Recent Developments in Private International Law — 1978–1980

J.L.R. Davis
Reader in Law, Australian National University

Jurisdiction

In the course of the 1970s the House of Lords developed a basis on which actions may be stayed which is very similar to the Scottish doctrine of forum non conveniens. This liberalising process was begun with *The Atlantic Star*[1] and continued in *Rockware Glass Ltd v MacShannon.*[2] The views of the House of Lords have been adopted and summarised by Powell J, in the Supreme Court of New South Wales, as meaning that on an application for a stay of proceedings: "(1) A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in a New South Wales Court if it is otherwise properly brought. (2) In order to justify a stay, two conditions must be satisfied, one positive, and the other negative: (a) the defendant must satsify the court that there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense, and (b) the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the New South Wales Court."[3] It has been suggested,[4] although with little force, that adoption of these views in Australia might be precluded by the decision of the High Court in *Maritime Insurance Co Ltd v Geelong Harbour Trust Commissioners,*[5] in which it was said that, for a defendant to succeed in having a local action stayed, he would have to show that it caused inconvenience "so enormous as practically to work the most serious injustice upon the defendant."[6] It is submitted, however, that even before the House of Lords decisions, Australian courts had adopted an approach similar to their Lordships, at least where the issue was whether a court in one State should stay proceedings before it, in favour of proceedings on the same subject-matter continuing in another State,[7] and in *Romeyko v Whackett (No 2)*[8] King CJ, in the Full Court in South Australia, assumed without reference to authority that the court might decline to exercise jurisdiction if it were not the convenient forum. It

1. [1974] AC 436.
2. [1978] AC 795.
3. *A v B* [1979] 1 NSWLR 57, at 61–2.
4. *Garseabo Nominees Pty Ltd v Taub Pty Ltd* [1979] 1 NSWLR 663, at 671 per Yeldham J.
5. (1908) 6 CLR 194.
6. *Logan v Bank of Scotland (No 2)* [1906] 1 KB 141, at 152 per Sir Gorrell Barnes P, quoted with approval by Griffith CJ in the *Maritime Insurance* case, 6 CLR at 199.
7. *Glasson v Scott* [1973] 1 NSWLR 689, at 702 per Larkins J.
8. (1980) 25 SASR 531 (FC), at 532.

might also be observed that on the facts of *Maritime Insurance Co Ltd v Geelong Harbour Trust Commissioners* the defendant was unable to point to another suitable forum, and so would not have satisfied the test to be derived from *Rockware Glass Ltd v MacShannon.*

The principles developed by the House of Lords have been applied in three cases in the period under review. In *Garseabo Nominees Pty Ltd v Taub Pty Ltd*[9] the issue between the parties was the effect of a clause in a contract between them. The contract was expressed to be governed by the law of New South Wales, which was also the State in which both companies were incorporated. The agreement, however, related to a cattle property in Queensland, and the defendant sought a stay of the New South Wales proceedings. Yeldham J granted the stay, pointing out that there was no physical connection between New South Wales and the subject-matter of the action, that a trial in Sydney would involve the defendant and a number of witnesses in substantial expense and inconvenience, and that "the measure of justice which all parties would receive in the Supreme Court of Queensland is precisely the same as that which they would receive in the Supreme Court of New South Wales."[10] The defendant had also given an undertaking that if proceedings on the same subject-matter were instituted in Queensland, it would not put in issue any matters other than those in issue in the New South Wales proceedings. In *A v B,*[11] on the other hand, Powell J refused to stay proceedings in New South Wales, in which the plaintiffs, residents of New South Wales, sought to make a child a ward of that court, even though the defendant, a resident of Queensland, had already applied to the Supreme Court of Queensland for the issue of a writ of habeas corpus directed to the plaintiffs and relating to the same child. The principal reason was that his Honour had serious doubts whether the Supreme Court of Queensland had jurisdiction in the matter,[12] but despite this he considered that the defendant had not discharged the onus of proving (1) that a trial in Queensland would "occasion *substantially* less inconvenience and expense to the parties; and (2) that the plaintiffs would not be deprived of any legitimate personal or juridical advantage."[13] The prime consideration in relation to the second point was that in a trial in Queensland the defendant would be legally aided, while the plaintiffs, in all probability, would not be.

It is well accepted that Australian courts have the jurisdiction, if it is necessary to prevent injustice, to restrain the institution or continuance of proceedings in foreign courts,[14] and in *Marriage of Takach*[15] the principles of *The Atlantic Star* and *Rockware Glass Ltd v MacShannon* were applied in deciding whether this jurisdiction should be exercised by the Family Court of Australia. The parties had been married in Australia, but had lived in Hong

9. [1979] 1 NSWLR 663.
10. At 670.
11. [1979] 1 NSWLR 57.
12. The jurisdiction of the several Supreme Courts in relation to the custody of children has also been extensively discussed in the period under review, and is considered below p 237.
13. [1979] 1 NSWLR 57, at 62 (his Honour's emphasis).
14. Dicey and Morris, *Conflict of Laws,* 10th ed (1980), 247 (r 30).
15. (1980) 47 FLR 441 (Fam Ct Aust).

Kong for 13 years before they separated, the wife returning to Australia and the husband remaining in Hong Kong. Some few months after the separation, the wife commenced proceedings in Hong Kong for dissolution of the marriage, and sought ancillary orders for maintenance and custody; the husband had, immediately prior thereto, commenced proceedings in the Family Court of Australia relating to maintenance, custody and access. Each party then sought, in the Family Court, to restrain the other from continuing. Gibson J considered that it was quite reasonable, and not unnatural, for the wife to have commenced her proceedings in Hong Kong since the procedures were quicker than in the Family Court, enforcement would be simpler and, at the time, the wife would not have been able to seek a dissolution of the marriage in Australia as the parties had not been separated for twelve months. His Honour was not convinced by the reasons advanced on behalf of the husband for continuing his proceedings in the Family Court, and concluded that the Australian matter should be stayed, allowing the wife to continue her action in Hong Kong.

