MATRIMONIAL CAUSES ACT 1945-55 (CWLTH.)

A significant step has recently been taken in Australian divorce reform with the passing of the Matrimonial Causes Act 1955 (Cwlth.)[1] amending the Matrimonial Causes Act 1945 (Cwlth.).[2] The amending legislation introduces a new Part IIIA into the Act, the effect of which is to extend considerably the rights of the wife. Section 12A(1) provides:

> Where a woman is resident in a State or Territory and has resided there for not less than three years immediately prior to the institution of proceedings under this Part, she may institute proceedings in any matrimonial cause in the Supreme Court of that State or Territory as though she were or had been for any period required by the law of that State or Territory, domiciled in that State or Territory.

Subsection (2) invests or confers federal jurisdiction on the Supreme Court of the State or Territory respectively. Section 12B provides that such Supreme Court shall exercise jurisdiction in accordance with the law of that State or Territory. In Part IV of the Act, s.13 is amended such that any judgment, decree, order or sentence pronounced in pursuance of the Act shall have effect throughout Australia.

This legislation is very similar in form to that enacted in recent years in other common law countries. It is therefore not unique in itself, but nonetheless gives rise to certain unique situations and certain practical difficulties both as regards divorce law and private international law.

The most obvious effect of the Act is the great inroad it makes into the rule in *Le Mesurier* v. *Le Mesurier*,[3] which established that the domicile of both spouses at the institution of the suit is the sole test of jurisdiction. This rule has been greatly criticised, largely on the ground that it discriminates between the sexes in favour of the husband.[4] He may seek and obtain a divorce wherever he may be domiciled, but the wife, whose domicile is that of her husband, must necessarily pursue him to his place of domicile to obtain the same relief. Many Australian States, including New South Wales, have for some time, had legislation remedying this defect as regards deserted wives by in effect giving them a separate domicile, but the present legislation goes much further in extending relief to wives on the basis of three years' residence irrespective of domicile.

The Act in its effect places the wife in a much stronger position than formerly, in two respects. Section 12B provides that in such a suit the law to be applied is the law of the State in which the wife has resided for three years. There is nowhere in the Act any provision against resorting to the jurisdiction, such as is contained in s.16 of the Matrimonial Causes Act, 1899-1951 (N.S.W.)[5]. The effect of these two features is that there is nothing to prevent a wife from taking up residence for the prescribed time in one State to obtain the benefit of local divorce provisions not available to her in the State of domicile. Thus a wife domiciled in New South Wales, which does not recognise insanity as a ground for divorce, may resort to and take up residence for three years in Tasmania, which does recognise this ground under certain conditions,[6] and obtain a decree under s.12A(1) of the Matrimonial Causes Act, 1945-1955 (Cwlth.).[7] Further, under s.13, such a decree would have to be recognised throughout Australia.

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[1] No. 29, 1955.
[2] No. 22, 1945.
[3] (1895) A.C. 528 (P.C.).
[4] See Erwin N. Griswold "Divorce Jurisdiction and Recognition of Divorce Decrees—A Comparative Study" (1951) 25 *A.L.J.* 248, 249.
[5] Act No. 14, 1899—Act No. 43, 1951.
[6] Matrimonial Causes Act, 1860 (Tas.), s.9 (1) (vi).
[7] No. 22, 1945-No. 29, 1955.

A far more remarkable feature, however, is the way in which the Act in its amended form enables the wife to exercise a choice of law completely independent of the court in whose hands this function normally rests. Under Part III of the Act, enacted in the original Matrimonial Causes Act, 1945 (Cwlth.),[8] s.10(1), a wife (or husband) domiciled in one State or Territory, but resident in another State or Territory of the Commonwealth, may, if resident in the latter for not less than one year immediately prior to the institution of the suit, bring such suit there. Under s.11, the law to be applied is the law of the State of domicile. However, as regards suits brought under Part IIIA of the Act, the law to be applied is, in accordance with s.12B, the law of the State of residence. It is this difference which results in the unique position of a wife domiciled in one State but resident for three years in another, having the choice of bringing her suit under Part III of the Act, in which case the law of the State of domicile applies, or under Part IIIA, in which case the law of the State of residence applies. It is, therefore, a strange position where a court may in effect have to ask the litigant to choose the applicable law, instead of *vice versa*.

A question of primary importance to practitioners invoking Part IIIA is the extent to which decrees granted on the basis of three years' residence will be recognised in other jurisdictions. Section 13 of the Act as amended provides:

> A judgment, decree, order or sentence of the Supreme Court of a State or Territory given, made or pronounced in the exercise of any jurisdiction invested or conferred by this Act shall have effect throughout Australia.

