Recent Developments in Private International Law

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The following represents a summary, critical in places, of case law and statutory developments in Australia affecting this area, and English decisions so far as seem relevant to the Australian scene, during the period from 1 July 1965 to 30 June 1966.

Jurisdiction—Service out of the jurisdiction

Three Victorian cases, one involving the validity of service out of the jurisdiction under the Service and Execution of Process Act 1901-1963 (Com.), and two involving the Victorian Rules of the Supreme Court, deserve mention. In *Earthworks & Quarries Ltd.* v. *Eastment & Sons*[1] the question was whether there was a breach of the contract within the issuing State, i.e. Victoria. The breach alleged was failure to pay money. The question was whether this failure occurred at the registered office of the plaintiff, the person to whom payment was due, in Victoria, in a situation where the contract had failed to advert to the question of where the money should be paid. It was held that the answer must be in the affirmative, not because of the application of the principle that the debtor must seek out his creditor, but because of the natural inference from the circumstances of what the parties must have intended. The case also decided in the affirmative sense the interesting question whether for this purpose a claim for a *quantum meruit* should be held to be a claim in contract. *Weckstrom v. Hyson*[2] involved service out of the jurisdiction under Order XI, Rule 1 of the Victorian Supreme Court Rules. In order to satisfy the relevant head of description, the claim had to be shown to be in respect of a contract "governed by Victorian law"—a new head of jurisdiction introduced in 1959. The claim here was for damages for breach of a contract to marry made in Finland. It was first argued that the claim was not one for breach of contract but one for a tort. This argument was rejected as McInerney, A.J. (as he then was), took the view that the cases could not be taken as going further than saying the measure of damages in such an action more closely resembled that which obtained in an action in tort than that normally applicable in breach of contract cases. On the other aspect, the learned judge treated the phrase "governing law" as equivalent to "proper law" and held that the proper law was that of Finland. Consideration of space preclude us from going into the balancing of relevant factors attempted by the learned judge. Suffice to say that his approach was

1 [1966] V.R. 24.

2 [1966] V.R. 277.

on the orthodox pattern involving an attempt to elucidate the question with which law the contract had "the most real connexion".[3]

The third case, viz. *Lewis Construction Co. Pty. Ltd. v. Tichauer S.A.*[4] is rather difficult to compress in the form of a note as the judge had to pass in review a number of the possible heads of claim enumerated in O. XI, r. 1 of the Victorian Rules. The contract was one for the purchase by the plaintiff, a Victorian company, of two cranes from the defendant, a French company. The contract was contained in a number of letters and cables which passed between the parties. The cranes were shipped to Melbourne and part of one of them fell, killing and injuring several persons and damaging property. The plaintiff alleged defects in the design or manufacture constituting a breach of the conditions and warranties contained in the contract. Hudson, J., held firstly that if the defendant committed a tort, it was not committed within the jurisdiction; here he relied on *George Monro Ltd. v. American Cuanamid & Chemical Corp.*[5] He also held that the fact that the contract was a C.I.F. contract meant that the breach of contract took place at the port of shipment so that there was no breach of the contract within the jurisdiction. He further rejected the submission that the contract was to be governed by Victorian law on the ground that the C.I.F. nature of the contract, involving that France was the place of performance, plus the fact that the parties had agreed that any litigation arising under the contract must be adjudicated upon by a French Court supplied indications that French law had been selected as the governing law. He finally held, however, that the contract fell within the description of O. XI, r. 1 (*e*)(i) as being a contract made within the jurisdiction; he was of the view that there had been a failure to accept the original offer and that the defendant had then made a counter offer which had been accepted by the plaintiff by cable sent from Melbourne.

Jurisdiction—*forum conveniens*

Hopkins v. Difrex S./A.[6] is interesting for the adoption by Maguire, J., of the New South Wales Supreme Court of the suggestion made by Denning, L.J., in *The Fehmarn.*[7] The application was one made by the defendant in an action for damages for wrongful dismissal under a contract of service made between the plaintiff and a French company. The application was for a stay of proceedings on the ground that the contract contained a clause that in the case of disputes as to interpretation or execution the French tribunals were the only courts competent to give a decision. It was held that neither an agreement to refer disputes to a foreign tribunal nor the fact that

3 See *Bonython v. The Commonwealth* (1948), 75 C.L.R. 589, at p. 601; [1948] A.L.R. 185.

4 [1966] V.R. 341.