These decisions are to be welcomed, and indicate the changes wrought by the House of Lords. Describing the situation prior to *The Atlantic Star,* Nygh commented that if "the defendant in the forum is the plaintiff abroad, the mere tactical advantage of having the carriage of the action would be sufficient to prevent a stay of either action".[16] In the light of the decisions discussed above, courts are now prepared to consider the whole matter on its merits, and, by means of stay or restraint, ensure that it is heard in the more natural forum. In relation to the staying of actions generally, it remains to be noted that in *The Courageous Coloctronis*[17] an action in rem against a ship temporarily within the jurisdiction of the Supreme Court of Western Australia was stayed, but the court was not referred to *The Atlantic Star.*[18]

A matter which attracted considerable judicial discussion during the period under review was the jurisdiction of the several State Supreme Courts in matters relating to the custody and guardianship of ex-nuptial children. (All proceedings concerning the maintenance, custody and guardianship of, and access to, the legitimate, legitimated and adopted children of partners to a marriage must be brought under the Family Law Act 1975 (Cth), which defines the jurisdiction of the court.[19]). In *A v B*[20] Powell J had serious doubts whether the Supreme Court of Queensland had jurisdiction to entertain proceedings seeking the issue of a writ of habeas corpus directed to persons resident in New South Wales, in relation to an infant present in that State. In *McM v C (No 1),*[21] in which the same issue of the jurisdiction to issue a writ of habeas corpus was more directly before his Honour, and fully argued, the same Judge was of the view that such jurisdiction depended upon either the child, or the person said to have control of the child, being present within the

16. *Conflict of Laws in Australia,* 3rd ed (1976), 58.
17. [1979] WAR 19.
18. The case was decided in 1977, prior to the decision of the House of Lords in *Rockware Glass Ltd v MacShannon.*
19. Nygh, *Conflict of Laws in Australia,* 3rd ed (1976), 382.
20. [1979] NSWLR 57; see above p 236.
21. [1980] 1 NSWLR 1, at 11–12.

State, or the child being ordinarily resident within the State. However, in relation to applications for custody either under the court's inherent jurisdiction, or legislation relating to the guardianship of infants,[22] it appears that a court may exercise jurisdiction so long as the parents are amenable to the jurisdiction (by presence or submission) and the child is an Australian citizen, even though the child is not present within the jurisdiction. In *Kelly v Panayioutou,*[23] Waddell J considered that the inherent jurisdiction of the court is derived from the Sovereign as parens patriae, and thus depends upon allegiance by nationality or presence. In relation to Australia, it follows that any child who is an Australian citizen within the meaning of the Australian Citizenship Act 1948 (Cth) may be within the jurisdiction of any State court, depending upon the amenability of the parents to the writ of a particular court. His Honour consequently regarded himself as able to entertain a custody dispute relating to a child who was an Australian citizen, but who was at the time of the suit in Cyprus. This reasoning was adopted and applied by McLelland J in *McM v C (No 2)*[24] in relation to a child who was in Victoria at the time of the proceedings in New South Wales. In *Romeyko v Whackett (No 2)*[25] the Full Court in South Australia considered both these decisions and provided considerable support for them. Matheson J (with whom King CJ and Zelling J agreed) concluded by saying that the court "has jurisdiction to entertain the father's application [for custody or access] as the child was physically present within the jurisdiction at the time he instituted proceedings. I would go further and hold that the Australian citizenship of the child is additional justification for the assumption of jurisdiction."[26] The court also dismissed as obiter the earlier comment of Wells J in *Chignola v Chignola*[27] that such jurisdiction depends on nothing but the physical presence of the child within the jurisdiction. It is obvious that if jurisdiction in custody matters may depend solely on the nationality of the child, there may be several State courts, to the writ of each of which the parents are amenable, having concurrent jurisdiction. McLelland J, in *McM v C (No 2),*[28] considered that the decision by a court whether to exercise its jurisdiction depended not so much on the principles adumbrated by the House of Lords in *Rockware Glass Ltd v MacShannon*[29] as on the principle that guides any court in the determination of matters relating to guardianship and custody, namely the paramount criterion of the welfare of the child.

The other matter concerning the jurisdiction of State and Territory courts to be considered in the period under review was the interpretation of various of the heads of jurisdiction under the respective Rules of Court, and under the Service and Execution of Process Act 1901 (Cth), s 11. One matter of general

22. Eg, Infants' Custody and Settlements Act 1899 (NSW), Guardianship of Infants Act 1940–1975 (SA).
23. [1980] 1 NSWLR 15n, relying on *Re P (GE) (An infant)* [1965] Ch 568 (CA).
24. [1980] 1 NSWLR 27.
25. (1980) 25 SASR 531.
26. At 543.
27. (1974) 9 SASR 479, at 487.
28. [1980] 1 NSWLR 27, at 45–8.
29. [1978] AC 795; see above p 235.

principle was raised by Sheppard J in *Stanley Kerr Holdings Pty Ltd v Gibor Textile Enterprises Ltd*[30] when he said that "the jurisdiction which is exercised under [the Rules of Court] ought only to be exercised upon proper evidence of the facts, that is to say, evidence from persons who are able to speak directly of them, and evidence which discloses in a little detail what the facts are, so as to enable the judicial officer who deals with the matter to come to a conclusion as to whether" the cause of action comes within a particular sub-rule.

In an action on a contract, it was held by Douglas J, in *Express Airways v Port Augusta Air Services*,[31] that an acceptance of an offer sent by telegram through the post office directly to the defendant's telex machine is to be regarded as acceptance at the defendant's place of business, and not at the point of sending. Although text-books on the law of contract consider that the "general rule is that a postal acceptance takes effect when the letter is posted or when a telegram is handed in at the Post Office"[32] his Honour considered that in this case, transmissions having taken place by the use of telex, the situation was analogous to that in *Entores Ltd v Miles Far East Corp*,[33] in which the acceptance had been transmitted from the defendant's telex to the plaintiff's telex, and was regarded as taking effect at the point of receipt. This continued weakening of the "posting rule" is to be welcomed, as the "rule" is an anachronism which is scarcely relevant in today's advanced communication technology. Since the Australian Postal Commission uses its own telex facilities for the transmission of all telegrams these days, it may be argued, by analogy with the decision of Douglas J, that the "posting rule" now applies only to letters.

