Marriage, Matrimonial Causes, Legitimacy and Adoption:

Miscellaneous Notes on Recent Australian Statutes

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During the 1960s, some important statutes which bear on matters of personal law, and notably on marriage, matrimonial causes, legitimacy and adoption have come into operation in Australia. The Matrimonial Causes Act 1959 came into operation early in 1961 and is a comprehensive exercise of Commonwealth legislative power primarily dependent upon section 51 (xxii) of the Constitution of the Commonwealth power to make laws with respect to divorce and matrimonial causes. It is an elaborate and complex statute and its constitutional base is, of course, broader than that single paragraph.[1] It was a response to a question asked by one of the Founding Fathers in 1897 "What subject is more fitted for general legislation?"[2] though the answer was not given in terms of comprehensive Commonwealth law for sixty years. The Marriage Act 1961 was a further comprehensive exercise of Commonwealth legislative power, this time principally based on the power conferred on the Commonwealth by section 51 (xxi) of the Constitution to legislate with respect to marriage. In Part 6 of that Act, provision was made for legitimation by subsequent marriage, the recognition of foreign legitimations, and for the legitimacy of the issue of a putative marriage. This raised important and difficult constitutional questions in the High Court of Australia which will be considered later.[3] Then in 1964, the Victorian Parliament enacted the Adoption of Children Act which is a comprehensive Act and, *inter alia*, formulates rules for the assumption of jurisdiction by a Victorian court to make adoption orders and for the recognition of foreign adoption orders. Adoption is a matter regulated by State law, and the enactment of the Victorian Act followed conferences attended by the law officers of the Commonwealth and the States for the purpose of reaching agreement on uniform legislation. In this article it is proposed to consider some aspects of these three Acts and their interpretation.

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1 See Cowen and Mendes da Costa, *Matrimonial Causes Jurisdiction* (1961), at p. 4.

2 Ibid, at p. 1.

3 *Attorney-General for Victoria v. Commonwealth* (1962), 107 C.L.R. 529; [1962] A.L.R. 673.

Matrimonial Causes Act 1959

The Matrimonial Causes Act (followed by the Marriage Act) broke new ground by constituting an Australian domicile. Hitherto domicile was determined by reference to a State or Territory and a domicile within a wider Australian area was unknown. In the context of matrimonial causes it had been urged by the Full Supreme Court of Victoria in *Armstead v. Armstead*[4] and by the Supreme Court of the Northern Territory in *Fullerton v. Fullerton*[5] that the time was ripe for regarding Australia as one country for the purposes of domicile. Kriewaldt, J., said that it was easy to conceive of a person having become a member of the Australian community without having identified himself with any one State or Territory. The draftsman of the Matrimonial Causes Act 1959 did not expressly say that there should be an Australian domicile; he provided in section 23, where domicile was the designated basis for jurisdiction, that proceedings should not be instituted except by a person domiciled in Australia; and in section 24 he spelled out particular cases in which a person "shall be deemed to be domiciled in Australia". As Barry, J., said in *Lloyd v. Lloyd*[6]: "Although that Act does not in terms state that there is an Australian domicile, the existence of an Australian domicile is assumed, and it is implicit in the provisions of Part 5 of the Act that a domicile in Australia is a juristically acceptable concept". There can be no doubt of the constitutional power of the Commonwealth Parliament to provide for a jurisdictional basis, being an Australian domicile, in matrimonial causes, and likewise no doubt of constitutional power to provide for an Australian domicile, where relevant, in a law with respect to marriage. But the Acts are silent on matters essential to the definition of domicile in Australia: in particular on the question whether such a domicile can only be acquired by way of a domicile established in a State or Territory, or whether it may be acquired, as Kriewaldt, J., suggested, without such a requirement. This problem, as Barry, J., observed in *Lloyd v. Lloyd*, is not likely to arise often, but it is not difficult to envisage cases where it may arise in a country of migration. A migrant may have an *animus manendi* directed to Australia at large without necessarily having such an *animus* directed to a particular State or Territory. Barry, J., expressed the view that in such a case it was proper to hold that he had acquired an Australian domicile.[7]

I have argued elsewhere that this view should be accepted, and that for the purposes of the Matrimonial Causes Act and Marriage Act a domicile in Australia may be established by satisfying the common law requirements of *animus* and *factum* within the general

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4 [1954] V.L.R. 733, at p. 736.

