It is, however, not necessary for the purposes of this case, to decide whether the enactment of the 1944 Act has brought about a change in the position, because an alternative submission made by Mr. *Wessels* appears to me to dispose of the case. This alternative submission was to the effect that a magistrate clearly has jurisdiction to grant an order for ejectment, and that what the appellant really asked for in this case was an order for the ejectment of respondent from the premises in question. Although the relief prayed in the notice of application is for an order restoring the premises to the appellant the practical way in which that result would be achieved would be by the issue of an ejectment order ejecting respondent from the premises and the issue of a warrant of ejectment in terms of Form No. 34 under the Rules of the Magistrates' Courts Act.

It seems to me therefore that the appellant was entitled to be put back in possession of the premises from which he was ejected on the 22nd January, 1953. Although the relief claimed in the lower court was not specifically confined to restoration of possession pending the determination of respondent's action against the appellant, the notice of appeal makes it clear that the relief sought is not intended in any way to bar the respondent from proceeding with its action. The order which this Court will make is therefore subject to the respondent's right to proceed with its action.

The appeal will be allowed with costs and the following words will be added to the order made by the magistrate on the 11th February, 1953:

> "The defendant is granted an order for the ejectment of the plaintiff company from the premises formerly occupied by the defendant at 37, Victoria Road, Woodstock."

VAN WINSEN, J., concurred.

Appellant's Attorneys: *Truter & Lombard.* Respondent's Attorney: *T. Snitcher.*

POWELL v. POWELL.

(WITWATERSRAND LOCAL DIVISION.)

1953. *September* 15, 23. LUDORF, A.J.

Gift.—Rule prohibiting gifts between spouses.—Such rule a local rule prohibiting such gifts whilst spouses domiciled in South Africa.—Husband married in England making gift to wife in South Africa.—Husband entitled to revoke such gift.

The rule prohibiting gifts between spouses is a part of the local law affecting the contractual capacity of the spouses in relation to contracts of donation. It is not a matter which affects the proprietary rights of the spouses or the rights created at the time of the marriage in relation to property. It is a local rule which prohibits donations between husband and wife while they are domiciled in South Africa.

Where spouses were domiciled in South Africa, although married in England, and the husband had in South Africa purchased a car and donated it to his wife, *Held*, that the husband was entitled to revoke the gift.

Application for an order for the return of a motor-car donated to the respondent. The facts appear from the reasons for judgment.

J. Douglas Davidson, for the applicant: In S.A. Law the proprietary rights of spouses are determined for all time by the law of the matrimonial domicile. See *Frankel's Estate and Another* v. *Master*, 1950 (1) S.A. 220 (A.D.). But this does not determine the question of their capacities to enter into contracts. See Cheshire, *Private International Law*, 3rd Ed., pp. 264-6, 259, 297.

The proper law of the contract governs the question of capacity to contract. The "proper law" in this case is S.A. Law because the contract was entered into in South Africa and to be performed in South Africa. No other system of law competes. See *Kent* v. *Salmon*, 1910 T.P.D. at p. 640; *Lee* v. *Abdy*, 17 Q.B. 309.

J. D. Cloete, for the respondent: The law of the matrimonial domicile governs the right of spouses to make gifts to each other and therefore English Law applies in this case. The purpose of the rule preventing gifts between spouses in Roman-Dutch Law was to avoid true love being measured by the liberality of one spouse towards another. See *Voet* 24.1.1. The rule permitting revocation of a gift *inter partes* was not concerned with the rights of creditors. This is confirmed by the principle that other contracts between spouses are permitted *stante matrimonio*. See *Ziedeman* v. *Ziedeman*, 1 M. 238; *Albertus* v. *Albertus' Exors.*, 3 S. at pp. 202, 210. See article by Prof. H. D. J. Bodenstein in 34 S.A.L.J. p. 11. The rule, therefore, originally intended to regulate the position of spouses in relation to each other and is an incident of the marriage. In the Roman-Dutch Law it is one of those incidents which cannot be changed by ante-nuptial contract, the reason being that to do so would be contrary to the legal nature of marriage. See Lee, *Roman-Dutch Law*, 5th Ed. at p. 73. The established rule in South Africa is that the law of the matrimonial domicile governs the rights of spouses in movables whether existing at the time of the marriage or acquired subsequently. See Cheshire, *Private International Law*, 3rd Ed. at p. 653; *Frankel's Estate* v. *The Master*, 1950 (1) S.A. 220 (A.D.). The case of *Lee* v. *Abdy*, 17 Q.B. 309 is distinguishable.

Davidson, in reply.

Cur. adv. vult.

Postea (September 23rd).

LUDORF, A.J.: In this application the applicant claims the return of a certain Standard motor-car which he donated to the

respondent. The applicant married the respondent in England in 1929 at a time when he was domiciled in England. Thereafter in 1946 the applicant settled in South Africa, where he set up in practice as an architect and where he has resided continuously ever since. He was joined by the respondent in 1947 and since then she has lived with him continuously until the parties became estranged in May, 1953.