On the issue of the place at which a contract is breached, for the purpose of establishing jurisdiction, it was held in *Stanley Kerr Holdings Pty Ltd v Gibor Textile Enterprises Ltd*[34] that express repudiation by telex was to be regarded as the same as repudiation by letter,[35] and took effect at the place from whence the telex was sent. Giving rise to more difficulties was the consideration, in *McFee Engineering Pty Ltd v CBS Constructions Pty Ltd*,[36] of the place of a breach consisting of failure to pay money due. Yeldham J, of the Supreme Court of New South Wales, pointed out that the place of payment, and hence of breach, depends upon the construction of the contract, and acknowledged that it may often, in the absence of express provision, be the place of residence or business of the creditor which, in this case, was New South Wales. However, the contract with which he was concerned was connected solely with Queensland, and hence he regarded that State to be the place at which the moneys ought to have been paid.

30. [1978] 2 NSWLR 372, at 375, relying on *GAF Corp v Amchem Products Inc* [1975] 1 Lloyd's Rep 601, at 608–9 per Megarry J.
31. [1980] Qd R 541.
32. *Chitty on Contracts*, 25th ed (1983), Vol. 1, para 66.
33. [1955] 2 QB 327 (CA).
34. [1978] 2 NSWLR 372, at 378.
35. See *Safran v Chani* (1970) 72 SR (NSW) 146 (CA).
36. (1980) 28 ALR 339 (NSW Sup Ct), at 348–351.

A further ground under the Rules of most State Supreme Courts for taking jurisdiction in a contract action is that the contract is governed by the law of the State.[37] The contract before the court in *Stanley Kerr Holdings Pty Ltd v Gibor Textile Enterprises Ltd*[38] was one appointing the plaintiff as the defendant's agent for Australia and New Zealand for the distribution of hosiery. The plaintiff was incorporated and carried on business in New South Wales, while the defendant was an Israeli company, with no place of business in Australia. The plaintiff argued that the contract was governed by the law of New South Wales. Sheppard J, after considering the agreement as a whole, concluded that he had "a serious doubt as to whether the proper law is the law of New South Wales, and that being the position the question must be resolved in favour of the defendant."[39] The decision highlights yet again the unfortunate fact that too seldom do parties to a contract consider the impact of private international law on their bargain, and make express provision for a proper law.

Jurisdiction to hear an action in tort, under both the Rules of Court and the Service and Execution of Process Act 1901 (Cth) was considered by Master Sharpe, of the New South Wales Supreme Court, in *Hall v Australian Capital Territory Electricity Authority*.[40] It was alleged that a fire had broken out at the defendant's electricity sub-station, in the Capital Territory, and spread from there to cause damage to 96 farm properties, most of them in New South Wales. This led to 96 actions being commenced against the defendant, 7 in the Supreme Court of the Australian Capital Territory, and the remaining 89 in various courts in New South Wales. It is not clear from the report, but it appears that the claims were in negligence and nuisance. The plaintiff, one of those 89, argued that the Supreme Court of New South Wales was able to take jurisdiction. His first argument relied on s 11(1)(a)(1) of the Service and Execution of Process Act 1901 (Cth), which concerns actions in which "the subject-matter of the suit, so far as it concerns such defendant, is — (1) land or other property situated or being within the State . . . in which the writ was issued" but Master Sharpe dismissed that argument summarily by saying that the "land or other property" referred to in the sub-paragraph must be the property of the defendant.[41] The second argument was based on s 11(1)(d) of the same Act — "that any act or thing . . . for which damages are sought to be recovered was done . . . within that State" — which the Master considered to be similar in many respects to two paragraphs of the Rules of Court, para (a) — "cause of action arising in the State" — and para (d) — "tort committed in the State" — on which the plaintiff also relied. This argument was also dismissed, on the ground that the mere suffering of damage within the jurisdiction has never been held sufficient to invoke any of those provisions.[42] While one may, with respect, agree with that proposition,

37. This ground is not available in Queensland or the two Territories (Nygh, op cit, 32) nor under the Service and Execution of Process Act 1901 (Cth).
38. [1978] 2 NSWLR 372.
39. At 380.
40. [1980] 2 NSWLR 26.
41. At 29.
42. At 29, 30.

it can be argued that in this case more occurred in New South Wales than the mere suffering of damage.

So far as the action in negligence is concerned, one may use the analogy of a manufacturer's liability to the ultimate consumer. In *Jacobs v Australian Abrasives Pty Ltd*[43] it was said that the "foundation of the action is that the plaintiff, although in another State, was one of the anonymous class of users of the [product] within the contemplation of the defendant. The breach of duty . . . is not complete until the dangerous article . . . reaches the consumer or user. He has no cause of action unless or until he suffers damage as a result of that breach of duty, but . . . the tort of negligence is committed when and where the breach of duty is complete . . ." It is to be regretted that this view was not referred to in *Hall's* case.

