliminary steps to obtaining such a declaration of status." (See also *Mason v Mason* (1885) 4 EDC 330 332.) A decree for judicial separation (no longer available in our law: see s 14 of the Divorce Act 70 of 1979), however, had no effect on the status of the parties and jurisdiction could be founded on residence: *Murphy v Murphy* 1902 TS 179 183-184 with reference to *Le Mesurier v Le Mesurier* [1895] AC 517 in regard to the distinction between suits for divorce (which affects the status of the parties) and suits for judicial separation (which did not affect the status of the parties).

47 *Mason v Mason* (1885) 4 EDC 330 336. See also *Reeves v Reeves* (1832) 1 Menz 244 249; *Bestandig v Bestandig* (1847) 1 Menz 280 281; *Le Mesurier v Le Mesurier* [1895] AC 517 540; *Gilbert v Gilbert* (1901) 22 NLR 201 202; *Brunschwik v Brunshwik* 1902 TH 223 225; *Ex parte Kaiser* 1902 TH 165 170; *Murphy v Murphy* 1902 TS 179 181-182; *Laughlin v Laughlin* (1903) 24 NLR 230 242; *Robarts v Robarts* (1903) 17 EDC 132 136; *Forster v Forster and Wheeling* (1905) 26 NLR 124-125; *Andrew v Andrew* 1905 ORC 40 41; *Nefler v Nefler* 1906 ORC 7 8; *Ex parte Standring* 1906 EDC 169 173; *Hudson v Hudson* 1907 EDC 189 191; *Knox v Knox* (1907) 24 SC 441; *Webber v Webber* 1915 AD 239; *Lewis v Lewis* 1939 WLD 140; *Frankenberg v Frankenberg* 1943 EDL 147 148; *Ex parte Oxtou* 1948 (1) SA 1011 (C) 1014ff; *Ex parte Stern* 1976 (2) SA 273 (C) 274G-H.

48 Except for Kahn 1986 TSAR 1 5ff; Faris 1993 THRHR 277.

connecting factor in divorce actions in South African law.

2.2.1.1 *Le Mesurier v Le Mesurier*:⁴⁹ *The facts of the case*

Le Mesurier came on appeal to the Privy Council⁵⁰ from the Supreme Court of Ceylon. The question which the Privy Council had to decide was whether the court of first instance, the District Court of Matara, had had jurisdiction to grant a divorce decree. At the time of the institution of the action, the husband (the plaintiff) was resident within the jurisdiction of the Matara Court (occupying the office of Assistant Government Agent) and the wife (a French lady) was resident in Ceylon, but it is not clear from the report whether she actually resided within the jurisdiction of the Matara court. The marriage was solemnised in England and it was accepted by the court that the husband had retained his English domicile of origin, despite the fact that he officially resided in Ceylon. Thus none of the parties was domiciled within the jurisdiction of the Matara court and therefore the jurisdiction of the District Court was questioned by the Supreme Court of Ceylon: could a court in Ceylon assume jurisdiction over two English domiciliaries on the basis of residence? The Supreme Court decided that the District Court did not have jurisdiction and the plaintiff subsequently appealed to the Privy Council.

2.2.1.2 *The governing law of Ceylon*

The first hurdle that the court had to surmount related to the legal system applicable to divorce jurisdiction in Ceylon, since the Privy Council did not sit as an English court when it heard appeals from the colonies. The Privy Council sat as if it were sitting in the colony from which the appeal had come⁵¹ and therefore the local law of that

49 [1895] AC 517.

50 The court of appeal for British colonies.

51 Falconbridge *Conflict* 227ff; Lipstein *Principles* 18.

colony had to be applied. In the case of Ceylon a distinction was drawn in 1801 by the Royal Charter of Justice⁵² between the Dutch inhabitants of the colony and the British residents in regard to jurisdiction in matrimonial matters. In respect of the Dutch inhabitants the law in force at the time of the British annexation continued to apply (presumably Roman-Dutch law modified by local customs and usages), but, in regard to the British residents, the matrimonial law of England, that was the ecclesiastical law,⁵³ applied.⁵⁴ However, the Royal Charter of 1801 was revoked and annulled in 1833,⁵⁵ and thus the special rules regarding matrimonial matters in respect of British residents were abolished. Thenceforth, in the absence of any legislation regulating the position of British residents in respect of jurisdiction in matrimonial matters, the Roman-Dutch law, which had prevailed in Ceylon before the annexation, was the applicable law.⁵⁶

2.2.1.3 *The question of jurisdiction*

Now, once it was established that the applicable law, for jurisdictional purposes, was Roman-Dutch law, the following question had to be decided: did Roman-Dutch law confer jurisdiction on the courts of Ceylon to dissolve a marriage between British subjects on the basis of *residence*? In the case under discussion the marriage was solemnised in England and both parties had retained their English domicile, but resided in Ceylon. Lord Watson, who delivered the judgment, emphasised that no authority, which did not relate to the *dissolution* of the marriage tie (*divorce a vinculo*

52 S 53.

53 Matrimonial matters fell within the province of the church courts: see *infra* under 2.2.1.3 *The question of jurisdiction*.

54 The Royal Charter of Justice (1801) s 53: see *Le Mesurier v Le Mesurier* [1895] AC 517 524.

55 By the Ceylon Charter of Justice.

56 *Le Mesurier v Le Mesurier* [1895] AC 517 525ff: In terms of a Royal Proclamation, promulgated at Colombo on 23 September 1799 the law of Ceylon (Roman-Dutch law as modified by local usages), as it existed at the time of annexation, continued to apply.

matrimonii), could be relevant to their decision whether the Matara court had had jurisdiction in the divorce matter. Thus a clear distinction was drawn between absolute divorce (resulting in a change of status) and other remedies such as judicial separation (which did not affect the status of the parties).⁵⁷

Historically, family matters belonged within the province of the church and the canon law (based on Roman Catholic doctrine) did not provide for divorce *a vinculo*. A couple could only obtain an order for separation *mensa et thoro* (from bed and board) which did not affect their status. In effect a marriage, once validly concluded, was indissoluble.⁵⁸ With the Protestant Reformation in the sixteenth century, absolute divorce was introduced in those countries (notably Protestant Germany, Switzerland, the Netherlands, Denmark, Norway, Sweden, Iceland and Scotland, but not England⁵⁹) which broke with Rome and Roman Catholic doctrine.⁶⁰ In many other countries, especially those in which the Roman Catholic church retained its supremacy, absolute divorce was only introduced as late as the nineteenth or even the twentieth century.⁶¹ The introduction of provisions for absolute divorce in the sixteenth century Protestant countries, did not result in the immediate transfer of the jurisdiction in matrimonial affairs from the church courts to the state courts. Whilst not without upheavals, a gradual process of secularisation led to the formation of special courts,

57 Judicial separation is no longer possible under South African law: see s 14 of the Divorce Act 70 of 1979.

58 See in general Phillips *Untying the Knot*; as well as Baker *English Legal History* 401ff; Gilissen *Historische Inleiding* 523ff; Holdsworth *History of English Law* 621ff.

59 Strangely enough, the English Anglican Church retained marital indissolubility: see Baker *English Legal History* 404ff.

60 Phillips *Untying the Knot* 24.

61 See Gilissen *Historische Inleiding* 527; Phillips *R Untying the Knot* 47ff. In the absence of divorce *a vinculo*, a marriage was often regarded as having been a nullity from the start due to some or other impediment, such as lack of consent (often fabricated afterwards) or lack of capacity. Since there could not have been a valid marriage, there was no marriage tie. The effect was, of course, that children born during the subsistence of such a "union" were illegitimate. For an interesting account of the marriages (some of which were declared nullities in order to bastardise the daughters) of King Henry VIII, see Baker *English Legal History* 404ff.

consisting of a mixture of clerics and laymen. Ultimately the state became the dominant partner and jurisdiction in matrimonial matters was vested in the state courts.⁶² Since the canon law, especially before the Reformation, was of universal application across vast areas of Europe, the criterion for jurisdiction in matrimonial matters, namely residence within a diocese with the concomitant subjugation to the faith, was universally accepted. As James LJ put it:

"The church and its jurisdiction had nothing to do with the original nationality or acquired domicils of the parties ... If a Frenchman came to reside in an English parish his soul was one of the souls the care of which was the duty of the parish priest, and he would be liable for any ecclesiastical offence by the ordinary ... The wrongdoer has elected to reside within the local limits of the jurisdiction of the Church Court, and neither the Court of the State nor the Church or State Court of his own country has any ground for alleging that the Church Court appealed to is usurping a jurisdiction, when it by Ecclesiastical monition, declaration, and censure, compels the offending party to give proper redress or declares the offended party to be thenceforth relieved from the obligation to provide for or to adhere to the bed and board of the other ..."⁶³

With the final transfer of jurisdiction in regard to family matters from the ecclesiastical courts to the state courts, the question arose whether the state courts should exercise jurisdiction on the same grounds as the church courts. The state courts extended the grounds for divorce (ecclesiastical law providing only for divorce on the ground of adultery) and so it may be said that the development of divorce principles lay more within the secular sphere than that of the church.⁶⁴ By drawing a clear distinction

62 Phillips *Untying the Knot* 47ff.

63 *Niboyet v Niboyet* (1878) 4 PD 1 5.

64 The natural law school also played an important role in the secularisation of matrimonial issues, such as divorce: see Phillips *Untying the Knot* 52ff.

between separation from bed and board (traditionally the province of the church) and absolute divorce (a secular institution), and thus between the jurisdiction of the church courts and the state courts, Lord Watson emphasised that the purely ecclesiastical courts were never empowered to adjudicate upon a change in status such as occurs upon divorce. Therefore, the jurisdictional grounds of the church courts did not have any bearing on those of the state courts in regard to divorce *a vinculo*.

This brings us to the crucial issue in *Le Mesurier*: on what grounds would a court assume jurisdiction in a divorce action? Lord Watson stated clearly that the jurisdiction of the Matara court must have been derived from a recognised principle of the general law of nations, or from some domestic rule of Roman-Dutch law:

"If either of these points were established, the jurisdiction of the District Court would be placed beyond question; but the effect of its decree divorcing the spouses would not in each case be the same. When the jurisdiction of the Court is exercised according to the rules of international law, as in the case where the parties have their domicile within its forum, its decree dissolving their marriage ought to be respected by the tribunals of every civilised country ... On the other hand, a divorce *a vinculo*, pronounced by a Court whose jurisdiction is solely derived from some rule of municipal law peculiar to its forum, cannot, when it trenches upon the interests of any other country to whose tribunals the spouses were amenable, claim extra-territorial authority."⁶⁵

A clear distinction was drawn, therefore, between international competence, in terms of which international recognition would follow, and internal competence (local jurisdiction), which could result in a limping marriage should it not correspond with international competence.

65 *Le Mesurier v Le Mesurier* [1895] AC 517 527-528.

Counsel for the plaintiff did not base their case on any domestic rule of Roman-Dutch law which would have vested jurisdiction in the Matara court. They maintained that, apart from the universally acknowledged rule that the true domicile of the parties was the criterion for divorce jurisdiction,⁶⁶ jurisdiction could also be assumed on the basis of a "matrimonial domicile" within the area of the court.⁶⁷ In support of this contention a number of English and Scottish cases were cited. From these cases it was clear that "matrimonial domicile" was distinguishable from the "true domicile" of the parties; the matrimonial domicile being the home or seat of the marriage, "resting upon a somewhat indefinite permanency of residence".⁶⁸ The concept has been criticised as being figurative and ascribing an extra domicile, in addition to their true domicile, to a married couple.⁶⁹ After a thorough examination of the English and Scottish authorities on this point, the court rejected "matrimonial domicile" as a ground for divorce jurisdiction. However, it is strange indeed that the Privy Council went to such great lengths to examine the English and Scottish authorities. As already pointed out, the Privy Council did not sit as an English court when it heard appeals from the colonies, but was bound to apply the local law of the colony concerned. The court had already established that, in the case of Ceylon, Roman-Dutch law was the local law. Therefore, strictly speaking, the English and Scottish cases had no bearing on *Le Mesurier*. The reason why they were canvassed by the court probably lies in the following quotation:

"When carefully examined, neither the English nor the Scottish decisions are, in their Lordships' opinion, sufficient to establish the proposition that, in either of these countries, there exists a *recognised rule of general law* to the effect that a so-called matrimonial domicile gives

66 It is interesting to note that counsel for the plaintiff actually acknowledged this rule that was to be expounded by the court in its final judgment.

67 *Le Mesurier v Le Mesurier* [1895] AC 517 528.

68 531-532.

69 532-533.

jurisdiction to dissolve marriage."⁷⁰

If the reference to "general law" is to be interpreted as a reference to the general law of nations (*ius gentium*), it may be argued that the court was really considering the criterion of "matrimonial domicile" in an international sense, and not as a rule of pure domestic law. This would accord with the earlier statement by Lord Watson to the effect that divorce jurisdiction, exercised in terms of the rules of international law, would be recognised by the courts of all civilised countries.⁷¹

Having rejected the English and Scottish authorities on "matrimonial domicile", Lord Watson observed that the English and Scottish judges had not referred to "those treatises on international law which are generally regarded as authoritative, in the absence of any municipal law to the contrary".⁷² He subsequently referred to works dealing with private international law by Huber, Rodenburg and the more recent Continental writer, Bar.⁷³ He emphasised that, in an appeal from a colony like Ceylon (where Roman-Dutch law was the governing law), these authorities should not be overlooked. Now, it is not clear whether these authorities should not be overlooked because they were of an international nature and therefore applicable to all nations, or whether at least two of them, namely Huber and Rodenburg, were regarded as Roman-Dutch authorities⁷⁴ and were therefore applicable in terms of Roman-Dutch law as the local law of Ceylon. Be that as it may, it is clear that the court was determined to pronounce an "international" rule for divorce jurisdiction:

70 536 (own italics).

71 527.

72 537.

73 *Ibid* ff.

74 *De Wet Ou Skrywers* 144, 151.

"There can, in their Lordships' opinion, be no satisfactory canon of international law, regulating jurisdiction in divorce cases, which is not capable of being enunciated with sufficient precision to ensure practical uniformity in its application".⁷⁵

On the authority of Huber, Rodenburg and Bar, the court concluded that "the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage".⁷⁶

Despite the mention of "international law", *Le Mesurier* pertained to internal competence rather than international competence in terms of which a foreign judgment could be recognised.⁷⁷ Therefore the concern over the recognition of local judgments abroad was not truly met by *Le Mesurier*. Although *Le Mesurier* was extended into the area of international competence, that is that a South African court will recognise a foreign divorce decree granted by the domiciliary court of the parties, this did not guarantee universal recognition of divorce decrees granted by the domiciliary court, since not all countries accept domicile as the jurisdictional basis for divorce actions, and, even amongst those countries that do accept domicile as the jurisdictional *nexus* for divorce actions, domicile is not interpreted uniformly.⁷⁸ At the time when *Le Mesurier* was decided, however, South Africa was part of the British Empire and therefore at least all the British colonies would have recognised divorce decrees granted by the court of the parties' domicile.

75 *Le Mesurier v Le Mesurier* [1895] AC 517 538.

76 540.

77 Kahn *TSAR* 1 5ff; Spiro 1974 *THRHR* 340 344.

78 See Forsyth *Private International Law* 383ff for an overview of the recognition of foreign divorce decrees in South African law. The most recent legislation on the recognition of foreign divorce decrees is contained in s 13 of the Divorce Act 70 of 1979 (as amended): see discussion *infra* under **5 Recognition of foreign judgments relating to status**.

2.2.1.4 Evaluation: jurisdiction versus choice of law

The impression gained from reading *Le Mesurier* is that the court endeavoured to find a domestic rule of divorce jurisdiction which would ensure international recognition of divorce orders based on that jurisdictional rule. Assuming that domestic Roman-Dutch law did not provide such a rule of jurisdiction,⁷⁹ recourse was had to "international treatises", such as those of Huber and Rodenburg (who happened to be Roman-Dutch writers),⁸⁰ as well as the Continental writer, Bar. However, the rule of the parties' domicile, though proclaimed an *international* rule of divorce jurisdiction, was probably based on the universal recognition of the personal law (indicated by the connecting factors domicile or nationality) as the applicable legal system in matters regarding status, a principle laid down by the thirteenth century statisticians in Italy.⁸¹ Moreover, this principle seems to have evolved as a principle of the conflict of laws rather than a jurisdictional one, since it was related to the application of foreign law by the forum or the recognition of a foreign law acquired status. Indeed, most modern commentators on the conflict of laws, especially in the common law world, will agree that status is determined by the personal law of the *propositus*.⁸² Now if this is so, the personal law should also determine whether a change in status has taken place or whether a new status has been acquired. Divorce is one of the best examples of an alteration in status and yet, the choice of law aspect of divorce is not governed by the *lex domicilii* in common law countries. Instead, once jurisdiction has been assumed, the *lex fori* is applied to divorce issues.⁸³ The question remains: why, in *Le Mesurier*,

79 Neither counsel for the plaintiff, nor counsel for the defence, advanced any authority on a domestic rule of Roman-Dutch law in this respect.

80 *De Wet Ou Skrywers* 144, 151.

81 See *supra* under 1 The meaning of private-law status.

82 Allen 1930 LQR 277 309; Graveson *Conflict* 230ff.

83 See eg *Holland v Holland* 1973 SA (1) 897(T) 899G:

"In our country, as is the case of all Christian nations, marriage, although it rests upon the actual consent of the parties, is part of the *jus publicum* and the

was the rule that status is determined by the personal law of the *propositus* embraced as a rule for divorce jurisdiction, rather than as one for the conflict of laws?

Although *Le Mesurier* was a Privy Council decision, and the court did not act as an English court in appeals from the colonies, it would seem as if the result of this case may be explained in terms of the relative late development of the conflict of laws as a recognised area in English law. As a result of the peculiar nature and structure of the English courts it was only at the turn of the eighteenth century that cases involving a conflict of laws were recognised and dealt with as such.⁸⁴ Previously the English common law reigned supreme: there were no intra-national conflicts and the common law courts applied the law of the forum to disputes before them. In civil suits the jury had to be drawn from the region where the cause of action had arisen, and, since the sheriff could not summon a jury from a foreign country, the common law courts did not entertain foreign causes. However, the English did engage in international trade and commerce and special courts were instituted to deal with commercial and maritime cases that contained foreign elements. Thus cases concerning commercial matters were heard by special tribunals that did not apply English common law, but the internationally recognised law merchant (*lex mercatoria*). Maritime cases were dealt with in similar fashion by admiralty courts that applied the law of nations (*jus gentium*).⁸⁵ It may be said that the English system involved a choice of jurisdiction rather than a choice of law.⁸⁶ Towards the end of the sixteenth century the technical

spouses are absolutely subject to the *jus publicum* of the place where they are domiciled. The highest considerations of social order and morality render it desirable that any alteration in the relations between husband and wife, or in the status of the husband and wife as such, should be determined by the *Courts of the country where the parties are domiciled* and that, having been so determined, it should be recognised in all countries ..." (own italics).

84 *Cheshire-North* 23ff (where it is pointed out that the first comprehensive treatise on the conflict of laws by an Englishman, Westlake, only appeared in the latter half of the nineteenth century); Juenger *Choice of Law* 22ff; Lipstein *Principles* 17ff. For a comprehensive survey of the historical development of the English conflict of laws, see Sack *History of English Law* 1.

85 On these special commercial and maritime courts see Holdsworth *History of English Law* 526ff.

86 Graveson 1951 *BYBIL* 273 274ff.

obstacle in regard to the selection of the jury in the English common law courts had disappeared. It was no longer necessary for the jury to be drawn from the foreign country where the cause of action had arisen, since the jury gained their knowledge of events from the testimony of witnesses. Thus the common law courts started hearing "foreign" cases. However, no elaborate system of conflict of laws had been developed. Since the bulk of cases related to commercial matters the *law merchant* (regarded as common to European nations) was applied by the common law courts. By the turn of the eighteenth century the *lex mercatoria* was incorporated into the common law. It was only then that the English courts were truly faced with the problem of developing a system of conflict of laws, since the *lex mercatoria* had ceased to be of international application.⁸⁷

In their search for the principles and rules of the conflict of laws, the English courts turned to civilian authority, a process that Juenger has aptly termed the "civilization of English conflicts law".⁸⁸ This process was aided, in no small measure, by the influence of Scottish law. Since many Scottish jurists had studied on the Continent, they were familiar with civilian authorities on the conflict of laws. Furthermore, a case like *Scrimshire v Scrimshire*⁸⁹ clearly adumbrated the notion that solutions to conflicts problems were to be found in the *ius gentium* and that the content of the *ius gentium* was to be found in the works of the civilian authorities.⁹⁰

It is against this historical background to the English conflict of laws that the reference to and reliance placed upon "international treaties" in *Le Mesurier* becomes clear. The

87 *Cheshire-North* 24; Juenger *Choice of Law* 24.

88 *Choice of Law* 25.

89 (1752) 2 Hagg Con 395, [1558-1774] All ER Rep 554.

90 Juenger *Choice of Law* 25. See also *Robinson v Bland* (1760) 1 Wm BI 234, 256, [1558-1774] All ER Rep 177, (1760) 2 Burr 1077, Bull NP 275 where Lord Mansfield (a Scot) adopted the proposition of Huber that the intention of the parties in regard to the law governing their contract should be heeded.

Privy Council did, in fact, act like an English court would have done: since English law lacked an elaborate system of conflict of laws, resort was had to Continental authority. Quite ironically, those authorities formed the very basis of the civil law systems on the Continent and since the governing law of Ceylon was Roman-Dutch law, these authorities were, in actual fact, quite appropriate. But even more remarkable is the fact that English law adopted *Le Mesurier* as authority for internal divorce jurisdiction, even though *Le Mesurier* had, strictly speaking, no authority in England.⁹¹

The interrelation of jurisdiction and conflict of laws is clear from the dictum in *Wilson v Wilson*⁹² quoted in support of the conclusion reached by the court in *Le Mesurier*:

"It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws."⁹³

This *dictum* raises the question whether the *status theory*, in terms of which status is governed by domicile, refers to the *court* of the domicile (in other words, jurisdiction) or to the *law* of the domicile (which would indicate choice of law). According to *Wilson*, the domiciliary law should govern divorce, but since the domiciliary law can only be properly administered by the domiciliary court, jurisdiction takes precedence over the conflict of laws. Once jurisdiction has been assumed, the *lex fori*, which will in fact be the *lex domicilii*, will be applied.⁹⁴ This view negates the whole struggle to find justification for the application of foreign law and therefore the very *ratio* for the existence of the conflict of laws. It seems to have been a step backward: in terms of

91 *Cheshire-North* 639; *Cook Logical and Legal Bases* 458ff; *Graveson Conflict* 282; *Morris Conflict* 181.

92 (1872) LR 2 P & D 435.

93 442.

94 *Graveson* 1951 *BYBIL* 273 277.

Wilson, status, or a change in status, could only be decided upon in the *court* of the domicile and choice of law is not addressed at all. On the other hand, it may be said that a principle of the conflict of laws was entrenched in this jurisdictional requirement. It then becomes impossible to distinguish between jurisdictional criteria and conflict rules and this has important implications in regard to the statutory extension of jurisdictional criteria without due regard being had to the law that governs divorce in a choice of law sense.⁹⁵

As long as the parties' mutual domicile remained the sole ground for divorce jurisdiction, the *lex domicilii* was, via the jurisdictional requirement, in actual fact applied to divorce issues. However, the extension of jurisdictional grounds by means of statute has led to the erosion of this marriage between jurisdiction and the conflict of laws.

2.2.2 Statutory intervention

The domicile of the parties remained the sole jurisdictional ground for divorce actions in South Africa until 1939⁹⁶ when legislation was introduced to extend the grounds of

95 *Ibid* 281.

96 It was only in Natal that the legislator intervened, even before the decision in *Le Mesurier v Le Mesurier* [1895] AC 517, in terms of Law 18 of 1891:

- 1 Nothing in Law No 43 of 1887 contained [which dealt with the practice of suing individuals not present in Natal by way of edictal process] shall be construed to disentitle any spouse who has resided in Natal for four years to edictal process for matrimonial relief against his or her wife or husband, if he or she shall have been deserted in Natal for an uninterrupted period of eighteen months, and if the deserting spouse shall be absent from the Colony at the date of the institution of such legal proceedings.
- 2 In case any spouse deserted in the manner stated in Section 1 shall sue his or her husband or wife by edict for matrimonial relief, his or her suit shall not be defeated by any change in the domicile of the deserting spouse following such desertion.

In terms of this statute a deserted wife, who had been resident in Natal for four years preceding

jurisdiction.⁹⁷ This legislative intervention took place in an attempt to alleviate the difficulties experienced by especially married women, who, until fairly recently,⁹⁸ followed the domicile of their husbands and therefore had to institute action in the area of the court where the husband was domiciled. In instances where the husband had deserted the wife, or had been deported, the husband's new domicile could well have been in another colony (before the establishment of the Union of South Africa in 1910), or in another provincial division of the Supreme Court of South Africa (after Union), or even overseas. Therefore, as a result of the rule of the wife's domicile of dependence,⁹⁹ it was often impossible to found divorce jurisdiction in South Africa on the common law ground, since the husband had abandoned his South African domicile. An interesting feature of all the statutes which dealt with the extension of the jurisdictional grounds for divorce, is that a choice of law clause was included in all these acts. However, the nature of this choice of law clause as such is not immediately apparent, since it was, since 1939 linked to or, later on, incorporated into those sections that dealt with jurisdiction. To the uninitiated, it may appear to deal strictly with

the institution of proceedings and been deserted there for an uninterrupted period of eighteen months, could institute action in Natal if that was the last common matrimonial domicile of the parties: see *Ex parte Pekola* 1951 (3) SA 793 (N) 795 and cases quoted there. In *Gilbert v Gilbert* (1901) 22 NLR 201 205 the fact that the desertion did not take place in Natal, prevented the application of the Act. The period of residence required (four years) also seems overlong. Law 18 of 1891 was repealed by the Pre-Union Statute Law Revision Act 78 of 1967.

- 97 The Matrimonial Causes Jurisdiction Act was promulgated in 1939 (Act 22 of 1939). This Act did not abolish existing grounds for divorce jurisdiction: see s 7. In all subsequent statutes, dealing with the statutory extension of jurisdictional grounds, this provision (although the wording differs) has been retained. This provision may appear superfluous, since the common law ground of divorce jurisdiction has been preserved in all the statutes. However, as Kahn (1979 ASSAL 491) points out, there may be a difference in regard to the actual date on which proceedings are regarded to be instituted in terms of the relevant legislation and in terms of the common law. In terms of s 1(2) of the Divorce Act 70 of 1979, the crucial date is the date of *issue* of the summons or the date on which notice of motion is filed or delivered in terms of the rules of court; whereas, in terms of the common law, the crucial date is probably the date of *service* of the summons or edict: see Hahlo & Kahn *Husband and Wife* 539. For an overview of the statutory grounds for extended divorce jurisdiction, see Hahlo & Kahn *Husband and Wife* 546-554, as well as Forsyth *Private International Law* 215-219 and Faris 1993 *THRHR* 277.
- 98 In terms of the Domicile Act 3 of 1992 s 1(1) a married woman can now acquire her own domicile of choice.
- 99 See *Mason v Mason* (1885) 4 EDC 330 351.

procedure. An attempt will now be made to state and analyse the relevant statutes.

As already noted, the first national statute which extended the jurisdictional grounds for divorce, appeared in 1939.¹⁰⁰ This Act¹⁰¹ enabled a wife to institute an action for divorce in the division of the Supreme Court in which she had been ordinarily resident for at least a year before proceedings commenced, provided that her husband was domiciled in South Africa at the date of the institution of proceedings.¹⁰² This Act also contained the first statutory choice of law clause in regard to divorce, which in its original form read as follows:

Whenever any division of the Supreme Court of South Africa deals with any action or claim in reconvention for divorce or for restitution of conjugal rights by virtue of the jurisdiction conferred upon it by section *one* or *four*¹⁰³ or determines the mutual property rights of the husband and wife by virtue of the jurisdiction conferred upon it by section *five*,¹⁰⁴

100 Matrimonial Causes Jurisdiction Act 22 of 1939.

101 S 1(1).

102 The original s 1(1) of the Matrimonial Causes Jurisdiction Act 22 of 1939 read as follows:

Any provincial or local division of the Supreme Court of South Africa shall have jurisdiction to try an action instituted by a wife against her husband for divorce or for restitution of conjugal rights or for judicial separation, if the wife has been ordinarily resident within the area of jurisdiction of that division for a period of one year immediately preceding the date on which the proceedings are instituted, and if at that date -

- (a) in the case of an action for divorce or for restitution of conjugal rights, the husband is domiciled within the Union; ...

103 S 1 dealt with the extension of jurisdictional grounds in favour of the wife (discussed *supra*) and s 4 simply stated that any division of the Supreme Court that had jurisdiction in terms of s 1 would also have jurisdiction to hear any claim in reconvention by the husband.

104 In terms of s 5 any division of the Supreme Court which had jurisdiction in terms of ss 3 and 4 also had jurisdiction to make an order determining the mutual property rights of the husband and wife or an order concerning the custody and maintenance of any minor child born of the union, as well as jurisdiction to amend any order made by it in regard to the custody or

it shall do so in accordance with the practice and the law in accordance with which the division within whose area of jurisdiction the defendant in convention or the plaintiff in reconvention is domiciled would have dealt with it.¹⁰⁵

Since the 1939 Act was still firmly based on domicile as the jurisdictional connecting factor (the husband had to be domiciled in the Union of South Africa at the time when proceedings were commenced),¹⁰⁶ section 6 meant that the South African law, which would have been the domiciliary law of the parties, was applicable to divorce. There is, however, a strange twist to this seemingly simple section. If (as must indeed be the case) the *defendant in convention* refers to the *husband* and the *plaintiff in reconvention* also refers to the *husband*, the section stipulates that the division of the Supreme Court where the wife has instituted the action must try the action in accordance with the law and practice of the division where the husband is domiciled. In fact, this meant that one division of the Supreme Court (where the wife had been ordinarily resident for one year) would have had to apply the law and practice of another division (where the husband was domiciled). As Kahn¹⁰⁷ points out, there was a *lacuna* in the Act: where the husband was not domiciled *in any particular division* of the Supreme Court, but only in the *Union of South Africa as a whole*,¹⁰⁸

maintenance of such child.

105 S 6.

106 See discussion *supra*.

107 Kahn *Domicile* 7.

108 Whether it was correct to speak of a "Union domicile", is debatable. Cf Pollak 1933 *SALJ* 449 456:

"... can it be said that there is such a thing as a Union domicile, or can one speak only of a provincial domicile? It is submitted that no hard and fast answer can be given to this question. The answer will depend on the nature of the inquiry ... If the inquiry relates to the jurisdiction of a provincial division domicile in that province is necessary, and this requirement is not met by showing a permanent home in some other province or a permanent home in the Union as a whole. If the inquiry relates to the jurisdiction of a local division

the court (where the wife instituted action) would not have been able to comply with section 6, since it would not have been referred to the law and practice of any particular division of the Supreme Court. Kahn proposed that in such an event the court where the wife had instituted action would have had to apply its own law and practice.¹⁰⁹

This raises the question: why did the legislator not simply state that the court, seized of the matter, should apply its own law and practice? Were there any significant disparities between the law and practice of two different divisions of the Supreme Court? It is hardly likely that there would have been any difference in regard to the grounds for divorce or other substantive law issues. In regard to procedure (if this is what *practice* refers to), it is an accepted principle that a court always applies its own procedural law.¹¹⁰ Thus, there seems to be no justification to refer one division of the Supreme Court to the law and practice of another division.

The only possible explanation is that the legislator endorsed the status theory in a conflict of laws sense, namely that the issue of divorce was to be dealt with by the domiciliary law of the parties (which was the domicile of the husband at that stage). Since the 1939 Act did not confer jurisdiction in cases where the husband was not domiciled in the Union, it meant that South African law was applied to divorce. Therefore, whatever be the correct interpretation of the 1939 Act, it did not hold any severe implications for the conflict of laws.¹¹¹

However, the 1939 Act did not deal satisfactorily with the difficulties experienced by the deserted wife whose husband had left the Union of South Africa or the wife whose

domicile even in the province is insufficient and domicile in the local area of the division is required."

109 Hahlo & Kahn *Husband and Wife* 639-640.

110 Forsyth *Private International Law* 20.

111 See also Kahn 1953 *SALJ* 52 55.

husband had been deported, since those husbands had, by the time that proceedings for divorce were commenced by the wife, already abandoned their domiciles in the Union. Thus further reform was introduced in 1953. Besides the jurisdictional grounds introduced by the 1939 legislation, provision was now made for those cases where the wife had been deserted by her husband and he had either left the Union or had been deported from it. In terms of this provision the wife must have been ordinarily resident for at least a year within a particular division of the Supreme Court, prior to the institution of her action, *and* the husband must have been domiciled in the Union immediately prior to the desertion or deportation.¹¹² However, as was the case with the 1939 Act, the 1953 legislation still required the husband to have been domiciled in South Africa at some time or another. The choice of law clause¹¹³ was amended accordingly to refer to the domicile of the husband immediately before he deserted his wife and left the country or immediately before he was deported.¹¹⁴ Thus, choice of

112 Matrimonial Affairs Act 37 of 1953 s 6. § 1(1) of the Matrimonial Causes Jurisdiction Act 22 of 1939 was thus replaced by this section that originally read as follows:

Any provincial or local division of the Supreme Court of South Africa shall have jurisdiction to try an action instituted by a wife against her husband for divorce or for restitution of conjugal rights or for judicial separation, if the wife has been ordinarily resident within the area of jurisdiction of that division for a period of one year immediately preceding the date on which proceedings are instituted, and if -

- (a) in any case in which the husband has deserted the wife and has departed from the Union or has been deported from the Union, he is at the said date or was immediately before the desertion or deportation domiciled within the Union;
- (b) in any other case of an action for divorce or for restitution of conjugal rights, the husband is, at the said date domiciled within the Union; ...

113 § 6 of the Matrimonial Causes Jurisdiction Act 22 of 1939.

114 Matrimonial Affairs Act 37 of 1953 s 8. The amended s 6 of the Matrimonial Causes Jurisdiction Act 22 of 1939 read as follows:

Whenever any division of the Supreme Court of South Africa deals with any action or claim in reconvention for divorce or for the restitution of conjugal rights by virtue of the jurisdiction conferred upon it by section *one* or *four* or determines the mutual property rights of the husband and wife by virtue of section *five*, it shall do so in accordance with the practice and the law in accordance with which the division within whose area of jurisdiction the

law was still based on domicile, even though it was a domicile which probably no longer existed at the time of the institution of the divorce proceedings. The fact that the date for the requisite domicile was the same for jurisdiction and choice of law, provides evidence, yet again, of the inseparability of these issues in regard to divorce actions. Since a South African domicile was required in terms of the Act in order to assume jurisdiction, there was no question of foreign law entering the choice of law question.

It was only in 1968 that provision was made for cases where the husband was not domiciled in South Africa at all. In terms of this provision a wife, whose husband was not domiciled in South Africa, could institute an action in a provincial or a local division of the Supreme Court provided that immediately before the marriage she had been a South African citizen or had been domiciled in the Republic, and that she was ordinarily resident in the Republic¹¹⁵ for one year before the institution of proceedings.¹¹⁶ For the first time jurisdiction could be assumed on a ground that did not involve the domicile of the husband (in terms of the domicile of dependence): if the wife had been a South African citizen before her marriage or had been domiciled in

defendant in convention or the plaintiff in reconvention is or was domiciled or is resident, as the case may be, would have dealt with it.

115 While both the 1939 and 1953 legislation required ordinary residence of the wife within the area of jurisdiction of the *division of the Supreme Court*, the 1968 legislation (s 1A) refers to ordinary residence *in the Republic*. Did this entitle the wife to institute action in any division of the Supreme Court? See Kahn 1968 SALJ 428 431ff in this regard. This was rectified in 1979 by s 2 of the Divorce Act 70 of 1979 in terms of which ordinary residence within the *area of jurisdiction of the court* when action is instituted as well as ordinary residence in the *Republic* for at least a year before institution of action, was required.

116 General Law Amendment Act 70 of 1968 s 21. This section (1A), inserted after s 1(1) of the Matrimonial Causes Jurisdiction Act 22 of 1939 (as amended by the Matrimonial Affairs Act 37 of 1953 s 6), read as follows:

A provincial or local division of the Supreme Court of South Africa shall have jurisdiction to try an action for divorce or restitution of conjugal rights instituted by a wife against her husband who is not domiciled in the Republic, if immediately before her marriage the wife was a South African citizen or was domiciled in the Republic, and she was ordinarily resident in the Republic for the period of one year immediately preceding the date on which proceedings are instituted.

South Africa *before her marriage* (thus referring to her pre-marital domicile), residence of one year within the Republic before the commencement of divorce proceedings enabled her to institute action in any provincial or local division of the Supreme Court of South Africa. This necessitated the introduction of the following section in regard to choice of law:

Any issue in proceedings relating to an action referred to in subsection (1A)¹¹⁷ shall be determined in accordance with the law which would be applicable if both parties were domiciled in the Republic at the time of the proceedings.¹¹⁸

Thus a fiction was introduced: the husband was not domiciled in South Africa, but for choice of law purposes, a South African domicile was assigned to the parties. This again raises the question why the legislator did not simply state that if a South African court had jurisdiction, it must apply South African law to divorce issues. Instead, the legislator seemed to have been haunted by the status theory and felt compelled to relate the choice of law issue to domicile, albeit a fictional one.¹¹⁹

When the Divorce Act¹²⁰ was promulgated in 1979, the grounds for jurisdiction were

117 In terms of which the grounds of jurisdiction were extended to cover cases where the husband was not domiciled in South Africa.

118 S 21 (b) (which was added as subsection (3) to s 1 of the Matrimonial Causes Jurisdiction Act 22 of 1939). See Kahn 1968 SALJ 428 432 for the problems occasioned by the fact that s 6 (as amended) of the Matrimonial Causes Jurisdiction Act 22 of 1939 was retained.

119 This may also be called a "deemed domicile" rule: see North *Problems* 69. North points out that the United Kingdom legislator preferred this approach in s 1(4) of the Law Reform (Miscellaneous Provisions) Act 1949, while the Canadian legislator opted for the *lex fori* rule (s 2 of the Divorce Jurisdiction Act 1930). However, recent legislation in both these countries, as well as Australia and New Zealand, contains no statutory choice of law rules; see the Domicile and Matrimonial Proceedings Act 1973 (United Kingdom); the Divorce Act 1985 (Canada); the Family Law Act 1975 (Australia) and the Family Proceedings Act 1980 (New Zealand).

120 70 of 1979.

redefined, but no additional grounds were proclaimed.¹²¹ In regard to choice of law the fiction employed by the 1968 Act was also retained.¹²²

With the abolition of the wife's domicile of dependence by the Domicile Act,¹²³ the jurisdictional grounds for divorce are now based on two connecting factors, namely *domicile* and *ordinary residence*,¹²⁴ stated in the alternative:

A court shall have jurisdiction in a divorce action if the parties are or

121 The original s 2(1) read as follows:

A court shall have jurisdiction in a divorce action if -

- (a) the parties to the action are domiciled in the area of jurisdiction of the court on the date on which the action is instituted; or
- (b) the wife is the plaintiff or applicant and she is ordinarily resident in the area of jurisdiction of that court on the date on which the action is instituted and has been ordinarily resident in the Republic for a period of one year immediately prior to the said date and -
 - (i) is domiciled in the Republic; or
 - (ii) was domiciled in the Republic immediately before cohabitation between her and her husband ceased; or
 - (iii) was a South African citizen or was domiciled in the Republic immediately prior to her marriage."

For a discussion of this section, see Brooks 1979 *THRHR* 103ff; Kahn 1979 *ASSAL* 491ff.

122 S 2(3) of the Divorce Act 70 of 1979 before it was substituted by s 6(c) of the Domicile Act 3 of 1992. It read as follows:

A court which has jurisdiction in terms of this section in a case where the parties are not domiciled in the Republic shall determine any issue in accordance with the law which would have been applicable had the parties been domiciled in the area of jurisdiction of the court concerned on the date on which the divorce action was instituted.

For comment on this section, see Kahn 1992 *ASSAL* 496.

123 3 of 1992 s 1(1).

124 See **Chapter 6** under **4.4.4 Ordinary residence** for a discussion of the interpretation of this concept.

either of the parties is -

- (a) domiciled in the area of jurisdiction of the court on the date on which action is instituted; or
- (b) ordinarily resident in the area of jurisdiction of the court on the said date and have or has been ordinarily resident in the Republic for a period of not less than one year immediately prior to that date.¹²⁵

Regarding the choice of law issue, the legislator has decided to retain the fictional domicile:

A court which has jurisdiction in terms of this section in a case where the parties are or either of the parties is not domiciled in the Republic shall determine any issue in accordance with the law which would have been applicable had the parties been domiciled in the area of jurisdiction of the court concerned on the date on which the divorce action was instituted.¹²⁶

From the above analysis of the relevant statutes two important observations must be made:

In the first place, the choice of law clause was, and in terms of the latest provisions¹²⁷ still is, included in the act or section of the act which specifically deals with divorce jurisdiction. Thus no clear distinction is drawn between jurisdiction and choice of law.

Secondly, the legislator still, as was the case in the past, makes reference to the

125 S 2(1) of the Divorce Act 70 of 1979 as amended by s 6(a) of the Domicile Act 3 of 1992.

126 S 2(3) of the Divorce Act 70 of 1979 as substituted by s 6(c) of the Domicile Act 3 of 1992.

127 *Ibid.*

domicile of the parties, albeit a *fictional* one (since 1968).¹²⁸ This creates the impression that an attempt was made to remain true to the status theory in terms of which the *lex domicilii* determines status, or any change in status. However, when the legislator introduced the fictional domicile of the parties to the choice of law issue, the status theory started falling apart. Not only is it possible to establish jurisdiction in a division of the Supreme Court where none of the parties is domiciled, but the law applied to the divorce issue is to be the law of the fictional domicile which simply serves to indicate the *lex fori*. Therefore, a court other than the *court* of the domicile can assume jurisdiction and, as a result of this, a law other than the *law* of the domicile may be applied. What is the significance of this for the conflict of laws?

A closer look at section 2(3) of the Divorce Act¹²⁹ reveals that *any issue* relating to a divorce will be determined in accordance with the law which would have been applicable had the parties been domiciled in the area of the court's jurisdiction on the date that the action was instituted. "Any issue" includes aspects such as the grounds of divorce, as well as ancillary claims, such as maintenance and custody as well as, according to Kahn,¹³⁰ property rights which are not directly associated with the matrimonial property regime of the parties, for instance, forfeiture of the patrimonial benefits of the marriage in terms of section 9(1) of the Divorce Act.¹³¹ Now, while it is both expedient and convenient that issues such as maintenance and custody, as well as the forfeiture of benefits, are governed by the *lex fori*,¹³² the grounds of divorce are a different matter. The grounds of divorce in any legal system are

128 In terms of the General Law Amendment Act 70 of 1968 s 21 provision was made for the assumption of jurisdiction in cases where the husband was not domiciled in South Africa at all: see *supra*.

129 70 of 1979.

130 See 1979 ASSAL 496.

131 70 of 1979.

132 Since these matters are not related to the status of the parties and may require specific procedures and structures which are provided by the forum, the court applies its own law.

essentially a substantive matter which pertains directly to the continued existence or dissolution of the marriage between the parties and therefore one would expect the law of the community to which the parties belong, to decide whether there are sufficient grounds for a divorce. In terms of the status theory this would have to be decided by the personal law of the parties, which, in the South African context, is the *lex domicilii*. However, there are also strong arguments for the application of the *lex fori* in this regard.

For instance, in *Holland v Holland*¹³³ the question as to which law should govern the grounds of divorce came before the court. The facts of the case were briefly as follows: the wife instituted action in South Africa for divorce on the ground of alleged adultery by the husband.¹³⁴ However, the adultery had been committed in England while the husband had been domiciled there, yet the wife instituted action in a South African court after the acquisition of a domicile of choice by the husband in South Africa. At this time the wife's domicile was that of her husband in terms of the then domicile of dependence.¹³⁵

The question was whether the wife could rely on the misconduct, which had taken place in the husband's previous domicile, when suing for divorce in the new domicile. In an earlier case, *Gilbert v Gilbert*,¹³⁶ Mason ACJ stated in an *obiter dictum* that there was considerable authority to support the view that a husband was entitled to obtain a divorce in the country of his present domicile on the basis of a matrimonial offence which had been committed by his wife in the country of their previous

133 1973 (1) SA 897 (T). For a discussion of this case, see Kahn 1973 SALJ 125.

134 At that stage adultery was still one of the common law grounds for divorce. In terms of s 4(2)(a) of the Divorce Act 70 of 1979 adultery may now be relied on as proof of the irretrievable breakdown of a marriage with the added proviso that the plaintiff finds it "irreconcilable with a continued marriage relationship".

135 The wife's domicile of dependence was only abolished by s 1(1) of the Domicile Act 3 of 1992.

136 (1901) 22 NLR 201.

domicile, even though the law of the previous domicile would not have granted the divorce on that specific ground. However, Mason ACJ argued that this could lead to grave injustice, especially in instances where the offending party was anxious to atone for the misconduct.¹³⁷ With reference to this *obiter dictum* from *Gilbert*, the judge in the court *a quo* in *Holland* decided, on the basis of a possibility of injustice, as well as "respect for the strict logic required to justify the extension of a Court's authority by way of interpretation", that adultery committed in the previous *locus domicilii*, could not form the basis for a divorce in the new *forum domicilii*.¹³⁸ On appeal to the Transvaal Provincial Division, the question that had to be decided was whether the judge in the court *a quo* had been correct in holding that he was precluded from granting a divorce on the ground of adultery which had been committed in the parties' previous domicile. Boshoff J (Marais J and Moll J concurring) decided that the court *a quo* was not precluded from granting a divorce on this basis and that, in fact, it was immaterial whether adultery constituted a ground for divorce in English law, as long as it constituted a ground for divorce in South African law.¹³⁹ This decision was no doubt correct: South Africa was the domicile of the parties at the time of the institution of the divorce proceedings and therefore the question whether the marriage between the parties should continue or not, should, in terms of the status theory, be decided by the law of the community to which the parties belong, in this case the *lex domicilii*. It is of little consequence *where* the adultery had been committed. However, it is quite clear from the judgment that the emphasis was placed on the exclusive jurisdiction of the *forum domicilii* in divorce matters, rather than the choice of law rule for divorce.

In the first place, Boshoff J emphasised that, even though marriage is based on the actual consent of the parties concerned and is therefore essentially a contract between two private individuals, it is part of the *ius publicum* and in this sense the parties are

137 203ff.

138 See *Holland v Holland* 1973 (1) SA 897 (T) 898D-899B for an exposition of the reasoning of the judge in the court *a quo*.

139 Which it did: see 899F of the report.

"absolutely subject to the *ius publicum* of the place *where they are domiciled*".¹⁴⁰ The qualification that it is the *ius publicum* of the *locus domicilii* that regulates the dissolution of the marriage tie, is evident from the following *dictum*:

"The highest considerations of social order and morality render it desirable that any alteration in the relations between husband and wife, or in the status of the husband and wife as such, should be determined by the Courts of the country *where the parties are domiciled* and that, having been so determined, it should be recognised in all countries

...¹⁴¹

and further on:

"It is nothing but the regulation by the *domiciliary state* of the domestic affairs of its domiciliaries and a *state of domicile* is alone concerned, therefore, in the granting or refusing to grant a divorce. In other words, where a divorce is granted as it can, subject of course to limited statutory exceptions, only be granted at the *domicile of the parties*, the cause for divorce and all the qualifications surrounding the granting of a divorce are to be determined in accordance with the law of the *forum*."¹⁴²

From these passages it is clear that the application of the *ius publicum* is squarely based on the assumption that the only court which has jurisdiction to grant a divorce decree, is the domiciliary court of the parties. Thus, application of the *lex fori* is founded on the assumption of jurisdiction by the *forum domicilii*. The application of the

140 *Holland v Holland* 1873 (1) SA 897 (T) 899G-H (own italics).

141 899G-H (own italics).

142 900A-B (own italics).

lex fori is justified by the judge on the basis that it is the court that sits within a particular society which has to decide on the desirability of the continuance of a marriage as a legal and social relationship within that society.¹⁴³ The "society", in this sense, is the place where the parties are domiciled:

"The State where the effect is felt, that is, *the state of domicile*, judges that, as a result of the act, the longer continuance of the marital relationship is undesirable ..."¹⁴⁴

The divorce was granted. Boshoff J emphasised that the risk of injustice in cases such as these, where the offending act had taken place in a previous domicile, was met by the "domiciliary control over status".¹⁴⁵ In the end, the *lex fori* was applied to decide whether there was a ground for a divorce, but one cannot ignore the insistence by the judge on the *forum domicilii* as the only competent court in a divorce action. While *Holland* provides authority for the proposition that the *lex fori* governs the grounds of divorce, this was based on the assumption of jurisdiction by the *forum domicilii*. It is doubtful whether the interpretation of *Holland* can be extended to cover cases where jurisdiction is assumed on a ground other than domicile.

In view of what was said in *Holland v Holland*,¹⁴⁶ the question must be asked whether the South African legislator had fully anticipated the consequences of a break with the status theory. There are no doubt sound arguments for the application of the *lex fori* to divorce issues. Divorce may be regarded as an aspect of the *ius publicum*, as was seen in the case of *Holland* above.¹⁴⁷ Furthermore, application of the *lex fori* will

143 902A.

144 902B (own italics).

145 904C-D.

146 1973 (1) SA 897 (T).

147 899G.

facilitate matters for the courts, especially in instances where the parties are domiciled in different countries¹⁴⁸ for choice of law purposes;¹⁴⁹ thus avoiding a conflict between different *leges domicilii*. However, North cautions that the *ius publicum* argument in support of the application of the *lex fori* becomes dubious when jurisdiction is assumed on the basis of limited links with the forum.¹⁵⁰ Justification of the *lex fori* on the ground that it is impossible to choose between the different *leges domicilii* of the parties, or even on the ground that application of the *lex fori* is cheaper and quicker, may undermine the choice of law process. It is always easier to resort to the *lex fori* and in many instances, such as maintenance, the *lex fori* is indeed the most suitable governing law. However, proper research should be undertaken into the choice of law question before such a conclusion is reached. Issues, such as grounds of divorce, relate to a potential change in the status of the parties and therefore there should be good reasons for not referring the issue to the *lex domicilii* of the parties. North has voiced his concern about this in no uncertain terms:

"The decision on choice of law rules in divorce must depend upon a balance between principle, which undoubtedly points to the application of the personal law, and pragmatism which favours the *lex fori*. It is no surprise that the civil law supports the former and the common law the latter. What is worrying about the common law approach is that a rule which was historically justified by its jurisdictional link has been maintained with little real consideration of the implications of breaking that jurisdictional link."¹⁵¹

148 In terms of s 1(1) of the Domicile Act 3 of 1992 a married woman can acquire her own domicile of choice. At the stage when one of the spouses commences divorce proceedings the parties may, in actual fact, have different domiciles.

149 In other words, in different legal units or "rechtskringen": see *Dicey-Morris* 26ff for the meaning of "country" in a conflict of laws sense.

150 *Problems* 70.

151 1980 I *Hague Recueil* 9 87-88.

2.3 Preliminary conclusions

The issue of jurisdiction in divorce actions has relegated the choice of law aspect to a position of complete subordination. Domicile, as the principal connecting factor in matters concerning status, has a definite role to play in regard to divorce. At first, when domicile was the sole jurisdictional connecting factor in divorce actions, the choice of law aspect posed no problem, since the *lex domicilii* (*qua* jurisdiction) was applied. Thus the requirement in *Wilson v Wilson*,¹⁵² that the differences of married people should be dealt with by the laws of the community to which they belong (that is the *lex domicilii*) and dealt with by the tribunals which alone can administer those laws (that is the courts of the domicile), was consistently adhered to.

However, with the statutory extension of the jurisdictional grounds for divorce, adherence to the status theory fell by the wayside. The question must be asked whether the legislator paid due consideration to the choice of law aspect. The fact that choice of law was relegated to a subsection of a section that deals with jurisdiction,¹⁵³ creates the impression that the conflict of laws did not receive the consideration it was entitled to.¹⁵⁴

As the law stands at present, *domicile* and *ordinary residence* are jurisdictional connecting factors in the alternative for divorce actions.¹⁵⁵ This has important implications for the status theory in terms of which a change in the status of an individual should be governed by his *lex domicilii*, for where *ordinary residence* (as brief as one year) constitutes the jurisdictional connecting factor, *ordinary residence* will, in effect, replace domicile as the connecting factor in the choice of law rule for

152 (1872) LR 2 P & D 435 442.

153 S 2(3) of the Divorce Act 70 of 1979.

154 The South African Law Commission's Report on Domicile 1990 (Project 60) contains no reference to the choice of law issue as such.

155 S 2(1) of the Divorce Act 70 of 1979.

divorce.¹⁵⁶

3 Status and nullity actions

In South African law a marriage may be annulled either because it was void *ab initio* or because it is voidable. A marriage is void *ab initio*,¹⁵⁷ for example, for failure to comply with certain prescribed formalities;¹⁵⁸ where the parties were of the same sex;¹⁵⁹ where one or both of the parties were already married at civil or customary law; where one or both of the parties were below the marriageable age;¹⁶⁰ where consent was lacking if the afflicted party (in the event of insanity or intoxication) was

156 This is the effect of 2(3) of the Divorce Act 70 of 1979, should *ordinary residence* be the basis for jurisdiction: see *supra* for reference to the "fictional domicile". It may be argued, of course, that a person may acquire a domicile of choice at a place where he has been living for less than a year. However, in such an instance his intention will be to reside at that place for an indefinite period (see s 1(2) of the Domicile Act 3 of 1992), whereas a person who qualifies on the basis of ordinary residence, does not necessarily have such an intention. Thus, domicile constitutes a more permanent link with a place than ordinary residence does.

157 For a comprehensive list of the defects which will render a marriage null and void, see Sinclair *Law of Marriage* 387ff.

158 See Sinclair *Law of Marriage* 387-388 for a list of those formal defects which will render a marriage null and void. Failure to register a marriage will, for example, not have this effect: Sinclair *Law of Marriage* 388.

159 At present gay and lesbian marriages are entirely prohibited in South African law. It remains to be seen whether this common law impediment on marriages between people of the same sex will fall foul of the equality clause embodied in Chapter 2 s 9 of the Constitution of the Republic of South Africa 108 of 1996, in terms of which neither the state nor a person may unfairly discriminate directly or indirectly against anyone on the ground of sex. Sinclair *Law of Marriage* 169 fn 460 is of the opinion that our common law definition of marriage, which insists on heterosexuality, unfairly discriminates against individuals on the basis of sexual orientation:

"To say to homosexuals that their incapacity is relative - they can marry, but they must marry a person of the opposite sex - is not a good enough answer ... In the case of gay and lesbian couples, the prospect of constitutional litigation based on discrimination on the ground of sexual orientation looms large."

160 Eighteen years for boys and fifteen years for girls.

incapable of understanding the nature of the ceremony;¹⁶¹ where the parties were within the prohibited degrees of blood relationship; where the marriage took place across the colour line under certain circumstances.¹⁶² A marriage is voidable,¹⁶³ for example, if one of the parties was a minor and his or her parents had not consented to the marriage; if one of the spouses was impotent; if one of the parties was coerced into the marriage or if the wife was pregnant with the child of someone other than her husband at the time of the marriage.

Strictly speaking a marriage which is void *ab initio* need not be annulled in a court of law, and yet an annulment is often sought in order to clarify the status of the parties. However, the annulment of a void marriage does not alter the status of the parties: since the marriage was void *ab initio* the parties never acquired marital status and therefore such an annulment is in the nature of a declaration of an existing fact.¹⁶⁴

The annulment of a voidable marriage, on the other hand, has a definite effect on the status of the parties. Since the voidable marriage is regarded as valid until it is annulled, the parties acquire the status of married persons until the marriage is terminated by a nullity decree. In this sense, the annulment of a voidable marriage is more akin to a divorce decree, which also affects the status of the parties, than it is to the annulment of a void marriage, which does not affect the status of the parties.¹⁶⁵

161 However, the marriage may be validated if the parties continue to live together after the incapacity ceased to operate; alternatively, the marriage may be voidable: Sinclair *Law of Marriage* 389.

162 This related to the Prohibition of Mixed Marriages Act 55 of 1949. This Act has since been repealed by the Immorality and Prohibition of Mixed Marriages Amendment Act 72 of 1985.

163 See Sinclair *Law of Marriage* 387ff for a list of defects which will render a marriage voidable.

164 Hahlo & Kahn *Husband and Wife* 559ff; Pollak *Jurisdiction* 181ff.

165 *Ibid.*

This distinction between void and voidable marriages has had a marked effect on the formulation of jurisdictional criteria and greatly complicates the assumption of jurisdiction. Since the annulment of a voidable marriage affects the status of the parties, the grounds for jurisdiction are different from those for the annulment of a void marriage.¹⁶⁶ Therefore the court must know whether it is dealing with a void or a voidable marriage before it can assume jurisdiction. In the case of the annulment of a marriage in a South African court on the basis of a "foreign" defect,¹⁶⁷ the court faces a jurisdictional dilemma: the court has to establish whether the "foreign" defect will render the marriage void or voidable, in other words whether it will affect the status of the parties or not, before it assumes jurisdiction. The question is which legal system will determine whether the defect is to be characterised as rendering the marriage void or voidable? It may well be that the particular defect does not exist in South African law, or that, even though it is recognised by South African law, it is characterised as a defect which renders the marriage void whereas, in the foreign legal system, it pertains to voidability. Kahn suggests that the courts approach the matter in a liberal way:

"If rules of foreign law are not to be distorted in the process by being forced into the Procrustean bed of rigid concepts of domestic South African law, it will behove our courts to approach the matter liberally, *sub specie orbis*. Exact parallels will not always be forthcoming and analogous foreign notions must needs suffice."¹⁶⁸

According to Kahn the *lex loci celebrationis* (which governs the validity of a marriage

166 See the discussion of jurisdiction *infra* under 3.2 Voidable marriages.

167 In other words, a ground for annulment which comes from a foreign legal system.

168 Hahlo & Kahn *Husband and Wife* 559.

in the South African conflict of laws)¹⁶⁹ will determine whether a particular defect renders a marriage void. In regard to voidability Kahn submits that the *lex domicilii* of the husband at the time of the suit may be invoked.¹⁷⁰ However, this submission was made before the wife's domicile of dependence was abolished,¹⁷¹ and thus this option will now be complicated by the fact that the husband and wife may have different domiciles at the time of the commencement of proceedings. Therefore it will be necessary to decide *whose* domiciliary law is decisive. As the law stands at present, the court that is approached for the assumption of jurisdiction is confronted with formidable issues: apart from having to determine whether a "foreign" defect renders a marriage void or voidable, it may also have to decide whose domicile is decisive, should the parties have different domiciles, in the case of a voidable marriage. It is submitted that a proper analysis of the problems involved in the assumption of jurisdiction and the choice of the appropriate *lex causae*, as well as the distinction between jurisdictional and choice of law issues in regard to nullity actions, will provide a basis for solutions to these questions.

3.1 Jurisdiction and choice of law in nullity actions

3.1.1 Void marriages

The choice of law issue does not present serious problems in the case of the annulment of a void marriage. Since the grounds for annulment of a void marriage, such as the failure to comply with certain prescribed formalities¹⁷² or where the parties were within the prohibited degrees of blood relationship or where one of the

169 See *Friedman v Friedman's Executors* 1922 NPD 259, as well as supporting *dicta* in *Seedat's Executors v The Master (Natal)* 1917 AD 302 307 and *Ochberg v Ochberg's Estate* 1941 CPD 15 32. For a critical evaluation of this rule, see Schoeman 1992 (1) *Codicillus* 22.

170 Hahlo & Kahn *Husband and Wife* 560.

171 See s 1(1) of the Domicile Act 3 of 1992.

172 See Sinclair *Law of Marriage* 387-388.

parties was already married,¹⁷³ coincide with the requirements for a valid marriage, the question for the conflicts lawyer is simply whether a valid marriage came into being or not. Therefore the South African conflict rule for validity, in terms of which the validity of a marriage is governed by the *lex loci celebrationis*, subject to certain exceptions, will be applied.¹⁷⁴

However, authority on the jurisdictional criteria for the annulment of a void marriage in a South African court is scant and there is no statutory directive in this regard.¹⁷⁵ Since the annulment of a void marriage does not alter the status of the parties, jurisdiction does not seem to be confined to the domicile of the parties.¹⁷⁶ The following jurisdictional criteria have been advanced:

3.1.1.1 *Locus celebrationis*

*Wells v Dean-Willcocks*¹⁷⁷ provides authority for the *locus celebrationis* as a jurisdictional ground for the annulment of a void marriage:

"... jurisdiction is founded on the facts that a marriage ceremony was performed here and entered in the marriage register of this Province, and that this is the proper Court to declare whether that ceremony was valid, and whether the plaintiff's status was altered thereby."¹⁷⁸

173 For a comprehensive list of all the impediments which will render a marriage void *ab initio*, see *Sinclair Law of Marriage* 387-390.

174 *Hahlo & Kahn Husband and Wife* 641.

175 Even though the Divorce Act 70 of 1979 s 13 deals with the recognition of foreign nullity orders, the Act does not contain any directive in regard to domestic jurisdiction in nullity actions.

176 In terms of the status theory (see *supra* under 2.2 **Jurisdiction and choice of law**) jurisdiction in matters which may affect the status of the parties, is based on domicile.

177 1924 CPD 89.

178 93.

In this case it was stressed that the court of the *locus celebrationis* was the only court which could rectify the marriage register in this respect.¹⁷⁹

This ground of jurisdiction is strongly supported by Pollak:

"... the courts of the country whose law governs the creation of a marriage should have jurisdiction to declare that what purports to be a marriage is void ..."¹⁸⁰

Although there is much support for the *locus celebrationis* as a jurisdictional ground, the arguments advanced in its favour seem to confuse the issues of jurisdiction and choice of law. Implicit in the assumption of jurisdiction on the basis of the *locus celebrationis* is the application of the *lex fori* (which will, in effect, be the *lex loci celebrationis*) to the substantive issue of validity of the marriage. This much is evident from the justification offered by Goodrich for the *locus celebrationis* as a *jurisdictional* criterion:

"... since the annulment goes back to the question of inception of the marriage status, it ought to be the *law* by which the status would come into being that should say that despite the form this man and woman went through they never became husband and wife."¹⁸¹

3.1.1.2 Domicile

Even though annulment of a void marriage does not alter the status of the parties

179 92. See, however, *De Bono v De Bono* 1948 (2) SA 802 (C) where the Registrar was authorised to expunge a marriage from the records on the basis of a decree of a Malta court which was accepted as valid by the South African court.

180 *Jurisdiction* 182-183.

181 1919 *Harv LR* 806 811 (own italics). See also Hahlo & Kahn *Husband and Wife* 561.

(they were, in fact, never married), there is ample support for domicile as a jurisdictional connecting factor.¹⁸² The reason for this is that the domiciliary forum has an interest in the status of the parties and since the status of the parties, involved in an alleged void marriage, is in question, the domiciliary court has jurisdiction to adjudicate thereon:

"In the case of a void marriage the parties are not necessarily domiciled in the same country and the decree is merely declaratory of, and does not alter, the status of the parties. The object of the decree, however, is to place on record by means of a judgment *in rem* the fact that the marriage entered into by the parties was void *ab initio* and gave rise to no legal consequence ..."¹⁸³

In the past the wife's domicile of dependence may have complicated matters, although, strictly speaking, a "wife" in a void marriage never followed her husband's domicile. With the abolition of the wife's domicile of dependence by the Domicile Act¹⁸⁴ any doubt that may have existed in this regard, has been dispelled.

It is important to note that it is the domicile of either of the parties at *the time of the institution of proceedings*¹⁸⁵ which suffices. And in this sense jurisdiction for void marriages coincides with divorce jurisdiction based on domicile. However, Pollak argued that the domicile at *the time of the marriage* should be the criterion.¹⁸⁶ This again would seem to confuse jurisdiction and choice of law to the extent that the *lex*

182 *Ex parte Strachan* 1946 NPD 592; *Ex parte Oxtan* 1948 (1) SA 1011 (C) 1015; *De Bono v De Bono* 1948 (2) SA 802 (C) 807; *Locke v Locke* 1950 (4) SA 240 (N) 241A-C; *Ex parte Cathrall* 1965 (2) SA 505 (N) 508B ff; *S v S* 1975 (3) SA 440 (R) 441A-H.

183 *Ex parte Oxtan* 1948 (1) SA 1011 (C) 1015; *Hahlo & Kahn Husband and Wife* 562ff.

184 3 of 1992 s 1(1).

185 See *Hahlo & Kahn Husband and Wife* 562ff.

186 *Jurisdiction* 183.

domicilii (at the time of marriage) should have a say in respect of the validity of a marriage where the *locus celebrationis* and domicile of the parties at the time of marriage differ.¹⁸⁷

3.1.1.3 Other grounds

In view of the fact that jurisdiction for divorce, which involves a change in status, may be based on *ordinary residence*,¹⁸⁸ it would indeed be strange if *ordinary residence* may not be invoked as a jurisdictional criterion for the annulment of a void marriage, which does not involve a change in status.

