Recent developments in Private International Law—1974-1975

P. E. Nygh
Professor of Law, Macquarie University

Jurisdiction

There were very few important decisions on the question of jurisdiction in Australia in 1974 and 1975. The decision of the House of Lords in *The Atlantic Star*[1] widening the concept of oppression and vexation to the point that the applicant for a stay of proceedings need only show that the plaintiff's legitimate advantage is outweighed by the disadvantage of the defendant was referred to in three Australian cases.

In *Clutha Developments Pty Limited v Marion Power Shovel Co Inc*,[2] an application by the defendant for a stay of proceedings on the ground that there was already litigation pending in the United States between the same parties on the same subject matter was refused. Although *The Atlantic Star* was referred to with approval, that case was distinguished by Master Cantor QC on the ground that the present proceedings did have a substantial connection with the forum.

In *Keenco v South Australian and Territory Air Service Ltd*,[3] Hogarth, J., distinguished *The Atlantic Star* on a similar basis: that the only connection between the parties and the English court in that case was the chance arrival in English waters of the Dutch-owned vessel. It did not, therefore, apply to a case where the defendant was a company registered in South Australia.

In *Maple v David Syme & Co Ltd*,[4] however, Begg, J., did apply the principles of *The Atlantic Star* to decline jurisdiction in an action brought by a resident of Victoria in New South Wales against the defendant who was the publisher of *The Age*, a Melbourne newspaper with only a limited circulation in New South Wales, when he had already brought an action in respect of the same alleged defamation in Victoria.

However, for the main part, the Australian courts continued to favour their own jurisdictions. In *Keenco v South Australian and Territory Air Service Ltd* Hogarth, J., at first instance, and the South Australian Full Court on appeal held that a clause in a contract providing 'that the agreement was to proceed only in accordance with Indonesian law' operated as a choice of law clause only. The decision supports the established rule that an agreement to submit to the exclusive jurisdiction

---

1. [1947] AC 436.
2. [1973] 2 NSWLR 173.
3. [1974] 23 FLR 155 at 183.
4. [1975] 1 NSWLR 97.

of a foreign court must be expressly stated: *Dunbee v Gilman & Co (Australia) Pty Ltd.*[5]

It must also explicitly state its exclusiveness. In *Sheldon Pellet Manufacturing Co Pty Ltd v New Zealand Forest Products Ltd,*[6] the clause of the relevant agreement provided that the agreement should 'in all respects be continued and carried into effect according to the law of New Zealand and be subject to the jurisdiction of the courts of the said Dominion, so far as may be and the circumstances would permit'. Master Cantor QC of the New South Wales Supreme Court, Common Law Division, held that this clause did not exclude or purport to exclude the jurisdiction of the New South Wales Supreme Court, following the earlier South Australian decision in *Contractors Ltd v MTE Control Gear.*[7]

Jurisdiction was also assumed by the Supreme Court of South Australia in *Hayel Saeed Anam & Co v Eastern Sea Freighters Pty Ltd.*[8] In that case the plaintiff, a resident of Yemen, sued the first defendant, a resident of South Australia, in respect of a contract made in South Australia for the carriage of goods from South Australia to Yemen. It was alleged that the goods had arrived in Yemen in a defective condition. The first defendant joined as co-defendant two companies both resident in Hong Kong. They objected to the jurisdiction of the South Australian court.

The Full Court rejected their objections. Since there was no argument that Hong Kong was the proper forum, the only choice lay between Yemen and South Australia. As between them, whatever disadvantage might arise from the necessity to get evidence from Yemen about the defective state of the goods on arrival, these would be suffered by the plaintiff, who had chosen the forum of South Australia, to a greater extent than by the second and third defendants. The Full Court regarded the fact that the law of South Australia governed the contract as the decisive factor when all other matters were equal.

The High Court did decline jurisdiction in *The Talabot.*[9] In that case an attempt was made to serve notice of a writ *in rem* on a ship in Singapore under Order 10 of the High Court Rules. Stephen, J., concluded that it would be contrary to the general practice of the Admiralty Courts and to the basic concept of Admiralty actions *in rem* to permit service of process *in rem* out of the jurisdiction. The *res* must, at the latest at the date of service, be physically within the jurisdiction. He therefore set aside the service effected in Singapore as a nullity. On appeal, the Full High Court affirmed the decision.[10]

The intricacies of the Service and Execution of Process Act 1901 (Cth) were discussed in two cases. In *Hodge v Club Motor Insurance Agency,*[11] the plaintiff, a passenger in a motor vehicle registered and insured in

---

5. (1968) 70 SR (NSW) 219.
6. [1975] 1 NSWLR 141.
7. [1964] SASR 47.
8. (1973) 7 SASR 200.
9. (1974) 3 ALR 576.
10. Digest of Unreported Cases 4 ALR p xxviii.
11. (1974) 2 ALR 421.