5 [1944] 1 K.B. 432; [1944] 1 All E.R. 386.

6 (1966), 84 W.N. (Pt. 1) (N.S.W.) 297; [1966] 1 N.S.W.R. 797.

7 [1958] 1 W.L.R. 159, at p. 162; [1957] 2 All E.R. 707.

the proper law of the contract was foreign was decisive in favour of the exercise of the jurisdiction to stay. The judge followed the view suggested in *The Fehmarn*[8] that the local court should look to see with what country the dispute is most closely concerned (Denning, L.J.) and also should consider matters of convenience (Hodson, L.J.). He exercised his discretion in favour of refusing the application to stay. In view of the language in *The Fehmarn* which was quoted by him, his refusal to regard the proper law as a material factor seems somewhat surprising but it appears that he was using the phrase "proper law" in a special sense.

Polygamous Marriages

The decision of Cumming-Bruce, J., in *Ali v. Ali*[9] represents a startling and, to the mind of the present reviewer, a legally unjustified erosion of the principle of *Hyde v. Hyde*[10] which declines to extend English matrimonial remedies to a potentially polygamous union. He held that a marriage potentially polygamous by the law of the place of celebration, and by the law of the then domicil of the parties, was converted to a monogamous union by the fact of the husband later acquiring a domicil in England and that matrimonial relief could be extended, at any rate where the matrimonial offences occurred after the date of such notional conversion. This holding goes far beyond *Cheni v. Cheni,*[11] though perhaps supported by one rather oblique *dictum* in that case,[12] and appears to depend upon the fact that upon the acquisition of the English domicil any further union of the man would be void as a marriage by his personal law. This is true but seems irrelevant in the instant situation, as in the converse situation it could be used to buttress a proposition that a change of domicil to a polygamous country could destroy the initial monogamous character of an earlier union.[13] In *Cheni v. Cheni*[14] at least the law in force in the place where the union was contracted, bore in itself the seeds of possible conversion of the union to the monogamous character.

Polygamous marriages—statute

By a 1965 amendment to the Matrimonial Causes Act 1959 (Com.), a new section 6A was introduced which changes the Australian law on the *Hyde v. Hyde and Woodmansee* principle generally. It is provided, so far as here material, that a union in the nature of a marriage entered into outside Australia, that was when entered into potentially polygamous, is a marriage for the purposes of proceedings under

8 [1958] 1 W.L.R. 159; [1957] 2 All E.R. 707.

9 [1966] 2 W.L.R. 620; [1966] 1 All E.R. 664.

10 (1866), L.R. 1 P. & D. 130; [1861-73] All E.R. Rep. 175.

11 [1965] P. 85.

12 [1965] P. 85, at p. 89.

13 It is submitted that the trend is against the correctness of such a proposition —*Cheni v. Cheni,* [1965] P. 85, at p. 90.

14 [1965] P. 85.

Part VI of the Act, and for the purposes of proceedings in relation to any such proceedings, when it would have been a marriage for those purposes but for the fact that it was potentially polygamous. Certain restrictive provisions are then contained in s. 6A (2) and (3).

It is clear that the amendment only applies to proceedings where matrimonial remedies are sought in respect of such a union or proceedings for ancillary relief. It therefore does not touch the type of question involved in *Baindail v. Baindail*[15] and *Re Bethell.*[16] Secondly, it applies only to the first of a series of potentially polygamous unions, though it does apply to such a first union notwithstanding that the husband has since purported to contract a further union (s. 6A (3)). However, the most considerable restriction lies in s. 6A (2). Though the language here appears to be obscure,[17] the legislation appears to mean that s. 6A applies only if at the time of the union, the pre-marital domiciliary law of both the man and the woman permitted polygamy on the part of the male.[18] It would, therefore, seem that the actual decision in *Risk v. Risk*[19] would stand so far as an Australian Court is concerned, and so too would the decision in *Hyde v. Hyde and Woodmansee*[20] itself, as it seems that Hyde himself had an English domicil at the time of the union, or at least a non-Mormon one.

