were adopted, E. would succeed, for the legal burden would shift from E. to those denying her claim.

The presumption of the validity of marriage is also considered to be extremely forceful[27] and as McInerney J. observed, it was created to further a result traditionally deemed socially desirable. Keeping this in mind, it seems more realistic to state that the party against whom the presumption operates has to overcome the presumption on the balance of probabilities. Of course, in the majority of cases, the Court can arrive at a result without relying on the burden of proof (as here), but it may become a vital issue in other cases.

GRACE LOLICATO

DOTTER v. EVANS[1]

Land under Torrens Title—Contract of Sale—Specific Performance—Vesting order—Four day order.

The action which forms the subject of this case was brought after the defendant, as vendor, had refused to comply with the terms of a decree of specific performance issued against him in respect of an unfulfilled contract with the plaintiff for the sale of land. As the land was subject to the Transfer of Land Act, the plaintiff sought to obtain his rights under the contract by having his name entered on the Register of Titles as the registered proprietor of the estate which the defendant had agreed to sell.

The claim was based upon s. 57 of the Trustee Act 1958 which provides that where a judgment for specific performance is given concerning any interest in land, the court may declare that any of the parties to that transaction are trustees of any interest in land, and on s. 58(1) of the same Act which empowers the court to make a vesting order where any person refuses to convey any property in accordance with the terms of an order of the court or where the property is vested in a trustee, and then upon s. 58(1) of the Transfer of Land Act 1958 which provides that where any person interested in land under the Act appears to be a trustee and a vesting order is made by the court, the Registrar shall enter a memorandum thereof in the Register Book.

However, the plaintiff, realizing that the title would not vest in him until appropriate entries had been made in accordance with the Transfer of Land Act,[2] and faced with the Registrar's refusal to enter the memorandum without the production of the duplicate Certificate of Title (which the defendant had already refused to surrender), sought in his motion an order that the court exercise the powers conferred upon it by s. 103 of the Transfer of Land Act 1958.[3]

In giving judgment, Gillard J. proceeded on the general principle that neither a vesting order under s. 58(1) of the Trustee Act, nor an order under s. 103 of the Transfer of Land Act should be used as a substitute for ordinary conveyancing practice. As His Honour was of the opinion that the provisions of these sections should only be resorted to in the last extremity, he refused to apply them to the facts before him. However, to enable the plaintiff to enjoy his rights under the contract, as contemplated by the decree of specific performance which had been made in previous proceedings, Gillard J. made a four day order commanding the defendant to execute a registrable instrument of transfer and deliver it to the plaintiff's solicitor. He stipulated that should the

[27] This presumption, in conjunction with the presumption of innocence and the presumption of death prior to the re-marriage was held to outweigh the presumption of continuance of life. On the conflict of presumptions see: [1969] V.R. 214, 226-227.

[1] [1969] V.R. 41.

[2] See s. 58(2) of the Transfer of Land Act 1958 to which 58(1) is subjected.

[3] Transfer of Land Act 1958, s. 103 would authorize the court to direct the Registrar to substitute the plaintiff's name as the registered proprietor.

defendant refuse to obey the order, proceedings against him for attachment would be instituted.

As the statutory provisions relied upon by the plaintiff seem to apply exactly to the present fact situation, it is an interesting exercise to examine the reasoning of Gillard J. which led him to decline to make the orders sought and grant an alternative means of relief to the plaintiff.

His Honour's refusal to make a vesting order which would have the effect of making the defendant a trustee of the land was based on the notion that a vesting order should not be made where the order is merely intended to facilitate an act as a substitute for ordinary conveyancing practice. Authority for this proposition has been firmly established in such cases as *Re Weston*;[4] *Re Orr*;[5] and *Weigall v. Barber*.[6]

However, it is suggested that these cases and the proposition they put forward have little relevance to matters in issue in *Dotter v. Evans*.[7] In each of the cases cited, the plaintiff had sought a vesting order as an alternative to other more complicated methods of proving his entitlement to registration. In *Re Weston*, a vesting order was sought as a method of getting over a difficulty arising from the loss of the title deeds; in *Re Orr* the order was sought in order to vest an estate in the son and heir when the testator had died leaving no will in the country from which it could be inferred that the estate had been devised to another, and in *Weigall v. Barber*, a purchaser sought an order vesting the land in him where a common law conveyance was inconvenient due to the absence from the jurisdiction of one of the trustees selling the land. Molesworth J., who heard and refused all three of these applications, considered that the Trustee Act was not to be converted into a mere conveyancing facility. Thus, while these cases may indeed be cited as authority for the proposition that a vesting order should not be substituted for ordinary conveyancing procedure, they can hardly amount to direct authority denying the power to make a vesting order where such an order is required to enforce a decree of specific performance because the problems relating to enforcement of specific performance did not, of course, arise in any of these decisions.