Queensland, had suffered personal injuries in an accident in South Australia. The driver died and the plaintiff brought action in South Australia against the driver's insurer who was not resident in South Australia or registered in that State as an approved insurer. The writ was served in Queensland in pursuance of the provisions of the Service and Execution of Process Act.

The Full Court held that it had jurisdiction under s 11(1)(d) of the Act which gives the court of the State in which the writ is issued jurisdiction over an interstate defendant if the act for which damages are sought to be recovered is done within that State. The plaintiff's claim against the insurer was not based in tort but on the quasi-contractual obligation of the insurer under Queensland law to compensate a person injured through the negligence of a deceased insured driver. The Full Court, however, held that s 11(1)(d) is not limited to a claim in tort nor to an act committed by the person who is sued. It is applicable when the act which gives rise to the liability on the part of the defendant occurred as the result of an act or omission within the State within which the writ was issued. In the present case the act in question was the collision which took place in South Australia.

In *Deer Park Engineering Pty Ltd v Townsville Harbour Board*,[12] the plaintiff had issued a writ out of the Supreme Court of Victoria and served in pursuance of the Act on the defendant in Queensland. The defendant applied by motion to set aside the service of the writ on the ground that the contract had been entered into in Queensland and that any breach of the contract had also taken place in Queensland.

Although Part II of the Service and Execution of Process Act does not make express provision for an appearance under protest, Gillard, J., followed the established practice of allowing the defendant to challenge the jurisdiction of the court. He accepted the proposition that, if it could be shown that the plaintiff would not have been able to obtain leave to proceed under s 11 of the Act in default of an appearance by the defendant, then the court will set aside service of the writ: see remarks of Dixon, C. J., and Fullagar, J., in *Tallerman & Co Pty Ltd v Nathans Merchandise (Vic) Pty Ltd.*[13]

The onus of establishing jurisdiction in such a challenge is on the plaintiff. The plaintiff in the present case had to make out a good arguable case that the contract had been made in Victoria or that a breach of the contract had occurred there. Since on the evidence it appeared that the contract had not been made or broken in Victoria, the defendant's challenge succeeded and service of the writ was set aside.

Recognition of foreign judgments

In *Crick v Hennessy*,[14] an application was made for registration of an English judgment under the Foreign Judgments (Reciprocal Enforcement) Act 1963 (WA). The judgment had been given in pursuance of

---

12. (1974) 5 ALR 131.
13. (1957) 98 CLR 93 at 108.
14. [1973] WAR 74.

jurisdiction under RSC Order 11 which is similar to the rules of the Supreme Court of Western Australia. The applicant could not establish that the judgment, being a judgment *in personam*, fell within any of the sub-paragraphs of s 9(2) of the Western Australian Act, but argued that it was sufficient that the English court had jurisdiction under its own rules or alternatively that the jurisdiction exercised by that Court was similar to the jurisdiction over foreign defendants possessed by the Supreme Court of Western Australia.

Burt, J., held, however, that the question of jurisdiction of the English court was to be determined in terms of the Western Australian statute which in s 9(2) laid down certain jurisdictional prerequisites as a condition for recognition. Furthermore, an English judgment would not be recognised in Western Australia merely because the jurisdiction exercised by the English court would in like circumstances have been exercised by the Supreme Court of Western Australia. His Honour, therefore, followed the action of the New Zealand Supreme Court in *Sharps Commercials Ltd v Gas Turbines Ltd*,[15] and of the Supreme Court of Ireland in *Rainford v Newell-Roberts*,[16] in rejecting the principle of reciprocity as a general basis of recognition despite remarks of Denning, L. J., in *Re Dulles Settlement (No 2).*[17] The principle of reciprocity has been applied in South Australia in *Malaysia-Singapore Airlines Ltd v Parker*,[18] but only because of the express provisions of the *Foreign Judgments Act* 1971 (SA).

