Cases in Private International Law 1968

By Alastair Bissett-Johnson*

Tort—place of commission of a tort in the conflict of laws

Thompson v. *Distillers*[1]

Where defective goods are manufactured in one country and sold to a wholesaler there for resale in some other country it is clear that one might locate the tort of negligence for jurisdictional purposes as having occurred:—

(1) at the place of manufacture
(2) at the point of original sale
(3) at the point where resale, use and damage occurred.

In *Thompson* v. *Distillers* the New South Wales Court of Appeal was asked to determine whether it had jurisdiction in the following circumstances.

Distillers Co. Ltd., an English company, not carrying on business in Australia, had produced the drug, Distival, containing thalidomide and sold the drug in England to a company incorporated in New South Wales. Eventually, after distribution through retailers and wholesalers in New South Wales, the drug was consumed in that State by the mother of the plaintiff. In due course the mother gave birth to a deformed child in New South Wales.

In order to obtain leave to serve the overseas manufacturer, proceedings were instituted under s. 18 (4)(a) of the New South Wales Common Law Procedure Act, which is in identical terms to the English Common Law Procedure Act 1852, and allows jurisdiction to be taken over an absent defendant where "there is a cause of action which arose within the jurisdiction".

The defendants in *Thompson's Case* relied strongly on *Monro* v. *American Cyanamid*[2] for the proposition that the tort of negligence should be regarded as having been committed in the place where the defective goods were produced and originally sold. This argument was, however, rejected both at first instance and on appeal. Taylor, J., at first instance[3] found for the plaintiff because he found the defendants had broken their duty to supply the plaintiff's mother

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1 [1968] 3 N.S.W.R. 3. This decision has been recently upheld by the Privy Council.

2 [1944] 1 K.B. 432.

3 (1967), 87 W.N. (Pt. 1) N.S.W. 69.

with a drug which could have an adverse effect on her unborn child.[4] On Taylor, J.'s view the duty, breach and damage had all occurred in New South Wales.

This view was upheld in the Court of Appeal by Holmes, J.A., Wallace, P., and Asprey, J.A. Wallace, P., relied strongly on dicta of Lord Wright in *Grant* v. *Australian Knitting Mills Ltd.*[5] . . . "the thing might never be used; it might be destroyed by accident, or it might be scrapped, or in many ways fail to come into use in the normal way: in other words the duty cannot at the time of manufacture be other than potential or contingent, and can only become vested by the fact of actual use by a particular person".

It is not clear, nor was it necessary for the judge, having adopted Lord Wright's test, to decide whether the critical point of time was reached when the defective tablets were sold, when they were consumed or when they caused damage. Wallace, P., stated:[6] "I think that the English company's duty 'vested' in a relevant sense when the 'Distival' tablets were handed by the chemist to the plaintiff's mother for consumption and she swallowed one or more of them. It is true that the first circulation of the tablets without a warning notice thereon, and which took place in England, is a link in the chain of acts and omissions which constitute the alleged cause of action, but, for the purpose of determining where the cause of action 'arose', I am of opinion that the first-named defendant breached a continuing and substituting duty to the plaintiff's mother (or the plaintiff) in New South Wales and caused the injury in New South Wales resulting from such breach. In other words duty, breach and injury all existed or occurred in New South Wales and so in the fullest sense the cause of action arose here."

In every other Australian jurisdiction the Rules of Supreme Court are worded differently from the N.S.W. Common Law Procedure Act, and refer instead to a "tort committed within the jurisdiction".[7] Is there a difference in jurisdiction over a cause of action arising within the jurisdiction and over a tort committed within the jurisdiction?

Although Wallace, P.'s analysis could be applied to both wordings, the previous Australian decisions on the words "tort committed within the jurisdiction" had been heavily influenced by the English decision in *Monro* v. *American Cyanamid.*[8] This distinction was taken up by Asprey, J.A., who took the view that the words "tort committed within the jurisdiction" required all the constituents of negligence to be committed within the jurisdiction, whereas the words "a cause of action

4 Since this case merely involved a preliminary jurisdictional point, it remains uncertain whether a duty of care is actually owed in Australian law to an unborn child.

5 [1936] A.C. 85, at pp. 104-5.

6 [1968] 3 N.S.W.R. 3, at p. 8.