It is arguable that in any event, a vesting order given in these circumstances would not act as a substitute for ordinary conveyancing practice but merely as a link in a chain of sections[8] which were intended by the legislature to provide the standard conveyancing practice where a fact situation of this type arises.

This criticism of the refusal of Gillard J. to make a vesting order will obviously be of value only if there was also no foundation for his refusal to make an order under s. 103 of the Transfer of Land Act.

As His Honour points out, it is one of the most fundamental policies of the Torrens System that only one duplicate Certificate of Title should be in circulation at any point of time with respect to any given parcel of land. That this is a fundamental policy of the statute is indicated in the judgment of Roper C.J. in *Caldwell v. Rural Bank of N.S.W.*[9] Gillard J. maintained therefore, that the court should in the first place attempt to safeguard the principles of the Torrens System, and since a direction by the court to the Registrar under the powers conferred by s. 103 of the Transfer of Land Act would involve disregard of this salutary rule, these powers should be used with caution.

[4] (1863) 2 W. & W. (E.) 55.
[5] (1865) 2 W. & W. & a'B. (E.) 100.
[6] (1884) 10 V.L.R. (E.) 90.
[7] [1969] V.R. 41.
[8] Trustee Act 1958, s. 58(1); Transfer of Land Act 1958, s 58; Transfer of Land Act 1958, s. 103.
[9] (1953) 53 S. R. (N.S.W.) 415, 425.

Having regard to the four day order issued by the court, and the threat of attachment if it failed to produce the desired result, from the plaintiff's point of view, this decision was effective enough. The four day order as authorized by the Supreme Court Rules[10] was made available for the recovery of a registrable instrument of transfer from the defendant. If the defendant failed to deliver such an instrument, a writ of attachment would be directed to the sheriff who would execute a warrant to the bailiff entrusted with executing the writ.[11] Gillard J. envisaged that the defendant faced with the threat of arrest would comply with the order, the plaintiff would obtain his registrable instrument of transfer, and the policy of the Torrens System would be upheld.

Gillard J., in holding that the established procedure for effectuating transmission of title should be exhausted before the court is requested to make an order under s. 103, followed a practice which, in ordinary circumstances, has much to recommend it. Indeed his restrictive interpretation of s. 103 of the Transfer of Land Act was approved by McInerney J. in *Casella v. Casella*.[12] However, the fact that the plaintiff in *Dotter v. Evans* was seeking to enforce a decree of specific performance should, it is suggested, have received more attention in the judgment, attention which would have, in all probability led to s. 103(1) of the Transfer of Land Act being applied.

In awarding such standard remedies as a four day order, Gillard J. 'assumed that the defendant should and will obey the court's orders on any directions given'.[13] But surely the fact that the plaintiff was forced to come to court in order to enforce his decree for specific performance raises some doubt about this assumption. As the remedy of specific performance was originally awarded in equity as a speedy and efficient means of enforcing a contract,[14] to adopt a course such as that taken by Gillard J. reduces the effectiveness of the remedy by subjecting its execution to more delay.

In refusing to exercise his discretion and apply s. 103(1) of the Transfer of Land Act, even to enforce a decree of specific performance, Gillard J. was, as previously mentioned, strongly influenced by the 'policy' behind the Act. But to cite the policy of the Act as a reason for a restrictive exercise of this discretion seems to be a course fraught with the possibility of error. While it is true that wherever possible only one Certificate ought to be in circulation, the legislature itself has seen fit to subject this notion to other policy considerations which permit, or at least envisage, the possibility of more than one duplicate existing. This is obvious from the inevitable effect which the application of such sections as 103(1) or 59(2) must have. Considering the special nature of the remedy of specific performance, and the public policy requirement that it remain an effective remedy to enforce contracts for the sale of land, it is suggested that the court could well have made a vesting order and altered the Register without such emphasis on the policy behind the Act.