5 (1958), 2 F.L.R. 391, at p. 399.

6 (1961), 2 F.L.R. 349, at p. 350; [1962] A.L.R. at p. 279.

7 *Lloyd v. Lloyd* (1961), 2 F.L.R. at p. 351; [1962] A.L.R. at pp. 280-1.

geographical area of Australia as defined in the Acts.[8] This may mean that a person will be held to be domiciled in Australia for the purpose of those Acts, while he may still retain an English domicile of origin for purposes of succession to movable property. If this is so it will be necessary to modify the time-hallowed rule that no person can at the same time have more than one domicile.[9] That results in this case from the fact that the statute speaks peremptorily to an Australian court. For an English court not subject to such a peremptory obligation, a question of modification of the one domicile rule may also arise in the context of recognition of an Australian decree. If a migrant with an English domicile of origin is granted a divorce by an Australian court on the footing that he has acquired an Australian domicile, although he has not established a domicile in a State or Territory, will such a decree be recognized in England? It is possible to argue that an English court is not bound to accept the new statutory creature, domicile in ***Australia***, and may take the view that the failure to show a domicile in an established ***common law*** sense in a State leads to the conclusion that at all material times the petitioner retained his domicile of origin in England. This question has not yet been answered. It is submitted that the better view is that an English court should recognize the Australian decree in such a case. The reason may be stated in these terms:

> "The citizen of a federation is subject to two legal systems, State and federal, in both of which domicile may be relevant. And within Australia, as Barry, J., said in *Lloyd v. Lloyd*, there is unity of law with respect to matrimonial causes throughout the country. This follows from the distribution of legislative power by the constitution and from the exercise of that constitutional power. The legislative framework within which this unity of law is established contemplates Australia as a single law district within which a domicile by reference to the common law concepts of animus and factum may be established: why, having regard to these considerations, should an English court insist that the only domicile which can be established at common law in Australia is one established in a State or Territory? Is there not more practical good sense, more adequate appreciation of the character and organization of a federal structure, in accepting the notion of an Australian domicile in such a case?"[10]

If this were accepted by an English court, it would follow that a court not ***constrained*** so to do by authority of statute, would accept a view of the law at variance with the classical rule of the singleness of domicile, because the petitioner in such a case would be held to be domiciled in Australia for purposes of divorce jurisdiction, and domiciled in England for purposes of succession to movable property.[11]

8 Cowen and Mendes da Costa, "The Unity of Domicile" (1962) 78 L.Q.R. 62; Cowen and Mendes da Costa, "Matrimonial Causes Jurisdiction: The First Year" (1962) 36 A.L.J. 31, at pp. 34-6.