7 See Vic. O. 11, r. 1 (eb); High Court O. 10, r. 10 (g); Qld. O. 11, r. 1 (5); S.A. O. 11, r. 1 (f); W.A. O. 11, r. 1 (e)(1); Tas. O. 11, r. 1 (f); A.C.T. O. 12, r. 2 (e)(ii); N.T. O. 12, r. 2 (e)(ii).

8 See, for example, *Lewis v. Tichauer,* [1966] V.R. 341.

which arose within the jurisdiction" meant that the cause of action in negligence only arose when it became actionable as a result of the damage to the foetus.[9] In the judge's own words:—

> "A cause of action in the field of negligence is only inchoate at the stage when the breach of duty takes place. It comes into existence when, as a consequence of the breach, actual loss or injury results."[10]

If Asprey, J.A.'s analysis is correct, and, under Order 11, rule 1 (h) all the constituents of a tort have to arise within the same jurisdiction, certainly in a country like Australia when many manufactured items have to be imported, this test, particularly if combined with the ratio of *Monro* v. *American Cyanamid,* could cause great hardship. If a foreign manufacturer wishes to sell goods for use within Australia surely he ought to be amenable to service should his goods turn out to be defective.

Tort—A possible exception to the rule in Phillips v. Eyre

Boys v. *Chaplin*[11]

One of the great advantages of the old Privy Council practice of delivering a single judgment was that it was possible to point with some certainty to the *ratio decidendi* of a given case. As if the *ratio decidendi* of *Phillips* v. *Eyre*[12] was not difficult enough to apply, problems have been compounded as a result of the House of Lords' decision in *Chaplin* v. *Boys*. In *Chaplin* v. *Boys* a motor accident had occurred in Malta between two servicemen stationed temporarily in Malta but normally resident in England. The defendant was adjudged to have been negligent and he, and his English insurance company, became liable to compensate the plaintiff. However during the course of English proceedings it emerged that, although English law would have assessed damages at £2250, Maltese Law, the *lex loci delicti,* would only have assessed damages at £53. The discrepancy arose from the refusal of Maltese law to allow recovery for pain and suffering and loss of amenity as recoverable heads of damage.

Hitherto the decision in *Phillips* v. *Eyre* had been interpreted to mean that, first, the suit must be actionable under the law of the forum, i.e. there could be no recovery for the tort of invasion of privacy if this was unknown to the *lex fori* and gave rise to no liability. The attractive suggestion made by Yntema[13] that the words action-

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9 The New South Wales Law Commission certainly thought that the two phrases might have different meanings for in their Report to Civil Procedure dated September 9 1969, at p. 21 suggested that their rules about service on an overseas defendant in cases in tort be brought into line with the Victorian and English position. However, to "the tort committed within the jurisdiction rule" has been added a rule permitting service overseas "where proceedings are founded on ... damage suffered wholly or partly in the State caused by a tortious act or omission wherever occurring". This seems to avoid the problems of the *Monro Case.*

10 [1968] 3 N.S.W.R. 3, at p. 12.

11 [1969] 2 All E.R. 1085 (H.L.); [1968] 1 All E.R. 283 (C.A.).

12 (1870), L.R. 6 Q.B. 1.

13 27 Can. Bar Review 116, at pp. 118-9.

able under the *lex fori* should be equated to "not infringing the public policy of the forum" had never found favour. Second, the rule that the tort must not be justifiable under the *lex loci delicti* had been interpreted to mean that the same cause of action must exist under the *lex loci delicti* as under the law of the forum. Thus, if the same causes of action did not arise under both laws,[14] and against the same person,[15] or if a defence existed under the *lex loci delicti,* or if fault liability had been replaced by an insurance scheme in the *lex loci delicti*[16] the plaintiff would fail. Regardless of the position in English law resulting from *Machado* v. *Fontes,*[17] it appeared that after the High Court decision in *Koop* v. *Bebb*[18] it would be insufficient to show that the act in question gave rise to criminal liability under the *lex loci delicti* unless civil liability arose under the *lex loci delicti* also.

In *Chaplin* v. *Boys* the same cause of action arose under both Maltese and English law but certain heads of damage were unknown to Maltese law. At first instance Milmo, J.,[19] was prepared to hold that the defendant's act was not justifiable under Maltese law because, following *Machado* v. *Fontes,* once it was established that some damages were recoverable under the *lex loci delicti* the question of damage then became at large and the *lex fori* could determine both the heads of damage and the quantum of damages available.