Movables and immovables

The High Court decision in *Haque v. Haque*[21] is notable for the application of this conflictual distinction to two cases of property interest which had not previously appeared before the courts in this particular context, viz., the interest of a vendor of land who has agreed to sell but has not yet received full payment, and the interest of a person in a partnership, the assets of which included land. The question arose in relation to the disposition by will of the assets of a deceased who died domiciled in India and who at the time of his death (a) had contracted to sell certain Western Australian land but had not received the purchase money, and (b) was a member of two partnerships carrying on business in Western Australia, the assets of each of which included land situate in Western Australia. One partnership was terminated by the death; the other continued notwithstanding the death. By the Moslem law applicable in India, the deceased had no power to dispose of his movables by will. Whether this law or the internal law of Western Australia (by which, of course, the dispositions were valid) governed the matter, depended upon the

15 [1946] P. 122; [1946] 1 All E.R. 342.

16 (1887), 38 Ch.D. 220.

17 See article by Professor D. Jackson in (1966), 40 A.L.J. 148, at p. 152.

18 The law of the woman's domicil must permit polygamy on the part of the male; the possibility of that law permitting polyandry is not recognized.

19 [1951] P. 50; [1950] 2 All E.R. 973.

20 (1866), L.R. 1 P. & D. 130; [1861-73] All E.R. Rep. 175.

21 (1965), 39 A.L.J.R. 144; [1966] A.L.R. 553.

question whether the interests of the deceased in the types of property involved were movables or immovables—a matter to be settled by the conflicts rules of the law of Western Australia.

It was held by the High Court—by a three to two majority—affirming the decision of the Supreme Court of Western Australia, that so far as the vendor interest in land was concerned, the law to be applied must be on the footing that this type of interest was a movable. (It is submitted that this cautious way of phrasing the decision is justified by the context in which the movable-immovable distinction has to be considered.) The comparatively short judgments of the majority judges go straight to the closest analogous interest which had been heretofore judicially considered, viz., the interest of a mortgagee under a mortgage of land which has been compendiously, though perhaps inaccurately, described as a "mortgage debt". It was pointed out that this had a double character, viz., a right to payment of a sum of money and an interest in land by way of security. However, effect could not be given in a succession context to both aspects and the majority were prepared to accept "the ingrained principle of English municipal law—namely that the debt is the principal thing and the mortgagee's interest in the mortgaged property is an accessory only".[22] In thus preferring the movable quality of the "mortgage debt", the majority followed the predominant trend of the Australian and New Zealand cases[23] in preference to the view of the Court of Appeal in *Re Hoyles; Row v. Jagg*[24] though such first-mentioned cases were to a large extent based upon decisions of the Privy Council in taxation cases.[25]

The majority thought that the answer to the "mortgage debt" cases also supplied the answer to the present situation regarding the interest of the unpaid vendor and Kitto, J., was impressed with the implications of such a decision as *Lysaght v. Edwards*,[26] the *dicta* in which put the position of an unpaid vendor somewhere between that of the trustee and that of the mortgagee. As in the mortgagee situation, there are two aspects, a right to receive money and a right to land, and in a question of succession, the former must be the predominant character.

Both Barwick, C.J., and Windeyer, J., dissented on somewhat different bases. Barwick, C.J., on an examination of the cases on "mortgage debts" thought that the conclusion to be drawn was that the mortgagee's interest in the land was an immovable and such interest attracted the mortgage debt so that it too was an immovable.

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22 (1965), 39 A.L.J.R. 144, at p. 154; [1966] A.L.R. 553, at p. 569, per Kitto, J.).

23 E.g. *Re Ralston*, [1906] V.L.R. 689; *Re Young*, [1942] V.L.R. 4; *Re Williams*, [1945] V.L.R. 213, *Re O'Neill* (1922), 41 N.Z.L.R. 468; *Contra*: *Re Donnelly* (1927), 28 S.R. (N.S.W.) 34.

24 [1911] 1 Ch. 179.

25 E.g. *Harding v. Queensland Stamps Commissioners*, [1898] A.C. 769; *Toronto General Trusts Corporation v. R.*, [1919] A.C. 679.

26 (1876), 2 Ch.D. 499.

Like reasoning, in his opinion, applied, in fact with even stronger force, in the case of the interest of the unpaid vendor.