So far as the action in nuisance is concerned, the gist of such an action is "interference with an occupier's interest in the beneficial use of his land"[44] and such interference, it is submitted, must necessarily occur where the land is situated. The plaintiff in *Hall's* case was, however, able to point to one paragraph of the New South Wales Rules of Court on which he could rely; para (e), a provision unique in Australia, permits service out of the jurisdiction "where the proceedings are founded on, or are for the recovery of, damage suffered wholly of partially in the State caused by a tortious act or omission wherever occurring." The Master dismissed an argument by the defendant that this paragraph was ultra vires as not being for the "peace, welfare, and good government of New South Wales"[45] principally on the ground that it did not direct the service of process in such a case but merely afforded a ground for the exercise of judicial discretion. Although the plaintiff had clearly brought his action within this paragraph, jurisdiction was declined on two grounds. First, since the defendant was the Commonwealth within the meaning of Part IX of the Judiciary Act 1903 (Cth), s 56(1) thereof required the suit to be brought either in the High Court or in "the Supreme Court of the State or Territory in which the claim arose". Relying only on *George Monro Ltd v American Cyanamid and Chemical Corp,*[46] a decision which has lost much of its force since the opinion in *Distillers Co (Biochemicals) Ltd v Thompson,*[47] the Master considered that the claim had arisen in the Capital Territory. It is submitted that the arguments put forward above as to the place of commission of a tort are equally relevant to this provision, and that the plaintiff's claim could be seen as arising in New South Wales. The judgment concluded with the observation, albeit obiter in view of the interpretation of s 56(1) of the Judiciary Act 1903 (Cth), that "it would appear onerous for a defendant to litigate a multiplicity of actions in various District and Supreme Courts when all could perhaps be dealt with conveniently in the Supreme Court [of the Australian Capital Territory]."[48]

43. [1971] Tas SR 92, at 96–7 per Burbury CJ, relying on *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458 (PC).
44. Fleming, *The Law of Torts,* 6th ed (1983), 384.
45. Constitution Act 1902 (NSW), s 5.
46. [1944] 1 KB 432 (CA).
47. [1971] AC 458 (PC).
48. [1980] 2 NSWLR 26, at 33; the correctness of this supposition is considered below p 243.

The other head of discretionary jurisdiction under the Rules of Court to be considered in the period under review was that concerned with the joinder of parties outside the jurisdiction in an action properly commenced against a defendant within the jurisdiction. There is provision in all jurisdictions[49] permitting service if the defendant outside the jurisdiction is a necessary and proper party to the proceedings, and in *Massey v Heynes*[50] it was said that this requirement is met if the defendant would have been properly sued if he had been within the jurisdiction. This test was applied in *Eversure Textiles Manufacturing Co Ltd v Webb*[51] to permit service on foreign companies which were, together with the defendant, subsidiaries of the same holding company and the identity of the particular company which was liable to the plaintiff was in doubt. The same test was applied in *Coppin v Tobler Bros Canberra Marine Centre Pty Ltd*[52] in an action against the manufacturer and retailer of an allegedly defective product, the manufacturer being within the jurisdiction, to permit service on the retailer, which was outside the jurisdiction.

A further provision, unique to New South Wales, permits service "where the proceedings are for contribution or indemnity in respect of a liability enforceable by proceedings in the Court." In *Angus & Coote Pty Ltd v Qantas Airways Ltd*[53] the plaintiff having commenced proceedings against the defendant for breach of the latter's obligations as a bailee, the defendant sought to rely on this paragraph in order to join as cross-defendant a West German company which was alleged to have breached its contract with the defendant. Sheppard J held that the paragraph applies only to proceedings brought pursuant to s 5(1)(c) of the Law Reform (Miscellaneous Provisions) Act 1946 (NSW),[54] which applies only when there is common liability in tort and not, as here, where the cross-defendant's only liability was for breach of contract. His Honour considered that this was a case in which any doubt on the construction of the rules permitting service "ought to be resolved in favour of the foreigner."[55]

One further matter relating to jurisdiction which received consideration during the period under review concerned the procedure to be adopted when jurisdiction is sought to be based on the Service and Execution of Process Act 1901 (Cth). Difficulties have arisen over the past 60 years on the relationship between ss 4 and 11 of the Act,[56] but in *Victorian Broadcasting Network Ltd v Whitlam*[57] the Full Court of the Federal Court of Australia, on appeal from the Supreme Court of the Australian Capital Territory, said that "the practice which seems to be most widely adopted, and which does not appear to be

49. Nygh, op cit, 36, n 20.
50. (1888) 21 QBD 330 (CA), at 338 per Lord Esher MR.
51. [1978] Qd R 347, at 351–2.
52. [1980] 1 NSWLR 183, at 189.
53. [1979] 2 NSWLR 398.
54. For a discussion of the legislation, common to all Australia jurisdictions, see Fleming, op cit, 233–4.
55. [1979] 2 NSWLR 398, at 402, quoting from *The Hagen* [1908] P 189 (CA), at 201 per Farwell LJ.
56. The difficulties are discussed in Nygh, op cit, 52–3.
57. (1980) 31 ALR 184, at 192.

contrary to any views expressed by judges of the High Court, is that in an appropriate case the court may stay proceedings which have been served under the Act where the proceedings do not fall within any of the paragraphs of s 11, but it appears that it may not set aside the writ or the service of the writ. We think that the practice of granting a stay is not in conflict with *Luke v Mayoh* (1921) 29 CLR 435, and is in accordance with the great weight of practice in New South Wales and Victoria; moreover, it is justifiable as resting on inherent jurisdiction . . ." Some few months previously Yeldham J, in the Supreme Court of New South Wales, had come to a similar conclusion,[58] but the matter still awaits conclusive determination by the High Court.

Jurisdiction over foreign land

We have noted above that in *Hall v Australian Capital Territory Electricity Authority*[59] Master Sharpe considered that all the actions against the defendant might conveniently be dealt with in the Supreme Court of the Australian Capital Territory. However, 89 of the 96 suits were (it is assumed) in negligence and nuisance relating to land in New South Wales which, for the purposes of the rule in *British South Africa Co v Companhia de Mocambique*[60] is "foreign land" to a court in the Capital Territory. Although the matter has not yet come before that court, when it does it will put in issue for Australian law the width of application of the *Mocambique* case.[61] If it should be held that the rule applies to these actions, the plaintiffs will be forced to commence fresh proceedings in the High Court, an avenue which is open to them by the fortuitous fact that the defendant happens to be the Commonwealth for the purposes of Part IX of the Judiciary Act 1903 (Cth), and s 56(1)(a) thereof permits such a suit to be brought in the original jurisdiction of the High Court.[62] It would appear to be quite clear that since the jurisdiction of the High Court is Australia-wide, land anywhere within the territorial limits of Australia is not "foreign" for these purposes. However, this discussion serves to highlight yet another reason for questioning the decision in *Hall's* case. Had the defendant there not been the Commonwealth the plaintiffs might well have been denied access to any court.