In the Court of Appeal[20] Milmo, J.'s judgment was upheld for a variety of differing reasons. Lord Denning apparently held that *Phillips* v. *Eyre* had only laid down general rules to which there could be exceptions, one such exception being where the parties, as here, had a close connexion with England. They were English servicemen whose homes were in England and who were insured with an English insurance company. The plaintiff had received medical treatment in England, and it was in England that he would expect to sue. In short, English law was the "proper law of the tort"[21] which determined the heads of damage recoverable.[22] Quantification of damages also fell for determination by English law though this time in its capacity as *lex fori.*[23]

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14 *M'Elroy v. M'Alister,* [1949] S.C. 110.
15 *M. Moxham, The* (1876), L.R. 1 P.D. 107.
16 *McMillan v. Canadian Northern Rail Co.,* [1923] A.C. 120.
17 [1897] 2 Q.B. 231.
18 (1951), 84 C.L.R. 629.
19 [1967] 2 All E.R. 665.
20 [1968] 1 All E.R. 283.
21 One is left to speculate whether English law would have been the proper law of the tort if the defendant were domiciled in Scotland and the plaintiff in Jersey.
22 Lord Denning seems unimpressed with Maltese law which, he stated, would have given the plaintiff "less than fair compensation" ibid., p. 289 G.
23 Lord Denning seems to have further distinguished between measure of damages and quantification of damages, see p. 287 letter A. The distinction seems difficult to draw unless measures of damages is intended to cover cases where a ceiling on recovery is imposed or problems of remoteness are involved.

Lord Upjohn decided in favour of the plaintiff on the ground that no valid distinction could be drawn between questions of heads of damages, an allegedly substantive matter, and quantification of damage an admittedly procedural matter and that the plaintiff did not need to show that the facts in question would be actionable under the *lex loci delicti* in order to satisfy the second head of *Phillips* v. *Eyre*. Lord Upjohn expressly disassociated himself from the acceptance of the "proper law of the tort" test indicated by Lord Denning.

Diplock, L.J., in a dissenting judgment strikingly similar to Yntema's views[24] suggested that the true choice of law rule in cases of foreign torts was to apply the *lex loci delicti* to all substantive matters including the heads of damage recoverable with the result he would have limited the plaintiff's recovery to £53. Diplock, L.J., refused to accept the view advanced by Lord Upjohn that there was no distinction between questions of quantification of damages and the heads of damage recoverable. Moreover, he expressly rejected the suggestion that a new choice of law rule involving the proper law of the tort could be invoked. The place of insurance of the defendant and the place where the plaintiff received medical treatment seemed to Diplock, L.J., not to be relevant matters for the court to consider.[25]

Thus far the *ratio decidendi* of the case appeared to be that the plaintiff was entitled to £2250 damages; almost any other proposition was rejected by a majority of the court. In the House of Lords a similar divergence of judicial opinion emerged. Lords Hodson and Wilberforce seemed to have taken the view that though, as a general rule, a plaintiff should not be entitled to recover for heads of damage where there was no recovery under the *lex loci delicti*, yet there were exceptions to the rule in *Phillips* v. *Eyre*. Where, as here, the parties were merely temporarily in Malta but normally resident in England, the forum in this particular case, it was permissible to determine the particular issue of whether there was recovery or pain and suffering by reference to the law of the forum. Thus the plaintiff was entitled to recover £2250 damages.

Lord Guest appeared to hold that though as a general rule recovery should be denied for heads of damage not existing under the *lex loci delicti*, pain and suffering were to be regarded as entirely an element in the quantification of total damages. Thus, had the question involved any other question than pain and suffering, Lord Guest would have required actionability for the particular head of damage under both the *lex fori* and the *lexi loci delicti*.

Lord Donovan delivered a short judgment apparently incorporating that of Lord Upjohn in the Court below. Thus, he held, once it was established that some liability existed under Maltese law, it did not matter that the heads of damage under Maltese law were more restricted than those existing under the law of the forum, since it had already been shown that the act of careless driving was unjustifiable under the *lex loci delicti*. Alternatively, Lord Donovan may

24 See footnote 13, ante.
25 See p. 302 letters D & E.

have accepted Lord Upjohn's view that heads of damage, like quantification of damages, was a matter for the *lex fori* to determine.