Clearly then a decree under Part IIIA of the Act granted in one State or Territory will be recognised in all other States and Territories of the Commonwealth. This, in view of the "full faith and credit" clauses[9] and *Harris* v. *Harris*,[10] where the Victorian court held that on the basis of the "full faith and credit" provisions it would recognise a New South Wales decision, even though by Victorian law the decision was clearly incorrect, adds little to the law.

What is of far greater interest is the extent to which decrees granted under Part IIIA of the Act will be accorded recognition in jurisdictions outside Australia, particularly common law countries. The principal requisite necessary is that the Australian court must have had jurisdiction in the international sense, that is, have exercised jurisdiction in circumstances corresponding to those in which the recognising court would exercise jurisdiction.[11] This applies to jurisdiction in the ordinary common law sense based on the principle of effectiveness, but will the same principle extend to jurisdiction in the assumed or statutory sense? It is, of course, with this latter type of jurisdiction that we are now concerned.

This question, though discussed earlier by Denning, L.J. in *dicta*,[12] was not squarely raised until the recent case of *Travers* v. *Holley and Holley*.[13] In that case a husband and wife married in England and acquired a domicile in New South Wales. The husband deserted his wife and subsequently returned to England, acquiring a domicile there. After three years' desertion the wife obtained a divorce in New South Wales under s.16(a) of the Matrimonial Causes Act, 1899,[14] and subsequently remarried. The husband petitioned in England for divorce on the ground of his wife's adultery with her second husband, contending that he had never been domiciled in New South Wales,

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[8] No. 22, 1945.

[9] Commonwealth of Australia Constitution Act, s.118—63 & 64 Vict., c. 12; State and Territorial Laws and Records Recognition Act, 1901-1928, s.18.

[10] (1947) V.L.R. 44.

[11] *Sirdar Gurdyal Singh* v. *The Rajah of Faridkote* (1894) A.C. 670 (P.C.).

[12] *Re Dulles Settlement Trusts* (1951) Ch. 842, 851.

[13] (1953) P. 246; see (1951) 1 *Sydney L.R.* 400 for a discussion of this case.

[14] Act No. 14, 1899-Act No. 43, 1951.

and even if he had been, the New South Wales court had no jurisdiction in the eyes of an English court since he was unquestionably domiciled in England at the time of the institution of the New South Wales proceedings. The Court of Appeal rejected both of these arguments. In regard to the latter, it was held that since s.16(a) of the New South Wales Matrimonial Causes Act, 1899 and s.13 of the English Matrimonial Causes Act, 1937,[15] were substantially identical, both courts claimed the same jurisdiction and hence were bound to accord recognition to decrees made by each with respect to such jurisdiction. Clearly then, in this case, reciprocity of assumed or statutory jurisdiction was recognised.

Such a decision, however, was inevitably bound to create difficulties as was clearly demonstrated by the subsequent case of *Dunne* v. *Saban* (formerly Dunne).[16] Here the parties were married in England and subsequently emigrated to Florida, acquiring a domicile of choice there. The husband later left his wife and returned to England, re-acquiring his English domicile of origin. The wife then instituted proceedings for divorce in Florida and obtained a decree on the ground of "extreme cruelty". The basis on which the Florida court exercised jurisdiction was the separate domicile of the wife and at least ninety days' residence there. The husband applied to the English court for a declaration as to whether or not the Florida decree was effective in England. Davies, J. held that the decree could not be recognised in England since it was made in the exercise of jurisdiction which encroached on the English principle of the domicile of the parties founding jurisdiction, and that the only occasion on which an English court would relax this rule and recognise a foreign decree encroaching in such manner would be where the English court itself possessed a statutory jurisdiction which encroached to an equal extent. He thus restricted the broad principle of reciprocity of assumed jurisdiction laid down and applied in *Travers* v. *Holley and Holley*[17] to those cases in which the respective statutory jurisdictions claimed by the court pronouncing the decree and the court of the forum are identical. Thus, he says:[18]

> *Travers* v. *Holley and Holley* deals with a case where the foreign court's jurisdiction depends on three years' residence, as does ours in similar circumstances. What is the court to do when it is faced with a case of this kind? How is it to draw the line? Three years is all right because we exercise a similar jurisdiction. Is two years all right or is it too short. Is twelve months, ninety days, sixty days, one day, all right? How is one to draw the line and where is one to fix the standard? . . . In my judgment the observations in *Travers* v. *Holley and Holley* merely decide that this court will recognise the right of other courts to encroach on the principle of domicile only to the extent to which this court also does.