9 Rule 4, Dicey, *Conflict of Laws* (7th ed., 1958), at p. 89.

10 Cowen and Mendes da Costa, "The Unity of Domicile" (1962) 78 L.Q.R. 62, at p. 68.

11 Cowen and Mendes da Costa, "Matrimonial Causes Jurisdiction: The First Year" (1962) 36 A.L.J. at p. 35.

The Matrimonial Causes Act makes provision for a domicile in Australia without defining it; it does not essay ***any*** definition of a ***marriage*** in respect of which the relief furnished by the Act is available. This was highlighted by the case of *Khan v. Khan*[12] where a wife petitioned for a decree of dissolution of her marriage on the ground of adultery, for custody of the children, and for maintenance. The wife was domiciled in Australia at all times until she went to Pakistan in 1955 to marry the respondent. The marriage was in Moslem form and was potentially polygamous. Thereafter the parties returned to Australia and at the time of the proceedings the respondent was an Australian domiciliary and citizen. Gowans, J., in the Supreme Court of Victoria held that that was not a marriage to which the Act applied. He based this conclusion on a line of authority starting with *Hyde v. Hyde*[13] where it was held that matrimonial relief was not available in the case of a potentially polygamous marriage. Though the courts have progressively afforded wider recognition to polygamous marriages, it was said in *Baindail v. Baindail,*[14] in a case in which the Court of Appeal recognized a polygamous marriage as a bar to a subsequent monogamous marriage in England, that "the powers conferred on the courts for enforcing or dissolving a marriage tie are not adapted to any form of union between a man and a woman save a monogamous union". Recently, in *Sowa v. Sowa*[15] the Court of Appeal affirmed this rule in the case of a potentially polygamous marriage and almost contemptuously rejected the argument that for the purpose of matrimonial relief, a distinction should be drawn between a marriage monogamous in fact though potentially polygamous by the *lex loci celebrationis,* and a marriage which was actually polygamous. In view of this, Gowans, J., held that he was constrained to hold that a marriage to which the Act applied was a monogamous marriage and that there was no jurisdiction to grant matrimonial relief in the case of a potentially polygamous union. It would have been difficult for a single judge of a State Supreme Court to depart from authority so consistent and so recent, and this may well have been a case in which the procedure provided for in section 91 of the Act could have been usefully employed. That allows for a case to be stated for the opinion of the Full High Court on a point of law in proceedings under the Act if the Judge and at least one of the parties so wish. The Full High Court may have been less oppressed by this unconvincing, though long established line of authority. But such a procedure, though very practical and useful, adds to costs which, it is understood, daunted the petitioner in *Khan v. Khan.*

In the outcome Mrs. Khan was denied all the matrimonial relief she sought. This result, it is submitted, is very unsatisfactory and works intolerable hardship. In some cases hardship may be ameliorated

12 [1965] V.R. 203.

13 (1866), L.R. 1 P. & D. 130.

14 [1946] P. 122, at p. 123.

15 [1961] P. 70.

by such decisions as in *Cheni v. Cheni*[16] where it was held that a marriage potentially polygamous by the *lex loci celebrationis* at the date of celebration may be regarded as a monogamous marriage for the purpose of granting matrimonial relief if there is a subsequent change in the *lex loci* converting the marriage into a monogamous union. But that is a rare case, though it reflects a desire to escape from an unhappy rule, and it would not help Mrs. Khan. The general rule, as applied to a potentially polygamous marriage, works grave hardship and, notwithstanding what was said in *Sowa v. Sowa,* has no sound base in principle. The problem should be tackled legislatively and it is submitted that this could most conveniently be done by inserting in the definition section of the Matrimonial Causes Act a statement that a marriage includes a potentially polygamous marriage, suitably defined.[17]

Khan v. Khan was cited and applied in another and, in the result, more beneficial context in *Luder v. Luder.*[18] There the question was whether the matrimonial relief furnished by the Act was available in the case of a proxy marriage entered into in Holland in 1951, when the husband was domiciled in Victoria. Joske, J., said: "The matrimonial causes legislation of the States providing for the dissolution of a marriage has, as already mentioned, been interpreted as including in the term 'marriage', a proxy marriage which was valid in form in the place of celebration. In my opinion the meaning to be given to the 'marriage' which may be dissolved under the Commonwealth Matrimonial Causes Act is the meaning given to it by prior decisions under corresponding legislation: cf. *Khan v. Khan* . . . Accordingly, I am satisfied that a proxy marriage lawfully celebrated abroad may be recognized as a valid marriage for the purposes of the Commonwealth Matrimonial Causes Act".