Lord Pearson seems to have accepted that once some liability was established under the *lex loci delicti*, the second head of *Phillips* v. *Eyre* was satisfied and the *lex fori* was the dominant law applicable to determining the cause of action.[26]

The decision may have relevance in Australia since, although the repeal of the N.S.W. Contributory Negligence Legislation in favour of apportionment legislation has removed the most fruitful source of problems of interpretation of *Phillips* v. *Eyre*, other problems remain. The liability of husbands and wives to sue one another might be one example. Suppose a husband domiciled and resident in Victoria injures his wife by his careless driving in New South Wales.[27] Under N.S.W. law, actions between husband and wife are only permitted in respect of the negligent driving of a car registered in New South Wales.[28] Would any action brought in Victoria infringe the second head of *Phillips* v. *Eyre*? One alternative would be to apply the law of the matrimonial home as a new choice of law rule to determine whether actions between husband and wife were permissible. The other alternative would be to adopt Lord Wilberforce's test of determining the ability of spouses to sue one another by reference to the proper law of the issue (Victoria) whilst leaving it open to another law (N.S.W.) to determine the relevant standard of driving and whether there was a breach of that standard. What is clear, however, is that the application of the rule in *Phillips* v. *Eyre*, as explained in *Chaplin* v. *Boys*, can still give rise to problems. Perhaps the time has come for the abolition of *Phillips* v. *Eyre*, at least in relation to interstate cases within Australia.

The relationship of choice of proper law to submission to jurisdiction

Dunbee v. *Gilman*

Whilst it is generally true that a choice of venue clause carries an implied choice of that law to govern disputes,[29] the converse is not necessarily true as *Dunbee* v. *Gilman*[30] illustrates. In that case, a company incorporated in England appointed a company registered in New South Wales as its sole agent and distributor in Australia and the Pacific Islands. A clause in the contract provided that it was to be "governed and construed under the laws of England". In due course the English company started proceedings in England against the absent defendant under 0.11 R.S.C. because the contract was

26 This is similar to the reasoning of Kerr, J., in *Hartley v. Venn* (1967), 10 F.L.R. 151.

27 The facts are not unlike those of *Zussino v. Zussino*, [1969] 2 N.S.W.R. 227.

28 See Married Persons (Property and Tort) Act 1901-1964, s. 168. Though under Victorian law an action in tort between spouses is clearly permitted under the Victorian Marriage (Liability in Tort) Act 1968.

29 *Hamlyn v. Talisker*, [1894] A.C. 202. The rule is not an invariable one and there are exceptions, e.g., *Compagnie d'Armament Maritime, S.A. v. Compagnie Tunisienne de Navigation S.A.*, [1970] 3 All E.R. 71.

30 [1968] 1 N.S.W.R. 577.

governed by English law. The New South Wales company wisely took no part in the proceedings either on the question of jurisdiction or on the merits of the case.[31] The English company then sought to register the English judgment under s. 5 of the Administration of Justice Act (N.S.W.) 1924. This provided for registration in N.S.W. of judgments of certain countries (including the U.K.) where, *inter alia,* the defendant submitted to the jurisdiction of the courts of the overseas country. On behalf of the English company it was contended that by agreeing to English law governing the contract, the N.S.W. Company had submitted to the jurisdiction of the English courts. This contention was rejected by the Court of Appeal of N.S.W. Walsh, J.A., Jacobs, J.A., and Wallace, P., refused to believe that the agreement to be "governed and construed under the law of England" included the agreement to accept an assertion of jurisdiction over an absent defendant by the English courts under 0.11 R.S.C. It thus becomes more desirable than ever for parties to nominate both the jurisdiction and choice of law to govern any dispute arising from their contract.

Recognition of foreign divorces

Post Indyka v. *Indyka Decisions*

In the previous issue of this series Professor Sykes discussed the implications of the House of Lords' decision in *Indyka* v. *Indyka*[32] but at that stage the decision was so recent that no subsequent decisions were available to interpret and delimit the scope of the House of Lords' decision. Professor Sykes questioned whether the requirement of a real and substantial connexion between the parties to a marriage and the foreign court pronouncing the decree could be applied to a husband's decree[33] or whether, in view of the Commonwealth Matrimonial Causes Act, *Indyka* v. *Indyka* was likely to be followed in Australia.[34] The time ratio of this case has been the subject of speculation in a variety of English first instance decisions. In the first case in *Mather* v. *Mahoney,*[35] Payne, J., approved a "quickie or purveyed" Nevada decree granted to a wife on the ground that, though the wife had no real and substantial connexion with Nevada, it was enough if the Nevada decree was recognized in Pennsylvania with which by nature of residence, the wife did have a substantial connexion. This case has been highly criticized[36] as have *Blair* v. *Blair*[37] and *Mayfield* v. *Mayfield.*[38] In the former case an Englishman married a Norwegian girl in 1957, settled in Norway

31 The wisdom of this course becomes apparent after reading *Harris v. Taylor,* [1915] 2 K.B. 580 and *Re Dulles,* [1951] Ch. 842.