3.2 Voidable marriages

In the case of voidable marriages jurisdiction seems to be less of a problem than choice of law. Since the annulment of a voidable marriage affects the status of the parties, jurisdiction is based on domicile: the court of the domicile of the parties at the time of the institution of proceedings has jurisdiction.¹⁸⁹ In the past the wife's domicile of dependence may have complicated matters,¹⁹⁰ but since it has now been abolished,¹⁹¹ it seems clear that the domicile of either of the parties at the time of the institution of proceedings will suffice for jurisdictional purposes.

187 *Ibid.*

188 S 2(1) of the Divorce Act 70 of 1979.

189 *Wolter v Wolter* (1897) 11 EDC 89; *Ex parte Styles* 1946 EDL 28. See also Hahlo & Kahn *Husband and Wife* 564; Pollak *Jurisdiction* 187ff. As is the case with void marriages, the Divorce Act 70 of 1979 does not provide a directive on domestic jurisdiction for voidable marriages, despite the fact that recognition of foreign nullity decrees is dealt with in s 13.

190 See Hahlo & Kahn *Husband and Wife* 564 on the question whether the retroactivity of the decree of annulment pertained to the domicile of the wife. If it did, it would have meant that the wife had never acquired the domicile of her husband (but retained her independent domicile) and therefore the husband and wife would not have had a common domicile on which to found jurisdiction.

191 S 1(1) of the Domicile Act 3 of 1992.

There is no statutory directive in this regard, but, since the annulment of a voidable marriage is akin to divorce, in the sense that it affects the status of the parties, the statutory extension of the jurisdictional grounds for divorce may also apply here. Thus it may be argued that *ordinary residence*,¹⁹² which is a statutory ground of jurisdiction for divorce, may also be invoked in the case of voidable marriages.

This brings the choice of law issue to the fore. There exists no South African authority on this point, but, since the annulment of a voidable marriage alters the status of the parties, the matter should, in terms of the status theory,¹⁹³ be referred to the *lex domicilii*.¹⁹⁴ This gives rise to a number of problems:

- (a) To which *lex domicilii* will the choice of law rule refer: the *lex domicilii* at the time of the conclusion of the marriage¹⁹⁵ or the *lex domicilii* at the time of the institution of proceedings for annulment? In this respect annulment differs from divorce: whereas the grounds for divorce are relevant at the time of the suit (irrespective of when they actually occurred),¹⁹⁶ the grounds for annulment pertain to defects which existed before the marriage. If the *lex domicilii* at the time of marriage differs from the *lex domicilii* at the time of the commencement of the suit, the court will have to decide which *lex domicilii* is decisive. This issue may be complicated even further if the husband and wife had different domiciles¹⁹⁷ both at the time of the marriage and at the time of the commencement of the suit. Therefore the question is not only *which* domicile will prevail, but also *whose* domicile?

192 S 2(1) of the Divorce Act 70 of 1979.

193 See *supra* under 2 Status and divorce.

194 See Hahlo & Kahn *Husband and Wife* 641.

195 Cf Forsyth *Private International Law* 270-271.

196 See *Holland v Holland* 1973 (1) SA 897 (T) discussed *supra* under 2.2.2 Statutory intervention.

197 The wife may acquire her own domicile in terms of the Domicile Act 3 of 1992 s 1(1).

- (b) The second question is whether the conflict rule in the case of a voidable marriage should refer to domicile as a connecting factor at all? In the South African conflict of laws the validity of a marriage is governed by the *lex loci celebrationis*.¹⁹⁸ This is contrary to the position in, for example England, where domicile does play a role in regard to the validity of a marriage.¹⁹⁹ Therefore it seems that, if domicile is indeed the connecting factor in the case of the annulment of a voidable marriage, it must be the *lex domicilii* at the time of the institution of proceedings. To hold otherwise, that is that the *lex domicilii* at the time of the marriage should govern, will result in a conflict with the South African choice of law rule, which says that it is the *lex loci celebrationis* that governs validity of a marriage, and not the *lex domicilii*. Application of the *lex domicilii* at the time of the suit would then be justified in terms of the status theory, that is that matters affecting status should be governed by the *lex domicilii*. However, this still leaves us with the nagging question as to why the *lex loci celebrationis* is left out of contention?
- (c) In terms of the status theory only the domiciliary court should assume jurisdiction in matters affecting status and that court should apply its own law.²⁰⁰ This means that the *lex domicilii* will, via the *lex fori*, find application, since the domiciliary court assumes jurisdiction. In the case of the statutory extension of the grounds of divorce jurisdiction the status theory is not fully adhered to anymore. In terms of the Divorce Act²⁰¹ a court in the area of which at least one of the parties has been ordinarily resident for a specified period, may assume jurisdiction.²⁰² The Act further stipulates that the *lex fori*

198 *Friedman v Friedman's Executors* 1922 NPD 259.

199 Especially in regard to essential validity: *Cheshire-North* 587ff.

200 See *supra* under 2 Status and divorce.

201 70 of 1979.

202 S 2(1).

will be applied to the issues pertaining to divorce.²⁰³ Therefore, the *lex domicilii* will not be applied to a change of status in a divorce action where the ground of jurisdiction is *ordinary residence*, unless that residence is also the domicile of one or both of the parties. Now, assuming for the moment that the *lex domicilii* at the time of the institution of proceedings will govern the annulment of a voidable marriage, the *lex domicilii* will be applied even if jurisdiction is based on another ground, such as residence. This is so because there is no statutory choice of law directive like the one for divorce actions. Thus the results (in regard to choice of law) of divorce and nullity actions may be different even though jurisdiction is based on the same ground (ie *ordinary residence*). The issue whether the legislator should include jurisdictional requirements and prescriptions for choice of law in nullity actions in respect of voidable marriages in the Divorce Act,²⁰⁴ will have to be addressed in the near future.²⁰⁵

It seems as if the choice of law issue comes down to a choice between the *lex loci celebrationis*, which governs the formal and essential validity of a marriage in the South African conflict of laws, and the *lex domicilii* at the time of the institution of the action, in terms of the status theory. In this respect the distinction between the grounds for the annulment of a void marriage and those for the annulment of a voidable marriage may prove helpful. In the case of void marriages the defects, which render a marriage such, coincide with the requirements for a valid marriage.²⁰⁶ Thus

203 S 2(3). Although the section does not expressly indicate the *lex fori*, the effect of the "fictional domicile" is that the *lex fori* will be applied: see discussion *supra* under **2.2.2 Statutory intervention**.

204 70 of 1979.

205 For a discussion of this option, see *infra* under **3.3 Preliminary conclusions**.

206 Eg failure to comply with certain prescribed formalities (which relates to formal requirements) and issues relating to the capacity of the parties to enter into marriage, such as parties within the prohibited degrees of blood relationship and parties who were already married (which pertains to material requirements for a valid marriage). For the defects which render a marriage null and void, see Sinclair *Law of Marriage* 387ff.

the *lex loci celebrationis* can be applied without further ado. However, in the case of voidable marriages some of the defects, such as impotence of one of the parties, do not, in actual fact, pertain to the requirements for the creation of a valid marriage.²⁰⁷ Therefore there may be room for arguing that, with regard to the annulment of voidable marriages, those defects-which pertain to the requirements for the creation of a valid marriage, should be subjected to the choice of law rule for validity of a marriage, namely the *lex loci celebrationis*. However, those defects which are not requirements for a valid marriage, should be dealt with by the *lex domicilii* at the time of the institution of the action. In this way a conflict between the choice of law rules for annulment of a voidable marriage and validity of a marriage will be avoided.

However, where domicile is the connecting factor and the parties have different domiciles at the time of the commencement of the suit, it will have to be decided *whose* domicile is decisive. There are various options in this regard. It may be argued that the marriage in question may be annulled if the ground relied upon is recognised by either of the parties' domiciliary law. The main argument against this solution is that it favours the annulment of a marriage.²⁰⁸ Another option is to apply the *lex domicilii* of the petitioner,²⁰⁹ but this will exclude a ground for annulment which is recognised only by the *lex domicilii* of the respondent and not by that of the petitioner. A third possibility is to apply the *lex domicilii* of the "affected party", yet it is difficult to justify this solution in instances where the *lex domicilii* of the "affected" party does not recognise the particular ground for annulment, while the *lex domicilii* of the other party does. It is submitted that any choice between the *leges domicilii* of the parties will lead to arbitrary results. Therefore it seems as if the first option advanced above, where the specific ground for annulment may exist under either parties' *lex domicilii*, although not

207 Cf Sinclair *Law of Marriage* 334.

208 *Cheshire-North* 651. See also Pålsson *Marriage and Divorce* 314-315 for a discussion of the policy of validation in regard to the annulment of a marriage.

209 See Morris *Conflict* 185.

perfect, is probably the fairest solution.²¹⁰

3.3 Preliminary conclusions

It seems that the main problem in formulating jurisdictional criteria and choice of law rules in regard to nullity actions, is the question whether these actions have an effect on the status of the parties concerned. Strict adherence to the status theory dictates that only the domiciliary forum assume jurisdiction in matters concerning status and that that forum applies its own law (which will, in effect, be the *lex domicilii*).²¹¹ The problem with the annulment of void marriages is, of course, that the nullity decree does not change the status of the parties, since the parties never acquired marital status.

However, it is questionable whether the issue of a *change* in status should be decisive at the jurisdiction stage of proceedings: that is often the issue that must be decided by the court at the choice of law level. One must be careful not to pre-empt the finding of the court by basing jurisdiction on the proposition that, for example, the annulment of a voidable marriage affects the status of the parties and therefore jurisdiction should be based on domicile. It may turn out that the alleged "voidable marriage" was indeed a "void" marriage and thus there is no change in the status of the parties. A clear distinction should be drawn between jurisdiction and choice of law. At the jurisdiction stage of proceedings the question should be whether the matter is *status-related* and not whether there is a *change in status*. If it is, it should be heard by a court with a sufficiently substantial connection with the parties concerned. This need not necessarily be the *forum domicilii*. Our legislator has already deviated from strict adherence to the status theory in this respect by introducing *ordinary residence* as a

210 The easiest solution will be, of course, for the *lex fori* to decide on those impediments which do not constitute requirements for the creation of a valid marriage. This course is not supported by the authors of *Cheshire-North*, for essentially the same reasons that they object to the *lex fori* as the governing law in divorce actions: see 649.

211 See *supra* under 2 Status and divorce.

jurisdictional ground for divorce.²¹² It is strange indeed that section 2(1) of the Divorce Act²¹³ does not contain internal jurisdictional criteria for nullity actions, especially since divorce decrees and nullity decrees share the same statutory grounds for international competence with regard to the recognition of foreign judgments.²¹⁴ In the area of internal jurisdiction a statutory directive for nullity actions is desperately needed and it is submitted that nullity actions in regard to both void and voidable marriages may be subjected to the same jurisdictional criteria as divorce actions, namely *domicile* and *ordinary residence*. Even though there may exist justifiable misgivings regarding the adequacy of *ordinary residence* as a sufficiently close jurisdictional connecting factor in divorce actions, there seems to be no reason why divorce and nullity actions should be treated differently in respect of jurisdiction. Therefore nullity actions may quite comfortably be included in this section of the Act which regulates divorce jurisdiction.²¹⁵ This will solve the problem alluded to earlier,²¹⁶ namely that, at present, a court needs to know whether a "foreign" defect renders a marriage void or voidable before it can assume jurisdiction. If a uniform set of jurisdictional criteria for nullity actions, in other words, for both void and voidable marriages, is formulated, the court will not be faced with the problem of having to decide whether a defect renders a marriage void or merely voidable at the jurisdictional stage of the proceedings.

Whether a change in status takes place or has taken place, or whether the parties actually acquired marital status, should be left to the conflict of laws. As was the case

212 S 2(1) of the Divorce Act 70 of 1979.

213 70 of 1979.

214 See s 13 of the Divorce Act 70 of 1979 discussed *infra* under **5 Recognition of foreign judgments relating to status**.

215 See eg the Domicile and Matrimonial Proceedings Act 1973, Part II (United Kingdom) where the same jurisdictional criteria, namely *domicile* and *habitual residence*, are employed for divorce as well as nullity actions.

216 See *supra* under **3 Status and nullity actions**.

with divorce, the choice of law aspect of nullity actions has been neglected because of the emphasis that was placed on the assumption of jurisdiction in the past. The separation of the jurisdiction and choice of law aspects demands a proper investigation into our choice of law rules.

Sooner or later the jurisdictional criteria for nullity actions will be statutorily codified by the legislator. It is hoped that the legislator will bear in mind the "divisibility" of jurisdiction and choice of law, but, at the same time, appreciate the historical interdependence of these two fields in view of the status theory.

4 Status and issues of legitimacy

4.1 Legitimacy²¹⁷

Even though the modern trend is to eliminate the disqualifications attached to the status of illegitimacy, the distinction between legitimate and illegitimate children has not been abolished in South Africa.²¹⁸ Therefore it may still be necessary to determine whether a child is legitimate or not. However, should a South African court, in terms of its choice of law rule, be referred to a foreign *lex causae* that does not distinguish

217 S 3 of the Births and Deaths Registration Amendment Bill 30 of 1996 seeks to replace the expression "illegitimate child" with the more acceptable and descriptive expression "child born out of wedlock" in s 11 of the principal Act. However, for purposes of the conflict of laws, "legitimate" and "illegitimate" will still be used, since this is the terminology used throughout the world. Also, it seems that it was the Afrikaans term "onwettig" (meaning, in a narrow sense, in contravention of a statute) which was ambiguous and unacceptable, and not so much the term "illegitimate".

218 The law of New Zealand does not distinguish between legitimate and illegitimate children: see the Status of Children Act (1969). In terms of s 9 of Chapter 2 of the Constitution of the Republic of South Africa 108 of 1996 there may not be unfair discrimination by the state or any other person against anyone on the grounds of, *inter alia*, birth. Thus it remains to be seen whether the distinction between legitimate and illegitimate children will be abolished. In terms of the Births and Deaths Registration Amendment Bill 30 of 1996 provision is made, as an interim measure, for the recognition of customary unions and religious marriages as marriages for purposes of the Births and Deaths Registration Act 51 of 1992. This means that children born of such unions are registered as legitimate children.

between legitimate and illegitimate children, the child concerned should be regarded as legitimate in South Africa if the incidents attached to his status as a "child" in the foreign legal system accord with those of a legitimate child at South African law.²¹⁹

4.1.1 Jurisdiction

Strictly speaking, the ascertainment of the status of legitimacy does not involve a change in the status of the child, but rather a declaration or confirmation of the child's existing status. In view of the approach of writers and our courts in regard to the annulment of void marriages, there seems to be no reason for limiting jurisdiction to the *forum domicilii* in cases concerned with legitimacy. However, in the case of declaratory orders in respect of legitimacy, jurisdiction has been based exclusively on domicile in the past,²²⁰ probably as a result of the failure to distinguish between jurisdiction and choice of law. Such confusion is clear from the stance adopted by Ludorf J in *Von Wintzingerode v Von Wintzingerode*:²²¹

"It is settled law that the only law to be applied in determining the legitimacy of a person is the law of his domicile of origin ... The question then arises whether any other *forum* has jurisdiction to enquire into the legitimacy of a person, other than the *forum* of the domicile of origin

...²²²

The question posed by the judge was answered in the negative: no other court than

219 Edwards *LAWSA: Conflict* par 445; *Cheshire-North* 754; *Dicey-Morris* 859.

220 In *Ex parte Anastasio* 1969 (1) SA 36 (W) jurisdiction was based on the presumptive father's domicile; while jurisdiction was denied in *Von Wintzingerode v Von Wintzingerode* 1964 (2) SA 618 (T) because neither the presumptive father nor the biological mother was domiciled within the jurisdiction of the court. See also Forsyth *Private International Law* 231; *Hahlo & Kahn Husband and Wife* 576.

221 1964 (2) SA 618 (T).

222 621C-E.

the forum of the domicile of origin had jurisdiction to decide on the legitimacy or otherwise of a child.²²³ This conflation of jurisdiction and choice of law can certainly not be accepted as jurisprudentially correct. It is clear that Ludorf J regarded a declaration of legitimacy (or illegitimacy) as a status issue and therefore concluded that, not only should domicile constitute the connecting factor for deciding the choice of law issue, but jurisdiction should also be based exclusively on domicile. However, the judge did not say anything about the time factor. With reference to *Seedat's Executors v The Master (Natal)*²²⁴ he stated that it was settled law that the question of legitimacy (in other words, the choice of law issue)²²⁵ should be decided by the child's domicile of origin, that is the domicile accorded to the child at birth.²²⁶ The finding of the judge that the forum of the child's domicile of origin has exclusive jurisdiction in such matters,²²⁷ seems strange indeed. It may happen that the issue of legitimacy has to be decided at a time when the child's domicile of origin has long been abandoned so that there is no connection between that forum and the child. If the domicile of the child should indeed be the basis for jurisdiction, it should be the domicile at the time when the issue of legitimacy needs to be decided.²²⁸ To insist on the domicile of origin as the jurisdictional connecting factor, would mean that the choice of law connecting factor is used as the basis for jurisdiction.

223 621H-622A.

224 1917 AD 302 311. For a discussion of *Seedat*, see *infra* under 4.1.2.2 *The lex domicilii originis*.

225 See *infra* under 4.1.2 **Choice of law** for a discussion of the choice of law rule.

226 621C-D. Before the promulgation of the Domicile Act 3 of 1992, a child's domicile of origin depended on whether he was legitimate or not: the domicile of origin of a legitimate child (in other words, a child born in wedlock) was that of his father at the time of his birth, while an illegitimate child (that is, a child born out of wedlock) followed the domicile of his mother: see *Govu v Stuart* (1903) 24 NLR 440; Kahn *Domicile* 17. In terms of s 2 of the Domicile Act 3 of 1992, a child, under the age of 18 who has not by law acquired the status of majority, will be domiciled at the place with which he is most closely connected. Should such a child have his home with either both or one of his parents, there is a presumption that the parental home concerned (and *not the domicile of that parent*) is his domicile.

227 621D.

228 Hahlo & Kahn *Husband and Wife* 576.

The distinction drawn by the judge in the same case between legitimacy as the principal issue in an application for a declaratory order and legitimacy as an incidental matter in other proceedings, for example, a custody action, can also not be supported:

"This Court can enquire into the legitimacy of a child with a foreign domicile [that is, in the absence of a domiciliary link] if the outcome of the enquiry is something incidental to the relief sought in the case ... Consequently if the first respondent should claim maintenance for the child the appellant can set up illegitimacy as a defence to a claim and this Court will have jurisdiction to decide whether it is a good defence ... In the present case illegitimacy is not a matter incidental to the relief sought ... and this Court has no jurisdiction to entertain such an action."²²⁹

This would mean that jurisdiction depends on the way in which the pleadings are drawn up: in terms of this *dictum* it would be better to combine legitimacy and custody proceedings within the same action, since the issue of legitimacy would then be incidental to the custody action, rather than go the cautious way and first approach the court for an order in respect of legitimacy before an action for custody is instituted. The way out of this dilemma appears to be to reason that, since a decision on legitimacy is declaratory in nature and does not involve a change in status, there is no reason why domicile should be the only jurisdictional connecting factor. There is merit in Kahn's suggestion that the court of the area where the birth was registered, should be competent to pronounce on the legitimacy or otherwise of such a child, since that

229 *Von Wintzingerode v Von Wintzengerode* 621E-622A. *In casu*, neither of the "parents" had a domiciliary link with the forum. Thus, the minor's domicile would not have aided the applicant in this case, since, according to the law as it stood before the promulgation of the Domicile Act 3 of 1992 s 2, the minor's domicile, for jurisdictional purposes, would have been that of his mother. See, in this regard, Hahlo & Kahn *Husband and Wife* 576 for the proposition that the minor's domicile, determined as if he were illegitimate (that is, before the inurement of s 2 of the Domicile Act 3 of 1992), should constitute a ground for jurisdiction.

court has an interest in its register reflecting the correct position.²³⁰

4.1.2 Choice of law

4.1.2.1 *The lawful wedlock theory*

Historically most domestic legal systems in the Western world regarded birth within lawful wedlock as the sole test of legitimacy, the so-called *lawful wedlock theory*.²³¹ In English law this "domestic" perception was carried into the arena of the conflict of laws when it came to questions concerning the legitimacy of children involving a foreign element. Thus the validity of the parents' marriage, which, in turn, might depend upon the recognition of a previous divorce, had to be ascertained in order to pronounce on the legitimacy of their issue.²³² This approach may be criticised on two grounds:

In the first place, domestic perceptions do not always fit into the international scheme of things. To limit legitimacy to birth within lawful wedlock, makes for unjust and unjustifiable results. For instance, the foreign *lex domicilii*²³³ of a child may regard him as legitimate, even though he was not born in lawful wedlock.²³⁴ Should the forum (assuming that its domestic law adheres to the lawful wedlock theory) now apply its domestic principles to the issue of legitimacy and pronounce the child illegitimate,

230 1964 SALJ 283 287.

231 *Cheshire-North* 752; Welsh 1947 LQR 65 69.

232 See the famous (or infamous) English case of *Shaw v Gould* (1868) LR 3 HL 55 where the House of Lords pronounced the children illegitimate on the basis that the marriage of their parents was not valid, since English law did not recognise the validity of a preceding Scottish divorce.

233 That will be the child's domicile at birth: see *infra*.

234 In South African law children born of putative (see Cronjé *Persons and Family* 179) and voidable marriages (Children's Status Act 82 of 1987 s 6) are legitimate. English law has also recognised these exceptions to the lawful wedlock theory: Graveson *Conflict* 362.

it would lead to disharmonious results.

Secondly, the lawful wedlock theory does not provide us with a choice of law rule in the true sense of the word. If the legitimacy of children depends on the validity of their parents' marriage, the conflict rule that is used is the rule relating to validity of marriage.²³⁵ This is unacceptable: legitimacy is not an incident of marriage; it is a status in itself. Therefore, for choice of law purposes, the legitimacy of a child should be referred to the domiciliary law of the child.²³⁶ An independent choice of law rule should be formulated to determine the legitimacy of a child; it should not be treated as an ancillary issue to the validity of the parents' marriage.

Fortunately South African law has steered clear of the lawful wedlock approach. In *Seedat's Executors v The Master (Natal)*²³⁷ Innes CJ drew a clear distinction between the issues of validity of a marriage and the status of legitimacy:

"... it is essential to bear in mind the distinction between the points to be decided in each instance. With regard to the wife, the issue is the validity of the marriage to which she was a party; with regard to the children the issue is their right to the status of legitimacy. The wife's position cannot be considered apart from the marriage, but the position of the children may be."²³⁸

This prepared the way for the enunciation of an independent conflict rule to determine

235 In South African law this will be the *lex loci celebrationis* (see *Friedman v Friedman's Executors* 1922 NPD 259), a situation which is even more unacceptable, since matters relating to status should be governed by the *lex domicilii*.

236 See *Cheshire-North* 747; *Graveson Conflict* 367.

237 1917 AD 302.

238 311-312.

the legitimacy of the children, namely the *lex domicilii originis*.²³⁹

4.1.2.2 *The lex domicilii originis*

Since legitimacy is a status issue, it is not surprising that South African law, like English law, has adopted domicile as a connecting factor in this respect.²⁴⁰ The crucial moment for the determination of legitimacy is at birth and thus the issue was traditionally referred to the law of the domicile of origin.²⁴¹ However, reference to the domicile of origin complicated matters. According to Roman-Dutch law the domicile of origin of a legitimate child (a child born in wedlock) was that of his father at the time of his (the child's) birth, while an illegitimate child (a child born out of wedlock) followed his mother's domicile.²⁴² Therefore the inquiry into the child's domicile of origin focused on whether the child was legitimate or not, the very issue that had to be determined with reference to the domicile of origin.²⁴³

The *lex domicilii originis* was accepted as the choice of law rule for the determination

239 Before the promulgation of the Domicile Act 3 of 1992, reference to the *domicilium originis* was often fraught with difficulties. Since a child, who was born in wedlock, acquired the domicile of his father as his domicile of origin and a child, born out of wedlock, acquired the domicile of his mother as his domicile of origin, it was difficult to determine the domicile of origin without reference to the validity of the parents' marriage. However, in *Seedat's* case, the mother and father were both domiciled in India when the children were born and therefore the *domicilium originis* of the children could only have been India. In terms of s 2 of the Domicile Act 3 of 1992, a child's domicile at birth no longer depends on that of either his mother or father.

240 *Cheshire-North* 746ff; *Dicey-Morris* 854ff; Edwards *LAWSA: Conflict* par 445.

241 *Seedat's Executors v The Master (Natal)* 1917 AD 302 310 314; *Hamid v Minister of the Interior* 1954 (4) SA 241 (T) 247B-C; *Righetti v Pinchin and Another* 1955 (3) SA 338 (D) 342H-343A; *Von Wintzingerode v Von Wintzingerode* 1964 (2) SA 618 (T) 621C-D.

242 *Govu v Stuart* (1903) 24 NLR 440; Kahn *Domicile* 17. In terms of the Domicile Act 3 of 1992 legitimacy is not the decisive factor in determining a child's domicile of origin any longer: in terms of s 2(1) a child is domiciled at the place with which he is most closely connected, while s 2(2) contains the presumption that, should a child have his home with one or both of his parents, that parental home will be his domicile.

243 *Welsh* 1947 *LQR* 65 70.

of the status of legitimacy in *Seedat's Executors v The Master (Natal)*.²⁴⁴ This case was concerned with the payment of succession duty, which eventually turned on the legitimacy of the children. Briefly, the relevant facts were the following: The deceased husband and father, Dawjee Mahomed Seedat, was a Mahomedan (Muslim) who married twice during his lifetime. He married his first wife while domiciled in India, according to Mahomedan rites, and the couple had four children who were all born in India. He subsequently moved to Natal where he became domiciled. On a visit to India, he married a second wife, also according to Mahomedan rites. Six children were born of this union; two were born in India and four were born in Natal. Both marriages were valid in terms of the *lex loci celebrationis* which recognised polygamous unions and regarded all the children as legitimate. The deceased had executed a will in Natal in which he bequeathed his estate to executors in trust to realise and distribute for the benefit of his two wives and children according to the Mahomedan law of succession. When he died, a dispute arose over succession duty, since one percent was levied on successors who were lineal descendant of the testator, but five percent on successors who were strangers in blood. A surviving spouse was entirely exempted from succession duty.²⁴⁵ Thus the payment of succession duty depended, in the wives' case, on the recognition of the polygamous marriages, and, in the case of the children, on their legitimacy.²⁴⁶ The appeal was concerned with the first marriage, which was entered into in India, while the deceased was domiciled there, and the children born of that union.²⁴⁷

With regard to the first marriage, it was decided that the first wife was not a surviving

244 1917 AD 302.

245 In terms of Act 35 of 1905.

246 It was common cause that the term "lineal descendants" referred to children recognised as legitimate in terms of South African law: *Seedat's Executors v The Master (Natal)* 1917 AD 302 307.

247 The second wife and issue of that union were subject to the full five percent succession duty and this was not challenged on appeal to the Appellate Division: see 307 of the report.

spouse, since polygamous unions were contrary to the public policy of South African law and thus not recognised as valid marriages.²⁴⁸ However, the fact that the marriage was not recognised in South Africa did not mean that the children were illegitimate. Innes CJ emphasised that the children themselves were not parties to the contract of marriage which our law did not recognise. Their legitimacy should be decided in terms of their domicile of origin and recognised as such in South Africa.²⁴⁹ Innes CJ drew a clear distinction between the issues of a valid marriage and legitimacy, emphasising that the possible non-recognition of a foreign polygamous union should not decide the fate of the children as regards their status.²⁵⁰ Innes CJ proceeded to apply the *lex domicilii originis* to the choice of law issue concerning the status of legitimacy of the children:

"The issue of a foreign polygamous marriage should form no exception to the application of the general rule that legitimacy is governed everywhere by the law of the domicile of origin."²⁵¹

In *Seedat* it was easy to refer the issue of legitimacy to the law of the domicile of origin, since both parents were, at the time of the birth of the children concerned, domiciled in India. Therefore there was no real need to determine which parents' domicile was decisive.

In a subsequent decision, *Hamid v Minister of the Interior*²⁵² matters were complicated by the fact that the parents of the child had had different domiciles at the time of his birth. In such a case it was impossible to refer to the law of the domicile of

248 307-309.

249 307-308.

250 312: see passage quoted *supra* under 4.1.2.1 *The lawful wedlock theory*.

251 314. See also 310ff.

252 1954 (4) SA 241 (T).

origin²⁵³ since the child's legitimacy (or illegitimacy) determined which parents' domicile was decisive. Hill AJ decided that, in such a case, reference should be made to the domicile of the father at the time of the birth of the child:

"Legitimacy is a matter of *status* and has therefore to be determined by the law obtaining in the child's domicile of origin, i e by the law of his father's domicile at the time of his birth ..."²⁵⁴

This conflict rule, namely that legitimacy should be determined by the law of the father's domicile at the time of the child's birth,²⁵⁵ also finds support in English law.²⁵⁶ Why the father's domicile should take precedence over that of the mother, is an open question, but nevertheless an important one, since a baby is bound to have its first home with his mother.²⁵⁷

However, it seems as if the South African legislator has, without realising it, found a

253 As it was understood at common law, before the inurement of s 2 of the Domicile Act 3 of 1992: see *supra*.

254 247B. Although the equation of the child's domicile of origin to the domicile of his father at the time of his birth was, at the time, certainly not correct, since the issue of legitimacy had not yet been determined, the gist of the decision seems to have been that the father's domicile at birth should be decisive.

255 See Kahn 1955 *SALJ* 24 25.

256 *Cheshire-North* 753 who indicates that it is the domicile of the *natural* father which is decisive. See also Guttman 1959 *ICLQ* 678 686 who proposes the following rule for common law as well as civil law systems:

"Legitimacy is to be governed by the *lex domicilii*, or the personal law [that would indicate *nationality* as the connecting factor in civil law systems], of the man who is alleged to be the mother's husband or alternatively of any other man who is proved to have lived with the mother in such circumstances that any child of hers is legitimate by his personal law at the time the child was conceived or was born."

257 *Dicey-Morris* 855. See also *Cheshire-North* 753 who answers the question with reference to the emphasis placed by Continental systems on the relationship between father and child: see also Guttman 1969 *ICLQ* 678 687.

way out of this conundrum.²⁵⁸ With the promulgation of the Domicile Act²⁵⁹ a child's domicile of origin is no longer linked to that of either of his parents, since a child does not have a domicile of dependence anymore. In other words, it is no longer necessary to establish whether a child is legitimate or not in order to assign a domicile to him at birth. In terms of section 2 of the Act a child's domicile is at the place with which he is most closely connected, and if he shares a home with one or both of his parents, that parental home is presumed to be his domicile. Thus it has become quite simple to determine a child's domicile, even at birth, in terms of the new Act. Since it no longer hinges on the question of legitimacy, the domicile of a child at birth could again become the connecting factor for choice of law purposes. This would indeed be appropriate: since it is the child's status that is at stake, reference should be made to *his* domicile, and not to that of his father.

4.2 Legitimation

In South African law an illegitimate child may be legitimated by the subsequent marriage of his natural parents to each other (*legitimation per subsequens matrimonium*)²⁶⁰ and by means of adoption.²⁶¹ Jurisdiction does not present a major obstacle in this regard: *legitimation per subsequens matrimonium* does not need the

258 There is no indication in the South African Law Commission's Working Paper on Domicile 20 (Project 60) that the conflict rule in regard to legitimacy was considered.

259 3 of 1992.

260 See s 4 of the Children's Status Act 82 of 1987:

Any child born of parents who marry each other at any time after his birth shall, even though his parents could not have legally married each other at the time of his conception or birth, as from the date of the marriage be in all respects the legitimate child of his parents.

261 See s 20(2) of the Child Care Act 74 of 1983:

An adopted child shall for all purposes whatever be deemed in law to be the legitimate child of the adoptive parent, as if he was born of that parent during the existence of a lawful marriage.

sanction of a court²⁶² and, for the purposes of adoption, the Child Care Act²⁶³ has established the *residence* of the child within the court's area of jurisdiction as the jurisdictional connecting factor.²⁶⁴

Since legitimation affects the status of the child concerned, domicile should constitute the connecting factor for choice of law purposes. In view of the changes brought about by the Domicile Act²⁶⁵ in regard to the determination of the domicile of a child²⁶⁶ it is submitted that the issue of legitimation (in other words, whether the child could have been, and was, in fact, legitimated) should be referred to the domicile of the child either at birth or at the time of legitimation.

4.3 Preliminary conclusions

In regard to the legitimacy and legitimation of children, the South African legislator has, by reforming the domicile of children, put our law back on track as far as status is concerned. Since a child's domicile is no longer dependent upon that of his father (if legitimate) or of his mother (if illegitimate), the child's own domicile can now be used to determine his status. In view of the fact that the *animus* requirement²⁶⁷ plays no role in the determination of a child's domicile,²⁶⁸ it is submitted that a child's domicile will be more easily and readily ascertainable than the domicile of choice of a person older than eighteen years. This will no doubt facilitate matters for jurisdictional as well

262 The legitimacy of such a legitimated child may come into issue when an application is brought for a declaration of his status, or when the status of the child arises as an ancillary matter: see *supra* under 4.1 Legitimacy.

263 74 of 1983.

264 S 18(1) which refers to the children's court of the district in which the child resides.

265 3 of 1992.

266 See s 2 of the Act discussed *supra*.

267 See Chapter 5 for a discussion of this requirement.

268 See s 2 of the Domicile Act 3 of 1992.

as choice of law purposes.

5 Recognition of foreign judgments relating to status

A matter which falls outside the sphere of the application of choice of law rules, in the sense of determining the appropriate *lex causae* for a specific conflicts issue, is the recognition and enforcement of foreign judgments. When recognition and enforcement of a foreign judgment is sought in a South African forum, the choice of law process has already run its course in the foreign court and a judgment or an order has been rendered by that court. The issue to be decided is whether a South African court will recognise and enforce this so-called foreign judgment.²⁶⁹

Strictly speaking, "recognition" of a foreign judgment means that "the domestic court acknowledges that it [the foreign judgment] has, within its own jurisdiction, the legal effect which the foreign court intended it to have".²⁷⁰ Enforcement of a foreign judgment means that "the domestic court will compel the judgment debtor to comply with it [the foreign judgment]".²⁷¹ In certain types of judgment, for example claims sounding in money,²⁷² recognition and enforcement go hand in hand: a forum will not order enforcement of a foreign judgment which it does not recognise. In these instances recognition is a *sine qua non* to the enforcement of a foreign judgment.²⁷³ However, in regard to status-related foreign judgments, such as divorce decrees, it is the recognition of a change in the private-law status of the individual(s) concerned that

269 On the meaning of the term "foreign judgment" see Silberberg *Foreign Judgments* 7.

270 *Ibid* 6.

271 *Ibid*.

272 For a discussion of the recognition and enforcement of foreign judgments sounding in money, see Edwards *LAWSA: Conflict* par 478; Forsyth *Private International Law* 365.

273 *Ibid*.

is at stake, and therefore enforcement does not enter the picture.²⁷⁴ Recognition of such a changed status, for example, a foreign divorce decree, may be crucial to the validity of a subsequent marriage.

The general requirements for the recognition and enforcement (where such is sought) of foreign judgments at South African law are as follows:²⁷⁵ the foreign court must have had jurisdiction according to the South African rules of international jurisdiction, in other words, the foreign court must have had "international competence"; the foreign judgment must be final; in regard to the enforcement of certain foreign judgments permission must be obtained in terms of the Protection of Business Act.²⁷⁶ In addition to these requirements a defendant may raise certain defences against the recognition and enforcement of a foreign judgment, for example, that the judgment is against the public policy of the forum, or that it was obtained fraudulently, or that the enforcement of foreign penal or revenue laws are being sought, or that the judgment is not consistent with the forum's notions of natural justice.²⁷⁷

In regard to the recognition of a change in the private-law status of an individual, the most crucial requirement is undoubtedly that of international competence, which means, in essence, that the foreign court must have had jurisdiction according to the South African rules pertaining to the jurisdiction of foreign courts.²⁷⁸ Therefore, recognition of a foreign judgment may be denied even though the court, which rendered the judgment, was indeed competent to entertain the action in terms of its own rules of domestic jurisdiction. This will, of course, lead to the phenomenon known

274 Forsyth *Private International Law* 363; Silberberg *Foreign Judgments* 21.

275 See, in general, Edwards *LAWSA: Conflict* par 477; Forsyth *Private International Law* 363-364.

276 99 of 1978: for a discussion of this Act see Edwards *LAWSA: Conflict* par 478; Forsyth *Private International Law* 402.

277 See Edwards *LAWSA: Conflict* par 477.

278 See *Reiss Engineering Co Ltd v Insamcor (Pty) Ltd* 1983 (1) SA 1033 (W) 1037H.

as a "limping marriage", which means that parties may be divorced in one country, while they are still regarded as married in another.²⁷⁹ In some way or another this gap between foreign domestic jurisdiction and international competence in regard to status-related judgments must be bridged: it is common knowledge that individuals travel extensively and fall in and out of love with little or no regard for international boundaries. It is quite possible for an individual to obtain a divorce in one country and enter into a marriage in another country the very next day.

The only way to prevent the occurrence of limping marriages completely, is to have uniform domestic jurisdictional criteria throughout the world. This was, to a certain extent, the position within the British Empire during the late nineteenth and early twentieth century. On the strength of *Le Mesurier v Le Mesurier*,²⁸⁰ the domicile of the parties within the court's area of jurisdiction was the sole determinant of divorce jurisdiction. Since the concept *domicilium* was interpreted uniformly within the Empire, this made for complete uniformity of decision. However, the desirability of world wide uniform domestic jurisdictional criteria for divorce and other status-related actions, will remain an ideal. Not only do countries employ different criteria for jurisdiction, but even in those countries that share the same jurisdictional connecting factors, such as domicile in common law jurisdictions, the concepts are interpreted differently. Therefore something needs to be done at the international level to accommodate differing domestic jurisdictional bases for the recognition of status-related judgments.

In this regard the Hague Convention on the Recognition of Divorces and Legal Separations²⁸¹ has had an important impact on the formulation of criteria of international competence for the recognition of foreign divorces and legal separations. Even though South Africa has not acceded to the Convention as such, the latest

279 See Kahn "Divorced Abroad: Still Married Here" 1986 *TSAR* 1.

280 [1895] AC 517.

281 1968. For the text of this Convention see 1969 *ICLQ* 647.

criteria for the recognition of foreign divorces, judicial separations, as well as nullity actions, have clearly been formulated with a view to possible accession in the future.²⁸² At present the Divorce Act²⁸³ provides for the recognition by a South African court of the validity of a divorce order or an order for annulment of a marriage or for judicial separation²⁸⁴ granted in a court of a foreign country or territory if, on the date on which the order was granted, either party to the marriage

- (a) was domiciled in the country or territory concerned, whether according to South African law or according to the law of that country or territory;
- (b) was ordinarily resident in that country or territory; or
- (c) was a national of that country or territory.²⁸⁵

282 See the South African Law Commission's Report on Domicile 1990 (Project 60) par 6.54.

283 70 of 1979 s 13.

284 Even though judicial separation is no longer possible in South African law (s 14 of the Divorce Act 70 of 1979), a South African court will recognise such an order issued by a foreign court.

285 Art 2 of the Hague Convention on the Recognition of Divorces and Legal Separations (1968), on which s 13 of the Divorce Act 70 of 1979 is based, provides for the recognition of divorces and legal separations if, at the date of the institution of proceedings in the so-called "State of origin" (the state where proceedings were instituted)

- (1) the respondent had his habitual residence there; or
- (2) the petitioner had his habitual residence there and one of the following further conditions was fulfilled-
 - (a) such habitual residence had continued for not less than one year immediately prior to the institution of proceedings;
 - (b) the spouses last habitually resided there together; or
- (3) both spouses were nationals of that State; or
- (4) the petitioner was a national of that State and one of the following conditions was fulfilled-
 - (a) the petitioner had his habitual residence there; or
 - (b) he had habitually resided there for a continuous period of one year falling, at least in part, within the two years preceding the institution of the proceedings; or
- (5) the petitioner for divorce was a national of that State and both the

A most interesting feature of section 13 is that the interpretation of domicile as a jurisdictional connecting factor for purposes of international competence is extended beyond the traditional *lex fori* interpretation that it is usually given in a choice of law context.²⁸⁶ In other words, with regard to *domicilium* as a criterion for international

following further conditions were fulfilled-

- (a) the petitioner was present in that State at the date of institution of proceedings and
- (b) the spouses last habitually resided together in a State whose law, at the date of institution of the proceedings, did not provide for divorce.

Art 3 of the Convention stipulates that, where the State of origin uses the concept of domicile as a test of jurisdiction, the expression "habitual residence" in art 2 above "shall be deemed to include domicile as the term is used in that State.

Two observations must be made. In the first place the crucial date for compliance with the jurisdictional requirements in the Convention is the date on which proceedings were instituted, while s 13 of our Divorce Act 70 of 1979 refers to the date on which the order was granted. The South African Law Commission regarded this as a more easily ascertainable date: see Report on Domicile 1990 (Project 60) par 6.42 fn 31. See, however, Forsyth *Private International Law* 388 for his criticism of the Law Commission's decision not to adopt the date used in the Convention. Secondly, the Act does not exclude the operation of the common law in respect of international competence. As indicated by Edwards *LAWSA: Conflict* par 480, as well as Forsyth *Private International Law* 388 fn 184, the Act does not exclude the recognition of a divorce in circumstances where neither of the parties was domiciled within the rendering court's jurisdiction, but which divorce is recognised by the common *lex domicilii* of the parties: see *Armitage v Attorney-General* [1906] P 135 which was followed in *Guggenheim v Rosenbaum* (2) 1961 (4) SA 21 (W) 31H-32H.

286 See Kahn-Freund *General Problems* 242. The principle, that the domicile of a person is determined by the *lex fori*, was endorsed in *Ex parte Jones: In re Jones v Jones* 1984 (4) SA 725 (W) (commented on by Kahn in 1984 ASSAL 407). This case dealt with the assumption of divorce jurisdiction by a South African forum in terms of s 2(1) of the Divorce Act 70 of 1979 before the 1992 amendment. In terms of the section as it stood at the time (see *supra* under 2.2.2 Statutory intervention), the wife had to prove that she was domiciled in the Republic of South Africa, in addition to being ordinarily resident in the court's area of jurisdiction at the time of the institution of the action and having been ordinarily resident in the Republic for a year immediately prior to the institution of the action. The issue was whether Mrs Jones met the domicile requirement. In terms of South African law (as it stood at the time, that was before the inurement of the Domicile Act 3 of 1992 in terms of which (s 1(1)) the wife's domicile of dependence was abolished) she followed the domicile of her husband, who happened to be domiciled in England. However, in terms of English law, a married woman could acquire her own domicile, independent of that of her husband. It was contended on behalf of Mrs Jones that the capacity to acquire a domicile should be determined by the *lex domicilii* of the *propositus* before the change occurred, in other words, the law of the old domicile. Thus it was argued that, in terms of English law, which allowed a wife to acquire her own domicile, Mrs Jones had acquired a domicile in South Africa and thus the Witwatersrand Local Division had jurisdiction

competence, a foreign order for divorce or annulment or judicial separation will be recognised by a South African court if either of the parties was domiciled in the country of territory concerned, *whether according to South African law or according to the law of that country or territory*. This was no doubt done in order to eliminate one of the root causes of limping marriages, namely the different interpretations given to *domicilium* in different jurisdictions. However, should a South African court have to decide whether an individual was domiciled in a particular area in terms of that foreign law, it will, more often than not, be a demanding task. Few countries have a statutory definition of *domicilium*; and even if they have one case law still plays an important role in the interpretation of the concept. Therefore, interpretation of the concept demands much more than mere reference to a statutory definition, if there is one. The danger also exists that the foreign country's concept of domicile may be so far removed from the South African concept that it does not represent a sufficiently close jurisdictional connection²⁸⁷ between the parties and the forum in order for a South African court to recognise the foreign court as having been internationally competent. Therefore it is questionable whether this extended interpretation of domicile was justified: if the criterion of domicile (in terms of South African law) is not met, it is hard to envisage the party not being able to rely on one of the other statutory criteria, especially *ordinary residence*.²⁸⁸ It is submitted that this is what will happen in

in the matter. This argument was rejected by Margo J on the basis that, in terms of the South African common law position at the time, a wife followed her husband's domicile and therefore Mrs Jones was domiciled in England. According to the judge it was not necessary to distinguish between the question of capacity to acquire a domicile and the question of where a person is domiciled (728C). He also added that, since he was dealing with the interpretation of a section of the Act which required a domicile "in the Republic", he had to determine Mrs Jones's domicile in accordance with the law of the Republic (728D). With the amendment of s 2(1) of the Divorce Act 70 of 1979, as well as the abolition of the wife's domicile of dependence in South African law (s 1(1) of the Domicile Act 3 of 1992, the situation which presented itself in the *Jones* case will not occur in the future.

287 See *Indyka v Indyka* [1967] P 233, [1966] 3 All ER 583. See also the discussion in regard to the jurisdictional link in Chapter 6 under 2.2 The function of the connecting factor in the law relating to jurisdiction.

288 For an analysis of the interpretation of this concept, see Chapter 6 under 4.2.2 Ordinary residence.

practice: rather than having to invoke expert evidence regarding the interpretation of domicile in terms of the law of a foreign country, parties will rely on *ordinary residence*, or even nationality, for the recognition of a foreign status-related judgment.

6 Conclusion

In terms of the status theory domicile is the most important jurisdictional and conflicts connecting factor in status-related issues. Unfortunately the distinction between jurisdiction and choice of law is not always acknowledged with the result that choice of law is often invoked at the jurisdiction stage of proceedings. In the past assumption of jurisdiction in status matters has completely overshadowed the conflicts issue. With the statutory extension of jurisdictional criteria for status matters beyond domicile the danger exists that a court may assume jurisdiction on the basis of, for example, *ordinary residence*, and apply its own law to the status issue.²⁸⁹ Therefore, more emphasis should be placed on the choice of law aspect in order to ensure that a person's status is indeed determined by his *lex domicilii*.

289 This is the effect of the Divorce Act 79 of 1979 in terms of ss 2(1)(b) and 2(3).

CHAPTER THREE

DOMICILE AS A CONNECTING FACTOR IN CERTAIN MATTERS OTHER THAN STATUS

Introduction

In the previous chapter the blurred distinction between jurisdiction and choice of law in the field of status-related issues was explored. In this chapter the remaining areas of both jurisdiction and choice of law, where domicile is used as a connecting factor, will be canvassed. However, in these areas (in other words, non-status matters) the issues of jurisdiction and choice of law are clearly separated and will be treated accordingly.

1 Jurisdiction¹

In the ordinary course of events domicile is a very common jurisdictional connecting factor. However, it does not occupy the special position² that it does in regard to status-related issues.

1.1 The relevance of domicile

In many instances the jurisdiction of the court will depend on whether one of the parties to an action is domiciled within the court's area of jurisdiction. This is especially

1 The discussion of jurisdiction will be limited to the jurisdiction of the Supreme Court, which, in terms of s 166 of the Constitution of the Republic of South Africa 108 of 1996, will be replaced by High Courts and a Supreme Court of Appeal.

2 Although the legislator has extended the grounds of jurisdiction in relation to divorce actions to include connecting factors other than domicile (s 2(1) of the Divorce Act 70 of 1979), domicile is still, as a result of the historical adherence to the status theory, an important jurisdictional and conflicts connecting factor in status-related matters at common law: see **Chapter 2**.

the case in claims sounding in money where the question is often whether the plaintiff or defendant is an *incola* of the court.³ An *incola* of the court is somebody who is either domiciled or resident in the court's area of jurisdiction.⁴ Though not totally unrelated, domicile and residence are different concepts. It has been said that residence means

"... more than domicile, because a person may be domiciled in a country in which he has never set foot,⁵ whereas one cannot speak of a person residing in a country unless at some time he has set foot therein; less than domicile, because a person may be resident in a country without having the *animus manendi* which is an essential ingredient of domicile in so far as the law considers the actual permanent home as the

-
- 3 Forsyth *Private International Law* 191ff; Pollak *Jurisdiction* 22ff. It may also be relevant in the case of an interdict: *CM Asbestos Co (Pty) Ltd v King Chrysotyle Asbestos Mines (Pty) Ltd* 1953 (3) SA 431 (W).
- 4 Harms *Civil Procedure* par D7; Kelbrick *Civil Procedure* par 85. On the meaning of *incola* see Pollak *Jurisdiction* 30-37. See also the following cases: *Rosenblum v Marcus* (1884) 5 NLR 82 83ff; *Einwald v The German West African Co* 1887 (5) SC 86 91; *Lotter v Salaman* (1902) 19 SC 158 161; *Schlimmer v Executrix in Estate of Rising* 1904 TH 108 112ff; *Noyes v Schulz* 1911 (32) NLR 318 319ff; *Riordan v B & F Wheeler Ltd* 1913 CPD 114 117; *Frank Wright (Pty) Ltd v Corticas "BLM" Ltd* 1948 (4) SA 456 (CPD) 460ff; *Minister of the Interior v Cowley* NO 1955 (1) SA 307 (N) 311 B-G; *Angelai v Padayachee* 1948 (4) SA 718 (N) 719; *Graham v Phillips* 1966 (1) SA 556 (SR); *Njikelana v Njikelana* 1980 (2) SA 808 (SE) 811A ff.
- 5 This refers to the domicile of origin and, more specifically, to the way in which it was determined and the gap-filling role it fulfilled before the promulgation of the Domicile Act 3 of 1992. Previously a child's domicile was dependent upon that of his mother (if he was born out of lawful wedlock) and that of his father (if he was born within lawful wedlock). It could happen that a child was born while the parent concerned was away from his or her place of domicile, even though he or she had not relinquished that domicile, and thus that domicile was ascribed to the newborn child as his domicile of origin. Let us assume that the parent concerned never returned to his "old" domicile and acquired a new domicile which the minor child followed. The child had never lived at the place of his domicile of origin and yet, in terms of the doctrine of the revival of the domicile of origin, that domicile of origin would have filled the gap whenever there was uncertainty about his present domicile. In terms of s 2 of the Domicile Act 3 of 1992 the domicile of a child under the age of eighteen years is at the place with which he is most closely connected and not dependent upon the domicile of his parents. Furthermore, the revival of the domicile of origin has been abolished (s 3(1) of the Domicile Act) - a person's existing domicile continues until he acquires a new domicile. See Chapter 4 under 1 The Domicile Act for a discussion of the reform brought about by the Act.

domicile ...¹⁶

However, it seems reasonable to conclude that, in most cases, it will be easier to found jurisdiction on residence than on domicile, since proof of the latter is fraught with difficulties.⁷

Domicile also constitutes a ground for jurisdiction in matters relating to insolvency. In terms of the Insolvency Act⁸ the debtor's domicile is one of the jurisdictional criteria for granting an order of insolvency.⁹ However, domicile is not the only criterion: the situation of the debtor's property, as well as the debtor being ordinarily resident or carrying on business within the court's area of jurisdiction, are all listed in the alternative as jurisdictional criteria.¹⁰

Another area where domicile may be employed as a jurisdictional connecting factor, is in claims relating to property. Although the *forum rei sitae* seems to dominate jurisdiction in regard to property in general,¹¹ the domicile of the defendant may be invoked as a jurisdictional criterion in order to effect the transfer of immovable property or a part thereof (in the case of partition). Since the domiciliary court of the defendant has control over the defendant, that court may compel him to sign a deed of transfer.¹² Where a minor owns immovable property application to sell or mortgage such property must be made to the court of the minor's domicile, since that court is

6 Pollak *Jurisdiction* 45. This was written before the promulgation of the Domicile Act 3 of 1992, which explains the reference to *permanent* instead of *indefinite* in terms of s 1(2) of the Act.

7 See **Chapters 4 and 5** for a discussion of specific problem areas regarding the interpretation of domicile.

8 24 of 1936.

9 S 149(1).

10 *Ibid.*

11 Pollak *Jurisdiction* 102ff.

12 Forsyth *Private International Law* 203.

the upper guardian of the minor.¹³ The *forum domicilii* also constitutes, besides the *forum rei sitae*¹⁴ and other statutory grounds,¹⁵ a common law jurisdictional ground for the appointment of a *curator bonis* to manage both the movable and immovable corporeal, as well as the incorporeal property of an incapacitated person.¹⁶

In regard to movable property it seems that the maxim *mobilia sequuntur personam* has had little effect on the assumption of jurisdiction. The idea that movables follow the domicile of the owner and that the *situs* of movable property is therefore presumed to be at the domicile of the owner is an anachronism. The *situs* of movable property is divorced from the domicile of the owner and the actual *forum rei sitae* is the appropriate forum. The *forum domicilii* may probably assume jurisdiction, on the basis that the defendant is an *incola* of that forum, if the property is situated elsewhere in the country, but not if the property is situated abroad. The reason for this is that it would be impossible for a South African court to enforce an order in regard to movable property situated in a foreign country.¹⁷

The dominance of the *forum rei sitae* in actions regarding property also applies to incorporeal property. Yet, it may be difficult to establish the *situs* of such property.¹⁸ In some instances domicile is used: the *situs* of a book debt and a share, for example, is the place where the debtor is domiciled or resident.¹⁹ In the event of cession, the *forum domicilii* may assume jurisdiction since it exercises control over the defendant

13 *Ibid* 205-206; Pollak *Jurisdiction* 115.

14 Forsyth *Private International Law* 206.

15 See eg the Mental Health Act 18 of 1973 ss 56 and 58.

16 Forsyth *Private International Law* 206; Kelbrick *Civil Procedure* par 89.

17 Pollak *Jurisdiction* 119-120.

18 See Pollak *Jurisdiction* 122 where it is said that the general principle is that an intangible is situated where it can be dealt with effectively.

19 Forsyth *Private International Law* 209, 211.

and may compel him to perform the necessary act.²⁰

Thus, it seems as if the *forum rei sitae* dominates as the proper forum for the assumption of jurisdiction in regard to property, whether it be movable or immovable corporeal or incorporeal property. Domicile may only be invoked if the domiciliary court of the defendant exercises sufficient control over the defendant to compel him to perform the necessary act or in those cases where the domicile of the defendant coincides with the *situs* of the property.

As a general rule it may be said that the *forum domicilii* will only assume jurisdiction in matters that do not affect status if it has sufficient control over the party concerned (usually the defendant). Thus, the basis for the assumption of jurisdiction in these cases differs from that pertaining to status-related matters. In the latter, *recognition* of a potential change in status is paramount, whereas *effectiveness* is far more important in regard to non-status matters.²¹

2 Conflict of laws

Domicile constitutes one of the most important connecting factors in the South African conflict of laws. A brief survey of conflict rules where domicile is the connecting factor which indicates the applicable *lex causae*,²² will illustrate the prevalence of this concept in this area of the law.

20 *Ibid* 209.

21 The underlying policies for the assumption of jurisdiction will be explored more fully in **Chapter 6** where a comparative study of the policies underlying jurisdictional and conflicts connecting factors will be undertaken. For the policies underlying the law of jurisdiction, see the discussion in **Chapter 6** under 2.2 **The function of the connecting factor in the law relating to jurisdiction.**

22 For a discussion of the structure of a choice of law rule, see **Chapter 6** under 1.1.1 **The traditional approach.**

2.1 Law of persons and family

2.1.1 Essential validity of a marriage

Essential validity of a marriage is concerned with the question whether two parties may enter into marriage.²³ Generally speaking essential validity pertains to the capacity of the parties to marry.²⁴ Since capacity is one of the incidents of status,²⁵ one would expect domicile to play a leading role in this area of the law. This is indeed the position in common law systems where domicile constitutes a connecting factor in regard to factors, such as consanguinity and affinity, bigamy and lack of age, which all affect capacity to enter into a valid marriage.²⁶ However, in South African law, the essential validity of a marriage is, as is the case with formal validity, governed by the *lex loci celebrationis*.²⁷

23 Although it is relatively easy to determine which issues relate to essential validity, namely all those that do not pertain to mere formalities, the following basis for distinguishing between formal and essential validity is insightful:

"... it will be found that whether or not any requirement of marriage is an essential or a formality depends on the degree of intensity of the public or social interest it embodies and expresses ... Those matters which are regarded as vital to the maintenance of an accepted standard in the matrimonial and family relations of any given society, whether on grounds of consanguinity, religion or otherwise, will be regarded as essentials of the marriage ... while matters of less vital social interest, e.g. the length of public notice to be given before celebration of a marriage, or the number of witnesses whose presence is required at a ceremony, will be treated as pure formalities ..." (Graveson *Conflict* 251)

24 Some authors draw a distinction between capacity and consent (see eg *Cheshire-North* 586-587; Jaffey *Introduction* 24); while others argue that capacity should be interpreted broadly so as to include all those impediments that render a marriage essentially invalid (see eg *Morris Conflict* 152-153).

25 For the meaning of private-law status and its incidents, see **Chapter 2 under 1 The meaning of private-law status**.

26 See *Cheshire-North* 586ff; *Morris Conflict* 152ff; *North Problems* 25ff.

27 *Friedman v Friedman's Executors* 1922 NPD 259. See also Edwards *LAWSA: Conflict* par 439; Forsyth *Private International Law* 243ff; Hahlo & Kahn *Husband and Wife* 594ff; Schoeman 1992 (1) *Codicillus* 22.

There is, however, an exception to the *lex loci celebrationis* in regard to the essential validity of a marriage where domicile plays a part. In South African law the *fraus legis* rule acts as an exception to the *lex loci celebrationis* in this respect. In terms of this rule, which was propounded by our Dutch authorities,²⁸ parties act *in fraudem legis* when they marry outside their *locus domicilii* with the intention to evade an essential requirement of at least one of the parties' *lex domicilii*. Should the essential validity of such a marriage be questioned in the court of the relevant *lex domicilii* (the essential requirements of which were evaded), the *lex fori*, which in this case would be the *lex domicilii*, will be applied.²⁹ Thus the *lex domicilii* finds application, but only when the essential validity of the marriage is questioned in the *forum domicilii*, and therefore application of the *fraus legis* rule is limited.³⁰

2.1.2 Personal consequences of a marriage

According to Kahn³¹ the personal consequences of a marriage concern the following aspects:

"... the personal rights and duties of the spouses which flow from the marital relationship, for instance, the duty of conjugal fidelity and the right and duty of support; the effect of marriage on the legal capacity of the parties, such as the capacity to contract, to acquire and alienate

28 See *Pretorius v Pretorius* 1948 (4) SA 144 (O) 150ff where reference is made to Van Bynkershoek *Observationes Tumultuariæ* I 230; Huber *Heedendaegse Rechtsgeleertheit* 1 3 31 *et seq*; Voet *Commentarius* 23 2 4; Van der Keessel *Theses Selectæ* 39 40. See also Hahlo & Kahn *Husband and Wife* 596.

29 On the *fraus legis* rule see Edwards *LAWSA: Conflict* pars 427 439; Forsyth *Private International Law* 248ff; Hahlo & Kahn *Husband and Wife* 596ff; as well as *Pretorius v Pretorius* 1948 (4) SA (O); *Kassim v Ghumran and Another* 1981 (4) SA 79 (Z).

30 It is interesting to note that the English law does not have a *fraus legis* doctrine, which perhaps partly explains why the *lex domicilii* plays such an important role in regard to the essential validity of a marriage: see North *Problems* 25ff for an evaluation of the English position.

31 *Husband and Wife* 622-623.

property, to sue and be sued, to carry on a business; legal transactions between husband and wife, for example, the capacity of the spouses to contract with, make donations to, and sue each other, and the power of the wife to bind her husband's credit for household necessities; the effect of marriage on the wife's name."³²

There is substantial Roman-Dutch authority for the choice of law rule that the personal consequences of a marriage are governed by the *lex domicilii* of the spouses at the time that the act in question took place.³³ However, in terms of the new Domicile Act³⁴ a wife may now acquire her own domicile, independent from that of her husband, and therefore it may be difficult to decide whose domicile is decisive if the parties were domiciled in different places at the time of the act or transaction.³⁵ In this regard the rule will have to be qualified, probably by referring to the party's domicile that has the most significant connection with the act or transaction.³⁶ When it comes to commercial contracts with third parties, a married woman should not be entitled to rely on contractual incapacity in terms of her domiciliary law (if such an incapacity exists) if she had contractual capacity according to the *lex loci contractus* or probably

32 The Matrimonial Property Act 88 of 1984 has abrogated many of the common law limitations and disqualifications which existed in this area of South African law: s 22 of the Act has abolished the prohibition on donations between spouses, while s 11 has removed the husband's marital power and s 12 has abolished the common law limitations on a married woman's capacity to act and to litigate. However, it must be borne in mind that, for purposes of the conflict of laws, similar disqualifications and limitations may still exist in other legal systems.

33 Bynkershoek *Observationes Tumultuariae* IV 3083 3260; Rodenburg *Tractatus de Jure Conjugum* 2 (*pars alt*) 1 1 p 107; Van der Keessel *Praelectiones Iuris* 1 2 27; Voet *Commentarius* 5 1 101. For case law on this topic, see *Kent v Salmon* 1910 TPD 637; *Powell v Powell* 1953 (4) SA 380 (W); *Perrott-Humphrey v Perrott-Humphrey* 1967 (3) SA 304 (W) and see Edwards *LAWSA: Conflict* par 440; Forsyth *Private International Law* 256ff; Hahlo & Kahn *Husband and Wife* 623ff as well as Van Rooyen *Kontrak* 120ff for discussions of the rule and the cases.

34 S 1(1) of Act 3 of 1992.

35 The South African Law Commission did not consider this problem in their Report on Domicile 1990 (Project 60).

36 See Chapter 7 under 3.2 Issues other than status.

the proper law of the contract.³⁷ Therefore domicile will not be decisive in the case of commercial transactions when the contractual capacity of a spouse is in issue.

2.1.3 Proprietary consequences of a marriage

In the conflict of laws proprietary consequences relate to issues concerning the estate(s) of the parties. These would include: whether they are married in or out of community of property, the interpretation and effect of antenuptial contracts, and the effect of termination of the union through death or divorce.³⁸ In South African law the proprietary consequences of a marriage, in the absence of an antenuptial contract, are governed by the *lex domicilii matrimonii*, that is the *lex domicilii* of the husband³⁹ at the time of marriage.⁴⁰ In South African law the unitary doctrine is applied, which means that the whole estate, movable as well as immovable property, is governed by the *lex domicilii matrimonii*.⁴¹ Furthermore, South African law adheres to the doctrine of immutability, which means that the husband's domicile, which constitutes the

37 Hahlo & Kahn *Husband and Wife* 624. See also the distinction drawn earlier in **Chapter 2** under **1 The meaning of private-law status** between status and the incidents of status. While status should be ascertained with reference to the *lex domicilii* of the individual, this principle does not necessarily apply to the incidents of status: see Huber *De Conflictu Legum* ss 12 and 13.

38 See further Hahlo & Kahn *Husband and Wife* 623.

39 Even though a married woman may acquire her own domicile in terms of the Domicile Act 3 of 1992 s 1(1), the husband's domicile determines the matrimonial domicile: see South African Law Commission: Working Paper 20 (Project 60) par 6.7. For criticism of this rule, see **Chapter 4** under **2.2 The domicile of a married woman and the conflict of laws**. For ideas on future reform, see **Chapter 7** under **3.2 Issues other than status**.

40 The Roman-Dutch authorities are not entirely clear on this issue; partly because the *locus celebrationis* and the *locus matrimonii domicilii* very often coincided: see Hahlo & Kahn *Husband and Wife* 627. After a thorough analysis of the old authorities in *Frankel's Estate v The Master* 1950 (1) SA 220 (A) (see especially Van den Heever JA's judgment at 240ff) it was decided that the *lex domicilii matrimonii* governed the proprietary consequences of a marriage. See also earlier cases such as *Blatchford v Blatchford's Executors* (1881) 1 EDC 365; *Clear v Clear* 1913 CPD 835; *Brown v Brown* 1921 AD 478; *Anderson v The Master and Others* 1949 (4) SA 660 (E); as well as subsequent affirmations of the rule in *Sperling v Sperling* 1975 (3) SA 707 (A); *Bell v Bell* 1991 (4) SA 195 (W). See also Edwards *LAWSA: Conflict* par 441; Forsyth *Private International Law* 259; Roodt 1995 *THRHR* 194; 440.

41 Hahlo & Kahn *Husband and Wife* 629.

matrimonial domicile of the parties, remains fixed at the time of marriage.⁴² The doctrine of strict immutability has been relaxed to a certain extent: in terms of the Matrimonial Property Act⁴³ parties may change their matrimonial regime, provided that they comply with all the statutory requirements.

2.2 Law of obligations

In this area of the conflict of laws domicile does not play a significant role as a connecting factor in choice of law issues. If it is used, it is used in conjunction with other connecting factors to determine the appropriate *lex causae*.