Federal jurisdiction

By an amendment in 1976, s 44 of the Judiciary Act 1903 (Cth) now provides that any matter that is at any time pending in the High Court may "be remitted by the High Court to any federal court, court of a State or of a Territory that has jurisdiction with respect to the subject-matter and the parties. . ." This provision was first considered by a Full Bench of the High Court in *Johnstone v Commonwealth,*[63] and a majority, at least, gave full

58. *McFee Engineering Pty Ltd v CBS Constructions Pty Ltd* (1980) 28 ALR 339, at 347.
59. [1980] 2 NSWLR 26; above p 241.
60. [1893] AC 602.
61. Nygh, op cit, 61 considers that the *Mocambique* rule extends to actions for negligence and nuisance, but Sykes and Pryles, *Australian Private International Law* (1979) 44 argue that there is no need for the rule to be so extended, since title and possession would not be in dispute.
62. [1980] 2 NSWLR 26, at 32–3.
63. (1979) 143 CLR 398 (Gibbs, Murphy and Aickin JJ, Stephen and Jacobs JJ dissenting).

weight to the width of the discretion thereby granted. The plaintiff claimed damages for personal injuries alleged to have been caused by the negligence of the Commonwealth. The alleged negligence occurred in South Australia, and thus by the operation of s 56(1) of the Judiciary Act the only courts having jurisdiction were the High Court or the Supreme Court of South Australia. However, the court pointed out that the Supreme Court of New South Wales has jurisdiction with respect to actions in tort generally, and also with respect to some such actions against the Commonwealth, and hence, in the words of s 44, it "has jurisdiction with respect to the subject-matter and the parties." The case was therefore remitted to that court. Gibbs and Murphy JJ stressed[64] that s 44 ought not to be given a narrow or restrictive interpretation, and that no useful purpose would be served by placing any fetters on a power of remitter which was obviously intended to be large and liberal.

Enforcement of foreign judgments

The litigation in England between Nelson Bunker Hunt and BP Exploration Co (Libya) Ltd which commenced in May 1975 and concluded in February 1982 with the House of Lords upholding the decision that Hunt should pay the company some $US15.5 million and £8.5 million[65] has provided a spate of decisions relating to the legislation in New South Wales, Queensland and New Zealand for the enforcement of foreign judgments, since Hunt owned property in these jurisdictions and the company has sought to enforce its English judgment there. The most important decision was that of the High Court,[66] on appeal from the Supreme Court of Queensland. The Court was unanimous in holding that the Reciprocal Enforcement of Judgments Act 1959 (Qld) was within the legislative competence of the Queensland Parliament, and enabled the registration there of foreign judgments even though the only connection with the State was the situation there of property owned by the judgment debtor. The fact that neither party to the judgment had any connection, by residence or otherwise, with the State was regarded as irrelevant. Since the corresponding legislation in the other States and Territories is in substantially the same terms,[67] the decision is clearly equally applicable throughout the country. In the course of their joint judgment, Stephen, Mason and Wilson JJ observed[68] that in Queensland no rules of court had been made relating to service on the judgment debtor of notice of registration of the judgment, and that this could lead to difficulties in the enforcement of the judgment.[69] Although their Honours declined to explore these difficulties, that task was undertaken shortly thereafter by Hunt J, in the Supreme Court of New South Wales.[70] His Honour was of the view[71] that Pt

64. At 402 (Gibbs J) and 407 (Murphy J).
65. *BP Exploration Co (Libya) Ltd v Hunt* [1982] 2 WLR 253 (HL).
66. *Hunt v BP Exploration Co (Libya) Ltd* (1980) 144 CLR 565.
67. For reference to the legislation see Nygh, op cit, 98 and 104.
68. 144 CLR 565, at 574–5.
69. This defect has now been remedied: Rules of Court under the Reciprocal Enforcement of Judgments Act 1959, r 7, Gov Gaz 16 August 1980, 2328.
70. *BP Exploration Co (Libya) Ltd v Hunt* [1980] 1 NSWLR 496.
71. At 502–3.

59 of the Supreme Court Rules was the only Part which might have been relevant to the question of service of notice outside the jurisdiction, but that that Part contained no provision for such service. He went on to say[72] that even if he were wrong on that point, the company had not complied with Pt 10, r 5 of the Supreme Court Rules, which requires non-personal service outside the State to be in accordance with the law of the country where service was to be effected. He therefore set aside the purported service of the order that had been made on Hunt. A further aspect of enforcement of a registered foreign judgment is the ability of the judgment creditor to obtain a "Mareva" injunction[73] to restrain the judgment debtor from removing his assets from the jurisdiction in which the judgment is registered. Powell J, in the Supreme Court of New South Wales,[74] considered that the court did not have jurisdiction to grant such injunctions in any case, but the Supreme Courts of Queensland[75] and New Zealand[76] not only held that they had such jurisdiction, but also exercised it in favour of the BP company.[77] Although, in proceedings originating within an Australian jurisdiction, it appears that a "Mareva" injunction will not issue unless the defendant is otherwise amenable to the jurisdiction,[78] this restriction was not considered by the courts which permitted such injunctions in relation to Hunt's property. It may well be that they are distinguishable as being concerned with the effective enforcement of a judgment already obtained overseas. The remaining conclusion to arise from this litigation was the decision of Hunt J[79] that registration of a judgment under the Foreign Judgments (Reciprocal Enforcement) Act 1973 (NSW) does not create obligations inconsistent with the Banking (Foreign Exchange) Regulations, made under the Banking Act 1974 (Cth).