The form of section 95 of the Matrimonial Causes Act, dealing with recognition of foreign decrees, shows that the draftsman had given careful attention to the existing state of the common law of recognition, and particularly to the problems posed by the conflict between the decision of the Court of Appeal in *Travers v. Holley*[19] and of the Victorian Full Supreme Court in *Fenton v. Fenton.*[20] The philosophy of recognition to which section 95 gives substantial expression is that recognition should be afforded to foreign dissolutions or annulments effected on jurisdictional bases which parallel the bases on which Australian courts would assume jurisdiction. The cases calling for interpretation of section 95 (2) and (3) have not given rise to much difficulty. The draftsman in section 95 (5) further safeguarded himself by providing that any dissolution or annulment of a marriage

16 [1963] 2 W.L.R. 17. See also *Sara v. Sara* (1962), 31 D.L.R. (2d) 566.

17 See Cowen, "A note on Potentially Polygamous Marriages" (1963) 12 I.C.L.Q. 1407, at p. 1411.

18 (1963), 4 F.L.R. 292 at p. 295; [1964] A.L.R. 3, at p. 5.

19 [1953] P. 246.

20 [1957] V.R. 17.

that would be recognized as valid under the common law rules of private international law but to which none of the preceding provisions of the section apply, shall be recognized as valid in Australia. The operation of this subsection is speculative[21] and it was briefly considered by the Full Supreme Court of New South Wales in *Sheldon v. Douglas*[22] where the Court, rightly it is submitted, held on the facts of that case that it was of no possible assistance to the respondent. Section 95 (7) provides that a dissolution or annulment should not be valid where, under the common law rules of private international law, recognition of its validity would be refused on the ground that a party to the marriage had been denied natural justice. The words "natural justice" preserve a common law rule of imprecise expression and uncertain scope.[23] At common law it has been held that want of notice to a respondent in divorce proceedings may constitute a denial of natural justice,[24] and in *Brown v. Brown*[25] Selby, J., in the Supreme Court of New South Wales considered whether recognition should be denied to a Mexican divorce on the ground that the respondent wife had no notice of the proceedings although notice was given by advertisement in an official gazette in accordance with local Mexican law. The judge found that no fraud was practised on the Mexican court and that notice was given in accordance with the requirements of Mexican law. He said that the Court should not minutely scrutinize the fairness of the Mexican court's rules of notice and procedure, and the decree was held not to deny natural justice within section 95 (7). This approach suggests, and rightly, that the subsection will be applied sparingly.

Marriage Act 1961

The Marriage Act in Part 6 makes provision for legitimation by subsequent marriage and for the legitimacy of children of certain void marriages. Prior to the enactment of these provisions, the only provision of Commonwealth law touching legitimacy was section 51 of the Matrimonial Causes Act 1959. Section 51 (1) provided that a decree of nullity of a ***voidable*** marriage under the Act annulled a marriage from the date of decree absolute, and section 51 (2) declared that a decree of nullity of a voidable marriage under the Act did not render illegitimate a child of the parties born since or legitimated during the marriage. In view of the terms of section 51 (1), subsection (2) appears to have been inserted *ex abundanti cautela*. But apart from this specific case, the legal rules relating to legitimacy and legitimation were the creatures of State law, and State provisions relating to legitimation were diverse.

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21 See Cowen and Mendes da Costa, *Matrimonial Causes Jurisdiction*, at pp. 93-7.

22 (1962), 4 F.L.R. 104, at p. 110; [1963] A.L.R. 197, at p. 202.

23 Cowen and Mendes da Costa, *Matrimonial Causes Jurisdiction*, at p. 97.

24 Ibid at pp. 98-9.

25 (1962), 4 F.L.R. 94; [1963] A.L.R. 817.