In the law of delict, none of the traditional choice of law rules uses domicile as a connecting factor.⁴⁴ The proper law approach, which was propagated by the English writer Morris,⁴⁵ makes use of several connecting factors in order to pinpoint that legal system which has the most significant connection with the delictual issue at hand. In terms of this approach domicile may well be relevant. However, it is doubtful whether South African courts will ever adopt this approach, especially in view of the fact that Morris's proper law approach has been heavily criticised in his own country.⁴⁶

42 See Hahlo & Kahn *Husband and Wife* 631 fn 463. However, this does not mean that the rules of the *lex domicilii matrimonii* remain fixed, eg in *Sperling v Sperling* 1975 (3) SA 707 (A) a retrospective change in the rules of the *lex domicilii matrimonii* pertaining to proprietary consequences was applied, even though the new legislation was promulgated after the parties had already acquired another domicile.

43 88 of 1984 s 21(1). For comment on this Act, see Lupton 1988 *Businessman's Law* 119; Neels 1992 *TSAR* 336; Roodt 1988 *De Rebus* 59; Thomashausen 1985 *De Rebus* 167.

44 The following conflict rules are usually advanced as possible solutions to the choice of law problem in delict: application of the *lex fori*, application of the *lex loci delicti commissi* and the English law rule which encompasses both the *lex fori* and the *lex loci delicti commissi* (*Phillips v Eyre* (1870) LR 6 QB 1): see *Cheshire-North* 528ff; *Dicey-Morris* 1480ff; Forsyth *Private International Law* 304ff; Edwards 1979 *SALJ* 48.

45 Morris *Conflict* 279.

46 *Ibid* 280.

In the law of contract the proper law doctrine has been accepted in South African law.⁴⁷ Whether the proper law is ascertained in a subjective fashion⁴⁸ or objectively,⁴⁹ domicile may be relevant in determining the *lex causae*.⁵⁰ However, this is not an area of the law where domicile, especially the domicile of private individuals,⁵¹ will play such a decisive role as it does in matters relating to status.

2.4 Property

Most choice of law issues relating to property are dealt with in terms of the distinction between movable and immovable property.⁵² Issues pertaining to immovable property are generally governed by the *lex situs*,⁵³ since the law of the place where such property is situated can deal effectively with it. Issues concerning movable property are often referred to the *lex domicilii* in terms of the fiction *mobilia sequuntur personam*, which means that movables are situated where their owner is.⁵⁴ However, in regard to the transfer of proprietary rights in movable property it seems as if the *lex domicilii* is no longer the popular theory; the law of the actual *situs* of the movable property

47 See in general Edwards *Reception of "Proper Law" Doctrine* 38ff.

48 See *Standard Bank of South Africa Ltd v Efroiken and Newman* 1924 AD 171; as well as *Improvair (Cape) (Pty) Ltd v Etablissements Neu* 1983 (2) SA 138 (CPD); *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* 1986 (3) SA 509 (D & CLD) (for a discussion of this case see Forsyth 1987 SALJ 4.

49 See eg *Ex parte Spinazze and Another NNO* 1985 (3) SA 650 AD 665F-H, as well as the discussion of this case by Edwards in 1986 *THRHR* 144.

50 For the determination of the proper law of a contract in South African law, see Edwards *Reception of "Proper Law" Doctrine* 44ff.

51 The domicile of a company may be relevant in international commercial contracts.

52 The conflict rule for proprietary consequences of a marriage is an exception: both movable and immovable property are subjected to the *lex domicilii matrimonii* - see the discussion *supra* under 2.1.3 **Proprietary consequences of a marriage**.

53 See Edwards *LAWSA: Conflict* par 455.

54 Forsyth *Private International Law* 318; *Maasdorp's Institutes* 1.

seems preferable.⁵⁵

It is in the law relating to the succession of movable property that domicile constitutes an important connecting factor. Almost all choice of law issues, testate or intestate, pertaining to succession of movables, are referred to the *lex domicilii* of either the deceased or beneficiary at the time of the execution of the will (testate succession) or at the time of death.⁵⁶

3 Conclusion

Although domicile features as a jurisdictional or a conflicts connecting factor in many issues which are not strictly related to status, it is clear that domicile does not play the significant role in these areas that it does in status matters. Also, there has been no conflation of jurisdiction and choice of law in these areas as has occurred in the case of status matters. The reason for this is that, in those instances where domicile features as a jurisdictional or a conflicts connecting factor in non-status matters, it is not founded on the status theory.⁵⁷ **Section III** will show that status issues, and more specifically the assumption of jurisdiction in divorce cases, dominate the South African law reports when it comes to the interpretation of *domicilium*.

55 *Cheshire-North* 795ff; *Dicey-Morris* 965ff; Edwards *LAWSA: Conflict* par 456; Neels 1991 *TSAR* 309. For a discussion of worldwide trends in this area of the law, see *North Problems* 187ff.

56 See in general Kahn *Appendix: Succession* 634ff.

57 For the meaning of the status theory, see **Chapter 2** under **1 The meaning of private-law status**.

PART II: THE CONCEPT *DOMICILIUM* IN SOUTH AFRICAN LAW

In this section the interpretation of the concept *domicilium* will be explored. **Chapter four** will focus on the South African case law of the past century or so, as well as innovations introduced by the Domicile Act 3 of 1992. In **Chapter five** the single most problematical aspect of the domicile of choice, namely the subjective *animus* requirement, will be analysed.

CHAPTER FOUR

PROBLEM AREAS IN REGARD TO DOMICILE

Introduction

In South African law *domicilium* is treated as a uniform concept. In other words, even though it may be used for different purposes in diverse areas of the law, for example to found jurisdiction or to determine a person's status in a conflicts case, the meaning of the concept remains the same. This is evident from the fact that the Domicile Act¹ covers aspects of internal private law,² the conflict of laws,³ as well as matters relating to evidence⁴ and jurisdiction,⁵ without differentiating between any of these fields as to the interpretation of the concept *domicilium*. This is also borne out by a study of our case law on domicile.⁶ *Domicilium* is one of the conflict of laws connecting factors which is interpreted according to the *lex fori*.⁷ Thus, South African law will be used when a South African court is confronted with such an exercise. Therefore it is imperative to know exactly what the concept means in South African law. It is also

1 3 of 1992.

2 See eg ss 1-3.

3 Notably ss 4 and 7; although ss 1-3 are also important for the conflict of laws where domicile constitutes a connecting factor.

4 S 5.

5 S 6.

6 The majority of cases in which the concept domicile have been explored, are cases concerned with jurisdiction in divorce actions. These cases are cited as authority on the interpretation of domicile in all other areas of the law.

7 Kahn *Domicile* 11; *Ex parte Jones: In re Jones v Jones* 1984 (4) SA 725 (W). There is, however, a statutory exception to this general rule in regard to international competence. With regard to the recognition of foreign divorce orders by a South African court, domicile may, in terms of s 13 of the Divorce Act 70 of 1979, be determined in terms of South African law or the law of the foreign country concerned: see **Chapter 2** under **5 Recognition of foreign judgments relating to status**.

necessary to be aware of the pitfalls in regard to the interpretation of the concept.

1 The Domicile Act⁸

Until the promulgation of the Domicile Act⁹ the interpretation of the common law concept *domicilium* was largely left to the courts. In the absence of any statutory directive, the courts were faced with the difficult task of giving substance to the concept and to fill *lacunae* in relation to certain aspects. In this process, our courts relied on the definitions of domicile from the *Corpus Iuris Civilis*,¹⁰ taking into account the expositions on this topic found amongst our Roman-Dutch authorities,¹¹ as well as the considerable English case law¹² on the subject. Through the years it became clear that reform in regard to the law of domicile was desperately needed.¹³ Reform came in the form of the Domicile Act which was promulgated in 1992.¹⁴ This Act succeeded in eliminating a number of problems areas in regard to the law of domicile.

Most welcome has been the abolition of the domicile of dependence in respect of

8 3 of 1992.

9 *Ibid.*

10 Notably C 10 40(39) 7 *pr* and C 10 40(39) 7 *lex* 1: see **Chapter 1** under **1 Early origins of domicile as a connecting factor**.

11 Especially Voet's *Commentarius* 5 1 92: see **Chapter 1** under **1 Early origins of domicile as a connecting factor**. See also Kahn *Domicile* 41ff.

12 Cases such as *Udny v Udny* (1869) LR 1 Sc & Div 441 and *Winans v Attorney-General* [1904] AC 287 have exercised a considerable influence on the interpretation of the concept *domicile* in our case law: see **Chapter 5** under **2.2 South African case law**.

13 See the South African Law Commission's Report on Domicile 1990 (Project 60) pars 1.1-1.16 (Introduction). See also the informative contribution by Thomashausen *Reflections on "Domicile"* where the need for extensive reform of the South African law relating to domicile was explored in a comparative vein, as well as Ranchod 1970 *Acta Juridica* 53 where problem areas in this field of the law were highlighted.

14 3 of 1992. For a discussion of the salient features of this Act and the implications thereof in the field of the conflict of laws, see Edwards *LAWSA: Conflict* par 428ff.

married women, as well as minor children¹⁵ over the age of eighteen years.¹⁶ The Act stipulates that:

Every person who is of or over the age of 18 years, and every person under the age of 18 years who by law has the status of a major, excluding any person who does not have the mental capacity to make a rational choice, shall be competent to acquire a domicile of choice, regardless of such person's sex or marital status.¹⁷

This means that a married woman no longer acquires and follows her husband's domicile upon marriage. Furthermore, a child, who has reached the age of eighteen, may acquire his own domicile, even though the law still regards him as a minor. According to the Report¹⁸ the wording of the phrase, "excluding any person who does not have the mental capacity to make a rational choice", is intended to include both mentally ill people, as well as persons who are in a protracted comatose state.¹⁹ Regarding minor children under the age of eighteen years, as well as other persons who are not capable of acquiring a domicile of choice,²⁰ the Law Commission has been most innovative in its recommendations. The appropriate section in the Domicile

15 Although the age of majority in South African law remains at 21 years, the Law Commission decided that a child over the age of 18 should be able to acquire his own domicile, since that is usually the age when children leave the parental home: see pars 3.57ff of the Report on Domicile 1990 (Project 60).

16 Although the domicile of minor children under the age of eighteen years does not depend on that of their parents any longer, this category of children is dealt with separately in s 2 of the Act.

17 S 1(1) of the Domicile Act 3 of 1992.

18 Report on Domicile 1990 (Project 60).

19 Par 2.117.

20 This refers to people who do not have the mental capabilities to acquire a domicile of choice as contemplated in s 1: see pars 2.110-2.120 of the Report.

Act²¹ reads as follows:

A person not capable of acquiring a domicile of choice as contemplated in section 1 shall be domiciled at the place with which he is most closely connected.²²

As far as children under eighteen years are concerned, this section does away with the domicile of dependence. It radically changes the way in which a child's domicile at birth is to be determined. Previously a child's domicile at birth, the so-called "domicile of origin",²³ depended on whether the child was legitimate (born in lawful wedlock) or not.²⁴ In the new Act no distinction is made between legitimate and illegitimate children, since "parent" also includes an adoptive parent, as well as parents who are not married to each other.²⁵ A child's domicile (of origin, or otherwise) will simply be the place with which the child is most closely connected.

In regard to children under the age of eighteen years, the following rebuttable presumption has been included in the Act:

If, in the normal course of events, a child has his home with his parents

21 3 of 1992.

22 S 2(1) of the Domicile Act 3 of 1992.

23 The concept *domicile of origin* has not been abolished by the legislator; it is, in fact, used in s 3 of the Act. However, since the method of determining a child's domicile of origin has been changed completely, the question may be asked whether it would not be more appropriate to speak of a *domicile at birth*. This will prevent any confusion with the "old" domicile of origin and the way in which it was assigned to a child.

24 The domicile of origin of a legitimate child (in other words, a child born in wedlock) was that of his father at the time of his birth, while an illegitimate child (that is, a child born out of wedlock) followed the domicile of his mother: see *Govu v Stuart* (1903) 24 NLR 440; Kahn *Domicile* 17. For a discussion of the status of legitimacy, see **Chapter 2** under **4 Status and issues of legitimacy**.

25 S 2(3).

or with one of them, it shall be presumed, unless the contrary is shown, that the parental home concerned is the child's domicile.²⁶

An interesting feature of this subsection is that a child does not follow the *domicile of the parent* with whom he has his home; the *place of the parental home* is his domicile. This represents a clean break with the old domicile of dependence.²⁷

In terms of section 3 of the Act²⁸ the doctrine of the revival of the domicile of origin has been abolished.²⁹ Whether or not this doctrine ever formed part of our law is no longer an issue; the Law Commission has done well to eliminate any uncertainty in this

26 S 2(2).

27 The English and Scottish Law Commissions were not prepared to go this far: *Private International Law: The Law of Domicile*, 1987: Law Commission No 168; Scottish Law Commission No 107. While they recommend (see par 10.1) that a child's domicile should be determined with reference to the country with which he/she is most closely connected, there are two rebuttable presumptions which refer to the domicile of the parent(s):

- (1) Where the child's *parents are domiciled in the same country* and he has his home with either or both of them, it is to be presumed, unless the contrary is shown, that the child is most closely connected with that country; and
- (2) where the child's parents are not domiciled in the same country and he has his home with one of them, but not with the other, it is to be presumed, unless the contrary is shown, that the child is most closely connected with the country *in which the parent with whom he has his home is domiciled*.

28 3 of 1992.

29 S 3(2) reads as follows:

Notwithstanding any law or the common law, no person's domicile of origin shall revive ...

regard.³⁰ A person's existing domicile will continue until he acquires a new domicile.³¹

The Act states explicitly that the acquisition or loss of a domicile is to be determined on a balance of probabilities.³² This is in line with the standard of proof required in all civil matters. This eliminates one of the problems that has plagued our courts (in consonance with the English courts)³³ for so long, namely that a so-called higher standard of proof was needed to prove the loss of a domicile of origin as well as the loss of a well-settled domicile of choice.³⁴ In regard to the *animus* element³⁵ this higher standard of proof has had a direct influence on the substantive interpretation of the *animus non revertendi*, resulting, in the case of an abandonment of a domicile

30 See the Report on Domicile 1990 (Project 60) pars 2.131-2.135. In *Ex parte Donelly* 1915 WLD 29 the doctrine of the revival of the domicile of origin was adopted by Mason J on the basis of the authority of *Udny v Udny* (1869) LR 1 Sc & Div 441, a Scottish appeal to the House of Lords which was followed in England (see *Cheshire-North* 157-158). Even though Mason J concluded that the tendency of Roman-Dutch (see especially Voet *Commentarius* 5 1 98 and 99) and allied authorities was against the doctrine of the automatic revival of the domicile of origin (at 33), he decided (at 32) "that we should be guided by the views accepted in the Empire to which we belong". An analysis of *Udny* reveals that no Roman-Dutch authority was quoted in support of the doctrine of the revival of the domicile of origin. Reliance was placed on Story *Commentaries* pars 47 and 48 who also did not base his opinion on Roman-Dutch authority. In fact, he relied on early nineteenth century English case law. Thus, it seems as if the doctrine of the revival of the domicile of origin was essentially an English creation. For an evaluation of English and Scottish case law on this point, see Schoeman 1994 *THRHR* 204 217-218.

31 S 3(1).

32 S 5.

33 The influence of English decisions in this field has been considerable: a case like *Winans v Attorney-General* [1904] AC 287 has continued to influence our law on domicile despite remarks such as those of Rumpff JA in *Eilon v Eilon* 1965 (1) SA 703 AD 704E-F:

"In my view Westlake and the English cases referred to are best left alone."

34 Cf *Lewis v Lewis* 1939 WLD 140 143:

"Stronger evidence is generally required to establish a change from a domicile of origin than from a domicile of choice; 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."

35 See Chapter 5 for a detailed analysis of the *animus* requirement.

of origin, in what was labelled the "tenacity of the domicile of origin".³⁶ This higher standard of proof not only affected the *animus non revertendi*, it also influenced the *animus manendi*. Thus, if greater proof was required to prove the loss of a domicile of origin, it also became harder to prove the acquisition of a new domicile of choice.³⁷ In terms of the new Act it is clear that, in proving the required *animus* to abandon a previous domicile, it does not matter in which manner the previous domicile was acquired (whether by choice or otherwise). Since the acquisition of a "new" domicile (of choice) is in many cases inevitably linked to the abandonment of a previous domicile the *animus manendi* and the *animus non revertendi* are often intertwined. Unfortunately the Act sheds little light on the contents of the *animus* requirement, save to stipulate that the required intention for the acquisition of a domicile of choice is to settle at a particular place for an *indefinite period*.³⁸

In regard to choice of law, the legislator has excluded the operation of the doctrine of *renvoi* in cases where domicile constitutes the connecting factor in a conflict of laws situation.³⁹

36 See Kahn *Domicile* 26ff.

37 *Johnson v Johnson* 1931 AD 391 is a striking example. See also *Ochberg v Ochberg* 1941 CPD 15 38:

"The choice of a new domicile therefore 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."

38 S 1(2).

39 See s 4 of the Domicile Act 3 of 1992:

If a court, in the application of the choice of law rules, finds that a question before the court should be decided in accordance with the law of a foreign state or territory on account of someone's domicile in that state or territory, the court shall decide that question in accordance with that law, even though a court of that state or territory, in the application of the choice of law rules, would have found the South African law or any other law to be applicable with respect to the question concerned.

Two sections of the Divorce Act⁴⁰ have also been affected: section 2, which deals with domestic divorce jurisdiction and choice of law, has been amended⁴¹ and section 13, which deals with the recognition of foreign divorce orders, nullity orders and orders for judicial separation, has been replaced.⁴²

Finally, it must be pointed out that the Act does not have retrospective effect so as to prevent prejudice to the *propositus* or any other party directly affected at the time of the ascertainment of the *propositus*'s domicile.⁴³

In order to evaluate the reform brought about by the Act, especially with regard to domicile as a connecting factor, those areas which, historically, have been most problematical, will be discussed in more detail.

40 70 of 1979.

41 See the discussion in **Chapter 2** under **2.2.2 Statutory intervention**.

42 See pars 6.23-6.42 of the Report on Domicile 1990 (Project 60) for the background to the new section. See also the discussion in **Chapter 2** under **5 Recognition of foreign judgments relating to status**.

43 S 8(2) provides as follows:

This Act shall not affect-

- (a) any right, capacity, obligation or liability acquired, accrued or incurred by virtue of the domicile which a person had at any time prior to the commencement of this Act;
- (b) the legality of any act performed before that commencement.

S 8(3) further stipulates that:

Any proceedings pending in a court of law at the commencement of this Act shall be proceeded with and finalized (*sic*) as if this Act had not been passed.

See also pars 4.1-4.2 of the Report on Domicile 1990 (Project 60).

2 The domicile of the wife

2.1 The wife's domicile of dependence

The effect of section 1(1) of the recent Domicile Act⁴⁴ is that a married woman may now acquire her own domicile, independent of that of her husband.⁴⁵ Before the promulgation of the Domicile Act, a married woman followed the domicile of her husband in terms of the wife's domicile of dependence.⁴⁶ The abolition of the wife's domicile of dependence has a long history. It was especially in the area of divorce jurisdiction that married women were most prejudiced by the domicile of dependence. A number of major cases on the interpretation of domicile have come about as a direct result of the jurisdictional difficulties occasioned by this doctrine.⁴⁷ Thus the domicile of dependence was not only ideologically unjustifiable: the cases discussed in this section will show that it also exerted an influence on the interpretation of the concept *domicilium*. In order to place the interpretation of domicile within the area of divorce jurisdiction into proper perspective, the discussion that follows will focus on earlier cases which have been significant in this respect. For the law reformer there is also a lesson to be learnt from the failure to effect timeous reform in this area of the law.

44 3 of 1992.

45 S 1(1) reads as follows:

Every person who is of or over the age of 18 years, and every person under the age of 18 years who by law has the status of a major, excluding any person who does not have the mental capacity to make a rational choice, shall be competent to acquire a domicile of choice, *regardless of such person's sex or marital status.* (own italics)

46 See Voet *Commentarius* 5 1 95 (Gane's translation):

"Moreover just as a wife follows the rank of her husband, so too she follows his domicile ..." ("Uti autem uxor mariti dignitatem sequitur, ita & domicilium ejus ...")

47 See eg *Eilon v Eilon* 1965 (1) SA 703 (AD), one of the leading cases on the interpretation of the requisite *animus* for the acquisition of a domicile of choice.

Since a wife followed the domicile of her husband as long as they were married, this meant that, until 1939,⁴⁸ the only court that had jurisdiction in a divorce case was the court in the area of which the husband was domiciled at the time of the institution of proceedings.⁴⁹ The 1939 reforms did not go far enough: the requirement that the husband had to be domiciled in South Africa at some stage⁵⁰ remained until 1968.⁵¹ In many cases the husband had left the wife and she wanted to institute divorce proceedings in the court of the area in which she was resident at the time. In some cases this happened to be the place where the parties had had their domicile before the husband left. Hence a case could be made out that the husband had not abandoned that domicile *animo et facto*.⁵² Had the husband, however, abandoned

48 The Matrimonial Causes Jurisdiction Act 22 of 1939 was the first in a series of legislative interventions in an effort to facilitate the assumption of divorce jurisdiction. In terms of s 1(1) a wife could institute action in the division of the Supreme Court where she had been ordinarily resident for at least a year before the commencement of proceedings, provided that her husband was domiciled in South Africa: see the discussion in **Chapter 2** under **2.2.2 Statutory intervention**.

49 *Le Mesurier v Le Mesurier* [1895] AC 517. See also *Reeves v Reeves* (1832) 1 Menz 244 249; *Bestandig v Bestandig* (1847) 1 Menz 280 281; *Mason v Mason* (1885) 4 EDC 330 336; *Gilbert v Gilbert* (1901) 22 NLR 201 203; *Ex parte Kaiser* 1902 TH 165 170; *Laughlin v Laughlin* (1903) 24 NLR 230 243; *Ex parte Standring* 1906 EDC 169 182-183; *Hudson v Hudson* 1907 EDC 189 191; *Hooper v Hooper* 1908 EDC 474 476-477; *Steytler v Steytler* 1913 CPD 725 729; *Shapiro v Shapiro* 1914 WLD 38 40; *Ricketts v Ricketts* 1929 EDL 221 223; *Frankenberg v Frankenberg* 1943 EDL 147 148.

50 At the date of the institution of proceedings in terms of the original s 1(1) of the Matrimonial Causes Jurisdiction Act 22 of 1939 and, later on, at the date of the institution of proceedings or immediately before the deportation or desertion of the wife in terms of s 6 of the Matrimonial Affairs Act 37 of 1953 which replaced s 1(1) of the first-mentioned Act.

51 It was only in terms of the General Law Amendment Act 70 of 1968 s 21 that provision was made for cases where the husband was not domiciled in South Africa at all: see the discussion in **Chapter 2** under **2.2.2 Statutory intervention**.

52 In a case such as *Etheridge v Etheridge* (1902) 23 NLR 180, where the husband (defendant) had eloped with his wife's sister and it was highly unlikely that he would ever return to the matrimonial home, the court (of the matrimonial home where the parties had had their mutual domicile) still assumed jurisdiction (185):

"... we think that the plaintiff, who was born in Natal, and has resided in this Colony all her life, should not be denied redress merely because the defendant, after committing a grievous matrimonial wrong, left the Colony, and because such change of residence, coupled with partition of property, might be taken to indicate an intention not to return to Natal."

that domicile, but not as yet acquired a new domicile of choice, it was possible that his domicile of origin (in many cases an English domicile of origin) could have revived.⁵³ Such a situation would possibly have deprived a South African court of jurisdiction. This doctrine of the domicile of dependence of the wife was severely criticised on a number of occasions:

"To my mind it would be playing with sacred justice to maintain that at the present time the wife's domicil, where it is a question of dissolving the marriage, is the same as that of her husband in consequence of such marriage, and that she is compelled to follow him there in order to get redress."⁵⁴

2.1.1 Exceptions to the wife's domicile of dependence

Exceptions to the general doctrine of the wife's domicile of dependence were mooted on several occasions, yet it is difficult, if not impossible, to find authority for these exceptions. Two possible exceptions seemed to crystallise quite clearly: where the husband was a *vagabundus* the wife was not bound by the doctrine of the domicile of dependence and, secondly, where a wife who had been deserted by her husband was allowed, under certain circumstances, to acquire her own "forensic" domicile.⁵⁵

2.1.1.1 *The case of the vagabundus husband*

The first-mentioned exception necessitates a clarification of what exactly a *vagabundus*

53 On the strength of the Scottish case of *Udny v Udny* (1869) LR 1 Sc & Div 441: see *supra* fn 30. The revival of the domicile of origin has now expressly been abolished: Domicile Act 3 of 1992 s 3(2).

54 Per Steyn J in *Burnett v Burnett* (1895) 12 CLJ 147 (OFS) 148. See also *Gilbert v Gilbert* (1901) 22 NLR 201 204; *Ex parte Kaiser* 1902 TH 165 170; *Foord v Foord* 1924 WLD 81 83; *Dyus v Dyus* (1926) 47 NLR 259 260.

55 For the meaning of *vagabundus* and "forensic" see the discussion that follows *infra*.

was. The term is not found in Justinian's Digest or Code, but was frequently used by the medieval and later civilians to refer to somebody who did not have a fixed domicile or place of abode,⁵⁶ "an errant and wandering person; ... those lazy ne'er-do-wells, who wander about without trade or calling, tramps without fixed domicilium ..."⁵⁷ The fact that a *vagabundus* was someone who did not make any attempt to earn a living, made this exception extremely difficult to rely on; one cannot help but wonder how many married tramps roam the world. Few decisions dealt with this exception specifically,⁵⁸ but cases such as *Mason v Mason*,⁵⁹ *Ex parte Sandberg*⁶⁰ and *Blair v Blair*⁶¹ provide some insight into the applicability of this exception to the general rule of the wife's domicile of dependence. These three cases were decided before the statutory extension of the jurisdictional grounds for divorce.⁶² Thus the domicile of the parties was the sole ground for divorce jurisdiction at that stage and, since the wife followed the domicile of her husband, it was the husband's domicile that was decisive.

*Mason v Mason*⁶³ was a case where a husband and wife were married in the Cape Colony, both being domiciled there at the time. The husband unsuccessfully tried his

56 Shippard J in *Mason v Mason* (1885) 4 EDC 330 353 with reference to the *Lexicum Juridicum* of Calvinus.

57 Wessels J in *Ex parte Sandberg* 1912 TPD 805 808-809 with reference to Boey's *Woordentolk*.

58 See *Mason v Mason* (1885) 4 EDC 330 353; *Ex parte Sandberg* 1912 TPD 805 807-808; *Blair v Blair* 1914 SR 111 112ff and *Ricketts v Ricketts* 1929 EDL 221 223. In *Laughlin v Laughlin* (1903) 24 NLR 230 241 Bale CJ was critical of this exception recognised by Shippard J in the *Mason* case, but see *Hudson v Hudson* 1907 EDC 189 192 where Kotzé JP confirmed the exception, as well as *Ex parte Stevens* 1912 EDL 443 446; *Dyus v Dyus* (1926) 47 NLR 259 260; *Bate v Bate* 1933 NPD 258 269 and *Ex parte Gordon* 1937 WLD 35 37 where the exception was referred to.

59 (1885) 4 EDC 330.

60 1912 TPD 805.

61 1914 SR 111.

62 For a detailed analysis of the relevant statutes, see **Chapter 2** under **2.2.2 Statutory Intervention**.

63 (1885) 4 EDC 330.

hand at various business ventures in Natal and the Orange Free State and after every failed attempt his family went back to his wife's mother in the Cape Colony. As a result of his gambling he got into difficulties and was arrested for debt, but escaped and made his way to Delagoa Bay. When he was notified of the divorce proceedings commenced by his wife, he said that he intended going to Australia and it was clear that he did not envisage being reunited with his wife again. The court (Eastern Districts) was faced with the problem of jurisdiction, since it was quite clear that the husband had no intention of returning to the Cape Colony and the court would only have had jurisdiction if the husband was domiciled within its area of jurisdiction at the time of the institution of proceedings. This was a typical "hard case" where the husband had abandoned his wife and children, leaving them in dire straits: "... penniless and unprovided for, while he himself wanders to and fro about the earth, motiveless and improvident, living hard and gambling only to gratify his craving for excitement."⁶⁴ Relying on Rodenburg,⁶⁵ Shippard J concluded that an exception to the doctrine that the wife always followed the domicile of the husband existed in instances where the husband was a *vagabundus*. In these cases the wife was not bound by the domicile of dependence.⁶⁶ But, even though it seems as if Mr Mason could indeed have been regarded as a *vagabundus*,⁶⁷ Shippard J did not base his decision on this exception. In deciding that the court had jurisdiction to entertain the action, he based his decision on the fiction that the husband had never changed his Cape domicile:

64 Barry J at 333.

65 *De iure quod Oritur ex Statutorum vel Consuetudinis Discrepantia* 1 2 1.

66 353.

67 See Shippard J at 353, as well as the judgment of Barry J at 334:

"He neglected and deserted her, not because he was poor, sick, and unfortunate, but because he meant to persist in the fugitive roving life of a gambler, and meant to relieve himself of the burden of a wife whom he never so much as invited to join him ..."

"In such a case it seems wholly unnecessary to press, as against the wife, the legal fiction of marital domicile; and so by a somewhat circuitous process it seems possible to arrive at the conclusion that, of the two legal fictions, that which assumes that the defendant in this case has never changed his Cape domicile is to be preferred."⁶⁸

This conclusion was no doubt aided by the non-appearance of the husband and in this regard reliance was placed on the statement by Voet that in a doubtful case a change of domicile is not to be readily presumed.⁶⁹ It was abundantly clear, however, that the husband had actually abandoned his Cape domicile:

"It is only by legal fiction that the defendant can be assumed to have retained in this Colony a domicil of choice, which all the positive evidence proves him to have deliberately and permanently abandoned."⁷⁰

If Shippard J had decided that the husband had in fact abandoned his domicile of choice in the Cape Colony, his domicile of origin (which was English) would probably have revived (since there was no evidence of any subsequent acquisition of a domicile of choice after he left South Africa) and that would have deprived the Eastern Districts Court of jurisdiction. The observation by Innes CJ in a subsequent case, *Ex parte Kaiser*,⁷¹ that Shippard J had apparently founded his opinion on the view that the wife was domiciled in the Cape Colony and that the husband had no domicile at all, seems strange, since Shippard J did not mention a separate domicile for the wife, but expressly relied on the fiction that the husband had not changed his Cape domicile.

68 Shippard J at 353.

69 *Commentarius* 5 1 99: see Shippard J's judgment at 341.

70 Shippard J at 351.

71 1902 TH 165 172.

However, in another case, *Laughlin v Laughlin*,⁷² Bale CJ seemed to conclude that Shippard J had based his decision on the exception that the husband was a *vagabundus*. Yet, it is clear that even though this exception was recognised by Shippard J and may have contributed to the final decision, this was not, according to Shippard J himself, the true basis of the decision. Although Shippard J admitted that his decision was not free from doubt, since it was based on a legal fiction,⁷³ it is clear that he was prepared to go to great lengths to entertain the wife's action.

In *Ex parte Sandberg*⁷⁴ a husband and wife, who were married in England, were both travelling acrobats and had appeared at various places all over the world. They came to South Africa and the wife wished to settle in Johannesburg as a dressmaker. She alleged that her husband had also formed the intention to settle in Johannesburg, but there was nothing to substantiate this. After he had deserted her, she instituted proceedings for divorce and the question was whether the Transvaal court had jurisdiction to hear the matter. It was clear that the husband had never acquired a domicile in Johannesburg, but the wife contended that, since he was a *vagabundus*, she could acquire her own domicile and that she had indeed acquired one in Johannesburg. Wessels J decided that the husband was not a *vagabundus*, since he travelled from town to town to fulfil engagements as an acrobat (he was also a sign painter) in order to earn a livelihood.⁷⁵ The fact that his profession barred him from acquiring a new domicile or that he did not wish to settle in a particular country, meant that his true domicile was his domicile of origin.⁷⁶ Since his domicile of origin was in

72 (1903) 24 NLR 230 241.

73 See 353-354.

74 1912 TPD 805.

75 Cf also *Ricketts v Ricketts* 1929 EDL 221 223 where it was said that the fact that a person was of drunken habits was not sufficient to make him a *vagabundus*, since he (a chemist) travelled from place to place to obtain work and had in fact earned a livelihood and acquired a decent place to stay.

76 808-809.

all probability Danish⁷⁷ (and it was clear that he had never acquired a domicile in Johannesburg), the court did not have jurisdiction to entertain the action.

*Blair v Blair*⁷⁸ was an exceptional case, since the exception of the *vagabundus* was actually relied upon by the judge, but the judgment is clouded by the approval of the rather contentious view expressed in *McCurrach v McCurrach*⁷⁹ that it was the policy of the Supreme Court not to inquire too minutely into the question of jurisdiction where the probable result would be to deprive an innocent plaintiff of redress.⁸⁰ In the *Blair* case the husband and wife were married in Natal and later resided at various places in Rhodesia where the wife, as a result of her husband's intemperate habits, had to work in order to support the family. He later deserted her and left for Australia. The wife wished to commence proceedings for divorce and the question was whether the Southern Rhodesian court had jurisdiction to hear the matter. In deciding that the court had jurisdiction, Watermeyer J said that he was influenced by the fact that the husband seemed to be a *vagabundus*, since he was of such wandering and unsettled habits that it would be difficult to say that he had acquired any new fixed domicile. The wife was therefore allowed to institute action in the area of the court where the parties had had their last common domicile.

The limits of this exception to the general rule were difficult to define: did the wife only retain the last mutual domicile of the parties or was it possible for her to acquire a new domicile for herself and institute action for divorce there? In *Ex parte Kaiser*⁸¹ the following opinion was advanced (*obiter*, since in that case the husband was not a

77 806, 809.

78 1914 SR 111.

79 (1892) 6 HCG 256 259: see the discussion in Chapter 2 under The importance of "international" recognition.

80 112.

81 1902 TH 165.

vagabundus):

"It is one thing to say that a wife, abandoned by a husband who is a *vagabundus*, is not bound to accept any new domicile which he may ultimately acquire; it is quite another thing to say that such a wife not only retains the domicile which she had in common with her husband when he left her, but may acquire any other one she pleases so as to enable her to sue him in the Courts of the new domicile."⁸²

It seems, therefore, that according to this interpretation, the wife would have retained the last common domicile that she and her husband had shared before he left her,⁸³ but would not have been able to acquire a new domicile until they were finally divorced.⁸⁴ In *Ex parte Sandberg*,⁸⁵ however, Wessels J assumed, stating clearly that he did not wish to express an opinion on the matter, that the wife of a *vagabundus* could acquire a domicile for herself and that she could sue her husband for divorce at her newly acquired domicile. But, since the judge decided, *in casu*, that the husband was not a *vagabundus*,⁸⁶ the exception did not apply and therefore the assumption of the judge did not have any effect.

82 172.

83 Cf the contention by counsel in *Ex parte Gordon* 1937 WLD 35 to the effect that if a husband had become a *vagabundus*, his wife could sue him for divorce in the jurisdiction where he was last domiciled.

84 Cf Kahn *Domicile* 77:

"If modern law is possibly prepared to concede the possibility of the existence of such a person [a *vagabundus*], it is not prepared to endorse certain judicial suggestions that the law endow his wife with the capacity to acquire a domicile of her own."

85 1912 TPD 805 807-808.

86 Cf *Ex parte Sandberg* 1912 TPD 805 808-809.

2.1.1.2 *A separate forensic domicile for the wife*

The second exception to the wife's domicile of dependence, in terms of which a deserted wife could, under certain circumstances, acquire a separate forensic domicile, was born out of a specific kind of fact complex that occurred only too often in Southern Africa during the rush for diamonds and gold, as well as the Anglo-Boer Wars and the two World Wars: a man (usually a foreigner) married a woman and left within days of the wedding to seek his fortune or, alternatively, to fight in a war or sail around the world. In many instances that was the last she saw of her husband and it was no easy matter to have the marriage dissolved, since the only competent court was the court of the parties' (that is the husband's) domicile.⁸⁷ In order to accommodate the wife's action, the possibility of her acquiring a separate domicile for jurisdictional purposes, was mooted. It seems as if the tag, "forensic", placed on this separate domicile served no other purpose than to distinguish this separate jurisdictional domicile from a fully independent domicile, recognised by the law and extending to all other issues relating to a woman's status.⁸⁸ Although this exception was referred to and discussed in a number of cases,⁸⁹ judges seemed rather wary

87 This was before the statutory extension of the grounds of divorce jurisdiction (see **Chapter 2** under **2.2.2 Statutory intervention**) and also before the introduction of s 1(1) of the Divorce Act 3 of 1992 in terms of which a wife may acquire her own domicile of choice.

88 Cf Buchanan J in *Mason v Mason* (1885) 4 EDC 330 355:

"... and [he] has entitled, or rather compelled, her to establish, for the purposes of obtaining justice against him, if not a separate domicil in the full sense of the term, at least as against him a separate forensic domicil ..."

89 The exception was advanced, but failed to constitute the basis for jurisdiction in *Mason v Mason* (1885) 4 EDC 330 355 (jurisdiction was founded on the husband's domicile); *Ex parte Kaiser* 1902 TH 165 174; *Ex parte Standring* 1906 EDC 169 181ff; *Hudson v Hudson* 1907 EDC 189 191ff; *Ex parte Stevens* 1912 EDL 443 445ff and *Ex parte Edwards* 1933 EDL 224. In both *Steytler v Steytler* 1913 CPD 725 730ff and *Bendell v Bendell* 1914 CPD 899 900 the wife had deserted the husband and the exception was found not to be applicable; while in *Von Falkenstein v Von Falkenstein* 1917 WLD 67 68 and *Deane v Deane* 1922 OPD 41 the point was raised, but not decided. In *Hooper v Hooper* 1908 EDC 474 476ff the judge indicated that he would have applied the exception had it been necessary for the decision of the case, but, as it happened, there was no problem in regard to jurisdiction. *Burnett v Burnett* (1895) 12 CLJ 147 (OFS) and *Dyus v Dyus* (1926) 47 NLR 259 260ff represent two cases in which the exception was successfully relied upon.

of founding jurisdiction on this exception.⁹⁰ An early case in which jurisdiction was based on this exception, *Burnett v Burnett*,⁹¹ was not free from doubt.

In *Burnett v Burnett*⁹² a husband and wife were married in Grahamstown (in the Cape Colony), but they never lived together, the husband leaving immediately after the solemnisation of the marriage. After nine months the wife saw him again "at the door" when he came to ask for money. She subsequently moved to Bloemfontein with her parents and that is where she commenced proceedings for divorce. The crucial question was whether the Orange River Colony Court had jurisdiction to hear the matter. It is clear that the sympathy of the majority of the judges lay with the unfortunate woman:

"The Courts of law must indeed be dead instruments for the administration of justice if it has to be laid down that they cannot help the woman because the result of their action may as a secondary matter affect another. So far as jurisdiction goes, ... I think this Court in such a case should directly and immediately assist the woman."⁹³

Without any real inquiry into the domicile of the husband the court decided that the wife was *bona fide* domiciled within its jurisdiction and therefore the court had jurisdiction to entertain the action. Finding no authority for the view that a wife could acquire an independent domicile from that of her husband amongst the Roman-Dutch

90 In *Mason v Mason* (1885) 4 EDC 330 355 Buchanan J advanced the view that if the husband made cohabitation impossible the basis of the doctrine that the wife followed the domicile of the husband was destroyed, and the wife was then compelled to establish a separate forensic domicile in order to obtain justice against him. However, Buchanan J chose to base his decision on the fact that the husband had not changed his Cape domicile, rather than founding jurisdiction on the wife's separate forensic domicile.

91 (1895) 12 CLJ 147 (OFS).

92 *Ibid.*

93 148.

or English authorities, the court relied on the American writer, Bishop, to the effect that if a wife had the right to sue, the law should provide her with a domicile in which to bring the suit, otherwise the right would be of no effect.⁹⁴ *Bona fide* domicile also raises a problem: did this not simply indicate residence?⁹⁵ *In Ex parte Kaiser*⁹⁶ Innes CJ was critical of the decision in the *Burnett* case, adding that it did not seem as if the extraterritorial recognition of the decree was considered. He also expressed doubt as to whether it was fitting for a court administering Roman-Dutch law to follow the American view in regard to jurisdiction in matters of divorce.⁹⁷

The perception gleaned from the *Burnett* case that, following the American view, a wife was entitled to acquire her own domicile, wherever she chose, in order to obtain the relief that she was as of right entitled to, certainly did not resound in our courts. This specific exception to the wife's domicile of dependence was limited to those instances where, in the words of Kotzé JP in *Hudson v Hudson*,⁹⁸ "... for instance, a man comes to South Africa on a shooting trip, and during a short residence in this colony marries a woman who has been born and is domiciled here,⁹⁹ then goes north on his expedition and never returns to her". In other words, there had to be a prior link with the jurisdiction where the wife wished to institute action in order to prevent "this country being resorted to by women who desire to acquire a domicile here in order

94 148-149.

95 This is difficult to establish, since the report contains no sign of a proper investigation into either the husband's or the wife's "independent" domicile. It only states that the wife has lived with her parents in Bloemfontein, but does not say anything about her intentions.

96 1902 TH 165 173.

97 173-174. See also *Atkinson v Atkinson* 2 Off Rep 212 (1895) 213-214.

98 1907 EDC 189 192.

99 Cf also *Ex parte Stevens* 1912 EDL 443 446:

"... where the domicile of origin of the wife was within the jurisdiction of the Court, and where she had not subsequently changed that domicile through marrying her husband, who was domiciled elsewhere, or who had acquired a fresh domicile beyond the jurisdiction of the Court."

to take proceedings against their husbands".¹⁰⁰

A number of cases in which jurisdiction was denied to a deserted wife really tug at one's sense of justice; for many of them the relief brought about by the 1939¹⁰¹ (and later on the 1968¹⁰²) legislation, in terms of which the residence of the wife played a part in regard to the assumption of jurisdiction, came too late.

In *Ex parte Kaiser*¹⁰³ a wife had to leave the common matrimonial home (in Cape Town) when her husband refused to provide her with a home any longer. She went to Johannesburg where she worked in order to earn a living for herself and her child, since her husband did not provide any maintenance. She wanted to institute an action for divorce in the Transvaal, stating that she intended remaining in Johannesburg. The court declined jurisdiction since the wife was domiciled outside the Transvaal when her husband deserted her and her husband had never acquired a domicile in the Transvaal. Realising the hardship that would ensue from this decision (since the husband had in all probability left the country, the wife would remain bound by a marriage that had clearly failed), Innes CJ justified his decision as follows:

"It seems to me by far the lesser of two evils to disappoint the desire of a woman like the applicant, whose case appears a hard one, and whose *bonâ fides* [sic] I have no reason to doubt, than to introduce an unnecessary element of uncertainty into one of the most important

100 Per Innes CJ in *Ex parte Kaiser* 1902 TH 165 176.

101 In terms of the Matrimonial Causes Jurisdiction Act 22 of 1939 s 1(1) a wife could institute action for divorce in the division of the Supreme Court in which she had been ordinarily resident for at least a year before proceedings commenced, provided that her husband was domiciled in South Africa: see the discussion in **Chapter 2** under **2.2.2 Statutory intervention**.

102 The General Law Amendment Act 70 of 1968 s 1(1) which made provision for cases where the husband was not domiciled in South Africa: see the discussion in **Chapter 2** under **2.2.2 Statutory intervention**.

103 1902 TH 165.

relationships which a man and a woman can enter."¹⁰⁴

In *Ex parte Standring*¹⁰⁵ the court declined jurisdiction in an action for the restitution of conjugal rights, despite the fact that the wife's domicile of origin was within the court's jurisdiction. The husband had come to South Africa from England, married and lived together with his wife in the Eastern Cape. During her husband's imprisonment (four years) Mrs Standring lived with her parents in Kingwilliamstown where her husband joined her upon his release. They moved to Natal where the husband presumably acquired a domicile of choice. He subsequently sent his wife back to her parents and she had not seen or received any money from him since. At the time of the institution of the proceedings against him, his whereabouts were unknown. In refusing to entertain the action, Kotzé JP said that the husband had acquired a domicile in Natal and that, while there might be exceptional cases in which a wife could acquire a separate forensic domicile for purposes of divorce proceedings against her husband, the case before him was not one of those.¹⁰⁶ That Mrs Standring's case was not without merit (her domicile of origin was within the jurisdiction of the court and they were married there), is clear from comments by Kotzé JP himself in a subsequent case, *Hudson v Hudson*¹⁰⁷. He further stated that although the case involved hardship for the wife, it was a far lesser evil to disappoint those who sought a dissolution of the

104 174.

105 1906 EDC 169.

106 182.

107 1907 EDC 189. *In casu*, Kotzé JP compared the facts and circumstances of *Hudson and Standring* and concluded (at 191) that:

"*Standring's* case was a stronger case than this, in that the husband and wife had been married in this colony and had lived together at Kingwilliamstown; but even there, as the husband appeared at the time of the application to be domiciled in Natal, whither the wife had followed him and where she had lived with him for nine months, the Court held it had no jurisdiction in an action for restitution of conjugal rights, and failing that for divorce."

See also *Ex parte Stevens* 1912 EDL 443 445 where Kotzé JP made similar comments in regard to *Standring*.

marriage tie than to introduce uncertainty into the area of divorce jurisdiction.¹⁰⁸

Similarly, jurisdiction was denied in *Hudson v Hudson*¹⁰⁹ (again by Kotzé JP), because neither of the parties had been domiciled within the jurisdiction of the court prior to their marriage and neither had they married there or had they set up a matrimonial home there. The wife was in a quandary: her husband had deserted her in the Orange River Colony (where they were domiciled at the time of the marriage), stating that he had lost all his money in racing and gambling, that he was a ruined man and that she would never see him again. She moved to Port Elizabeth where she made her living as a nurse and where she intended to remain.

In *Hooper v Hooper*¹¹⁰ Kotzé JP came across the appropriate set of facts for reliance on this exception of a separate forensic domicile: the wife (plaintiff) had been brought up within the court's jurisdiction (Port Elizabeth), the parties were married there and set up their matrimonial home there. However, it was not necessary to rely on this exception for jurisdictional purposes, since the parties were, at the time of the institution of proceedings, domiciled within the court's jurisdiction. In view of this *dictum*, the different decisions in *Dyus v Dyus*¹¹¹ and *Ex parte Edwards*¹¹² seem difficult to explain. The facts of these two cases were remarkably similar: in both cases the wife (plaintiff) was domiciled within the jurisdiction of the court before the marriage and that was also where the respective marriages took place. In both instances the husbands were sailors and sailed away the day after their wedding, never to resume marital relations. However, it does not seem as if either of the husbands was ever domiciled within the area of the court or as if either of them ever resided there. In the

108 182-183.

109 1907 EDC 189.

110 1908 EDC 474.

111 (1926) 47 NLR 259.

112 1933 EDL 224.

Dyus case the court assumed jurisdiction on the basis of the exception, stated in *Hudson v Hudson*,¹¹³ that a court was justified to accommodate the action of a wife in a case where a man came to South Africa on a shooting trip and, during a short residence, married a woman who had been born and was domiciled within the jurisdiction of the court, and thereafter abandoned her.¹¹⁴ Tatham J stated further that he was also influenced by the consideration that he was entitled to assume, in the absence of any evidence to the contrary, that the parties were domiciled at the place where the marriage took place.¹¹⁵ This seems a rather strange assumption, since the husband had never even resided within the jurisdiction of the court.¹¹⁶ This seemed to be the very reason why jurisdiction was denied in the *Edwards* case, since Pittman J said that there must be something from which domicile could reasonably be inferred.¹¹⁷ In the *Dyus* case Tatham J admitted that the case was near the borderline and pleaded for a revision of the divorce laws.¹¹⁸

The cases discussed above prove the non-existence of the second exception to the wife's domicile of dependence. The separate forensic domicile proved to be nothing less than a previous link with the area of jurisdiction, such as the wife having been born and domiciled within the jurisdiction of the court, as well as having married there and having established a matrimonial home there. If the deserted wife had been forced to go elsewhere in order to earn a living, she had no redress, since this exception did not allow her to acquire a separate domicile in another jurisdiction in order to sue her husband for divorce.

113 1907 EDC 189 192.

114 *Dyus v Dyus* (1926) 47 NLR 259 260.

115 *Ibid.*

116 See the headnote to the case.

117 *Edwards v Edwards* 1933 EDL 224 226.

118 *Dyus v Dyus* (1926) 47 NLR 259 260-261.

2.1.1.3 Preliminary conclusions

Thus the general doctrine of the wife's domicile of dependence, despite the injustice and hardship caused by its application, remained the law until 1992.¹¹⁹ The cases discussed above bear out the discrepancy between reality and fiction: the wife's domicile of dependence was a legal fiction indeed, which, in cases where the husband and wife had been living apart for some time, did not take cognisance of the wife's intention as to where she intended to settle in order to earn a living. Therefore, the reform brought about by the Domicile Act¹²⁰ to the effect that the wife may acquire her own domicile of choice, independent of that of her husband, was, to say the least, long overdue. But there is also another important point which must be borne in mind: the forced interpretation given to domicile in cases such as *Mason v Mason*¹²¹ must be viewed within the context of the jurisdictional difficulties caused by the domicile of dependence. Although the existence of the two exceptions discussed above was acknowledged in a number of cases, neither found general application. It cannot be denied that, where common sense dictated the assumption of jurisdiction in a deserving case, "legal manoeuvres" around the concept of *domicilium* had to provide the answer.¹²² This was certainly an area where the law lagged pitifully behind the reality of a cosmopolitan society; a deserted wife could actually have remained tied to a marriage that had long since ceased to exist. Up till 1910, when the Union of South Africa came into existence, problems in regard to divorce jurisdiction were aggravated by the existence of separate Southern African colonies, each operating like a separate

119 It was abolished by s 1(1) of the Domicile Act 3 of 1992.

120 3 of 1992 s 1(1).

121 (1885) 4 EDC 330 351 where Shippard J said that it was only by legal fiction that the husband could have been assumed to have retained his Eastern Cape domicile, since the evidence proved him to have abandoned that domicile deliberately and permanently. See also *Etheridge v Etheridge* (1902) 23 NLR 180.

122 Cf cases like *Hawkes v Hawkes* (1882) 2 SC 109; *Mason v Mason* (1885) 4 EDC 330; *McCurrach v McCurrach* (1892) 6 HCG 256; *Ex Parte Hamman* (1894) 1 Off Rep 306; *Etheridge v Etheridge* (1902) 23 NLR 180; *Thompson v Thompson* 1940 SR 187.

country for jurisdictional purposes.¹²³ This meant that a deserted wife, whose husband had just gone across the border into another colony, was in exactly the same position as if he had gone to Australia or England. After 1910, the institution of an Appeal Court for all the provinces alleviated matters somewhat, but each division of the Supreme Court still insisted on domicile within its area of jurisdiction.¹²⁴ With the benefit of hindsight it is clear that, instead of extending the jurisdictional grounds for divorce by statute, the root cause of the problem, namely the doctrine of the wife's domicile of dependence, should have been addressed. The abolition of this doctrine would have cured the jurisdictional ills and, at the same time, freed the concept of *domicilium* from the jurisdictional chains within which it had become entangled. It is hoped the injustice suffered by many deserted wives will not have been in vain and that the law reformer will heed this lesson from our not so distant past.

123 See eg *De Senan v De Senan* (1908) 18 CTR 759 760:

"... there are different jurisdictions and different domiciles - a state of things which is not one of the least weighty arguments in favour of some system of fusion of the various portions of British South Africa ..."

124 See eg *Cowan v Cowan* (1925) 6 PH B4 (T):

"... though a judge of the Court of one Province is a judge of the Supreme Court of the whole of South Africa, this fact does not necessarily give this Court jurisdiction in a case where otherwise it would not have jurisdiction."

See also the criticism in *Jooste v Jooste* 1938 NPD 212 213:

"... it seems to me regrettable to consume time, effort and private and public money on an investigation of this kind ... in order merely to decide which of two of the Provincial Divisions of the Supreme court of South Africa is the forum having jurisdiction to decide whether South African citizens are entitled to dissolution of their marriage, it being common cause that both the plaintiff and the defendant are domiciled in the Union ..."

See also *Croft v Croft* 1930 WLD 201 where De Waal JP expressed the opinion that the courts of the Union should have concurrent jurisdiction in cases where the parties roam from one province to another without any fixed place of abode or residence, as well as *Smith v Smith* 1952 (4) SA 750 (O) 756.

2.1.2 *Ubi uxor, ibi domus*

Another legal "mechanism" that was often employed to assume jurisdiction in the case of a deserted wife, was the maxim *ubi uxor, ibi domus*.¹²⁵ The gist of this maxim was that where a man left his home and his wife, the presumption was raised that he did not intend changing his domicile.¹²⁶ The applicability of the maxim was limited to cases where the husband had left the place of mutual domicile of the parties and the wife had remained there. Thus, where the wife had also been forced to leave the place of mutual domicile in order to earn a living or to return to her parents, the maxim could not aid her in filing for divorce in the court of the area in which she then resided.¹²⁷ Whereas the true construction of the maxim seemed to be that the husband was only temporarily absent from the matrimonial home,¹²⁸ and could therefore not have abandoned the matrimonial home or acquired a new domicile elsewhere, the maxim was employed to accommodate instances where it would seem that the husband had in fact abandoned the mutual domicile or never intended living there. *McCurrach v McCurrach*¹²⁹ and *Ex parte Rowland*¹³⁰ are examples of such cases.

In *McCurrach v McCurrach*¹³¹ the husband, originally from Scotland, came to Kimberley, where he remained for five years. During this period he married his wife

125 Where the wife is, there is the home.

126 Per De Villiers CJ in *Adams v Adams* (1882) 2 SC 24 25. See also *Mason v Mason* (1885) 4 EDC 330 356; *McCurrach v McCurrach* (1892) 6 HCG 256 259; *Gqiba v Gqiba* (1901) 16 EDC 4; *Ex parte Kaiser* 1902 TH 165 176; *Robarts v Robarts* (1903) 17 EDC 132 139; *Ex parte Standring* 1905 EDC 169 179; *Clayton v Clayton* 1922 CPD 125 127; *Ricketts v Ricketts* 1929 EDL 221 224.

127 See eg *Ex parte Kaiser* 1902 TH 165 and *Ex parte Standring* 1906 EDC 169.

128 See counsel's argument in *Gqiba v Gqiba* (1901) 16 EDC 4. See also the facts of *Robarts v Robarts* (1903) 17 EDC 132 and *Ricketts v Ricketts* 1929 EDL 221.

129 (1892) 6 HCG 256.

130 1937 (1) PH B8 (T).

131 (1892) 6 HCG 256.

and they set up a home. They subsequently left for Scotland to visit his mother, selling the furniture and Mr McCurrach resigning from his job. He tried to obtain employment in Scotland, but was unsuccessful and left for Australia. When his wife did not hear from him again, she returned to her mother in Kimberley. She wanted to institute action for divorce in the High Court of Griqualand West and the question of jurisdiction was raised. From the facts of the case it seems as if Mr McCurrach had definitely abandoned whatever domicile he might have acquired in South Africa, but Hopley J decided that the court had jurisdiction to entertain the action on the grounds of the maxim *ubi uxor, ibi domus*, as well as the policy of the Supreme Court which, according to him, was not to inquire too minutely into the question of jurisdiction with the probable result of depriving an innocent plaintiff of redress.¹³² This decision was criticised by Kotzé JP in *Ex parte Standring*:¹³³ "... the court, in its anxiety to meet the application of the wife, was guided by the maxim *ubi uxor, ibi domus* ..." According to Kotzé JP, the maxim could only have found application had the husband, when he went to Scotland, left his wife in Kimberley.

The facts of *Ex parte Rowland*¹³⁴ were as follows: The husband, whose domicile of origin was Irish, came to South Africa with his parents where they settled and acquired a domicile. He fought in the First World War and, although he came back to South Africa, he went to England for medical treatment on two occasions, apparently not returning after the second time. Whilst in England for the second period of medical treatment, he married a South African girl who had, prior to her marriage, resided in South Africa (with her parents) for twenty-five years. A year after the marriage the wife returned to South Africa on the understanding that her husband would follow, which he did not do. She visited him again in England five years later and fifteen years after they were married she received a letter from her husband informing her that he had

132 259.

133 1906 EDC 169 178.

134 1937 (1) PH B8 (T).

no intention of living with her again or providing a home for her. Mrs Rowland wished to institute an action for the restitution of conjugal rights and the question arose whether the Transvaal Provincial Division had jurisdiction. It was decided that the court had jurisdiction on the basis of the maxim *ubi uxor, ibi domus*. For, by marrying a South African woman and sending her back to what she presumably regarded as her home, on the understanding that he would follow her, the husband had made it clear that he intended to retain his Transvaal domicile. Now, although there is no doubt that he had a Transvaal domicile before the war, one cannot help but wonder how this maxim could have been invoked in a case where the husband had for fifteen years never joined his wife in their matrimonial home and eventually informed her that he did not intend living with her.

In cases like *McCurrach* and *Rowland* the presumption created by the maxim, namely that a husband does not intend changing his domicile when he leaves his wife behind, was stretched beyond its limit. This was no doubt brought about by the fact that in most of these cases, there was no appearance by the husband (the defendant)¹³⁵ and consequently no attempt to rebut the presumption.¹³⁶ Therefore the statement of Kotzé J in *Clayton v Clayton*,¹³⁷ that the maxim merely creates a presumption which only holds true until it is rebutted, though undoubtedly correct, does not take account of the reality of unrepresented defendants, husbands who had in many instances left the country and would not have taken the trouble to return for a court case. In such cases the very first stage of divorce proceedings often culminated in a final order; the defendant, though in some cases aware of the proceedings against

135 See eg *Adams v Adams* (1882) 2 SC 24; *McCurrach v McCurrach* (1892) 6 HCG 256; *Gqiba v Gqiba* (1901) 16 EDC 4; *Blair v Blair* 1914 SR 111; *Hills v Hills* 1933 NPD 84; *Ex parte Rowland* 1937 (1) PH B8 (T); *Orton v Orton* 1938 (2) PH B57 (T); but see *Ex parte Edwards* 1933 EDL 224 (discussed *supra*) where the maxim *ubi uxor, ibi domus* was not applied.

136 See, however, *Robarts v Robarts* (1903) 17 EDC 132 and *Ricketts v Ricketts* 1929 EDL 221: in both cases the maxim was applied, but the defendant was properly represented and objection to jurisdiction duly filed.

137 1922 CPD 125 127.

him, not bothering to reply. Therefore, a provisional¹³⁸ assumption of jurisdiction, remaining unchallenged, became a final one. Herein lies the weakness of a presumption such as this one: in the absence of a proper defence, jurisdiction could have been assumed by the court even though, in actual fact, the defendant-husband was not domiciled in the area of the jurisdiction of the court. --

That the maxim *ubi uxor, ibi domus* was in some instances regarded in the same light as an exception to the wife's domicile of dependence, is clear from a case such as *Shapiro v Shapiro*¹³⁹ where Mason J said the following:

"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."¹⁴⁰

It does seem, though, as if the courts were less reluctant to base jurisdiction on this maxim than on one of the exceptions to the wife's domicile of dependence. The reason for this might have been that the presumption created by this maxim, namely that the husband does not intend changing his domicile, was in accordance with the rule, well-known to our Roman-Dutch writers, that a change of domicile is not to be presumed too easily.¹⁴¹ Although this presumption facilitated the assumption of jurisdiction, it was often not a true reflection of reality. In cases where a forced interpretation of the maxim applied or where the presumption created by the maxim went unchallenged, the domicile ascribed to the husband did not correspond with his

138 See *Hills v Hills* 1933 NPD 84 87.

139 1914 WLD 38.

140 40.

141 Voet *Commentarius* 5 1 99 (Gane's translation):

"Nevertheless in case of doubt change of domicile is not to be readily presumed; so that he who sets it up is bound to prove it as a matter of fact."

true *animus* in regard to whether he had changed his domicile or not.

In view of the fact that married couples do not necessarily share a common domicile any longer,¹⁴² the application of this maxim should be limited in future. Certainly a deserted wife will have no need for it, since she may institute action for divorce in the area of jurisdiction where she herself is domiciled, or on the basis of ordinary residence as stipulated in the Divorce Act.¹⁴³ Once again, the solutions adopted in the cases discussed above, should be viewed within the framework of the jurisdictional difficulties encountered in the past.

However, the Domicile Act¹⁴⁴ does not render this maxim redundant. It is possible that this maxim may be invoked to establish the domicile of the husband in a doubtful case. Since the domicile of origin no longer revives automatically, the last domicile of a person continues until a new one has been acquired.¹⁴⁵ Where a husband has left his wife, but has not acquired a new domicile of choice, this maxim may be used to determine where his last domicile was. This is one instance where the domicile assigned to a husband will not accord with his *animus*, since he has definitely abandoned his last domicile, but the law has to provide an answer in order to prevent a stalemate situation.¹⁴⁶

2.2 The domicile of a married woman and the conflict of laws

In the area of the conflict of laws the wife's domicile of dependence has not, in the

142 The wife may now acquire her own domicile: s 1(1) of the Domicile Act 3 of 1992.

143 70 of 1979 s 2: See **Chapter 2** under **2.2.2 Statutory intervention**.

144 3 of 1992.

145 See s 3(1) of the Domicile Act 3 of 1992.

146 In South African law no person may be without a domicile: see the South African Law Commission's Report on Domicile 1990 (Project 60) par 1.15.

past, produced the unjust and indefensible results which it has in regard to divorce jurisdiction: women have only recently emerged as major financial contributors to the family household. The domicile of a married couple is used as a connecting factor in two choice of law rules pertaining to the consequences of marriage. In the first place, the personal consequences of a marriage are determined by the *lex domicilii* of the parties to the marriage at the time when the act in issue occurred.¹⁴⁷ Secondly, in the absence of an antenuptial contract, the proprietary consequences of a marriage are governed by the *lex domicilii matrimonii*.¹⁴⁸

Where domicile has been used in the past as a choice of law connecting factor in regard to the personal consequences of a marriage, it has referred to the domicile of the married couple as it changed from time to time, and more specifically, to the domicile *at the time when the act in question occurred*.¹⁴⁹ Since the wife can now acquire her own independent domicile,¹⁵⁰ the question arises whether the abolition of the wife's domicile of dependence affects the connecting factor in this conflict rule. The South African Law Commission chose not to regulate this aspect of the conflict of laws directly¹⁵¹ and therefore, in the absence of any indication to the contrary, it must be assumed that the abolition of the wife's domicile of dependence will affect the determination of the connecting factor in this conflict rule. Which party's domicile will

147 *Kent v Salmon* 1910 TPD 637; *Powell v Powell* 1953 (4) SA 380 (W); *Perrot-Humphrey v Perrot-Humphrey* 1967 (3) SA 304 (W) and see Edwards *LAWSA: Conflict* par 440; Forsyth *Private International Law* 256ff; *Hahlo & Kahn Husband and Wife* 623ff; *Van Rooyen Kontrak* 120ff. Cf also **Chapter 3** under **2.1.2 Personal consequences of a marriage**.

148 *Blatchford v Blatchford's Executors* (1881) 1 EDC 365; *Clear v Clear* 1913 CPD 835; *Brown v Brown* 1921 AD 478; *Anderson v The Master and Others* 1949 (4)SA 660 (E); *Sperling v Sperling* 1975 (3) SA 707 (A); *Bell v Bell* 1991 (4) SA 195 (W) and see Edwards *LAWSA: Conflict* par 441; Forsyth *Private International Law* 259. Cf also **Chapter 3** under **2.1.3 Proprietary consequences of a marriage**.

149 Edwards *LAWSA: Conflict* par 440.

150 S 1(1) of the Domicile Act 3 of 1992.

151 The Report on Domicile 1990 (Project 60) only refers to proprietary consequences: par 6.2ff. The proposal by one commentator that a provision encompassing personal, as well as proprietary, consequences be inserted, was rejected.

be decisive in which circumstances, will have to be decided by the courts.¹⁵²

However, in regard to the choice of law rule in respect of the proprietary consequences of a marriage in the absence of an antenuptial contract, the connecting factor is the matrimonial domicile, that is the domicile of the parties *at the time of marriage*, which becomes immutably fixed so as to determine the proprietary consequences once and for all.¹⁵³ If the intending spouses had different domiciles at the time of the marriage, the domicile of the husband has always prevailed.¹⁵⁴ In the past this preference for the husband's domicile could have been justified on the basis that the husband was, in all respects, the head of the household. However, with the emergence of the wife as a major financial contributor to the household, the ratio for this arrangement is disappearing fast. This is definitely an area where reform is needed.¹⁵⁵

2.3 Preliminary conclusions

There can be no question that the wife's domicile of dependence had to be abolished - on occasion it has been called the "last barbarous relic of a wife's servitude".¹⁵⁶ However, sight must not be lost of the effect that this doctrine has had on the law of domicile in the past, as well as the possible need for further reform in the future.

152 See further the discussion in **Chapter 7** under **3.2 Issues other than status**.

153 *Hahlo & Kahn Husband and Wife* 631 fn 463.