32 [1969] A.C. 33.

33 Australian Year Book of International Law 1967, p. 229. Taking up comments by Lord Wilberforce in the course of *Indyka v. Indyka,* [1969] A.C. 33; [1967] 2 All E.R. 689.

34 *Op. cit.,* p. 230.

35 [1968] 3 All E.R. 223.

36 See 20 N.I.L.Q. 169. Surely this was just the sort of decree that Lord Pearce, in the *Indyka Case,* did not intend to recognize.

37 [1968] 3 All E.R. 639.

38 [1969] 2 All E.R. 219.

and acquired a domicil of choice there. In 1959 he had to return to England to training but intended to return to Norway when his training was completed. In 1963, however, his wife informed him that she had committed adultery and so the husband, though he had resumed an English domicil, took proceedings through a Norwegian lawyer in Norway and obtained a divorce. At the time of the proceedings the husband had no real or substantial connexion with Norway by virtue of domicil, residence or nationality. Nevertheless, recognition was granted as it was in the *Mayfield Case* where a British husband, after the breakdown of the marriage, took proceedings in Germany to have the marriage dissolved. The respondent had real and substantial connexion with Germany by virtue of her nationality and residence and Sir Jocelyn Simon said:—

> "If the wife had brought the proceedings and had secured a decree there can be no question in my view that the case would be covered by *Indyka* v. *Indyka* and that we should recognize the German decree as valid to dissolve the marriage. Is it, then, a material distinction that the proceedings were brought by the husband who had no close or real or substantial connexion with Germany and not by the wife? In my view the difference is not material. What is the material fact is that the German decree operated on the status of the wife who had such close substantial connexion. If it operated on the status of the wife and should be recognized as such, for the reasons I have ventured to give in *Lepre* v. *Lepre*, [1963] 2 All E.R. 49, at pp. 55-7. we should recognize the decree as also operating on the status of the husband."[39]

It is suggested that if the *Indyka Case*[40] is followed in Australia under s. 95 (5)[41] of the Commonwealth Matrimonial Causes Act, it will be to the extent of allowing petitioning husbands to have decrees of divorce recognized if they have a real and substantial connexion with the court pronouncing the decree and petitioning wives to have decrees recognized if they have a real and substantial connexion with the court pronouncing the decree. It is submitted the decision in

39 p. 220.

40 *Norman v. Norman* (*No.* 2) (1968), 12 F.L.R. 39, at pp. 44 and 45 in *obiter dicta* suggests that it does. In the South Australian case of *Alexsandrov v. Alexsandrov* (1967), 12 F.L.R. 360 the acceptance of the *Indyka Case* into Australian matrimonial law was left open. Mr. Justice Selby clearly thought that the *Indyka Case* was to be followed in the recent case of *Nicholson v. Nicholson*, 1971 Legal Monthly Digest 883. This contrasts strongly with the restrictive attitude of some State Courts to the recognition of foreign divorces under the Pre-matrimonial Causes Act decisions. See *Fenton v. Fenton*, [1957] V.R. 17.

41 Section 95 (5). Any dissolution or annulment of marriage that would be recognized as valid under the common law rules of private international law but to which none of the preceding provisions of this section applies shall be recognized as valid in Australia, and the operation of this sub-section shall not be limited by any implication from those provisions.
If the *Indyka Case* is not followed in Australia it is difficult to see what meaning s. 95 (5) could have in relation to the recognition of foreign divorces that is not already covered by sub-sections 2-4 of s. 95. Section 95 (5) would, however, have relevance in relation to recognition of foreign nullity decrees of the respondents' residence at domicil and, in the case of void marriages, of the *lex loci celebrationis*. See Nygh, *Conflict of Laws in Australia*, p. 456.