Section 89 provides that a child will be legitimated by the subsequent marriage of its parents whether or not there was an impediment to the marriage of the parents at the time of the birth of the child and whether or not the child was still living at the time of marriage or, in the case of a child born before the commencement of the Act, at the commencement of the Act, provided that at the date of the marriage the father was domiciled in Australia *or* the marriage of his parents took place in Australia *or* outside Australia under special provision of the Act or the Marriage (Overseas) Act 1955. A child so legitimated is legitimated from the date of his birth or the commencement of the Act whichever was the later. Section 90 provides for the legitimation of a child by the subsequent marriage of his parents where the marriage took place outside Australia and the father was not domiciled in Australia at the date of the marriage and was at that time domiciled in a place by the law of which the child was legitimated by virtue of the marriage. Whether or not the law of the domicile of the father at the date of the ***birth*** of the child permitted or recognized legitimation by subsequent marriage was expressly stated to be irrelevant. A "foreign" legitimation under section 90 operates as from the date of the marriage or the commencement of the Act whichever was the later. Section 91 provides that a child of a void marriage is deemed to be the legitimate child of his parents as from his birth or the commencement of the Act, whichever is the later, if at the time of the intercourse that resulted in the birth of the child or the time when the ceremony took place, whichever was the later, either party to the marriage believed on reasonable grounds that the marriage was valid. The section applies whether the child was born before or after the commencement of the Act, and whether the marriage took place before or after the commencement of the Act and whether the marriage took place in or outside Australia. It is, however, required that at least one of the parents of the child was domiciled in Australia at the date of the birth, or having died before that time, was domiciled in Australia immediately before his death.

The validity of these provisions was challenged, in advance of their being proclaimed as law, in *Attorney-General for Victoria v. Commonwealth of Australia.*[26] The purpose of the attack was to set at rest doubts which might then or thereafter affect or attend the title to proprietary rights and other private rights. The case was first argued before a Bench of six judges of the High Court in 1961 and was reargued before a Bench of seven in 1962. This reflected the sharp divisions in the Court, and by a majority of four to three, sections 89 and 90 were upheld, and by a majority of six to one (Dixon, C.J., dissenting) section 91 was held valid. The critical question was whether these sections were properly characterized as laws with respect to marriage and matters incidental thereto (Constitution section 51 (xxi) and 51 (xxxix)), since the Commonwealth parliament is not invested with express powers to legislate with respect to

26 (1962), 107 C.L.R. 529; [1962] A.L.R. 673.

legitimacy and legitimation. It is not proposed to canvass in detail the argument for and against constitutionality; the sharpness of the division in the Court on the issue of the constitutionality of the legitimation by subsequent marriage sections exposes the difficulties of characterization which inevitably arise in a federal constitution in which specific and enumerated powers are conferred. As Kitto, J., expressing the majority view, put it: "The enactment is rightly to be described not only as a law with respect to legitimation but also as a law with respect to the step to which a legitimating effect is given. The purpose and operation of the law is to annex a legal incident to the step, and there seems to be no error of proportion or perspective in regarding the step itself, no less than legitimation, as a topic of the law".[27] With that view I agree and I have developed the argument at length elsewhere.[28] There was some difference of opinion in the Court as to consequences; particularly on the question whether it was still open to the States to deprive these sections of ***operational*** effect by denying to persons so legitimated specific advantages, as for example, in relation to inheritance which they would otherwise derive from legitimate status. The majority view appears to be that the States may take such action, though this is likely to remain an abstract proposition.

The sections work important changes in the law; sections 89 in fashioning rules of what might be described as "local" legitimation by subsequent marriage, and 91 in providing for the legitimacy of the issue of a putative marriage create new law in the fullest sense, while section 90 in its provision for the recognition of "foreign" legitimations fixes less stringent requirements than did the common law. The doctrine of such cases as in *Re Goodman's Trusts*[29] required a capacity for legitimation by the law of the domicile of the father at the date of the child's birth ***and*** at the date of the subsequent marriage. This was an unsatisfactory and needlessly severe rule and the express deletion of the reference to the *lex domicilii* at the date of birth by section 90 (2) is a progressive step.