In January, 1950, the applicant purchased a motor-car which was registered in the name of the respondent. It is common cause between the parties that applicant paid for the motor-car, but there is a dispute between them about the ownership of another car which was handed to the seller as part of the purchase price. It is, however, common cause that the applicant also paid for this other car. It is therefore clear from the papers that the Standard motor-car was a gift from the applicant to the respondent at a time when the parties were domiciled in South Africa and while the marriage still subsisted.

On the 30th day of July, 1953, the applicant's attorneys wrote to the respondent and informed her that applicant had revoked the gift and that he claimed the return of the Standard motor-car. Respondent has refused to return the car and claims that she is entitled to hold it as her own.

The question which arises is which system of law applies to the contract of donation. If it is the law of England, that is the law of the original domicile of the marriage, then the gift is valid; if, however, the South African law applies then applicant can revoke the donation.

Mr. *Davidson*, who appears for the applicant, has contended that the rule in Roman-Dutch Law invalidating gifts between spouses is part of the commercial law, and as such the rule affects the capacity of spouses to conclude a contract of donation. This being so, the proper law must be applied, namely, the law most closely connected with the contract which in the circumstances of this contract is the South African law. Mr. *Cloete*, on behalf of the respondent, contends that the rule is a direct consequence of the contract of marriage and as this marriage was one under English law, the rule does not operate between the applicant and respondent.

No direct authority has been cited which resolves this problem. In *Frankel's Estate and Another* v. *The Master and Another*, 1950 (1) S.A. 220, the Appellate Division held that the law governing the marriage is that of the domicile of the husband at the time of the marriage and not that of another domicile which he intends to acquire immediately after the marriage, and decided further that the proprietary rights of spouses after marriage *vis-à-vis* one another, are governed by the law of the husband's domicile at the time of marriage. These proprietary rights clearly include such questions as to whether the marriage is one in or out of community, but there is no indication in the judgments that the right to donate

property to the other spouse or the prohibition against such donation is a proprietary right.

Cheshire on *Private International Law* reviews the authorities and writers on the capacity of a married woman to contract and comes to the conclusion that if the *lex domicilii* and the *lex loci contractus* are at variance with regard to existence of the capacity, then the validity of the contract must be determined upon the same principle as that which determines the power of a minor to enter into a merchantile contract. He says at p. 297 of the 3rd Ed.:

> "If the woman is capable by the 'proper law' of the contract (which is generally the law of the place where the contract is made) though incapable by the law of her domicile, the contract will be valid:
>
> The proper law is the legal system with which the contract has the most real connection and is usually though not always the *lex loci contractus*. The surrounding circumstances of the contract show which is the proper law. To decide therefore which is the 'proper law', one asks such questions as: Where was the contract made? Where is it to be executed? Where are the parties domiciled at the time of the contract?, and the like."

If this test is applied to the present case then clearly the law of South Africa must determine the validity of the donation. The parties were domiciled here at the time, the motor-car was to be used here. The creditors of the parties, if any, are probably here and nothing about the donation has anything to do with England.

I find further support for the contention advanced on applicant's behalf, in the case of *Lee* v. *Abdy and Others* (1886) 17 Q.B.D. 309. In that case an insurance policy issued by an English insurance company had been assigned by the plaintiff's husband to her while she and her husband were domiciled in the Cape Colony, where such an assignment constituted an invalid gift between spouses. Plaintiff sued the insurance company in England, and the Court held that the law of the Cape Colony applied.

Mr. *Cloete*, however, suggests that one must look to the reason for the prohibition against donations between spouses to ascertain whether it is a direct consequence of marriage or whether it is a rule of mercantile law affecting the capacity of the parties. *Voet* 26.1 deals with this question and says that in marriage affection must be the bond and not the liberality of the spouses. That may have been one of the reasons for the introduction of the rule, but I think its retention in modern law is for the protection of creditors. Exceptions to the rule which were introduced by the Insolvency Act, strengthen me in this view.

In *Kent* v. *Salmon*, 1910 T.P.D. 637, the full Court decided that the capacity of a married woman to enter into an ordinary commercial contract depends on the *lex loci contractus* and not on the law of her domicile.

After considering the arguments and authorities, I have come to the conclusion that the rule prohibiting gifts between spouses is a part of the local law affecting the contractual capacity of the spouses in relation to contracts of donation. It does not seem to me to be a matter which affects the proprietary rights of the spouses

or the rights created at the time of the marriage in relation to property. I think it is a local rule which prohibits donations between husband and wife while they are domiciled in South Africa, and in these circumstances the applicant in the present case was entitled to revoke the donation as he has done.

The respondent is ordered to restore to the possession of the applicant certain "Standard" motor-car presently in her possession and to pay the costs of this application.