As the decision in *Dotter v. Evans* gave a remedy for the refusal of the defendant to perform the contract, it can hardly be criticized from a practical viewpoint. However, a disturbing feature of the case is that it seems to introduce into the application of s. 103(1) of the Transfer of Land Act a qualification that the court will not exercise the discretion conferred upon it unless the plaintiff has exhausted every other remedy available to obtain a transfer. Whether such an important restriction should be implied into a section which in no way suggests such a limitation, is, at this stage, not particularly clear,

[10] O. 41 r. 5 and O. 42 r. 7.
[11] See Williams (ed.), *Daniell's Chancery Practice* (8th ed. 1914) 772.
[12] [1969] V.R. 49, 59. [13] [1969] V.R. 41, 45.
[14] For a general discussion of specific performance as a means of enforcing a contract for the sale of land, see *Seton on Decrees* 606-18.

but it seems that, unless there is further judicial consideration of the matter, the restriction will apply to the Victorian Transfer of Land Act as from 1969.

JUDITH A. EARLS

HARTLEY v. VENN AND ANOTHER[1]

Private International Law—Choice of law for a foreign tort—Effect of a complete defence in the place of commission—Jurisdiction—What constitutes the law of the forum.

The plaintiff was injured in a motor accident in New South Wales as a result of the defendant's negligence. The plaintiff was contributorily negligent. An action was brought in the Australian Capital Territory before Kerr J. If the action had been brought in the place of commission of the tort, N.S.W., the plaintiff's contributory negligence would have supplied a complete defence. Nevertheless, His Honour gave judgment for the plaintiff and merely apportioned damages under the relevant A.C.T. Statute.

It was clearly established that the rules of Private International Law should have been used to decide between the laws of the A.C.T. and N.S.W. The instant case being a tort, the Court framed its judgment in terms of the choice of law rules laid down in *Phillips v. Eyre*.[2] Before considering what His Honour said, it is convenient to look at the doctrine of that case.

The Governor of Jamaica had imprisoned the plaintiff, who sued claiming damages for wrongful imprisonment. Willes J. for the Court of Exchequer Chamber laid down the famous test that to 'found a suit in England', (i) 'the wrong must be of such a character that it would have been actionable in England' and that (ii) 'the act must not have been justifiable by the law of the place where it was done'. An Act of Indemnity had been passed making the Governor's action 'lawful'. Hence it was 'justifiable', and that meant the plaintiff did not succeed.

There has been a trend noticeable in the recent texts and cases, for example, *Boys v. Chaplin*[3] and *Anderson v. Eric Anderson Radio and T.V. Pty Ltd*,[4] to treat the *Phillips v. Eyre* two part test as going only to jurisdiction. This means that, as well as the jurisdictional rules usual in civil suits with a foreign element, a Court must be satisfied that the wrong is 'actionable' in the forum and 'not justifiable' in the place of commission, to put the two conditions briefly. There is no conclusive evidence in *Phillips v. Eyre* that Willes J. intended to so state the law. He makes no mention of needing to apply any further law if he decided that he had jurisdiction. The Court of Exchequer Chamber never suggested that it did not have jurisdiction. It should have if its test only concerned that. Rather, the Court seems to have taken jurisdiction on the basis of service, the orthodox basis in Private International Law. It then seems to have used its two conditions to see whether plaintiff would succeed.

The Court of Appeal in *Boys v. Chaplin*,[5] on the other hand, did use the two conditions as a jurisdictional test only. Having satisfied itself that it had jurisdiction, it went on to choose the appropriate law. Lord Denning M.R. favoured the notional 'Proper Law of the Tort' which has been advocated by some writers. This is the system of law, analogous to the proper law of con-

[1] (1967) 10 F.L.R. 151. Supreme Court of Australian Capital Territory: Kerr J.
[2] (1870) L.R. 6 Q.B.1.
[3] [1968] 1 All E.R. 283.
[4] (1965) 114 C.L.R. 20.
[5] [1968] 1 All E.R. 283.