Arbitration

In *Commonwealth v Adelaide Steamship Industries Pty Ltd*,[19] the South Australian Full Court refused to grant a stay of proceedings brought in breach of a valid arbitration clause. In that case a South Australian company had entered into an agreement with the Commonwealth for the building of two ships to be delivered to the Commonwealth at Newcastle in New South Wales. It was agreed in the contract that any dispute arising therefrom should be referred to arbitration, that the contract should be construed in accordance with the law of New South Wales, that the arbitration agreement should be deemed to be a submission to arbitration within the meaning of the New South Wales Arbitration Act 1902, and that the arbitrator should have all the powers conferred by the Second Schedule of that Act.

When a dispute did arise between the parties, the plaintiff South Australian company brought an action at law in the Supreme Court of South Australia and applied for summary judgment. The Commonwealth entered an appearance and indicated that it had a substantive defence to the claim. Subsequently, the Commonwealth applied for a stay of proceedings in reliance upon the arbitration clause.

The Full Court refused the stay. The Court sidestepped the issue of

---

15. [1956] NZLR 819.
16. [1961] IR 95.
17. [1951] Ch 842 at 851.
18. [1972] 3 SASR 300.
19. (1974) 24 FLR 97.

whether the power of the Court to grant or refuse a stay of proceedings in such a case was statutory being based on s 3 of the Arbitration Act 1891 (SA), as was suggested by the early English case of *Law v Garrett*,[20] or derived from the court's inherent powers at common law as has been the view expressed in later English cases,[21] by holding that, whatever might be the correct view, the power to stay proceedings should be exercised on the principles laid down in s 3 of the Arbitration Act. This section requires that the party seeking the stay apply for the same 'before taking any step in the proceedings' instituted in the court. In the present case the Commonwealth had filed an appearance and taken steps in the proceedings before applying for a stay. Hence, it did not qualify under s 3.

Domicile

The decision in *Smith v Smith*,[22] does not add much to the existing case law on the subject of domicile. It merely follows the decision of the New South Wales Court of Appeal in *Hyland v Hyland*[23] in holding that the onus of proving a change of domicile lies upon the party alleging it. In discharging this onus, the standard of proof is the civil one of the balance of probabilities, but in considering the evidence the court will pay regard to the 'more enduring character of the domicile of origin'. Consequently it was held that a man whose domicile of origin was Australian had not lost it despite his acquisition of Fijian nationality where he had established a business and a residence, as long as he still maintained strong family and business connections with Australia.

Contracts

There were two interesting decisions concerning the application of statutes of the forum to international contracts.

In *Keenco v South Australian and Territory Air Service Ltd*,[24] a company incorporated in the United States claimed the price of an aeroplane sold and delivered to the defendant, a South Australian company. The defendant claimed that the plaintiff had no right to proceed to judgment owing to the provisions of reg 8 of the Banking (Foreign Exchange) Regulations of the Commonwealth which prohibits the making of any payment to any person resident out of Australia without the authority of the Reserve Bank of Australia. The plaintiff had not obtained such authority. The South Australian Full Court rejected the proposition that an Australian court could not, or should not, proceed to hear a foreigner's case if payment in Australia of the judgment debt would require Reserve Bank authority. At most the regulation would be a ground for a stay of proceedings after judgment had been obtained.

Since the case was heard, the regulations have been amended to provide in reg 45 that no contract or transaction shall be invalid or

---

20. (1878) 8 Ch D 26.
21. *Racecourse Betting Control Board v Secretary for Air* [1944] Ch 114.
22. (1975) 25 FLR 38.
23. (1971) 18 FLR 461.
24. (1974) 23 FLR 115.

unenforceable by reason only that a provision of the regulations has not been complied with.

In *Goodwin v Jorgensen*,[25] the High Court had to consider the ambit of ss 41 and 47 of the Hire-Purchase Act 1960 (NSW) to deal with the right of the owner of goods to require the hirer to disclose their whereabouts and to seek their recovery respectively. In that case the hire-purchase agreement had been made in the Australian Capital Territory although both the owner and the hirer were residents of New South Wales and the goods were to be used in that State. No doubt the arrangement had been made by the owner in reliance on the earlier decision of the High Court in *Kay's Leasing Corporation Pty Ltd v Fletcher*,[26] where it was held that the provisions of the previous Hire-Purchase Act 1941 (NSW) relating to minimum hiring charges and minimum deposits only applied to contracts entered into within New South Wales. When the owner took proceedings under ss 41 and 47 of the present Act for repossession, it was argued that they were not applicable to contracts entered into outside New South Wales.