154 See *Gunn v Gunn* 1910 TPD 423 427:

"Where both spouses are not, at the date of the marriage, domiciled in the same country, then the domicile of the husband prevails, and the law of that domicile is the one to which the parties are understood to have submitted themselves."

155 For a more specific reform proposal in regard to proprietary consequences, see **Chapter 7** under **3.2 Issues other than status**.

156 *Gray v Formosa* [1963] P 259 267.

With regard to divorce jurisdiction, especially, the doctrine of dependence has been a major obstacle in the past. In many cases courts have, out of sympathy for the deserted wife, assumed jurisdiction where the husband was definitely not domiciled in the area of the court's jurisdiction. In the process forced and manipulated interpretations were given to the concept of domicile in order to found jurisdiction.¹⁵⁷ Therefore a warning must be sounded: these cases on divorce jurisdiction must be studied in context with a full knowledge of the historical peculiarities relating to divorce jurisdiction at the time. Otherwise a reader of these cases might be perplexed by the interpretations given to domicile. Since these cases constitute the majority of case law on domicile in South Africa, this *caveat* must be heeded when these cases are consulted in future.

With a view to the future, clarification must be sought in regard to the two choice of law rules pertaining to personal and proprietary consequences of the marriage (in the absence of an antenuptial contract) respectively: determination of the dominant domicile of the partners in these two rules will have to be reviewed, or alternative measures of reform will have to be considered.¹⁵⁸

3 Freedom of choice

Another aspect which often complicates the ascertainment of a domicile of choice, is the question whether certain categories of people are free agents in the sense of being capable of acquiring a domicile of their own. These categories include members of the armed forces (soldiers, sailors, etc), deported persons, prisoners and prohibited immigrants, as well as government employees and contract workers; all of whom are dependent upon a higher authority in regard to where they are stationed or where they

157 See the cases discussed *supra* under 2.1 **The wife's domicile of dependence**, as well as Schoeman 1995 *THRHR* 488.

158 See further **Chapter 7** under 3.2 **Issues other than status**.

are allowed to stay and, in some instances, how long their stay will be.¹⁵⁹ Although the South African Law Commission considered the problem of individuals with limited choice, no special recommendations in this regard were deemed necessary.¹⁶⁰ However, as the following survey of case law will show, the common law position is not altogether clear cut.

3.1 Members of the armed forces

The question in regard to members of the armed forces is simply: can a soldier acquire a domicile of choice, despite being liable to be called away at any time? The answer to this question is complicated: while it is true that a soldier is able to formulate an intention (*animus*) as to where he wishes to reside, the legal issue is whether he has the power to carry out his intention¹⁶¹ given the restraints in regard to freedom of choice that exist within his profession. In the absence of an Appellate Division decision on this question, the case law is divided.

In a number of cases it was held that members of the armed forces were under orders from their superiors and therefore they did not have the capacity to realise the requisite *animus* for the acquisition of a domicile of choice.¹⁶² Support for this view was found in the English law and in most of these cases reliance was placed on the

159 See Turpin 1957 SALJ 201 for a discussion of this topic.

160 See Report on Domicile 1990 (Project 60) par 3.76.

161 See *Ex parte Quintrell* 1922 TPD 14 15, 18.

162 See *Lea v Lea* (1902) 23 NLR 91 92; *Brace v Brace* (1904) 25 NLR 52 53ff; *Ex parte Quintrell* 1922 TPD 14 15, 18; *Fozard v Fozard* 1924 CPD 62 63; *Neaves v Neaves* 1936 NPD 682; *Jordaan v Jordaan* 1939 OPD 197 198; *Van Niekerk v Van Niekerk* 1941 TPD 59 61ff; *Ex parte De Lange* 1941 (2) PH B82 (W); *Baxter v Baxter* 1943 NPD 85 86; *Frankenberg v Frankenberg* 1943 EDL 147 149ff; *McMillan v McMillan* 1943 TPD 345 347ff; *Davel v Davel* 1944 (2) PH B49 (W).

English writer, Dicey.¹⁶³ *Fozard v Fozard*¹⁶⁴ provided the typical set of facts: The husband, a member of the Royal Navy, was stationed in the Cape Province (Simonstown) where he was married. After his discharge from the navy, he intended settling in Cape Town where he had every prospect of obtaining employment in a ship chandler's business. In an action for divorce by the husband, Gardiner J declined jurisdiction on the basis that the husband was not a free agent, since he could still be transferred to another part of the world before his discharge. He further stated that a member of the armed forces, as a rule, retained his domicile of origin.¹⁶⁵

In *Frankenberg v Frankenberg*¹⁶⁶ jurisdiction was denied on the same basis. The husband was a medical officer in the Royal Air Force, stationed at Port Elizabeth. He declared that it was his intention to settle in Port Elizabeth after his discharge from the air force and produced letters to corroborate this, one being an offer by a local doctor of a partnership which he had accepted. In an action for divorce by the husband, Lewis AJ denied jurisdiction since the husband was still in the air force and had not yet applied for registration as a doctor in South Africa. While he was still in the air force he could be sent anywhere and therefore it was of necessity impossible for a member of the armed forces to declare a "present and binding intention to settle in the place he happens to be stationed".¹⁶⁷

In *McMillan v McMillan*¹⁶⁸ Murray J gave an interesting interpretation of the intention of members of the armed forces in regard to a domicile of choice. In this case the husband, a member of the Royal Air Force, had formed the intention to settle in the

163 *Conflict of Laws* (2nd ed).

164 1924 CPD 62.

165 63. See also *Jordaan v Jordaan* 1939 OPD 197 198 and *Baxter v Baxter* 1943 NPD 85 86.

166 1943 EDL 147.

167 149.

168 1943 TPD 345.

Transvaal upon his discharge and had already secured employment there. In an action for divorce by the husband jurisdiction was denied on the ground that he was not a free agent.¹⁶⁹ Murray J came up with the following construction of such a person's intention:

"... the accepted intention remains in abeyance during such period 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."¹⁷⁰

One may well ask whether an intention that is held in abeyance is any intention at all and it is clear that during the period that such an intention was held in abeyance, it could not aid the *propositus*. It could only be fulfilled once the person had been discharged from the armed forces. Therefore, the result was no different from the previous cases in which it was held that a member of the armed forces did not have the power to carry out the requisite intention in order to acquire a domicile of choice.¹⁷¹

There were, however, also a considerable number of cases that supported the opposite view, namely that soldiers, sailors and the like, were in a position to carry out the intention to acquire a domicile of choice. In a number of cases the court assumed jurisdiction on the basis that a member of the armed forces did acquire a domicile of choice¹⁷² under circumstances in which jurisdiction was denied in other cases of a

169 Murray J's likening of a member of the RAF to a lunatic, who cannot exercise choice or will and therefore cannot acquire a domicile (see 348 of the report), can certainly not be accepted.

170 353.

171 See *Nicol v Nicol* 1948 (2) SA 613 (C) 618 for criticism of *McMillan*.

172 *Davies v Davies* 1922 CPD 323; *Bishop v Bishop* 1923 CPD 414; *Phillips v Phillips* 1937 CPD 54 (*in casu* the court was influenced by the fact that the defendant had written a letter to the court stating that he did not object to the jurisdiction of the court); *Evans v Evans* 1942 SR 12; *Commin v Commin* 1942 WLD 191; *Pickford v Pickford* 1943 SR 6; *Paterson v Paterson* 1946

similar nature.¹⁷³

*Davies v Davies*¹⁷⁴ was a doubtful case. The husband, whose domicile of origin was English, came to South Africa as a member of the Royal Navy and subsequently joined the South African forces during the First World War. The day before he departed overseas he married a South African woman and said that he would return after the war. When he failed to return, she instituted an action for divorce and the question of jurisdiction had to be decided. Although the court assumed jurisdiction, it is clear that Gardiner J was in some doubt: "Had it not been for the decision in *King v King*,¹⁷⁵ which goes very far, I doubt whether I should have been prepared to give an order."¹⁷⁶

In *Evans v Evans*¹⁷⁷ the question whether a member of the armed forces could acquire a domicile of choice was decided on the presumption that such persons could not freely acquire a domicile of choice, but that the presumption could be rebutted. In this case the husband, whose domicile of origin was English, came to Southern Rhodesia as a member of the Royal Air Force at his own request and formed the

EDL 67; *Nicol v Nicol* 1948 (2) SA 613 (C); *Hibbs v Wynne* 1949 (2) SA 10 (C); *Ex parte Readings* 1958 (4) SA 432 (C).

173 See eg *Lea v Lea* (1902) 23 NLR 91; *Brace v Brace* (1904) 25 NLR 52; *Ex parte Quintrell* 1922 TPD 14; *Ex parte De Lange* 1941 (2) PH B82 (W); *Baxter v Baxter* 1943 NPD 85; *Davel v Davel* 1944 (2) PH B49 (W); *Fozard v Fozard* 1924 CPD 62; *Van Niekerk v Van Niekerk* 1941 TPD 59; *Frankenberg v Frankenberg* 1943 EDL 147; *McMillan v McMillan* 1943 TPD 345.

174 1922 CPD 323.

175 Unfortunately the report on *King v King* 1914 WR 282 is very brief and no reference is made to domicile as such. It seems, though, as if the court had assumed jurisdiction in a case where the husband (a steward in the Royal Navy) had left his wife four days after the marriage and did not have the intention to return. Whether he had acquired a domicile in the Cape Colony at all, is not clear. If he had had an English domicile of origin, it is hard to believe that he would have relinquished it and acquired a domicile in the Cape.

176 324. Although this was not specifically mentioned, the fact that the husband had joined the South African forces, might have played a role.

177 1942 SR 12.

intention of settling there after the war. He subsequently had a legacy transferred to Rhodesia, rented a house and sent for his family. His wife deserted him there and in an action brought by him for divorce, the question was whether the Southern Rhodesian court had jurisdiction. The court assumed jurisdiction, apparently on the basis that the husband had acquired a domicile in Southern Rhodesia and had therefore rebutted the presumption that a member of the armed forces could not acquire a domicile of choice.¹⁷⁸ According to this interpretation it would seem as if Dicey's view that a soldier did not have the power to carry out the requisite intention, was not an absolute rule, but a presumption that could be rebutted.

Another dimension was introduced to the stereotype fact-complex of soldiers, sailors and other members of the armed forces by the cases of *Powell v Powell*¹⁷⁹ and *Baker v Baker*.¹⁸⁰ In both cases the husbands had decided to settle in South Africa and brought their families here, but were subsequently sent elsewhere by the military and spent vacations with their families in South Africa. In both cases it was held that they had acquired a domicile in South Africa. In the *Baker* case the *ratio* for the decision was clearly spelt out:

"For here we are not dealing with the case of a soldier seeking to establish a domicile of choice in the country in which he is stationed¹⁸¹ ... During his period of leave¹⁸² he was a free agent, entitled to select and establish his home wherever in the world he pleased, outside the

178 The report is very brief, but this seems to be the gist of the decision. The decision was supported in *Commin v Commin* 1942 WLD 191.

179 1943 (1) PH B2 (C).

180 1945 AD 708.

181 Although the *Baker* case was an Appeal Court decision it did not cover the same ground as the other cases in regard to servicemen and thus did not establish a precedent in regard to the question whether servicemen, under orders from their superiors, are capable of realising the intention required to acquire a domicile of choice.

182 Three weeks, according to the reports.

limits of enemy territory."¹⁸³

This result seems unsatisfactory in view of the cases in which it was held that a soldier could not acquire a domicile at the place where he was stationed although he had, in some instances, acquired a home there and secured employment on his discharge.¹⁸⁴ It is questionable whether a soldier on leave was a free agent indeed, since he was not in a position to carry out his intention before his discharge from the armed forces. As long as he was a member of the armed forces, his position remained the same, whether he was on leave or not.

In *Nicol v Nicol*¹⁸⁵ it was decided, after a full review of the existing case law (South African as well as English), that there was no absolute legal bar against the acquisition of a domicile by a serviceman as long as the requisite *factum* (residence) and *animus* (intention) were present. In a subsequent case, *Ex parte Readings*,¹⁸⁶ *Nicol v Nicol* was approved and De Villiers AJ advanced Roman-Dutch authority in support of the contention that it was possible for a soldier to acquire a domicile of choice at the place where he was stationed. In this regard reference was made to two opinions, one by Hugo de Groot¹⁸⁷ and the other by Johan Schrassert.¹⁸⁸ According to the first opinion it is not a requirement for the acquisition of a domicile of choice that a person's business should not be of a temporary nature:

183 1945 AD 708 715.

184 See eg *Fozard v Fozard* 1924 CPD 62; *Frankenberg v Frankenberg* 1943 EDL 147; *McMillan v McMillan* 1943 TPD 345; *Davel v Davel* 1944 (2) PH B49 (W).

185 1948 (2) SA 613 (C).

186 1958 (4) SA 432 (C).

187 The opinion is dated 31 October 1613 and reported in 3 *Holl Cons* C 196: see 436 of the case report.

188 This opinion was given in 1733 and is to be found in *Schrassert Consultatien, Advysen en Advertissementen* (Hardewyck 1740-1754): this reference is supplied by Kahn *Domicile* 58, since the reference in the case report (at 436F) is incorrect.

"It is especially noteworthy that this last-mentioned factor [ie that an individual's business should not be of a temporary nature] resorts merely amongst the *conjecturae*, ranking not even as a *firmissima*, and that any contemplation of its absence constituting an absolute bar as a matter of substantive law is therefore excluded."¹⁸⁹

The opinion by Schrassert also clearly supports the notion that a soldier may acquire a domicile of choice at the place where he is stationed, provided that the requirements for the acquisition of such a domicile are met:

"Want of wel een officier in de plaets van sijn garrisoen sig moet voorsien van een logement geduyrende sijn verblyf aldaer; soo maect dog een soodanig logement denselven niet tot een inwoonder der Stadt voor soo verre andersints een officier geen gedachten heeft om deer altoos sijn *fixum domicilium te houden*: maer behoud sijn voorige woonplaets."¹⁹⁰

It seems, therefore, that a soldier should be able to acquire a domicile of choice at the place where he is stationed, provided that he meets the requirement of lawful presence and, in terms of the Domicile Act,¹⁹¹ has the intention to settle indefinitely. This was indeed the opinion of the South African Law Commission in its Report on Domicile:¹⁹²

It appears as if a person, whose capacity to choose a domicile is restricted should nevertheless be able to exercise a choice within the limitations of his capacity. For example, nothing should prevent a long term prisoner, while being imprisoned at a particular place, from forming

189 Per De Villiers AJ in *Ex parte Readings* 1958 (4) SA 432 (C) 436C.

190 *Ibid* 436G. See Kahn 1959 SALJ 13, as well as Kahn *Domicile* 57ff for a discussion of De Villiers's judgment.

191 3 of 1992 s 1(2).

192 1990 (Project 60).

the intention to remain indefinitely in that town, district or country. The same applies to a soldier, diplomat or other person who is not present at a particular place of his own choice. It is obvious that settlement and residence at a particular place should be legal in order to acquire a domicile at that place.¹⁹³

The Commission did not deem it necessary to include a specific provision in regard to members of the armed forces. This is regrettable, since the concept "indefinite period" in the Domicile Act¹⁹⁴ may be difficult to apply in this respect: it would seem to contradict the view (supported by Roman-Dutch authority) that it is not an absolute requirement that the *propositus*'s business should not be of a temporary nature. The presence of members of the armed forces may be limited in terms of a specific period, for example two years, or it may endure subject to the happening of a future event, for example the end of a war. In this sense their presence cannot be said to be of an indefinite nature. Whether this will defeat the intention to settle for an indefinite period in terms of the Domicile Act,¹⁹⁵ remains to be seen.

3.2 Deportees, prohibited immigrants and prisoners

These three categories of people have one thing in common: they are usually banished or removed from their existing domicile and forced to go elsewhere. The question is whether they inevitably relinquish their existing domicile though they may still harbour the intention to return some day, and if they do lose their existing domicile, whether they acquire a new domicile of choice at the new place despite the fact that they intend to return to the place from which they have been banished or removed. In short, the courts are once again confronted with the question whether a

193 Par 3.76.

194 3 of 1992 s 1(2). See **Chapter 5** for an analysis of this concept.

195 3 of 1992 s 1(2).

change of domicile has taken place.

3.2.1 Deportees

In regard to deportees a number of cases followed the view, expressed in *Olwage v Buntman*,¹⁹⁶ that enforced residence elsewhere cannot affect an existing domicile in the absence of proof of an intention to change that domicile.¹⁹⁷ In *Hitchcox v Hitchcox*¹⁹⁸ the defendant-husband, whose domicile of origin was English, acquired a domicile of choice in the Cape Province. He was convicted of extortion and, after he had served his prison term, he was deported. His wife wished to institute an action for the restitution of conjugal rights, failing which, divorce, and the question of jurisdiction arose. The Cape court assumed jurisdiction on the basis that the defendant, whose whereabouts were unknown, had, according to one of his relatives, the intention to return to the Union even if his residence would be illegal. *Hitchcox* was followed in *Taylor v Taylor*,¹⁹⁹ the facts of which were similar to those related above. In both cases the defendant-husband was in default and it is clear that the courts were quite prepared to come to the aid of the deserted wife. The main problem with this point of view is that the requisite intention to return cannot be realised as long as residence in the former domicile is illegal.

The contrary view, taken in *Ex parte Donnelly*,²⁰⁰ seems the correct one, even though its result was harsh in the sense that jurisdiction was denied to the deserted wife. In this case the husband, originally from California, had acquired a domicile of choice in

196 1910 WLD 44.

197 Previously also expressed in *Ebert v Goldman* (1900) 15 SC 530. *Olwage v Buntman* was followed in *Hitchcox v Hitchcox* (1930) 2 PH B33 (C); *Taylor v Taylor* 1931 CPD 98. See also *Craven v Craven* (1923 2 PH B13 (W) (though the defendant was not deported in this case).

198 (1930) 2 PH B33 (C).

199 1931 CPD 98.

200 1915 WLD 29.

Johannesburg. He was convicted and, on the expiry of his prison term, deported to New York. His wife wanted to commence divorce proceedings, but the court refused jurisdiction on the ground that Mr Donnelly had relinquished his domicile of choice in Johannesburg. Although the old authorities were divided on the issue,²⁰¹ Mason J decided that the husband could not retain his domicile in Johannesburg if he was liable to instant punishment and deportation on his return. He also decided that, in a case such as this, the husband's domicile of origin (which was probably California) revived.²⁰²

In two subsequent cases,²⁰³ both points of view (that of *Olwage* and that of *Donnelly*) were carefully considered, but the decision in *Donnelly* to the effect that a deported person relinquishes his existing domicile, was followed.²⁰⁴ This had the effect that the deserted wife was left without a remedy in cases where her husband had been deported from South Africa, since no court could up till 1953 have assumed jurisdiction in the absence of a South African domicile at the time of the institution of proceedings.²⁰⁵ Had the wife's domicile of dependence been abolished sooner, these situations would not have occurred and no special provisions would have been

201 See 30 for a brief survey of the authorities.

202 At 33:

"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."

The Domicile Act 3 of 1992 s 3 has now abolished the revival of the domicile of origin.

203 *Ex parte Gordon* 1937 WLD 35; *Ex parte MacLeod* 1946 CPD 312.

204 See also *Drakensbergpers v Sharpe* 1963 (4) SA 615 (N).

205 It was only in 1953 that provision was made in terms of s 6 of the Matrimonial Affairs Act 37 of 1953 for divorce jurisdiction where the husband had been deported, provided that the husband was domiciled in the Union of South Africa at the date on which proceedings were instituted or had been domiciled in the Union immediately before the deportation: see **Chapter 2** under **2.2.2 Statutory intervention**.

necessary. It seems as if the wife was severely penalised by having the forced abandonment of her husband's domicile also made applicable to her.

3.2.2 Prisoners

The case of *Neffler v Neffler*²⁰⁶ presented an interesting set of facts. The husband was a Russian subject who had come to South Africa as a commercial traveller. After he was married in Johannesburg, he was sentenced to life-imprisonment for assaulting his wife. He was confined in the central prison in Bloemfontein (the assault having taken place in Bloemfontein). His wife instituted an action for divorce on the ground of his imprisonment. The defendant-husband contested the jurisdiction of the court. It was clear from the evidence that the defendant had never acquired a domicile in the Orange River Colony before being imprisoned there. In a dissenting judgment, Fawkes J maintained that the defendant retained the domicile that he had antecedent to his imprisonment and therefore the court did not have jurisdiction.²⁰⁷ However, Maasdorp CJ (Ward J concurring with him) decided that the court had jurisdiction to entertain the action:

"In the absence of authority, I think this Court must apply common-sense principles ... Equity will demand that the Court should assume jurisdiction in this case where the man is imprisoned for life."²⁰⁸

This implied, of course, that the defendant had acquired a domicile in the Orange River Colony; therefore a prisoner, serving a life-sentence, acquires a domicile where he is imprisoned. This case proved, yet again, the inadequacy of the common law criteria for the assumption of divorce jurisdiction: a domicile was allocated to a person for

206 1906 ORC 7.

207 19ff.

208 12.

reasons of expediency which did not necessarily correspond to that person's *animus*.

3.2.3 Prohibited immigrants

Prohibited immigrants are not unlike deportees in the sense that their presence in a particular country is illegal. In some instances, however, a prohibited immigrant may succeed in entering a country and his presence may be condoned, or a person may be declared a prohibited immigrant subsequent to him settling in a country and his presence there may be tolerated as long as he conducts himself accordingly.²⁰⁹ Although immigration authorities can order a prohibited immigrant to leave, such immigrants may, in some instances, actually remain in the country whereas deportees are summarily deported on entry. Whether a prohibited immigrant can acquire a domicile in such a country and, if he has a domicile there, whether he relinquishes it on being declared a prohibited immigrant, are the kind of questions that need to be answered in regard to jurisdiction, based on domicile, especially in divorce cases.

In the Southern Rhodesian case of *Abelheim v Abelheim*²¹⁰ it was decided that the case of a prohibited immigrant was analogous to that of an exile: he retained his domicile, even when forced to absent himself from his home, as long as he had the intention to return.²¹¹ In a subsequent case, *Ex parte Fraser*,²¹² where the husband had been declared a prohibited immigrant and deported eight years previously, his wife was granted permission to sue for restitution of conjugal rights by edictal citation

209 See eg *Joosub v Salaam* 1940 TPD 177 (a case concerning security for costs) where a prohibited immigrant resided in South Africa in terms of a temporary permit which was renewed from time to time and who had the intention to remain in South Africa permanently. See also *Fenner v Fenner* 1943 SR 188, as well as *Van Rensburg v Ballinger* 1950 (4) SA 427 (T).

210 1918 SR 85.

211 86.

212 1934 SR 35.

on the basis that she was still living in Southern Rhodesia.²¹³ This meant, in effect, that the defendant-husband had never lost his Southern Rhodesian domicile. Yet another Southern Rhodesian case, *Fenner v Fenner*,²¹⁴ yielded the same result.²¹⁵ In this case the husband was a British subject who would not have been denied entry to South Rhodesia under normal circumstances, but in terms of a wartime measure to keep employment fluid, he was declared a prohibited immigrant on economic grounds. He had the intention to settle permanently in the colony and would probably have been allowed to do so once the general restrictions were removed. In an action by the husband for the restitution of conjugal rights the court, after a thorough survey of relevant authority, assumed jurisdiction in the matter. Tredgold J placed great emphasis on the fact that the husband had entered the colony freely and voluntarily, and, while admitting that a prohibited immigrant was not a free agent in the true sense of the word, this did not prevent him from acquiring a domicile of choice in that country:

"But it seems to me clear that a man may have a fixed and settled intention despite the fact that the fulfilment of such intention is liable to be postponed, interrupted, or even wholly frustrated by the military or immigration authorities, or by the intervention of other circumstances."²¹⁶

*Smith v Smith*²¹⁷ presented a somewhat different set of facts. In an action for nullity of the marriage by the wife, it appeared that the entry to and residence of her husband in Southern Rhodesia were at all times unlawful in terms of the relevant immigration

213 36.

214 1943 SR 188.

215 Cf also *Van Rensburg v Ballinger* 1950 (4) SA 427 (T).

216 191.

217 1962 (3) SA 930 (FC).

laws. He had entered under a false name with a British passport and had failed to disclose a previous criminal record. A temporary residence permit had also been obtained by fraudulent means. With due reference to relevant authority (amongst others *Abelheim* and *Fenner*)²¹⁸ Briggs ACJ (with two other judges concurring) decided that the husband had never acquired a domicile in Southern Rhodesia:

"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."²¹⁹

It would seem, though, as if the husband's residence was "more illegal" than those of the prohibited immigrants in the cases discussed above. It seems as if the lawfulness of the residence has a definite impact on the realisation of the requisite *animus* in the case of prohibited immigrants.

3.3 Certain classes of employees

People employed by the government or by private companies in terms of employment contracts present problems in regard to the acquisition of a domicile of choice, since they are not truly independent as regards employment and the question arises whether they can acquire a domicile of choice at the place where they work. In many cases, these employees are not free to choose where they want to work and therefore the choice of a place of residence is not voluntary.

In *Moncrieff v Moncrieff*²²⁰ the husband came to South Africa in terms of a contract of employment with an English company. His wife returned to England and an action

218 931E ff.

219 936F.

220 1934 CPD 208.

for the restitution of conjugal rights was instituted by him. Jurisdiction was denied on the ground that the husband had not acquired a domicile of choice in the Cape Province. The husband contended that he intended to remain in South Africa and that he would not renew his contract with the company should they decide to send him elsewhere. The court was not moved by his statement: since the company could (although it was unlikely) send him elsewhere even before the expiry of his existing contract, he was not free to choose and determine that South Africa would be his permanent home.²²¹

The reverse set of facts were presented by *Nash v Nash*:²²² The husband, whose domicile of origin was in the Cape, had been working for a Johannesburg firm in Lourenco Marques for eighteen years. In an action for divorce by the husband, he contended that he intended to return to the Cape upon the termination of his employment and that he had never made Lourenco Marques his home. The court assumed jurisdiction in the matter on the basis that, since the husband's residence in Lourenco Marques depended upon the continuance of his employment there, he could not have acquired a domicile of choice there, and therefore he retained his domicile of origin in the Cape. Bearing in mind that he had already resided in Lourenco Marques for eighteen years, the length of his residence there should surely have been taken into account.²²³

In *Cohill v Cohill*²²⁴ the husband, an American citizen, came to South Africa as the

221 211. See also *Noyes v Schulz* (1911) 32 NLR 318; *Meade v Meade* (1928) 12 PH B25 (W) and *Carvalho v Carvalho* 1936 SR 219: *in casu* the court seemed to adopt a more lenient attitude and, out of sympathy for the plaintiff-husband (an employee of the Portuguese government), decided to let the matter stand over in order to give him the opportunity to strengthen his evidence so that the court could assume jurisdiction.

222 1935 (1) PH B4 (C).

223 See eg *Van Straaten v Van Straaten* 1911 TPD 686 to the effect that length of residence may create a presumption of domicile.

224 1938 (2) PH B41 (C).

managing director of an American company. He bought a house and brought his family to South Africa in order to establish a home here. His wife left and returned to America and he sold the house. At the time of the institution of divorce proceedings by the husband, he had been living in South Africa for about two years. He contended that he intended buying another house and remaining in South Africa permanently. He stated that he was in a position, from the point of view of his contract, as well as financially, to sever his ties with the company at any time. The court decided that it had jurisdiction on the basis that the husband had acquired a domicile in South Africa.

In two cases in 1940 different decisions were reached in regard to railway employees. In *Thompson v Thompson*,²²⁵ it was assumed, without a proper investigation into the case law on free agents, that an employee of the Rhodesian Railways could acquire a domicile of choice at the place to which he had been transferred.²²⁶ However, in *Bothma v Bothma*²²⁷ it was decided that an employee of the South African Railways was not a free agent and could not have acquired a domicile of choice where he resided; therefore he retained his domicile of origin. In both cases the decisions led to the assumption of jurisdiction by the respective courts and this raises the question whether the assumption of jurisdiction was not the overriding concern. The requirement to settle indefinitely in terms of the new Domicile Act,²²⁸ may create difficulties in this regard, since it is questionable whether a fixed period of time will suffice for the acquisition of a domicile of choice.

3.4 Preliminary conclusions

The limitations on the independence or freedom of choice of the categories of people

225 1940 SR 187.

226 Members of the diplomatic corps are apparently also free to acquire a domicile of choice at the place where they are stationed: see *Naville v Naville* 1957 (1) SA 280 (C).

227 1940 (1) PH B8 (O).

228 3 of 1992 s 1(2).

discussed above, present a major problem for the South African law of domicile, since the acquisition of a domicile of choice is essentially based on the voluntary, unfettered choice of an individual. The submission by the South African Law Commission in its Report on Domicile²²⁹ that these persons should be able to exercise a choice *within the limitations of their capacity*, does not take the matter any further. It may be asked: since these people do not have complete freedom of choice, should a domicile of choice even be assigned to them? If one is, should the determination of such a domicile not be aided by a rebuttable presumption?²³⁰ The reality is that this is one of the areas where the subjective wishes or intentions of the *propositus* may be totally disregarded or ignored on the ground that he does not have the freedom to choose his own domicile. Therefore a rebuttable presumption may be helpful in order to infer an intention. Since the domicile of these categories of people is, more often than not, determined completely objectively,²³¹ it is submitted that the use of a rebuttable presumption to infer the requisite *animus* will promote certainty and uniformity of decision.

Furthermore, the tendency to allow the issue of the lawfulness of residence to influence the *animus* requirement, is also unacceptable. It has been said, in the case of deportees and prohibited immigrants, that it is "impossible to have an *animus manendi* of the requisite quality" if "one is residing only in defiance of the law".²³² Surely, the law does not judge our intentions; the *propositus* may still have the

229 1990 par 3.76.

230 A rebuttable presumption is an inference which is drawn from a set of proved facts, but it is provisional in the sense that it may be rebutted. If it is not, the presumption will stand: see *Wille's Principles* 50-51. Cf s 2 of the Domicile Act 3 of 1992, which deals with the domicile of children, which contains a rebuttable presumption that, should a child have his home with one or both of his parents, the place where that parental home is, will be presumed to be the child's domicile. In regard to the possible use of presumptions for the determination of the requisite *animus* for the acquisition of a domicile of choice, see the discussion in **Chapter 7** under **2.1 Rebuttable presumptions**.

231 This aspect will be discussed in more detail in **Chapter 5** under **3 Determination of the requisite *animus* for a domicile of choice: subjective or objective?**

232 *Smith v Smith* 1962 (2) SA 930 (FC) 936F.

intention to reside in the country from which he has been deported, but as long as his presence there is *unlawful*, he will not be able to comply with the *residence* requirement of domicile.

Finally, the requirement that, in order to acquire a domicile of choice, a person must have the intention to settle in a particular place for an *indefinite period*,²³³ greatly complicates the acquisition of a domicile for these categories of people, since they may indeed, in terms of their contract of employment or conditions of service, be present in a particular place for a very *definite* period.²³⁴

4 Proof of change of domicile

The determination of a person's domicile often involves proof of a change of domicile. In the past this was complicated by the heavy burden of proof required to prove such a change of domicile. The onus of proof for a change of domicile lies with the party alleging such change.²³⁵ Although the new Domicile Act²³⁶ stipulates that the acquisition or loss of a domicile must be determined on a balance of probabilities,²³⁷ this was not always the view taken in the past.

Great emphasis was placed on the text by Voet to the effect that a change of domicile was not to be presumed too easily:

233 S 1(2).

234 This aspect will be dealt with in more detail in Chapter 5 under 2.2.2 Towards an interpretation of the term "indefinite".

235 *Webber v Webber* 1915 AD 239 242; *Deane v Deane* 1922 OPD 41 43; *Moncrieff v Moncrieff* 1934 CPD 208 210; *Lewis v Lewis* 1939 WLD 140 142-143; *Cook v Cook* 1939 CPD 314 316; *Van Niekerk v Van Niekerk* 1941 TPD 59 61; *O'Mant v O'Mant* 1947 (1) SA 26 (W) 28; *Smith v Smith* 1952 (4) SA 750 (O) 753B-C; *Massey v Massey* 1968 (2) SA 199 (T).

236 3 of 1992.

237 S 5.

"Nevertheless in case of doubt change of domicile is not to be readily presumed; so that he who sets it up is bound to prove it as a matter of fact. A change is proved in about the like ways ... that the first establishment of domicile is also proved."²³⁸

This meant that, in a situation where doubt existed as to whether there had been a change of domicile the scale should tilt in favour of the retention of the existing (the alleged "previous") domicile, rather than the alleged "new" domicile; in effect this was nothing short of a presumption against a change of domicile in a doubtful case. Although this presumption no doubt provided a safeguard against a haphazard assumption of a change of domicile in order to, for example, found jurisdiction, the manipulative quality of such a presumption is clearly illustrated by the case of *Etheridge v Etheridge*.²³⁹ The wife sued her husband for divorce on the grounds of his adulterous relationship with her sister. At the time of the institution of the proceedings, the husband had already left the matrimonial home and followed his wife's sister to East London where he subsequently obtained employment. The joint property of the spouses had already been sold and divided between them. The court *a quo* refused to entertain the action, on the basis that the husband had abandoned his Natal domicile. However, the Durban Circuit Court decided (the defendant-husband being in default) that it had jurisdiction in the matter, since a change of domicile should not be presumed too easily and that the husband retained his Natal domicile. Finnemore J added that it was difficult to see what remedy would be left to the plaintiff if the Durban Circuit Court could not give relief²⁴⁰ and remarked that:

238 *Commentarius* 5 1 99. See eg *Mason v Mason* (1885) 4 EDC 330 338; *McCurrach v McCurrach* (1892) 6 HCG 256 259; *Etheridge v Etheridge* (1902) 23 NLR 180 183; *Robarts v Robarts* (1903) 17 EDC 132 137; *Lewis v Lewis* 1939 WLD 140 142-143; *Thompson v Thompson* 1940 SR 187 189.

239 (1902) 23 NLR 180.

240 184.

"In the absence of clear evidence, which does not appear in this case, of abandonment of domicile, we think that the plaintiff, who was born in Natal, and has resided in this Colony all her life, should not be denied redress merely because the defendant, after committing a grievous matrimonial wrong, left the Colony, and because such change of residence, coupled with partition of property, might be taken to indicate an intention not to return to Natal."²⁴¹

It is clear that the main concern of the judge was to grant the wife the relief she sought and the presumption against a change of domicile provided the necessary basis for the decision.²⁴² It is significant that the husband did not dispute jurisdiction (although the citation had been served on him personally), but if he had, he would have been saddled with the heavy burden of proof in regard to a change of domicile.

The decision of the Appellate Division in *Webber v Webber*²⁴³ set the tone for the heavy burden of proof placed on the party who alleged that a change of domicile had taken place. Innes CJ was of the opinion that the principles governing domicile had developed along similar lines in England and Holland and that the basic requirements for the acquisition of a domicile of choice were the same: lawful residence (the *factum* requirement) coupled with the necessary intention (the *animus* requirement). But, whereas Roman law did not insist on a single domicile for an individual, it was a fundamental principle of English law that no man could have more than one domicile at any given time. Therefore, the abandonment of a previous domicile and the acquisition of a new one, were subjected to the utmost scrutiny with the result that a

241 185.

242 Cf *Mason v Mason* (1885) 4 EDC 330 351 where Shippard J said that it was only by means of a legal fiction that the defendant-husband could be said to have retained his "existing" domicile which he seemed to have abandoned deliberately and permanently: see the discussion of this case *supra* under 2.1.1.1 *The case of the vagabundus husband*.

243 1915 AD 239.

change of domicile required very strict proof indeed.²⁴⁴ This strict requirement was formulated as follows in the well-known English case of *Winans v Attorney-General*²⁴⁵:

"... 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 domicil and settle in England?"²⁴⁶

Our curial practice not only accepted this strict test for the *animus* requirement,²⁴⁷ but it also approved of the heavy burden of proof required for a change of domicile.

In *Lewis v Lewis*²⁴⁸ Millin J expressly stated that stronger evidence was required to establish a change from a domicile of origin or a well-settled domicile of choice than from an ordinary domicile of choice.²⁴⁹ The heavy burden of proof in regard to the abandonment of a domicile of origin is well illustrated by the case of *Deane v Deane*.²⁵⁰ In this case the husband came to South Africa at the turn of the century, settled in the country and was married in the Transvaal. He joined the defence force and was appointed as an instructor in the Orange Free State where he established a home. During the First World War he served abroad and after the war he returned to Pretoria to inquire about his pension. He subsequently resigned from the service of the (South African) Union Government and went to England and later St Lucia in the West

244 242ff.

245 [1904] AC 287.

246 292.

247 See *Webber v Webber* 1915 AD 239; *Johnson v Johnson* 1931 AD 391; *Lewis v Lewis* 1939 WLD 140; *Eilon v Eilon* 1965 (1) SA 703 (A).

248 1939 WLD 140.

249 143.

250 1922 OPD 41.

Indies. His life was still insured with a South African company. In an action for divorce by the wife, the question of jurisdiction had to be decided. The defendant-husband did not put in an appearance. Ward AJP had no difficulty in denying jurisdiction: according to him there had been no intention on the part of the defendant to abandon his English domicile of origin and even if there had been such an intention, it was a doubtful case; in the absence of adequate proof by the wife that the defendant had acquired a domicile of choice in South Africa, his domicile of origin was his proper domicile.²⁵¹ McGregor J indicated that, had he been sitting alone, he would probably have assumed jurisdiction:

"The difficulty, therefore, is that by refusing to entertain the suit in this forum, we may be denying justice to the plaintiff: and were I sitting alone I should very possibly incline to the view that this is one of the cases where the non-appearance of the defendant to object might be a relevant 'element' on the decision and entertain the suit."²⁵²

McGregor J thought that factors such as his long stay (at least sixteen years), his establishment of a home in the Orange Free State, as well as the fact that his life was insured with a South African company, pointed to a South African domicile.²⁵³ It would seem that the wife's case was defeated by the lack of sufficient proof of the abandonment of the husband's domicile of origin, although there existed strong indications of an intention to settle permanently in South Africa.

In *Ley v Ley's Executors*,²⁵⁴ Centlivres CJ was critical of this high standard of proof required for the acquisition of a domicile of choice. According to him there was no

251 43.

252 46.

253 45ff.

254 1951 (3) SA 186 (AD).

reason why a higher standard of proof should be required than the usual standard in civil cases, namely a preponderance of probability.²⁵⁵ Nevertheless, despite the fact that it was agreed that the standard of proof required for a change of domicile (or the acquisition of a domicile of choice) was the same as the standard for all civil cases,²⁵⁶ the perception that a higher standard of proof was required, lingered on. Now the legislator has removed all doubt by stating very clearly that the acquisition or loss of a domicile will be determined according to the civil standard of a balance of probabilities.²⁵⁷

However, the heavy burden of proof on the party alleging a change of domicile, has had an adverse effect on the *animus* requirement. Together with the presumption against a change of domicile, the heavy burden of proof has substantially affected the *animus* requirement²⁵⁸ in the sense that the more difficult it became to prove an abandonment of a domicile, the more difficult it became to prove the acquisition of a new one.

5 Conclusion

It is clear that the concept *domicilium* has been moulded and formed within the sphere of jurisdiction, more particularly jurisdiction in divorce cases in the years preceding the inurement of the Domicile Act.²⁵⁹ Aspects such as the wife's domicile of dependence, the revival of the domicile of origin, the heavy burden of proof required for a change of domicile, as well as the strict *animus* requirement, gave rise to grave jurisdictional problems. Whilst these aspects related to the interpretation of the concept of

255 192ff. See also *Howard v Howard* 1966 (2) SA 718 (R) 721 where *Ley* was cited with approval.

256 This has now expressly been endorsed by s 5 of the Domicile Act 3 of 1992.

257 S 3 of the Domicile Act 3 of 1992.

258 See **Chapter 5** for a discussion of this requirement.

259 3 of 1992.

domicilium itself, little development occurred in this regard to alleviate jurisdictional difficulties. In reaction to jurisdictional problems, the grounds of jurisdiction for divorce matters were extended.²⁶⁰ The mere fact that such legislative extensions were revised time and again creates the impression that these reforms were conducted in a piecemeal fashion; no attempt was made to deal with the source of these problems, namely the concept *domicilium* itself, in its entirety. It may even be argued that these legislative interventions stultified the development of the common law concept *domicilium* in the sense that additional grounds of jurisdiction became available whenever domicile posed a problem. In this way, instead of reforming the concept itself, external reform was undertaken in the form of the statutory extension of jurisdictional grounds for divorce.

The new Domicile Act²⁶¹ has now introduced reforms to the common law concept *domicilium* itself. The abolition of the wife's domicile of dependence, as well as the abolition of the revival of the domicile of origin and the regulation of the standard of proof required for a change of domicile, may go a long way towards making domicile a more attractive connecting factor. However, the *animus* requirement remains problematical. Although the new Act no longer requires an intention to settle permanently, the term *indefinite* will have to be defined by our courts. This subjective *animus* requirement makes *domicilium* such a difficult concept to use as a connecting factor in a jurisdictional or a conflict of laws context. In the next chapter the *animus* requirement will be investigated in greater depth.

260 See Chapter 2 under 2.2.2 Statutory intervention.

261 3 of 1992.

CHAPTER FIVE

THE SUBJECTIVE ELEMENT OF DOMICILE

Introduction

In order to acquire a domicile of choice, a person must be lawfully present at a particular place and have the intention to settle there indefinitely.¹ The last-mentioned requirement is known as the *animus* requirement; but what does this intention to settle indefinitely, or for an indefinite period, mean? This requirement constitutes one of the major obstacles when domicile is used as a connecting factor, be it in the law relating to jurisdiction or in the conflict of laws. In this chapter an attempt will be made to analyse this requirement and to determine how it is interpreted by our courts.

1 The common law interpretation of the requisite *animus*

The Roman-Dutch writers² focused mainly on the definition given in the *Corpus Iuris Civilis*:

"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

1 See s 1(2) of the Domicile Act 3 of 1992:

A domicile of choice shall be acquired by a person when he is lawfully present at a particular place and has the intention to settle there for an indefinite period.

2 See Kahn *Domicile* 41ff for an excellent exposition of the Roman-Dutch writers' formulations and definitions of domicile. However, he comes to the conclusion (at 43) that the "Roman-Dutch authorities can hardly be said to have distinguished themselves as jurists in their analysis of *animus manendi*".

to be on a journey, and when he returns, to have completed it."³

As Kahn has indicated, this definition stresses the negative side of the requisite intention, namely "no one shall depart", whereas the positive side would be something to the effect that the intention is one to remain with a certain degree of permanence.⁴ In their expositions on domicile, and more specifically on this text of the *Codex*, some of the Roman-Dutch writers have adopted the negative formulation of the required *animus*. See, for example, Voet's definition of domicile:

"Everyone can also be sued by virtue of domicile, in the place, that is to say, 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."⁵

Elsewhere Voet adopted a positive formulation:

3 C 10 40(39) 7 *lex* 1 (Scott's translation). The Latin text reads as follows:

"Et 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."

For an exposition and critical discussion of the pre-codification Continental interpretation of the Roman law definition of domicile, see Uys *Intention* 25ff. However, as will become apparent through the study of South African case law on the requisite *animus* for the acquisition of a domicile of choice in this chapter, our courts have followed the English law interpretation of domicile; an interpretation founded on the analyses of civilian writers of the seventeenth and eighteenth centuries, but adapted to meet the needs of a growing British Empire.

4 Kahn *Domicile* 42ff. See also Pollak 1933 *SALJ* 449 462ff.

5 *Commentarius* 5 1 92 (Gane's translation). The Latin text reads as follows:

"Domicilii quoque intuitu conveniri quisque potest, in eo scilicet loco, in quo larem, rerumque ac fortunarum suarum summam constituit, unde rursus non sit discessurus, si nihil avocet, undeque cum profectus est, peregrinari videtur."

See also Voet *Commentarius* 5 1 94, as well as Brissonius *Lexicon Juridicum sv Domicilium*; Schraessert *Consultatiën, Advysen ende Advertissementen* cons 94 n 8; Van Leeuwen *Censura Forensis* 2 1 12 5.

"It is certain that domicile is not established by the mere intention and design of the head of a household, nor by mere formal declaration without fact or deed; nor by getting ready of a house in some country; nor by residence without the purpose to stay there permanently."⁶

Other writers have combined the negative and the positive approaches within the same definition. See, for example, Van Leeuwen's definition:

"Ik seg een vaste woonplaats, Om dat niet het enkel verblijven van yemand, het welk dikmaals maar voor een tijd geschied, gelijk als yemand in hete siekte sig buyten de Stadt begeeft, of om andre saken buyten de Stadt sijn vier en ligt houd, maar het vaste voornemen om daar te zijn en blyven, sonder mening van wederkeren, yemands woonplaats maakt."⁷

It would seem, though, as if the negative formulation of the required *animus* makes for a more realistic yardstick than the positive approach, since the intention not to leave, unless something happens, is less rigid than the intention to remain forever, which leaves little or no room for doubt as regards the future:

"The former statement [negative formulation] is compatible with a total

6 *Commentarius* 5 1 98 (Gane's translation). The Latin text reads as follows:

"Illud certum est, neque solo animo atque destinatione patrisfamilias, aut contestatione solâ, sine re & facto, domicilium constitui ... neque solâ domus comparatione in aliquâ regione ... neque solâ habitatione, sine proposito illic perpetuo morandi ..."

See also Schomaker *Selecta Consilia en Responsa Juris* I cons 7; Schrassert *Consultatiën, Advysen ende Advertissementen* cons 94 n 11.

7 Van Leeuwen *RHR* 3 12 10. (See, however, the negative formulation of domicile adopted by Van Leeuwen in his *Censura Forensis* 2 1 12 15.) Although Voet J and Schrassert described the requisite *animus* in both negative and positive terms, they did not combine the two approaches within the same definition.

absence of any intention on the man's part as to his future residence - a blank mind; the latter [positive formulation] presupposes that the man has given some consideration to the question of his future residence."⁸

However, as is the case in many areas of the law, these approaches to the formulation of the *animus* requirement have occupied the minds and time of many a judge and very involved interpretations of seemingly simple terms have become immortalised in the pages of the law reports.

In this area of the law our courts have been heavily influenced by the interpretation given to the *animus* requirement by the nineteenth and early twentieth century English and Scottish cases, which in turn have borrowed heavily from Roman-Dutch authorities on the subject. A survey of these cases reveals an important feature: the heavy burden of proof required for a change of domicile, in other words to prove the necessary *animus non revertendi* or *animus manendi*. This, no doubt, was the result of mainly two factors which, either jointly or separately, played a part in the majority of these cases, namely the tenacity of the domicile of origin,⁹ as well as the reluctance of the courts to find in favour of a change of domicile where the "new" domicile was a foreign one.¹⁰ Added to this was the conception that an individual could only have one

8 Pollak 1933 SALJ 449 463.

9 Cf *Winans v Attorney-General* [1904] AC 287 290:

"Domicil of origin ... differs from domicil of choice mainly in this - that its character is more enduring, its hold stronger, and less easily shaken off ..."

and *Udny v Udny* (1869) LR 1 Sc & Div 441 457-458:

"When another domicile is put on, the domicil of origin is for that purpose relinquished, and remains in abeyance during the continuance of the domicil of choice ... It revives and exists whenever there is no other domicile ..."

10 See eg *Hodgson v Beauchesne* (1858) 12 Moo PCC 285 314-315, 14 ER 920 931:

"... the presumption of law is against an intentional change of domicile, and, ordinarily so, for a change of domicile supposes a severance, to a great degree at least, of all those mutual ties which bind mankind together, and which we all

domicile at any given time,¹¹ a conception that led the courts to scrutinise every minute detail, though sometimes overlooking important clues, lest they should find in favour of a change of domicile too easily.

The early English cases relied very heavily on civilian authority:

"On the subject of domicile, there is so little to be found in our own law that we are obliged to resort to the writings of foreign jurists ..."¹²

References to the famous C 10 40(39) 7,¹³ as well as writers like Johannes Voet,

desire to retain, the dissolution of which is repugnant to all our feelings ..."

and further (317, 932):

"We think in all these questions there is a most essential difference between the acquisition of a foreign domicile, the presumption against the latter being infinitely stronger."

Cf also *Whicker v Hume* (1858) 7 HLC 124 159, 11 ER 50 64:

"... I think all courts ought to look with the greatest suspicion and jealousy at any of these questions as to a change of domicile into a foreign country ..."

and *Lord v Colvin* (1859) 4 Drew 366 422-423, 62 ER 141 163:

"... it requires stronger and more conclusive evidence to justify the Court in deciding that a man has acquired a new domicile in a foreign country, than would suffice to warrant the conclusion that he has acquired a new domicile in a country where he is not a foreigner."

11 Cf *Udny v Udny* (1869) LR 1 Sc & Div 441 448:

"It is clear by our law a man must have some domicil, and must have a single domicil."

See also *Webber v Webber* 1915 AD 239 242:

"It is a fundamental English principle, however, (though it was not so in Roman law) that no man can have more than one domicile at one time."

12 *Pottinger v Wightman* (1817) 3 Mer 67 79, 36 ER 26 30.

13 See *supra*.

Bynkershoek and Pothier appear frequently.¹⁴ Although the references to civilian authority declined during the latter half of the nineteenth century, reference was often made to Story who, in turn, relied heavily on civilian authority in his exposition of domicile.¹⁵

With regard to the interpretation of the *animus* element (whether *manendi* or *non revertendi*) the English courts must receive credit for their tireless investigation into the Roman texts (notably C 40(39) 7) and the civilian authorities, albeit their legacy may have retarded the development of the South African law of domicile during the twentieth century. In the same breath one must concede, though, that to extract a definition of domicile from the diverse analyses of C 10 40(39) 7 by our Roman-Dutch writers must have been a daunting task.¹⁶ With the expansion of the British Empire the conception took root that the British, although travelling abroad and settling in British colonies or even foreign countries, never really relinquished their English or Scottish domiciles of origin, since they might want to return "home" one day. This, together with the fact that an individual could only have one domicile at a time,¹⁷ culminated in the very stringent requirement for a change of domicile, as enunciated in the famous cases of *Udny v Udny*¹⁸ and *Winans v Attorney-General*,¹⁹ which have left such a lasting impression on South African law. In terms of these cases the

14 *Somerville v Somerville* (1801) 5 Ves 750, 31 ER 839; *Pottinger v Wightman* (1817) 3 Mer 67, 36 ER 26; *Munro v Munro* (1840) 7 Cl & Fin 842, HL, 7 ER 1288; *Forbes v Forbes* (1854) Kay 341, 69 ER 145; *Hodgson v Beauchesne* (1858) 12 Moo PCC 285, 14 ER 920; *Whicker v Hume* (1858) 7 HLC 124, 11 ER 50; *Lord v Colvin* (1859) 4 Drew 366, 62 ER 141.

15 Story *Commentaries* par 39ff. Though not important for present purposes, it is interesting to note that the doctrine of the revival of the domicile of origin (which has been abolished by the Domicile Act 3 of 1992 s 3) was in all probability an English creation, since no civilian authority was advanced by Story to support this doctrine: see Chapter 4 fn 30.

16 See Kahn *Domicile* 3, 41ff.

17 *Supra*.

18 (1869) LR 1 Sc & Div 441.

19 [1904] AC 287.

intention required to acquire a domicile of choice was the intention to settle indefinitely or permanently in a particular country.²⁰ This was interpreted by Westlake to mean that:

"The intention necessary for acquiring a domicil of choice excludes all contemplation of any event on the occurrence of which the residence would cease."²¹

2 The *animus* requirement in South African law

The South African case law of the last century or so reveals a sad legacy of reluctance to reform the concept of *domicilium* with regard, especially, to the required *animus* to acquire a domicile of choice. Cases dating back to the previous century embraced the common law concept of *domicilium* as defined by the English courts. Potent reasons may be advanced for our courts' reliance on English law in regard to the interpretation of domicile, such as the fact that South Africa was part of the British Empire. However, the fact that, especially after Union in 1910, judicial criticism of the very strict *animus* requirement went unheeded for so many years, can hardly be justified. Reform came in 1992: the Domicile Act²² now clearly states that the intention to acquire a domicile of choice must be to settle for an *indefinite period*.²³ In order to evaluate the reform brought about by the Act, as well as to gain an understanding of precisely what *indefinitely* means, a review of South African case law on this point will be undertaken.

20 For a more detailed discussion of the English case law in this respect, see Schoeman 1994 *THRHR* 204 213ff.

21 *Private International Law* (4th ed) par 264.

22 3 of 1992.

23 S 1(2).

2.1 South African case law

Ever since the definition of domicile in the *Corpus Iuris Civilis*,²⁴ it was clear that, whether a positive or a negative formulation²⁵ of the required *animus* was to be preferred, a certain degree of permanence was required to satisfy the *animus* requirement for a domicile of choice. Exactly how permanent has been the subject of debate in many a courtroom.

Initially South African courts adopted the description of the required *animus* as set out in the Scottish case of *Udny v Udny*:

"Domicile 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 ... it must be a residence fixed, not for a limited period or particular purpose, but general and indefinite in its future contemplation."²⁶

Thus in *Weatherley v Weatherley*²⁷ this interpretation of *animus* was regarded as consistent with the *animus manendi* required by Roman-Dutch authorities such as Van Leeuwen, J Voet and Groenewegen.²⁸ A reference to an opinion that, should there be an intention to return to one's native country, even after the lapse of a thousand

24 C 10 40(39) 7: see *supra* under 1 The common law interpretation of the requisite *animus*.

25 See *supra*.

26 (1869) LR 1 Sc & Div 441 458.

27 (1879) Kotzé 66.

28 74.

years, no new domicile will have been acquired,²⁹ seems to indicate that Kotzé J required a rather high degree of permanence in order to acquire a new domicile.³⁰ It is interesting to note that, even though *Weatherley* was concerned with divorce jurisdiction and the domicile of the husband was thus the crucial factor,³¹ this was one of the cases in which the interpretation of the required *animus* was not manipulated to found jurisdiction at all costs.³² The evidence clearly indicated that the husband did not wish to settle in the Transvaal,³³ but circumstances made him stay for three years. Kotzé J concluded that Colonel Weatherley had had no intention to make the Transvaal his fixed and permanent home. Jurisdiction was assumed on the basis of residence,³⁴ a state of affairs that was subsequently altered by the Privy Council in *Le Mesurier v Le Mesurier*.³⁵ Therefore, the strict positive formulation of the required *animus* in *Weatherley* may be seen as an honest interpretation of Roman-Dutch

29 74-75:

"Accordingly Simon van Groenewegen, an eminent Dutch lawyer, has observed that if a man leaves his native country for several years, merely to make his fortune in the East Indies, he does not thereby change his domicile of origin (*Consult et Adwijs*, vol 6, cons 153), and the Dutch *Juris-Consult* elsewhere emphatically says, that if there be an intention of returning to the native country, even after the lapse of a thousand years, no new domicile will have been created by the removal or change of residence ... (*Consult et Adwijs*, vol 3, cons 138, n 27)."

30 See also *Clear v Clear* 1913 CPD 835 839.

31 For a discussion of the grounds of divorce jurisdiction, see **Chapter 2** under **2.2 Jurisdiction and choice of law**.

32 See, in general, **Chapter 4** in regard to the manipulation of the concept *domicilium* in order to found divorce jurisdiction.

33 On occasion Colonel Weatherley stated that it was "not a country for a lady or a gentleman either": *Weatherley v Weatherley* (1879) Kotzé 66 74.

34 "Upon the general ground that, by Roman Dutch law, the Court has power to take cognizance of any wrong or delict committed within this territory by persons having an actual *bona fide* residence here at the time, it being immaterial whether such residence amounts to a *domicilium* or not, and to apply the suitable remedy thereto." (*Weatherley v Weatherley* (1879) Kotzé 66 92-93)

35 [1895] AC 517: see **Chapter 2** under **2.2.1 Common law**.

authority as interpreted by the Scottish court in *Udny*.³⁶ Since the judge ruled out the possibility of founding jurisdiction on *domicilium* there was no pressure on him to formulate the *animus* requirement in a manner that would have granted the court jurisdiction.

In *Moreland v Moreland*³⁷ this test from *Udny v Udny*³⁸ was again applied, but Mason J added that the test would be satisfied even though the *propositus* may have contemplated "the possibility of circumstances compelling him to change his abode".³⁹ This tag was probably attached in order to reflect the reality of the situation: the acquisition of the husband's domicile for purposes of divorce jurisdiction in *Moreland* was bound up with the Anglo-Boer War and the judge probably wished to indicate that the affairs of many people were in a state of uncertainty. The war might actually have *compelled* some people to change their domiciles. Therefore this *dictum* cannot really be seen as a relaxation of the requisite *animus* as described in *Udny*.⁴⁰ However, any possible further interpretations of the test in *Udny* were countered by the appearance of John Westlake's fourth edition of his *Treatise on Private International Law* in 1905, the year after *Winans v Attorney-General*⁴¹ was decided. In *Winans v Attorney-General* the requisite intention was formulated as follows:

"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'

36 (1869) LR 1 SC & Div 441 458.

37 (1901) 22 NLR 385.

38 (1869) LR 1 Sc & Div 441 458.

39 *Moreland v Moreland* (1901) 22 NLR 385 388.

40 (1869) LR 1 Sc & Div 441 458.

41 [1904] AC 287.

- to abandon his American domicil and settle in England?"⁴²

Subsequent to this decision Westlake pronounced that, as a result of the English cases, and especially after the decision in *Winans*:⁴³

"The intention necessary for acquiring a domicil of choice excludes all contemplation of any event on the occurrence of which the residence would cease."⁴⁴

The description of the requisite *animus* for the acquisition of a domicile of choice in terms of a "fixed and settled purpose", "a determination" and "a final and deliberate intention" in *Winans v Attorney-General*⁴⁵ has had a decisive influence on South African law. In *Webber v Webber*⁴⁶ Innes CJ interpreted the "array of emphatic adjectives",⁴⁷ used in *Winans*, as meaning that the *propositus* must deliberately have decided to give up his old home and make his permanent home in a new place.⁴⁸ No reference was made in *Webber* to Westlake's interpretation of the requisite *animus* in the wake of the decision in *Winans*. Thus *Webber* stressed the positive approach of intending to establish one's permanent home in a certain place, but did not add the interpretation of Westlake to the effect that the contemplation of any event on the occurrence of which the residence would cease, would defeat such an intention.⁴⁹ It

42 292.

43 *Ibid.*

44 Westlake *Private International Law* (4th ed) par 264.

45 [1904] AC 287 292: see full quotation *supra*.

46 1915 AD 239.

47 243.

48 *Ibid.* See also 249 and 258 of the report, as well as *Hutchison's Executor v The Master* 1919 AD 71 74.

49 Westlake *Private International Law* (4th ed) par 264.

would seem that, had the description of the requisite *animus* remained at "permanent", without Westlake's interpretation added to it, the criterion would have been more susceptible of innovation. As was pointed out in *Deane v Deane*,⁵⁰ the word "permanent" should not be given a too drastic, too absolute connotation, since "man is not a prescient being and cannot predicate an inflexible course of life".⁵¹ McGregor J⁵² regarded the rule expounded in *Webber v Webber*,⁵³ which was based on *Winans v Attorney-General*,⁵⁴ as being essentially the same as the criterion laid down in *Udny v Udny*.⁵⁵ Therefore, leaving aside the interpretation of Westlake, a compromise could probably have been reached between *Udny* and *Winans* to the effect that the intention should be to remain permanently or indefinitely. However, once Westlake's interpretation was authoritatively accepted in *Johnson v Johnson*,⁵⁶ the strict positive approach adopted in *Winans* was burdened with the insurmountable requirement that there should not be present in the mind of the *propositus* contemplation of any event on the occurrence of which the intended residence would cease.

*Johnson v Johnson*⁵⁷ tells the story of a twelve year old Swedish boy who ran away from home, sailed all over the world and settled wherever opportunity presented itself. He acquired his wealth through hard work, never allowing an opportunity to make money slip by. One might say that his movements throughout his life were steered by

50 1922 OPD 41.

51 43-44.

52 44.

53 1915 AD 239 243.

54 [1904] AC 287 292.

55 (1869) LR 1 Sc & Div 441 458.

56 1931 AD 391 398. Note, however, that Stratford J, in his minority judgment, did not refer to either *Winans v Attorney-General* [1904] AC 287 292 or Westlake (*Private International Law* (4th ed) par 264), but preferred the test from *Udny v Udny* (1869) LR 1 Sc & Div 441 458 to the effect that the requisite *animus* should be general and indefinite in its future contemplation.

57 1931 AD 391.

his ambition to better himself. In an action concerning the property rights of the spouses, the domicile of the husband at the time of the conclusion of the marriage had to be determined.⁵⁸ It appeared that Mr Johnson was residing in the State of New Jersey at the time when he married, but the court had to decide whether his residence in New Jersey at that stage constituted a domicile. The majority of the court decided that Mr Johnson had not acquired a domicile in New Jersey at the time of his marriage and based their finding on the requirement for the acquisition of a domicile of choice set out in *Winans v Attorney-General*.⁵⁹ De Villiers CJ, who delivered the majority judgment, also adopted Westlake's view to the effect that the contemplation of any event on the occurrence of which the residence would cease, would exclude the necessary intention, emphasising that Westlake's view satisfied the test of Voet's *propositum illic perpetuo morandi*.⁶⁰ Looking at the facts, there was really no way that a man like Mr Johnson, who would have gone anywhere to make a fortune (and had in fact just done that), could ever have satisfied the test put forth by Westlake. As a matter of fact, Mr Johnson must always have contemplated the possibility of a new business venture, regardless of where in the world, since he moved between continents with the greatest ease.

Stratford JA, the lone dissenting voice, stated that he did not differ from the other judges in regard to the law, but rather in regard to the inference drawn from the facts of the case.⁶¹ It is interesting to note, though, that, whereas the majority adopted Westlake's approach to the required *animus*, Stratford JA preferred the test of *Udny v Udny*,⁶² reaching the conclusion that Mr Johnson had, in fact, established his

58 In terms of the conflict rule that the proprietary consequences of a marriage must be determined by the law of the husband's domicile at the time of the marriage: Edwards *LAWSA: Conflict* par 441.

59 [1904] AC 286 292.

60 *Johnson v Johnson* 1931 AD 391 398.

61 408.

62 (1869) LR 1 Sc & Div 441 458: see *supra*.

residence in New Jersey for an unlimited or indefinite period at the time of his marriage. Stratford JA emphasised that Mr Johnson's subsequent conduct (after his marriage) could not be used retrospectively⁶³ to prove that he could not have intended to remain in New Jersey.⁶⁴ He also stressed that the ambition to better oneself should not be allowed to frustrate the acquisition of a domicile of choice:

"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 ... should not ... avoid the acquisition of a domicile."⁶⁵

The significance of the minority judgment is that the test in *Udny v Udny*⁶⁶ presented a more workable criterion in Mr Johnson's case, in the sense that he intended remaining in New Jersey *indefinitely*, than Westlake's test which was adopted in the majority judgment.

Thus, whereas there would still have been room for creative judicial interpretation in regard to "permanent" or "indefinite", Westlake's statement removed any possibility that may have existed to interpret "permanent" or "indefinite" in accordance with changing circumstances. Westlake's interpretation of the required intention has been consistently

63 Cf the warning by Carter 1987 *ICLQ* 713 722 against the unwarranted "common law assumption that the outcome of any enquiry as to a person's domicile at a particular moment in his life, or at the moment of his death, must depend upon the result of an historical or chronological investigation". See further *infra* under 2.2.2.2 *Time factor*.

64 *Johnson v Johnson* 1931 AD 391 410-411.

65 *Ibid* 410.

66 (1869) LR 1 Sc & Div 441 458.

applied in South African courts for more than half a century.⁶⁷ The acceptance of the conception that Westlake's view of the *animus* requirement was in keeping with the kind of intention required by the Roman-Dutch authorities,⁶⁸ resulted in a reluctance by the courts to deviate from it. However, there are three cases that stand out with regard to the interpretation of the *animus* requirement, namely *Ley v Ley's Executors*,⁶⁹ *Smith v Smith*⁷⁰ and *Eilon v Eilon* (especially the minority judgment).⁷¹

*Ley v Ley's Executors*⁷² concerned the well-known case of the stone mason who was born in England, but came to South Africa and worked wherever he was able to find employment. When he arrived in South Africa at first (he was unmarried at the time), he was mostly seen in Cape Town, where he had a postal address, and had told witnesses that he intended to remain in the country. A few years after his marriage, he

67 Since its adoption in *Johnson v Johnson* 1931 AD 391 it was applied in, amongst other cases, *Moncrieff v Moncrieff* 1934 CPD 208; *Carvalho v Carvalho* 1936 SR 219; *Ex Parte Ralston's Estate* 1937 TPD 46; *Lewis v Lewis* 1939 WLD 140; *O'Mant v O'Mant* 1947 (1) SA 26 (W); *Nicol v Nicol* 1948 (2) SA 613 (C); *Ley v Ley's Executors* 1951 (3) SA 186 (D); *Smith v Smith* 1952 (4) SA 750 (O); *Senior v Commissioner of Inland Revenue* 1960 (1) SA 709 (AD); *Eilon v Eilon* 1965 (1) SA 703 (AD); *Howard v Howard* 1966 (2) SA 718 (R).