Applicant's Attorneys: *Webster, Dunbar & Sauer.* Respondent's Attorneys: *van Hulsteyn, Feltham & Ford.*

R. v. D. AND ANOTHER.

(APPELLATE DIVISION.)

1953. *September* 1, S. GENTLIVRES, C.J., SCHREINER, J.A., VAN DEN HEEVER, J.A., HOEXTER, J.A., and DE BEER, A.J.A.

Criminal procedure.—Review.—After unsuccessful appeal.—Incompetency of.—Decision of Provincial Division dismissing appeal from magistrate's court a final one in absence possibly of fraud.—Such Division not competent thereafter to consider application to set conviction and sentence aside and to remit to magistrate's court for further evidence.—Criminal law.—Intercourse between Europeans and Natives.—Act 5 of 1927, secs. 1 and 2.—When Court entitled to draw inference that accused had carnal intercourse with one another or attempted to do so.

The decision of a Provincial Division dismissing an appeal from a conviction in a magistrate's court and confirming the conviction and sentence is final and cannot be re-opened, except, possibly, on the ground that it was obtained by fraud. That decision stands until reversed or varied by the Appellate Division.

It is therefore not competent for a Provincial Division which has dismissed an appeal from a conviction in a magistrate's court to thereafter consider an application made to it to set aside the conviction and sentence and remit the case for further evidence.

R. v. *Masondo*, 1940 N.P.D. 196 and *R.* v. *Mahomed Shameen*, 1944 N.P.D. 133, overruled.

Semble: The proper course to adopt is to apply to the Provincial Division for leave to adduce further evidence before that Division has disposed of the appeal and to set down the application and the appeal together. If the further evidence comes to light after the disposal of the appeal, it is competent for the appellants to file with the Registrar of the Appellate Division an application for leave to adduce further evidence to be heard at the same time as the appeal, for the Appellate Division has the same powers in an appeal originating from the magistrate's court as a Provincial Division has.

In an appeal from a decision of a Provincial Division dismissing an appeal from convictions of attempts to contravene sections 1 and 2 respectively of Act 5 of 1927 as amended, it appeared that the appellants had been found almost

naked in the same bed and under the same blanket at 10.5 p.m. and that before the police entered they were in all probability asleep,

Held, as it would be manifestly absurd, from the facts proved, having regard to human experience, to hold that appellants, who got into bed a considerable time before the police arrived, in a practically nude condition, did so with any purpose other than that of having connection with one another and that, to put it at its lowest, they had not attempted to have connection with each other before the police arrived on the scene, that the verdict of an attempt was not wrong.

53/4/384 R v D

dist: Hoosain v A-G Cape	88/4/139/C	
ref : Hoosain v A-G Cape (2)	88/4/144/C	
ref : Sefatsa v A-G Tvl	89/1/840/A	
appl: Qeja v Mag Tsolo	93/2/CR/619/Tk	
dictum at 390		
appl: Mavunjana v Mag Lusikisiki	95/2/CR/370/Tk	

ad SHAW, gment of to the re- lence, see n *R.* v. e sought to be led in the present case is material and if it had been led the appellants might have been acquitted; *cf. R.* v. *Kanyile and Others*, 1944 A.D. at p. 293. In the circumstances of the case, the reasons for not leading the medical evidence now desired should be regarded as reasonably sufficient.

E. A. Logie, for the Crown: The judgment refusing the application for an order setting aside appellants' convictions and sentences and remitting their case to the magistrate for the purpose of hearing further evidence and determining the issue afresh, is not appealable as of right. The proceedings in the Provincial Court were not a "civil case", "civil suit" or "civil action" within the extended meaning of "any civil proceedings whatsoever" given in those words by sec. 3 (*c*) of Act 1 of 1911 as added by sec. 106 (ii) of Act 46 of 1935 and as interpreted in *Minister of Labour* v. *Building Workers' Industrial Union*, 1939 A.D. at p. 331. On the basis that the proceedings on the application for review were criminal proceedings commencing in the Supreme Court and not an appeal in terms of sec. 105 of the South African Act, no appeal lies as of right (if at all) to this Court. Sec. 104 of the South Africa Act now only applies to civil proceedings in consequence of the amendment by sec. 2 of Act 37 of 1948. The only provisions now relating to appeals from criminal cases commencing in the Supreme Court are contained in secs. 368 to 375 of Act 31 of 1917, as amended, none of which is applicable to the proceedings on an application for the re-opening of a magistrate's court trial; see sec. 368 (2) of Act 31 of 1917, Rule 13 of the Union Rules framed under sec. 108 of the South Africa Act. If the application on notice was an appeal in a criminal case from the magistrate's court in terms of sec. 105 of the South Africa Act, then, because at the establishment of Union a similar application might have been made under sec. 8 of Act 39 of 1896 (N), a further appeal might have been made to this Court provided that an application for special leave to appeal had been made and