Commonwealth power to legislate with respect to legitimacy and legitimation is still limited. As Kitto, J., pointed out in the context of legitimation: "If the legitimation is made to depend not upon the contract of a valid marriage but upon the taking of some other step ... there is not such a relation between the law and the subject of marriage as would justify the description"[30] of a law with respect to marriage or a matter incidental thereto. It would follow that Commonwealth legislation providing for legitimation *per rescriptum principis* would lack a constitutional base.

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27 (1962), 107 C.L.R. at p. 554; [1962] A.L.R. at p. 684.

28 Cowen, "Legitimacy, Legitimation and Bigamy" (1963), 36 A.L.J. 239.

29 (1881), 17 Ch.D. 266.

30 (1962), 107 C.L.R. at p. 554; [1962] A.L.R. at p. 684.

Adoption of Children Act 1964

The adoption of Children Act 1964 (Victoria) provides in section 5 that an adoption order shall not be made unless at the time of filing the application for the order, the applicant or each of the joint applicants was resident ***or*** domiciled in Victoria ***and*** the child was present in Victoria. Heretofore the Victorian legislation did not spell out the jurisdictional requirements for making an adoption order, and in *Re X, an Infant*[31] Dean, J., held that a Victorian court had jurisdiction to make an adoption order under the legislation as it then stood in favour of applicants who were resident though not domiciled in Victoria. In that case the adopted infant was domiciled in Victoria, though that does not appear to have been regarded as a significant matter by the judge. Dean, J., noted that an order made by a court which was not a court of the domicile of the adopting parents might not be accorded recognition elsewhere, but said that this should not be decisive in fixing the ***local*** basis of jurisdiction.

The Act of 1964 requires residence or domicile within the jurisdiction for the adopter and mere presence for the child. This is quite liberal, and residence will presumably be construed in the sense in which it is used in such provisions as sections 23 (5) and 24 (2) of the Matrimonial Causes Act 1959. The judgment of the legislature in not requiring that the adopters be domiciled within the jurisdiction is sound, and it is in accordance with the law in New Zealand[32] and in various Canadian jurisdictions.[33] Domicile is a legal concept of considerable complexity and not infrequently of some artificiality, and the Victorian Act in providing for the alternative requirement of residence gives an additional and desirable flexibility while preserving an adequate nexus with the jurisdiction. It may be a question whether it was necessary even to require residence; the New Zealand Adoption Act 1955, section 3 (1), provides that a court may upon an application made by any person whether domiciled in New Zealand or not, make an adoption order in respect of any child whether domiciled in New Zealand or not. This leaves the New Zealand courts wide latitude to work out their own practice, and suggests that the courts in deciding whether to assume jurisdiction to make an order in any particular case will consider all the facts and not be constrained by any specific technical requirement, whether of domicile or of residence.

Part 3 of the Adoption of Children Act deals with the recognition of adoptions. It provides—

> "40. In this Part, 'country' includes a part of a country.
> 41. For the purposes of the laws of Victoria, the adoption of a person (whether before or after the commencement of this Act) in another State, or in a Territory of the Commonwealth, in accordance with the

31 [1960] V.R. 733.

32 Adoption Act 1955, section 3 (1).

33 See G. D. Kennedy, "Adoption in the Conflicts of Laws" (1956), 34 C.B.R., at pp. 509-21.

law of that State or Territory has, so long as it has not been rescinded under the law in force in that State or Territory, the same effect as an adoption order made in Victoria, and has no other effect.

42. (1) For the purposes of the laws of Victoria, the adoption of a person (whether before or after the commencement of this Act) in a country outside the Commonwealth and the Territories of the Commonwealth, being an adoption to which this section applies, has, so long as it has not been rescinded under the law of that country, the same effect as an adoption order under this Act.

