Recent Developments in Private International Law—1976-1977

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Jurisdiction

The judgment of Starke J in *John Sanderson & Co (NSW) Ltd (In liquidation) v Giddings*[1] raised an issue which was apparently a matter of first impression in both Australian and English case law. The plaintiff, a Victorian company, commenced an action in New South Wales in 1969 against the defendant, but this action was subsequently stayed pending discovery by the plaintiff. The plaintiff company was subsequently placed in liquidation and shortly thereafter it commenced an action in Victoria against the defendant. The writ in this action was endorsed for service within the jurisdiction, but service was not effected forthwith, as the defendant was a resident of New South Wales. However, some six months after the issue of the writ, the Supreme Court of Victoria made an order under s 367A of the Companies Act 1961 (Vic) requiring the defendant to appear before a judge of the County Court in Victoria for examination. The defendant duly appeared, and was served with a copy of the writ in the present action during the luncheon adjournment of the examination proceedings.

The first issue to be decided by Starke J was whether this service was good, since it was conceded that the defendant had been brought into the jurisdiction by force of law. His Honour cited only one case, a decision of 1933 of the Supreme Court of Georgia,[2] but decided that it was not in point, as it concerned a non-resident who had been brought into that State for the purpose of imprisonment there. His Honour went on to say that he could find no reason to depart from the general principle laid down by the High Court in *Laurie v Carroll*[3] that 'In the case of personal service within the jurisdiction of a writ of summons in an action in personam the view seems to be accepted that it is enough that the defendant is present in England at the time of service. It does not matter why, so long as he has not been enticed there fraudulently for the purpose. It does not matter whether he is a foreigner or a subject of the Crown. It does not matter how temporary may be his presence, how fleeting may be his visit.' An argument had been raised by the defendant that he had been brought into Victoria by fraud, but Starke J found that there was not sufficient evidence to support this contention.

The other issue in *Giddings*' case was whether the action in Victoria should be stayed on the ground that proceedings were already pending

1. [1976] VR 421.
2. *Lomax v Lomax*, 168 SE 863.
3. (1958) 98 CLR 310 at 331, per Dixon CJ, Williams and Webb JJ.

between the parties, on similar causes of action, in New South Wales. His Honour referred to the decision of the House of Lords in *The Atlantic Star*[4] and pointed out that, since that case, the defendant need merely show that any disadvantage to him outweighs any advantage to the plaintiff in continuing the action. The judge also commented that this was an entirely proper approach within Australia, and that any view based on an assumed superiority of the courts of the forum was inapposite within our federal system. He went on to hold, however, that the Victorian action would not be stayed; the causes of action were found to be closely connected with Victoria and there was therefore no substantial disadvantage to the defendant in the Victorian action continuing. The fact that the failure to proceed in New South Wales was the fault of the plaintiff was regarded as irrelevant to the question before the court.

The other aspect of jurisdiction to come before the courts in 1976 and 1977 was the application of various of the grounds for service out of the jurisdiction under local Rules of the Supreme Court.

In *Macgregor v Application des Gaz*,[5] the defendant, a French company, sought to set aside service upon it of notice of the writ issued by the plaintiff out of the Supreme Court of Queensland. Order 11, rule 1, of the Queensland Rules of Court permits such service where 'any act . . . for which damages are sought to be recovered' was done within the State, and Matthews J considered that this formulation was to be construed more narrowly than comparable rules of other State courts, which permit service if there has been a tort committed within the jurisdiction, or a cause of action (in tort) arising within the jurisdiction.[6] His Honour did not, however, elaborate on the construction he would give to the rule. He said that even if jurisdiction were to be based on a tort committed within Queensland, such a test had not been satisfied as the relevant wrongdoing (here the allegedly negligent manufacture of a gas appliance) had been done in France. This part of the judgment is in contrast with the judicial interpretation in New Zealand of an identically worded provision. In *Adastra Aviation Ltd v Airparts (NZ) Ltd*,[7] Hardie Boys J considered that the New Zealand provision is wider in scope than the provisions permitting service out for a tort committed within the jurisdiction, and he went on to say that delivery 'in New Zealand of a defective machine, resulting in damage to a plaintiff in New Zealand, may well qualify as an "act done in New Zealand".' This comment was approved (though again in obiter dicta) by Speight J in *Pratt v Rural Aviation (1963) Ltd*[8] and was applied, as the sole basis for decision, by Wild CJ in *My v Toyota Motor Co Ltd*.[9] None of these cases was referred to by Matthews J in his judgment.