Davies, J. was thus faced with the problem of what degree of similarity between the two statutory provisions is necessary before reciprocity can occur. In an attempt to introduce certainty into the law he concluded that the provisions must be identical in substance—a rather uncommon phenomenon where the legislation of two States, steeped in different legal traditions, is concerned. He sought to render the principle enunciated in *Travers* v. *Holley and Holley*[19] almost totally ineffective and to return to "the insularity of outlook which had previously marked many decisions of the English courts on the subject of private international law".[20] It is submitted, therefore, with respect, that the observations of Davies, J. in *Dunne* v. *Saban* (*formerly Dunne*)[21] are wrong on this point, and in reply to his question of how the court is to draw the line, a broader answer should be given on the basis of comparability in sub-

[15] 1 Edw. 8 and 1 Geo. 6, c. 57 (now s.18 of Matrimonial Causes Act, 1950-14 Geo. 6, c. 25).
[16] (1954) 3 All E.R. 586 (P.D.A.).
[17] (1953) P. 246.
[18] (1954) 3 All E.R. 586, 592.
[19] (1953) P. 246.
[20] (1955) 1 *Sydney L.R.* 400.
[21] (1954) 3 All E.R. 586 (P.D.A.).

stance, rather than absolute identification, even if this does involve a corresponding sacrifice of certainty.[22]

In the light of *Travers* v. *Holley and Holley*,[23] therefore, Australian decisions under Part IIIA of the Act will only be recognised in other British jurisdictions if these jurisdictions possess legislative provisions substantially similar to, but not necessarily identical with, Part IIIA. An examination of these various provisions is therefore necessary.

In England and Wales the issue is governed by the Matrimonial Causes Act, 1950,[24] s.18 of which provides:

> (1) Without prejudice to any jurisdiction exercisable by the court apart from this section, the court shall by virtue of this section have jurisdiction to entertain proceedings by a wife in any of the following cases, notwithstanding that the husband is not domiciled in England, that is to say:
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> (b) in the case of proceedings for divorce or nullity of marriage, if the wife is resident in England, and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings and the husband is not domiciled in any other part of the United Kingdom or in the Channel Islands or the Isle of Man.

Subsection 3 provides that the law to be applied is that which would be applied if both parties were domiciled in England at the time of the proceedings. It will be seen that there is basically only one difference between the English and Australian provisions. Section 18(1)b of the English Act expressly excludes a wife domiciled in one part of the United Kingdom but resident in another part from availing herself of the use of this subsection, probably because the legislature did not consider it too onerous that a wife domiciled in Scotland but resident in England, for example, should have to initiate proceedings in Scotland, the two countries being geographically so close to one another. This provision is not duplicated by Part IIIA as regards the various States of the Commonwealth. It is interesting to note in passing that had such a restriction been included in Part IIIA both the overlapping of this Part with Part III, and the resorting of the wife from the jurisdiction of one Sate to that of another as discussed above, would have been prevented since Part IIIA would only then apply where the husband was domiciled outside Australia. According to the private international law rule of recognition based on reciprocity of assumed jurisdiction then, Australian decrees under Part IIIA would be given full force and effect throughout England and Wales, except perhaps in the one instance mentioned above where the husband is domiciled within Australia.[24a] However it would seem that an English court would nonetheless accord recognition even in that case, not on the basis of reciprocity, but either on the basis that for the purpose of such a case the whole Commonwealth might be considered as a single law district and hence as the common domicile of the parties or on the basis that the decree would be recognised in the State of the domicile. This point will be discussed later.

Section 2 of the Law Reform (Miscellaneous Provisions) Act, 1949,[25] repealed as regards its application to England by the consolidating Act of 1950,[26] but not as regards Scotland, is exactly similar to the English provision.

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[22] *Cf.* G. D. Kennedy, "Australian Divorces in Canada" *supra* 285 at 287.
[23] (1953) P. 246.
[24] 14 Geo. 6, c. 25.
[24a] See for the reciprocal situation, *Comber* v. *Comber* (1956) at moment unreported, where Brereton, J. in *dicta* stated that a decision under s.18(1)(b) of the English Act would in view of Part IIIA be accorded recognition by a N.S.W. court even if exercising merely *State* jurisdiction. The issue was not material in this case, however, since the English decree was granted a few months prior to the date of commencement of Part IIIA.
[25] 12, 13, 14 Geo. 6, c. 100.
[26] 14 Geo. 6, c. 25.

A similar provision is also in force in Northern Ireland.[27] Thus Australian decrees under Part IIIA would be recognised throughout the whole United Kingdom.