The High Court refused to infer this as a general policy underlying the statute. Each section of the Act had to be construed separately in the light of its own provisions. The sections dealing with minimum charges and deposits related to the formation and content of the contract and were for that reason confined to contracts made in New South Wales. In defining the ambit of s 41 of the 1960 Act, it was sufficient that the act or omission complained of took place in New South Wales, and in relation to s 47 it was enough that the defendant be present in New South Wales. It is interesting to note that the Court in construing the statute followed the basic principle laid down in *Kay's Leasing Corporation v Fletcher* by Kitto, J., namely that the ambit of the Act should not be construed merely by reference to the rules of private international law relating to contracts. Indeed, in some respects it may be said that the decision of the High Court in *Goodwin v Jorgensen* was a better application of that principle than *Kay's Leasing* itself. In the present case the court's only concern was to find an acceptable nexus by which the provision could be confined within the ambit of the territorial legislative power of New South Wales.

Currency

The effect of the decision of the House of Lords in *Miliangos v George Franks (Textiles) Ltd*,[27] permitting English courts to give judgment in foreign currency is still to be felt in Australia.

A conventional approach was taken by Starke, J., in *Bando Trading Co Ltd v Registrar of Titles*[28] where he upheld the refusal of the Registrar to register a mortgage over Victorian land expressed in United States dollars. The main reason for upholding this refusal was His Honour's adherence to the nominalist theory which views foreign currency as a

---

25. (1973) 1 ALR 94.
26. (1964) 116 CLR 124.
27. [1976] AC 443.
28. [1975] VR 353.

commodity rather than as money. Since the forms prescribed by the relevant regulations required that the monetary value of the principal and interest be stated, His Honour took the view that this had to be stated in money as it was understood in Victoria, that is to say, either in Australian currency or in terms which could be calculated into Australian currency through a conversion clause. The principle of nominalism was rejected by the House of Lords in *Miliangos*[29] in a decision given a few months after that of Starke, J. However, the English Court of Appeal had already cast doubt upon the principle in *Schorsch Meir GmbH v Hennin*[30] to which His Honour made no reference.

However, His Honour must have felt some unease about this aspect of his reasoning for he gave as an alternative ground that the expression in non-Australian currency impeded the practical working of the Department and the Registrar had the power in his discretion to refuse to register the instrument on that ground.

Also prior to the House of Lords decision in *Miliangos*, the High Court in *Re White; ex parte TA Field Pty Ltd*[31] had to consider a similar question. In that case the Chief Collector of Taxes of the Australian Territory of Papua New Guinea sought to enforce against the defendant a judgment debt obtained in that Territory and expressed in kina, the currency of that Territory. The judgment had been obtained in the Supreme Court of the Territory by the Chief Collector in respect of tax imposed under the Income Tax Act 1959 of the Territory.

When an attempt was made to register the judgment under s 20 of the Service and Execution of Process Act 1901 in the Supreme Court of New South Wales, the defendant sought to restrain the same. He raised two objections: that the judgment debt was in respect of a revenue debt which is not enforceable at common law, and secondly that it was expressed in a foreign currency.

As regards the first objection, the High Court held that the Service and Execution of Process Act provided for the execution of judgments throughout Australia and its Territories, and there was no reason why 'the language of the Act should be modified to accommodate it to the pre-existing common law obtaining in relation to the process and judgments of foreign countries'.[32] The High Court has, therefore, settled the dispute as to whether the obligation to register a judgment under s 20 of the Act is absolute or is qualified by reference to the common law rules of recognition in private international law.[33]

As regards the latter objection, the Chief Justice did refer to the decisions of the English Court of Appeal in *Schorsch Meir GmbH v Hennin* and *Miliangos v George Franks (Textiles) Ltd*,[34] but confined himself to stating that the kina was a currency authorised under the

29. Per Lord Wilberforce at 466.
30. [1975] QB 416.
31. (1975) 49 ALJR 351.
32. Per Barwick CJ at 352.
33. See Nygh, P. E., *Conflict of Laws in Australia*, 3rd ed (1976) pp 110-112 for a discussion of the earlier cases on the subject.
34. [1975] 2 WLR 555.

legislation of the Territory which in its turn derived its authority from the legislation of the Parliament of the Commonwealth. Consequently, it was a currency created by Australian law and could not be regarded as foreign. He would reserve the question whether or not a judgment expressed in truly foreign currency would be enforceable in Australia in that currency. Gibbs and Jacobs, JJ., did not even find it necessary to go that far: they based their concurrence in the decision on the ground that the language of s 20 imposes an obligation to register the judgment which was absolute and compelled registration even though the judgment was expressed in a currency which was not legal tender throughout Australia.