(2) This section applies to an adoption in a country if—

(a) the adoption was effective according to the law of that country;

(b) at the time at which the legal steps that resulted in the adoption were commenced the adopter, or each of the adopters, was resident or domiciled in that country;

(c) in consequence of the adoption, the adopter or adopters had, or would (if the adopted person had been a young child) have had, immediately following the adoption, according to the law of that country, a right superior to that of any natural parent of the adopted person in respect of the custody of the adopted person; and

(d) under the law of that country the adopter or adopters were, by the adoption, placed generally in relation to the adopted person in the position of a parent or parents.

(3) Notwithstanding the foregoing provisions of this section, a Court (including a Court dealing with an application under the next succeeding section) may refuse to recognize an adoption as being an adoption to which this section applies if it appears to the Court that the procedure followed, or the law applied, in connexion with the adoption involved a denial of natural justice or did not comply with the requirements of substantial justice.

(4) Where, in any proceedings before a Court (including proceedings under the next succeeding section), the question arises whether an adoption is one to which this section applies, it shall be presumed, unless the contrary appears from the evidence, that the adoption complies with the requirements of sub-section (2) of this section and has not been rescinded.

(5) Except as provided in this section, the adoption of a person (whether before or after the commencement of this Act) in a country outside the Commonwealth and the Territories of the Commonwealth does not have effect for the purposes of the laws of Victoria.

(6) Nothing in this section affects any right that was acquired by, or became vested in, a person before the commencement of this Act."

Subsisting adoptions made under the laws of other States and Territories are recognized in Victoria on the footing that they are to have the same effect as an adoption order made in Victoria and no other. The general principle of recognition of interstate (including territorial) orders follows the pattern set by section 95 (1) of the Matrimonial Causes Act 1959 providing for the recognition of interstate decrees or dissolution or nullity of marriage. That section put at end the controversy over the decision in *Harris v. Harris*[34] and the implications of that decision,[35] in the matrimonial context, anyway.

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34 [1947] V.L.R. 44.

35 See Cowen, "Full Faith and Credit: The Australian Experience", in *Essays on the Australian Constitution* (2nd ed., 1961), at pp. 307, *et seq.*

The basis on which Fullagar, J., rested his decision, that section 18 of the State and Territorial Laws and Records Recognition Act 1901-1950 (which provides that "all public acts, records and judicial proceedings of any State, if proved or authenticated as required by this Act, shall have such faith and credit given to them in every Court and public office within the Commonwealth as they have by law or usage in the Court and public offices of the State or Territory from whence they are taken"), peremptorily required that a New South Wales divorce decree be recognized in Victoria without inquiry into the assumption of jurisdiction by the New South Wales court, may raise a question whether it is lawful to limit the effect and recognition of a sister state adoption as is done in section 41 of the Adoption of Children Act. It is submitted that it is lawful for the States so to provide, and, in any event, it is possible to ensure this result by the enactment of appropriate uniform State and Territorial legislation. The notion that the measure of recognition to be accorded to a foreign (in this case, a sister State) adoption is the measure accorded by the recognizing State to its own adoptions is, it is submitted, sound and the express provision in section 41 puts an end to controversy over this issue.[36]

The provision for the recognition of foreign adoptions in the wider sense which is made by section 42 requires (1) that the foreign adoption was effective according to the law of that country; (2) that the adopter(s) were resident or domiciled in the country of adoption; (3) that the effect of the foreign adoption is in that country to give the adopter a right superior to the natural parents in respect of the custody of the child; (4) that the effect of the adoption is generally to place the adopting parent in the position of a parent; (5) that the procedure adopted in making the foreign adoption did not involve a denial of natural justice and complied with the requirements of substantial justice.