In the Dominion of Canada, unlike Australia, divorce legislation is a federal matter, but due to the social and religious views prevailing there, it is usually politically inexpedient for the Dominion Parliament to legislate on the subject. Consequently, there is a great dearth of such legislation, and the only Act of any great importance is the Divorce Jurisdiction Act, 1930,[28] which in its effect is similar to s.16(a) of the Matrimonial Causes Act, 1899 (N.S.W.).[29] There is certainly no legislation which can be compared with Part IIIA of the Australian Act, so it would seem that decrees made pursuant to that Act would not be recognised in Canada, on the basis of reciprocity at least.[30]

In New Zealand, the relevant provision is s.12(4) of the Divorce and Matrimonial Causes Act, 1928-1953,[31] which provides:

> Where a wife who is living apart from her husband is living in New Zealand and has been living there for three years at least, and has such intention of residing permanently in New Zealand as would constitute a New Zealand domicile in the case of an unmarried woman, she shall be deemed for the purposes of this Act to be domiciled in New Zealand and to have been domiciled there for two years at least, notwithstanding that her husband is not domiciled in New Zealand.

This subsection does not go nearly as far as the Australian provision. In the first place, the jurisdiction of the New Zealand courts depends on an intention to reside permanently in New Zealand; in the second place, and following from this, a wife is capable of possessing a separate domicile in effect; and in the third place, she must be living apart from her husband. It would therefore appear that Australian decrees under Part IIIA would only be recognised in New Zealand where the wife, in addition to having residence in the jurisdiction for three years, intends to reside there permanently and is living apart from her husband. This, however, is subject to the rule in *Armitage* v. *A.G.* (*Gillig* v. *Gillig*[32]) to be discussed later.

As regards the United States of America, the position is rather different. There have been few statutory developments, the basic results being reached for the most part by judicial decision. Unlike British countries, the idea has grown in the various States that the wife can have a separate domicile quite independent of that of her husband. This trend dates back to well over a century ago. In 1831 the Supreme Court of Indiana in *Tolen* v. *Tolen*[33] upheld the separate domicile of the wife and the following year the Supreme Court of Maine in *Harding* v. *Harding*[34] reached a similar result. Dean Griswold of the Harvard Law School, in a paper submitted to the Seventh Legal Convention of the Law Council of Australia, said of this result:[35]

> Rightly or wrongly, this is the way our law got started, and it has since continued in this way without any dissent. To me it is understandable that the courts should have reached this result, and, conceding my obvious bias, I am inclined to feel that this was right. We were a young country, with rather numerous and relatively small States, and a considerable freedom and volume of moving about. We were also in the beginnings of a strong development towards the equality of women and a recognition of that equality in our laws.
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> The question, therefore, arises as to whether an American court will accord

[27] Law Reform (Miscellaneous Provisions) Act (Northern Ireland) 1951, s.1.
[28] 20-21 Geo. 5, c. 15.
[29] Act No. 14, 1899-Act No. 43, 1951.
[30] For a more detailed survey of the Canadian position see generally Professor Kennedy's article *supra* 285.
[31] No. 16, 1928-No. 43, 1953.
[32] (1906) P. 135.
[33] (1831) 2 Blackford 407.
[34] (1832) 9 Greenleaf 140.
[35] (1951) 25 *A.L.J.* 255.

recognition to an Australian decree under Part IIIA when such legislation is similar in its effect to its own common law provisions. There is no authority on this point, but it is submitted that it would do so. After all, this question really does not go as far as that in *Travers* v. *Holley and Holley*[36] which involved reciprocity based on the States having similar legislative provisions. All that is involved here is reciprocity based on the similarity of one State's legislation with another's common law provisions. Generally speaking, therefore, decrees under Part IIIA would be recognised to a greater or less degree throughout America, depending on whether the State concerned regarded residence alone as sufficient, in which case such Australian decrees would be fully recognised or whether the separate domicile of the wife is required, in which case it would be necessary to prove that the wife would have been domiciled, if unmarried, in the Australian State of residence.