The High Court considered the question of conversion of the judgment from kina to Australian currency as a matter of machinery which did not prevent registration. Subsequently Taylor, C. J., at Common Law in the Supreme Court of New South Wales had to consider this matter in *TA Field Pty Ltd v Chief Collector of Taxes of Papua New Guinea.*[35] He held that the Supreme Court of New South Wales had an inherent power to issue a writ of execution expressed in Australian currency to the value of the judgment debt in kina converted as at the date of issue of the writ.

The actual problem is now moot. For by virtue of the Papua New Guinea Independence Act 1975 (Cth) the Service and Execution of Process Act 1901 ceased to apply to the Independent State of Papua New Guinea. There are no Australian territories at present which possess their own currency. The decision of the High Court and especially that of Taylor, C. J., at Common Law, in his reliance upon the inherent power of the Supreme Court indicate that there are no insuperable obstacles to Australian courts following the example of the House of Lords and giving judgment in foreign currencies.

Torts

Australia continued to make notable contributions to the development of the common law rules of private international law in the field of torts.

The New South Wales Court of Appeal reaffirmed its rejection of the new learning enunciated in *Boys v Chaplin.*[36] In *Schmidt v Government Insurance Office of New South Wales,*[37] the plaintiff wife was a passenger in a car driven by her husband. The car was registered and insured in New South Wales. She was injured in a motor accident which occurred in Victoria and was allegedly caused by her husband's negligence. Since her husband died as a result of the accident, she brought the action against the insurer, the Government Insurance Office of New South Wales. At the time of the accident the common law rule that spouses cannot sue each other in tort still applied in Victoria. But in New South Wales s 16B of the Married Persons (Property and Torts) Act 1901 permitted spouses to sue each other in relation to motor accidents arising out of the use of vehicles registered in New South Wales.

The defendant argued that there existed under Victorian law no civil

35. [1975] 2 NSWLR 101.
36. [1971] AC 356.
37. [1973] 1 NSWLR 59.

liability of the husband to the wife in respect of the particular claim. Moffitt, J. A., with whom Reynolds, J. A., agreed, rejected this argument by holding that s 16B removed the immunity as between husband and wife, provided 'the injury shall have been caused by conduct which would have constituted negligence between parties not under disability'. That condition was fulfilled 'because negligence between persons not under disability is actionable in Victoria and New South Wales'.[38]

This is, of course, contrary to the principle laid down by Lord Wilberforce in *Boys v Chaplin* as the standard rule, namely that there should be civil liability in respect of the relevant claim between the actual parties under both laws. But it conforms to the earlier principle laid down in *Machado v Fontes*,[39] which makes it sufficient that under the *lex loci delicti* the act of the defendant was 'wrongful' even though not giving rise to civil liability. This is in line with the approach taken by Kerr, J., (as he then was) in *Hartley v Venn*,[40] and the New South Wales Court of Appeal in *Kolsky v Mayne Nickless Ltd*.[41]

Hardie, J. A., who dissented, also departed from the Wilberforce approach. He took the view that civil liability should exist under Victorian law as a pre-condition for actionability in New South Wales, but he did not allow the flexible exception which Mathews, J., in Queensland had invoked on the very similar facts of *Warren v Warren*.[42]

The majority also based its judgment on the interpretation of the New South Wales provision as applying to all motor accidents wherever occurring arising out of the use of a motor vehicle registered in New South Wales. This was, of course, the logical counterpart of the earlier decision in *Zussino v Zussino*,[43] where it had been held that s 16B, as a matter of statutory construction, did not apply to an accident occurring in New South Wales arising out of the use of a motor vehicle registered in Queensland.

In *Corcoran v Corcoran*,[44] the situation was the converse of *Schmidt's* case. An inter-spousal action was brought in Victoria in respect of an accident which had occurred in New South Wales arising out of the use of a motor vehicle registered and insured in Victoria. By that time Victoria had abolished inter-spousal immunity entirely. The defendant argued that had action been brought in New South Wales, the plaintiff would not have succeeded since s 16B had been held in *Zussino v Zussino* not to be applicable to motor vehicles registered outside New South Wales. Consequently, there was no civil liability under the *lex loci delicti*.