The question of the enforcement of a foreign maintenance agreement was discussed at some length by the New South Wales Court of Appeal in *McLean v McLean.*[80] The parties had entered into a separation agreement in the State of Alabama in 1973, which provided, inter alia, for the husband to pay his wife maintenance for a fixed period. Shortly thereafter the parties were divorced in Alabama, the court at that time approving the terms of the agreement. The former wife then brought these proceedings in New South Wales seeking, in part, payment of unpaid alimony. The principal issue before the court was whether the proceedings were a "matrimonial cause" within the meaning of the Family Law Act 1975 (Cth), thus rendering the matter justiciable only by the Family Court of Australia. The Court of Appeal, however, was unanimous in concluding that it was not such a

72. At 503–4.
73. For a brief explanation of these injunctions see, eg, Dicey and Morris, op cit, 1198–9.
74. *Ex parte BP Exploration Co (Libya) Ltd, re Hunt* [1979] 2 NSWLR 406.
75. *BP Exploration Co (Libya) Ltd v Hunt,* Kelly J, 21 September 1979 (unreported).
76. *BP Exploration Co (Libya) Ltd v Hunt,* [1980] 1 NZLR 104.
77. The decision of Powell J was subsequently overruled in *Riley McKay Pty Ltd v McKay* [1982] 1 NSWLR 264 (CA).
78. Dicey and Morris, op cit, 1198.
79. [1980] 1 NSWLR 496, at 505–6.
80. [1979] 1 NSWLR 620.

"matrimonial cause". Hutley JA pointed out[81] that the phrase "maintenance agreement" used in the Family Law Act, although given no spatial limitation, must be read as referring only to "Australian" maintenance agreements, i.e. "agreements initially intended to receive the sanction of the Family Court of Australia under s 87; or a maintenance agreement which is made, and intended to operate, according to Australian law under s 86; or to overseas maintenance agreements which are to operate under s 89 . . ." The latter provision is confined by the Act to agreements having force and effect in a prescribed overseas country, and since it was accepted by the parties that Alabama was not such a country, the Court of Appeal held that the agreement before it had always been wholly outside the purview of the Act. Hence the New South Wales Supreme Court had jurisdiction to enfore the agreement and, by its proper law (that of Alabama), unpaid alimony thereunder had the status of a debt.

The Federal Government, during the period under review, was concerned with the possible enforcement in this country of judgments given in the United States awarding treble damages under the United States antitrust laws. The matter was brought to a head by the proceedings commenced by the Westinghouse Electric Corporation in the District Court in Chicago, alleging violations of antitrust laws by a number of uranium producers, including some Australian companies.[82] The Government's initial response was to pass the Foreign Antitrust Judgments (Restriction of Enforcement) Act 1979 (Cth), under which the Attorney-General may declare that a judgment given in foreign antitrust proceedings shall not be recognised or enforceable in Australia. Subsequently the Attorney-General, pursuant to that Act, declared that judgments given in the United States District Court for the Northern District of Illinois, Eastern Division, in favour of Westinghouse Electric Corporation, should not be recognized or enforceable in Australia.[83] The Government also pursued the matter at the Meeting of Commonwealth Law Ministers at Barbados in April/May 1980. The Communique from that meeting noted that of "particular concern was the question of the recognition and enforcement of multiple damages awards, a feature of antitrust judgments under United States law."[84]

The other matter relating to the enforcement of foreign judgments to arise in the period under review is also legislative rather than judicial. At a meeting of the Standing Committee of Commonwealth and State Attorneys-General in July 1980 it was agreed that uniform legislation would be introduced in all jurisdictions to enable judgments given in Papua New Guinea in respect of income tax to be enforced within Australia. The Government of Papua New Guinea had experienced difficulties in enforcing such judgments against expatriate Australians who had returned to this country, as all foreign judgments of a revenue nature are regarded as purely local both at common

81. At 625.
82. For a full discussion of the Westinghouse case see Maher, 'Antitrust Fallout: Tensions in the Australian-American Relationship' (1982) 13 FL Rev 105.
83. *Commonwealth of Australia Gazette* No S105, 8 June 1979.
84. Meeting of Commonwealth Law Ministers, Barbados, 28 April-2 May 1980, *Memoranda*, vii.

law and under the reciprocal enforcement legislation.[85] Up to the end of 1980, the Attorneys' agreement had been given effect in South Australia,[86] Tasmania[87] and Western Australia[88] but in each case is to commence on a date to be fixed by Proclamation, in order to ensure a uniform commencement date throughout Australia.

Domicile

1978 saw a start being made to the legislative reform of the concept of domicile. In 1970 the Standing Committee of Commonwealth and State Attorneys-General received a report recommending a number of changes in the law of domicile; in 1974 the Committee of Australian and New Zealand Law Ministers agreed in principle that reforms were desirable, and uniform legislation was drafted for its consideration; in August 1976 the Domicile Act 1976 (NZ) received the Royal Assent, and the first Australian jurisdiction to pass similar legislation was Victoria, the Domicile Act 1978 (Vic) receiving the Royal Assent on 19 December 1978. To the end of 1980, uniform legislation had also been enacted in New South Wales, the Northern Territory, Tasmania and South Australia.[89] In each case the legislation is to commence on a date to be fixed by Proclamation, in order to ensure a uniform commencement date throughout Australia.[90]

Some of the changes to be made by this legislation are similar to those already effected (for the purposes of the respective statutes) by s 5(4) of the Marriage Act 1961 (Cth) and s 4(3) of the Family Law Act 1975 (Cth); a wife's dependent domicile will be abolished,[91] the rule of the revival of the domicile of origin will be abolished[92] and a person will have capacity to acquire an independent domicile on attaining the age of 18 or earlier marriage.[93] However, the uniform legislation will be prospective only in effect, since by s 4(1) thereof the domicile of a person at a time before the commencement date shall be determined as if the legislation had not been enacted, whereas the Commonwealth legislation is retrospective, providing rules for the determination of a person's domicile at any time, whether before or after the