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4. [1974] AC 436.
5. [1976] Qd R 175.
6. Cp Nygh, P.E., *Conflict of Laws in Australia*, 3rd ed (1976), p 34, who submits that all the various formulations have basically the same meaning.
7. [1964] NZLR 393 at 395.
8. [1969] NZLR 46 at 47.
9. [1977] 2 NZLR 113.

The plaintiff in *Macgregor's* case had amended his statement of claim, to allege not only negligent manufacture of the gas appliance, but also an intention by the defendant to market the appliance in Queensland, and a failure properly to instruct or warn ultimate consumers of its use and dangers. Matthews J was well aware that this amended statement of claim sought to rely on statements of principle in *Jacobs v Australian Abrasives Pty Ltd*[10] and *Moran v Pyle National (Canada) Ltd*[11] but considered that the principle could not be applied to the facts before him, as the connexions between these allegations and Queensland were unreal and artificial. The defendant's motion to set aside service consequently succeeded. However, the problems of a consumer seeking recompense against an overseas (or inter-State) manufacturer have subsequently been ameliorated by the passing of the Trade Practices Amendment Act 1978 (Cth). This Act inserts a new Division 2A into Part V of the principal Act, under which a consumer is able to seek compensation for damage caused by defective goods from the manufacturer, if that is a corporation which has a place of business in Australia, or in other cases from the corporation which imported the goods into Australia. Since such an action must be brought in the Federal Court of Australia, and the writ of that court runs throughout the country by reason of its federal nature, there need be no jurisdictional problems facing the consumer.

The question of service out of the jurisdiction was also raised in *Baldry v Jackson*,[12] in the following circumstances. Two motor cars came into collision in Queensland; one car was driven by Baldry, a New South Wales resident, and carried a passenger, Fanning, who was also a New South Wales resident; the other car was driven by Jackson, a resident of Queensland. Fanning sued Baldry in New South Wales for the injury he had suffered, and recovered judgment. Baldry then commenced an action in New South Wales against Jackson, claiming contribution under s 5(1)(c) of the Law Reform (Miscellaneous Provisions) Act 1946 (NSW). The writ was in fact served personally on Jackson in Queensland, with the leave of the court, and he sought in these proceedings, inter alia, to set aside that service. Master Allen had little difficulty in coming to the conclusion[13] that the service should be confirmed under Part 10, rule 1(f) of the Supreme Court Rules, which permits service 'where the proceedings are for contribution or indemnity in respect of a liability enforceable by proceedings in the Court'. The Master also, in the first judicial consideration of this paragraph, upheld its validity as having a sufficient nexus with New South Wales to be regarded as within the peace, welfare and good government of that State. However, he went on to voice serious doubts whether the cause of action could have come within any of the other paragraphs of Part 10, rule 1; in particular he did not think that the proceedings were founded on a cause of action arising within the State

10. [1971] Tas SR 92.
11. (1973) 43 DLR (3d) 239.
12. [1977] 1 NSWLR 494.
13. At 502.