Windeyer, J., with considerable hesitation, agreed with the position reached by the Australian cases in relation to mortgage debts in preference to that expressed in *Re Hoyles; Row v. Jagg*[27] but found that the interest of the vendor was somewhat different because "the deceased here was . . . the owner in a relevant sense of the lands in question".[28] To consider the fact that equity effected a change because the vendor had agreed to sell the land was to import the English distinction between real and personal property which was an unjustified step.[29]

The judgments of the majority judges on the point of the mortgage debts reflects an opinion that, although for the purposes of a succession on death question, the "debt" characteristic must be regarded as the dominant one, this would not necessarily be so in all types of question, e.g. where it was a question of enforcing rights under the security, and separate treatment of the debt and security aspects might be proper.[30]

As regards the interest in the partnerships, the High Court with the dissent, in part, of Windeyer, J., thought that the interest of the deceased was of the character of a movable. The reasoning here seems to be placed fairly frankly on the doctrines of municipal English law as to the nature of the share of a partner to partnership property, viz., a right to realization of assets to pay debts and pay the value of the share when ascertained. There is no proprietary right to any specific asset. There is, however, considerable point in the view of Windeyer, J.,[31] that to adopt the device of the Partnership Acts in applying the equitable doctrine of conversion to partnership property, was not looking at matters on the international law plane. So far as land is concerned, each partner has an interest in it as co-owner and the fact that the domestic part of the *lex situs* subjects it to realization, along with other partnership assets, for the purposes of payment of the debts of the partnership does not convert it or each partner's interest in it into a movable. In the case of one partnership, he thought that the interest of the deceased was an immovable, as the lands were unsold; in the case of the other partnership (the one that was dissolved by death) he concluded that the interest of the deceased was in the nature of a movable by reason of special arrangements made by the deceased in his lifetime.

It seems that, whilst the cross-currents of opinion make the matter rather confusing, the High Court held that when an Australian Court is seised of the matter, and the *lex situs* is identical with the *lex fori*,

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27 [1911] 1 Ch. 179.

28 (1965), 39 A.L.J.R. 144, at p. 161; [1966] A.L.R. 553, at p. 582.

29 (1965), 39 A.L.J.R. 144, at p. 162; *Re Berchtold; Berchtold v. Capron* [1923] 1 Ch. 192.

30 (1965), 39 A.L.J.R. 144, at p. 154, (Kitto, J.), 156 (Menzies, J.).

31 (1965), 39 A.L.J.R. 144, at p. 162.

or is a law which accepts the movable-immovable distinction and follows the same basis as the *lex fori* in dealing with such distinction, an unpaid vendor's interest in land and the interest of a partner in partnership land are both to be treated as movables.

The majority judgments proceed directly to expound the view which a Western Australian court should adopt in dealing with the assets involved for the purposes of the conflictual distinction between movables and immovables without spelling out the reason why Western Australian law was resorted to. It is only in the minority judgments that it is made clear that it was for Western Australian law (which would be at one with other English-based systems) to determine this question only because it was the *lex situs*. If the *situs* was in some other country, the law of that other country might well be very different. Windeyer, J., in fact, in a closely reasoned judgment, draws attention to the fact that there may be a question which is more "threshold" still, viz., what *is* the *situs*.[32] In the instant situation there was no need to determine this because on all possible reasoning approaches, the *situs* of the assets was in Western Australia. However, some of the Australian cases on mortgage debts seem to by-pass the *situs* point, though it appears to have been involved, but these and the Privy Council decision relied on therein were cases of the determination of *situs* for probate and revenue purposes.[33] Windeyer, J., makes the interesting suggestion, however, that, notwithstanding the taxation cases, "when the question is whether a debt secured by mortgage . . . is to be considered as a movable or immovable, the *situs* of the *res* is taken to be where the land is"[34] and relies on in *Re O'Neill*.[35]

The only remaining comment to make is that the view of Farwell, L.J., in *Re Hoyles*[36] that where the choice of law lies between two system of law, each of which employs the English division into realty and personalty, there is no need to determine whether the relevant asset is a movable or immovable, found support only from Barwick, C.J.[37]

Wills—testamentary capacity and undue influence

Many issues were involved in the decision of Scarman, J., in *In the Estate of Fuld (deceased) (No. 3)*[38] but the only aspect to which it is desired to call attention in this note is the statement that whilst questions of testamentary capacity and undue influence fall to be determined by the law of the testator's domicil, issues relating to

32 (1965), 39 A.L.J.R. 144, at pp. 157-9.