Adam, J., felt constrained with some reluctance to follow the views of Lord Wilberforce in *Boys v Chaplin*. He therefore held that under the basic principle of double civil liability the plaintiff would not have succeeded. He then considered the flexible exception. In the first clear

---

38. At 64.
39. [1897] 2 QB 231.
40. (1967) 10 FLR 151.
41. (1970) 72 SR (NSW) 437.
42. [1971] Qd R 386.
43. (1969) 71 SR (NSW) 24.
44. [1974] VR 64.

example of interest analysis found outside the United States, His Honour concluded that both the Victorian statute and the New South Wales statute agreed on the one basic policy: to allow husbands and wives access to third party motor vehicle insurers in respect of accidents arising out of the use of a vehicle registered and insured within the forum. Although the exact machinery differed, this was the common policy of both states involved and hence it was a situation where no real conflict existed. New South Wales could have no objection to the application of Victorian law in fulfilment of a policy which it had pursued itself in *Schmidt v The Government Insurance Office of New South Wales.*

Corcoran v Corcoran is also remarkable as the first unqualified application in Australia of the principle laid down by Lord Wilberforce. In *Kemp v Piper*[45] and *Warren v Warren*,[46] the courts provided alternative reasoning supporting their conclusions. It means that there is a conflict of opinion between New South Wales and Victoria on the application of Lord Wilberforce's reasoning in Australia which may eventually have to be resolved by the High Court.

The actual issue of inter-spousal actions is now moot in Australia since the enactment of the Family Law Act 1975 (Cth) s 119 of which provides that spouses may sue each other in contract or in tort throughout Australia. But defamation still offers a scope for conflict of laws as there are marked differences especially between Victoria and New South Wales on the question of whether truth alone constitutes a defence and what constitutes the defence of fair comment.

In *Gorton v The Australian Broadcasting Commission*,[47] the plaintiff, a former Prime Minister of Australia, complained of having been defamed in a television broadcast received throughout Australia. Publication was proved in Victoria, New South Wales and the Australian Capital Territory. The defendants raised defences under the laws of each of these jurisdictions. In some respects these defences differed.

Fox, J., sitting as a judge of the Supreme Court of the Australian Capital Territory, proceeded on the basis that he should determine liability by reference to defences available in each jurisdiction where publication was alleged and in the Australian Capital Territory. This statement was based on two assumptions: one is that the place of publication is the place where the programme is seen by viewers and not where it is made in the studio, following *Jenner v Sun Oil Company Limited*,[48] and secondly that a separate tort of defamation occurs in each place where publication took place. On one of the imputations the plaintiffs succeeded in establishing defamation in both Victoria and the Australian Capital Territory, but was met with a successful defence under the law of New South Wales. The learned judge awarded damages in

---

45. [1971] SASR 25.
46. [1972] Qd R 386.
47. (1973) 22 FLR 181.
48. [1952] 2 DLR 526.

respect of the publication of that imputation in Victoria and the Australian Capital Territory only. However, His Honour did not apportion damages as between the publication in Victoria and that in the Territory.

The separate publication approach was taken to its logical conclusion by Blackburn, J., again sitting in the Supreme Court of the Australian Capital Territory, in *Alsopp v Incorporated Newsagencies Co Pty Ltd.*[49] In that case the plaintiff complained of an article published in the Nation Review which was distributed in all the States and Territories of Australia. Blackburn, J., following the principle laid down by Fox, J., in *Gorton v The Australian Broadcasting Commission*, proceeded on the basis that the plaintiff's claim was based not merely on the commission of a tort within the jurisdiction but on the commission of as many torts as there are jurisdictions.[50] He, therefore, considered the defences available to the defendant under the law of each State and Territory. Having found that the plaintiff succeeded under the law of each of the separate jurisdictions, His Honour then assessed the damages suffered in each of them separately, having regard to the number of copies sold and the likely impact of the defamatory material on persons who knew the plaintiff within that jurisdiction.