(r 1(a)), or a tort committed within the State (r 1(d)) or on damage suffered wholly or partly in the State caused by a tortious act or omission wherever occurring (r 1(e)). The Master also inclined to the view that the subject-matter of the suit was not one in which an act for which damages were sought was done within the State and service could not, therefore, be justified under s 11(1)(d) of the Service and Execution of Process Act 1901 (Cth). This decision points up a serious gap in the provisions for service out of the other States and Territories, as none has anything as widely drawn as the above rule 1(f). The only other provision referring to claims for contribution is the Queensland Order 11 rule 5, but that is restricted to actions based on a 'liability founded on . . . a tort committed within the jurisdiction.' This gap is all the more surprising in view of the virtual identity between the States and Territories of their substantive enactments allowing for contribution between tortfeasors.

In *Keevers v O'Neill*[14] further judicial consideration was given to rule 1(e) of Part 10 of the New South Wales Rules of Court. The plaintiff widow was suing on behalf of herself and her child under the Compensation to Relatives Act 1897 (the New South Wales equivalent of Lord Campbell's Act). However, the accident from which her husband's death ensued had occurred in the Northern Territory, and the defendant resided in South Australia. The defendant had been served in South Australia, and had entered a conditional appearance which, in the circumstances of the case, became unconditional and was regarded as submission to the New South Wales court. However, Ash J considered whether the service could have been justified under rule 1(e) of the Rules of Court, had the defendant's appearance remained conditional. It was argued on behalf of the plaintiff that she and her child had suffered damage in New South Wales, by the loss there of the deceased's maintenance of them. His Honour refused to accept this argument, saying that, if that were the law, 'Rule 1(e) would be applicable . . . if a New South Wales resident instituted here an action in respect of a tort originating outside the State of the *Donoghue v Stevenson* type, where the damage occurred in this State.'[15] With the greatest respect, one cannot help but agree with the earlier comment of Nygh[16] that the paragraph is 'clearly directed at the type of situation which arose in *Distillers Co (Biochemicals) Ltd v Thompson*[17]', that is, the very case to which Ash J said it ought not to apply.

A minor matter of procedure under the Service and Execution of Process Act 1901 (Cth) was also referred to in *Keevers v O'Neill*.[18] Ash J remarked in passing that if there had been any defect in the indorsement required by the Act on the writ, it was an irregularity which had been waived by the defendant not taking the point until the early stages of argument. The possible defect was that the writ had been indorsed for

14. [1977] 1 NSWLR 587.
15. At 593.
16. Op cit at p 36.
17. [1971] AC 458.
18. [1977] 1 NSWLR 587 at 591-592.

service in the Northern Territory, whereas it had in fact been served in South Australia.

Enforcement of foreign judgments

In *Chief Collector of Taxes v Bayliss*,[19] the Full Court of the Supreme Court of Victoria followed the decision of the High Court of Australia in *R v White, ex parte TA Field Pty Ltd*[20] and held that a judgment of the Supreme Court of the Territory of Papua and New Guinea in favour of the Chief Collector of Taxes of the Territory could be enforced in Victoria by virtue of the Service and Execution of Process Act, notwithstanding that the judgment was for unpaid taxes levied under Territory law. The one difference between the two cases was that in *Field's* case the High Court handed down its decision before the Territory of Papua and New Guinea became the independent State of Papua New Guinea on 16 September 1975, by virtue of the Papua New Guinea Independence Act 1975 (Cth), whereas in *Bayliss's* case the judgment was sought to be enforced after the Territory had achieved independence. The Full Court held that this made no difference, because the judgment had been registered in Victoria in 1971. The Court said[21] that, by virtue of s 21(2) of the Act, the date of registration of the judgment in Victoria was the only crucial date. It went on to reinforce this point by remarking[22] that if enforcement had been sought after the Territory had achieved independence, such an action would have met the insurmountable obstacle that one country will not enforce the revenue laws of another. It would have been nothing to the point that the original judgment had been given at a time when it could have been registered under the Service and Execution of Process Act.