85. Nygh, op cit, 99 and 198. The agreement of the Standing Committee of Attorneys-General is referred to in, eg, Parl Deb (WA), Vol 229, 1823.
86. Foreign Judgments Act Amendment Act 1980 (No 66 of 1980).
87. Foreign Judgments (Reciprocal Enforcement) Amendment Act 1980 (No 84 of 1980).
88. Foreign Judgments (Reciprocal Enforcement) Amendment Act 1980 (No 61 of 1980).
89. Domicile Acts: Vic, 1978 (No 9231); NSW, No 118, 1979; NT, No 78 of 1979; Tas, No 38 of 1980; SA, No 81 of 1980. The Victorian statute differed slightly from the other Acts in relation to the domicile of children, but it was amended in 1982 (Act No 9780) in order to ensure complete uniformity throughout Australia.
90. The Northern Territory Act commenced on 21 September 1979 (*Commonwealth of Australia Gazette* No G38, 21 September 1979, p. 1) but the legislation in the other States had not been proclaimed to commence by the end of 1980.
91. Domicile Acts, s 5; cp Family Law Act 1975 (Cth), s 4(3)(b); Marriage Act 1961 (Cth), s 5(4)(b).
92. Domicile Acts, s 6; cp Family Law Act 1975 (Cth), s 4(3)(a); Marriage Act 1961 (Cth), s 5(4)(a).
93. Domicile Acts, s 7; cp Family Law Act 1975 (Cth), s 4(3)(c), Marriage Act 1961 (Cth), s 5(4)(c).

commencement of either of the Acts. Section 8 of the uniform legislation will make various changes to the rules for the determination of a child's domicile. The section makes no change to the common law rules regarding a legitimate child whose parents are both alive and living together. But if the parents are living separately and apart, or one parent has died, the child (including, for these purposes, an ex-nuptial child — s 8(1)(b)) will take the domicile of the parent with whom he has his principal home (s 8(2)). The phrases "living separately and apart" and "principal home" are not defined in the legislation, and are clearly questions of fact to be determined in each instance. Section 8(3) repeats the substance of provisions formerly contained in legislation on adoption, in providing that the effect of adoption on domicile is to treat the child in all respects as if he were the lawful child of his adopting parent or parents.

Section 9 spells out in clear words the intention that a person must have in order to acquire a domicile of choice in a country; it will be "the intention to make his home indefinitely in that country", rather than the requirement at common law of an "intention of permanent or indefinite residence."[94] The domicile of origin will, under this legislation, lose the retentive power it had at common law;[95] by s 11 the "acquisition of a domicile of choice in place of a domicile of origin may be established by evidence that would be sufficient to establish the domicile of choice if the previous domicile had also been a domicile of choice." Finally, s 10, read with the definition contained in s 3, clarifies the position of domicile in a federation, and abrogates the decision in *Re Benko.*[96] When that section comes into operation, a person who is at common law domiciled in a federation, but not in any constituent State or Province thereof, shall be domiciled in the State or Province with which he has for the time being the closest connection.

Contract

An interesting, and rarely discussed, point as to the law governing the authority of an agent to contract on behalf of his principal arose before Master Allen in *Samarni v Williams.*[97] The parties were involved in a motor accident in New South Wales. The plaintiff, wishing to commence proceedings in that State for damages resulting therefrom, was unable to find the defendant. The plaintiff's solicitors then entered into a contract with RACV Insurance Pty Ltd, the defendant's authorized insurer under the Motor Car Act 1958 (Vic), as to the place and manner of service of originating process in the proceedings. The insurer subsequently sought to deny the effectiveness of this agreement, for the purpose of preventing the continuation of the proceedings in New South Wales. It argued that it had become the defendant's agent solely by the operation of the Motor Car Act

94. Dicey and Morris, op cit, 110 (r 10), but cp Nygh, op cit, 134 who regards a more accurate description as being 'the intention to remain in a country for an indefinite period without a fixed determination to move at any future time.'
95. Cp *Winans v Attorney-General* [1904] AC 287; *Ramsay v Liverpool Royal Infirmary* [1930] AC 588; *IRC v Bullock* [1976] 1 WLR 1178 (CA).
96. [1968] SASR 243.
97. [1980] 2 NSWLR 389.

1958 (Vic), but that the question of whether it had authority to appear, in a New South Wales court, as the defendant's agent was a matter of procedure and not substance, and hence governed solely by New South Wales law as the lex fori. Master Allen rejected this contention. He considered that, although the proper law of the contract as to service may well have been, for most purposes, the law of New South Wales, for the purpose of determining whether the insurer had authority to bind the defendant its proper law was that of Victoria. The decision is to be regretted. Although some judicial and academic comments have been made in England to the effect that different aspects of a contract may be governed by different laws,[98] in *Wanganui-Rangitikei Electric Power Board v Australian Mutual Provident Society*[99] Evatt J said that "the whole theory which lies at the root of private international law, however difficult that theory may be in application, is that the law of one country, and one country alone, can be the proper law governing the contract . . ." It further appears that Master Allen had no need to split the contract in the sense which he did. First, viewing the question before the court as one as to the authority of an agent, as between himself and his principal, there is no doubt that that is governed by the law with reference to which the agency is constituted[1] (here Victoria) and is to be distinguised from the law governing the obligations of the principal vis-a-vis third parties. Secondly, if the question be considered as one concerning the proper party to accept service of the writ and conduct the proceedings, it has been argued[2] that the question of who may bring proceedings (and consequently, it is submitted, who may defend them) is governed by the law by which such an agency relationship is created (here Victoria).