33 See, e.g. the judgment of Gavan Duffy, J., in *Re Williams*, [1945] V.L.R. 213.

34 (1965), 39 A.L.J.R. 144, at p. 158; [1966] A.L.R. 553, at p. 577.

35 (1922), 41 N.Z.L.R. 468.

36 *Re Hoyles; Row v. Jagg*, [1911] 1 Ch. 179, at p. 185.

37 (1965), 39 A.L.J.R. 144, at p. 146; [1966] A.L.R. 553.

38 [1966] 2 W.L.R. 717; [1965] 3 All E.R. 776.

burden of proof and the operation of presumptions in such matters are referable to the *lex fori* as being matters of an evidentiary character.[39]

Tort liability

Anderson v. Eric Anderson Radio & T.V. Ltd.[40] raises the quite short point whether the Court of the *forum* should dismiss an action for damages for negligence in respect of a negligent act which occurred in another jurisdiction and is both "non-justifiable" and actionable by the law of the place of commission of the act, where by the *lex fori* contributory negligence is a complete defence. The collision occurred in the Australian Capital Territory and action was brought in New South Wales. The jury found negligence by the defendant and contributory negligence on the part of the plaintiff. By the law of the Territory, viz., the Law Reform (Miscellaneous Provisions) Ordinance (1955), s. 15, the contributory negligence becomes in effect merely a matter going to reduction of damages. By the law of New South Wales, apart from the factors invoked in *Alford v. Magee*[41] it was a complete defence.

The High Court, affirming the decision of the Supreme Court of New South Wales, held that the fact of contributory negligence was a complete defence on the private international law plane. The judgment of the High Court did three things: (a) It affirmed the common law principle of *Phillips v. Eyre,*[42] requiring that the alleged tortious conduct must be of such a character that it would have been actionable if it had happened in the country of the *forum* and "not justifiable" by the *lex commissi*; (b) it rejected a submission that because the New South Wales Court was exercising federal jurisdiction then, by the operation of various provisions, viz. the Commonwealth Constitution, s. 76 (ii), and the Judiciary Act 1903-1959 (Com.), ss. 79, 80, the laws enacted or promulgated for the government of the Territory, including the Ordinance, applied to the Australian courts wherever sitting in the same way as they would be applied by a court of the Territory sitting in the Territory itself, and (c) it likewise rejected a view that the New South Wales Court was bound to give effect to the Ordinance because of s. 118 [*sic*] of the Constitution and s. 18 of the State and Territorial Laws and Records Recognition Act 1901-1964 (Com.), which embody what have usually been called the "full faith and credit" requirements.

As regards the first point, the High Court was not disposed to question the correctness of the *Phillips v. Eyre* doctrine, which had been acted on for nearly a century and accepted in Australian Courts,[43] in a situation where, as here, its correctness was not

39 *In the Estate of Field (deceased) (No. 3)*, [1966] 2 W.L.R. 717, at pp. 735-7; [1965] 3 All E.R. 776.

40 (1965), 39 A.L.J.R. 357; [1966] A.L.R. 423.

41 (1952), 85 C.L.R. 437.

42 (1870), L.R. 6 Q.B. 1, 28-9.

43 E.g. in *Koop v. Bebb* (1951), 84 C.L.R. 629.

seriously disputed by counsel. Windeyer, J., regarded the reference in the first limb of the *dictum* of Willes, J., in *Phillips v. Eyre* as not merely defining conditions for the entertaining of an action but to the substantive law determining liability including the matter of defences. It does seem indeed that even if counsel had mounted a full-scale attack on the interpretation by courts of the *Phillips v. Eyre* rule, the High Court could not, apart from "full faith and credit" considerations, have by-passed the decision of the Privy Council in *The Halley,*[44] unless it is distinguishable. It is submitted that the attempt of Mr. P. Gerber in a learned article[45] to distinguish this case either on the score of public policy or that the general character of tortious conduct was absent[46] is not convincing. To collide with a ship is surely conduct of a generic tortious type in the "threshold" sense even though foreign law brings in a special type of vicarious liability rule not recognized by English law; as for public policy the imposition of rigorous conditions of vicarious liability for a pilot surely does not go to basic English policy.