Mather v. *Mahoney* and the *Blair* and *Mayfield Cases* might not be followed in Australia. Nationality *per se* can never be enough to amount to a substantial connexion, as some of the dual nationality cases show.

Polygamous marriage and the Commonwealth Matrimonial Causes Act

Crowe v. *Kader*[42]

At common law unless a marriage conformed to the definition of marriage stated in *Hyde* v. *Hyde and Woodmansee* no maintenance or other matrimonial relief could be granted by the courts. In an attempt to alleviate hardship s. 6A was enacted in 1965 as an amendment to the Matrimonial Causes Act 1959 (Com.). Section 6A provides:—

> "(1) Subject to this section, a union in the nature of marriage entered into outside Australia or under Division 3 of Part IV of the Marriage Act 1961 that was, when entered into, potentially polygamous is a marriage for the purpose of proceedings in relation to any such proceedings, where it would have been a marriage for those purposes but for the fact that it was potentially polygamous.
> "(2) This section does not apply to a union unless the law applicable to local marriages that was in force in the country, or each of the countries, of domicile of the parties at the time the union took place permitted polygamy on the part of the male party."

This inelegantly drafted section requires that both parties' domiciliary laws permit the husband to enter into a valid polygamous marriage before matrimonial relief is available from the Australian courts.

In *Crowe* v. *Kader*, a girl with an Australian domicil of dependence married, in Penang, a man with a Malaysian domicil. This was a valid potentially polygamous marriage by the *lex loci celebrationis* but, since Australia does not permit husbands to marry polygamously, the girl was unable to obtain any matrimonial relief from the Australian courts when she returned here after her marriage had broken down. Curiously, had the girl been 21 and had the capacity to acquire a domicil of choice in Malaysia, then she would have satisfied the requirement of s. 6A (2). It seems anomalous that the younger a person is, the less protection s. 6A affords them. Perhaps the case for the reform of the law of domicil needs restating. Unfortunately, amendment of the law of domicil seems to have a low priority in law reform. Even where a reduction of the age of majority is contemplated by the individual States, it is questionable whether this can affect a person's ability to acquire a domicil of choice under Commonwealth law. It would be anomalous if an 18 year old who settled in a State allowing majority at that age could rid himself of his domicil of dependence derived from his parents and acquire an Australian domicil for matrimonial causes jurisdiction, while his twin brother who settled in a State retaining traditional rules on the attainment of majority remained dependent for his domicil on his parents.

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42 12 F.L.R. 357.

Residential Qualifications in Adoption

Re G (an infant)[43]

Under the Adoption Acts which are more or less uniform throughout Australia, before the Court can make an order it must be satisfied that at the time of the filing in the Court of the order:—

(a) the applicant, or, in the case of joint applicants, each of the applicants, was resident or domiciled in New South Wales; and

(b) the child was present in N.S.W.[44]

This gave rise to difficulty in the case, *Re G (an infant)*, where an American couple living in Sydney in a flat sought to adopt a child. The husband's affidavit stated: "I and my said wife are American citizens but due to my employment we have resided in Australia since 8 December 1966. We will continue to reside in Australia for a period of at least one more year after this date and thereafter it is most probable that I will be assigned to duties in the United States."

The Court held that residence for the purposes of the Act denoted some degree of permanence in sense of the applicants having a settled headquarters in New South Wales and the applicants had failed to satisfy this test.[45] Moreover, since there was no evidence as to the effectiveness of a New South Wales adoption under the law of the applicants' American domicil, the Court could not be satisfied as it was required to be under the Adoption Act that the adoption would promote the child's welfare.

It is regretted that the word resident was given such a restricted definition in this case. Most laymen would believe that if a person had been physically present in an area for between 18 months and two and a half years he was a resident of that area. The effect of this decision may well be to lead to *de facto* adoptions over which the courts can exercise little control.

Death Duties and the power to impose them within Australia*

Permanent Trustee Co. (Canberra) Ltd. v. *Finlayson*[46]

In *Permanent Trustee Co. (Canberra) Ltd.* v. *Finlayson* the High Court reversed an order of the Supreme Court of the Australian Capital Territory directing a New South Welsh duty to be paid out of the testatrix's assets situate in the Territory. The testatrix, who had been domiciled and resident in New South Wales, had executed two wills. One, made in the Australian Capital Territory, dealt with her

43 [1968] 3 N.S.W.R. 483.