Some interesting comments were also made by Begg, J., in *Maple v David Syme & Co Ltd.*[51] That case concerned an alleged defamation by The Age newspaper which is published in Melbourne, but has a limited circulation in New South Wales. In the event the court declined jurisdiction over the New South Wales action and consequently His Honour's remarks on the matter of applicable law are *obiter.*

His Honour appears to have shared the view that the publication in New South Wales and Victoria were separate torts.[52] However, he would have given the *lex loci delicti* a much more limited scope for application. Noting that truth is a defence *per se* in Victoria under the common law applicable there, but that truth and public benefit must be pleaded under the New South Wales Defamation Act 1958, His Honour pointed out correctly that truth is not a justification to an action for defamation at common law. It is only a defence to a *civil* action for damages. Consequently, under the principle of *Machado v Fontes* which, as we have seen, is still good law in New South Wales, the defendant's action being not justifiable under the law of Victoria, would have been actionable in New South Wales under the substantive law of New South Wales. If the plaintiff had not been denied jurisdiction, he might have succeeded in New South Wales and recovered damages for the tort committed in both Victoria and New South Wales where he might have failed in Victoria. This would have been quite inconsistent with the reasoning of Lord Wilberforce in *Boys v Chaplin* both as regards the main principle and the flexible exception, since both plaintiff and defendant were residents of Victoria.

---

49. (1975) 26 FLR 238.
50. At 241.
51. [1975] 1 NSWLR 97.
52. At 104.

In none of the cases was reference made to the United States experience in this regard. The courts in the United States in multi-state defamation cases have frequently avoided the multiple tort approach, and have treated a multi-state defamation as constituting a single tort located in the domicile or principal place of business of the plaintiff as the place where he is likely to incur the most harm.[53] This has been backed up by statute in the form of the Uniform Single Publication Act which has been accepted in a number of States. It must be admitted, of course, that United States practice is not uniform and in *Brewster v Boston Herald-Traveller Corporation*,[54] the court followed the approach now favoured by Australian courts of treating the publication in each State separately.

Family Law

There were two cases dealing with the validity of marriages. In *Di Mento v Visalli*,[55] the New South Wales Supreme Court was told a most harrowing story. The petitioner for annulment was an immigrant from Sicily. Nine years earlier, as a 14-year-old girl, she had been abducted from Sicily by a disappointed suitor and kept by force in his house for several days. This led to a situation where the girl, under Sicilian custom, had to marry her abductor or face death at the hands of her father for presumed dishonour of her family. As Larkins, J., put it colourfully: 'She was to go to the altar. That much was clear. Her only choice was whether she went as a bride or in her own coffin'.[56]

She chose to marry him. They lived together for several years and a child was born of the relationship. There was no evidence presented as to whether such a marriage was valid under Italian law, although it did appear that, with the consent of the parties, an Italian court had pronounced a judicial separation between them in 1971 to enable the woman and her child to accompany her parents to Australia.

Although both parties at the time of the ceremony were Italian citizens domiciled in Italy, and the marriage had taken place in that country, the judge in holding the marriage to be void referred exclusively to Australian and English decisions on the law of duress. This is difficult to justify in theory, however convenient it may be for the forum. In similar English cases such as *H v H*,[57] and *Szechter v Szechter*,[58] where both parties were also foreign, the court has made enquiry into the foreign law relating to duress, even if it invariably came to the convenient conclusion that the foreign law on the point was the same as English law.

It is hard to believe that Italian law tolerates such a marriage, whatever may be local custom in its southern provinces. If Italian law were to consider such a marriage valid, or afterwards ratified by co-habitation,

---

53. *Restatement of the Conflict of Laws*, 2d s 150; see also *Bernstein v National Broadcasting Company* 232 F 2d 369 (1955); *Dale Systems Inc v Time Inc* 116 F Suppl 527 (1953).
54. 188 F Suppl 565 (1960).
55. (1973) 1 ALR 351.
56. At 355.
57. [1954] P 253.
58. [1971] P 286.

the question of public policy might have arisen in view of the policy later declared in s 43(a) of the Family Law Act 1975 that marriage is a union of a man and a woman voluntarily entered into.

In *Stankus v Stankus*,[59] a man originally domiciled in Lithuania, who had not seen nor heard from his wife since he fled that country in 1944, remarried in 1950 in Germany honestly believing that his wife was dead. In fact she was then living in Canada. He asserted that under German law the second marriage was valid in those circumstances. Evidence was given by a Lithuanian lawyer that under Lithuanian law the marriage was void, if in fact the wife was still alive at the time of the second ceremony, whatever the state of knowledge of the husband. Bray, C. J., held the second marriage to be void, applying Lithuanian law as the law of the man's domicile at the time of remarriage since he was in Germany merely as a transient. In so doing, he applied the now-established rule that the capacity to marry is governed by the law of the pre-nuptial domicile and not by the law of the intended matrimonial home, which in the present case could have been Germany.