As to this, it may be observed that as in the case of recognition of foreign matrimonial decrees under section 95 of the Matrimonial Causes Act, the Adoption of Children Act provides broad symmetry in local jurisdiction and recognition of foreign orders, save that in the recognition provision there is no express requirement that the child should be present within the jurisdiction in which the foreign adoption was made. Apart from this the recognition provision reflects the philosophy of *Travers v. Holley*.[37] In so far as the jurisdictional basis is ***broad***—the residence or domicile of the adopting parents—this is reasonably satisfactory and it is not likely to produce many hard cases. It is good that the legislature has not insisted that the adopter be domiciled in the foreign country. Recently Scarman, J., proposed

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36 See *Re Pearson*, [1946] V.L.R. 356. And see P. Gerber, "Some Aspects of Adoptions in the Conflict of Laws" (1965), 38 A.L.J. 309, and cases there cited.

37 [1953] P. 246.

that a foreign adoption should be recognized if it was effected according to the law of the domicile of the adopting parent[38] and the present writer in reply argued that the requirement of domicile was too restrictive.[39] The draftsman of the Victorian Act has taken the less restrictive view, save that he has formulated his jurisdictional rules in terms that require the adopter ***to be resident or domiciled*** in the country in which the adoption was made. It might have been more appropriate and sufficient to require that the ***law*** of the residence or domicile of the adopter should regard the adoption as effective. For example: an adoption might be made in Ruritania where the adopter is physically present but not domiciled or resident. That adoption is valid by Ruritanian law. The adopter is domiciled (or resident) in Barataria and Baratarian law recognizes the Ruritanian adoption. Is there not a good case for recognizing the Ruritanian adoption which in all other respects satisfies the terms of section 42 (2)? This result appears to be foreclosed because of the precise terms of section 42 (2), and section 42 (5) provides that ***only*** an adoption which complies with the requirement of section 42 will have effect for the purposes of the laws of Victoria. There is no saving provision comparable with section 95 (5) of the Matrimonial Causes Act.

This defect apart, section 42 clarifies the law with respect to the recognition of foreign adoptions, which was in an uncertain and unsatisfactory state.[40] It also furnishes a liberal rule of recognition, more liberal than was anticipated by Dean, J., in *Re X, an Infant*[41] when he indicated that an adoption order made by a court which was not the *forum domicilii* of the adopter might have limited recognition. Provided that the adopter is resident in the foreign forum of adoption, the decree will be recognized subject to the other reasonable safeguards which are written into the section. Of these the least clear is section 42 (3) which refers to denial of natural justice and the requirements of substantial justice. This will raise questions of a kind which arise under section 95 (7) of the Matrimonial Causes Act, and the Courts will have to work these out. Doubtless one relevant question which will arise in this context will be whether the natural parents of the adopted child were accorded an adequate opportunity to be heard. As a general comment on the recognition provision, it may be that an even more liberal recognition rule would have been preferable. In New Zealand, the Adoption Act 1955, section 17, does not even require residence of the adopter in the foreign country, and some Canadian jurisdictions have very liberal recognition rules.[42] But the

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38 (1962), 11 I.C.L.Q. 635.

39 "English Law and Foreign Adoptions" (1963), 12 I.C.L.Q. 168.

40 See Dicey, *Conflict of Laws* (7th ed., 1958) at pp. 460 *et seq.*

41 [1960] V.R. 733, at p. 735.

42 See Cowen, "English Law and Foreign Adoptions" (1963), 12 I.C.L.Q., at pp. 173-4.

Victorian legislation has gone a long way in providing liberal recognition rules and, particularly in a country of immigration, that is sound policy. The Act in section 42 (1) provides that an adoption effected under the section shall have the same effect as an adoption order under this Act. This appears to express the same policy as is stated in section 41, in the case of interstate adoption orders. In section 41, however, the language is "the same effect as an adoption order made in Victoria and has no other effect" while in section 42 the words are "the same effect as an adoption order under this Act". The draftsman was less definite in dealing with the effects of "foreign" adoption in the wider sense, and the courts will have to determine whether there is any significance in the change of language.