44 Section 8 (1) N.S.W. Adoption Act 1965-1966.

45 The word residence is often used to mean little more than a physical presence which is not transient (see *The Meaning of Residence* J. D. McClean, 11 I.C.L.Q. 1155) but in Australia particularly in the Constitution s. 75, the word seems to have a more stringent definition; *Australian Temperance Society v. Howe* (1922), 31 C.L.R. 290.

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46 (1968), 43 A.L.J.R. 42.

personal estate which became situate there, and the other with her estate situate in New South Wales. The A.C.T. will appointed the Permanent Trustee Co. (Canberra) as executor and trustee. After her death the Supreme Court of the A.C.T. granted probate of that will to the Canberra company. The N.S.W. will appointed the Permanent Trustee Co. of New South Wales as executor and the N.S.W. Supreme Court granted probate of that will to the N.S.W. company. The beneficiaries named in both wills were identical.

The Commissioner of Stamp Duties in N.S.W. issued a notice of assessment of death duty under the relevant N.S.W. enactment, and in accordance with it, which was based on the value of the deceased's assets situate in N.S.W. and the A.C.T. As the N.S.W. property was insufficient to pay the duty the Commissioner lodged a claim against the A.C.T. company for the unpaid balance. The relevant provisions of the Stamp Duties Act of N.S.W. 1920-1965 were ss. 102 and 114 which provided:—

> "S. 102. For the purposes of the assessment and payment of death duty but subject as hereinafter provided, the estate of a deceased person shall be deemed to include and consist of the following classes of property:—(1)(a) All property of the deceased which is situate in New South Wales at his death. And in addition where the deceased was domiciled in New South Wales all personal property of the deceased situate outside New South Wales at his death.
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> "S. 114 (1) Death duty (other than death duty separately assessed in respect of non-aggregated property) shall constitute a debt payable to His Majesty out of the estate of the deceased in the same manner as the debts of the deceased, and such duty shall be paid by the administrator accordingly out of all real or personal property vested in him and forming part of the dutiable estate of the deceased whether that property is available for the payment of the other debts of the deceased or not and whether the property in respect of which the duty or any party thereof has been assessed is vested in the administrator or not."

The A.C.T. company considered that it was not liable to pay the duty within s. 114. The Supreme Court of the Australian Capital Territory, in a judgment delivered by Dunphy, J., found that the intention of the statute was for all personal property outside N.S.W. to be liable for assessment and payment of duty.[47] The A.C.T. company then argued that even if this were so the rule in *Government of India* v. *Taylor*[48] was applicable. Dunphy, J., also rejected that contention, holding that the rule did not operate within the Australian federation:—

> "In coming to this decision I am aided, in the first place, by the decision of the Privy Council in *Government of India* v. *Taylor*, upon which both parties to these proceedings rely. However, the Privy Council was not considering the question of the rule that the courts of one country will not entertain a suit to recover taxes due to another country in relation to a federation of States where legislation exists comparable with the 'full faith and credit' provisions of our Constitution or of the State and Territorial Laws and Records Recognition Act. Lord Somervell of Harrow dealt shortly with this aspect when he said in the first paragraph of his judgment at the top of p. 515: 'The

47 *Permanent Trustee Co. (Canberra) Ltd. v. Finlayson* (1967), 9 F.L.R. 424.
48 [1955] A.C. 491.

> position in the United States of America has been referred to and I agree that the position as between members of a federation, wherever the reserve of sovereignty may be, does not help.' Lord Keith of Avonholm expressed the view, at the bottom of p. 511, that 'it may be possible to find reason for modifying the "rule" as between the States of a federal union.' The rule, of course, could be changed by Parliament, as pointed out by Viscount Simonds at the top of p. 508 of the report of his decision in *Taylor's Case*.
> This, it seems to me, Parliament has done through s. 118 of the Commonwealth of Australia Constitution Act and s. 18 of the State and Territorial Laws and Records Recognition Act 1901-1964."

Finally, Dunphy, J., noted that no challenge had been made to the constitutional validity of the New South Wales Act in so far as it provided that personal property of a deceased person outside the State was liable for assessment. In any event two High Court authorities put the matter beyond doubt. In essence, then, the Supreme Court of the Australian Capital Territory considered the New South Wales Act validly imposed an obligation which was enforceable in other States and the *Government of India* v. *Taylor* rule was inapplicable.