His Honour also had to consider the question of proof of the earlier marriage. There was no marriage certificate available in relation to a religious ceremony which had taken place in Lithuania in 1933. The court accepted the factual evidence that a church ceremony had taken place, but required additional evidence from a Lithuanian lawyer that such a marriage was valid under Lithuanian law since 'it is notorious that in many European countries the religious ceremony is ineffectual to constitute a valid marriage by itself'.[60] This contrasts with other cases such as *Sheludko v Sheludko*,[61] where the court imposed no such requirement.

Succession

An interesting case is the decision of the New South Wales Court of Appeal in *In the Application of White*.[62] The deceased, who died leaving immovable property in New South Wales had referred to his wife as his beneficiary in a document of identity issued by the United States Army in 1944 whilst he was engaged as a civilian engineer with that Army in the South West Pacific. Helsham, J., at first instance had refused letters of administration with the will annexed on the ground that this document was not a proper will within the meaning of s 10 (1) of the Wills, Probate and Administration Act 1898 (NSW), which deals with the privileged wills of soldiers.

The Full Court affirmed his decision but on a different ground. It disagreed with the learned trial judge that the privilege of making an informal will was restricted to soldiers of Her Majesty's Forces. Instead, it held, following the decision of Sir Herbert Jenner in *In the Goods of Donaldson*,[63] that the privilege was not limited to any nationality or any armed forces, and even extended to persons serving in enemy forces.

---

59. (1974) 9 SASR 20.
60. At 22.
61. [1972] VR 82.
62. [1975] 2 NSWLR 391.
63. (1840) 2 Curt 386.

However, the Court concluded that the document of identity was not a will and it was not intended by the deceased to operate as a will. The Full Court reaffirmed the well-established principle that the validity of a testamentary disposition of immovable property is governed by the *lex situs.*

Direct recourse and full faith and credit

In *Hodge v Club Motor Insurance Agency,*[64] the question arose whether a Queensland statute granting direct recourse against the insurer of a deceased motorist whose car is registered and insured in Queensland, could be applied in South Australia so as to give a plaintiff in that State the right to sue the insurer, a right which he did not possess under the law of South Australia against that particular insurer.

The Full Court granted him that right. Bray, C. J., characterised the liability of the defendant as a liability in quasi-contract rather than in tort. Hence the appropriate choice of law rule was to apply the proper law of the obligation created by the Queensland statute on the Queensland insurance company and that was clearly the law of Queensland. His Honour followed by analogy the English decision in *De Greuchy v Wills,*[65] where it was held that the liability of a husband for the ante-nuptial debts of his wife which His Honour considered to be a quasi-contractual liability, was governed by the law of the place where the marriage took place and the husband was domiciled, i.o.w. with which the events giving rise to the liability were most closely connected. As the learned Chief Justice said:[66]

> '. . . . the South Australian law will enforce this cause of action, because it was imposed by the law of Queensland on the defendant when it issued the policy contemplating that the liability under it might extend to a person in the position of the plaintiff, and hence the law of Queensland is its proper law. The car, in my view, did carry with it on its travels through Australia a potential liability on the defendant and a potential right in persons who suffered bodily injuries through its driving. It would probably be different if the law of Queensland had purported to create such an obligation on an insurance company issuing its policies outside Queensland in conformity with some other system of law.'

Bright, J., agreed. Zelling, J., preferred to place his decision on a different ground. In his view, s 118 of the Constitution, together with s 18 of the State and Territorial Laws and Records Recognition Act 1901 (Cth), had a substantive and not merely evidentiary effect, contrary to the view expressed by Nygh.[67] He took the view that, provided there was no conflict between the law in South Australia and the law in Queensland, the effect of full faith and credit is to provide a substantive right in the cases to which the Queensland statute applies. Since the Queensland

---

64. (1974) 2 ALR 421.
65. (1879) LR 4 CPD 362.
66. 2 ALR at 426.
67. *Conflict of Laws in Australia,* 2nd ed (1971) pp 732-6, (see now 3rd ed (1976) pp 7-9).

statute on its proper construction applied to accidents occurring outside Queensland and there was no South Australian provision which prevented a plaintiff in South Australia from bringing action against the Queensland insurers, the plaintiff could invoke the right given him by the Queensland law.