Domicile

There was apparently only one reported judicial discussion of domicile in the period under review: *In the Marriage of McMahon (No 2)*.[23] The wife had petitioned for divorce under the former Matrimonial Causes Act 1959-1973 (Cth). After she had been granted a decree, and various financial orders had been made in her favour, the husband appealed and challenged, among other things, the Court's jurisdiction, claiming that neither he nor the wife was domiciled in Australia. The Full Court of the Family Court of Australia, on the hearing of the appeal, had little trouble in finding the husband domiciled in Australia. It considered as sufficient the facts that the husband's domicile of origin was in Australia, that he retained an Australian passport and that, despite a long period of residence in New Guinea and financial interest there, he had maintained a flat in Australia for some 5 years, and some bank accounts.

Since, under the Family Law Act 1975 (Cth), s 39(3), jurisdiction for a

19. (1976) 31 FLR 490.
20. (1975) 133 CLR 113.
21. At 494.
22. At 495.
23. (1976) 27 FLR 297 at 299.

dissolution of marriage may be exercised so long as either party is either an Australian citizen, domiciled in Australia, or has been ordinarily resident here for one year immediately prior to the commencement of proceedings, it is most unlikely that domicile will be raised as an issue in this field in the future.

Contract

A nice question of the distinction between matters of substance and procedure was raised in the context of a contractual claim in *Allan J Panozza & Co Pty Ltd v Allied Interstate (Qld) Pty Ltd.*[24] The parties, both incorporated in Queensland, entered into a contract in Queensland for the carriage of the respondent's goods by the appellant from New South Wales into Queensland. In the course of such carriage the goods were so badly damaged as to be rendered useless and the respondent sought to recover their value from the appellant in the District Court in New South Wales. That Court gave judgment for the respondent, and the appellant took the present appeal to the New South Wales Court of Appeal. It was argued by the appellant that various provisions of the Carriage of Goods by Land (Carriers' Liabilities) Act 1967 (Qld) were applicable; by s 5(3) a claim against a carrier was not to be enforceable unless the claimant had given notice in writing within a specified time; by s 6(1) a carrier was not to be liable, in any event, in an amount greater than $200; and by s 9(1) the provisions of these sections were deemed to be incorporated in 'every contract of carriage'. The Court of Appeal had no difficulty in assuming that the proper law of the parties' contract was that of Queensland. From that it followed that s 9(1) of the Act operated to amend the contract so as to include the limitation of liability contained in s 6(1). However, their Honours also held that the provisions of s 5(3) were matters of procedure and not of substantive law, and so would not be given effect to in a New South Wales court.

The decision may, at first sight, seem surprising for it is generally accepted that the distinction between 'substance' and 'procedure' is made only for the purpose of deciding whether a particular rule of law is to be applied by the court.[25] Although s 5(3) was expressed in a Queensland statute it was deemed to be incorporated as one of the contractual provisions between the parties and thus no different from the written terms to which they had expressly agreed. However, Street CJ[26] adverted to the fact that s 5(3) opened with a saving clause allowing 'the court' to dispense with the necessity for notice; his Honour considered that this must refer only to a court in Queensland, and therefore the whole of the provisions of s 5(3) were applicable only when action was brought in Queensland. Reynolds JA,[27] on the other hand, stressed the fact that s 5(3) was directed to whether contractual rights were 'enforceable' or not, and thus, as a rule of law, it was a matter of procedure. He thus, by inference,

24. [1976] 2 NSWLR 192.
25. See Nygh, op cit, Ch 12.
26. [1976] 2 NSWLR at 196.
27. At 197.

considered that s 9(1) was effective only to incorporate substantive rules of the law of Queensland (such as s 6(1)) into the parties' contract.