The whole of the foregoing discussion on foreign recognition of Australian decrees under Part IIIA of the Act must, however, be read subject to the rule in *Armitage* v. *A.G.* (*Gillig* v. *Gillig*).[37] This case decided that a divorce, no matter how or where obtained, which is valid by the law of the State which is the domicile according to the rules of the forum, will be recognised as valid in that forum. Being a decision of the Probate Division of the High Court in England, strictly speaking it is only of any authority at all throughout the United Kingdom and the Commonwealth. However, it would seem that the courts of the United States of America have adopted the same principle. It was said in *Ball* v. *Cross*,[38] "If the State of which she was then a citizen recognised such a decree as that obtained in Nevada, and gives it full force and effect, then it is not for us to say that it is void as to her." Again, in *Dean* v. *Dean*,[39] a husband and wife were domiciled in Ontario. The husband abandoned his wife, went to Pennsylvania obtaining a divorce there, subsequently remarried and went to New York. His first wife then sued for divorce in New York. This was granted on the basis that the Pennsylvanian decree would not have been recognised in Ontario, the matrimonial domicile—a negative application of the principle.

Thus, British or American jurisdictions will, irrespective of their own legislative or judicial provisions on the subject of residence, accord recognition to a decree under Part IIIA, provided the husband is domiciled in a jurisdiction which does recognise such a decree, even where such recognition is granted on the basis of reciprocity of assumed jurisdiction—a combination of the rules in *Travers* v. *Holley and Holley*[40] and *Armitage* v. *A.G.* (*Gillig* v. *Gillig*).[41] This is so whether the domicile is another Australian State, in which case s.13 of the Act applies, or is some outside country such as England assuming jurisdiction in similar terms to the Act.[42]

In the case of an Australian State being the domicile, however, it might well be argued that *Armitage* v. *A.G.* (*Gillig* v. *Gillig*)[43] is irrelevant. It is quite probable that although the States are generally considered as separate law districts, an American court, for example, faced with the problem of recognising a decree under Part IIIA, might regard the whole Commonwealth as a single law district since the Federal Parliament is the law-making source.[44] The fact that the parties were domiciled in one State and the decree was granted by the court of another, such as to bring into operation the rule in *Armitage* v.

[36] (1953) P. 246.
[37] (1906) P. 135.
[38] (1921) 231 N.Y. 329, 332; (1921) 132 N.E. 106, 107.
[39] (1925) 241 N.Y. 240; (1925) N.E. 844.
[40] (1953) P. 246.
[41] (1906) P. 135.
[42] See Professor Kennedy's article *supra* at 285.
[43] (1906) P. 135.
[44] See Footnote 7 to Professor Kennedy's article at 285 where he discusses this question and prefers the viewing of Australia as a single law-district.

A.G. (*Gillig* v. *Gillig*)[45] would then, of course, be quite immaterial. The parties would be considered to have an Australian domicile, and the fact that each State has separate and varying divorce laws would merely constitute one of the facts of a case upon which the federal legislation operates. If Australia as one law district be considered the domicile of the parties, then a foreign court would, if British or American, recognise the decree on the basis that it had been pronounced by the common domicile of the parties—an application of the rule in *Le Mesurier* v. *Le Mesurier*.[46] Since there has been no express decision by any foreign court on the point, and there is strong argument on both sides, it cannot be stated with certainty which side a foreign court would favour. In any event, the question is not of any great practical importance in view of the fact that if a court rejected the view that there was an Australian *unitary* domicile it would then be bound to recognise a decree given in the circumstances at present being considered because of the principle in *Armitage* v. *A.G.* (*Gillig* v. *Gillig*).[47]

The concept of the unitary domicile is a concept of long standing in English law. However, when this concept is made the sole basis of jurisdiction in divorce suits, an unsatisfactory and discriminatory position is reached. This is what occurred in *Le Mesurier* v. *Le Mesurier*,[48] a decision which, despite bitter criticism, still stands. Many exceptions to it have been established, however, the most notable being the decision in *Armitage* v. *A.G.* (*Gillig* v. *Gillig*).[49] The present legislation embodied in Part IIIA of the Matrimonial Causes Act 1945-1955 (Cwlth.)[50] is another such exception, and as is made evident above is an example of the present trend in other British jurisdictions in recent years. No longer is the wife bound to follow her husband to his place of domicile to obtain a decree; no longer is a deserted wife precluded from such action by virtue of the fact that the desertion occurred after instead of before the husband's change of domicile; no longer has the husband alone the power to resort to another jurisdiction to obtain the benefit of its laws. Although the concept of the unitary domicile, despite the criticism it receives that in this day and age it is contrary to the two great principles of equality and non-discrimination, is likely to remain with us for some time yet, the Matrimonial Causes Act 1945-1955 (Cwlth.)[51] goes much of the way towards eliminating its unpleasant features.

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[45] (1906) P. 135.
[46] (1895) A.C. 528 (P.C.).
[47] (1906) P. 135.
[48] (1895) A.C. 528 (P.C.).
[49] (1906) P. 135.
[50] No. 22, 1945-No. 29, 1955.
[51] *Ibid.*