68 See eg *Webber v Webber* 1915 AD 239 242:

"The principles regulating domicile, founded as they are upon the civil law, have been developed in England and in Holland upon very similar lines ..."

and further (with regard to the *animus* requirement specifically) at 243:

"... the Roman-Dutch law, as administered by our Courts, is in substantial agreement with the law of England."

See also *Johnson v Johnson* 1931 AD 391 398 where De Villiers CJ said that the statement in *Winans v Attorney-General* [1904] AC 287 292, as well as the statement by Westlake (*Private International Law* 4th ed (1904) par 264) was "in accord with our law as laid down by Voet (5 1 98) and others, who require a *propositum illic perpetuo morandi*". Cf also *Eilon v Eilon* 1965 (1) SA 703 (AD) 720ff.

69 1951 (3) SA 186 (AD).

70 1952 (4) SA 750 (O).

71 1965 (1) SA 703 (AD).

72 1951 (3) SA 186 (AD).

settled in Pretoria. When he died a dispute arose between the executors of his estate and his wife with regard to the question whether the marriage had been in or out of community of property. The question turned on the issue of domicile: had he been domiciled in England at the time of the marriage, the marriage would have been out of community of property; had he been domiciled in the Cape Colony at the time of the marriage, the marriage would have been in community of property.⁷³ Whereas the trial court decided that Mr Ley was not domiciled in the Cape at the time of his marriage, the Appellate Division decided that he had acquired a domicile of choice in the Cape at that time. Since this case concerned a pre-Union domicile,⁷⁴ it had to be established that Mr Ley was indeed domiciled in the Cape Colony at that time.

The trial court judge said that, although Mr Ley had decided to make his future home somewhere in South Africa, it had not been shown that he had chosen the Cape Colony to the *reasonable exclusion of the other colonies south of the Limpopo*. Thus his intention fell short of the requirement set by Westlake.⁷⁵ However, Centlivres CJ, who delivered the unanimous judgment of the Appellate Division, thought that the trial court judge had experienced difficulty in applying Westlake's criterion, "excludes all contemplation", as adopted in *Johnson v Johnson*.⁷⁶ Centlivres CJ then proceeded to explain what this phrase was intended to mean:

"... it means that if the state of mind of the *de cuius* 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

73 An application of the choice of law rule that the patrimonial consequences of a marriage, concluded without an antenuptial agreement, must be determined by the law of the husband's domicile when the marriage was entered into (the *lex domicilii matrimonii*): see Edwards *LAWSA: Conflict* par 441.

74 The couple were married in 1905.

75 *Ley v Ley's Executors* 1951 (3) SA 186 (AD) 190.

76 1931 AD 391 398.

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 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 domicile."⁷⁷

From this *dictum* it is clear that Centlivres CJ had in mind an intention to settle in a place for the foreseeable future, without any doubt as to whether the *propositus* would remain. Therefore the required *animus* will only be defeated by *genuine doubt* as regards the permanency of the *propositus's* stay.⁷⁸ This interpretation qualifies that of *Westlake* in regard to the phrase *any event*: this phrase refers to the contemplation of an event that will not necessarily occur, but an event that is definitely contemplated by the *propositus*.

77 *Ley v Ley's Executors* 1951 (3) SA 186 (AD) 195A-C, quoted with approval in *Senior v Commissioner of Inland Revenue* 1960 (1) SA 709 (AD) 714B-D and *Howard v Howard* 1966 (2) SA 719 (R) 721E-H. In support Centlivres CJ referred to the following *dictum* from the English case *Attorney-General v Pottinger* (1861) 30 LJ Ex 284 292:

"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 except his domicile of origin."

78 At the time Pollak expressed the hope that the *dicta* on the nature of the *animus* requirement in *Ley* would lead to a more realistic approach: see 1951 ASSAL 282 283; Kahn 1951 SALJ 360 361. However, this was not to be: see the discussion of the majority judgment in *Eilon v Eilon* 1965 (1) SA 703 (AD) *infra*.

In *Smith v Smith*⁷⁹ the parties had recently moved to Welkom in the Orange Free State from the Transvaal where they had originally established their matrimonial home. The move to Welkom was prompted by better terms of employment, the husband accepting work as an electrician on a mine. Shortly after their move, the wife instituted an action for divorce and the question of jurisdiction arose. It had to be decided whether the husband had acquired a new domicile of choice in Welkom or not. In deciding that there was not sufficient proof that a domicile of choice had been acquired in Welkom, Horwitz AJP referred to the interpretation of the *animus* requirement in *Ley v Ley's Executors*,⁸⁰ and concluded that it boiled down to

"... the necessity of proving a final and deliberate intention to abandon a domicile of origin and to settle in another country."⁸¹

This is in line with the *animus* requirement, as formulated in *Winans v Attorney-General*,⁸² and may be seen as a vote in favour of a realistic positive formulation of the requisite *animus*. The judge also referred to the English case of *Gulbenkian v Gulbenkian*⁸³ in which it was stated that the intention should be *unlimited in period*, but not *irrevocable in character*.⁸⁴

*Eilon v Eilon*⁸⁵ will be remembered as a case where the forces of reform were defeated by a majority of three to two. However, to this day, it remains the *locus classicus* on the interpretation of the *animus* requirement. The case concerned,

79 1952 (4) SA 750 (O).

80 1951 (3) SA 186 (AD), see *supra*.

81 *Smith v Smith* 1952 (4) SA 750 (O) 754.

82 [1904] AC 287 292.

83 [1937] 4 All ER 618.

84 627.

85 1965 (1) SA 703 (AD).

amongst other issues, the question of divorce jurisdiction. The wife had instituted the action and since, at that stage a married woman still followed the domicile of her husband in terms of the domicile of dependence,⁸⁶ the jurisdiction of the Cape Provincial Division depended on whether the husband was domiciled in the court's area of jurisdiction at the commencement of the proceedings.⁸⁷ Mr Eilon and his wife were Israeli citizens who came to South Africa as teachers of Hebrew under the aegis of the Jewish Agency in Israel. The aim of this agency was to send these teachers all over the world as missionaries for limited periods. Thus the Eilons were sent to South Africa for an initial period of two-and-a-half years in terms of their contract of employment. At their request, their contracts were extended for a further two years, but problems arose when they requested that their contracts be extended for another two years. It seems that their contracts were renewed for another two years, yet Mr Eilon, probably sensing that yet a further extension would not be granted (and was, in fact, not granted) by the Jewish Agency, tried to secure other employment in South Africa after the expiry of the last extension. He accepted a position in Johannesburg, but his appointment was summarily cancelled even before he commenced duties and he returned to Israel. The question, therefore, was whether Mr Eilon had formed the intention to remain permanently in South Africa, despite the fact that the Jewish Agency could have terminated his contract and recalled him to Israel. Relevant facts that were placed before the court included the following: that the Eilons held fixed property in Israel, but none in South Africa; that Mr Eilon had retained his Israeli citizenship (although he had applied for permanent residence in South Africa); that Mr Eilon had family relations in Israel; that abandonment of his Israeli domicile would have postulated a disloyalty to the ideals of Zionism and that he did, in fact, return to Israel when his contract was terminated. Although a person's moral standards can hardly affect the acquisition of a domicile, the fact that the divorce proceedings came about as a result of Mr Eilon's adulterous relationship with another woman, certainly reflected

86 The wife's domicile of dependence was abolished in 1992: s 1(1) of the Domicile Act 3 of 1992.

87 Matrimonial Affairs Act 37 of 1953 s 6: discussed in **Chapter 2** under **2.2.2 Statutory intervention**.

badly on his Zionist convictions. Rumpff JA indicated that, as a result of Mr Eilon's alleged immoral conduct, his co-religionists had made it impossible for him to acquire a teaching position in South Africa.⁸⁸

On the facts before them the majority of the judges (Potgieter AJA, Steyn CJ and Wessels JA) decided that Mr Eilon had not acquired a domicile of choice in South Africa, whereas the minority (Rumpff JA and Williamson JA) were of the opinion that the respondent had, in fact, acquired a domicile in South Africa. However, the division between the majority and minority did not merely relate to a difference as regards the inference drawn from the facts, it went to the principles applied in South African law at that stage to determine whether a person had formed the requisite *animus* for the acquisition of a domicile of choice.⁸⁹ Broadly speaking, the majority followed the approach adopted in South Africa since *Johnson v Johnson*,⁹⁰ which was firmly based on English law as enunciated by Westlake,⁹¹ while the minority rejected Westlake's approach. The judgments of Rumpff JA and Williamson JA (the minority) and of Potgieter AJA (who delivered the majority judgment) make interesting reading.

In a short judgment, only a page long, Rumpff JA's sentiments were clear:

"In my view *Westlake* and the English cases referred to are best left alone. It is sufficient to refer to our own - albeit somewhat ancient - author Vromans ... Like our other old writers he may be ancient in regard to time but not necessarily in regard to outlook."⁹²

88 *Eilon v Eilon* 1965 (1) SA 703 (AD) 704H.

89 De Waal & Van Heerden 1987 TSAR 254.

90 1931 AD 391.

91 Discussed *supra*.

92 *Eilon v Eilon* 1965 (1) SA 703 (AD) 704E-F.

In his interpretation of the requisite *animus* he stated that the intention to settle indefinitely need not be accompanied by a desire to turn one's back on the old country or to sever all connections with that country or a desire never to return there. Thus a Zionist could have his domicile in another country, yet retain his spiritual bonds with Israel.

Williamson JA delivered a more detailed judgment. He took the trial judge (Corbett J) to task for relying on De Villiers CJ's exposition of the principles relating to the acquisition of a domicile in *Johnson v Johnson*.⁹³ It will be remembered that De Villiers CJ was of the opinion that Westlake's view with regard to the requisite *animus* was in agreement with the Roman-Dutch authorities.⁹⁴ According to Williamson JA, reference to Voet⁹⁵ indicated that the requisite *animus manendi* or *morandi* was not excluded on the basis of "any contemplation of a possible move".⁹⁶ To his mind Roman-Dutch law had never adopted such a rigid approach to the *animus* requirement as was the case in English law, for:

"... it is not quite correct to call the intention required by English law an *animus manendi*; it is an *animus semper manendi* ... it needs the will to 'live and die' in that country."⁹⁷

The judge noted that the very strict *animus* requirement enunciated by Westlake in the wake of *Winans v Attorney-General*,⁹⁸ was not received into American law, a legal system which, at that stage, followed the English principles of the conflict of laws very

93 1931 AD 391.

94 See discussion of *Johnson v Johnson* 1931 AD 391 *supra*.

95 *Commentarius* 5 1 92 and 94: see *Eilon v Eilon* 1965 (1) SA 703 (AD) 706E.

96 *Eilon v Eilon* 1965 (1) SA 703 (AD) 706E.

97 707, quoting Wolff *Private International Law* (2nd ed) 15.

98 [1904] AC 287 292: see *supra*.

closely.⁹⁹ He also mentioned the fact that there had been some degree of deviation from Westlake's strict approach by English judges. In the English case of *Gulbenkian v Gulbenkian*,¹⁰⁰ quoted in *Smith v Smith*,¹⁰¹ it was stressed that the intention need not be irrevocable in character.¹⁰² This was in accordance with the more lenient way in which the required intention was approached in the seventh edition of Dicey's work on the *Conflict of Laws* where the author said that, as long as the *propositus* did not *actually contemplate* moving, it was immaterial that he might have contemplated it.¹⁰³ Williamson JA came to the conclusion that Mr Eilon had actually formed the intention to reside permanently in South Africa at the stage when divorce proceedings were commenced by his wife; Mr Eilon only returned to Israel because he could not find a position in South Africa. In his view the enquiry did 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".¹⁰⁴

Potgieter AJA, in his rendition of the majority judgment, did not pursue the question whether English law, and more specifically Westlake's exposition of the requisite *animus*, was reconcilable with the principles of Roman-Dutch law in regard to a domicile of choice. However, the fact that he adopted the views of De Villiers CJ in

99 *Eilon v Eilon* 1965 (1) SA 703 (AD) 708F:

"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."

100 [1937] 4 All ER 618.

101 1952 (4) SA 750 (O) 754G.

102 [1937] 4 All ER 618 627.

103 96, quoted at 707 of the report (*Eilon v Eilon* 1965 (1) SA 703 (AD)). The judge also referred to Cheshire's criticism of the strict English approach in his work, *Private International Law* (5th ed) 164.

104 709C.

Johnson v Johnson,¹⁰⁵ seems to indicate that he did not seriously question the stance taken by De Villiers CJ that the English law was in harmony with the views of our Roman-Dutch authorities. But his judgment was not devoid of innovative reasoning in this respect. According to Potgieter AJA "excludes all contemplation" could never have meant that the *propositus* must have excluded from his mind "all possibility that in future he might leave the country".¹⁰⁶ With reference to the views of Centlivres CJ in *Ley v Ley's Executors*,¹⁰⁷ Westlake's formulation of the *animus* requirement was clarified to a certain extent:

"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 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."¹⁰⁸

This "gloss" on Westlake's "excludes all contemplation of any event" certainly makes for a more realistic interpretation of the *animus* element. In terms of Potgieter AJA's interpretation only a real doubt as regards the permanency of the *propositus*'s residence would exclude the intention to remain permanently. Thus *contemplation* relates to a *certain or foreseeable future event* and *contemplation* must be interpreted as *actual contemplation*. The judge decided that Mr Eilon must have entertained some doubt as regards the permanency of his stay in South Africa; he might actually have "contemplated that he would at some foreseeable future date return to Israel".¹⁰⁹

105 1931 AD 391: discussed *supra*.

106 *Eilon v Eilon* 1965 (1) SA 703 (AD) 720C-D.

107 1951 (3) SA 186 (AD): discussed *supra*.

108 *Eilon v Eilon* 1965 (1) SA 703 (AD) 721A-B.

109 723E.

Eilon's case was the last great case on the interpretation of the *animus* requirement in the context of divorce jurisdiction. In 1968 provision was made for the establishment of divorce jurisdiction by the wife in instances where the husband had no domicile in South Africa.¹¹⁰ Therefore the need for reforming the concept *domicilium* became less pressing. Reform eventually came in the form of the Domicile Act,¹¹¹ but, regrettably, the *animus* requirement did not attract the scrutiny of the reformer, as did other aspects of *domicilium*.

2.2 The meaning of "indefinite" in the Domicile Act¹¹²

The Act states, very simply, that the intention should be to settle in a place *for an indefinite period*.¹¹³ Thus we are faced with the interpretation of *indefinite*.

Now, *indefinite* is not a strange or uncommon term for the South African lawyer when it comes to domicile. In the case of *Udny v Udny*,¹¹⁴ the Scottish case which has often been cited in South Africa,¹¹⁵ the intention required for the acquisition of a domicile of choice was described as having to be "general and *indefinite* in its future contemplation".¹¹⁶ After the decision in *Winans v Attorney-General*¹¹⁷ and the

110 General Law Amendment Act 70 of 1968 s 21: see Chapter 2 under 2.2.2 Statutory intervention.

111 3 of 1992.

112 *Ibid* s 1(2).

113 S 1(2). The whole section reads as follows:

A domicile of choice shall be acquired by a person when he is lawfully present at a particular place and has the intention to settle there for an indefinite period.

114 (1869) LR 1 Sc & Div 441.

115 See discussion *supra* under 2.1 South African case law.

116 *Udny v Udny* (1869) LR 1 Sc & Div 441 458 (own italics).

117 [1904] AC 287 292.

acceptance of Westlake's interpretation of the English cases,¹¹⁸ the courts started referring to the requisite intention as one to settle *permanently*,¹¹⁹ presumably because Westlake's interpretation was regarded as conforming to the Roman-Dutch authorities on this point.¹²⁰ In a few cases *permanent* and *indefinite* were regarded as synonymous:

"In other words, what was his permanent home - because domicile only means home; where did he mean to reside indefinitely?"¹²¹

In its Report on Domicile¹²² the South African Law Commission came to the conclusion that the requisite *animus* for the acquisition of a domicile of choice should be to settle in a place for an *indefinite period*.¹²³ Pollak¹²⁴ was quoted in support of this statement. In order to shed some light on the recommendations of the Law Commission, one needs to take a closer look at the four kinds of intention that Pollak mentioned in his article, namely:

"(1) An intention to reside in the country for a definite period, e.g., for the next six months, and then to leave.

118 See *Johnson v Johnson* 1931 AD 391 discussed *supra* under 2.1 South African case law.

119 See eg *Webber v Webber* 1915 AD 229 242 249 258; *Hutchison's Executors v The Master* 1919 AD 67 74; *Deane v Deane* 1922 OPD 41 43; *Johnson v Johnson* 1931 AD 391 398; *Moncrieff v Moncrieff* 1934 CPD 208 210ff; *Carvalho v Carvalho* 1936 SR 219 221; *Ex parte Ralston's Estate* 1937 TPD 46 53; *Cook v Cook* 1939 CPD 314 316; *Eilon v Eilon* 1965 (1) SA 703 (AD) 720-721.

120 See *supra* under 2.2 South African case law.

121 *Gunn v Gunn* 1910 TPD 423 427. See also *Carvalho v Carvalho* 1936 SR 219 221:

"... there must ... be not only residence but the intention to remain permanently and indefinitely ..."

122 1990 (Project 60).

123 Par 3.44.

124 1933 SALJ 449 465.

-
- (2) An intention to reside in the country until a definite purpose is achieved, e.g., until a particular piece of work is completed, and then to leave.
 - (3) An intention to reside in the country for an indefinite period, i. e., until and unless something, the happening of which is uncertain, occurs to induce the person to leave.
 - (4) An intention to reside in the country for ever.¹²⁵

At the time of writing his article, Pollak indicated that the first and second types of intention were clearly not sufficient to acquire a domicile of choice.¹²⁶ While the fourth kind of intention would, according to South African case law, have sufficed, there was some doubt in regard to the third type of intention. At the time the most recent decision was that of the Appellate Division in *Johnson v Johnson*¹²⁷ and that case was regarded by Pollak as definite authority against the third type of intention mentioned by him.¹²⁸

It was the third type of intention described by Pollak which was adopted by the Law Commission, but without the tag "until and unless something, the happening of which is uncertain, occurs to induce the person to leave".¹²⁹ On closer inspection it appears that Pollak's third type of intention is, by implication, a combination of a positive and negative formulation of the requisite *animus*. It is positive in the sense that it requires an intention to reside for an indefinite period. However, as Pollak points out, the positive formulation of the *animus* also implies the negative, since the intention to

125 *Ibid.*

126 *Ibid.*

127 1931 AD 391.

128 1933 SALJ 449 467.

129 *Ibid* 465.

remain indefinitely¹³⁰ implies the absence of any intention of leaving, in other words, the negative formulation. But the negative formulation does not necessarily imply the positive: a person may reside in a country without any present intention of leaving and yet not have the intention to reside in that country indefinitely.¹³¹ In this sense the positive formulation is far more restrictive than the negative formulation.

However, in opting for a rigid positive formulation, the Law Commission decided to use *indefinite* instead of *permanent*. The reason given for this was that it would result in a more flexible *animus* requirement, since less is required to establish an intention to settle for an *indefinite period* than to settle *permanently*. Thus the South African Law Commission definitely regarded *permanent* as a more rigid term than *indefinite*.¹³² It is interesting to note that Pollak himself draws a distinction between the intention to reside in a country for an *indefinite* period and the intention to reside in a country *for ever*: to reside for an *indefinite* period, means to stay "until and unless something, the happening of which is uncertain, occurs to induce the person to leave", whereas no tag is attached to *for ever*.¹³³ Within the context of Pollak's article it is clear that *indefinite* is regarded as a more lenient criterion than *for ever*. Given that South African case law has inclined towards *permanent*, rather than *indefinite*,¹³⁴ or has even used the two terms in the same breath,¹³⁵ it must be established whether there is a difference in meaning between *indefinite* and *permanent*. Since Pollak relied very

130 Pollak uses "permanently" in his argument, but the same argument holds true for "indefinite".

131 1933 SALJ 449 463-464.

132 Par 3.44.

133 Pollak 1933 SALJ 449 465.

134 See eg *Webber v Webber* 1915 AD 229 242 249 258; *Hutchison's Executors v The Master* 1919 AD 67 74; *Deane v Deane* 1922 OPD 41 43; *Johnson v Johnson* 1931 AD 391 398; *Moncrieff v Moncrieff* 1934 CPD 208 210ff; *Carvalho v Carvalho* 1936 SR 219 221; *Ex parte Ralston's Estate* 1937 TPD 46 53; *Cook v Cook* 1939 CPD 314 316; *Eilon v Eilon* 1965 (1) SA 703 (AD) 720-721.

135 See eg *Gunn v Gunn* 1910 TPD 423 427; *Carvalho v Carvalho* 1936 SR 219 221.

heavily on English law in his article¹³⁶ and our courts have also adopted, rightly or wrongly, the English decisions on this point,¹³⁷ reference must be made to the recent report of the English and Scottish Law Commissions on domicile.

2.2.1 Report of the English and Scottish Law Commissions on Domicile¹³⁸

This report states that the current position in English and Scottish law is that the intention should be to make one's home in a specific country *permanently or indefinitely*,¹³⁹ but that the content and nature of the requisite intention is unclear.¹⁴⁰ In the past, according to the report, the intention required for the acquisition of a domicile of choice was interpreted as an intention to remain *permanently* in the sense of *perpetually*. That meant that even a vague hope of returning to a country of a previous domicile, excluded the necessary intention. Recently a more lenient attitude has been adopted, as is evident from the following extract quoted by the Law Commissions:

"... a domicile of choice is acquired only if it be affirmatively shown that the propositus is resident within a territory subject to a distinctive legal system with the intention, formed independently of external pressures, of residing there indefinitely. If a man intends to return to the land of his birth upon a clearly foreseen and reasonably anticipated contingency, e.g., the end of his job, the intention required by law is lacking; but, if he has in mind only a vague possibility, such as making a fortune (a

136 450 fn 8.

137 See eg *Webber v Webber* 1915 AD 239 242.

138 Private International Law: The Law of Domicile, 1987: Law Commission No 168; Scottish Law Commission No 107.

139 Par 2.6(b).

140 Par 5.8.

modern example might be winning a football pool), or some sentiment about dying in the land of his fathers, such a state of mind is consistent with the intention required by law. But no clear line can be drawn: the ultimate decision in each case is one of fact - of the weight to be attached to the various factors and future contingencies in the contemplation of the propositus, their importance to him, and the probability, in his assessment, of the contingencies he has in contemplation being transformed into actualities."¹⁴¹

The Law Commissions make it clear in the report that to require an intention to settle *permanently* would be too rigorous a requirement and would result in people being unable to acquire a domicile of choice. This would, in turn, lead to unrealistic and artificial decisions in cases where it was clear that a person had abandoned his previous domicile, but cannot meet the requirement of permanency in regard to a new domicile. The approach adopted in *In the Estate of Fuld (No 3)*¹⁴² to the effect that the intention should be to settle *indefinitely*, was preferred by the Law Commissions and incorporated into their recommendations. In their decision to opt for *indefinite* instead of *permanent* the Commissions were influenced by the following factors:

- (1) It has the merit of simplicity; yet the courts would have a measure of flexibility to deal with "hard cases".
- (2) It would provide a measure of harmonisation with legislation in other Commonwealth countries which use *indefinitely* as a criterion in the sphere of domicile.
- (3) To provide fuller guidance would lead to very detailed and complex rules in order to deal with the infinite variety of circumstances which may play a role in regard to the acquisition

141 *In the Estate of Fuld (No 3)* [1968] P 675 684-685; quoted in par 5.8 of the report.

142 [1968] P 675 684-685 quoted *supra*.

of a domicile of choice.¹⁴³

The doubts expressed in regard to the use of *indefinite* were the following:

- (1) Would it be possible to establish the requisite intention if a person intends leaving the country on the happening of a more or less probable contingency?
- (2) Would the test be able to accommodate instances of long-term employment abroad or prisoners abroad?
- (3) Concern was expressed over the uncertainty of the test.¹⁴⁴

The Law Commissions concede that *indefinite* is not sufficiently clear in itself¹⁴⁵ and attempt to explain the content of the term by the use of examples.

The first example deals with the following case: a person settles in country A without the present intention to move back to a previous domicile or to settle in another country in the future. This person will have acquired a domicile in country A. This does not mean, however, that his intention should be immutable or irrevocable; neither should he intend to live in country A till he dies.¹⁴⁶ It is interesting to note that, even though the test for the requisite intention is formulated positively, namely to settle in a country for an indefinite period, this example adopts a negative formulation, namely the absence of a present intention to settle elsewhere in future.¹⁴⁷

143 Par 5.11.

144 *Ibid.*

145 Par 5.12.

146 Par 5.13(a).

147 See *supra* under 1 The common law interpretation of the requisite *animus* for a discussion of positive and negative formulations of the *animus* requirement.

The second example deals with the question whether an intention to reside for a limited time or for some temporary or special purpose (for example, when a job is completed) will suffice for purposes of a domicile of choice. The Law Commissions decided that such an intention will not be sufficient.¹⁴⁸ Once the Law Commissions opted for *indefinite*, they could not escape this conclusion, since indefinite automatically rules out any intention which is limited in time or linked to the fulfilment of a particular purpose.

The third example deals with contingencies.¹⁴⁹ It is stated that the requisite intention should not be conditional on a future event. However, "future event" must be qualified: vague and indefinite contingencies must be disregarded. Thus contingencies like "when I have made a fortune" or "if my health should deteriorate" will not defeat an intention to settle indefinitely. However, should the "future event" be clearly defined and should there be "a real likelihood or sufficiently substantial possibility that it might occur",¹⁵⁰ the intention requirement will not have been met.

The desirability of rebuttable presumptions to facilitate proof of the acquisition of a domicile of choice was thoroughly debated.¹⁵¹ In the end it was decided not to incorporate any of the presumptions into the draft bill relating to domicile, one of the objections against the incorporation of such being that concepts used in the presumptions are often more difficult to interpret than domicile itself. For instance, if it is presumed that a person intends to live permanently in the country where *he has his home*, it would be no easier to determine where a person's home is than to

148 Par 5.13(b).

149 Par 5.13(c).

150 *Ibid.* The report refers to the cases of *IRC v Bullock* [1976] 1 WLR 1178 and *In the Estate of Fuld (No 3)* [1968] P 675.

151 Pars 5.15-5.22. See also the discussion in **Chapter 7** under **2.1 Rebuttable presumptions**.

establish his domicile.¹⁵² However, a cogent argument for the use of presumptions was advanced in the area of administrative matters where the issue of domicile is unlikely to go to court, but needs to be determined.¹⁵³ This means that the person's whole life story must be investigated in order to determine his domicile. In such cases presumptions could have been of great assistance, but the Commissions decided that the benefits of making it easier to establish the requisite intention were outweighed by the risk of injustice to too many people.¹⁵⁴ This, of course, raises the issue whether the same concept should be used in different areas of the law for different purposes.¹⁵⁵

2.2.2 Towards an interpretation of the term *indefinite*

From the reports of the South African Law Commission, as well as the English and Scottish Law Commissions it is abundantly clear that *indefinite* is intended to have a more flexible meaning than *permanent*. Although a case can be made out that *permanent*, in fact, means *indefinite*,¹⁵⁶ this is not the interpretation that has been accorded to the two terms by the English case law, which interpretation, in turn, has been followed by the South African courts.

Indefinite itself is difficult to explain. Part of the problem seems to be that a term that is negative in itself is more difficult to explain than a positive term. According to the

152 Par 5.15 read together with par 5.16.

153 Par 5.21.

154 Par 5.22.

155 This issue will be addressed in **Chapter 7** under **1.1 Does domicile bear a single meaning?**

156 According to the *Collins English Dictionary* 1092 *permanent* means:

"... not expected to change for an indefinite time; not temporary: a *permanent condition*."

dictionary *indefinite* means: "not certain or determined; unsettled."¹⁵⁷ However, what the legislator had had in mind, was probably a more *permanent* time frame than the grammatical meaning of the term *indefinite* seems to convey. It is indeed an interesting feature of the statutory *animus* requirement that the legislator has opted for a positive formulation of the *animus* requirement; yet the legislator chose a negative term, "indefinite", to define it.

Mindful of the aims of the South African Law Commission, the *animus* requirement for the acquisition of a domicile of choice may be interpreted as follows:

2.2.2.1 *Indefinite period*

The intention must definitely be to reside for an *indefinite period*. This was the test adopted by Stratford JA in his minority judgment in *Johnson v Johnson*,¹⁵⁸ as well as by Rumpff JA and Williamson JA in their respective minority judgments in *Eilon v Eilon*.¹⁵⁹ Therefore, cognisance will have to be taken of these judicial interpretations of *indefinite*, even though they were minority judgments. They may well set the tone for future decisions on domicile; since existing precedents, predicated upon the stringent requirement of an intention to settle *permanently*, will be of little assistance in regard to the new statutory requirement. An unfortunate result of the statutory intention requirement to settle for an indefinite period, is that residence for a limited period or for a specific purpose, even though it may involve a very lengthy period, will be excluded. This means that a person may reside at a particular place for a period of ten years (in terms of a contract of employment, for example) and not be able to acquire a domicile there.

157 *Collins English Dictionary* 743.

158 1931 AD 391 411.

159 1965 (1) SA 703 (AD) 705H and 716H respectively.

2.2.2.2 *Time factor*

Secondly, the *propositus* must have the intention to settle for an indefinite period *at the time when his domicile is relevant*. It must be borne in mind that the acquisition of a domicile is always linked to a specific time in the *propositus's* life: when he entered into marriage; when proceedings for divorce are instituted; when he died; etcetera. Thus the relevant intention is always linked to a date or specific period. This may be problematical where, for example, the domicile of a deceased person at the time of his marriage must be established. Events subsequent to his marriage may not be taken into account:

"This *ex post facto* ascertainment of a man's intention in the light of what subsequently happens to him, I cannot but regard as unsound."¹⁶⁰

Carter also berates the English and Scottish courts for launching a historical and chronological investigation into an individual's whole life story in order to determine his domicile at, for example, the time of his death.¹⁶¹ He points out that the English and Scottish courts commence their enquiry with the *propositus's* domicile of origin and trace all the acquisitions, abandonments and revivals of domicile throughout his life time until the final acquisition, abandonment or revival immediately prior to the relevant time in regard to which his domicile must be determined. Not only may the major part of the *propositus's* early history not have any bearing on his last domicile, the enquiry is also concluded prematurely. The last domicile is, in fact, determined on the basis of the last acquisition, abandonment or change of domicile, which may have occurred

160 Per Stratford JA in *Johnson v Johnson* 1931 AD 391 411. See also *Eilon v Eilon* 1965 (1) SA 703 (AD) 709:

"... the enquiry 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."

161 1987 ICLQ 713 722.

ten years before the individual's death.¹⁶² Carter proposes a different approach:

"A more rational, but quite different, approach would involve looking first of all to the situation as it existed at the very moment in time to which the enquiry relates, and asking directly what was *then* his home, which was the community with which he was *then* most closely connected, which is the community to which it would be most reasonable to say that he *then* belonged."¹⁶³

This does not mean that historical antecedents are not relevant in the determination of an individual's domicile: where they are relevant, they must be taken into account. However, the emphasis should be on the *moment in time* to which the enquiry relates.

2.2.2.3 Contingencies

Thirdly, the question of contingencies remains. It has been said that, in order to prevent the acquisition of a domicile of choice, a contingency should be certain or foreseeable.¹⁶⁴

162 *Ibid.*

163 *Ibid* 722-723.

164 *Eilon v Eilon* 1965 (1) SA 703 (AD). The English and Scottish Law Commissions explained it as follows in their Report (par 5.13(c)):

"The intention to reside at the moment of acquisition of the domicile must not be conditional on a future event. However, contingencies which are vague or indefinite ought to be disregarded. Thus a person who contemplates departure from the new country of residence on the happening of an ill-defined or indefinite event, or where the contingency is no more than a vague hope or aspiration, such as 'when I have made a fortune' or 'if my health should deteriorate', would not be precluded from acquiring a new domicile in that country. On the other hand, if the person in question intends to depart on the happening of some clearly defined event and there is a real likelihood or sufficiently substantial possibility that it might occur, he should not be held to be domiciled in the new country of residence." (Private International Law: The Law of Domicile, 1987: Law Commission No 168; Scottish Law Commission No 107)

However, the Domicile Act¹⁶⁵ does not say anything about contingencies and this raises the question whether contingencies are relevant to the *animus* requirement at all. Two examples from our case law may shed some light on this matter.

*Ricketts v Ricketts*¹⁶⁶ concerned the domicile of the defendant-husband in a divorce action.¹⁶⁷ The husband was a chemist of drunken habits who had not resided in any place in such a manner that it could be said that he had acquired a domicile there. The only place where he had had residence of any significance before his marriage was Port Elizabeth, but he deserted his wife a few months after the marriage. At the time of the institution of the divorce proceedings, he was residing in Cape Town and stated that Cape Town was his domicile. However, when the question was put to him, he admitted that he would be willing to accept a position at Port Elizabeth or elsewhere should better terms of employment be offered to him. On the basis of this admission Graham JP decided that the defendant could not have had the intention to reside permanently in Cape Town.¹⁶⁸ It was decided, somewhat arbitrarily, that the defendant was domiciled in Port Elizabeth: "In one sense it may be said that even at Port Elizabeth the parties never had a permanent home."¹⁶⁹ Now, the contingency of more lucrative employment must be something contemplated by many, if not most, people. The fact that this contingency persuaded the judge to rule against a Cape domicile, is somewhat surprising. Mindful of what was said above about contingencies having to be certain or foreseeable, the possibility of more lucrative employment is certainly not certain; yet it may be foreseeable. However, in the defendant's case, it could hardly have been foreseeable, since he had previously lost positions due to his

165 3 of 1992.

166 1929 EDL 221.

167 See **Chapter 2** under **2.2 Jurisdiction and choice of law** for a discussion of divorce jurisdiction.

168 *Ricketts v Ricketts* 1929 EDL 221 223.

169 224.

drunken habits. What is more, this contingency was actually "ascribed" to the defendant, since he did not mention it until he was asked about it. It is clear that this contingency, however inappropriate in the defendant's case, was used to assume jurisdiction in order to grant relief to the plaintiff. Be that as it may, this kind of contingency should ideally be individualised, in other words, each case should be assessed on its own merits. Whereas for one person the possibilities of better terms of employment may be very real, it may not be so for someone else. The certainty or foreseeability of a contingency such as this should not be judged by the *propositus* himself, but rather objectively by the court with due regard to the circumstances of each individual. This would result in an individualised objective assessment, which would take into account the personal circumstances of the *propositus*.

*Quayle v Quayle*¹⁷⁰ concerned the return of a husband, who had previously left his wife, on the understanding that he would settle in Southern Rhodesia with his wife and child, should the parties be able to reconcile their differences. Therefore the continued residence in Southern Rhodesia depended upon the success of his marriage. However, the marriage broke down again and his wife instituted an action for divorce. The defendant-husband's domicile had to be determined for purposes of divorce jurisdiction.¹⁷¹ Tredgold J decided that the husband had acquired a domicile in Southern Rhodesia, despite the fact that he would probably return to England once the marriage was dissolved. The judge decided that at the time when he returned to his family in Southern Rhodesia he had had the intention to settle there indefinitely. Since he was, at the time of the institution of the divorce proceedings, still residing there, he had retained his domicile of choice. With regard to the husband's intention to settle conditionally in Southern Rhodesia, the judge had the following to say:

170 1949 SR 203.

171 In terms of the domicile of dependence, the wife followed the domicile of her husband and therefore his domicile was decisive: see the discussion in **Chapter 4** under **2 The domicile of the wife**.

"... but I think that, in saying that he had a mental reservation and that his return here was conditional, he is allowing what has proved true in the event to influence his impressions of his own mental attitude at the time when he came here ..."¹⁷²

This is a difficult kind of condition to deal with, since it may be argued that the establishment and continued existence of a matrimonial home is always conditional upon the success of the marriage. Even though there may be room for arguing that the judge ruled in favour of a Southern Rhodesian domicile in order to accommodate the divorce action on behalf of the wife, the court was probably correct in attaching little significance to the condition relating to the success of the marriage. In referring to the condition as having influenced the defendant-husband's *own* impressions of his mental attitude, but not those of the court, the judge indicated that he viewed the contingency in an objective fashion.¹⁷³

It is interesting to note that, in the two cases discussed above, the contingency ascribed to the defendant in the *Ricketts* case¹⁷⁴ was heeded by the court, while the condition formulated by the defendant himself in the second case, *Quayle v Quayle*,¹⁷⁵ was rejected. It seems as if the *propositus*'s subjective perceptions of contingencies will have as little credibility as a declaration by the *propositus* in regard to his domicile.¹⁷⁶ Thus, if contingencies are to play a role in the determination of the requisite *animus*, the certainty or foreseeability of such should be judged objectively.

However, it seems as if there are few, if any, contingencies which should be

172 *Quayle v Quayle* 1949 SR 203 206.

173 *Ibid.*

174 *Ricketts v Ricketts* 1929 EDL 221.

175 1949 SR 203.

176 See discussion *infra* under 3.1 Declarations by the *propositus*.

considered seriously. Contingencies such as more lucrative employment opportunities, success of a marriage, residence as long as a person enjoys good health, contemplation of a move should the *propositus* be predeceased by his/her partner and the like¹⁷⁷ are the kind of future events which may occur during the lives of most people and are not always consciously contemplated as such. It may be argued that these contingencies operate in a resolute manner, in other words, they do not actually prevent the acquisition of a domicile; they terminate domicile when they materialise. Thus they are resolute in regard to the continued existence of a domicile. Explained in this way, these kinds of contingencies should not jeopardize the acquisition of a domicile. The investigation should simply be whether the residence and *animus* in regard thereto amount to domicile or not. It is hard to think of a contingency which will, from the moment that it occupies the mind of the *propositus*, exclude the requisite *animus*. A contingency such as "I shall remain here until my job is completed", will certainly qualify as a certain or foreseeable contingency, but then it may more appropriately be classified as a limitation on the requirement of an *indefinite period*. Thus it will negate the acquisition of a domicile on the ground that it does not meet the requirement of an *indefinite period*, and not because it constitutes a certain or foreseeable contingency.

2.2.2.4 Preliminary conclusions

From the above it is clear that our courts have not been provided with an easily ascertainable *animus* requirement by the Domicile Act.¹⁷⁸ It may be asked whether a negatively formulated *animus* requirement would not have suited our purposes better. In terms thereof the absence of a present intention to depart would have sufficed. It is probably easier and definitely more realistic to prove the non-existence of an intention to depart than to prove that the *propositus* had the intention to settle

177 See also *Jooste v Jooste* 1938 NPD 212 214 where the *propositus* said that he was prepared to remain in Natal so long as he was able to make a reasonably good living.

178 3 of 1992 s 1(2).

indefinitely. In this sense it would have provided a more flexible yardstick with the added advantage of referring to a specific point in time, namely "present" in the context of "the time when domicile is relevant". Be that as it may, the Domicile Act requires a positive intention to settle for an indefinite period¹⁷⁹ and thus the minority judgments in *Johnson v Johnson*¹⁸⁰ and *Eilon v Eilon*,¹⁸¹ as well as the decision in *Ley v Ley Executors*¹⁸² will provide assistance in the interpretation of the *animus* requirement.

3 Determination of the requisite *animus* for a domicile of choice: subjective or objective?

The intention required of a person to acquire a domicile of choice, is essentially a subjective requirement, or so it is thought, in the sense that it relates to the *propositus*'s state of mind at the time. But how is this *subjective* element to be determined?

3.1 Declarations by the *propositus*

It is accepted that the *animus* required for the acquisition of a domicile of choice is not the intention to acquire a *domicile*.¹⁸³ The intention is to settle indefinitely and the law then ascribes a domicile to someone. Thus domicile is a legal term which the layman is not expected to understand. But what about declarations by the *propositus* in regard to his domicile?

179 *Ibid.*

180 1931 AD 391.

181 1965 (1) SA 703 (AD).

182 1951 (3) SA 186 (AD).

183 Kahn *Domicile* 41.

In *Hills v Hills*¹⁸⁴ the defendant-husband's domicile had to be determined for purposes of divorce jurisdiction.¹⁸⁵ He had made an affidavit to the effect that, despite him being described in his antenuptial contract as domiciled in England, his domicile was Durban. He also described himself as "Richard Hugh Hills of Durban"¹⁸⁶ in his will which was made on the same date as the affidavit. At the time when divorce proceedings were commenced by his wife, he was not living in Durban. While it was clear that the husband had abandoned his domicile of origin and acquired a domicile of choice in Durban when he married, it was not clear whether he had abandoned his Durban domicile when he subsequently returned to England. When the case was heard, the wife was resident in Durban, but the whereabouts of her husband were unknown. Lansdown J decided that, in the absence of any proof to the contrary, it should be assumed that the husband was still domiciled in Durban:

"We have therefore not only no evidence of any intention to change his domicile in Natal, but no evidence of his acquisition of a domicile elsewhere, or even residence of permanent character elsewhere, though it seems on the evidence that he is not living in Natal."¹⁸⁷

It would seem as if the declarations by the husband in regard to his domicile did not play a decisive role in the court's decision. It appears that they were made at a time (twelve days after the execution of his antenuptial contract) when his domicile was indeed in Natal and therefore did not have a bearing on the subsequent possible abandonment of his Natal domicile. Thus there was no need for the judge to consider the relevance of these declarations.

184 1933 NPD 84.

185 See *Le Mesurier v Le Mesurier* [1895] AC 517 540: discussed in **Chapter 2** under **2.2.1 Common law**.

186 87.

187 *Ibid.*

It seems as if a declaration by a person in regard to his domicile will not, in the absence of other factors which point to the same domicile, be accepted as decisive. In *British American Assurance Co v Moretti (2)*¹⁸⁸ the defendant applied for security for costs in an insurance claim by an alleged peregrine plaintiff. It appeared that the plaintiff was a businessman from Italy where he had a workshop in which marble and alabaster wares were manufactured. He brought these goods to South Africa to sell them here. While his attorney stated that he was domiciled in Italy, the plaintiff himself stated in his affidavit that he had abandoned his domicile in Italy and had decided to settle permanently in South Africa. The plaintiff claimed that he had sold his business in Italy and that his family would join him in South Africa the following year. This was not supported by any material evidence, such as, for example, a deed of sale. Jones J decided that the plaintiff had not convinced the court that he had abandoned his Italian domicile in favour of a South African one. With reference to the plaintiff's declaration as regards his domicile, the judge said:

"It is, however, not sufficient for the purpose of satisfying the Court that a person should simply state that. He should give other indications to the Court to enable it to judge whether such a statement is one upon which full reliance can be placed."¹⁸⁹

It is interesting to note that this case did not concern the determination of a matter which could potentially have affected the status of the parties concerned, such as the assumption of jurisdiction in a divorce action.¹⁹⁰

*Ochberg v Ochberg's Estate and Another*¹⁹¹ also supports the view that a statement

188 1936 CPD 543.

189 545.

190 See Chapter 2 under 2 Status and divorce.

191 1941 CPD 15.

by a person as regards his domicile will not be viewed in isolation. In this case a testator had made the following statement in his will:

"I declare that at the time of my marriage I was domiciled in Russia and I was married to my wife ... according to the Russian law and in accordance with the Jewish law which excluded community of property between spouses."¹⁹²

From the evidence it was quite clear that the statement had been made to avoid a claim by his wife for half of the estate upon his death. Since all the other factors, relevant at the time of the marriage, pointed to a South African domicile, this statement by the testator was not regarded as conclusive.¹⁹³

Now, whereas one would expect a declaration by the *propositus* concerning his domicile, and especially his intention in respect of the permanency of his residence, to be viewed in a very serious light, such statements are not at all conclusive.¹⁹⁴ In fact, it seems as if the motives underlying such declarations, such as to prevent a wife from claiming a portion of the estate, or to avoid having to provide security for costs, greatly impair their reliability.¹⁹⁵ The fact that a person's declaration as to where he is domiciled cannot be accepted at face value, proves that the *animus* requirement cannot be, and is not, viewed completely subjectively.

192 20.

193 See also *Mason Gordon v Mason Gordon* 1945 TPD 62 where a similar statement by a testator was not accepted.

194 Cf also the South African Law Commission's Report on Domicile 1990 (Project 60) par 3.46.

195 See also *Shoesmith v Shoesmith* 1936 EDL 129 where the husband declared that he was domiciled in Natal (which declaration was not accepted by the court) in order to be able to enter into a post-nuptial contract.

3.2 Domicile of choice without reference to *animus*?

Even though it is unthinkable that a domicile of choice could be determined without reference to the requisite *animus*, a number of cases can be cited to show that this did in fact occur. In all of these cases numerous factors were considered in the determination of a domicile and these factors undoubtedly would have influenced the intention of the *propositus* with regard to the permanence of his residence; yet no mention was made of the *propositus*'s intention.

In *Harrop v Harrop*,¹⁹⁶ Kotzé JP had to decide whether the court had jurisdiction to entertain proceedings for divorce; and this meant that the domicile of the husband had to be ascertained.¹⁹⁷ The following factors were considered: the matrimonial domicile (which appears to have been the place where the parties cohabited after the marriage, yet no reference was made to the husband's intention to reside there permanently/indefinitely); the defendant-husband accepted the service of documents to his attorneys who were within the court's area of jurisdiction; the husband did not object to the jurisdiction of the court. The inference drawn from these considerations was that the husband was still domiciled in the court's area of jurisdiction (*in casu*, the Eastern Districts), even though he was living in the Transvaal at the time. Although no mention was made of the husband's *animus*, the court was probably correct in assuming that he had not changed his domicile. Since no change of domicile was alleged by the defendant-husband, the court actually had no alternative but to conclude that he had not abandoned his domicile in the Eastern Cape. Whether the husband had actually acquired a domicile of choice in the Eastern Cape in the first place or whether he had had a domicile of origin there, is not clear from the brief case report. The important point, though, is that the court reached a conclusion without actually inquiring into the husband's intention to reside permanently in the Eastern

196 (1905) 19 EDC 341.

197 Given the authority of *Le Mesurier v Le Mesurier* [1895] AC 517, this constituted the decisive jurisdictional criterion: see **Chapter 2** under **2.2.1 Common Law**.

Cape.

*Wooldridge and Others v Ellemor*¹⁹⁸ concerned an application for security for costs in the case of a peregrine plaintiff. The court had to decide whether the respondent (the plaintiff in the main action) was domiciled within its jurisdiction or not. It appeared that the respondent was born in Australia, but came to Johannesburg where he established himself as a mantelpiece maker. He married, acquired fixed property and set up a home in Johannesburg where he lived for twelve years. He then sold his house and business. His wife left for Australia and he followed shortly afterwards. Without making reference to the respondent's intention to reside permanently in Johannesburg, Bristowe J concluded that he had acquired a domicile of choice there and had not abandoned his domicile there. Again, the conclusion of the court was probably correct, since the applicants failed to prove that the respondent had indeed abandoned his South African domicile.

*Von Falkenstein v Von Falkenstein*¹⁹⁹ is another case in point. In this case the court had to determine whether it had jurisdiction in a divorce action and thus the domicile of the husband²⁰⁰ was in issue. Again, no reference was made to the husband's intention regarding residence in the Transvaal. In fact, little was known about him. The parties were married in Mafeking and the marriage certificate stated that the defendant-husband was residing at Mafeking at the time and that he was unemployed. His wife alleged that, at the time of the marriage, he was a policeman in the Refugee Lager under the military authorities of the Transvaal Republic and that he had only been temporarily resident in Mafeking. According to her, his actual residence was in Johannesburg. He subsequently left her and went to Johannesburg from where she received a telegram to join him. However, when she arrived in Johannesburg, she was

198 1909 TS 158.

199 1917 WLD 67.

200 In terms of *Le Mesurier v Le Mesurier* [1895] AC 517 540 the domicile of the husband was the jurisdictional ground for divorce actions: see **Chapter 2** under **2.2.1 Common law**.

unable to find him and has not succeeded in tracing his whereabouts since. On these facts, Ward J decided that the husband was domiciled in the Transvaal: "There is nothing to show that the domicile of origin of the defendant is not the Transvaal except his name and that nothing can be learnt of his origin."²⁰¹ Presumably jurisdiction was founded on the husband's domicile of origin on the basis that there was no evidence that the Transvaal was not his domicile of origin; a very shaky ground indeed. Admittedly, the non-appearance of the husband made it very difficult, if not impossible, for the court to inquire into his state of mind regarding the requisite *animus* for the acquisition of a domicile of choice.

In all of the above cases, the factors considered by the court to determine where the *propositus* was domiciled, could have been translated into an intention, for example, "considering the relevant facts, the *propositus* must have intended to settle in a particular place". This raises the question whether the determination of the requisite *animus* is not, even in cases where it is discussed in great detail, done completely objectively, regardless of the *propositus*'s actual intention.

3.3 Factors determining domicile

A survey of our case law reveals certain factors which are used in most cases to determine whether a domicile of choice has been acquired or whether there has been a change of domicile. These factors relate primarily to the *animus* requirement in the sense that the court ascribes an intention to the *propositus* on the basis of all the relevant factors. An attempt will be made to isolate a number of the factors which are usually considered by our courts. It must be pointed out that these factors are used cumulatively to indicate what the intention of the *propositus* is. However, in a given case one of these factors may be decisive.

3.3.1 Residence

Residence occupies a special position when it comes to a domicile of choice. On the one hand *lawful residence* is one of the prerequisites for the acquisition of a domicile of choice,²⁰² but *residence* as such may also be an important indicator of an intention to remain indefinitely. Therefore, it seems as if *residence* should not be regarded as a totally independent prerequisite for the acquisition of a domicile of choice - it is, in fact, almost always involved in the determination of the requisite intention. In the past little attention was paid to this element of domicile, since it presented few problems. However, a proper analysis of this requirement is necessary in order to clarify its role in the determination of the *animus* requirement.

It is submitted that the operative word, when it comes to residence, is *lawful*. Nobody can acquire a domicile in South Africa if his residence here is unlawful. Lawfulness does not relate to the *propositus*'s intention: one cannot have an "unlawful intention"; after all, the law does not place a sanction upon our intentions.²⁰³ It is only when a manifestation of such an intention occurs, such as *residence* in the case of domicile, that the law becomes relevant. Therefore, unlawfulness in relation to domicile is to be found in the factual element of physical presence, that is *residence*. Once the intention to remain indefinitely at a particular place has been translated into residence and that residence is unlawful, no domicile will have been acquired.

Residence, in the sense of actual physical presence, is an important indicator of an

202 S 1(2) of the Domicile Act 3 of 1992.

203 Cf the following quote from *Abelheim v Abelheim* 1918 SR 85 86:

"What I have to look to is the intention of the plaintiff ... Even if that intention should be in conflict of the law, it seems to me to be the determining factor."

See also Pollak 1934 SALJ 11 18:

"Even if the motive is morally blameworthy that will not in itself prevent the acquisition of a domicile of choice."

intention to remain indefinitely at a particular place.²⁰⁴ According to our case law, it is not mere physical presence which is decisive - the type of residence is important. We are often reminded of the definition in the *Corpus Iuris Civilis*²⁰⁵ where it is said that an individual's domicile is that place where he has placed his household goods and the greater part of his property and fortune, in other words, the place that he calls home.²⁰⁶ In the case of a married couple, for example, the establishment of a matrimonial or family home may be evidence of their intention to remain at that place indefinitely. The purchase of a dwelling or a farm and the accumulation of furniture are

204 Almost every case concerning domicile includes a reference to residence. The following are some of the more informative ones: *McCurrach v McCurrach* (1892) 6 HCG 256 258; *Moreland v Moreland* (1901) 22 NLR 385 391; *Etheridge v Etheridge* (1902) 23 NLR 180 183 (where "lodgings" were specifically mentioned); *Robarts v Robarts* (1903) 17 EDC 132 136ff; *Forster v Forster and Wheeling* (1905) 26 NLR 124 125; *Wooldridge and Others v Ellemor* 1909 TH 158 159; *Gunn v Gunn* 1910 TPD 423 428; *Van Straaten v Van Straaten* 1911 TPD 686 689; *Noyes v Schulz* 1911 32 NLR 318 319; *Clear v Clear* 1913 CPD 835 839; *Webber v Webber* 1915 AD 239 243ff 251; *Von Falkenstein v Von Falkenstein* 1917 WLD 67 68; *Hutchison's Executor v The Master* 1919 AD 71 76ff; *Croft v Croft* 1930 WLD 201ff; *Johnson v Johnson* 1931 AD 391 406ff 410ff; *Taylor v Taylor* 1931 CPD 98 99; *Ex parte Fraser* 1934 SR 35 36; *British American Assurance Company v Moretti (2)* 1936 CPD 543 545; *Cook v Cook* 1939 CPD 314 318; *Ochberg v Ochberg's Estate* 1941 CPD 15 39ff; *Commin v Commin* 1942 WLD 191 194; *Moore v Moore* 1945 TPD 407 409; *Ex parte Glass et Uxor* 1948 (4) SA 175 (T) 382; *Quayle v Quayle* 1949 SR 202 206; *Ley v Ley's Executors* 1951 (3) SA 186 (AD) 193ff; *Eilon v Eilon* 1965 (1) SA 703 (AD) 709ff 721ff; *Howard v Howard* 1966 (2) SA 718 (R) 722ff.

205 C 10 40(39) 7 *lex* 1.

206 Whether the term, *larem*, used in C 10 40(39) 7 *lex* 1 should be translated as "household goods" (as Scott's translation reads) or "household gods", is debatable. In the English case of *Lord v Colvin* (1859) 62 ER 141 144 *larem* was translated as follows:

"'Larem', which even to a Roman was a figurative expression, may be properly translated 'household', meaning by that term the united body, consisting of a man and his wife and his children and domestics dwelling together in one abode."

However, in an old South African case, *Rosenblum v Marcus* 1884 5 NLR 82 84, *larem* was translated as "household gods". (See also *Moreland v Moreland* (1901) 22 NLR 385 392.) It seems as if a workable interpretation of *larem* would be the establishment of a home in the sense that Voet defines domicile:

"Everyone can also be sued by virtue of domicile, in the place, that is to say, 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." (*Commentarius* 5 1 92 (Gane's translation))

important indicators of the establishment of a home in this respect.²⁰⁷ In the case of a single person, temporary lodgings will not necessarily defeat the requisite *animus*.²⁰⁸ On the whole it may be said that residence is an important pointer towards the intention to remain indefinitely and that each case must be evaluated on its own merits.

3.3.2 Employment

Apart from residence, employment²⁰⁹ or the existence or setting up of a business at a certain place is an important indication of a person's intention to remain indefinitely. In many cases the setting up of a home is directly related to employment, since the place where the *propositus* earns his livelihood, is usually the place where he establishes his home.

Certain types of employment may, however, effectively prevent the acquisition of a domicile of choice. Reference to the case of *Crystal v Colonial Secretary*,²¹⁰ gives one the impression that the occupation of the *propositus*, namely that of a prostitute, led

207 *McCurrach v McCurrach* (1892) 6 HCG 256 258; *Mills v Executors of Mills* (1900) 18 SC 182 190ff; *Moreland v Moreland* (1901) 22 NLR 385 391; *Forster v Forster and Wheeling* (1905) 26 NLR 124 125; *Wooldridge and Others v Ellemor* 1909 TH 158 159; *Gunn v Gunn* 1910 TPD 423 428; *Clear v Clear* 1913 CPD 835 839; *Taylor v Taylor* 1931 CPD 98 99; *Ex parte Fraser* 1934 SR 35 36; *Commin v Commin* 1942 WLD 191 194; *Ex parte Glass et Uxor* 1948 (4) SA 175 (T) 382; *Quayle v Quayle* 1949 SR 202 206; *Howard v Howard* 1966 (2) SA 718 (R) 722.

208 See eg *Hutchison's Executors v The Master* 1919 AD 71 76ff where residence in a hotel was regarded as sufficient to acquire a domicile.

209 *McCurrach v McCurrach* (1892) 6 HCG 256 258; *Moreland v Moreland* (1901) 22 NLR 385 391; *Etheridge v Etheridge* (1902) 23 NLR 180 183; *Crystal v Colonial Secretary* (1905) 22 SC 646 648; *Forster v Forster and Wheeling* (1905) 26 NLR 124 125; *Wooldridge and Others v Ellemor* 1909 TH 158 159; *Noyes v Schulz* (1911) 32 NLR 318 319; *Clear v Clear* 1913 CPD 835 839; *Johnson v Johnson* 1931 AD 391 406ff; *Moncrieff v Moncrieff* 1934 CPD 208 211; *Carvalho v Carvalho* 1936 SR 219 220; *British American Assurance Company v Moretti (2)* 1936 CPD 543 545; *Cook v Cook* 1939 CPD 314 318; *Ochberg v Ochberg's Estate* 1941 CPD 15 40; *Nicol v Nicol* 1948 (2) SA 613 (C) 621; *Quayle v Quayle* 1949 SR 203 206; *Ley v Ley's Executors* 1951 (3) SA 186 (AD) 193ff; *Eilon v Eilon* 1965 (1) SA 703 (AD) 709ff 721ff.

210 (1905) 22 SC 646.

the court to conclude that she had not acquired a domicile in the Cape Colony:

"It is often easy to discover from the business carried on, or from the occupation a man is engaged in, and the manner in which he carries on business, whether he has come to the country for a permanent residence ... In this case the occupation of the applicant is not such that one can infer therefrom that she intended to carry on business here permanently. She seems to be what she is described - a common prostitute - and she seems, having left her native land, to be a sort of wanderer."²¹¹

The same may happen in the case of a person who moves around in search of better employment opportunities²¹² or performs work on a contract basis.²¹³ Be that as it may, the fact that one's occupation, in conjunction with other relevant factors, may either support the intention to settle indefinitely, or defeat such an intention, makes it one of the most important considerations for the determination of the requisite *animus*.

3.3.3 Other factors

Other factors, which have an influence on the determination of the *animus* include the following: place of marriage,²¹⁴ registration of marriage with a specific foreign

211 648.

212 See eg *Johnson v Johnson* 1931 AD 391. However, in *Ley v Ley's Executors* 1951 (3) SA 186 (AD) this did not constitute a barrier to the acquisition of a domicile of choice.

213 See eg *Moncrieff v Moncrieff* 1934 CPD 208 as well as *Bothma v Bothma* 1940 (1) PH B8 (O), but see *Cohill v Cohill* 1938 (2) PH B41 (C) and *Thompson v Thompson* 1940 SR 187 where a contract of employment did not prevent the acquisition of a domicile of choice: see the discussion in Chapter 4 under 3.3 Certain classes of employees.

214 *McCurrach v McCurrach* (1892) 6 HCG 256 258; *Wooldridge and Others v Ellemor* 1909 TH 158 159; *Johnson v Johnson* 1931 AD 391 406ff; 410ff.

consulate,²¹⁵ the place where one party deserted the other,²¹⁶ naturalisation.²¹⁷ Anyone of these factors may, of course, be decisive on its own, but they are usually considered in conjunction with other relevant factors.²¹⁸

4 Conclusion

From what was said above it is clear that domicile, and more specifically the requisite *animus*, is determined in an objective fashion.²¹⁹ Scant regard is paid to the *propositus*'s declared intention in this regard; on the basis of all relevant factors, the court ascribes an intention to the *propositus*. These factors connect a person to a specific place and, in order to satisfy the *animus* requirement, it is said that the *propositus* must have intended to settle at that place indefinitely. Thus a subjective intention is determined by means of objective criteria. Even a declaration regarding the *propositus*'s intention is judged according to the facts of his life; if the declaration does not correspond to his circumstances it will not be accepted. In short, a person is not master of his own destiny when it comes to the determination of his domicile. As was said in the case of *Brace v Brace*:

215 *Brunschwik v Brunschwik* 1902 TH 223 226.

216 *Harrop v Harrop* 19 (1905) EDC 341 342.

217 *Johnson v Johnson* 1931 AD 391 406ff 410ff; *Ochberg v Ochberg's Estate* 1941 CPD 15 44.

218 See also Pollak 1934 SALJ 11 32ff for a discussion of factors which are indicative of a domicile of choice.

219 Our courts seemingly disregard the following *dictum* from *Fenner v Fenner* 1943 SR 188 191:

"The determination of a man's intention must be a subjective question. It may be evidenced by outward circumstances but must be decided finally on the simple fact of his state of mind."

The problem with this statement is, of course, that it is impossible to subjectively determine a person's state of mind.

"In these cases we do not regard altogether what a man says is in his mind as to his intentions. We look into the facts ..."²²⁰

This underlines the jurisprudential questionability of the retention of the *animus* requirement for the acquisition of a domicile of choice by the legislator. More importantly, it raises the issue whether it is possible to use a concept which depends on an undefined, subjective element, such as the *animus* requirement for a domicile of choice, as a jurisdictional and a conflicts connecting factor? In short, does domicile pass the test as a connecting factor? This question will be addressed in **Part III**.

220 (1904) 25 NLR 52 53.

PART III: EVALUATION OF DOMICILE AS A CONNECTING FACTOR

In this section the concept *domicile* will be evaluated as a conflict of laws and a jurisdictional connecting factor on the basis of the function of connecting factors in the conflict of laws, as well as jurisdiction. With a view to future law reform, certain aspects relating to the concept of *domicilium* itself, as well as certain areas where domicile features as a connecting factor, which are in need of reform, will be identified.

CHAPTER SIX

THE FUNCTIONAL DIVERSIFICATION OF CONNECTING FACTORS: DOMICILE COMPARED WITH OTHER CRITERIA

Introduction

Domicile is used extensively as a connecting factor in choice of law and jurisdiction.¹ But what are connecting factors and what do they do? In this chapter the functions of both conflict of laws and jurisdictional connecting factors will be investigated with a view to a comparison of these two kinds of connecting factors. On the basis of this analysis domicile will be compared with other connecting factors, such as nationality and residence.

1 Conflict of laws

1.1 The position of the connecting factor in the conflict of laws

The connecting factor plays a crucial role in the conflict of laws and therefore it is important to establish exactly where and how the connecting factor fits into the whole scheme. This will be investigated with reference to the traditional approach to choice of law, as well as twentieth century reaction to the traditional approach.

1.1.1 The traditional² approach

The use of connecting factors in the conflict of laws is firmly rooted in the traditional approach to a conflicts problem. This "traditional" approach implies the selection of an

1 See especially Chapters 2 and 3.

2 Or "classical": see Juenger *Choice of Law* 88.

appropriate conflict rule which will indicate the proper *lex causae* for a specific choice of law issue.³ Thus the traditional approach entails the use of conflict rules to solve conflicts problems. These conflict rules are often referred to as jurisdiction-selecting rules since the issue is referred to the legal system of a specific jurisdiction (or country) without any investigation into the content or policies of the particular substantive law rule of the jurisdiction (or country) referred to.⁴ Since the connecting factor constitutes the essential indicator of the relevant *lex causae* within the conflict rule, the structure of a conflict rule will briefly be examined.

For purposes of this study the discussion of the structure of a conflict rule will focus on that of the multilateral or general⁵ or all-sided (in German "allseitige" or "zweiseitige") conflict rule. The multilateral conflict rule indicates which legal system (whether foreign or the *lex fori* itself) governs a particular conflicts question and this constitutes the true domain of the connecting factor in the conflict of laws.⁶ The conflict rule with regard to the proprietary consequences of a marriage may serve as an example:

The proprietary consequences of a marriage are governed by the *lex domicilii matrimonii*.⁷

-
- 3 See Anton *Private International Law* 5ff; *Cheshire-North* 43ff; *Dicey-Morris* 29ff; *Falconbridge Conflict* 37ff; *Morris Conflict* 9ff; *Robertson Characterization* 92ff; *Stone Conflict* 2ff, as well as Lederman 1951 *Can B Rev* 168; Spiro 1979 *SALJ* 598.
- 4 See *infra* under 1.1.2 **Modern approaches** for a discussion of the so-called "American revolution" that places great emphasis on the content and policies of the substantive rules involved in a conflict of laws situation.
- 5 *Robertson Characterization* 98.
- 6 For a discussion of the different kinds of conflict rules, see Spiro 1979 *SALJ* 598, as well as *Kegel Internationales Privatrecht* 227ff; *Lipstein Principles* 93ff; *Wolff Private International Law* 96ff.
- 7 *Brown v Brown* 1921 AD 478; *Frankel's Estate v The Master* 1950 (1) SA 220 (A); *Sperling v Sperling* 19775 (3) SA 707 (A).

Falconbridge, who coined the term "connecting factor",⁸ subdivides such a conflict rule into three parts, namely

- (a) a particular kind of legal question (in this example *proprietary consequences*),
- (b) the connecting factor: "a particular local element in the factual situation" (*domicilium matrimonii*) and
- (c) the *lex causae* as indicated by the connecting factor (*lex domicilii matrimonii*).⁹

He submits, however, that a conflict rule may also be divided into two parts, consisting of the former (a) and (b), that is the legal category and the connecting factor, as the first part and (c), the *lex causae*, as the second part.¹⁰ I prefer, however, the analysis of the structure of a conflict rule by Rabel who regards the connecting factor as part of the second part of a conflict rule (the *lex causae* indicated by the connecting factor, in our example the *lex domicilii matrimonii*),¹¹ although of course it arises out of the facts that raise a legally relevant question (the legal question or legal category being the first part of the rule).¹² Since the connecting factor forms the link between the first and third parts of a conflict rule, it seems that it may quite comfortably be placed with either its "origin" or its "destination" (the *lex causae* indicated by it). In line with the usual formulation of a conflict rule, it is practically convenient to regard the legal category (proprietary consequences of the marriage) as the first part of the rule and the connecting factor (*domicilium matrimonii*) together with the *lex causae* (*lex*

8 1937 LQR 235 236.