Currency

Some argument on the difference between the currency of obligation and the currency of payment was raised in *Electricity Trust of South Australia v CA Parsons & Co Ltd.*[28] At the appellant's request, the respondent had submitted a tender to supply certain equipment. In that tender, the prices for some items were shown in pounds sterling, but these were converted, in the same document, to an amount in Australian dollars at a specified rate of exchange. The respondent's tender was accepted, the lump sum price in the final contract was stated in Australian dollars, and provision was made for payment of that price in Adelaide in Australian currency. By the time the equipment had been delivered, the value of the pound had fallen dramatically in relation to the Australian dollar, and the appellant's argument was that its obligation under the contract was to pay only as much in Australian dollars as was then equivalent to the tender prices which had been quoted in pounds sterling. The High Court of Australia (Barwick CJ, Mason and Aickin JJ) unanimously rejected this argument. The Chief Justice, after reviewing the terms of the contract, found it to be one in which a firm lump sum price, expressed in Australian dollars, was agreed to be paid. He said that there was no question of any diversity of currency of obligation and currency of payment, and that there was at no stage any agreement to make any payment calculated in other than Australian dollars. He regarded the sterling figures in the tender document as of no more than historical interest, once the firm-price contract had been made.

Classification of statutory rights of action

There were two reported decisions in the period under review in which the issue arose of whether a right of action arising solely from a statute was to be classified as tortious or quasi-contractual. In *Baldry v Jackson*,[29] the facts of which have already been noted,[30] Master Allen had to determine the classification of a claim for contribution from a joint tortfeasor under s 5 of the Law Reform (Miscellaneous Provisions) Act 1946 (NSW) in order to decide the applicable law. The Master recognised that such a claim is a very special kind of action, and that it did not, for all purposes, fit comfortably into either category. He nevertheless concluded that, for the purposes of private international law, it was to be classified as tortious:

> 'That, rather than quasi-contract, is the substantial character of the claim. The claim is directed to determining whether [the defendant] was guilty of a tort, and, if so, the extent of his responsibility for the damage suffered by the person injured, so that just and equitable

28. (1977) 18 ALR 225.
29. [1977] 1 NSWLR 494.
30. Above p 388.

> contribution may be awarded to [the plaintiff], who has paid to the person injured all the damages recoverable by him.'[31]

Again, in *Ryder v Hartford Insurance Co*[32] the question arose of the classification of a right of direct recourse against a motor-car insurer. The plaintiff had been injured in Victoria while a passenger in a motor vehicle; the driver of the vehicle died and the plaintiff sought to bring an action against the driver's insurer. The insurance policy had been taken out in South Australia, and complied with the Motor Vehicles Act 1959-1970 (SA). By s 113(1) of that Act,

> 'where—
>
> (a) an insured person has caused death or bodily injury by negligence in the use of an insured motor vehicle but is dead . . .;
>
> (b) a person who could have obtained a judgment in respect of that death or bodily injury against the insured person . . . may recover the amount of that judgment by action against the insurer.'

The plaintiff argued that the right of action given by this subsection was contractual or quasi-contractual in nature, was governed by its 'proper law' (that of South Australia) and was justiciable in Victoria. Jenkinson J held, however, that the plaintiff's cause of action was to be classified as tortious:

> 'Of considerable significance for the purposes of characterization, in my opinion, is the circumstance that there are included in the essential ingredients of the cause of action constituted by s 113(1) all but one of the essential ingredients of the cause of action in tort for damages for negligently causing personal injury. The omitted ingredient is the fact that it was the defendant whose negligent act caused the injury. In lieu of that ingredient s 113(1) substitutes a different ingredient: the fact that the person whose negligent act caused the personal injury was an "insured person" within the meaning attributed to that phrase for the purposes of Part IV of the Act.'[33]

His Honour considered *Hodge v Club Motor Insurance Agency Pty Ltd*,[34] in which the Full Court in South Australia had classified such a right of direct recourse as quasi-contractual. Jenkinson J remarked, however, that there was a certain metaphorical quality which marked the classification of a non-contractual obligation as contractual or quasi-contractual, and that it was not supported by the authority relied on in *Hodge's* case.