The interpretation of the Arbitration (Foreign Awards and Agreements) Act 1974 (Cth) arose for the first time in *Flakt Australia Ltd v Wilkins & Davies Construction Co Ltd.*[3] The plaintiff Australian company had entered into a contract with the defendant New Zealand company, governed by New Zealand law and providing for arbitration of disputes in New Zealand. The plaintiff subsequently commenced proceedings in the Supreme Court of New South Wales, seeking declarations as to the amounts payable by it to the defendant under the contract, and the defendant sought a stay of those proceedings. The latter relied on s 7(2)(b) of the Commonwealth Act, which requires a stay of any proceedings which involve "the determination of a matter that . . . is capable of settlement by arbitration" and McLelland J granted the stay. His Honour considered[4] that the word "matter" in that paragraph denotes "any claim for relief of a kind proper for determination in a court. It does not include every issue which would, or might, arise for decision in the course of the determination of such a claim." He concluded that the plaintiff's claim came within the paragraph, as interpreted.

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98. Referred to by Master Allen, at 394–5.
99. (1934) 50 CLR 581, at 604; the case was apparently not cited to Master Allen.
1 Dicey and Morris, op cit, 909 (r 167).
2. Nygh, op cit, 179, citing *Anderson v Johnson* (1877) I Knox (NSW) I (FC), a case that was apparently not cited to Master Allen.
3. [1979] 2 NSWLR 243.
4. At 250.

By the Contracts Review Act 1980 (NSW), a move has been made to control by legislation contracts which are regarded as unconscionable, harsh or oppressive. Unfortunately, in attempting to provide a relevant connecting factor for this legislation, the way has been opened for wholesale evasion of its effects. Section 17(3) provides:

> "This Act applies to and in relation to a contract only if —
> (a) the law of the State is the proper law of the contract;
> (b) the proper law of the contract would, but for a term that it should be the law of some other place or a term to the like effect, be the law of the State; or
> (c) the proper law of the contract would, but for a term that purports to substitute, or has the effect of substituting, provisions of the law of some other place for all or any of the provisions of this Act, be the law of the State."

It is obvious that a person or company intent on evading the Act need only ensure that the place of making and the place of performance of a contract are in a State or Territory other than New South Wales, that a clause provides for arbitration of disputes there, and that the person or company is resident in that State or Territory. Then, whether or not the contract makes express provision for its proper law, even a court in New South Wales would find it difficult to say that the proper law of such a contract is, or would be, the law of New South Wales.

Tort

The question of whether the rule in *Phillips v Eyre*[5] is one of choice of law or a preliminary or threshold rule[6] was considered incidently by the New South Wales Court of Appeal in *Walker v WA Pickles Pty Ltd.*[7] The decision was concerned with points of pleading, and what is necessary to be included in a statement of claim in an action based on a foreign tort. However, in the course of his judgment Glass JA indicated unequivocal support for the view that the rule is a preliminary or threshold one only. His Honour considered[8] that

> "the rules of private international law in force in New South Wales, so far as they relate to an action to recover damages for a foreign tort . . . are as follows: (1) It is not open to doubt that such an action is not well founded or justiciable unless it appears both that the conduct sued upon would have been actionable under the law of New South Wales, if it had occurred there, and, secondly, that such conduct is not justifiable under the law of the place where it occurred. (2) To prove that it is actionable abroad goes further than is necessary in proving that it is not justifiable. (3) Once these threshold questions have been decided in favour of the plaintiff, the liability of the defendant is to be judged by reference to the law of New South Wales".

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5. (1870) LR 6 QB 1.
6. For a discussion of the then state of authority see Nygh, op cit, 258.
7. [1980] 2 NSWLR 281.
8. At 288–9.

Hutley JA, with whom Glass JA agreed in the decision on the point of pleading, may have gone even further in giving predominance to the lex fori in an action based on a foreign tort. In considering which party had the burden of proof, his Honour said[9] that the "principle of private international law [in relation to foreign torts] that the local law applies, but the acts relied on must not be justifiable in the place in which they were done, . . . assimilates the latter requirement to an exculpatory fact" the burden of pleading and proving which generally lies on the defendant.

In other respects the decision is surprising. The plaintiff, who had been injured in Victoria, sought in his statement of claim damages for, inter alia, alleged breaches by the defendant of statutory duties imposed on it by regulations made under the Construction Safety Act 1912 (NSW). A majority of the Court of Appeal granted the plaintiff a new trial on this issue, Glass JA commenting[10] that at the new trial it would be "for the defendant, if it chose to do so, to raise the contention that conduct which amounted to a breach of statutory duty in New South Wales was justifiable in Victoria." At first sight it might be thought that the expense of a new trial was scarcely warranted, as the defendant would be able to prove "justifiability" in Victoria on showing that the Construction Safety Act 1912 (NSW) and regulations made thereunder apply only to things done or omitted within New South Wales. It appears, however, from the judgments of the majority that in their view the defendant could show the necessary "justifiability" in Victoria only on proving the negative proposition that its acts or omissions in Victoria were not contrary to any industrial safety legislation passed by the Victorian Parliament. It must also be borne in mind that in New South Wales,[11] alone of the States, contributory negligence is not a defence to an action for breach of statutory duty. Further, the fact that the plaintiff might have been met with such a defence in Victoria is irrelevant in a New South Wales action for injury occurring in Victoria.[12] As a consequence of *Walker's* case, it would appear that New South Wales is a most desirable forum in which to bring an action for breach of statutory duty, wherever committed. It remains to be seen whether this turns out to be true.[13]

The principal matter for decision in *Walker's* case — the matters which must be included in a statement of claim — may be summed up in the words of Glass JA. Relying on the effect of the State and Territorial Laws and Records Recognition Act 1901 (Cth), his Honour said that "whatever the position may be with respect to torts committed outside the Commonwealth of Australia, a plaintiff alleging a foreign tort occurring within the Commonwealth is not required to plead the relevant provisions of State or Territory law."[14]

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9. At 285.
10. At 290.
11. Statutory Duties (Contributory Negligence) Act 1945 (NSW).
12. *Kolsky v Mayne Nickless Ltd* (1970) 72 SR (NSW) 437 (CA).
13. The writer understands from the solicitors for the defendant in *Walker's* case that it was settled without going to the new trial ordered there.
14. [1980] 2 NSWLR 281, at 290; see also Hutley JA, at 286.

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