9 39.

10 125.

11 Rabel *Conflict: Comparative* 47ff.

12 Rabel (*Conflict: Comparative* 47) describes the first part of a conflict rule as a definition of its object, ie "certain operative facts, the legal consequences of which are determined in the second part".

domicilii matrimonii) as the second part.

The legal category of a conflict rule is arrived at by a process called characterisation.¹³ The determination of the connecting factor does not form part of the characterisation process, but may be regarded as the interpretation of a factual element.¹⁴ As a general rule, connecting factors are interpreted by the *lex fori*, with *nationality* the notable exception to the rule.¹⁵ This is explained by Kahn-Freund in terms of the two aspects which he distinguishes within the rule that the *lex fori* defines the connecting factor. According to him, the *lex fori* initially decides what is meant by the connecting factor (in other words, the *lex fori* defines the connecting factor) and then the *lex fori* decides whether, in terms of its definition of the connecting factor, the issue in question is indeed linked to the *lex causae* indicated by the conflict rule (in other words, whether the facts match the connecting factor).¹⁶ Now, in regard to a connecting factor, such as domicile, the *lex fori* both defines the meaning of domicile and decides, for example, where the *propositus* is, according to the *lex fori*'s definition of domicile, indeed domiciled. However, when *nationality* is invoked as a connecting factor, the *lex fori* defines the connecting factor, but, when it comes to the second leg of the rule, the *lex fori* cannot decide whether, for example, the *propositus* is a national of a foreign country. The second leg of the inquiry can only be decided by the law of

13 The literature on characterisation is extensive. All the major works on the conflict of laws contain a section on characterisation (also termed qualification after its French origins (*qualifikation* in German), or classification): see eg *Cheshire-North* 43ff; *Dicey-Morris* 34ff; *Falconbridge Conflict* 50ff; Kahn-Freund *General Problems* 223ff; Neuhaus *Grundbegriffe* 113ff. See also the following contributions: Beckett 1934 *BYBIL* 46; Lederman 1951 *Can B Rev* 3; Morse 1949 *Columbia LR* 1027 (especially fn 3 which contains an extensive list of references to writings on the question of characterisation).

14 Wolff *Private International Law* 136.

15 Kahn-Freund *General Problems* 242ff. Note, however, that where domicile is used as a connecting factor in regard to the recognition (by a South African court) of a foreign divorce order, domicile may be interpreted according to the law of the foreign country concerned in terms of s 13(1)(a) of the Divorce Act 70 of 1979: see Chapter 2 under 6 Recognition of foreign judgments relating to status.

16 *Ibid.*

the country to which the issue of nationality pertains. Thus it is perfectly possible that a South African court may assign an English domicile to a person, whereas English law would not, given the same facts, have assigned an English domicile to him. This cannot happen with nationality - each country decides who its nationals are and this is accepted by the rest of the world. This distinction, drawn by Kahn-Freund, gains significance when it comes to people who have more than one nationality or no nationality at all. It will be up to the *lex fori* to decide, in terms of Kahn-Freund's first leg, which nationality will be decisive or what will happen in the case of a stateless person.¹⁷

Since this thesis is concerned with the connecting factor, *domicile*, the peculiarities pertaining to nationality will not be investigated further. Suffice it to say that the South African conflict of laws adheres firmly to the traditional approach to choice of law and that domicile is one of the predominant connecting factors used in our choice of law rules.¹⁸ However, at this stage, regard must be had to the reaction (mainly American) against the use of conflict rules (in other words, the traditional approach) to indicate the applicable *lex causae* for a choice of law issue.

1.1.2 Modern approaches

In reaction to the traditional approach twentieth century American commentators have embarked on a total re-evaluation of the conflicts process. In their search for new approaches or methods which will guarantee just results, they have not accepted any of the existing principles or traditional ideas as axiomatic, but, on the contrary, questioned, and for the most part rejected, the established rules and approaches. It would be an almost impossible task to canvass all the different American approaches, as well as the reaction of the courts to them, but an attempt will nevertheless be made

17 *Ibid.*

18 See **Chapters 2 and 3.**

to give a brief synopsis of the main trends.

A number of these commentators have rejected the classic "jurisdiction-selecting" method, in terms of which the law of a jurisdiction or certain state is indicated by a conflict rule, and turned their attention to so-called "rule-selection". Instead of blindly selecting a *lex causae* by means of a choice of law rule with no regard being had to the content and policies of the substantive law of the jurisdiction referred to,¹⁹ rule-selection focuses on the content of the substantive law rules of the different states concerned, as well as the policy or policies underlying those rules.²⁰ In fact, someone like Currie advocates the scrapping of all existing conflict rules (calling them "irrational", "futile", "arbitrary")²¹ in favour of a case-by-case approach. Very significant has been the attention directed at the issue which lies at the very basis of any conflicts problem, namely *whether* a conflict of laws does indeed exist in a given fact-complex. In terms of the jurisdiction-selecting approach, any fact-complex that crosses state boundaries (in other words, containing a "foreign" element) is regarded as a conflicts issue and subjected to the conflicts process without any investigation into the content and policies of the different substantive laws concerned. Writers like Cavers and Currie²² have indicated that, according to their rule-selecting approach, this basic premise of the traditional approach is unacceptable. There are indeed many fact-complexes which, though they contain foreign elements, do not, on a proper investigation into the content and policies of the relevant substantive law rules, constitute a conflict of laws situation and should thus be labelled "false conflicts". Examples of such false conflicts

19 Cf the following remark by Cavers:

"... the court ... is engaging in a blindfold test. The court must blind itself to the content of the law to which its rule or principle of selection points and to the result which that law may work in the case before it." (1933 *Harv LR* 173 180)

20 In regard to these modern American trends see generally Anton *Private International Law* 31ff; Cavers *Choice-of-Law Process*; *Cheshire-North* 31ff; Currie *Selected Essays*; Juenger *Choice of Law* 88ff; Lipstein *Principles* 36ff; Morris *Conflict* 512ff.

21 Currie *Selected Essays* 183.

22 Cavers *Choice-of-Law* 89; Currie *Selected Essays* 152.

are instances where the substantive laws of two states are the same or would produce the same result, or it appears that only one state has an interest in the application of its substantive law.²³ Whether a state has such an interest must be determined with reference to the content of the substantive law rule concerned, as well as the policy or policies underlying it. In other words, only once it has been established that more than one state has an interest in the application of its substantive law rule, is a true conflict of laws (or rules) at hand.²⁴

Once a true conflict has been identified, the question is how to solve it or, in other words, how to select the appropriate substantive law rule. A variety of solutions to this problem has been advanced. Currie's solution is rather unsatisfactory, since he generally finds refuge in the *lex fori* whenever a true conflict presents itself; it is only when the forum has no interest whatsoever in the application of its own law that foreign law will be applied.²⁵ Many writers were not prepared to accept this unqualified resort to the *lex fori* and have argued for the "weighing" of the interests (also called "comparative impairment") of the different states concerned in order to determine which state's interests would be more impaired if its policy were not given effect to.²⁶ Cavers, again, attempted to establish "principles of preference" to solve true conflicts. These principles would indicate which state's substantive law rule should be applied. Cavers conceded though that, while he rejected the traditional jurisdiction-selecting approach, choice of law rules could develop from his principles of preference:

23 Cavers *Choice-of-Law* 89. There is also a possibility that no state has a particular interest in the application of its substantive law, eg where the law of the plaintiff's state favours the defendant (but the plaintiff's state has no interest in protecting the defendant) and the law of the defendant's state favours the plaintiff (but the defendant's state has no interest in protecting the plaintiff): see Currie *Selected Essays* 152ff.

24 See Cavers 1970 III *Hague Recueil* 75 129; *Cheshire-North* 32; Currie 1963 *Columbia LR* 1212 1233; Morris *Conflict* 461; Pryles 1987 *Sydney LR* 284.

25 Currie *Selected Essays* 183ff.

26 *Cheshire-North* 34.

"I must concede, however, that a jurisdiction-selecting rule may be the product of two decisions choosing on policy grounds between competing rules in cases in which the law-fact patterns are reversed. If the court concludes that the same contact should be controlling in each case, economy in stating the results would yield a choice-of-law rule stated in terms of the jurisdiction where that contact is located. However, in the use of a rule thus synthesized, its origin should always be kept in mind."²⁷

These American approaches have not found favour with English and Continental academics, the strongest points of criticism being that these approaches create uncertainty (for example, interpretation of policies underlying substantive law rules by different courts may differ)²⁸ and that many of these approaches are only suited to the American situation, that is conflicts between states, and not to private international conflicts between the legal systems of different countries.²⁹ Furthermore, it is questionable whether it is possible to totally reject the traditional approach. Whether a state has an interest in the application of its substantive law rule, will often depend on whether the underlying policy of the rule is, for example, to protect a defendant *domiciled* or *resident* in that state. In this sense interest-analysis relies quite heavily on *connecting factors* and in the area of family law and torts, resort will often be had to *personal* connecting factors, such as domicile and residence.³⁰

27 Cavers *Choice-of-Law Process* 9 fn 24.

28 See especially the comment by Stone *Conflict* 5:

"... their use on a case-by-case basis, *instead of rules*, amounts to a formula for chaos; and that is what the American conflicts revolution has in fact achieved."

29 See in general Anton *Private International Law* 37ff; Cheshire-North 33ff; Kegel 1964 II *Hague Recueil* 95 180ff; Morris *Conflict* 453ff; Reese 1964 I *Hague Recueil* 315 329ff.

30 See Juenger *Choice-of-Law* 100.

The American Law Institute's *Restatement (Second)*,³¹ presents a more balanced picture. The basic criterion for choice of law in the *Restatement (Second)* is the application of the law of the state which has the most significant connection with the issue concerned, and in the absence of a statutory directive in this respect, the following factors must be considered:

- (a) the needs of the interstate and international systems;
- (b) the relevant policies of the forum;
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue;
- (d) the protection of justified expectations;
- (e) the basic policies underlying the particular field of law;
- (f) certainty, predictability and uniformity of result;
- (g) ease in the determination and application of the law to be applied.³²

The approach of the *Restatement (Second)* represents a compromise between those who support traditional conflict rules (notably factors (d), (f) and (g)) and the more revolutionary commentators who place great emphasis on policy evaluation (see especially factors (b), (c) and (e)). The reporter of the *Restatement (Second)*, Reese, explains the approach as follows:

"I believe that one ultimate goal, be it ever so distant, should be the development of hard-and-fast rules of choice of law. I believe that in many instances these rules should be directed, at least initially, at a particular issue. And I believe that in the development of these rules

31 Published in 1971.

32 S 6.

consideration should be given to the basic objectives of choice of law, to the relevant local law rules of the potentially interested states and, of course, to the contacts of the parties and of the occurrence with these states."³³

The question is whether these modern American methods and approaches, as well as the *Restatement (Second)*, hold any significance for the civilian-trained lawyer? Now, while the success or failure of these methods and approaches are largely dependent on the way in which the American courts apply them, as well as trends in the different states, these commentators have succeeded in stimulating thought on the conflicts process itself. The identification and evaluation of policies underlying particular fields of law are essential; it is true, indeed, that these considerations and policies are at the bases of many of the traditional conflict rules.³⁴ A conflict rule may have developed out of, for example, the policy that minors should be protected by the law to which they belong, which led to a choice of law rule using the domicile of the minor as a connecting factor.³⁵ For the civilian-trained lawyer there can be no harm in reassessing the true *ratio* behind every existing conflict rule and, in the light of this, re-evaluating the existing rule.

It is significant, however, that even those modern approaches which wish to get rid of

33 1976 II *Hague Recueil* 1 180.

34 See Stone *Conflict* 5-6.

35 Cf the *fraus legis* rule in regard to the essential validity of a marriage in the South African conflict of laws in terms of which, for example, a minor may not marry in a country other than his/her domicile with the intention to evade a disqualification regarding age (or relating to any other essential requirement) which exists in the *lex domicilii*. Such a marriage may be declared invalid by the forum of the *lex domicilii*, in other words the *forum legis domicilii*. Therefore, the regular conflict rule regarding the essential validity of a marriage which refers such issues to the *lex loci celebrationis*, will be displaced by the *lex domicilii* provided that the forum is also the *forum domicilii*: see Edwards *LAWSA: Conflict* par 427. See also Forsyth *Private International Law* 107 for the argument that the doctrine of *fraus legis* should not be limited to *fraus legis fori* (in other words where the *lex domicilii* is also the *lex fori*), but that it should be extended to apply in cases where the *lex domicilii* has intentionally been evaded, regardless of which forum is approached in the matter.

conflict rules altogether, cannot function without establishing some link between the problem at hand and the substantive law of the state which claims application. As indicated above, the interest of a state in the application of its law will inevitably depend on a connecting factor, for example, the fact that immovable property is *situated* within its jurisdiction, or the fact that the defendant is *domiciled* or *resident* within the state. Therefore, the connecting factor plays a vital role in the process of selecting the appropriate substantive law rule for a specific conflicts problem.³⁶

1.2 The function of the connecting factor in the conflict of laws

Despite the declaration of war by the revolutionaries on the traditional jurisdiction-selecting approach to the choice of law problem, the two opposing schools of thought share a common goal: to indicate, for each conflicts issue, the appropriate *lex causae* or substantive law rule. Whereas the traditionalists focus on more generally formulated conflict rules which would accommodate certain categories of conflicts issues (for example, *validity of a marriage*), the modern American approaches focus on selecting for each fact-complex the appropriate substantive law rule. However, these American approaches do have the potential to produce, as a result of the repeated evaluation of essentially identical conflicts situations by the courts, more generally formulated conflict rules. Be that as it may, an essential feature of both the traditional approach and the modern approaches, is that the connecting factor fulfils the crucial function of indicating which *lex causae* is the appropriate one. Therefore it is important to identify the most important principles underlying the choice of connecting factors.³⁷

Section 6 of the American *Restatement (Second)*³⁸ identifies certain factors which may

36 See Kegel's criticism of Currie's approach, with specific reference to points of contact, in 1964 II *Hague Recueil* 95 189.

37 Obviously, it is an impossible task to identify *all* possible underlying principles; that would constitute a thesis in itself. For the purposes of this work, an attempt will be made to identify those principles which are particularly relevant to the present work.

38 1971.

influence the choice of an appropriate *lex causae*. Since the function of the connecting factor is to indicate the *lex causae*, these factors impact on the selection of the connecting factor. The factors relevant to the present discussion include the following: the protection of justified expectations; certainty, predictability and uniformity of result.³⁹

In certain areas of the law the protection of justified expectations is paramount and therefore the choice of the applicable *lex causae* should meet this requirement.⁴⁰ This is, for example, the case in the law of contract where parties are allowed to choose the *lex causae* themselves⁴¹ in order to give effect to their expectations. This is also an important factor in choice of law issues relating to private-law status, since one may expect a status, created by a particular legal system, to be recognised by other countries.⁴² Although it is said that the protection of justified expectations has limited significance in certain areas of the law such as delict (or torts),⁴³ it is submitted that, even after someone has acted negligently, such an individual may still have a justified expectation (albeit a negative one) as regards the law which will be applied to the dispute. Therefore the choice of the connecting factor should reflect an awareness of which legal system parties would justifiably or reasonably expect to apply.

The *Restatement (Second)* acknowledges the importance of certainty, predictability and uniformity of result, since the attainment of these values will definitely discourage forum

39 Ss 6(2)(d) and 6(2)(f). See also Nygh *Conflict* 33-35; Reimann *Conflict* 12-17.

40 Nygh *Conflict* 33-34.

41 This is known as the principle of party autonomy: North *Problems* 104ff; see also *Restatement (Second)*: Comment on s 6(2)(g).

42 Cf Kegel 1964 II *Hague Recueil* 95 184:

"Law is not just an armor fixed onto life. It is the guiding principle for human actions. It is that element by which man directs himself or, in cases of breach and infraction, the court compels him to."

43 *Restatement (Second)*: Comment on s 6(2)(g); Morris *Conflict* 459.

shopping.⁴⁴ In the comment on this section of the *Restatement (Second)* the *caveat* is sounded that these values may be purchased at too great a cost and that experimenting with new rules may often be preferable to adherence to existing rules which are out of date.⁴⁵ Uniformity of result, which will ensure certainty and predictability, is, realistically speaking, an unattainable goal, since absolute uniformity can only be achieved if the substantive law of all countries were unified⁴⁶ and that would render choice of law rules redundant. Nevertheless, this ideal should be borne in mind when connecting factors are selected, since uniformity of connecting factors may go a long way towards achieving uniform results.⁴⁷

All these factors which may influence the selection of a particular connecting factor, may, directly or indirectly, be traced back to the very *ratio* of our subject, namely to ensure, or to aspire to do, justice to individuals.⁴⁸ Therefore the purpose of the connecting factor is to indicate which legal system is the appropriate one to be applied within the framework of what would constitute justice in the particular situation. According to Kegel, *conflicts justice* is concerned with "the correct and proper ordering of relationships among private parties"⁴⁹ or "a *just* ordering of private life"⁵⁰ in a conflict of laws sense: the ideal should be to achieve the best and fairest solution

44 Ideally, the fact that a case is heard in a specific forum should not have an effect on the outcome of the case. In other words, the decision on the same facts should be the same, regardless of *where* the case is heard: see Nygh *Conflict* 34.

45 *Restatement (Second)*: Comment on s 6(2)(i).

46 Cf Kegel 1964 II *Hague Recueil* 95 185.

47 See eg s 3bis of our South African Wills Act 7 of 1953 which is based on the Draft Convention on the Formal Validity of Wills which emanated from the Ninth Session of the Hague Conference on Private International Law (1960): see Kahn *Appendix: Succession* 643. This Convention was aimed at the unification of the conflict rules of the ratifying countries, in other words, the use of uniform connecting factors.

48 See Anton *Private International Law* 4ff; *Cheshire-North* 5ff; *Dacey Morris* 5ff; *Graveson Conflict* 8ff; Fawcett 1991 *Current Legal Problems* 39 50.

49 1964 II *Hague Recueil* 95 182.

50 *Ibid* 183.

for *all* people, regardless of which state they are affiliated to. If this result can only be achieved by the application of a foreign *lex causae* the forum should not hesitate to apply such foreign law; state interests should never be confused with "the search for justice inherent in private law".⁵¹ A forum may, of course, refuse to apply foreign law should such application lead to a result which is contrary to the public policy of the forum.⁵²

Furthermore, a clear distinction should be drawn between *conflicts justice* and *substantive justice*. Unlike conflicts justice, substantive justice is found in domestic substantive law rules themselves and is, therefore, concerned with justice for the legal subjects of that particular legal system within its particular legal framework. This is where, according to Kegel, those modern American approaches which focus on the content of substantive law rules, fail to meet the standard of conflicts justice:

"Even assuming that domestic substantive law is in every way the most just solution ... its application might perpetrate an injustice. What is considered as the best law according to its content, that is *substantively*, might be far from the best *spatially*, that is to say, where it relates to a set of circumstances arising abroad ... It could therefore be unjust to judge an individual according to a legal system other than his own, even where the foreign system claims to be "substantively" more just."⁵³

Kegel emphasises that no substantive law rule may be applied as if it were "isolated

51 *Ibid* 184.

52 *Cheshire-North* 128; Kahn-Freund *General Problems* 280; Morris *Conflict* 41ff.

53 1964 II *Hague Recueil* 95 184. See also Reimann *Conflict* 109 who, with specific reference to European conflicts practice, expresses the same sentiments regarding the distinction between substantive and conflicts justice:

"The principal objective of the European choice of law process is to determine the law that is geographically most appropriate, not the law that provides the best substantive solution in the individual case."

and self-contained".⁵⁴ Every rule of substantive law is, in a conflict of laws situation, subject to the justice of the conflict of laws, in other words, *conflicts justice*. Conflicts justice should not be influenced by notions of *substantive justice*, in other words, decisions regarding justice in substantive law rules.⁵⁵ The structure of the conflict of laws (and here Kegel refers to the traditional doctrine) is such that a conflict rule may refer to a certain group of substantive law rules from different countries, for example, the conflict rule pertaining to the essential validity of marriage, the group or category being *essential validity of marriage*. The purpose of an individual substantive law rule will only become relevant when it has to be decided whether a specific issue, for example the question of consent⁵⁶ where one of the parties to the marriage was a

54 1964 II *Hague Recueil* 95 185.

55 In conflicts cases conflicts justice will, as a rule, take precedence over substantive justice. However, in exceptional cases, substantive justice may prevail. This will happen where the application of a foreign substantive law rule would violate the public policy of the forum. In such an instance the foreign law will not be applied on the basis of the well-known public policy exclusion, see Kegel 1964 II *Hague Recueil* 95 189; Reimann *Conflict* 111. This raises the question of the effect of a written constitution, such as the Constitution of the Republic of South Africa 108 of 1996 on the conflict of laws, especially in the area of conflicts justice. The Bill of Rights (Chapter II), which operates horizontally, in other words, in regard to relations between individuals (see Sinclair *Law of Marriage* 72ff; Van Aswegen 1995 *SAJHR* 50 52ff), as well as vertically, embodies the democratic values of human dignity, equality and freedom. The question is whether, in a conflicts situation, the essentially substantive justice contained in the Bill of Rights will have an influence upon conflicts justice. It is submitted that the exclusion of a foreign substantive law rule on the basis of the Constitution, should be treated in the same manner that exclusion on the basis of the forum's public policy is treated. In other words, like the public policy exclusion, exclusions based on the Constitution should be restricted as far as possible. Kegel 1964 II *Hague Recueil* 95 198 sounds the following caveat:

"... constitutional law should remain in the background in discussions of conflicts law. In extreme cases it could be invoked. But it should be recognised from the outset that wrong court decisions should not be declared unconstitutional just because they are wrong. Nor, conversely, should every correct conflicts decision be justified in its constitutional implication over and above its validity under the rules of conflicts law."

Therefore, conflicts justice may never be compromised by the substantive justice embodied in the Constitution. In other words, "substantive constitutional justice" must remain subordinate to conflicts justice. On the relationship between the conflict of laws and constitutional law, see further Thomashausen 1984 *Am J Comp L* 595 597.

56 Some legal systems may classify consent as a matter relating to the formalities of marriage (see eg English law: *Cheshire-North* 574-575) while other legal systems may regard it as an essential requirement for a valid marriage (see eg Hahlo & Kahn *Husband and Wife* 594-595).

minor, relates to formal or essential validity.⁵⁷ Therefore, conflicts justice should not be derived from substantive justice. Conflicts justice has a spatial reach⁵⁸ and in this sense it is "altruistic" rather than "egoistic".⁵⁹

Seen in this perspective, the *ratio* of our subject, to do justice to individuals, and the function of the connecting factor are inextricably linked: the selection of the correct connecting factor will, ideally, ensure conflicts justice. The motivation to seek just results has led traditionalists to rethink the connecting factors used in certain conflict rules, for example, those pertaining to contracts, in order to instil a degree of flexibility into the choice of law process. This has resulted in what has been termed the "softening of connecting factors",⁶⁰ a process aimed at the transformation of connecting factors within certain conflict rules. The softening of connecting factors should not be confused with twentieth century reaction to the traditional approach.⁶¹ It goes back to the endeavours of Savigny to establish the proper *seat* of each legal relationship:

"To ascertain for every legal relation (case) that law to which, in its proper nature, it belongs or is subject."⁶²

57 Kahn-Freund 1964 II *Hague Recueil* 95 198-199.

58 See Reimann *Conflict* 110 for an explanation of "spatial reach" with reference to Western European choice of law:

"Its goal is to select the law of the governmental unit, the country or state, with which the case is primarily connected ... Thus it is, in principle, neutral vis-à-vis substantive values and blind towards results. More modest than American approaches, it only tries to achieve what has been called "conflicts justice".

59 Cf Kegel 1964 II *Hague Recueil* 95 183.

60 Kahn-Freund *General Problems* 260.

61 Cf Kahn-Freund *General Problems* 262:

"... the 'softening' of concepts began long before the first American 'realist' ever saw the light of day ..."

62 Von Savigny *Private International Law* 70.

This is indeed the test to which every conflict rule should conform: to indicate, by means of a connecting factor, where the seat of every legal relationship is.

It was in the area of contract conflict of laws that the softening of connecting factors started to emerge. As early as the sixteenth century, it was realised that the *lex loci contractus-lex loci solutionis* rule did not always produce just results.⁶³ The development and extension of trade often rendered the *locus contractus* fortuitous, or each party had a different *locus solutionis* in the case of bilateral contracts. The idea had also taken root that parties to an agreement should be allowed to choose the legal system to govern their contract, commonly known as the principle of *party autonomy*.⁶⁴ Therefore a contract should, ideally, be governed by the *lex causae* chosen by the parties.⁶⁵ In the absence of an express choice, or in the event of the court being unable to infer a choice from the contract, the contract will be governed by the legal system with which it has the closest and most real connection.⁶⁶ This, of course, gives more power to the judge to decide every case on its merits and, in actual fact, to formulate a rule for every case.

The question is whether a softening of concepts does not render the whole system of choice of law rules with fixed connecting factors redundant. Should we not abandon the traditional approach altogether in favour of the American case-by-case approaches? No, says Kahn-Freund:

63 See Edwards *Reception of "Proper Law" Doctrine* 38ff; Van Rooyen *Kontrak* 13.

64 North *Problems* 104ff.

65 Unless there is a reason not to give effect to the parties' choice, eg that application of the chosen *lex causae* is against the public policy of the forum. See the classic English case of *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277 where it was said that the choice of law by the parties should be *bona fide* and legal and not against the public policy of the forum (290).

66 This is also the criterion accepted by the Rome Convention on the Law Applicable to Contractual Obligations (1980).

"... 'closest and most real connection' is a form of words which merely substitutes for a connecting concept the motivation for defining it. The *raison d'être* of any choice of law is to find the legal system with which a given issue is considered to be most closely connected. All 'hard' connecting factors are crystallisations of a policy to find the system of law with which a type of issue has its closest link."⁶⁷

Therefore, when we talk about a softening of concepts, it is the *motivation* for the connecting factor that takes the place of a "hard" connecting factor in the choice of law rule. The fact that the softening of connecting factors first occurred in the law of contract is significant, since this is an area where the parties may choose the *lex causae* for their contract. In other areas of the law, for example, issues pertaining to private-law status, such as divorce, there has not been a softening of concepts. Kahn-Freund himself is not in favour of a softening of concepts in these areas of the law where certainty and predictability are paramount:⁶⁸ each individual can only have one personal law to determine and govern his status. In this sense the conflicts connecting factor operates exclusively. A softening of concepts cannot happen in a vacuum: it is dictated by the policies underlying certain areas of the law. This has been acknowledged by the authors of the American Law Institute's *Restatement (Second)*:

"In certain areas, as in parts of Property ... such rules are sufficiently precise to permit them to be applied in the decision of a case without explicit reference to the factors which underlie them. In other areas, such as Wrongs ... and Contracts ... the difficulties and complexities involved have as yet prevented the courts from formulating a precise rule, or series of rules, which provide a satisfactory accommodation of the underlying factors in all of the situations which may arise. All that can

67 *General Problems* 263.

68 *Ibid* 265-266.

presently be done in these areas is to state a general principle, such as the application of the local law 'of the state of most significant relationship', which provides some clue to the correct approach, but does not furnish precise answers. In these areas, the courts must look in each case to the underlying factors themselves in order to arrive at a decision which will best accommodate them."⁶⁹

In conclusion, it may be said that the function of the connecting factor in the conflict of laws, and more specifically within the structure of the traditional conflicts rule, is to indicate, for each category of issues (for example, *proprietary consequences of a marriage*) the appropriate *lex causae*.⁷⁰ However, this rather clinical formulation of the function of the connecting factor does not reveal the true complexities thereof. The connecting factor does not exist in a vacuum - its purpose is to secure conflicts justice for individuals. Even though this is perhaps an unattainable goal, it is an ideal worth striving for. In most instances⁷¹ conflicts justice will be achieved by determining the true seat of a legal relationship which will, in turn, point to the appropriate *lex causae*. The reason for this is probably that the true seat of a legal relationship is determined objectively in an "international" frame of mind, in other words, without any undue advantage being sought for the subjects of a particular legal system; rather, it is an attempt to establish the seat of the legal relationship which will ensure conflicts justice for *all* people.⁷² In the process of determining the true seat of a legal relationship, many and varied considerations may play a role, such as the policies underlying a particular field of law; certainty, predictability and uniformity of result; as well as the

69 *Restatement (Second)*: Comment on s 6(2)(c).

70 See 1.1.1 **The traditional approach** *supra* for a discussion of the structure of the traditional choice of law rule.

71 There will always be "hard cases", ie cases in which the general rule produces an unjust result, but this is an acceptable price to pay in areas of the law where certainty and predictability are paramount.

72 See Kegel 1964 II *Hague Recueil* 95 183.

protection of justified expectations.

2 Jurisdiction

2.1 The position of the connecting factor in the law relating to jurisdiction

The connecting factor fulfils a crucial role in the law relating to jurisdiction, since that link constitutes the justification or reason for the assumption of jurisdiction by a particular court. Once jurisdiction has been assumed, the *lex fori* will govern all matters relating to procedure⁷³ and, in a conflicts case, it is the approach of that forum to choice of law which will be decisive. In view of the modern American approaches to choice of law, many of which are characterised by a strong "homing trend",⁷⁴ the assumption of jurisdiction will often entail application of the *lex fori* to the conflicts issue at hand. Therefore, the assumption of jurisdiction by a particular court may indeed have a profound effect on the outcome of a case.

Jurisdiction differs from choice of law in the sense that there are no formally structured rules of jurisdiction, like the traditional multilateral choice of law rule, which allocate a special niche to the connecting factor. Furthermore, the theory underlying jurisdiction, mainly derived from the international principle of territorial sovereignty,⁷⁵ has developed in an evolutionary fashion, rather than a revolutionary one, with jurisdictional criteria being gradually extended to cope with contemporary situations.⁷⁶ These extensions of jurisdiction have mainly been statutory and the basic theories underlying

73 The principle that the *lex fori* governs procedural matters is widely accepted: *Cheshire-North* 74; *Dicey-Morris* 169. However, different countries have different conceptions of what constitutes procedure and what constitutes substance, and therefore the distinction between substance and procedure may differ from country to country. For a discussion of the substance-procedure dichotomy see Reese 1976 *Hague Recueil* 85ff.

74 In other words, the application of the *lex fori* to conflicts issues: see Juenger *Choice of Law* 103.

75 *Schlimmer v Executrix in Estate of Rising* 1904 TH 108 111.

76 See Smit 1972 *ICLQ* 335 for a comparison of common law and civil law systems in this regard.

jurisdiction have not come under attack in the way that the traditional approach to choice of law has. Most importantly, no commentator has, as yet, advocated the abolition of jurisdictional connecting factors. On the contrary, jurisdictional connecting factors are aptly called *rationes jurisdictionis*,⁷⁷ in other words, they constitute the reason for the assumption of jurisdiction and therefore the principles underlying the assumption of jurisdiction must be explored in order to establish the true function and purpose of the jurisdictional connecting factor.

2.2 The function of the connecting factor in the law relating to jurisdiction

Jurisdiction means "the right or authority, under South African law, of the various divisions of the Supreme Court of South Africa to entertain actions or other legal proceedings",⁷⁸ a right or authority which is granted to the court by the state. Historically, a state could only bind persons and property within its territorial boundaries,⁷⁹ and thus jurisdiction was based on territorial sovereignty.⁸⁰ This gave rise to the rule *actor sequitur forum rei*, which meant that a defendant should be sued in the forum of the place where he is domiciled, since that court has effective control over the defendant.⁸¹ In similar vein it was argued that proceedings relating to immovable property should be instituted in the *forum rei sitae*, since the court of the

77 Forsyth *Private International Law* 149.

78 Pollak *Jurisdiction* 1. See also Voet *Commentarius* 2 1 1.

79 Cf the well-known Roman maxim enunciated in D 2 1 20: *extra territorium ius dicenti impune non paretur* (one who administers justice beyond the limits of his territory may be disobeyed with impunity).

80 D 2 1 20. Cf also Bristowe J, quoted by Pollak *Jurisdiction* 17, in *Schlimmer v Executrix in Estate of Rising* 1904 TH 108 111:

"The jurisdiction of the courts of every country is territorial in its extent and character, for it is derived from the sovereign power, which is necessarily limited by the boundaries of the state over which it holds sway."

81 C 3 13 2; C 3 19 3.

area where the property is situated, has effective control over such property.⁸²

The doctrine of effectiveness thus became the basis for the assumption of jurisdiction and, even though the contemporary meaning of effectiveness is far removed from the original meaning of "territorial control", the principle is, to this day, acknowledged as a realistic foundation for the assumption of jurisdiction. In modern law "effectiveness" pertains rather to the ability of the court to give a meaningful judgment, in the sense that the court has *sufficient* control, and not necessarily *territorial* (or *physical*) control, over the property or the defendant to render its judgment potentially⁸³ effective.

In order to give effect to this doctrine of effectiveness, Pollak has argued that actions should be classified with reference to the *nature of the relief* sought. This is contrary to the Roman law classification,⁸⁴ which was adopted by Roman-Dutch law,⁸⁵ into *actiones in personam*, *actiones in rem* and *actiones mixta* (a category which was added in the Middle Ages). In terms of this classification of actions which focuses on the *nature of the action*, it was considered that the *forum rei domicilii* had jurisdiction in *actiones in personam*, the *forum rei sitae* in *actiones in rem* and either forum in the case of an *actio mixta*. However, Pollak indicates that, in an action concerning a *res*, a party may base his claim on either ownership of that *res*, which will mean that it is an *actio in rem*, or on contract, which will mean that it is an *actio in personam*. Thus different rules of jurisdiction will apply, depending on the nature of the claim.⁸⁶ Therefore Pollak argues that the *nature of the relief* sought, rather than the *nature of the action*, provides a proper basis for the assumption of jurisdiction, because

82 C 3 19 3.

83 Assumption of jurisdiction does not carry a guarantee of effectiveness; yet there must be a reasonable belief that the judgment will be effective: Forsyth *Private International Law* 150-151.

84 D 44 7 25pr.

85 Voet *Commentarius* 44 7 9.

86 Pollak *Jurisdiction* 14ff. See also Cook *Logical and Legal Bases* 53ff; Pyles 1972 *ICLQ* 61 66.

"... a court may give an effective judgment in regard to one type of relief and not in regard to another type ... Since the principle of effectiveness underlies the views in regard to jurisdiction entertained by South African courts, it seems that the jurisdiction of the South African courts should depend not on the classification of actions which has come down to us from the Roman law but on the nature of the relief claimed."⁸⁷

Therefore effectiveness should be regarded as the guiding norm and it certainly seems as if a classification in terms of the relief sought would better satisfy the criterion of effectiveness than a classification according to the nature of the action. This does not mean that the nature of the relief sought is the only way of determining the proper jurisdictional connecting factor; submission to the jurisdiction of a court,⁸⁸ as well as other connecting factors, may very well meet the requirement of effectiveness. Therefore jurisdictional connecting factors should be selected with the principle of effectiveness in mind.

When it comes to the assumption of domestic jurisdiction in a conflicts case, the principle of effectiveness gains significance. Although the forum is primarily concerned with its domestic rules of jurisdiction, the possibility of its judgment being subjected to recognition and enforcement proceedings in a foreign country should be kept in mind.⁸⁹ If the court's assumption of jurisdiction meets the requirement of

87 Cf *Steytler NO v Fitzgerald* 1911 AD 295 346; *Estate Agents Board v Lek* 1979 (3) SA 1048 (A) 1063F-G where both the nature of the proceedings and the nature of the relief claimed were named as possible bases of jurisdiction, either in the alternative or together, as well as *Hugo v Wessels* 1987 (3) SA 837 (A) 849H-J where specific mention was made of the doctrine of effectiveness.

88 See Pollak *Jurisdiction* 19, as well as Beck 1983 SALJ 43 45.

89 Cf Beck 1983 SALJ 43 44-45:

"It is submitted that effectiveness is material in every matter ... for if the court were to give judgment without having jurisdiction over a material party to the action, the judgment could be reversed on appeal and would hardly be likely to find acceptance in other countries. This cannot be a general basis for effective judgments."

effectiveness, the potential for foreign recognition of its judgment will definitely be greater and this will contribute to international harmony. However, this is an area where statutory extension of jurisdiction, especially in the case of *in personam* jurisdiction, may create problems.

In a purely domestic matter, the plaintiff and defendant are domiciled or resident in the same country and it is even possible that they both reside or are domiciled within the same court's area of jurisdiction.⁹⁰ However, in a conflicts case the plaintiff and defendant are rarely situated within the same jurisdictional area and the basic premise that the plaintiff should sue the defendant in the forum where he resides or is domiciled (which also underlies the doctrine of effectiveness), has been questioned. Whereas the state does not have a direct interest in the choice of the applicable *lex causae* in a conflicts case,⁹¹ it may well have an interest in the assumption of jurisdiction by its courts:

"The State may be interested in creating a forum for its own litigants. It may be interested in creating a local forum so that its laws can be properly applied. It may be interested in controlling the actions of its nationals [or, in common law countries, its domiciliaries]. It may be interested in creating a forum that is convenient for resident witnesses. It may have an interest in creating a local forum for the adjudication of

90 Eg in South Africa where every division of the Supreme Court (or the High Court in terms of s 166 of the Constitution of the Republic of South Africa 108 of 1996) has its own area of jurisdiction.

91 The emphasis placed by Currie and some of the other American commentators on the state's interest in choice of law matters has been severely criticised (see *supra* under 1.1.2 **Modern approaches**): in choice of law matters it is the interests of *individuals* which are at stake, and not state interests. Nygh *Conflict* 33 states it very clearly:

"Generally speaking, [choice of law rules] are not concerned with the protection or application of governmental interests. Exceptions exist where a governmental interest is directly involved as in state immunity, or where a statute expressly or by necessary implication asserts a governmental interest ... But primarily the conflict of laws is concerned with the reconciliation of private interests and expectations."

disputes that have an impact on the economic and social life of the State." ⁹²

Apart from the state's interests, the plaintiff and the defendant may also have very specific interests. Very often the financial burden will be greater for the plaintiff suing in the forum of the defendant than suing at home. Furthermore, the plaintiff will be more comfortable suing at home, since he is familiar with his forum's rules of procedure.⁹³ However, the plaintiff's interests are often overlooked or given less weight, since he is the one who institutes action and is regarded as disturbing the peace.⁹⁴ The defendant's interest of being sued in his home forum in familiar surroundings has always been protected by the maxim *actor sequitur forum rei*. Very often, though, it is the defendant who has refused to perform or has breached his obligations and therefore the blame for the resultant legal action rests squarely on his shoulders.⁹⁵

Thus the balancing of the respective interests of the state, the plaintiff and the defendant may indeed be extremely complicated. It is submitted though, that the balancing of these interests should be done with the principle of effectiveness in mind. The creation of additional fora for private international law disputes, in the context of extension of jurisdiction, should not detract from the ability of a court to render a meaningful judgment. While it is true that there may be more than one forum that can justifiably assume jurisdiction in a dispute, it is important that the jurisdictional connecting factor secure a sufficiently close link between the parties and/or the property in dispute and the forum to enable the forum to render a meaningful judgment.

92 Smit 1972 *ICLQ* 335 351-352.

93 Von Mehren & Trautman 1966 *Harv LR* 1121.

94 Smit 1972 *ICLQ* 335 351.

95 *Ibid* 350ff.

In conclusion, it is submitted that the jurisdictional connecting factor provides the reason or justification for the court to assume jurisdiction. The selection of these *rationes jurisdictionis* should be based on the principle of effectiveness, which means that, while a jurisdictional connecting factor must be selected with the interests of the state, the plaintiff and the defendant in mind, *effectiveness* should ultimately be decisive.

3 The conflicts connecting factor versus the jurisdictional connecting factor

On the basis of the preceding discussion of the function of connecting factors, a clear distinction may be drawn between conflicts and jurisdictional connecting factors. This distinction is essential in order to determine whether the same concept, such as domicile in the South African context, can be used as a connecting factor in choice of law issues, as well as matters relating to jurisdiction.

The purpose of the conflict of laws connecting factor is to pinpoint the most appropriate *lex causae* for a specific issue. Since this entails the ascertainment of the true seat of a legal relationship, it means that there will, or there should, ideally, only be *one* such true seat.⁹⁶ Therefore an issue pertaining to, for example, the validity of a marriage, will always be governed by the *lex loci celebrationis* in South African conflicts law.⁹⁷ There may be instances where more than one *lex causae* is available, for example in the case of the formal validity of a will where multiple *leges causae* are listed in the South African Wills Act.⁹⁸ The *ratio* behind this is the promotion of the widest possible acceptance of formally valid wills in an international context. Hence, the acceptance of connecting factors which are alien to the South African forum. And

96 See Fawcett 1991 *Current Legal Problems* 39 51.

97 See Edwards *LAWSA: Conflict* pars 438-439.

98 7 of 1953. S 3*bis* of this Act was modelled on the Draft Convention on the Formal Validity of Wills which emanated from the Ninth Session of the Hague Conference on Private International Law (1960): see Kahn *Appendix: Succession* 643.

this in turn advances the claims of several legal systems as appropriate *leges causae*.

In the case of private-law status, however, there can only be one legal system indicated by the connecting factor, otherwise there would be confusion in regard to which legal system governs an individual's status. On the other hand, the jurisdictional connecting factor provides the justification for a court to assume jurisdiction in a particular case. However, more than one *ratio jurisdictionis* may present themselves for the assumption of jurisdiction in the same case. For example, in a dispute concerning a contract involving property, the domicile of the defendant or the situation of the property (assuming that these two points of contact are in different countries) may each provide a *ratio jurisdictionis* and it will be up to the plaintiff to decide where to institute action. Thus it may be said that the function of the conflicts connecting factor is *exclusive* in the sense that only one *lex causae* is indicated, whereas there may be several possible *rationes jurisdictionis* for the assumption of jurisdiction in the same case.

This "exclusivity" of the conflicts connecting factor features prominently when the interrelation between jurisdiction and choice of law is explored. One may well ask why it is so, in terms of the traditional approach to the conflict of laws, that the court which assumes jurisdiction on the basis of a proper *ratio jurisdictionis* will not, without further ado, apply the *lex fori*,⁹⁹ while it is highly probable, although it may not be practical or convenient for the plaintiff to institute action there, that the forum of the *lex causae* will also qualify to assume jurisdiction in that particular instance.¹⁰⁰ Should one not,

99 The *lex fori* may well be the applicable *lex causae*, but then it is so on the basis of the application of a conflict rule and not merely as a result of the assumption of jurisdiction.

100 Since the *true seat* of a legal relationship will undoubtedly evince a significant connection between the issue and the *lex causae*, this connection will probably be sufficiently close for the assumption of jurisdiction as well. In an article on the interrelation of jurisdiction and choice of law in American conflicts (1979 *JCLQ* 161 especially 170ff), Hay emphasises the point that there is no automatic connection between jurisdiction and choice of law. However, he admits that, especially in conflicts issues that require the determination of the most significant connection in order to establish the *lex causae*, the factors indicating the *lex causae* may also support jurisdiction. For the influence of choice of law on jurisdiction in English law, see Fawcett 1991

in the light of this seemingly contradictory state of affairs, attempt to establish a "proper forum" for conflicts issues; a forum which will apply its own law once its jurisdiction has been assumed? This would eliminate unjust results ensuing from the improper application of foreign law in a local forum. However tempting this may sound, this negation of the distinction between jurisdiction and choice of law is simply not acceptable. In view of the different functions of jurisdictional and conflicts connecting factors, the jurisdictional connecting factor provides the justification for the court to entertain legal proceedings, whereas the conflicts connecting factor is aimed at the resolution of the dispute. Thus, at the jurisdiction stage of proceedings, the question is simply whether the court has a sufficient link with the case in order to assume jurisdiction and once jurisdiction has been assumed, the case must run its course. The forum cannot, at the jurisdiction stage, already decide which is the applicable *lex causae*. A merging of jurisdiction and choice of law would overburden the court with choice of law issues at the start of legal proceedings. This will mean that, since there is only *one* applicable *lex causae*, there will also have to be only *one* forum which has jurisdiction and this will have to be the forum of the *lex causae*, which, at the jurisdiction stage, has not as yet been determined.

Different principles underlie the function of jurisdictional and conflicts connecting factors. The function of the jurisdictional connecting factor is to provide a ground for the assumption of jurisdiction that will enable the court to render an effective judgment. Thus the underlying principle is one of effectiveness: the jurisdictional connecting factor must secure a link between the case and the court which is sufficiently close so that the judgment of the court will be effective. This means that, in the selection of connecting factors for domestic jurisdiction, the possibility of recognition and enforcement of local judgments being sought abroad, should always be kept in mind. However, since jurisdictional connecting factors are essentially state-bound¹⁰¹ in the

Current Legal Problems 39 47ff.

101 "State" is used here in the sense of a "rechtskring", in other words, a territorial unit which is subject to a single legal system, and not in the public law context of a sovereign political unit.

sense that they pertain to the assumption of jurisdiction by the courts of a certain state, unification of domestic jurisdictional connecting factors is not an attainable option. In the case of conflicts connecting factors, the underlying motivation is to seek conflicts justice for individuals. Therefore the identification of conflicts connecting factors should not be limited by notions of substantive justice found in domestic law, but rather aimed at securing conflicts justice for all people, regardless of which state they are affiliated to.¹⁰² This makes the unification of conflicts connecting factors a viable option and a worthwhile endeavour indeed, since uniformity of connecting factors will go a long way towards ensuring uniform results.¹⁰³ Thus it is the function of the conflicts connecting factor, once jurisdiction has properly been assumed, to secure conflicts justice.

Looking at the interests involved in jurisdiction and choice of law, it is clear that the state has a definite interest in the assumption of jurisdiction by its courts. Since jurisdiction was originally derived from the sovereignty of the state, the state may have an interest in creating a forum for resident or domiciled plaintiffs or a forum where disputes, which may affect its economic and social life, may be heard.¹⁰⁴ In contradistinction to this, the state does not, in the traditional approach to conflicts issues,¹⁰⁵ have a direct interest in choice of law issues. It is the interests of individuals which are at stake and not those of states. Only once a *lex causae* has been indicated by the connecting factor, may the court refuse to apply such foreign law on the basis

102 Cf Kegel 1964 II *Hague Recueil* 95 184ff.

103 As submitted *supra* (see 1.2 **The function of the connecting factor in the conflict of laws**) absolute uniformity can only be achieved through the unification of the substantive law of all countries, since connecting factors, such as *domicile*, may still be interpreted differently in different legal systems. However, the unification of connecting factors is a step towards the goal of uniformity.

104 See Smit 1972 *ICLQ* 335 351-352 quoted *supra* under 2.1.2 **The function of the connecting factor in the law relating to jurisdiction**.

105 The involvement of state interests in choice of law issues is one of the grounds on which the American approach of "interest-analysis" is heavily criticised: Juenger *Choice of Law* 131ff.

that it is repugnant to the public policy of the state.¹⁰⁶

In conclusion, therefore, the diverse nature of conflicts and jurisdictional connecting factors is borne out by the milieu within which each one functions: the underlying principles of choice of law and the assumption of jurisdiction are different; the interests and policies are different and so are the goals and ideals peculiar to each of these two areas of the law. The exclusive nature of the conflicts connecting factor is most pronounced in matters concerning private-law status, the true domain of the personal connecting factor, *domicilium*. The status of each individual can only be subjected to a single personal legal system; whereas multiple *rationes jurisdictionis* may be available for the assumption of jurisdiction. The question that must be answered is whether domicile is a suitable connecting factor for both jurisdiction and choice of law. In other words, can, and should, the same criterion be used as a jurisdictional and a conflicts connecting factor? In an attempt to answer this question, a look at other criteria which may be used as connecting factors, such as nationality and residence, will provide some insight into the possible replacement of domicile, or the use of supplementary connecting factors, in certain instances.

4 Other connecting factors

4.1 Nationality

Nationality, as we know the concept in modern day law, represents an individual's political status by virtue of which he owes allegiance to his particular country.¹⁰⁷ Admittedly nationality is the most stable and most easily ascertainable connecting factor, yet its prominence on the European Continent, where it originated, has declined

106 See Kahn-Freund *General Problems* 276 for a discussion of the public policy principle.

107 *Cheshire-North* 165. See also De Winter 1969 III *Hague Recueil* 349 361ff for an account of the early history of the nationality principle.

significantly in recent times.¹⁰⁸ The merits and demerits of nationality as a connecting factor are well-known.¹⁰⁹

It cannot be denied that nationality has a political base and may therefore be regarded as a concept characterised by a very strong tie between the individual and the state to which he belongs. Therefore nationality is not relinquished by simply leaving one's country of nationality; just as nationality can only be acquired through birth or naturalisation,¹¹⁰ it can only be relinquished in specific ways, for example, release, deprivation or long residence abroad.¹¹¹ In addition to this, there is a presumption against the loss of a nationality which has been held for a reasonably long time.¹¹² In the case of an individual who has left his country of nationality and settled in another country without having terminated his nationality of the former country, this may result in the application of the personal legal system of a country with which he has little or no connection. Furthermore, it may be difficult to apply the *lex patriae* in cases where the *propositus* has more than one nationality or where the *propositus* is a stateless individual or where a political unit comprises of different legal units, such

108 Nadelmann 1969 *Am J Comp L* 418 448. According to Pålsson (*Marriage and Divorce* 41-42), this does not mean that the nationality principle will be abandoned completely: the so-called decline in the use of nationality as a connecting factor has manifested itself in a softening and modification of the principle. Increasingly other connecting factors, such as domicile and habitual residence are used as supplementary or subsidiary criteria in cases where nationality does not operate satisfactorily. See also Dickson 1985 *ICLQ* 231 242-243 who criticises the use of nationality in German law very strongly:

"The truth is ... that the concept of nationality as a legally relevant connecting factor is obsolescent. The basic objection to it is that its conferment can be a matter of governmental discretion, not of legal ascription."

109 See in general Anton *Private International Law* 123-124; *Cheshire-North* 166-167; De Jager *Domicilium as Koppelfaktor* 202ff; Morris *Conflict* 32; Pålsson *Marriage and Divorce* 43ff.

110 These are the most commonly recognised ways of acquiring nationality; however, there are also other possibilities, such as the assumption of the nationality of the conqueror by inhabitants of the conquered territory: see Shearer *Starke's International Law* 310.

111 See Brownlie *Public International Law* 386-393; Shearer *Starke's International Law* 310-311 for a discussion of nationality rules and principles which are accepted throughout the world.

112 Shearer *Starke's International Law* 311.

as the United Kingdom.¹¹³

The greatest merits of nationality undoubtedly lie in the ease with which it can be ascertained and the stability inherent in the concept.¹¹⁴ However, these are not the only considerations that should be taken into account when deciding on a suitable connecting factor. As the authors of *Cheshire-North* point out, "nationality yields a predictable but frequently an inappropriate law".¹¹⁵ Suffice it to say that nationality often does not meet the most important criterion for an appropriate connecting factor in the area of choice of law regarding private-law status, namely to indicate the most appropriate *lex causae*, in other words, the legal system with which the individual has the most significant connection.¹¹⁶ The mere fact that substantial reform has taken place in regard to nationality as a connecting factor in those countries that traditionally adhered to the principle of nationality for the ascertainment of an individual's personal law, proves that nationality has serious shortcomings in this regard.

Nationality and domicile are often compared as connecting factors in the sense that they fulfil the same kind of function, that is, to indicate the personal law of an individual. No purpose will be served here to compare these two concepts. Not only does adherence to either nationality or domicile constitute one of the traditional dividing lines between common law and civil law systems (albeit not always a definite one), but no common law system, whose personal law is based on domicile, will be persuaded to revert to nationality on the strength of such a comparison, and vice versa. However, there seems to be a fair measure of common ground between the traditional adherents to nationality and domicile in that both systems have been forced to explore the use of supplementary connecting factors, such as residence, or have

113 *Cheshire-North* 167.

114 See De Jager *Domicilium as Koppelfaktor* 211-215 for an evaluation of nationality in this context.

115 *Cheshire-North* 167. See also Anton *Private International Law* 123.

116 See the discussion of this point *supra* under 1.2 **The function of the connecting factor in the conflict of laws.**

even, as a consequence of international conventions, listed nationality (in the case of common law countries) and domicile (in the case of traditional civil law countries) as supplementary connecting factors.¹¹⁷ Residence, and more specifically *habitual residence*, may ultimately become the common denominator between common law and civil law countries in regard to connecting criteria for jurisdiction and choice of law in private international law. Therefore, this concept needs to be explored in more detail.

4.2 Residence

Residence has made its appearance as a connecting factor in different forms and guises, namely residence *simpliciter*, ordinary residence and habitual residence. It is not easy to distinguish between these different forms of residence, but an attempt will nevertheless be made to do so in order to evaluate residence as a connecting factor in a conflict of laws and a jurisdictional context.

4.2.1 Residence *simpliciter*

This is the most basic or simple form of residence and amounts to nothing more than physical presence at a particular place which is not merely fleeting or transitory.¹¹⁸ It is not necessary to reside in a house or even to have a roof over one's head. There must, however, be some degree of permanence. This may be proven by the fact that

117 See eg s 3*bis* of the Wills Act 7 of 1953 where the South African legislator has included nationality, as well as habitual residence, alongside the traditional connecting factor, domicile, as supplementary connecting factors for the determination of the formal validity of a will. S 3*bis* is based on the Draft Convention on the Formal Validity of Wills which emanated from the Ninth Session of the Hague Conference on Private International Law (1960): see Kahn *Appendix: Succession* 643. See also s 13 of the Divorce Act 70 of 1979 (discussed in **Chapter 2** under **5 Recognition of foreign judgments relating to status**) where nationality is listed as one of the criteria (the other two being domicile and ordinary residence) for international competence in regard to the recognition of foreign divorce decrees and nullity orders.

118 McClean 1962 *ICLQ* 1153 1154.

the *propositus* has a real interest in residing at a certain place,¹¹⁹ for example a building contractor who builds a house for someone and resides at that place for the duration of the building operations. Even though an *animus*, such as that required for the acquisition of a domicile of choice, is not a requirement for residence *simpliciter*, the intention of the *propositus*, which may be deduced from certain factors, such as the signing of a lease for a certain period, may serve to qualify the degree of permanence of his residence.¹²⁰ It also matters not whether the *propositus* resides at a particular place of his own volition. The *ratio* behind this is that insistence on *voluntary* residence would prevent individuals such as prisoners from having a residence *simpliciter* and thus, where residence *simpliciter* constitutes a ground of jurisdiction, they will be precluded from the court's jurisdiction. This will have the effect of placing them in a privileged position, free from the jurisdiction of the court.¹²¹ Actual physical presence seems important for the establishment of residence *simpliciter*, since that is the essential link: if this link is severed, there is no additional requirement such as intention, to constitute residence *simpliciter*. This conclusion renders multiple residences at the same time within the context of residence *simpliciter* virtually impossible.¹²²

Since residence *simpliciter* is mainly used in statutes, it should be interpreted in terms of the intention of the legislator.¹²³ In South African law residence has up till now been used as a jurisdictional connecting factor. The Supreme Court Act¹²⁴ provides that:

119 Forsyth *Private International Law* 178.

120 McClean 1962 *ICLQ* 1153 1156.

121 *Ibid* 1159. It will be recalled that the jurisdiction of the ecclesiastical courts was based on residence: *Niboyet v Niboyet* (1878) 4 PD 1 5. See also the discussion in **Chapter 2** under 2.2.1.3 *The question of jurisdiction*.

122 See Castel *Canadian Conflict* 95.

123 *Ibid* 94; Forsyth *Private International Law* 177.

124 59 of 1959.

A provincial or local division of the Supreme Court shall have jurisdiction over all persons residing or being in ... its area of jurisdiction ...¹²⁵

The term "residing" is not defined in the Act, but, according to Forsyth, this section has been interpreted by the courts to mean that the different divisions of the Supreme Court are limited to their territorial jurisdiction in keeping with common law principles.¹²⁶ Even though this does not bring us any closer to a definition of residence *simpliciter*, it is clear that residence *simpliciter* is primarily used as a statutory jurisdictional criterion. It is submitted that any attempt at a statutory interpretation of residence *simpliciter* should explore the meaning of the concept with reference to the existing non-statutory common law definitions and interpretations, with the intention of the legislator being decisive in the final analysis.

4.2.2 Ordinary residence

Ordinary residence seems to connote physical residence in a particular place for settled purposes. This does not mean that there must be continuous physical presence; accidental or occasional temporary absences will not have any effect on ordinary residence. Generally speaking, ordinary residence refers to the regular order of an individual's life for the time being and it does not matter that the residence may be of short duration.¹²⁷ In comparison to domicile, no intention to settle indefinitely, in the sense of the *animus* required for the acquisition of a domicile of choice, is required and it seems that a person may indeed have more than one ordinary

125 S 19(1)(a). See also s 18(1) of the Child Care Act 74 of 1983 which refers to the children's court of the district in which the child resides for the purposes of assumption of jurisdiction.

126 *Private International Law* 178, approved by Hoexter JA in *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd* 1991 (1) SA 482 (AD) 492 H-I.

127 *Binchy Irish Conflicts* 101; *Cheshire-North* 169; *Fawcett* 1962 *ICLQ* 1153 1161; *Morris Conflict* 33.

residence.¹²⁸ As was the case with residence *simpliciter*, the intention of the *propositus*, as manifested by his acts such as enrolment at a university and residing at a university residence, may qualify his residence as having been adopted for settled purposes.¹²⁹

The distinction between residence *simpliciter* and ordinary residence probably lies in the degree of permanence or continuity. Residence *simpliciter* refers to residence for the time being (and may, in this sense, pertain to a specific purpose), while ordinary residence pertains to the way in which an individual orders his life. Therefore, ordinary residence will not be relinquished by temporary absences, while such absences may actually terminate residence *simpliciter*. In this sense ordinary residence refers to the place in which the individual lives and works and the society within which he moves on a daily basis. There seems to be confusion in regard to the question whether voluntariness should be a prerequisite for ordinary residence. As is the case with residence *simpliciter*, McClean argues that voluntariness is not essential for ordinary residence,¹³⁰ while the authors of *Morris Conflict*¹³¹ incorporate "voluntary" into their definition of ordinary residence. Nygh, on the other hand, qualifies "voluntary" to the extent that the residence must not be the result of kidnapping or imprisonment.¹³²

Ordinary residence is used as a jurisdictional connecting factor by the South African legislator in the Divorce Act¹³³ which provides that a court will have divorce

128 Binchy *Irish Conflicts* 101; *Morris Conflict* 33.

129 Nygh *Conflict* 215-216.

130 1962 *ICLQ* 1153 1162. See also Binchy *Irish Conflicts* 102-103 who, with reference to Irish case law, comes to the same conclusion, as well as De Jager (*Domicilium as Koppelfaktor* 218 fn 2) who argues that the absence of volition constitutes the main difference between ordinary residence and habitual residence.

131 33.

132 *Conflict* 215. See also *Cheshire-North* 169.

133 70 of 1979.

jurisdiction if the parties or either of the parties is:

... *ordinarily resident* in the area of jurisdiction of the court on the said date and have or has been *ordinarily resident* in the Republic for a period of not less than one-year immediately prior to that date.¹³⁴

No definition of ordinary residence is given in the Act; therefore the concept must be interpreted with due regard being had to the intention of the legislator, as well as existing definitions and interpretations of the concept. Since the aim of this section is to enable a court to assume jurisdiction in divorce cases more readily,¹³⁵ ordinary residence will be interpreted rather leniently.

4.2.3 Habitual residence¹³⁶

Habitual residence has been hailed as "a possible compromise solution to the impasse between the common law's adherence to domicile and the civil law's regard for the nationality principle".¹³⁷ Used for the first time in a bilateral treaty between France and Prussia in 1880,¹³⁸ the concept has really been popularised by the Hague Conference on Private International Law. It was employed in the first Hague Convention on Civil Procedure in 1896.¹³⁹ Because domicile has acquired so many divergent meanings in civil-law countries, as well as common-law countries, habitual residence has been used as an alternative to domicile in numerous conventions. But what does habitual

134 S 2(1)(b). S 2(1)(a) deals with jurisdiction founded on the domicile of the parties. For a discussion of divorce jurisdiction, see **Chapter 2** under **2.2.2 Statutory intervention**.

135 One of the policies underlying divorce jurisdiction is to assume jurisdiction whenever possible: Fawcett 1985 *Oxford Jour Leg Stud* 378 381.

136 "Résidence habituelle" in French or "gewöhnlicher Aufenthalt" in German.

137 Binchy *Irish Conflicts* 98. See also Pålsson *Marriage and Divorce* 76.

138 See Van Hoogstraten 1967 III *Hague Recueil* 343 359.

139 De Winter 1969 III *Hague Recueil* 349 423.

residence mean?

As is the case with residence *simpliciter* and ordinary residence, to determine the meaning and contents of habitual residence is no easy task. No Hague Convention contains a definition of the concept; the purpose of this deliberate omission being to "leave the notion free from technical rules which can produce rigidity and inconsistencies as between different legal systems".¹⁴⁰ It is often said that habitual residence should be interpreted in the way that "habitual" and "residence" are usually understood.¹⁴¹ Habitual residence has been interpreted by lawyers and academics to mean "a regular physical presence which must endure for some time".¹⁴² This is also the gist of a resolution adopted by the Ministers of the Council of Europe:

"In determining whether a residence is habitual, account is to be taken of the duration and the continuity of the residence as well as of other facts of a personal or professional nature which point to durable ties between a person and his residence."¹⁴³

One of the vexing questions is whether, in this sense, there is any material difference between *ordinary* residence and *habitual* residence. The fact that legislators around

140 *Morris Conflict* 34. See also De Winter 1969 III *Hague Recueil* 349 428ff.

141 See *Morris Conflict* 34.

142 *Cruse v Chittum* [1974] 2 All ER 940 943. See also *Cheshire-North* 169; Kegel *Internationales Privatrecht* 345; *Morris Conflict* 34.

143 Resolution (72) 1 9, adopted on 18 January 1972, quoted by Pålsson *Marriage and Divorce* 78. Cf also the definition of "gewöhnlicher Aufenthalt" quoted by Kegel *Internationales Privatrecht* 345:

"Den gewöhnlichen Aufenthalt hat jemand dort, wo er sich unter Umständen aufhält, die erkennen lassen, daß er an diesem Ort oder in diesem Gebiet nicht nur vorübergehend verweilt."

the world, and specifically in the common law countries,¹⁴⁴ have been very specific as to the use of ordinary and habitual residence, seems to indicate that one must differentiate between the two terms.¹⁴⁵ An English case in which this distinction was discussed, is the well-known case of *Cruse v Chittum*.¹⁴⁶

The petitioner, a domiciled Englishman, and his wife (the respondent) were married in Bedfordshire. After a number of years, the petitioner's wife left him for a sergeant in the American forces. She subsequently obtained a divorce in the state of Mississippi of which the petitioner was informed a year later. At that stage he had no intention to marry again and therefore he did not do anything about the divorce to ensure that it was valid and binding. However, some years later, he wished to marry someone else

144 See the list of examples from English law in *Cheshire-North* 168. Cf also Castel *Canadian Conflict* 94ff. *Contra*, however, the position in German law, where little attention is given to "schlichter Aufenthalt" (simple or plain residence) in text books on the conflict of laws, see Kegel *Internationales Privatrecht* 346. See also Pålsson *Marriage and Divorce* 80-81 who comes to the conclusion that residence, in the sense of residence *simpliciter* or ordinary residence, plays a very modest role as a connecting factor on the Continent:

"A connecting factor with this low degree of stability is not well suited to serve as a criterion of its own for jurisdiction or choice of law in marriage or divorce. In fact it is usually only resorted to for such purposes as a sort of makeshift solution in situations where the person concerned lacks not only a nationality but also a domicile or habitual residence anywhere in the world."

145 See eg the use by the South African legislator of "ordinarily resident" in s 2(1)(b) of the Divorce Act 70 of 1979 for purposes of divorce jurisdiction and "habitually resident" in s 3bis(1)(a)(ii) of the Wills Act 7 of 1953 in regard to choice of law rules for the formal validity of a will. Unfortunately, the Afrikaans translation of both these sections refer to *gewoonlik woonagtig*, which may create the impression that "ordinarily resident" and "habitually resident" are synonymous. However, it is submitted that an incorrect translation has been adopted in the Afrikaans text of s 3bis(1)(a)(ii): "habitually resident" should have been translated as "gebruiklik woonagtig". Since the English text of the Wills Act 7 of 1953 was signed by the Governor-General, that text will be decisive and therefore it must be presumed that "habitually" was not intended to mean the same as "ordinarily". The problem in the Afrikaans text is the result of a direct translation of the German term for habitual residence, namely *gewöhnlicher Aufenthalt*, as "gewoonlik woonagtig", instead of "gebruiklik woonagtig". It is submitted that this is incorrect and that the distinction between "ordinary residence" and "habitual residence" should also be maintained in Afrikaans. See also De Jager *Domicilium as Koppelfaktor* who uses the term "gewoonlike verblyf" for ordinary residence and "gebruiklike verblyf" for habitual residence or the German *gewöhnlicher Aufenthalt*.