Lex causae of quasi-contractual obligations

In the course of his judgment in *Baldry v Jackson*,[35] referred to above, Master Allen considered that the claim for contribution against a joint tortfeasor might be viewed as quasi-contractual. He then raised the issue of the law to govern such an obligation, and said that, by analogy with the

31. [1977] 1 NSWLR at 500.
32. [1977] VR 257.
33. At 266.
34. (1974) 7 SASR 86.
35. [1977] 1 NSWLR 494 at 501.

rules relating to contracts, strictly so-called, the law to be applied to a quasi-contractual obligation is that with which the subject-matter of the claim has the closest and most real connection. On the facts before him, he considered that to be the law of New South Wales, since it was there that the plaintiff to the present action had suffered judgment in favour of the person injured.

Tort

A somewhat unorthodox application of the first rule in *Phillips v Eyre*[36] was made by Jenkinson J in *Ryder v Hartford Insurance Co.*[37] The injury in that case, it will be recalled, had occurred in Victoria, and one would therefore think that there was no room for the application of the first rule in *Phillips v Eyre*, which is that the wrong must be of such a character that it would have been actionable if committed in the country of the forum. Nevertheless, his Honour's reasoning[38] was that the liability imposed on an insurer by the Motor Vehicles Act 1959-1970 (SA), s 113(1), was a part of the law of South Australia only. He then said that if the injury, in the case before him, had occurred outside Victoria the plaintiff would be defeated by the first rule in *Phillips v Eyre* since the rights given by the South Australian statute were not justiciable in Victoria. He concluded by saying that the same result followed when the injury had occcurred in Victoria. With the greatest respect, it is submitted that the learned Judge was on surer ground in the second reason he gave for not allowing the plaintiff's action to proceed. The reason relied on the decision of the Privy Council in *The Halley*,[39] in which it was said that it is 'alike contrary to principle and to authority to hold, that an English Court of Justice will enforce a Foreign Municipal law, and will give a remedy in the shape of damages in respect of an act which, according to its own principles, imposes no liability on the person from whom the damages are claimed'. Jenkinson J, after quoting from *The Halley,* said:[40]

> 'It may be that the statement of the principle which I have quoted has been subsequently qualified in certain respects and that the ambit of application of the principle has been subsequently circumscribed. It may be that the application of the principle in this case is an example of that mechanical jurisprudence which Professor Hancock and the editor of the 9th edition of *Cheshire's Private International Law* (at p 271) have condemned. But I know of no authority which would justify a failure by this Court to apply the principle in respect of the matters alleged in this statement of claim.'

A much more straightforward approach to the rules in *Phillips v Eyre* was taken by Master Allen in *Baldry v Jackson.*[41] On the assumption that the plaintiff's claim for contribution was tortious in nature, the Master

36. (1870) LR 6 QB 1.
37. [1977] VR 257, see also above, p 393.
38. At 269.
39. (1868) LR 2 PC 193 at 204.
40. [1977] VR at 271.
41. [1977] 1 NSWLR 494; see also above, p 388.

first concluded that the place of the wrong was Queensland, since the injury for which contribution was claimed had occurred there. With delightful simplicity, he then said[42] that

> '. . . so far as relevant, the law of Queensland, both as to civil liability for negligence generally, and as to contribution between tortfeasors is concerned: Law Reform Act 1952 (Qld), is the same as that of New South Wales.'

He thus concluded that both of the rules in *Phillips v Eyre* had been satisfied. Treating these rules as going to the issue of justiciability or jurisdiction, he was led to the view that since they were met, the court would apply the lex fori.

There were two instances, in the period under review, of actions for defamation in which publication had taken place outside the country of the forum, but the application of principles of private international law seems now to be well settled. In *Hewitt v West Australian Newspapers Ltd*,[43] Franki J in the Supreme Court of the Australian Capital Territory acknowledged that counsel for the plaintiff had conceded that the defendant was entitled to rely on any defences available in each of the places of publication; in *Renouf v Federal Capital Press of Australia Pty Ltd*[44] Blackburn CJ applied the same principle, without any apparent argument on the matter.