No comment is offered on the second point save to point out that the merits of the submission were considered on the footing that the New South Wales Court *was* exercising jurisdiction. The High Court did not say it was. In fact Windeyer, J., expressed the opinion that it was not.[47]

On the third point it is hard to resist the impression that the High Court did not do adequate justice to the "full faith and credit" aspect. This was possibly because the argument of counsel in favour of the applicability of "full faith and credit" requirements seems to have been inextricably mixed up with the argument based on the exercise of federal jurisdiction. It could well have stood on its own feet. Section 118 of the Constitution could indeed not apply to the Ordinances of the Territory, but s. 18 of the State and Territorial Laws and Records Recognition Act could. It has been argued in many places[48] that the constitutional mandate of s. 118 has removed the requirement of conformity to the local law of the *forum* in foreign tort cases and the same could be pressed in regard to s. 18. It would be a relevant circumstance here, however, that Australian cases involving the giving of full faith and credit to laws (as distinct from judgments) have not gone beyond excluding non-recognition of sister-State laws for reasons of public policy.[49] It does seem, however, that the first limb of the *Phillips v. Eyre* formulation is not based on a public policy concept; it is a genuine choice of law rule which refers

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44 (1868), L.R. 2 P.C. 193.

45 (1966), 40 A.L.J. 44, at p. 50.

46 Mr Gerber appears to rely on both points.

47 (1965), 39 A.L.J.R. 144, at p. 367; [1966] A.L.R. 553.

48 E.g. (1966), 40 A.L.J. 73, at p. 81.

49 E.g. *Merwin Pastoral Co. v. Moolpa Pastoral Co.* (1933), 48 C.L.R. 565; 39 A.L.R. 401.

the question to two systems of law, viz., the law of the place of commission of the tort *and* the *lex fori*.[50]

Li Lian Tan v. Durham is an unreported decision of the Supreme Court of South Australia.[51] The plaintiff (widow) sued in South Australia in respect of a wrongful death occurring in Victoria. Whilst the widow recovered in certain aspects of her claim, she failed in respect of a claim for *solatium*. This head of claim was introduced into South Australia by the Wrongs Act 1936-1959 but has no counterpart in Victoria. Chamberlain, J., held that the right to *solatium* was a matter of substance and not one of procedure and the action failed as the second limb of the *Phillips v. Eyre* principle had not been satisfied. It is possible that this applies a rejection of the English decision of *Machado v. Fontes*,[52] but the point can be argued either way.

Foreign judgments

In *Middleton v. Middleton*[53] Cairns, J., had to consider a situation where the husband had procured a decree of divorce from an Illinois Court on the basis of fraudulently given evidence as to the fact of the wife's desertion. The case came before him on a petition for a declaration that the Illinois decree was valid. Cairns, J., appears to have rejected the argument based on fraud as such, on the ground that fraud to vitiate a foreign judgment must be fraud going to the jurisdiction.[54] Nonetheless, he held that the conduct of the defendant, as affecting the proceedings, was sufficient to constitute either denial of material or "substantial justice".[55] The interesting (and contentious) point of the judgment arose from the fact that it appeared that the Illinois decree would be recognized by the law of Indiana which was the law of the husband's domicil. However, Cairns, J., refused to apply the principle of *Armitage v. A.-G.; Gillig v. Gillig*[56] on the ground that that principle was not an overriding one but was subject to exceptions, viz. (1) if there was fraud going to the point of jurisdiction and (2) if the decree was made in circumstances offending either natural justice or substantial justice. Accordingly he held that the marriage was still in existence. The decision has been subjected to vigorous criticism.[57]

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50 Wolff: *Private International Law* (2nd ed.), p. 493.

51 Noted however in (1966), 40 A.L.J. 16.

52 [1897] 2 Q.B. 231.

53 [1966] 2 W.L.R. 512; [1966] 1 All E.R. 168.

54 *Bater v. Bater*, [1906] P. 209. Later on in his judgment, however, he does appear to accept that there was fraud in relation to a fact going to jurisdiction.

55 See *Formosa v. Formosa*, [1963] P. 259; [1962] 3 All E.R. 419, and *Lepre v. Lepre* [1965] P. 52; [1963] 2 All E.R. 49, as to this second concept.

56 [1906] P. 135.

57 E.g. in (1966), 29 Modern L.R. 327.