146 [1974] 2 All ER 940. For a discussion of this case see Hall 1975 *ICLQ* 1.

and the registrar of marriages in Wales required proof that his previous marriage had been validly dissolved. Therefore a petition was lodged for a declaration that the marriage had been validly dissolved by the Mississippi court. The case turned on the recognition of the Mississippi divorce decree in terms of the United Kingdom Recognition of Divorces and Legal Separations Act¹⁴⁷ which provided for the recognition of a foreign divorce decree on the basis of either spouse having been *habitually resident* in that country at the date of the institution of the proceedings.¹⁴⁸ In the Mississippi divorce decree it was stated that the respondent had been an actual *bona fide* resident citizen of Harrison County, Mississippi, and the question was whether this constituted habitual residence as envisaged by the Act.

The declaration was granted on the ground that the wife's residence had indeed qualified as habitual residence. It was submitted by counsel for the petitioner (and accepted by the judge) that habitual residence required an element of intention and that "habitual" indicated "a quality of residence rather than a period of residence".¹⁴⁹ Furthermore, the residence should not be of a temporary or of a secondary nature.¹⁵⁰ It was submitted that the phrase in the Mississippi divorce decree, "actual *bona fide* resident citizen", defined what was meant by habitual residence, and as such denoted "a regular physical presence which must endure for some time".¹⁵¹ Counsel for the petitioner then drew the following distinction between *ordinary residence* and *habitual residence*:

"... ordinary residence is different from habitual residence in that the latter is something more than the former and is similar to the residence

147 1971.

148 S 3.

149 *Cruse v Chittum* [1974] 2 All ER 940 942.

150 *Ibid* 943.

151 *Ibid*.

normally required as part of domicile, although in habitual residence there is no need for the element of animus which is necessary in domicile."¹⁵²

This distinction between ordinary residence and habitual residence is not accepted by all the commentators on the English conflict of laws. In the latest edition of *Cheshire-North*¹⁵³ the authors seem to conclude, on the basis of three cases¹⁵⁴ decided subsequent to the *Cruse* case, that there is no distinction between ordinary residence and habitual residence. However, the decision in at least one of these cases, *Kapur v Kapur*,¹⁵⁵ may be open to criticism: it was held, for the purposes of divorce jurisdiction, that *ordinary residence* of one year for educational purposes was sufficient to constitute *habitual residence*. It is debatable whether such a relatively short residence would indeed have constituted a habitual residence. Rather it seems as if it would have constituted residence *simpliciter* or, at the most, ordinary residence.¹⁵⁶ As the authors of *Cheshire-North* point out, an equation of ordinary and habitual residence will lead to the logical conclusion that a person may indeed have more than one habitual residence as is the case with ordinary residence.¹⁵⁷ This will have serious repercussions should habitual residence be employed as a connecting factor

152 *Ibid.* In the light of the earlier submissions by the petitioner's counsel in the case (at 942), it is clear that this does not mean that no intention whatsoever is required for habitual residence, but simply that the intention involved is not of the same nature and intensity as the *animus* required for the acquisition of a domicile of choice.

153 1992 (12th ed).

154 Reference is made to the House of Lords decision in *R v Barnet London Borough, ex p Shah* [1983] 2 AC 309 (in which habitual residence was seemingly, according to the authors themselves, equated with ordinary residence), *Kapur v Kapur* [1984] FLR 920 and *V v B (A Minor) (Abduction)* [1991] 1 FLR 266.

155 [1984] FLR 920.

156 See 4.2.1 Residence *simpliciter* and 4.2.2 Ordinary residence *supra* for the interpretations of these two forms of residence.

157 170-171.

for the establishment of an individual's personal law in a choice of law context.¹⁵⁸

At present there seems to be a difference between ordinary and habitual residence, however vague and ill-defined this distinction may be.¹⁵⁹ In the South African context, it would seem that the legislator has used *ordinary residence* as a jurisdictional connecting factor in regard to internal jurisdiction,¹⁶⁰ as well as international competence,¹⁶¹ while *habitual residence* has been used as a conflicts connecting factor.¹⁶²

A more important distinction is the one between habitual residence and domicile. For the South African lawyer this distinction will shed some light on the meaning of habitual residence, which is a relatively unknown concept in our law.

One of the most prominent differences between habitual residence and domicile is that

158 In this regard it is interesting to note that, in two territories that have statutorily adopted habitual residence as a connecting factor, it is expressly stipulated that a person may only have one habitual residence. In Ireland, where habitual residence has replaced domicile, the legislator has stipulated that a person's habitual residence may only be in one state: see Binchy *Irish Conflicts* 100. In Manitoba, where the law relating to domicile and habitual residence has been codified by the Domicile and Habitual Residence Act 1987, it is also stipulated that no individual can have more than one domicile and habitual residence at any time: see Castel *Canadian Conflict* 104.

159 See also De Jager *Domicilium as Koppelfaktor* 218 fn 2:

"Gewone verblyf [ordinary residence] is die feitlike aanwesigheid op 'n bepaalde plek sonder dat dit gewil is. Gebruiklike verblyf [habitual residence] daarenteen is van meer duursame aard. By die vasstelling van die vraag of verblyf as gebruiklik beskou word, word ook op die bedoeling van die persoon gelet."

160 See s 2(1)(b) of the Divorce Act 70 of 1979 for divorce jurisdiction.

161 S 13 of the Divorce Act 70 of 1979 in respect of the recognition of foreign divorce orders: see the discussion of this section in **Chapter 2** under **5 Recognition of foreign judgments relating to status**.

162 See s 3bis(1)(a)(ii) of the Wills Act 7 of 1953.

domicile is a legal concept, while habitual residence represents a factual situation.¹⁶³ In view of the similarity between the Continental concept of domicile ("Wohnsitz" in German) and habitual residence,¹⁶⁴ habitual residence is sometimes referred to as "domicile de fait" and domicile as "domicile de droit".¹⁶⁵ In similar vein Kegel defines habitual residence as: "ein Wohnsitz **ohne rechtliche Bestandteile**; ein 'faktischer' Wohnsitz".¹⁶⁶ Thus, habitual residence is a concept without the legal fictions inherent in the concept of domicile: there is no habitual residence corresponding to the domicile of origin or the domicile of dependence.¹⁶⁷ In this sense habitual residence is a "... 'virgin' concept offering greater chances to achieve international uniformity".¹⁶⁸ Hall argues that, because habitual residence is a question of fact, it will not, like

163 Castel *Canadian Conflict* 102; *Cheshire-North* 170; De Winter 1969 III *Hague Recueil* 349 428; Hall 1975 *ICLQ* 1 9; Kegel *Internationales Privatrecht* 345; Pålsson *Marriage and Divorce* 77; Thomashausen *Reflections on "Domicile"* 187.

164 See, for example, the definition in art 5 of the Draft Hague Convention to Determine Conflicts Between the National Law and the Law of Domicile (1951):

Domicile ... is the place where a person habitually resides, unless it depends on that of another person or on the seat of an authority.

See also Neuhaus *Grundbegriffe* 220 where "Domizil" and "Wohnsitz" are used interchangeably:

"Die *Termini* 'Domizil' und 'Wohnsitz' werden hier wie üblich synonym gebraucht, obwohl es manchmal nahe liegt, das deutsche Wort für den deutschen oder die mit ihm verwandten kontinentaleuropäischen Begriffe zu verwenden, dagegen das Fremdwort den stark abweichenden englischen und amerikanischen vorzubehalten."

Cf also De Nova 1964 *Am J Comp L* 542 562 where he states, with reference to the increasing use of habitual residence as a connecting factor in Hague Conventions on private international law:

"*Résidence habituelle* is domicile in modern garb for international consumption."

165 De Winter 1969 III *Hague Recueil* 349 429.

166 *Internationales Privatrecht* 345.

167 In South African law the Domicile Act 3 of 1992 has abolished the doctrine of the revival of the domicile of origin (s 3), as well as the domicile of dependence in respect of married women (s 1(1)) and children (s 2).

168 Pålsson *Marriage and Divorce* 76.

domicile, invite different legal interpretations from different countries and therefore a finding of habitual residence, being a factual finding, will normally not be reviewed by a forum which is called upon to, for example, recognise a foreign divorce decree.¹⁶⁹ In this sense habitual residence will provide a connecting factor with a universal uniform meaning for purposes of private international law.

Having said that habitual residence is a question of fact, the issue of the relevance of *animus*, in comparison to the *animus* required for the acquisition of a domicile of choice, as we have come to know it in the common law world, arises. There is no question that intention *may* play a role; however, it does not occupy the dominant position that it does in regard to domicile.¹⁷⁰

As is the case with domicile, the requisite *animus* is often inferred from an evaluation of the relevant objective facts and surrounding circumstances. For example, it may be inferred from the *propositus*'s type of employment or from the fact that he has acquired a residence, or from other factors, such as having acquired citizenship of a country through naturalisation, that he had indeed formed the intention to settle at a particular place indefinitely and has therefore acquired a domicile of choice there.¹⁷¹ This may also happen in the case of habitual residence. The actions of an individual may give rise to the inference that he has the intention to habitually reside at a particular place.¹⁷² This does not mean, however, that an intention to reside habitually is a requirement for the acquisition of a habitual residence and therefore it is different from domicile.

169 1975 *ICLQ* 1 9-10.

170 *Binchy Irish Conflicts* 98; *Castel Canadian Conflict* 103; *Cheshire-North* 170; *De Winter* 1969 III *Hague Recueil* 349 430; Hall 1975 *ICLQ* 1 22ff; *Morris Conflict* 34; *Pålsson Marriage and Divorce* 78ff.

171 See the examples discussed in Chapter 5 under 3.3 Factors determining domicile.

172 See also Hall 1975 *ICLQ* 1 22ff; *Pålsson Marriage and Divorce* 78.

Intention may, in certain circumstances, "fortify" the objective connection between an individual and a particular place for purposes of the determination of a habitual residence.¹⁷³ Pålsson gives the example of an emigrant who has just arrived in his new country and has severed all his ties with the former country.¹⁷⁴ On a purely objective evaluation of the emigrant's circumstances, he will not have acquired a habitual residence in the new country, while on the same facts, he may indeed have acquired a domicile of choice, provided that he has the requisite *animus* to settle in the new country indefinitely. Pålsson argues that, in such a case, the brief duration of the emigrant's residence in the new country is outweighed by the intention to (habitually) settle in the new country. In this regard the authors of *Cheshire-North*¹⁷⁵ draw the following distinction: the intention required in domicile is concerned with whether there is a future intention to live elsewhere, whereas in the case of habitual residence no more than a *present* intention to reside should be necessary. However, where the objective factors alone unambiguously point to the acquisition of a habitual residence in a certain territory, there will be no need to invoke the subjective *animus*.¹⁷⁶ This is in line with the recommendation of the Council of Europe:

"The voluntary establishment of a residence and a person's intention to maintain it are not conditions of the existence of a residence or an habitual residence, but a person's intentions may be taken into account in determining whether he possesses a residence or the character of that residence."¹⁷⁷

173 See Pålsson *Marriage and Divorce* 79.

174 *Ibid* 78.

175 170.

176 See also De Winter 1969 III *Hague Recueil* 349 430 who says that a person's hidden mental attitude cannot affect the determination of his habitual residence in the face of conclusive objective facts.

177 Resolution (72) 1 10, adopted on 18 January 1972, quoted by Pålsson *Marriage and Divorce* 79.

Thus it seems fair to conclude that *animus* will only play a role in the determination of habitual residence if it can be invoked as an aid to determine the exact character of the *propositus*'s residence. It also seems that, even though a habitual residence will usually be the result of a voluntary choice, lack of voluntariness may be highly relevant in regard to certain groups of individuals. Kegel is adamant that habitual residence should not be used as a connecting factor in regard to hostages, people who have been abducted, members of the armed forces, prisoners and individuals who are forced to stay in a certain place.¹⁷⁸ It is therefore submitted that, while voluntariness should not constitute an essential requirement for the acquisition of a habitual residence, forced residence, in the sense that the individual has no freedom of choice in regard to where he wishes to settle, will definitely negate the acquisition of a habitual residence. However, with habitual residence the emphasis is on the factual situation and therefore the objective facts and surrounding circumstances will, in the absence of strong evidence to the contrary, be decisive.

4.2.4 Preliminary conclusions

It seems that residence *simpliciter* and ordinary residence are primarily common law concepts, while habitual residence is essentially a civil law concept which has found its way into the common law systems through the Hague Conventions.¹⁷⁹ It is also quite clear that residence *simpliciter* and ordinary residence are mainly used as jurisdictional connecting criteria and not as conflicts connecting factors. This is due to the fact that these two types of residence do not constitute a sufficiently significant link between an individual and a legal system in order to assign a personal legal system

178 See Kegel *Internationales Privatrecht* 346:

"Von einem **Daseinsmittelpunkt** [habitual residence] kann man nicht sprechen, wenn **Bewegungsfreiheit** fehlt: Geiselnahme, Verschleppung, Wehrdienst, Kriegsgefangenschaft, Strafhaft, Zwangsaufenthalt in Heilanstalten begründen keinen gewöhnlichen Aufenthalt."

179 See De Winter 1969 III *Hague Recueil* 349 419ff.

to the individual on the basis of residence *simpliciter* or ordinary residence.¹⁸⁰

On the other hand, habitual residence is used as both a jurisdictional and a conflicts connecting factor. In this sense habitual residence is clearly distinguishable from residence *simpliciter* and ordinary residence and is therefore more akin to domicile. However, the most important point of distinction between habitual residence and domicile is that domicile is a legal concept, while habitual residence is a factual one.¹⁸¹ In this respect the absence of a requisite *animus* for the acquisition of a habitual residence, as well as the absence of legal fictions inherent in domicile, such as the domicile of dependence,¹⁸² makes habitual residence a much less "conceptually cluttered notion"¹⁸³ than domicile.

4.3 Should domicile be replaced?

It is clear that nationality is not a viable option to replace domicile as a connecting factor for the ascertainment of an individual's personal law in a choice of law context. All too often a person does not have a sufficiently significant connection with his country of nationality in order to subject issues relating to his private-law status to the law of his nationality. In regard to other areas of choice of law where other forces are at work, for example where the policy of validity is promoted, nationality may well be used as a connecting factor in conjunction with other criteria.¹⁸⁴ However, for purposes of the determination of an individual's personal law, nationality does not pass

180 See Pålsson *Marriage and Divorce* 80-81.

181 Castel *Canadian Conflict* 102; *Cheshire-North* 170; De Winter 1969 III *Hague Recueil* 349 428; Hall 1975 *ICLQ* 1 9; Kegel *Internationales Privatrecht* 345; Pålsson *Marriage and Divorce* 77; Thomashausen *Reflections on "Domicile"* 187.

182 This has been abolished in South African law: see ss 1(1) and 2 of the Domicile Act 3 of 1992.

183 Binchy *Irish Conflicts* 98.

184 See ss 3bis(1)(a)(ii) and (iii) of the Wills Act 7 of 1953 where nationality, habitual residence and domicile are listed as possible connecting factors for the determination of the formal validity of a will.

the test: in too many instances nationality does not represent the true seat of issues pertaining to private-law status.

In regard to jurisdiction, nationality may be used as a connecting factor. Since the jurisdictional connecting factor does not operate exclusively,¹⁸⁵ nationality may be used in the alternative or in conjunction with other *rationes jurisdictionis*. This route has been followed by the South African legislator in regard to the recognition of foreign decrees of divorce, as well as nullity orders, where nationality, domicile and ordinary residence are listed as connecting factors for the determination of international competence.¹⁸⁶

Regarding residence, it seems as if residence *simpliciter* and ordinary residence may be used as jurisdictional connecting factors, since they constitute a sufficiently close link with the forum to justify the assumption of jurisdiction. Once again, the jurisdictional connecting factor does not operate exclusively and therefore residence *simpliciter* and ordinary residence may be used in conjunction with domicile or even replace domicile in appropriate instances. The difference between residence *simpliciter* and ordinary residence is really one of degree and it is submitted that residence *simpliciter* may not always evince a jurisdictional link which is sufficiently close to ensure that a judgment will be potentially effective, especially when it comes to the recognition and enforcement of local judgments abroad or foreign judgments in a South African forum. Even though both residence *simpliciter* and ordinary residence have been used in a jurisdictional context in South African law,¹⁸⁷ the legislator should perhaps consider using ordinary residence, rather than residence *simpliciter*, as the

185 See the discussion *supra* under **3 The conflicts connecting factor versus the jurisdictional connecting factor**.

186 See the discussion of the relevant section, s 13 of the Divorce Act 70 of 1979, in **Chapter 2 under 5 Recognition of foreign judgments relating to status**.

187 See eg s 19(1)(a) of the Supreme Court Act 59 of 1959 (quoted *supra* under **4.2.1 Residence simpliciter** and s 2(1)(b) of the Divorce Act 70 of 1979 (quoted *supra* under **4.2.2 Ordinary residence**).

ratio jurisdictionis. It is abundantly clear that neither residence *simpliciter* nor ordinary residence qualify as conflicts connecting factors: the link that they represent is too weak to constitute the true seat of issues relating to private-law status for choice of law purposes.¹⁸⁸ While residence *simpliciter* and ordinary residence may, in conjunction with other criteria, be relevant in, for example, ascertaining the proper law of a contract, they can never operate exclusively to determine the legal system which governs an individual's private-law status.

On the other hand, habitual residence has attractive qualities for use as a conflicts connecting factor. Its objective and purely factual nature¹⁸⁹ renders it most suitable for choice of law purposes, especially for issues pertaining to status. Ideally, the status of a private individual should be governed by the legal system of the country with which he has the most significant connection, in other words the "rechtskring" which represents the seat of his very existence. In South Africa this "seat" is indicated by the connecting factor *domicilium*. Unfortunately the subjective *animus* requirement for the acquisition of a domicile of choice has made domicile a cumbersome and unpredictable criterion for the establishment of an individual's personal law. In many instances this subjective element has been manipulated in order to achieve the desired result in a jurisdictional context.¹⁹⁰ However, it has emerged that the subjective *animus* is, more often than not, determined completely objectively with little or no cognisance being taken of the *propositus*'s subjective intention.¹⁹¹ Pålsson has termed this increasing reliance on completely objective factors to determine a person's

188 See Pålsson *Marriage and Divorce* 81.

189 Castel *Canadian Conflict* 102; Cheshire-North 170; De Winter 1969 III *Hague Recuell* 349 428; Hall 1975 *ICLQ* 1 9; Kegel *Internationales Privatrecht* 345; Pålsson *Marriage and Divorce* 77; Thomashausen *Reflections on "Domicile"* 187. See also the discussion *supra* under 4.2.3 **Habitual residence**.

190 See, in general, **Chapter 5** for a detailed exposition of the subjective element of domicile as well as **Chapter 4** for a discussion of South African cases which bear testimony to the manipulation of the *animus* requirement, especially in the area of divorce jurisdiction.

191 See the case law discussed in **Chapter 5** under **3 Determination of the requisite *animus* for a domicile of choice: subjective or objective?**

domicile and, therefore, by implication the requisite *animus*, the "objectivisation" of the concept.¹⁹² In this sense, domicile comes very close to habitual residence in regard to the way in which it is determined. De Winter comes to the conclusion that " 'habitual residence' should be understood to mean a person's *social domicile*".¹⁹³ Thus habitual residence and domicile both serve to indicate the community to which the individual sociologically belongs.¹⁹⁴

In view of what has been said, should domicile not be replaced by habitual residence as a conflicts connecting factor? I submit that the answer for South African law must be "no!"¹⁹⁵ It is true that both criteria strive to indicate the "rechtskring" to which an individual truly belongs, in other words the true seat of his existence. However, habitual residence is not a concept which has been developed sufficiently within a choice of law context to replace domicile. For the ascertainment of a person's personal law it is important that only one personal law at a time be indicated by the connecting factor; and that "gap-filling rules" exist so that there will never be a "gap" in regard to the personal law. This is indeed the position regarding domicile in South African law: each person can only have one domicile at a time and no-one can be without a domicile.¹⁹⁶ In regard to habitual residence these principles are not entirely clear: it is not certain whether a person may only have one habitual residence at a time and no "gap-filling" rules exist where a person has abandoned his habitual residence and

192 *Marriage and Divorce* 71.

193 1969 III *Hague Recueil* 349 431.

194 *Ibid*; Pålsson *Marriage and Divorce* 78.

195 See the South African Law Commission's Report on Domicile 1990 (Project 60) pars 5.7-5.29. The English and Scottish Law Commissions also decided against the replacement of domicile by habitual residence: see pars 3.5-3.8 of their report (*Private International Law: The Law of Domicile*, 1987: Law Commission No 168; Scottish Law Commission No 107).

196 See Forsyth *Private International Law* 113-115. S 3(1) of the Domicile Act 3 of 1992 provides that:

No person shall lose his domicile until he has acquired another domicile, whether by choice or by operation of law.

has not as yet acquired a new one.¹⁹⁷ Mindful of the exclusive nature of the conflicts connecting factor, it is clear that habitual residence does not fit the profile at present. In the area of private-law status, especially, conflicts justice demands that the connecting factor be certain and that results be uniform and predictable. Therefore, instead of replacing domicile by a criterion, such as habitual residence, which has not sufficiently been developed in order to satisfy the demands of conflicts justice, attention should be directed at further reform of the concept *domicilium*. In this context, certain features of habitual residence, which make it attractive as a conflicts connecting factor, may be given due consideration.

Can habitual residence be used as a jurisdictional connecting factor? While there is no reason why it should not be used as such, a *caveat* must be sounded. In South African law *domicilium* has been used as both a jurisdictional and a conflicts connecting factor. However, since the majority of cases in which the interpretation of domicile was explored, concerned jurisdiction, and in particular divorce jurisdiction, domicile was interpreted as a jurisdictional connecting factor. Very often the interpretation of domicile was manipulated in order to achieve a certain result, for example to assume jurisdiction on behalf of a deserted wife.¹⁹⁸ These interpretations served as general authority on the interpretation of *domicilium* in other areas of the law and therefore also in regard to choice of law. Should habitual residence be considered as a possible future conflicts connecting factor,¹⁹⁹ it would be wise to use *ordinary residence* as the jurisdictional connecting factor and *habitual residence* as the conflicts connecting factor. This will prevent a manipulation of the concept for the purpose of assuming jurisdiction. Such a clear distinction will also ensure that, should habitual residence be used as a conflicts connecting factor in the future, it is developed to suit the requirements of a connecting factor for choice of law purposes.

197 See *Cheshire-North* 170-171; *Pålsson Marriage and Divorce* 78.

198 See the cases discussed in **Chapter 4**.

199 Habitual residence is already used as a connecting factor in s 3bis(1)(a)(ii) of the Wills Act 7 of 1953 in regard to the formal validity of wills.

Another important aspect relating to the interpretation of domicile and habitual residence is that domicile is traditionally interpreted in terms of the *lex fori*, in other words, in terms of the legal system from which it comes.²⁰⁰ This is one of the main reasons for the widely divergent interpretations of domicile that exist in the legal world today.²⁰¹ On the other hand, it seems as if habitual residence has acquired an "international meaning" in the sense that it is interpreted in a more uniform way, albeit mainly with reference to the European Continental concept of domicile. This has also been the motivation behind the use of habitual residence as a connecting factor in the Hague Conventions.²⁰² Pålsson expresses the hope that there will not, as has been the case with domicile, develop "national schools" of interpretation in regard to habitual residence.²⁰³ An "international" connecting factor will certainly promote the ideal of uniformity. However, to develop such a criterion will, if not impossible, take a long time indeed. The concept of habitual residence has been with us for almost a century and yet no authoritative, truly international, definition of the concept exists.²⁰⁴ The solution seems to lie in sensible law reform.

Not only should the determination of domicile be simplified and facilitated,²⁰⁵ a more accommodating interpretation of the concept may go a long way towards ensuring that justice is done to individuals. The South African legislator has already embarked on a road of reform in this regard. In terms of section 13 of the Divorce Act²⁰⁶ domicile constitutes one of the grounds of international competence for the recognition

200 Kahn-Freund *General Problems* 242. See also *Ex parte Jones: In re Jones v Jones* 1984 (4) SA 725 (W).

201 De Winter 1969 III *Hague Recueil* 349 419ff.

202 *Ibid* 423ff.

203 *Marriage and Divorce* 80.

204 See De Winter 1969 III *Hague Recueil* 349 423.

205 See further Chapter 7 under 2 The *animus* requirement for a domicile of choice: should it be retained?

206 70 of 1979.

of foreign divorces and nullity decrees. However, the Act states clearly that domicile may be interpreted according to South African law (the traditional *lex fori* interpretation) or it may be interpreted in terms of *the law of the relevant foreign country or territory*.²⁰⁷ This will prevent limping marriages as a result of different interpretations given to domicile in different jurisdictions: This section of the Divorce Act relates to international competence, in other words, the question regarding the sufficiency of the foreign court's jurisdiction to pronounce on a matter relating to private-law status. The question now is whether this "accommodating" or "extended" interpretation of domicile for the purposes of international competence should also be adopted in issues which relate to choice of law in the narrow sense, in other words, in regard to domicile as a connecting factor within the structure of the traditional conflict rule. It is submitted that, while international interaction between private individuals in the area of status demands that the net of recognition of a change in private-law status be cast wide, the same does not hold true for choice of law rules. In regard to international competence, one is dealing with the domestic jurisdiction of a foreign court and therefore an extended interpretation of domicile is justifiable. When it comes to choice of law, the connecting factor, *domicilium*, is a manifestation of the link which the forum will regard as sufficient in terms of its own choice of law rules.²⁰⁸ Therefore the interpretation of domicile in the sense of a personal connecting factor as the indicator of an individual's personal law, must remain within the province of the forum. However, this does not prevent any legal system from reforming its concept of *domicilium* so as to conform more closely to a concept such as habitual residence.

5 Conclusion

It is clear that there is a definite distinction between jurisdictional and conflicts

207 For a discussion of this s 13 of the Divorce Act 70 of 1979, see **Chapter 2 under 5 Recognition of foreign judgments relating to status**.

208 See *supra* under **3 The conflicts connecting factor versus the jurisdictional connecting factor** for a comparison of the functions of jurisdictional and conflicts connecting factors, as well as the principles underlying those functions.

connecting factors; a distinction which is often not sufficiently acknowledged. The sharing of the same connecting criteria creates problems in regard to the interpretation of these criteria. In regard to domicile its *exclusive use* as a jurisdictional connecting factor in especially divorce actions for seventy odd years, has had a marked effect on the interpretation of the concept. In these cases the assumption of jurisdiction was the primary concern and this resulted in result-selective interpretations of domicile. In the process the assumption of jurisdiction totally overshadowed the choice of law issue. Although there is no objection to the use of domicile as a *ratio jurisdictionis*, especially in status-related matters, the different functions of jurisdictional and conflicts connecting factors must be borne in mind. Since the jurisdictional connecting factor is not exclusive in nature, like the conflicts connecting factor, domicile may be replaced or supplemented as a jurisdictional connecting factor in many instances. This will, in effect, free domicile from the shackles of jurisdiction which have, in no small measure, impeded its development as a legal concept. On the choice of law front, however, domicile remains the principal connecting factor for the ascertainment of an individual's personal law and it is in this area of the law that the future of domicile will be shaped.

CHAPTER SEVEN

DOMICILE IN SOUTH AFRICAN LAW: THE WAY AHEAD

Introduction

Throughout this thesis the emphasis has been on domicile as a connecting factor, both in a jurisdictional and a conflict of laws sense. In the final analysis, however, domicile is essentially a South African law concept and it is within the context of the South African legal practice that its future development lies. The viability of domicile as a connecting factor will ultimately depend on whether the concept, as it is developed in the South African context, suits the purposes of jurisdiction or choice of law. The reason why domicile features so prominently as a connecting factor in matters relating to private-law status, is because domicile represents that essential link between an individual and a legal territory or a "rechtskring". With a view to future reform, the time has come to determine afresh what the true meaning of domicile is and to revisit certain areas of the law where domicile features as a connecting factor.

1 The true meaning of domicile

In terms of the Domicile Act¹ there are different categories of people whose respective domiciles are determined in different ways in South African law. There is the domicile of a person who is capable of acquiring his own domicile of choice;² the domicile of a child under the age of eighteen years³ and the domicile of a person who does not

1 3 of 1992.

2 S 1(1).

3 S 2(1) read together with s 2(2).

have the mental capacity⁴ to acquire his own domicile of choice.⁵ The respective domiciles of these different categories of people are mainly determined in two ways. In the case of a person capable of acquiring his own domicile of choice (and this includes children above the age of eighteen years, as well as married women)⁶ the requirements are lawful presence at a particular place and the intention to settle there for an indefinite period.⁷ In the case of a child under the age of eighteen years, as well as a person who does not have the mental capacity to acquire his own domicile of choice, the criterion is the place with which such a child or other person is most closely connected.⁸

In regard to the determination of the domicile of children under eighteen, as well as other people who do not have the capacity to acquire their own domicile of choice, the common law has been drastically reformed by the Domicile Act. In these cases the relevant domicile is determined completely objectively with reference to the place with which such a person is most closely connected.⁹

However, the common law requirements for the acquisition of a domicile of choice have not undergone the same measure of reform. In terms of the Act, apart from the objective requirement of "lawful presence", a very definite subjective *animus* is still required, namely the intention to settle at a particular place for an indefinite period.¹⁰

4 This refers to the mentally ill, as well as persons who are in a protracted comatose state: see par 2.117 of the South African Law Commission's Report on Domicile 1990 (Project 60), referred to in **Chapter 4** under **1 The Domicile Act**.

5 S 2(1).

6 See s 1(1).

7 S 1(2).

8 For a child under the age of eighteen years there is a rebuttable presumption that, should such a child have his home with both or one of his parents, that parental home is his domicile: s 2(2).

9 3 of 1992. See **Chapter 4** for a discussion of the reform brought about by the Act.

10 See s 1(2) of the Act.

In particular, it is submitted that the choice of "indefinite" in the Act in regard to the requisite *animus*¹¹ was a most unfortunate one.¹² While the term "indefinite" was chosen to introduce more flexibility into the *animus* requirement, many of the old problems remain. It offers no solution to the problem of persons who are employed for a certain period and therefore reside at a particular place, for example, for ten years or until the job is finished in terms of their contract of employment. For these people it is still impossible to form the intention to settle at that place for an *indefinite period*. People, like soldiers, who are stationed at a particular place for a period depending on the happening of a future event, for example, the end of a war, face the same problem. Furthermore, "indefinite" itself, negative in the sense that it is the opposite of "definite", defies exact definition. A study of South African case law has revealed that, in the majority of cases concerning domicile, it is the domicile of choice that needs to be determined¹³ and that the requisite *animus* is the single most problematical obstacle to overcome.¹⁴

The different ways in which an individual's domicile may be determined, as well as the different interpretations of the requisite *animus* give rise to the question whether domicile bears a single meaning in South African law. In other words, does domicile mean the same thing for all people in all areas of the law?

11 *Ibid.*

12 See Chapter 5 for a critical discussion of the term "indefinite".

13 See Chapter 4 for a study of South African case law in this respect.

14 See Chapter 5 for a critical discussion of the courts' interpretation of the *animus* requirement.

1.1 Does domicile bear a single meaning?¹⁵

1.1.1 Different domiciles for different purposes?

In reaction to the single-conception-theory¹⁶ a number of jurists have argued that an individual may have different domiciles for different purposes.¹⁷ He may, for example, have a certain domicile for purposes of divorce jurisdiction, while he has another domicile for purposes of taxation (for example, in English law):

"... as new combinations of facts have presented themselves, more and more unlike the simple cases from which the development started (i e, 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 ..."¹⁸

Cook goes on to say that this is correct, since this approach takes cognisance of the social and economic circumstances involved in any decision regarding a person's domicile. In other words, domicile should be determined so as to fit the occasion, otherwise "unfortunate results"¹⁹ may ensue. Does this mean that the interpretation

15 This heading is borrowed from the article by Reese in 1955 *Columbia LR* 589.

16 See s 11 of the first *American Restatement of the Conflict of Laws*, published in 1934:

"Every person has at all times one domicil, and no person has more than one domicil at a time."

This statement was adjusted slightly in the *American Restatement (Second)*, dated 1971, to read as follows:

"Every person has a domicil at all times and, at least for the same purpose, no person has more than one domicil at a time."

17 Notably Cook *Logical and Legal Bases* 194ff; Reese 1955 *Columbia LR* 589 592.

18 Cook *Logical and Legal Bases* 196.

19 *Ibid* 197.

of domicile is dependent on the result which the court wishes to achieve?²⁰ Many examples from our case law bear testimony to the fact that the concept *domicile* has, in the past, been manipulated by South African courts to achieve the desired result.²¹ Especially in the area of divorce jurisdiction sympathetic judges have gone out of their way to entertain divorce proceedings instituted by a deserted wife.²² One of the underlying policies in cases concerning divorce jurisdiction is to assume jurisdiction whenever possible.²³ Thus, result selection in the field of the law relating to domicile is not a strange phenomenon in South African law, albeit our judges, working with general principles as it were, will not openly admit to result selection.²⁴

20 See Fawcett 1985 *Oxford Jour Leg Stud* 378 for a discussion of relevant English case law.

21 See the cases discussed in **Chapters 4 and 5**.

22 See eg *Etheridge v Etheridge* (1902) 23 NLR 180 185:

"... we think that the plaintiff, who was born in Natal, and has resided in this Colony all her life, should not be denied redress merely because the defendant, after committing a grievous wrong, left the Colony, and because such a change or residence, coupled with partition of property, might be taken to indicate an intention not to return to Natal."

See also *Mason v Mason* (1885) 4 EDC 330; *Blair v Blair* 1914 SR 111; *Neffler v Neffler* 1906 ORC 7; as well as *Burnett v Burnett* (1895) 12 CLJ 147 (OFS) 148:

"The Courts of law must indeed be dead instruments of justice if it has to be laid down that they cannot help the woman because the result of their action may as a secondary matter affect another. So far as jurisdiction goes, . . . I think this Court in such a case should directly and immediately assist the woman."

Contra however, *Ex parte Kaiser* 1902 TH 165 174:

"It seems to me by far the lesser of two evils to disappoint the desire of a woman like the applicant, whose case appears a hard one, and whose *bonâ fides* [*sic*] I have no reason to doubt, than to introduce an unnecessary element of uncertainty into one of the most important relationships which a man and a woman can enter."

23 See Fawcett 1985 *Oxford Jour Leg Stud* 378 381.

24 Cf Fawcett's conclusion (1985 *Oxford Jour Leg Stud* 378 390) after a study of English case law in this regard:

"Result selection does take place. The courts wish to achieve a number of policy objectives: most notably to validate wills and to take jurisdiction to grant

Whether result selection takes place or not, it is submitted that, in South African law, a person cannot have different domiciles for different purposes.²⁵ The Domicile Act²⁶ draws no distinction between domiciles for different purposes. The domicile of every category of individuals is determined in a specific manner, regardless of the purpose for which such a domicile needs to be determined. However, different interpretations, as well as the judicial manipulation of the concept "domicile" in the past, may have created the perception that domicile is interpreted differently, and in some cases more leniently, depending on the purpose for which it needs to be determined. It is submitted that this is the result of the undefined and uncertain *animus* requirement for the acquisition of a domicile of choice: in this area of the law uncertainty has resulted in distorted interpretations of the requisite intention in order to suit different purposes.

1.1.2 Different inferences - different results

Apart from the manipulation of the concept *domicile* to secure the desired result, it is quite possible that different inferences may be drawn from the same set of facts and evidence. This was acknowledged by Stratford JA in a three to one minority judgment

a divorce whenever possible. Judges are then prepared to use the process of finding the domicile in order to reach the right result, and have done this by taking the emphasis off the legal rules and putting it on the facts of the instant case, and, in particular paying great attention to the expectations of the parties. The process so far from being a mechanical one, where the result is dictated by the application of the law to the facts, can work in the reverse order: with the initial desire to reach the right result dictating the finding of fact as to a person's intent."

That result selection occurs is also acknowledged in the *American Restatement (Second)*: Comment on s 11 (2) (o) where it is said that courts may on occasion be either more or less inclined to find a person domiciled in a state for one purpose (eg divorce jurisdiction) than another (eg taxation). Very often a decision on domicile will depend on the purpose for which the concept is used.

25 See also Kahn *Domicile* 8-10 who concludes that *domicillium* bears a single meaning in South African law.

26 3 of 1992.

in *Johnson v Johnson*:²⁷

"The point of difference is not one of law, but of inference from the facts of the case ..."²⁸

However, apart from different inferences from the same facts there may also be differences of opinion regarding a point of law. *Eilon v Eilon*,²⁹ discussed earlier in this thesis,³⁰ where the majority-minority split was three to two, is a case in point. The majority and the minority differed in regard to the interpretation of the *animus* requirement, in other words, a point of law: the majority accepted Westlake's very strict interpretation of the requisite *animus*, while the minority rejected Westlake's interpretation in favour of a more lenient approach.³¹ Furthermore, the majority and the minority also differed in regard to the weight to be attached to certain relevant factors, in other words, what is to be inferred from the facts and evidence, such as employment in terms of renewable contracts, the commitment of the parties to the Zionist faith, the acquisition of property abroad, etcetera.³² This resulted in three of the judges (the majority) deciding that the *propositus* had not acquired a domicile of choice in South Africa, while the other two judges decided that he had indeed formed

27 1931 AD 391. For a discussion of this case see Chapter 5 under 2.1 South African case law.

28 408.

29 1965 (1) SA 703 (AD).

30 See Chapter 5 under 2.1 South African case law.

31 Westlake's interpretation of the requisite *animus* for the acquisition of a domicile of choice (*Private International Law* (4th ed) par 264) was as follows:

"The intention necessary for acquiring a domicil of choice excludes all contemplation of any event on the occurrence of which the residence would cease."

See further Chapter 5 under 2.1 South African case law for a detailed discussion of the majority and the minority judgments.

32 For the relevant factors, see *Eilon v Eilon* 1965 (1) SA 703 (AD) 709ff.

the requisite *animus* for the acquisition of a domicile of choice.

That different judges will come to different conclusions given the same facts and hearing the same evidence, is a fact which must be accepted. However, it is a matter of grave concern that divergent opinions on a point of law, such as the interpretation of the *animus* requirement, may actually precipitate irreconcilable results, as has happened in the *Eilon* case above. Since the *lex domicilii* of an individual plays such a decisive role in the conflict of laws, a decision in regard to the domicile of a person may mean the difference, for example, between a share in an estate for a divorced spouse and no claim at all.³³ In the case of domicile the *animus* requirement for the acquisition of a domicile of choice, together with the wife's domicile of dependence,³⁴ has been the root cause of different and often unjustifiable results.

While accepting that a concept which derives its meaning from the intentions and movements of human beings, must be flexible, a balance should nevertheless be struck between flexibility and legal certainty. Therefore, the criteria for the determination of a person's domicile should be such that, even though absolute uniformity is unattainable, it promotes uniform decisions. In this regard the current subjective *animus* requirement for a domicile of choice does not provide the court with a certain criterion and thus there exists too much room for divergent interpretations of domicile.

33 Where the proprietary consequences of a marriage depend on the *lex domicilii matrimonii* (that is, the law of the matrimonial domicile at the time of the marriage), it may be of crucial importance to determine where the matrimonial domicile of the couple was. This will be the position, for example, where either of two different countries may be the matrimonial domicile of the couple, and, according to the law of the one country, the wife will share in the estate, while, according to the law of the other country, she may not have a claim at all. Therefore her success or failure in claiming a portion of the estate will depend on the interpretation of domicile.

34 The wife's domicile of dependence was only abolished in 1992 by s 1(1) of the Domicile Act 3 of 1992.

1.1.3 Preliminary conclusions

It is clear that the concept *domicilium* does not project a clear, uniform image. Rather, it is a concept befuddled by confusing and contradictory, and often manipulative, interpretations. The vague and undefined *animus* requirement for the acquisition of a domicile of choice is probably the main source of confusion in this regard. Unfortunately, this is the one aspect of domicile which has not been addressed satisfactorily by the recent Domicile Act.³⁵ As a connecting factor, domicile needs to be ascertainable with reasonable ease and certainty. In the case of a jurisdictional connecting factor, a larger measure of flexibility can be tolerated than in the case of a conflicts connecting factor, since the jurisdictional connecting factor (or *ratio jurisdictionis*) is not as exclusive as the conflicts connecting factor.³⁶ There may also be supplementary or alternative jurisdictional criteria available. However, when domicile is called upon to determine the personal law of an individual in matters relating to private law-status, the current uncertainty and confusion surrounding the interpretation of the requisite *animus* for a domicile of choice is unacceptable. In this context domicile is an exclusive conflicts connecting factor: every person should only have one domicile at a time for whichever purpose³⁷ and this domicile should be easily and readily ascertainable.

For whichever purpose domicile is used, whether it is in the context of jurisdiction, choice of law or even for administrative purposes, the uncertainty pertaining to the *animus* for a domicile of choice cannot be tolerated. Perhaps the best way to address

35 3 of 1992.

36 For a comparison of the nature of the jurisdictional and the conflicts connecting factor, see **Chapter 6** under **3 The conflicts connecting factor versus the jurisdictional connecting factor**.

37 While there may be multiple connecting factors available in the case of, for example, the formal validity of a will (see **Chapter 6** under **3 The conflicts connecting factor versus the jurisdictional connecting factor**), this is not the position in regard to private-law status: where the personal law of an individual needs to be ascertained in a status matter there can only be *one* personal law.

this problem area, is to have a fresh look at the real meaning of domicile, in other words, what is it that is indicated by a person's domicile?

1.2 Domicile means home

Despite all the different interpretations of domicile and the different uses of the concept, there must be a *core* meaning of the concept which explains its application as a connecting factor. As indicated above, in terms of the Domicile Act a domicile of choice is acquired by way of lawful presence at a particular place coupled with the intention to settle there for an indefinite period.³⁸ These requirements do not differ significantly from the common law requirements,³⁹ except that the legislator has opted for "indefinite" instead of "permanent" as regards the requisite intention.⁴⁰ Thus the actual meaning of *domicile of choice* was not changed by the Act. But what does domicile of choice mean?

Although this may seem like a very simplistic interpretation of a complex concept, there is a lot of sense in the statement that domicile means home:

"By domicile we mean home, the permanent home; and if you do not understand your permanent home, I am afraid that no illustration drawn from foreign writers or foreign languages will very much help you to it."⁴¹

The same sentiment was echoed by Innes CJ in *Gunn v Gunn*:

38 S 1(2) of the Domicile Act 3 of 1992.

39 See Kahn *Domicile* 35ff for an exposition of the common law in this respect.

40 See **Chapter 5** for a critical discussion of the subjective *animus* requirement and the meaning of "indefinite".

41 *Whicker v Hume* (1858) 7 HCL 124 160; 11 ER 50 64.

"... domicile only means home ..." ⁴²

The definition of domicile in the *Corpus Iuris Civilis* also emphasises the idea of "home":

"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." ⁴³

From this definition it is clear that a person has a single home base from which he operates; it is the centre of his domestic, social and civil life. ⁴⁴ Temporary absence from his "home" will not have an effect on his domicile and this is one of the important characteristics of domicile: a person need not be present at the place of his domicile all the time.

But a domicile of choice also has a subjective dimension to it, namely the *animus* to

42 1910 TPD 423 427.

43 C 10 40(39) 7 *lex* 1 (Scott's translation). The Latin text reads as follows:

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

44 Cf s 12 of the American *Restatement (Second)* where certain factors are listed as important in determining "a person's home". These factors pertaining to the home are, in the words of the Restatement, the following:

- 1 Its physical characteristics;
- 2 The time the *propositus* spends there;
- 3 The things he does therein;
- 4 The persons and things therein;
- 5 His mental attitude towards the place;
- 6 His intention, when absent, to return to the place;
- 7 Other dwelling places of the person concerned and similar factors concerning them."

settle at a particular place indefinitely. It is this subjective dimension which sets domicile apart from other connecting factors, such as residence.⁴⁵ It is submitted that "home" should not be interpreted too narrowly, meaning only a person's physical residence. It should be given a meaning which also encompasses the subjective dimension of domicile. Seen in this perspective, "home" refers to the community to which a person belongs and this is the essential reason for each person to have a personal law:

"It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws."⁴⁶

This is where the subjective dimension of domicile comes in: each person has a sense of belonging.⁴⁷ This is the reason why each individual only has one domicile at a time: he can only truly "belong" to one community. Once this is realised, all the complicated and involved interpretations of the requisite *animus* for a domicile of choice lose significance. As indicated earlier,⁴⁸ courts have, in the past, taken little, if any, cognisance of an individual's subjective intention in the determination of his domicile. They have, in actual fact, considered all relevant factors and circumstances and then, objectively, determined what the intention of the *propositus* should have been.⁴⁹ What the courts have done in reality, was to decide to which community the individual

45 See the discussion of these connecting factors in **Chapter 6** under **4.2 Residence**.

46 *Wilson v Wilson* (1872) LR 2 P & D 435 442.

47 See Carter 1987 *ICLQ* 713 718; Kahn 1987 *TR* 113 115.

48 See **Chapter 5** under **3 Determination of the requisite *animus* for a domicile of choice: subjective or objective?**

49 Cf *Harrop v Harrop* (1905) 19 EDC 341; *Wooldridge and Others v Ellemor* 1909 TH 158; *Von Falkenstein v Von Falkenstein* 1917 WLD 67: see **Chapter 5** under **3.2 Domicile of choice without reference to *animus*?**

belonged; in other words, where was the *centre* or *gravity* of his existence?

This does not mean that domicile should become a watered-down concept which means little more than physical residence. On the contrary, if "home" is given the correct interpretation it not only encompasses the subjective dimension of domicile, but at the same time rids the concept of the artificiality of a subjective intention requirement. A court can more readily determine to which community a person belongs, than establish what his intention is or was.

1.3 Preliminary conclusions

In a nutshell, it may be said that domicile indicates the community to which an individual belongs and it is the legal system of this "rechtskring" that should govern issues relating to an individual's private-law status. Domicile can only have one meaning and the purpose for which it is used should not have an effect on the interpretation of the concept. If the concept does not fit the purpose, its interpretation should not be manipulated in order to achieve the desired results: it should rather be replaced by another more suitable criterion. In this regard the lessons of the past, especially in the area of divorce jurisdiction, should be heeded. A realisation of the different functions of jurisdictional and conflicts connecting factors, especially in status-related matters, will alleviate the pressure put on domicile in the past to satisfy the demands of an exclusive jurisdictional connecting factor. With a view to the future, reform must focus on the concept *domicilium* and in this respect the *animus* requirement for the acquisition of a domicile of choice must be addressed.

2 The *animus* requirement for a domicile of choice: should it be retained?

Future reform in regard to domicile should focus on the true meaning of domicile and directed at ways and means of ascertaining someone's domicile with reasonable ease

and certainty. The Domicile Act⁵⁰ has succeeded in eliminating a number of the fictions inherent in the domicile concept: the domicile of dependence in respect of married women and children under the age of eighteen years, as well as the doctrine of the revival of the domicile of origin, has been abolished.⁵¹ However, the requisite *animus* for the acquisition of a domicile of choice remains a major obstacle. In order to constitute a viable and credible connecting factor the criterion which is used should be readily and easily ascertainable. It cannot always be left to the courts to decide whether a person has acquired a domicile of choice at a particular place or not. The question is whether the requisite *animus* should be retained as one of the essential requirements for the acquisition of a domicile of choice.

There seems to be two options in this regard. The first option would be to retain the *animus* requirement, but to facilitate the ascertainment of the requisite intention by using rebuttable presumptions. The second option would be to abolish the *animus* requirement and determine someone's domicile in a completely objective manner.

2.1 Rebuttable presumptions

The determination of the requisite intention may be facilitated by the use of rebuttable presumptions. A rebuttable presumption is a presumption which is drawn from a set of proved facts, but it is provisional in the sense that it may be rebutted. If it is not, the presumption or inference will stand.⁵²

In its Working Paper on Domicile⁵³ the South African Law Commission indicated that they did not favour the use of rebuttable presumptions to infer an intention for the

50 3 of 1992.

51 Ss 1(1); 2 and 3 respectively.

52 *Wille's Principles* 50-51.

53 Project 60.

acquisition of a domicile of choice. In their final Report⁵⁴ they rejected a proposal by the Cape Bar that a rebuttable presumption, in terms of which a person is presumed to have the requisite intention for the acquisition of a domicile of choice if he has resided at a particular place for a period of seven years or more, be included in the Domicile Act.⁵⁵ Even though the Commission conceded that a presumption could be helpful to determine the necessary intention, they were not convinced that the use of a rebuttable presumption would always lead to equitable results.⁵⁶ They based their decision on the views expressed in the Report of the English and Scottish Law Commissions on domicile.⁵⁷

The English and Scottish Law Commissions considered a proposal⁵⁸ that there should be a rebuttable presumption that a person had the requisite intention for the acquisition of a domicile of choice under the following circumstances:

- (a) subject to evidence to the contrary, a person should be presumed to intend to live permanently in the country in which he has his home;
- (b) where he has more than one home he should be presumed to intend to live permanently in the country where he has his principal home;
- (c) where a person is in a country to carry on a business, profession

54 Report on Domicile 1990 (Project 60).

55 3 of 1992.

56 Report on Domicile 1990 (Project 60) pars 3.49-3.50.

57 Private International Law: The Law of Domicile, 1987: Law Commission No 168; Scottish Law Commission No 107 pars 5.15-5.22.

58 This proposal, made by the Private International Law Committee, dates back to 1954: Private International Law: The Law of Domicile, 1985: Law Commission Working Paper No 88; Scottish Law Commission Consultative Memorandum No 63 par 5.11. For the history of the reform of domicile in the United Kingdom, see Private International Law: The Law of Domicile, 1987: Law Commission No 168; Scottish Law Commission No 107 pars 1.4-1.6.

or occupation, and any wife or children have their home in another country, he should be presumed to intend to live permanently in that other country.⁵⁹

This proposal was rejected on the basis that it would often be more difficult, or at least just as difficult, to determine where a person's home is, than to determine where he is domiciled.⁶⁰ This is certainly true if "home" is defined as the place where a person *intends to settle permanently or indefinitely*.⁶¹ This means that one would have to determine the *propositus*'s intention in order to determine where his home is or was and this would defeat the whole purpose of using a rebuttable presumption. The criterion or criteria used in a presumption should be totally factual and objective without any cognisance being taken of subjective intentions. The great merit of presumptions such as these, lies therein that it provides an aid to lawyers, administrators and individuals to determine a person's domicile without having to scrutinise every detail of a person's history, as well as his present circumstances and probable future contingencies, in an attempt to discover his intention at a specific moment in time. Therefore, in order to render a rebuttable presumption effective, reference should be made to easily ascertainable, objective, factual criteria.

Even though the English and Scottish Law Commissions rejected a rebuttable presumption based on the "home" of the *propositus*, they were not totally

59 Private International Law: The Law of Domicile, 1987: Law Commission No 168; Scottish Law Commission No 107 par 5.15.

60 *Ibid* par 5.16.

61 Cf the definition of home given in the Report:

"... what constitutes a home ... is in the last resort determined by the intention of the party, so that a type of residence which might constitute a home in one case would not necessarily do so in another." (Private International Law: The Law of Domicile, 1987: Law Commission No 168; Scottish Law Commission No 107 par 5.16)

unsympathetic to the use of rebuttable presumptions.⁶² On the contrary, they proposed the introduction of a rebuttable presumption based on *habitual residence* instead of *home*.⁶³ It is submitted that *habitual residence*, which is a purely factual concept,⁶⁴ may provide a suitable basis for a rebuttable presumption. However, the English and Scottish Law Commissions felt that habitual residence should be qualified in some way in order to justify the inference of an intention for the acquisition of a domicile of choice. Therefore they proposed that the habitual residence should have endured for at least *seven years* in order to raise the presumption.⁶⁵ However, in their final Report, this presumption was dropped as a result of strong opposition from commentators on the Consultation Document.⁶⁶ The fear that a rebuttable presumption may too often produce the wrong result, in other words, a result different to that which would have been reached had there been no presumption, weighed heavily on their minds.⁶⁷

Perhaps the English and Scottish Law Commissions were too sensitive to the criticism levelled at the introduction of such a presumption. The fear of injustice to individuals seems to be unfounded. The facts and circumstances which would be taken into account in order to determine a person's habitual residence would, more often than not, coincide with those that courts normally take into account when they have to

62 Private International Law: The Law of Domicile, 1987: Law Commission No 168; Scottish Law Commission No 107 pars 5.15-5.22.

63 Private International Law: The Law of Domicile, 1985: Law Commission Working Paper No 88; Scottish Law Commission Consultative Memorandum No 63 par 5.13.

64 For a discussion of *habitual residence*, see **Chapter 6** under **4.2.3 Habitual residence**.

65 Private International Law: The Law of Domicile, 1985: Law Commission Working Paper No 88; Scottish Law Commission Consultative Memorandum No 63 par 5.14.

66 Private International Law: The Law of Domicile, 1987: Law Commission No 168; Scottish Law Commission No 107 pars 5.17-5.19.

67 *Ibid* par 5.20.

determine an individual's domicile.⁶⁸ Therefore "habitual residence" represents one of the most common combinations of facts and circumstances from which an *animus* may be inferred. A time period of seven years would ensure that it is an "established" habitual residence from which the requisite intention is inferred. This will also render the presumption useful in the case of those categories of people who do not have complete freedom of choice in regard to where they wish to settle, such as members of the armed forces, deportees, prohibited immigrants, prisoners and certain classes of employees.⁶⁹ The South African Law Commission stated that these individuals should be able to exercise a choice *within the limitations of their capacity*.⁷⁰ As indicated previously, the requirement of an intention to settle at a particular place for an *indefinite period* for the acquisition of a domicile of choice, greatly complicates the acquisition of a domicile for these categories of people.⁷¹ In these cases, a rebuttable presumption, based on seven years' habitual residence, will dispel the notion that, since these people do not have complete freedom of choice, they cannot acquire a domicile of choice at the place where they are stationed or where they work. Since the presumption is rebuttable, the individual concerned (or his legal representative) is free to adduce evidence to the contrary.

With a view to future reform, the South African law reformer will be well advised to seriously consider the introduction of a rebuttable presumption, based on habitual residence for a specified period of time. The fear that this will reduce the concept of a domicile of choice to nothing more than habitual residence, is unfounded. The purpose of the presumption is to infer an intention from the fact of a habitual residence that has endured for some time, an inference that may be rebutted. In the past courts have inferred intentions from lesser facts than those that constitute habitual residence,

68 See the discussion in **Chapter 5** under **3.3 Factors determining domicile**.

69 For a discussion of these categories, see **Chapter 4** under **3 Freedom of choice**.

70 Report on Domicile 1990 (Project 60) par 3.76.

71 See **Chapter 4** under **3.4 Preliminary conclusions**.

or they did not even make mention of an intention.⁷² Furthermore, the presumption is based on the fact that the *propositus* has *already* habitually resided at a certain place for a specified period of time. Therefore, it is based on past facts, while a domicile may be acquired on the basis of an intention to reside for an indefinite *future* period.

It is submitted that the use of a rebuttable presumption will promote informed decisions in regard to the domicile of choice and go a long way towards the elimination of arbitrary decisions: rebuttable presumptions may indeed ensure a qualitative and jurisprudentially sound interpretation of the concept, which, in turn, will promote certainty and uniformity of decision.

2.2 Most significant connection

In view of the fact that the domicile of choice is often determined completely objectively, and very often with little or no reference to the intention of the *propositus*,⁷³ it may be asked why the subjective *animus* requirement is not abolished. Why not replace it with an objective criterion such as a "most significant connection" test? Will such a criterion not be a true reflection of what the courts are *really* doing when they determine an individual's domicile of choice?

This will not be unfamiliar territory for the law reformer. In the case of those persons who are not capable of acquiring their own domicile, the legislator has introduced a "closest connection" test.⁷⁴ This has certainly brought the position of these categories of people (mentally ill individuals and children under eighteen years) in step with reality.

72 See the cases discussed in Chapter 5 under 3 Determination of the requisite *animus* for a domicile of choice: subjective or objective?

73 See the cases discussed in Chapter 5 under 3 Determination of the requisite *animus* for a domicile of choice: subjective or objective?

74 S 2 of the Domicile Act 3 of 1992.

Since a domicile, once determined, has the same consequences in terms of the application of the *lex domicilii* as the personal law, regardless of the way in which it was determined, the question is: why should the domicile of choice be burdened with an uncertain, undefined subjective intention requirement? Why may the domicile of a mentally ill person (or a person in a protracted comatose state or a child under eighteen) be determined with reference to the place with which he is most closely connected, but the same criterion may not be applied to the mentally able (or a child over eighteen)?⁷⁵

Furthermore, it is submitted that the interpretation of "home", given *supra*,⁷⁶ ties in well with the idea of "closest connection". A person will, objectively, be closest connected with the community to which he belongs and thus this test may be applied to determine the domicile of every individual, whether it is a mentally able person or not, or whether it is a child under the age of eighteen years or not.

Should the introduction of such a criterion for a domicile of choice be regarded as a viable option, it must be pointed out that a test based on the *most significant connection* will be preferable to one based on the *closest connection*. There exists a very real danger that a "closest connection" test will often amount to the mere counting of connecting factors resulting in a *quantitative* evaluation rather than a *qualitative* one. In regard to domicile, especially, where the aim is to establish the *centre* of an individual's existence, a "most significant connection" test will ensure just results.

A "most significant connection" test will meet the demands of a connecting factor for choice of law purposes. Since the function of the conflicts connecting factor is to find the most appropriate *lex causae* to govern a particular issue, this test will ensure that, where domicile is the connecting factor, the legal system with the most significant

75 Carter 1987 *ICLQ* 713 725; Fentiman 1986 *Oxford Jour Leg Stud* 353 361; Kahn 1987 *TR* 113 119-120.

76 See under 1.2 Domicile means home.

connection will be applied.⁷⁷ On a conflicts level, this will amount to a softening of the connecting factor in regard to issues concerning private-law status, in the sense that a "hard" connecting factor, namely domicile, is replaced by the motivation for defining it.⁷⁸ However, it has been argued that a softening of concepts was not feasible in regard to status matters, since considerations of certainty and predictability are paramount in this area of the law.⁷⁹ Ironically, though, the ascertainment of a domicile of choice, and more specifically, the interpretation of the requisite *animus*, has given rise to so much confusion and uncertainty that it cannot be said that this "hard" connecting factor has promoted the ideals of certainty and predictability in the past. It may be certain that the personal law, namely the *lex domicilii* in South African law, will be applied to status issues, but when it comes to the interpretation of the concept "domicile", especially in respect of a domicile of choice, there is no certainty. Thus there may be justification for arguing that the interests of choice of law may perhaps better be served by incorporating into the criteria for the acquisition of a domicile of choice, the motivation for defining it.

A "most significant connection" test will also comply with the requirements for a jurisdictional connecting factor. The function of a jurisdictional criterion is to establish a link with a court which is sufficiently close to render an effective judgment.⁸⁰

77 See Chapter 6 under 1.2 The function of the connecting factor in the conflict of laws.

78 See Kahn-Freund *General Problems* 263:

"... 'closest and most real connection' is a form of words which merely substitutes for a connecting concept the motivation for defining it. The *raison d'être* of any choice of law is to find the legal system with which a given issue is considered to be most closely connected. All 'hard' connecting factors are crystallisations of a policy to find the system of law with which a type of issue has its closest link."

For a discussion of the softening of connecting factors, see Chapter 6 under 1.2 The function of the connecting factor in the conflict of laws.

79 See Kahn-Freund *General Problems* 265-266.

80 See Chapter 6 under 2.2 The function of the connecting factor in the law relating to jurisdiction.

However, it must be borne in mind that a jurisdictional connecting factor does not have the "exclusive" character that the conflicts connecting factor has. Thus, other jurisdictional connecting factors may, in certain instances, replace or supplement domicile.⁸¹

The objectivisation of domicile in this way may bring the concept much closer to habitual residence. In fact, Pålsson argues that it makes the two concepts virtually indistinguishable.⁸² This does not mean that an intention which is clearly evident from the facts and circumstances of the individual will be ignored completely. A clear intention may be *one of the factors* which may be taken into account to determine a person's domicile of choice. South African courts have been hesitant in the past to take declarations regarding an intention to acquire a domicile into account; in most of these cases such declarations were not regarded as conclusive.⁸³ The reason for this is that these declarations were often motivated by factors relating, for example, to the division of an estate. Therefore these declarations could not serve as the sole determinant of the requisite intention for a domicile of choice. However, there is no reason why such a declaration may not be considered in conjunction with other relevant factors, or support an inference drawn from the other facts and circumstances.

2.3 Conclusion

The abolition of the *animus* requirement for the acquisition of a domicile of choice and the introduction of a "most significant connection" test, certainly seems attractive. However, it must be conceded that a "most significant connection" test will initially be uncertain and difficult to apply. It is doubtful whether it would be any easier for the

81 See Chapter 6 under 3 The conflicts connecting factor versus the jurisdictional connecting factor, as well as 4 Other connecting factors.

82 See Pålsson *Marriage and Divorce* 71.

83 See the cases discussed in Chapter 5 under 3.3 Declarations by the *propositus*.

courts to determine the most significant connection than to discover a person's intention. "Most significant connection" is a criterion that will have to be shaped into a workable test by the courts. This will take a long time. It is submitted that, in those cases where a "closest connection" test is used at present, it will be reasonably easy to determine that connection. In the case of persons who do not have the mental capability to acquire a domicile of choice, they will probably be institutionalised or they will reside with a relative and therefore their actual place of residence will be a decisive factor.⁸⁴ In regard to children under the age of eighteen years, a rebuttable presumption to the effect that the parental home of such a child will be presumed to constitute his domicile, has been included in the Domicile Act.⁸⁵ However, in regard to the acquisition of a domicile of choice, "most significant connection" will have to be defined by the courts and therefore it represents, at this stage, an uncertain criterion.

Mindful of the subjective element inherent in a domicile of choice, namely the sense of belonging to a certain community,⁸⁶ the introduction of a rebuttable presumption, based on habitual residence for a specified period, may facilitate the ascertainment of the requisite *animus* and ensure uniformity and predictability. Even though "habitual residence" is not a well-defined concept in South African law, it is a factual concept which is determined objectively.⁸⁷ As the basis for a rebuttable presumption, habitual residence will not constitute the sole criterion for the acquisition of a domicile of choice: it will only be used as an aid from which to infer the requisite *animus*. Perhaps this is the crux of the matter: whereas a "most significant connection" test will replace the existing criteria for the determination of a domicile of choice completely, a

84 See the South African Law Commission's Report on Domicile 1990 (Project 60) pars 2.110-2.120. It is submitted that the position in regard to persons who are in a protracted comatose state, may be more complicated, since their institutionalisation may not be of such a permanent nature as that of the mentally ill.

85 3 of 1992 s 2(2).

86 See *supra* under 1.2 Domicile means home.

87 See the discussion of the concept in Chapter 6 under 4.2.3 Habitual residence.

rebuttable presumption will fulfil a positive, supporting role in ascertaining the intention required for a domicile of choice. Seen in this perspective a rebuttable presumption, based on habitual residence for a reasonable period, is definitely the more viable option of the two.

3 Domicile as a jurisdictional and a conflicts connecting factor in South African law: future directions

Domicile is a well-established connecting factor. Its early origins are to be found in the law relating to jurisdiction.⁸⁸ In Roman times it was used for administrative purposes to subject an individual to the burdens of a specific community, as well as to the jurisdiction of the courts of that community.⁸⁹ As the world expanded and people from different tribes and cities engaged in trade and travelled to foreign places, domicile was the criterion which was used to determine what the personal law of a person was.⁹⁰ Thus, domicile was used as both a jurisdictional and a conflicts connecting factor. However, we have a vastly different world today and other jurisdictional connecting factors, such as nationality and residence have emerged. Against the background of the functional diversification of connecting factors,⁹¹ those areas of our law where domicile features most prominently as a connecting factor will be revisited briefly. It is submitted that a realisation of the different functions of jurisdictional and conflicts connecting factors, as well as the different principles and policies that underlie jurisdiction and choice of law, will provide a sound basis for future reform.