Family law

In the Marriage of Katavic[45] was concerned with the formal validity of a marriage celebrated in November 1945, when the parties to it were resident in a refugee camp in Austria. The ceremony of marriage had been conducted by a Roman Catholic priest, in a church near the refugee camp, but the parties did not comply with Austrian law, which required registration of the marriage in the civil marriage registry. Lindenmayer J, in the Family Court of Australia, referred to the general rule laid down in *Berthiaume v Dastous*[46] that the formal validity of marriages is governed by the law of the place of celebration, and found that the marriage before him appeared to be void on that ground. He also found that on the facts there were no exceptional circumstances to take the situation out of that general rule. Such exceptional circumstances he classified as: impossibility of compliance with the local law;[47] a marriage within the lines of a foreign army of occupation;[48] or a marriage within a refugee camp which was found on the evidence to constitute a distinct community, separate from and not subject to the laws of the country in which it was located.[49]

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42. At 499. For a discussion of whether the rules in *Phillips v Eyre* are choice of law rules or preliminary or 'threshold' rules see Nygh, op cit, p 258.
43. (1976) 27 FLR 222 at 229.
44. (1977) 17 ACTR 35.
45. (1977) 29 FLR 510.
46. [1930] AC 79 at 83.
47. *Savenis v Savenis* [1950] SASR 309.
48. *Taczanowska v Taczanowski* [1957] P 301.
49. *Kochanski v Kochanska* [1958] P 147; *Jaroszonek v Jaroszonek* [1962] SASR 157; *Preston v Preston* [1963] P 411.

In the Marriage of El Oueik[50] appears to be the first reported case to apply s 104 of the Family Law Act 1975 (Cth) to the recognition of a foreign divorce. The parties, who were of Lebanese origin, were married in Lebanon in 1960. They emigrated to Australia in 1965, but in 1975 the husband commenced proceedings for divorce in Lebanon. On the wife's subsequent petition for dissolution of marriage in New South Wales, the husband argued that the Lebanese divorce should be recognized in Australia. The only ground relied on for such recognition was s 104(3)(a), under which the respondent to the foreign divorce (here the wife) must have been ordinarily resident in Lebanon at the date of the commencement of the proceedings there. Since emigrating to Australia, the wife had returned to Lebanon, for some 8 months in 1972, and again for almost 2 years from June 1973 to March 1975. She had remained in Australia since the latter date. Toose J, in the Family Division of the New South Wales Supreme Court, found on the facts before him that the wife had not been 'ordinarily resident' in Lebanon at the relevant time. He went on to say that even if he were wrong on that point, he would still deny recognition of the Lebanese divorce on the application of s 104(4) of the Family Law Act.

That subsection provides that a divorce shall not be recognized where '(a) under the common law rules of private international law, recognition of its validity would be refused on the ground that a party to the marriage had been denied natural justice . . . ; or (b) recognition would manifestly be contrary to public policy.' Toose J said:[51]

> 'I am not satisfied that the petitioner received notice of such proceedings and, accordingly, in such circumstances it would be a denial of natural justice for such a decree to be recognized against her.
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> In addition I am satisfied that the respondent [husband], in spite of being domiciled in Australia and an Australian citizen, resorted to the Moslem court in the Lebanon purely for procuring a divorce and avoiding his responsibilities towards the petitioner. In those circumstances in my view it would be manifestly contrary to public policy to recognize the decree of the Moslem court.'