In a joint judgment, the High Court reversed this decision by declaring that the A.C.T. administrator had to administer the A.C.T. estate in accordance with *lex fori*. The claim of the New South Wales Commissioner was not for a debt of the deceased but of a tax which became payable subsequently to her death. Section 114 of the N.S.W. Act required an administration governed by New South Wales law to meet the duty as if it had been a debt. The Court, however, considered that "the section shows on its face that it is intended to apply only to administrations in which New South Wales law governs the course to be followed . . ." and even if the Act explicitly required the duty to be considered as a debt "it could be so deemed, by virtue of that provision, in a Court applying Territory law . . .". Thus, the N.S.W. duty did not constitute a debt in the A.C.T.

Several points which emerge from the High Court's judgment, are noteworthy:—

1. Extensive reliance was placed on English authorities and English Private International Law generally without consideration of their appropriateness in the Australian Federation. The High Court did note the contention that the *Government of India* v. *Taylor* rule was inapplicable as between States and territories in the Federation but did not expressly so hold.

2. The actual basis of the decision was that the administration was to be carried out in accordance with the *lex fori*; that the New South Wales Act did not intend to bind the Territory executor and even if it did, it could not. Further s. 118 of the Constitution could not be employed to give the N.S.W. duty this effect:—

> "An endeavour was made in the course of argument to invoke s. 118 of the Constitution and s. 18 of the State and Territorial Laws and Records Recognition Act 1901-1964 (Com.); but it is one thing to give full faith and credit to the New South Wales Stamp Duties Act as achieving all that it purports to achieve as an alteration of the law of New South Wales, and quite another thing to treat it as producing an

> extra-territorial result which on its true construction it does not purport to have and could not constitutionally have, namely, to alter the law of the Territory as to Territory administrations."

3. The High Court indicated that duty may have been payable out of the A.C.T. assets in two circumstances:—

(a) If the N.S.W. executor had also been executor in the A.C.T. the duty "might perhaps have been payable out of the general mass of assets, regardless of their local situation at the death of the deceased . . ."

(b) In the actual distribution, after the administration had been completed, the N.S.W. duty may be relevant for "by the rule of private international law in force in the Territory, the distribution, unlike the administration that precedes it, is ordinarily governed by the *lex domicilii*". However, the Court largely negated this possibility by remarking that:—

> "The court of the situs has . . . a discretion in the matter and, there is authority for saying that a remission to the representative in the place of domicil will not be directed if, as is the case here the result would be to subject the property to a claim which is not enforceable against it in the administration under the *lex fori* . . ."

4. The fact that the deceased had been domiciled in N.S.W. was relevant. It enabled N.S.W. to validly impose duty on the value of the deceased's estate in N.S.W. and on personalty situate elsewhere but it only cast a liability on the N.S.W. executor. Because of domicil within the State, then, N.S.W. had the necessary nexus to calculate duty on the personal estate in the A.C.T., but it could not effectuate payment of that duty out of those assets unless one of the conditions mentioned in paragraph 3 above applied. The Court in fact decided that N.S.W. was competent to take into account the value of personalty situate out of State in calculating duty; but, though out-of-State personal assets were relevant in calculating duty, they were not relevant for the purposes of payment of duty.

The High Court's curt dismissal of the possible application of the full faith and credit provisions is regrettable. The Court itself observed that, "at the time of the making of the will there was no death duty in force under Territory law, nor is there any yet", and, the Territory was prepared to acknowledge the N.S.W. duty. Further, the deceased had lived and died domiciled in New South Wales and the beneficiaries were all resident and domiciled in New South Wales. That State was the only one really interested. The making of a separate will and the appointment of a separate executor in the A.C.T. as well as the eventual removal of most assets from N.S.W. to there was no more than a device to avoid N.S.W. duty. The deceased left an estate of more than $250,000 but the value of assets remaining in New South Wales which were available to pay the duty did not exceed $3000. The A.C.T. did not object to enforcing the duty; it had no tax conflicting with that of the only interested jurisdiction, New South Wales. It is difficult to imagine a stronger or more apparent case where full faith and credit should have been applied.

The High Court did not investigate the extent of the operation of the full faith and credit provisions nor examine United States cases on point. But, ironically, had it done so, it would have found some authority for the proposition that the full faith and credit provisions do not compel the enforcement of a sister State tax claim not yet reduced to a judgment.