88 See Chapter 1 for a short historical overview, as well as Schoeman 1994 *THRHR* 204.

89 C 10 40 (39) 7pr; Von Savigny *Private International Law* 88, 110.

90 See Chapter 1 under 1 **Early origins of domicile as a connecting factor.**

91 See Chapter 6 for an analysis of the functions of conflicts and jurisdictional connecting factors.

3.1 Status-related issues

Private-law status is the true domain of the personal connecting factor, *domicilium*. The status theory determined that issues concerning status should be decided by the *lex domicilii* of the parties and that the only forum which can assume jurisdiction in such matters is the forum *domicilii*:

"It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong [in other words, their personal law], and dealt with by the tribunals which alone can administer those laws."⁹²

However, it is submitted that the nature of the status theory in modern day law is conflicts rather than jurisdictional. This means that status issues should be subjected to the personal law of the individual, the *lex domicilii* in terms of South African law, wherever he may go. That was the reasoning behind the extraterritorial effect of the personal statute in terms of the medieval statist theory: rules relating to the law of persons and family law were regarded as personal statutes which followed the individual wherever he went.⁹³ The insistence on exclusive jurisdiction by the forum *domicilii*, especially in divorce actions, was received into South African law through the authoritative Privy Council decision in *Le Mesurier v Le Mesurier*,⁹⁴ which was consistently adhered to by South African courts:

"... the domicile for the time being of the married pair affords the only true

92 *Wilson v Wilson* (1872) LR 2 P & D 435 442.

93 On the statist theory, see *Cheshire-North* 17ff; *Juenger Choice of Law* 11ff; *Lipstein Principles* 8ff; *Yntema Historic Bases* 35ff. See also Chapter 1 under 1 Early origins of domicile as a connecting factor.

94 [1895] AC 517.

test of jurisdiction to dissolve their marriage."⁹⁵

As a result of the decision in *Le Mesurier*, choice of law was completely subordinated to the issue of jurisdiction in divorce actions. This did not present serious problems for the conflict of laws as long as the domicile of the parties remained the sole common law jurisdictional ground for divorce actions. Since only the forum *domicilii* assumed jurisdiction, the *lex domicilii* was applied *qua lex fori*.

However, it soon became clear that, especially in divorce matters, the wife's domicile of dependence⁹⁶ presented a major obstacle to the assumption of jurisdiction in the case of the deserted wife.⁹⁷ The situation was alleviated by the introduction of statutory extensions to the common law jurisdictional grounds for divorce. With the benefit of hindsight, reform of the concept "domicile" itself, instead of statutory extensions of jurisdictional criteria in those early stages, would better have served the interests of both jurisdiction and choice of law, as well as the interpretation of the concept *domicilium*. The abolition of the wife's domicile of dependence or the recognition, at least, of exceptions to the wife's dependent domicile for jurisdictional purposes, would probably have prevented the distorted and manipulated interpretations of the requisite *animus* for the acquisition of a domicile of choice in an effort to assume jurisdiction on behalf of the deserted wife.⁹⁸

Once the legislator started to extend jurisdictional criteria for divorce actions in an attempt to provide for specific situations, such as the deserted wife and the wife of a

95 540. See Chapter 2 under 2.2 Status and divorce for a discussion and evaluation of *Le Mesurier v Le Mesurier* [1895] AC 517.

96 In terms of the domicile of dependence the wife followed the domicile of her husband on marriage. This domicile of dependence was only abolished in 1992 by s 1(1) of the Domicile Act 3 of 1992.

97 See Chapter 2 under 2.2.2 Statutory intervention, as well as Chapter 4 under 2.1 The wife's domicile of dependence.

98 Cf Schoeman 1995 *THRHR* 488.

deportee,⁹⁹ it became a gap-filling exercise. Jurisdictional criteria had to be adapted and extended each time a new problem arose. Eventually, in 1968, it became possible for a wife to institute action for divorce in a South African court even though her husband was not domiciled in South Africa at all.¹⁰⁰ Thus, for the first time, a court other than the forum *domicilii* could assume jurisdiction in a divorce action. The legislator realised that this could have an effect on the choice of law aspect and the following section was introduced:

Any issue in proceedings relating to an action [a divorce action] ... shall be determined in accordance with the law which would have been applicable if both parties were domiciled in the Republic at the time of the proceedings.¹⁰¹

Thus the choice of law issue was subjected to a fictional domicile, since it was possible that the husband was not domiciled in South Africa and at that stage (1968) the wife still followed her husband's domicile. So, even if the husband was not domiciled in South Africa, the court which assumed jurisdiction, applied the *lex fori* as if it were the *lex domicilii* of the parties.¹⁰²

As the law stands at present, a court may, in terms of the Divorce Act,¹⁰³ assume jurisdiction in a divorce action on a ground other than domicile, namely *ordinary*

99 See the Matrimonial Causes Jurisdiction Act 22 of 1939 s 1(1) and the subsequent Matrimonial Affairs Act 37 of 1953 s 6: see 2.2.2 Statutory intervention in Chapter 2 for a detailed discussion of these sections.

100 General Law Amendment Act 70 of 1968 s 21.

101 S 21(b).

102 See the section titled 2.2.2 Statutory intervention in Chapter 2 for a discussion of the choice of law issue in respect of the statutes which dealt with the extension of jurisdictional criteria for divorce.

103 70 of 1979 s 2.

residence.¹⁰⁴ Therefore it is possible that the law of an individual's *ordinary residence*, which, in terms of the Divorce Act, may be as short as one year, will determine issues relating to the divorce.¹⁰⁵ The effect of this is a complete break with the status theory; not only may a court other than the forum *domicilii* assume jurisdiction in a divorce matter which concerns a change in the status of the parties, but divorce issues may be decided by a legal system other than the *lex domicilii*, namely the law of the *ordinary residence*.¹⁰⁶

In regard to other actions relating to status, such as nullity actions and legitimacy, our courts have followed the status theory and placed great emphasis on whether the proceedings involved a change in the status of the party or parties for purposes of the assumption of jurisdiction. If the action involves a change in status, the forum *domicilii* should, in terms of the status theory, assume jurisdiction. However, it is often difficult to decide whether a change in status is involved. In the case of nullity actions, for example, annulment of a void marriage does not affect the status of the parties, since

104 With the abolition of the wife's domicile of dependence s 2 of the Divorce Act 70 of 1979 reads as follows:

A court shall have jurisdiction in a divorce action if the parties are or either of the parties is -

- (a) domiciled in the area of jurisdiction of the court on the date on which action is instituted; or
- (b) ordinarily resident in the area of jurisdiction of the court on the said date and have or has been ordinarily resident in the republic for a period of not less than one year immediately prior to that date.

For a discussion and interpretation of the concept "ordinary residence", see **Chapter 6** under **4.2.2 Ordinary residence**.

105 The fictional domicile has been retained:

A court which has jurisdiction in terms of this section in a case where the parties are or either of the parties is not domiciled in the Republic shall determine any issue in accordance with the law which would have been applicable had the parties been domiciled in the area of jurisdiction of the court concerned on the date on which the divorce action was instituted. (s 2(3) of the Divorce Act 70 of 1979)

106 See the discussion of the choice of law issue in **Chapter 2** under **2.2.2 Statutory intervention**.

they were never married. On the other hand, annulment of a voidable marriage alters the status of the parties concerned.¹⁰⁷ Therefore, before a court assumes jurisdiction in a nullity action, it needs to know whether it is dealing with a void or voidable marriage. If a "foreign defect" is involved this inquiry may be complicated by the fact that different legal systems do not agree on the grounds which would render a marriage void or voidable. Therefore the court is faced with a characterisation problem at the jurisdiction stage of proceedings.¹⁰⁸

When it comes to choice of law, a great deal of uncertainty prevails in regard to status matters other than divorce. In the case of a voidable marriage, which involves a change in the status of the parties, domicile is the jurisdictional connecting factor, yet the South African choice of law rule for the determination of the validity of a marriage is the *lex loci celebrationis*.¹⁰⁹ It seems strange indeed to insist on domicile for jurisdictional purposes and then disregard domicile when it comes to choice of law.¹¹⁰ In regard to declaratory orders pertaining to the legitimacy of children, a matter which does not affect the status of the child concerned since it is a declaration of an existing status, jurisdiction has also been based exclusively on domicile.¹¹¹

It is submitted that the problems surrounding jurisdiction and choice of law in status matters are the result of a failure to recognise the distinction between jurisdiction and choice of law. In a matter involving a foreign element it must be realised that a court may assume jurisdiction on a ground other than domicile, but still apply the *lex*

107 See Chapter 2 under 3 Status and nullity actions.

108 See Hahlo & Kahn *Husband and Wife* 559. See also the discussion in Chapter 2 under 3 Status and nullity actions.

109 *Friedman v Friedman's Executors* 1922 NPD 259.

110 For a detailed discussion of this problem, as well as a possible solution, see Chapter 3 under 3.2 Voidable marriages.

111 See *Von Wintzingerode v Von Wintzingerode* 1964 (2) SA 618 (T), as well as *Ex parte Anastasio* 1969 (1) SA 36 (W) discussed in Chapter 2 under 4 Legitimacy and legitimation.

domicilii to an issue pertaining to status in terms of its choice of law rule. This is the significance of the status theory for modern day law: that matters pertaining to the status of the individual should be subjected to his *lex domicilii*, unless cogent reasons exist for the application of another legal system.¹¹²

The need to draw a clear distinction between jurisdiction and choice of law is also borne out by the different functions of jurisdictional and conflicts connecting factors. A comparison of the underlying principles of jurisdiction and choice of law, as well as the policies and interests involved in these two areas of the law, underlines the differences between these two fields of law.¹¹³ The significance of this for matters pertaining to private-law status is that domicile need not be the exclusive jurisdictional connecting factor for status issues. Since jurisdiction is essentially based on the doctrine of effectiveness, in the sense that a court should be in a position to render a meaningful judgment,¹¹⁴ it is submitted that any court, which has a sufficiently close link with the matter, should be able to assume jurisdiction. Thus jurisdiction may be based on, for example, *ordinary residence*,¹¹⁵ as is the case in divorce actions,¹¹⁶ or the *locus celebrationis* in the case of void marriages, since that is the only court which can rectify the marriage register.¹¹⁷ Realisation of the fact that jurisdiction need not be based exclusively on domicile, will alleviate the burden of the court at the jurisdiction stage of proceedings in the sense that the court will not have to decide

112 This is the case with commercial contracts where the contractual capacity of a party to the contract may be tested by the *lex loci contractus* or even the proper law of the contract: see Hahlo & Kahn *Husband and Wife* 624. See also the discussion in **Chapter 3** under **2.1.2 Personal consequences of a marriage**.

113 See **Chapter 6** under **3 The conflicts connecting factor versus the jurisdictional connecting factor**.

114 See **Chapter 6** under **2.1.2 The function of the connecting factor in the law relating to jurisdiction**.

115 For a discussion of this concept, see **Chapter 6** under **4.2.2 Ordinary residence**.

116 See s 2 of the Divorce Act 70 of 1979.

117 See *Wells v Dean-Willcocks* 1924 CPD 89.

whether a change of status will occur or not. Thus, jurisdictional criteria should be established for issues *pertaining* to status and not for issues which will necessarily result in a *change* in the status of the parties. The community does not only have an interest in a change in the status of an individual, but also in the declaration of an existing status, for example a declaration of legitimacy, or any other matter pertaining to the status of a member of that community. Seen in this perspective, a connecting factor, such as ordinary residence, may be sufficient for purposes of the assumption of jurisdiction. In the light of the adverse effect that jurisdictional difficulties have had on choice of law in status matters, the law reformer will be well advised to consider the statutory codification of jurisdictional criteria for nullity actions.¹¹⁸

However, a *caveat* must be sounded. In the case of divorce actions a choice of law clause slipped into the section dealing with divorce jurisdiction.¹¹⁹ This conflation of jurisdiction and choice of law is unacceptable. Therefore, while the enactment of statutory criteria for jurisdiction in nullity actions is strongly supported, choice of law should not be directly linked to the jurisdictional criteria, as has happened with divorce actions. Whereas more than one court may have jurisdiction in a status matter, the choice of law connecting factor is an exclusive one. It is submitted that, on the basis of conflicts justice and for reasons of legal certainty, any issue which affects the status of an individual, should in principle be referred to his personal law. Statutory codification of jurisdictional criteria in the case of nullity actions will free the choice of law issues and allow for the sound development of conflict rules.

3.2 Issues other than status

As indicated earlier,¹²⁰ domicile does not play such a decisive jurisdictional role in

118 For a more detailed proposal, see Chapter 2 under 3.3 Preliminary conclusions.

119 S 2 of the Divorce Act 70 of 1979 quoted *supra*.

120 See the examples discussed in Chapter 3.

regard to matters which do not involve the determination of or change in private-law status as such. In non-status matters, a clear and definite distinction exists between jurisdiction and choice of law. Two choice of law rules, which rely on domicile as an exclusive connecting factor, may be singled out for discussion.

The first of these is the conflict rule which determines that the personal consequences of a marriage are governed by the domicile of the parties at the time that the relevant act or transaction took place.¹²¹ The relevance of domicile as a connecting factor in regard to personal consequences may be explained with reference to the aspects which fall under the personal consequences of a marriage.¹²² Some of these aspects, for instance the duty of conjugal fidelity and the right and duty of support, pertain directly to the relationship between the spouses and therefore the law of the community to which they belong, namely the *lex domicilii*, should govern these issues. Other aspects, such as the capacity to contract or to acquire or to alienate property or to sue or to be sued, pertain to capacity which is a status-related issue and therefore the *lex domicilii* is applicable. Previously the *lex domicilii* was indicated by the domicile of the husband in terms of the domicile of dependence. However, following the abolition of the wife's domicile of dependence,¹²³ a husband and wife may now indeed have different domiciles. Should the issue pertain to, for example, the capacity of the spouses to contract with each other, it will be difficult to determine whose domicile is decisive. It is submitted that a solution to this problem may be found

121 Edwards *LAWSA: Conflict* par 440; Forsyth *Private International Law* 256ff; Hahlo & Kahn *Husband and Wife* 623ff. For case law on this topic, see *Kent v Salmon* 1910 TPD 637; *Powell v Powell* 1953 (4) SA (W); *Perrott-Humphrey v Perrott-Humphrey* 1967 (3) SA 304 (W). See also Chapter 3 under 2.1.2 Personal consequences of a marriage.

122 For a summary of the personal consequences of a marriage, see Hahlo & Kahn *Husband and Wife* 622-623. Note, however, that the Matrimonial Property Act 88 of 1984 has abrogated many of the common law limitations and disqualifications which existed in this area of South African law: s 22 of the Act has abolished the prohibition on donations between spouses, while s 11 has removed the husband's marital power and s 12 has abolished the common law limitations on a married woman's capacity to act and to litigate. However, it must be borne in mind that, for purposes of the conflict of laws, similar disqualifications and limitations may still exist in other legal systems.

123 S 1(1) of the Domicile Act 3 of 1992.

with reference to the *ratio* behind every conflict rule, namely to determine the true seat of the issue or legal relationship. Therefore the legal system of the "rechtskring" that has the most significant connection with the transaction or act must be applied, since this will constitute the appropriate *lex causae*.¹²⁴ It is submitted that, in the context of the personal consequences of a marriage between the spouses themselves, the domicile of the party that has the most significant connection with the act or transaction will point to the applicable *lex causae*.¹²⁵ However, as has been argued earlier,¹²⁶ where one of the spouses is involved in a transaction with a third party, domicile will probably not constitute the connecting factor. The reason for this is that a married woman should not be entitled to rely on contractual incapacity in terms of her *lex domicilii* (should such incapacity exist) in commercial transactions with third parties. In these cases the *lex loci contractus* or probably the proper law of the contract will constitute the *lex causae*.¹²⁷

The second example pertains to the proprietary consequences of a marriage. The conflict rule determines that, in the absence of an antenuptial contract, the *lex domicilii matrimonii* governs the proprietary consequences,¹²⁸ but what is the *domicilium matrimonii*? Now, even though a woman can acquire her own independent domicile of choice, the matrimonial domicile is said to be the domicile of the husband at the

124 See Chapter 6 under 1.2 The function of the connecting factor in the conflict of laws for an analysis of the policies and principles underlying choice of law rules.

125 See also the discussion in Chapter 3 under 2.1.2 Personal consequences of a marriage.

126 See Chapter 3 under 2.1.2 Personal consequences of a marriage.

127 Hahlo & Kahn *Husband and Wife* 624. See also the distinction drawn earlier in Chapter 2 under 1 The meaning of private-law status between status and the incidents of status. While status should be ascertained with reference to the *lex domicilii* of the individual, this principle does not necessarily apply to the incidents of status: see Huber *De Conflictu Legum* ss 12 and 13.

128 *Blatchford v Blatchford's Executors* (1881) 1 EDC 365; *Clear v Clear* 1913 CPD 835; *Brown v Brown* 1921 AD 478; *Anderson v The Master and Others* 1949 (4) SA 660 (E); *Frankel's Estate v The Master* 1950 (1) SA 220 (A); *Sperling v Sperling* 1975 (3) SA 707 (A); *Bell v Bell* 1991 (4) SA 195 (W). See further Chapter 3 under 2.1.3 Proprietary consequences of a marriage.

date of marriage.¹²⁹ The significance of the *domicilium matrimonii* is that, once that domicile is determined, it remains immutably fixed for purposes of determining the proprietary consequences of the marriage.¹³⁰ In other legal systems where the wife's domicile of dependence has been abolished, the conflict rule for proprietary consequences still refers to the law of the husband's domicile at the time of the marriage, although criticism has been levelled against this preference for the husband's domicile:

"... it is no longer acceptable for the law to discriminate on the grounds of sex."¹³¹

In its recent investigation into the law relating to domicile, the South African Law Commission elected to retain the rule as it stands at present. Thus, in the absence of an antenuptial contract, the domicile of the husband at the time of marriage will still be decisive for the determination of the matrimonial domicile in respect of proprietary consequences.¹³² In the light of the equality clause, as embodied in section 9 of the Constitution of the Republic of South Africa,¹³³ the dominance of the husband's

129 See South African Law Commission: Working Paper 20 (Project 60) par 6.7.

130 *Hahlo & Kahn Husband and Wife* 631 fn 463. The contents of the *lex domicilii matrimonii* may change: see *Sperling v Sperling* 1975 (3) SA 707 (A) where a South African court gave effect to a retrospective change in the foreign *lex domicilii matrimonii*.

131 *Dicey-Morris* 1069.

132 Report on Domicile 1990 (Project 60) pars 6.2-6.8.

133 108 of 1996. S 9 reads as follows:

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age disability, religion, conscience, belief, culture, language,

domicile in this regard may certainly be challenged in the near future. It is submitted, however, that the injustice of this state of affairs is recognised all over the world, even in countries, like England, that do not have a written constitution. Therefore, the *status quo* will have to be reviewed, be it in the light of the South African Constitution or otherwise. In this regard the proposal of the authors of *Dicey-Morris* seems both realistic and reasonable:

"If the husband and wife are domiciled in the same country, the problem does not arise. In the absence of special circumstances, that country is the matrimonial domicile. If they are not, it is suggested that the applicable law should be that of the country with which the parties and the marriage have the closest connection, equal weight being given to connections with each party. The only objection that might be raised against it is that it could produce uncertainty, though this could also be levelled against the traditional rule, since the determination of domicile always involves an element of uncertainty."¹³⁴

This seems like a good point of departure for the selection of an appropriate *lex causae* for proprietary consequences.¹³⁵ Again, it is submitted that, on jurisprudential grounds, a "most significant connection" test, rather than a "closest connection" test,

-
- and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
 - (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

In regard to the constitutional protection pertaining to gender equality, see, in general, Sinclair *Law of Marriage* 66ff.

134 *Ibid.*

135 See Chapter 6 under 2.1 The function of the connecting factor in the conflict of laws for an analysis of the principles and policies which underlie choice of law rules.

is to be preferred.¹³⁶ Initially this criterion will create uncertainty, but, on the other hand, it may solve the problem of the intended matrimonial home in certain cases. In *Frankel's Estate v The Master*¹³⁷ the possibility of regulating the proprietary consequences of a marriage in terms of the law of the place where the parties intended to settle after their marriage, the so-called *intended matrimonial home/domicile*, was rejected. The main argument against the application of the law of the intended matrimonial home is that it creates uncertainty, especially in cases where the spouses never move to their intended matrimonial home.¹³⁸ However, if the applicable *lex causae* is determined with reference to the place with which the parties and the marriage have the most significant connection at the time of the marriage, the intended matrimonial home may, in certain instances, be indicated, provided that it constitutes the most significant connection. It is submitted that such a connection will only exist, for example, if one of the parties already resided at the place of the intended matrimonial home at the time of the marriage, or where the parties had definitely severed their ties with the country where they were domiciled immediately before the marriage and secured positions and accommodation in the new country. This will impact favourably on the question of the intended matrimonial home: it will only be recognised if it evinces the most significant connection with the marriage and the parties.

Therefore the proprietary consequences of a marriage must be viewed in the correct perspective. Where the parties share a common domicile at the time of marriage, the *lex domicilii* provides a suitable connecting factor. However, since the proprietary consequences of a marriage is not a status-related issue, there is no justification for the continued use of the domicile at the time of marriage as a connecting factor should it lead to unjust results. Where special circumstances, such as a clearly intended

136 See *supra* under 2.2 Most significant connection.

137 1950 (1) SA 220 (A).

138 *Contra*, however, Turpin 1957 SALJ 93ff.

matrimonial home, exist, the rule may be displaced by the law of that country, provided that the country of the intended matrimonial home evinces the most significant connection with the parties and the marriage. Where the parties had different domiciles at the time of marriage, the basic domicile rule will have to be displaced. Once again, the *ratio* which underlies each conflict-rule, namely to select the most appropriate *lex causae*, must constitute the point of departure.¹³⁹ In these instances, it seems as if the *lex causae* will have to be determined on the basis of the country which has the most significant connection with the parties and the marriage. It must be borne in mind that this route will only be followed in cases where the parties do not have the same domicile at the time of marriage or where special circumstances (such as a clearly intended matrimonial home) exist. Therefore, initial uncertainty will be limited to those instances where there is no mutual domicile.¹⁴⁰ Furthermore, parties are free to conclude an antenuptial contract in which they may choose the *lex causae* to govern the proprietary consequences of their marriage.

139 For the principles and policies which underlie choice of law, see Chapter 6 under 2.1 The function of the connecting factor in the conflict of laws.

140 Western European conflict of laws codifications use a number of connecting factors in regard to proprietary consequences in the absence of a choice of law by the parties. See, for example art 54 of the Swiss code which provides that:

- 1 In the absence of a choice of law [by the spouses], the matrimonial regime is governed:
 - (a) By the law of the state in which both parties are domiciled at the same time, or, if this is not the case,
 - (b) By the law of the state in which both spouses were last domiciled at the same time.
- 2 If the spouses have never been domiciled at the same time in the same state, their common national law applies.
- 3 Spouses who have never been domiciled in the same state, and who have no common nationality are subject to the Swiss regime of separate property.

(English translation by Cornu, Hankins & Symeonides "LSU Translation" in 1989 *Am J Comp L* 193)

3.3 Conclusion

With regard to status issues jurisdiction has completely overshadowed choice of law in South African law in the past. This was the result of the insistence on domicile as the exclusive jurisdictional connecting-factor with regard to status matters in terms of the status theory. This has had an adverse effect on the interpretation of the concept *domicilium*, especially in regard to the *animus* requirement for the acquisition of a domicile of choice. A survey of our case law on the assumption of jurisdiction in divorce actions reveals a sad history of manipulative interpretations of domicile as a result of the lack of appropriate measures of reform. In modern day South African law the emphasis should rather be on domicile as a criterion to determine the personal law of an individual, than on domicile as an exclusive jurisdictional connecting factor.

The reform brought about by the Domicile Act¹⁴¹ is commendable. The abolition of the wife's domicile of dependence has brought South Africa into line with other Western countries. While this has removed all remaining obstacles for the wife in regard to divorce jurisdiction, it has created problems for the conflict of laws. Conflict rules which rely on the domicile of the husband as the dominant partner, such as the rule for proprietary consequences of a marriage in the absence of an antenuptial contract, must be re-evaluated. This may yet prove to be a positive and rewarding exercise, since it will entail a proper investigation into the basis and *ratio* of the existing rule. The proposal to determine the appropriate *lex causae* with reference to the place with which the parties and the marriage have the most significant connection in cases where the parties had different domiciles at the time of marriage,¹⁴² embodies the true function of the conflicts connecting factor, namely to pinpoint the seat of the legal relationship concerned.

141 3 of 1992.

142 *Dicey-Morris* 1069.

CONCLUSION

The question whether domicile can be used as both a jurisdictional and a conflicts connecting factor, must certainly be answered in the affirmative. However, this is not an unqualified "yes". A clear distinction must be maintained between jurisdiction and choice of law. Different principles underlie the areas of jurisdiction and choice of law; different interests are at stake; different goals and ideals are envisaged. Whereas there may be multiple *rationes jurisdictionis* available for the assumption of jurisdiction in a given case, the conflicts connecting factor operates exclusively: there is only *one* appropriate *lex causae* for every issue. The differentiation between jurisdictional and conflict of laws criteria on the basis of the exclusivity of the conflicts connecting factor, is most pronounced in the area of private-law status. In principle, the *lex domicilii* should govern choice of law issues concerning status. However, domicile need not be the only jurisdictional criterion. Other criteria, such as *ordinary residence*, may be used as *rationes jurisdictionis* in status matters. This may indeed have a positive effect on the future development of the concept *domicilium*. Freed from the shackles of an "exclusive" jurisdictional connecting factor *domicilium* will be allowed to develop in a jurisprudentially sound way.

Domicile is a unique concept. Through its resilience and adaptability it has stood the test of time. No other connecting factor can provide the special link which domicile constitutes between an individual and the community to which he belongs. However, the determination of the domiciliary link between an individual and a "rechtskring" must be simplified. Therefore the ascertainment of the requisite *animus* for the acquisition of a domicile of choice will have to be addressed. The current uncertainty in this regard is unacceptable. In view of the recent reforms introduced by the Domicile Act 3 of 1992, which have been both positive and progressive, the legislator has shown that it is committed to reform. Thus it is hoped that reform in regard to the law relating to domicile will be a continuing process so that the advent of the twenty-first century will not catch the law reformer napping.

BIBLIOGRAPHY**AUTHORITATIVE WORKS AND MODE OF CITATION**

Allen 1930 *LQR* 277

Allen CK

"Status and Capacity" 1930 *LQR* 277

Anonymous 1903 *SALJ* 382

Anonymous

"Notes on Some Controverted Points of Law"
1903 *SALJ* 382

Anton *Private International Law*

Anton AE

Private International Law (2 ed) W Green:
Edinburgh, 1990

ASSAL 1947-1994

"Conflict of Laws" 1947-1994 *ASSAL* Juta:
Cape Town, Wynberg, Johannesburg, 1948-
1995

Baker *English Legal History*

Baker JH

An Introduction to English Legal History (2
ed) Butterworths: London, 1979

Beck 1983 *SALJ* 43

Beck A

"The Convenience of Jurisdiction" 1983 *SALJ*
43

Beckett 1934 *BYBIL* 46

Beckett WE

"The Question of Classification in Private
International Law" 1934 *BYBIL* 46

Binchy *Irish Conflicts*

Binchy W

Irish Conflicts of Law Butterworths: Ireland, 1988**Brownlie *Public International Law***

Brownlie I

Principles of Public International Law (4 ed) Clarendon Press: Oxford, 1990**Castel *Canadian Conflict* 95**

Castel JG

Canadian Conflict of Laws (3 ed) Butterworths: Toronto, Vancouver, 1993**Carter 1987 *ICLQ* 713**

Carter PB

"Domicil: The Case for Radical Reform in the United Kingdom" 1987 *ICLQ* 713**Cavers 1933 *Harv LR* 173**

Cavers DF

"A Critique of the Choice-of-Law Problem" 1933 *Harv LR* 173**Cavers *Choice-of-Law Process***

Cavers DF

The Choice-of-Law Process University of Michigan Press: Ann Arbor, 1965**Cavers 1970 III *Hague Recueil* 75**

Cavers DF

"Contemporary Conflicts Law in American Perspective" 1970 III *Hague Recueil* 75

Cheshire-North

North PM & Fawcett JJ

Cheshire and North's Private International Law (12 ed) Butterworths: London, Dublin, Edinburgh, 1992*Cook Logical and Legal Bases*

Cook WW

The Logical and Legal Bases of the Conflict of Laws Harvard University Press: Cambridge, Massachusetts, 1949Cornu, Hankins & Symeonides "LSU Translation" 1989 *Am J Comp L* 193-246

Cornu J-C, Hankins S & Symeonides SC

"LSU Translation" (An English Translation of the Swiss Federal Statute on Private International Law of December 18, 1987) printed in 1989 *Am J Comp L* 193-246*Corpus Iuris Civilis**Corpus Iuris Civilis Iustinianei* Lugduni, 1627 reprinted by Otto Zeller: Osnabrück, 1965 (Translation of the whole *Corpus Iuris Civilis* by Scott SP *The Civil Law* The Central Trust Company: Cincinnati, 1932; Translation of the *Digest* by Mommsen T, Krueger P, Watson A *The Digest of Justinian* University of Pennsylvania Press: Philadelphia, 1985)*Cronjé Persons and Family*

Cronjé DSP

The South African Law of Persons and Family (3 ed) Butterworths: Durban, 1994

Currie *Selected Essays*

Currie B

Selected Essays on the Conflict of Laws
Duke University Press: Durham, NC, 1963

Currie 1963 *Columbia LR* 1212

Currie B

"Comments on Babcock v Jackson, a recent
Development in Conflict of Laws" 1963
Columbia LR 1212

De Jager *Domicillium as Koppelfaktor*

De Jager FJ

*Domicillium as Koppelfaktor in die
Internasionale Privaatreg* (LLM Dissertation)
University of South Africa, 1973

De Nova 1964 *Am J Comp L* 542

De Nova R

"Current Developments of Private
International Law" 1964 *Am J Comp L* 542

De Nova 1966 II *Hague Recueil* 441

De Nova R

"Historical and Comparative Introduction to
Conflict of Laws" 1966 II *Hague Recueil* 441

De Waal & Van Heerden 1987 *TSAR* 254

De Waal MJ & Van Heerden BJ

"Boekbespreking: AH Barnard, DSP Cronjé
en PJJ Olivier *Die Suid-Afrikaanse Persone-
en Familiereg*" 1987 *TSAR* 254

De Wet *Ou Skrywers*

De Wet JC

Die Ou Skrywers in Perspektief Butterworths:
Durban, 1988

De Winter 1969 III *Hague Recueil* 349

De Winter LI

"Nationality or Domicile?: The Present State
of Affairs" 1969 III *Hague Recueil* 349

Dicey-Morris

Collins L (gen ed)

Dicey and Morris on the Conflict of Laws
(two volumes) (12 ed) Sweet & Maxwell:
London, 1993

Dickson 1985 *ICLQ* 231

Dickson B

"The Reform of Private International Law in
the Federal Republic of Germany" 1985 *ICLQ*
231

Edwards 1979 *SALJ* 48

Edwards AB

"Choice of Law in Delict: Rules or
Approach?" 1979 *SALJ* 48

Edwards *Reception of "Proper Law" Doctrine*

Edwards AB

*Some Reflections on the Reception of the
"Proper Law" Doctrine into South African Law
in Huldigingsbundel Paul van Warmelo* (ed J
Van der Westhuizen et al) University of South
Africa: Pretoria, 1984

-
- Edwards 1986 *THRHR* 144
Edwards AB "Locus Regit Actum" 1986 *THRHR* 144
- Edwards *LAWSA: Conflict*
Edwards AB Title on *Conflict of Laws* in vol II (first reissue) of WA Joubert *The Law of South Africa* Butterworths: Durban, 1993
- Falconbridge 1937 *LQR* 235
Falconbridge JD "Characterization in the Conflict of Laws" 1937 *LQR* 235
- Falconbridge *Conflict*
Falconbridge JD *Essays on the Conflict of Laws* (2 ed) Canada Law Book Company: Toronto, 1954
- Faris 1993 *THRHR* 277
Faris J "Domicile and Residence - The Independent Grounds for Divorce Jurisdiction" 1993 *THRHR* 277
- Fawcett 1985 *Oxford Jour Leg Stud* 378
Fawcett JJ "Result Selection in Domicile Cases" 1985 *Oxford Jour Leg Stud* 378
- Fawcett 1991 *Current Legal Problems* 39
Fawcett JJ "The Interrelationships of Jurisdiction and Choice of Law in Private International Law" 1991 *Current Legal Problems* 39

Fentiman 1986 *Oxford Jour Leg Stud* 353

Fentiman R "Activity in the Law of Status: Domicile, Marriage and the Law Commission" 1986 *Oxford Jour Leg Stud* 353

Fleming 1952 *ICLQ* 381

Fleming JG "Evasion of Law and Divorce Adjudication" 1952 *ICLQ* 381

Forsyth 1987 *SALJ* 4

Forsyth C "Enforcement of Arbitral Awards, Choice of Law in Contract, Characterisation and a New Attitude to Private International Law" 1987 *SALJ* 4

Forsyth *Private International Law*

Forsyth CF *Private International Law* (3 ed) Juta: Cape Town, Wetton, Johannesburg, 1996

Frames 1884 *Cape LJ* 253

Frames GC "Domicil" 1884 *Cape LJ* 253

Gilissen *Historische Inleiding*

Gilissen J *Historische Inleiding tot het Recht* Kluwer Rechtswetenschappen: Antwerpen, 1981

Goodrich 1919 *Harv LR* 806

Goodrich HF "Jurisdiction to Annul a Marriage" 1919 *Harv LR* 806

Graveson 1951 *BYBIL* 273

Graveson RH

"Choice of Law and Choice of Jurisdiction in the English Conflict of Laws" 1951 *BYBIL* 273

Graveson *Conflict*

Graveson RH

Conflict of Laws (7 ed) Sweet & Maxwell: London, 1974

Guterman 1961 *New York Law Forum* 131

Guterman SL

"The First Age of European Law: the Origin and Character of the Conflict of Laws in the Early Middle Ages" 1961 *New York Law Forum* 131

Guttman 1959 *ICLQ* 678

Guttman E

"The Status of Legitimacy in Comparative Conflict of Laws" 1959 *ICLQ* 678

Hahlo & Kahn *Husband and Wife*

Hahlo HR & Kahn E

The South African Law of Husband and Wife with an appendix by Kahn E on *Jurisdiction and Conflict of Laws* (4 ed) Juta: Cape Town, Wynberg, Johannesburg, 1972

Hahlo & Kahn *South African Legal System*

Hahlo HR & Kahn E

The South African Legal System and its Background Juta: Cape Town, Wynberg, Johannesburg, 1973

Hall 1975 *ICLQ* 1

Hall C

"*Cruse v Chittum*: Habitual Residence
Judicially Explored" 1975 *ICLQ* 1

Harms *Civil Procedure*

Harms LTC

Civil Procedure in the Supreme Court
Butterworths: Durban, 1992

Hay 1979 *ICLQ* 161

Hay P

"The Interrelation of Jurisdiction and Choice-
of-Law in United States Conflicts Law" 1979
ICLQ 161

Holdsworth *History of English Law*

Holdsworth W

A History of English Law vol I (7 ed, 1956)
Methuen & Co; Sweet and Maxwell: London,
1966 (reprint)

Huber *De Conflictu Legum*

Huber U

*De Conflictu Legum Diversarum in Diversis
Imperiis*, a chapter in Huber's *Praelectiones
Juris Civilis* Franeker 1687. (Copies of the
text of *De Conflictu Legum* are to be found
in Lorenzen EG *Selected Articles on the
Conflict of Laws* Yale University Press: New
Haven, 1947; Oxford University Press:
London, 1947 (which also contains an
English translation of the Latin text) and Von
Savigny FC *Private International Law, and
the Retrospective Operation of Statutes: A*

Treatise on the Conflict of Laws and the Limits in Respect of Place and Time (translated by Guthrie W) (2 ed) T & T Clark: Edinburgh; Stevens & Sons: London, 1880)

Jaffey Introduction

Jaffey AJE

Introduction to the Conflict of Laws
Butterworths: London, Edinburgh, 1988

Juenger Choice of Law

Juenger FK

Choice of Law and Multistate Justice
Martinus Nijhoff: Dordrecht, Boston, London,
1992

Kahn 1953 *SALJ* 52

Kahn E

"*De Lege Ferenda*: Jurisdiction and Choice of Law in Matrimonial Actions" 1953 *SALJ* 52

Kahn 1955 *SALJ* 24

Kahn E

"The Law Determining Legitimacy" 1955 *SALJ* 24

Kahn 1959 *SALJ* 13

Kahn E

"Acquisition by Soldier of Domicile in Country where He is Stationed" 1959 *SALJ* 13

Kahn 1964 *SALJ* 283

Kahn E

"Illegitimacy: Jurisdiction and Choice of Law" 1964 *SALJ* 283

Kahn 1968 SALJ 428

Kahn E

"Divorce Jurisdiction - The Recent Reform"
1968 SALJ 428

Kahn *Territorial and Comity School*

Kahn E

The "Territorial and Comity School" of the Conflict of Laws of the Roman-Dutch Era in Huldigingsbundel Daniel Pont AA Balkema: Kaapstad, 1970

Kahn *Domicile*

Kahn E

The South African Law of Domicile of Natural Persons Juta: Cape Town, Wynberg, Johannesburg, 1972

Kahn 1973 SALJ 125

Kahn E

"Choice of Law in Divorce Actions" 1973 SALJ 125

Kahn *Appendix: Succession*

Corbett MM, Hahlo HR &
Hofmeyr G

The Law of Succession in South Africa with an Appendix on the Conflict of Laws by E Kahn Juta: Cape Town, Wetton, Johannesburg, 1980

Kahn 1986 TSAR 1

Kahn E

"Divorced Abroad: Still Married Here" 1986 TSAR 1

Kahn 1987 *TR* 113

Kahn E

"Reform of the Law of Domicile: Time for Some History" 1987 *TR* 113

Kahn-Freund *General Problems*

Kahn-Freund O

General Problems of Private International Law AW Sijthoff: Leyden, 1976

Kegel 1964 II *Hague Recueil* 95

Kegel G

"The Crisis of Conflict of Laws" 1964 II *Hague Recueil* 95

Kegel *Internationales Privatrecht*

Kegel G

Internationales Privatrecht (7 ed) CH Beck'sche Verlagsbuchhandlung: München, 1995

Kelbrick *Civil Procedure*

Kelbrick RA

Civil Procedure (South Africa) in International Encyclopedia of Law Kluwer Law International: The Hague, London, Boston, 1996

Kollewijn *Geschiedenis*

Kollewijn RD

Geschiedenis van de Nederlandse Wetenschap van het Internationaal Privaatrecht NV Noord-Hollandsche Uitgewersmij: Amsterdam, 1937

Kosters & Dubbink *Nederlandse Internationaal Privaatrecht*

Kosters J & Dubbink CW *Algemeen Deel van het Nederlandse Internationaal Privaatrecht* De Erven F Bohn NV: Haarlem, 1962

Lederman 1951 *Can B Rev* 3; 168

Lederman WR "Classification in Private International Law" 1951 *Can B Rev* 3; 168

Lipstein *Principles*

Lipstein K *Principles of the Conflict of Laws, National and International* Martinus Nijhoff: The Hague, Boston, London, 1981

Lorenzen *Selected Articles*

Lorenzen EG *Selected Articles on the Conflict of Laws* Yale University Press: New Haven, 1947; Oxford University Press: London, 1947

Lupton 1988 *Businessman's Law* 119

Lupton M "Divorce and Property Rights" 1988 *Businessman's Law* 119

Maasdorp's Institutes

Hall CG *Maasdorp's Institutes of South African Law* vol II *The Law of Property* (10 ed) Juta: Cape Town, Wynberg, Johannesburg, 1976

McClellan 1962 *ICLQ* 1153

McClellan JD "The Meaning of Residence" 1962 *ICLQ* 1153

Morris *Conflict*

McClellan JD

Morris: The Conflict of Laws (4 ed) Sweet & Maxwell: London, 1993**Morse 1949 *Columbia LR* 1027**

Morse J

"Characterization: Shadow or Substance"
1949 *Columbia LR* 1027**Neels 1991 *TSAR* 309**

Neels JL

"Die *Lex Causae* vir eiendomsoordrag van
Res in Transitu" 1991 *TSAR* 309**Neels 1992 *TSAR* 336**

Neels JL

"Die Internasionale Privaatreg en die
Herverdelingsbevoegdheid by Egskeiding"
1992 *TSAR* 336**Neels 1992 *TSAR* 739**

Neels JL

"Die Gedeeltelike Uitsluiting van *Renvoi* in
Resente Wetgewing" 1992 *TSAR* 739**Neuhaus *Grundbegriffe***

Neuhaus PH

*Die Grundbegriffe des Internationalen
Privatrechts* (2 ed) JCB Mohr (Paul Siebeck):
Tübingen, 1976**North 1980 I *Hague Recueil* 9**

North PM

"Development of Rules of Private
International Law in the Field of Family Law"
1980 I *Hague Recueil* 9

North *Problems*

North PM

Private International Law Problems in Common Law Jurisdictions Martinus Nijhoff Publishers: Dordrecht, Boston, London, 1993

Nygh 1961 *Tasm ULR* 555

Nygh PE

"The Reception of Domicil into English Private International Law" 1961 *Tasm ULR* 555

Nygh 1964 *ICLQ* 39

Nygh PE

"Foreign Status, Public Policy and Discretion" 1964 *ICLQ* 39

Nygh *Conflict*

Nygh PH

Conflict of Laws in Australia (6 ed) Butterworths: Sydney, Brisbane, Melbourne, Adelaide, Canberra, Perth, 1995

Pålsson *Marriage and Divorce*

Pålsson L

Marriage and Divorce in Comparative Conflict of Laws AW Sijthoff: Leiden, 1974

Phillips *Untying the Knot*

Phillips R

Untying the Knot: A Short History of Divorce Cambridge University Press: Cambridge, 1991

Pryles 1987 *Sydney LR* 284

Pryles M

"Reflections on the False Conflict in the Choice of Law Process" 1987 *Sydney LR* 284

Rabel *Conflict: Comparative*

Rabel E

The Conflict of Laws: A Comparative Study (2 ed) University of Michigan Law School: Ann Arbor, 1958

Ranchod 1970 *Acta Juridica* 53

Ranchod BG

"The Concept of Domicile in South African Law" 1970 *Acta Juridica* 53

Reese 1955 *Columbia LR* 589

Reese WLM

"Does Domicile Bear a Single Meaning?" 1955 *Columbia LR* 589

Reese 1964 I *Hague Recueil* 315

Reese WLM

"Discussion of Major Areas of Choice of Law" 1964 I *Hague Recueil* 315

Reese 1976 II *Hague Recueil* 1

Reese WLM

"General Course on Private International Law" 1976 II *Hague Recueil* 1

Reimann *Conflict*

Reimann M

Conflict of Laws in Western Europe Transnational Publishers: Irvington, New York, 1995

-
- Restatement (Second)*
Robertson AH
Restatement of the Law (Second): Conflict of Laws American Law Institute: Washington, 1971
- Robertson Characterization*
Robertson AH
Characterization in the Conflict of Laws (Harvard Studies in the Conflict of Laws) Harvard University Press: Cambridge, Massachusetts, 1940
- Roodt 1988 *De Rebus* 59
Roodt HC
"Artikel 7(3) van die Egskeidingswet: Talle Vroue Feitlik Sonder Remedie" 1988 *De Rebus* 59
- Roodt 1995 *THRHR* 194; 440
Roodt HC
"Migrerende Egpere se Huweliksgoedereprobleme: *common law* en gemengde stelsels" 1995 *THRHR* 194; 440
- Rorke 1905 *SALJ* 399
Rorke CF
"Divorce in the Transvaal" 1905 *SALJ* 399
- Sack *History of English Law*
Sack AN
Conflict of Laws in the History of English Law in Selected Readings on the Conflict of Laws West Publishing Co: St Paul, Minnesota, 1956

Schoeman 1992 (1) *Codicillus* 22

Schoeman E

"Wesentliche Geldigkeit van die Huwelik in die Internasionale Privaatreg" 1992 (1) *Codicillus* 22

Schoeman 1994 *THRHR* 204

Schoeman E

"Die Herkoms en Ontwikkeling van *Domicilium* as Verbindingsfaktor in Internasionale Privaatreg" 1994 *THRHR* 204

Schoeman 1995 *THRHR* 488

Schoeman E

"The Abolition of the Wife's Domicile of Dependency: A Lesson in History" 1995 *THRHR* 488

Scholten *Comitas*

Scholten JMB

Comitas in het Internationaal Privaatrecht van de Hollandse Juristenschool der Zeventiende Eeuw Dekker & Van de Vegt NV: Utrecht, Nijmegen, 1952

Shearer *Starke's International Law*

Shearer IA

Starke's International Law (11 ed) Butterworths: London, 1994

Silberberg *Foreign Judgments*

Silberberg H

The Recognition and Enforcement of Foreign Judgments in South Africa Institute for Foreign and Comparative Law (University of South Africa): Pretoria, 1973

Sinclair Law of Marriage

Sinclair J (assisted by
Heaton J)

The Law of Marriage (vol I) Juta: Cape Town,
1996

Smit 1961 Am J Comp L 164

Smit H

"The Terms Jurisdiction and Competence in
Comparative Law" 1961 *Am J Comp L* 164

Smit 1972 ICLQ 335

Smit H

"Common and Civil Law Rules of In
Personam Adjudicatory Authority: An
Analysis of Underlying Policies" 1972 *ICLQ*
335

Spiro Conflict

Spiro E

Conflict of Laws Juta: Cape Town, Wynberg,
Johannesburg, Durban, 1973

Spiro 1974 THRHR 340

Spiro E

"Recognition of Foreign Decrees of Divorce"
1974 *THRHR* 340

Spiro 1979 SALJ 598

Spiro E

"Kinds of Conflicts Rules" 1979 *SALJ* 598

Stone Conflict

Stone P

The Conflict of Laws Longman: London, New
York, 1995

Story Commentaries

Story J

Commentaries on the Conflict of Laws (8 ed by Bigelow MM) Little, Brown, and Co: Boston, 1883

Suijling Statuentheorie

Suijling JP

De Statuentheorie in Nederland gedurende de XVIIde Eeuw (LLD Thesis, Rijks University) Firma Robijns & Co: 'S-Hertogenbosch, 1893

Thomashausen 1984 *Am J Comp L* 595

Thomashausen AEAM

"Review: M Ramos *Direito Internacional Privado E Constituição-Introdução A Uma Analise Das Suas Relações*" 1984 *Am J Comp L* 595

Thomashausen 1985 *De Rebus* 167

Thomashausen AEAM

"The Matrimonial Property Act 1984: Some New Aspects for Marriages out of Community and Marriages Governed by Foreign Law" 1985 *De Rebus* 167

Thomashausen *Reflections on "Domicile"*

Thomashausen AEAM

Reflections on "Domicile" as a Connecting Factor in Huldigingsbundel vir WA Joubert Butterworths: Durban, 1988

Turpin 1957 *SALJ* 93

Turpin CC

"The Intended Matrimonial Home" 1957 *SALJ* 93

Turpin 1957 *SALJ* 201

Turpin CC

"Freedom of Choice in the Acquisition of a Domicile of Choice" 1957 *SALJ* 201

Uys Intention

Uys NR

The Intention Required in South Africa for the Acquisition of a Domicile of Choice (LLM Dissertation) University of Stellenbosch, 1983

Van Aswegen 1995 *SAJHR* 50

Van Aswegen A

"The Implications of a Bill of Rights for the Law of Contract and Delict" 1995 *SAJHR* 50

Van Hoogstraten 1967 III *Hague Recueil* 343

Van Hoogstraten MH

"La Codification par Traités en Droit International Privé dans le Cadre de la Conférence de la Haye" 1967 III *Hague Recueil* 343

Van Leeuwen *RHR*

Van Leeuwen S

Het Roomsche Hollandsch Recht (Het Rooms-Hollands-Regt) (10 ed) Jan Boom: Tamsteldam, 1732

Van Rooyen *Kontrak*

Van Rooyen JCW

Die Kontrak in die Suid-Afrikaanse Internasionale Privaatreg Juta: Kaapstad, Wynberg, Johannesburg, 1972

Vitta 1970 *Israeli LR* 170

Vitta E

"The Conflict of Personal Laws" 1970 *Israeli LR* 170

Voet *Commentarius*

Voet J

Commentarius ad Pandectas Hagrae-Comitum, 1698-1704 (Translation by Gane P *The Selective Voet, being the Commentary on the Pandects* Butterworths: Durban, 1955)

Von Bar *Theory and Practice*

Von Bar L

The Theory and Practice of Private International Law (translated by Gillespie GR) (2 ed) William Green & Sons Law Publishers: Edinburgh, 1892

Von Mehren & Trautman 1966 *Harv LR* 1121

Von Mehren AT & Trautman DT "Jurisdiction to Adjudicate: A Suggested Analysis" 1966 *Harv LR* 1121

Von Savigny *Private International Law*

Von Savigny FC

Private International Law, and the Retrospective Operation of Statutes: A Treatise on the Conflict of Laws and the Limits in Respect of Place and Time (translated by Guthrie W) (2 ed) T & T Clark: Edinburgh; Stevens & Sons: London, 1880

Welsh 1947 *LQR* 65

Welsh RS

"Legitimacy in the Conflict of Laws" 1947
LQR 65**Westlake *Private International Law***

Westlake J

A Treatise on Private International Law (4 ed)
Sweet & Maxwell: London, 1905**Wille's *Principles***

Hutchison D (gen ed)

Wille's Principles of South African Law (8 ed)
Juta: Cape Town, Wetton, Johannesburg,
1991**Wolff *Private International Law***

Wolff M

Private International Law (2 ed) Clarendon
Press: Oxford, 1950**Yntema *Historic Bases***

Yntema HE

*The Historic Bases of Private International
Law in Selected Readings on Conflict of
Laws* West Publishing Co: St Paul,
Minnesota, 1956**Yntema 1966-1967 *Michigan LR* 9**

Yntema HE

"The Comity Doctrine" 1966-1967 *Michigan
LR* 9

LIST OF ABBREVIATIONS

Am J Comp L	American Journal of Comparative Law
ASSAL	Annual Survey of South African Law
BYBIL	British Yearbook of International Law
Can B Rev	Canadian Bar Review
Cape LJ	Cape Law Journal
Columbia LR	Columbia Law Review
Harvard LR	Harvard Law Review
ICLQ	International and Comparative Law Quarterly
Israeli R	Israeli Law Review
LAWSA	Law of South Africa
LQR	Law Quarterly Review
Michigan LR	Michigan Law Review
Oxford Jour Leg Stud	Oxford Journal of Legal Studies
SAJHR	South African Journal for Human Rights
SALJ	South African Law Journal
Sydney LR	Sydney Law Review
Tasm ULR	Tasmanian University Law Review

THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TR	Tydskrif vir Regswetenskap
TSAR	Tydskrif vir Suid-Afrikaanse Reg

STATUTES**South Africa**

Law 18 of 1891 (Natal)

Insolvency Act 24 of 1936

Matrimonial Causes Jurisdiction Act 22 of 1939

Prohibition of Mixed Marriages Act 55 of 1949

Wills Act 7 of 1953

Matrimonial Affairs Act 37 of 1953

Supreme Court Act 59 of 1959

Pre-Union Statute Law Revision Act 78 of 1967

General Law Amendment Act 70 of 1968

Mental Health Act 18 of 1973

Divorce Act 70 of 1979

Child Care Act 74 of 1983

Matrimonial Property Act 88 of 1984

Immorality and Prohibition of Mixed Marriages Amendment Act 72 of 1985

Children's Status Act 82 of 1987

Domicile Act 3 of 1992

Constitution of the Republic of South Africa 108 of 1996

Births and Deaths Registration Amendment Bill 30 of 1996

Foreign

The Royal Charter of Justice (1801)

The Ceylon Charter of Justice (1833)

Divorce Jurisdiction Act 1930 (Canada)

Law Reform (Miscellaneous Provisions) Act 1949 (United Kingdom)

Status of Children Act 1969 (New Zealand)

Recognition of Divorces and Legal Separations Act 1971 (United Kingdom)

Domicile and Matrimonial Proceedings Act 1973 (United Kingdom)

Family Law Act 1975 (Australia)

Divorce Act 1985 (Canada)

Domicile and Habitual Residence Act 1987 (Manitoba)

LAW COMMISSION WORKING PAPERS AND REPORTS**South Africa**

South African Law Commission: Working Paper on Domicile (Project 60)

South African Law Commission: Report on Domicile 1990 (Project 60)

United Kingdom

Private International Law: The Law of Domicile, 1985: Law Commission Working Paper No 88; Scottish Law Commission Consultative Memorandum No 63

Private International Law: The Law of Domicile, 1987: Law Commission No 168; Scottish Law Commission No 107

CONVENTIONS

Draft Hague Convention to Determine Conflicts Between the National Law and the Law of Domicile (1951)

Draft Hague Convention on the Formal Validity of Wills (1960)

Hague Convention on the Recognition of Divorces and Legal Separations (1968)

Rome Convention on the Law Applicable to Contractual Obligations (1980)

CASES**South Africa**

Abelheim v Abelheim 1918 SR 85

Adams v Adams (1882) 2 SC 24

Anastasio, *Ex parte* 1969 (1) SA 36 (W)

Anderson v The Master and Others 1949 (4) SA 660 (E)

Andrew v Andrew 1905 ORC 40

Angelai v Padayachee 1948 (4) SA 718 (N)

Atkinson v Atkinson 2 Off Rep 212 (1895)

Baker v Baker 1945 AD 708

Bate v Bate 1933 NPD 258

Baxter v Baxter 1943 NPD 85

Bell v Bell 1991 (4) SA 195 (W)

Bendell v Bendell 1914 CPD 899

Bestandig v Bestandig (1847) 1 Menz 280

Bishop v Bishop 1923 CPD 414

Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd 1991 (1) SA 482 (AD)

Blair v Blair 1914 SR 111

Blatchford v Blatchford's Executors (1881) 1 EDC 365

Bothma v Bothma 1940 (1) PH B9 (O)

Brace v Brace (1904) 25 NLR 52

Briscoe v Briscoe 1944 GWL 4

British American Assurance Co v Moretti (2) 1936 CPD 543

Brown v Brown 1921 AD 478

Brunschwik v Brunschwik 1902 TH 223

Burnett v Burnett (1895) 12 CLJ 147 (OFS)

-
- Carvalho v Carvalho 1936 SR 219
Cathrall, *Ex parte* 1965 (2) SA 505 (N)
Clayton v Clayton 1922 CPD 125
Clear v Clear 1913 CPD 835
CM Asbestos Co (Pty) Ltd v King Chrysotyle Asbestos Mines (Pty) Ltd 1953 (3) SA 431 (W)
Cohill v Cohill 1938 (2) PH B41 (C)
Commin v Commin 1942 WLD 191
Cook v Cook 1939 CPD 314
Cowan v Cowan (1925) 6 PH B4 (T)
Craven v Craven (1923) 2 PH (W)
Croft v Croft 1930 WLD 201
Crystal v Colonial Secretary (1905) 22 SC 646
- Davel v Davel 1944 (2) PH B49 (W)
Davies v Davies 1922 CPD 323
Deane v Deane 1922 OPD 41
De Bono v De Bono 1948 (2) SA SA 802 (C)
De Lange, *Ex parte* 1941 (2) PH B82 (W)
De Senan v De Senan (1908) 18 CTR 759
Donnelly, *Ex parte* 1915 WLD 29
Drakensbergpers v Sharpe 1963 (4) SA 615 (N)
Dreyer v Dreyer 1936 EDL 384
Dyus v Dyus (1926) 47 NLR 259
- Ebert v Goldman (1900) 17 SC 530
Edwards, *Ex parte* 1933 EDL 224
Eilon v Eilon 1965 (1) SA 703 (AD)
Einwald v The German West African Co 1887 (5) SC 86 91
Estate Agents Board v Lek 1979 (3) SA 1048 (A)

Etheridge v Etheridge (1902) 23 NLR 180

Evans v Evans 1942 SR 12

Fenner v Fenner 1943 SR 188

Flack v Flack 1944 (2) PH B66 (C)

Foord v Foord 1924 WLD 82

Forster v Forster and Wheeling (1905) 26 NLR 124

Fozard v Fozard 1924 CPD 62

Frankel's Estate v The Master 1950 (1) SA 220 (A)

Frankenberg v Frankenberg 1943 EDL 147

Frank Wright (Pty) Ltd v Corticas "BLM" Ltd 1948 (4) SA 456

Fraser, *Ex parte* 1934 SR 35

Friedman v Friedman's Executors 1922 NPD 259

Gibson, *Ex parte* 1936 SR 71

Gilbert v Gilbert (1901) 22 NLR 201

Glass, *Ex parte* 1948 (4) SA 175 (T)

Gordon, *Ex parte* 1937 WLD 35

Govu v Stuart (1903) 24 NLR 440

Gqiba v Gqiba (1901) 16 EDC 4

Graham v Phillips 1966 (1) SA 556 (SR)

Guggenheim v Rosenbaum (2) 1961 (4) SA 21 (W)

Gunn v Gunn 1910 TPD 423

Gwambe v Gwambe 1950 (2) SA 643 (T)

Hamid v Minister of the Interior 1954 (4) SA 241 (T)

Hamman, *Ex parte* (1894) 1 OR 306

Harrop v Harrop (1905) 19 EDC 341

Hawkes v Hawkes (1882) 2 SC 109

Hibbs v Wynne 1949 (2) SA 10 (C)

Hills v Hills 1933 NPD 84

Hitchcox v Hitchcox (1930) 2 PH B33 (C)

Holland v Holland 1973 (1) 897 (T)

Hooper v Hooper 1908 EDC 474

Howard v Howard 1966 (2) SA 718 (R)

Hudson v Hudson 1907 EDC 189

Hugo v Wessels 1987 (3) SA 837 (A)

Hutchison's Executor v The Master (Natal) 1919 AD 71

Improvair (Cape) (Pty) Ltd v Establissemments Neu 1983 (2) SA 138 (CPD)

Jacks v Jacks (1903) 20 SC 196

Johnson v Johnson 1931 AD 391

Jones: *In re* Jones v Jones, *Ex parte* 1984 (4) SA 725 (W)

Jooste v Jooste 1938 NPD 212

Joosub v Salaam 1940 TPD 177

Jordaan v Jordaan 1939 OPD 197

Kaiser, *Ex parte* 1902 TH 165

Kassim v Ghumran and Another 1981 (4) SA 79 (Z)

Kent v Salmon 1910 TPD 637

King v King 1914 WR 282

Knox v Knox (1907) 24 SC 441

Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd 1986 (3) SA 509 (D & CLD)

Laughlin v Laughlin (1903) 24 NLR 230

Lea v Lea (1902) 23 NLR 91

Leviny v Leviny (1908) 25 SC 173

Lewis v Lewis 1939 WLD 140

Ley v Ley's Executors 1951 (3) SA 186 (AD)

-
- Locke v Locke 1950 (4) SA 240 (N)
Lotter v Salaman (1902) 19 SC 158
- MacLeod, *Ex parte* 1946 CPD 312
Mason v Mason (1885) 4 EDC 330
Mason Gordon v Mason Gordon 1945 TPD 62
Massey v Massey 1968 (2) SA 199 (T); 1968 (2) PH B10 (T)
McCurrach v McCurrach (1892) 6 HCG 256
McMillan v McMillan 1943 TPD 345
Meade v Meade (1928) 12 PH B25 (W)
Mills v Executors of Mills (1900) 18 SC 182
Minister of the Interior v Cowley NO 1955 (1) SA 307 (N)
Moncrieff v Moncrieff 1934 CPD 208
Moore v Moore 1945 TPD 407
Moreland v Moreland (1901) 22 NLR 385
Murphy v Murphy 1902 TS 179
- Nash v Nash 1935 (1) PH B4
Neville v Neville 1957 (1) SA 280 (C)
Neaves v Neaves 1936 NPD 682
Nefler v Nefler 1906 ORC 7
Nicol v Nicol 1948 (2) SA 613 (C)
Njikelana v Njikelana 1980 (2) SA 808 (SE)
Noyes v Schulz (1911) 32 NLR 318
- Ochberg v Ochberg's Estate 1941 CPD 15
Olwage v Buntman 1910 WLD 44
O'Mant v O'Mant 1947 (1) SA 26 (W)
Orton v Orton 1938 (2) PH B57 (T)
Oxton, *Ex parte* 1948 (1) SA 1011 (C)

-
- Paterson v Paterson 1946 EDL 67
Pekola, *Ex parte* 1951 (3) SA 793 (N)
Perrott-Humphrey v Perrott-Humphrey 1967 (3) SA 304 (W)
Phillips v Phillips 1937 CPD 54
Pickford v Pickford 1943 SR 6
Powell v Powell 1943 (1) PH B2 (C)
Powell v Powell 1953 (4) SA 380 (W)
Pretorius v Pretorius 1948 (4) SA 144 (O)
- Quayle v Quayle 1949 SR 203
Quintrell, *Ex parte* 1922 TPD 14
- Ralston's Estate, *Ex parte* 1937 TPD 46
Readings, *Ex parte* 1958 (4) SA 432 (C)
Record, *Ex parte* 1936 SR 1
Reeves v Reeves (1832) 1 Menz 244
Reiss Engineering Co Ltd v Insamcor (Pty) Ltd 1983 (1) SA 1033 (W)
Ricketts v Ricketts 1929 EDL 221
Righetti v Pinchin and Another 1955 (3) SA 338 (D)
Riordan v B & F Wheeler Ltd 1913 CPD 114
Robarts v Robarts (1903) 17 EDC 132
Rooth v Rooth 1911 TPD 47
Rosenblum v Marcus (1884) 5 NLR 82
Rowland, *Ex parte* 1937 (1) PH B8 (T)
- S v S 1975 (3) SA 440 (R)
Sandberg, *Ex parte* 1912 TPD 805
Schlimmer v Executrix in Estate of Rising 1904 TH 108
Seebratan v Fakira (1907) 28 NLR 529
Seedat's Executors v The Master (Natal) 1917 AD 302

-
- Senior v CIR 1960 (1) SA 700 (AD)
Shapiro v Shapiro 1914 WLD 38
Shoosmith v Shoosmith 1936 EDL 129
Smith v Smith 1952 (4) SA 750 (O)
Smith v Smith 1962 (3) SA 930 (FC)
Sperling v Sperling 1975 (3) SA 707 (A)
Spinazze, *Ex parte* and Another NNO 1985 (3) SA 650 AD
Standard Bank of South Africa Ltd v Efroiken and Newman 1924 AD 171
Standring, *Ex parte* 1906 EDC 169
Stern, *Ex parte* 1976 (2) SA 273 (C)
Stevens, *Ex parte* 1912 EDL 443
Steytler NO v Fitzgerald 1911 AD 295
Steytler v Steytler 1913 CPD 725
Strachan, *Ex parte* 1946 NPD 592
- Taylor v Taylor 1931 CPD 98
Thompson v Thompson 1940 SR 187
Thurgood v Thurgood (1896) 17 NLR 49
- Van Niekerk v Van Niekerk 1941 TPD 59
Van Rensburg v Ballinger 1950 (4) SA 427 (T)
Van Straaten v Van Straaten 1911 TPD 686
Von Falkenstein v Von Falkenstein 1917 WLD 67
Von Wintzingerode v Von Wintzingerode 1964 (2) SA 618 (T)
- Walker v Walker (1896) 13 SC 363
Warren v Warren 1942 (2) PH B58 (W)
Weatherley v Weatherley (1879) Kotzé 66
Webber v Webber 1915 AD 229
Wells v Dean-Willcocks 1924 CPD 89

Wolter v Wolter (1897) 11 EDC 89

Wooldridge and Others v Ellemor 1909 TH 158

Foreign

Armitage v Attorney-General [1906] P 135

Attorney-General v Pottinger (1861) 30 LJ Ex 284

Cruse v Chittum [1974] 2 All ER 940

Forbes v Forbes (1854) Kay 341, 69 ER 145

Fuld, In the Estate of (No 3) [1968] P 675

Gray v Formosa [1963] P 259 (CA)

Gulbenkian v Gulbenkian [1937] 4 All ER 618

Hodgson v Beauchesne (1858) 12 Moo PCC 285, 14 ER 920

Indyka v Indyka [1967] P 233, [1966] 3 All ER 583

IRC v Bullock [1976] 1 WLR 1178

Kapur v Kapur [1984] FLR 920

Le Mesurier v Le Mesurier [1895] AC 517

Lord v Colvin (1859) 4 Drew 366, 62 ER 141

Munro v Munro (1840) 7 Cl & Fin 842, HL, 7 ER 1288

Niboyet v Niboyet (1878) 4 PD 1 5

Phillips v Eyre (1870) LR 6 QB 1

Pottinger v Wightman (1817) 3 Mer 67, 36 ER 26

R v Barnet London Borough, ex p Shah [1983] 2 AC 309

Robinson v Bland (1760) 1 Wm Bl 234,256; [1558-1774] All ER Rep 177; (1760) 2 Burr 1077, Bull NP 275

Scrimshire v Scrimshire (1752) 2 Hagg Con 395; [1558-1774] All ER Rep 554

Shaw v Gould (1868) LR 3 HL 55

Somerville v Somerville (1801) 5 Ves 750, 31 ER 839

Udny v Udny (1869) LR 1 Sc & Div 441

V v B (A Minor) (Abduction) [1991] 1 FLR 266

Vita Food Products Inc v Unus Shipping Co Ltd [1939] AC 277

Whicker v Hume (1858) 7 HLC 124, 11 ER 50

Wilson v Wilson (1872) LR 2 P & D 435

Winans v Attorney-General [1904] AC 287