The other family law case reported in the period under review concerns the recognition of a foreign legitimation under s 90 of the Marriage Act 1961 (Cth). In *Heron v National Trustees Executors & Agency Co of Australasia Ltd*[52] the plaintiff had been born in England in 1935. At that time his father, who was domiciled in England at all relevant times, was married to someone other than his mother. In 1938 the father obtained a divorce from his then wife, and married the plaintiff's mother. By English law as it then stood, the marriage of the parents did not legitimate the plaintiff, but by the English Legitimacy Act 1959, which amended the previous law, the plaintiff was regarded as legitimate in England as from

50. (1977) 29 FLR 171.
51. At 178.
52. [1976] VR 733.

the coming into operation of the 1959 Act. The question before Lush J was whether this legitimation was to be recognized in Victoria in order to allow the plaintiff to take under the will of his grandfather. It was accepted that the legitimation fulfilled the requirements of paras (a) to (c) of s 90(1) of the Marriage Act, and argument centered on whether it also came within para 90(1)(d), which requires that 'by the law of the place where the father was then domiciled the child became legitimated by virtue of the marriage.' The defendant argued that this paragraph required legitimation by force of marriage alone, whereas the plaintiff had been legitimated by force of the English Legitimacy Act 1959. Lush J accepted that, prior to the Marriage Act, there had been decisions both in Australia and New Zealand which had uniformly held that in cases where the marriage preceded the legitimating statute, legitimation was effected by force of the statute, and not by reason of the marriage. His Honour also pointed out that this judicial view had been academically criticized.[53] He went on to say that his sole task was the construing of the Marriage Act, and he did not consider earlier decisions on the common law position to be binding. After referring to some of the judicial observations in *A-G for Victoria v Commonwealth*,[54] in which the constitutional validity of s 90 had been upheld, his Honour laid particular emphasis on the comments of Taylor J in the latter case to the effect that s 90 was intended to be complementary to s 89 of the Marriage Act (which provides for legitimation when the father was domiciled in Australia or the marriage took place here). Lush J[55] took that to mean that the draftsman

> 'intended that s 90 should accord recognition to legitimation by marriage outside Australia to the same extent as s 89 accorded a legitimating effect to marriages within Australia. I do not think that, having said in s 89 that a child was, by virtue of the marriage, legitimated whether the marriage occurred before or after the commencement of the Act, he intended, when he referred in s 90(1)(d) to a foreign law under which a child became legitimated by virtue of the marriage, to exclude recognition of the effect of a foreign law applicable to past marriages.'

It was thus held that the plaintiff's legitimation had been 'by virtue of the marriage' of his parents, and was to be recognized. This had the further consequence that, within Victoria, he was to be accorded for all purposes the status of legitimate child, and he could therefore take under the will of his grandfather, who had died in 1929. In reaching this conclusion, the court followed the New South Wales decision in *Thompson v Thompson*.[56]

In view of the passing of the Status of Children Act 1974 (Vic) and similar legislation in all the other States and Territories,[57] the problems

53. By Dicey and Morris, *Conflict of Laws*, 9th ed (1973), pp 442-443.
54. (1962) 107 CLR 529.
55. [1976] VR at 740.
56. (1950) 51 SR(NSW) 102.
57. By the end of 1979, the ACT was the only State or Territory not to have such legislation.

facing Lush J in the above case are of decreasing significance. The legislation abolishes the distinction between legitimacy and illegitimacy, and abolishes the rule of construction whereby words signifying relationships were presumed to refer to legitimate relationships only; but it applies only to instruments executed or intestacies occurring after the commencement of the relevant legislation.

Succession

The only development in this field was legislative, not judicial. With the enactment of the Wills, Probate and Administration (Amendment) Act 1977, the law in New South Wales is now the same as that in Victoria, South Australia, Western Australia and Tasmania, in relation to the laws governing the formal validity of wills. The latter States, in 1964 and 1965, had passed legislation closely based on the English Wills Act 1963, under which a will formally valid by any one of seven different laws would be upheld as formally valid in the forum. As Queensland and the Northern Territory each has legislation dealing with this matter, it is only in the Australian Capital Territory that the formal validity of a will is determined by the common law rules laid down in *Bremer v Freeman*[58] in 1857.

58. 10 Moo PC 306; 14 ER 508.

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