CASE NOTES

WILLIAMS v. LORD MAYOR, ALDERMEN AND CITIZENS OF THE CITY OF HOBART[1]

'Incapacity' and 'Schedule Injuries' in Workers' Compensation

The dispute in this case involved a claim for £275 under rule 4 (1) of Schedule 1 of the Workers' Compensation Act 1927 (item 31) in respect of 'total loss of a joint of the great toe of either foot'.

That rule provides as follows:

> 'In respect of an injury specified in the second column of the table set forth hereunder, the compensation payable under this Act, where total or partial incapacity results from the injury, shall, subject to sub-rule (2) of this rule, be the amount respectively specified opposite that injury in the second column of that table . . .'

There follows a table of scheduled injuries involving total or partial loss of certain limbs or members of the body, together with a statutory amount of compensation payable in respect of each It was under that table that the amount of the claim was arrived at.

The defence raised three points:

(1) That no incapacity for work resulted from the injury within the meaning of rule 4 (1).

(2) That no compensation is payable because there was no loss of a joint.

(3) Even if there was a degree of loss of the use of the distal phalanx it was so small as not to amount to incapacity in relation to the work or 'industrial loss'.

The plaintiff, a trench worker and jack-hammer operator, was digging a trench when a jack-hammer fell on his foot. This caused him to lose one toe and part of the joint of the great toe. Compensation for the former was paid, and the claim in respect of the latter only remained in issue. The plaintiff asserted, as a result of the accident, loss of stability, mobility and agility. Conflicting medical evidence was given. A medical witness for the plaintiff said that the plaintiff's 'thrust' speed and steadiness and ability to climb out of trenches were affected, that there was loss

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[1] Supreme Court of Tasmania, Serial No. 12/1962 (unreported). This case was not followed by Crawford J. in *Collis* v. *Huddart Parker Limited* (Serial No. 86/1962, Unreported Judgments, Supreme Court of Tasmania) where His Honour took the view that the decision in *Williams's* case could not be maintained. Whilst, with respect, the latter view is the correct one, the state of the law on this point will remain one of uncertainty until such time as it may be settled by the Full Court or by amending legislation.

of thrusting power and that there was no prehensile power. He equated the disability with total loss of the distal phalanx. The defendant, on the other hand, called a doctor who conceded that the phalanx was to some degree impaired, but was of opinion that the effect of the injury was entirely trivial as having no significant effect on the plaintiff.

The plaintiff, at the time of the action, had returned to his employer and was engaged in the same work—apparently at his pre-accident wage. The defendant thus contended that the plaintiff was not and could not be incapacitated for work. It was because he ultimately adopted this view that the Judge did not attempt to resolve the conflicting medical evidence.

It is respectfully submitted that, in coming to this conclusion, His Honour misdirected himself. He rightly concluded that 'capacity' meant 'capacity for work', and he cited the judgment of Williams J. in *Brugnoni* v. *Hydro-Electric Commission*[2] in support of that interpretation. He did not, however, analyse the meaning of the expression 'capacity for work' and, of course, in *Brugnoni's* case that meaning was not in issue. His Honour further compared the provisions of rule 4 (1) with the equivalent sections of the Victorian and New Zealand Acts. Seeing that in those Acts the words 'where total or partial incapacity results from the injury' do not appear, he sought to distinguish the position under the Tasmanian Act from Victorian and New Zealand decisions in which awards had been made in respect of schedule injuries.

However, section 16 (1) of the New South Wales Act, prior to 1951, contained almost the same expression as the Tasmanian rule 4 (1) and it was the section as so worded which governed the decision in *Frost* v. *Mark Foys Ltd.*[3] In *Williams's* case neither *Frost's* case nor any of the cases referred to therein were apparently cited in argument, nor are they cited in the judgment. The omission of any reference to *Thompson* v. *Armstrong and Royse Pty. Ltd.*[4] is particularly regrettable since, being a decision of the High Court of Australia, it could well have resulted in a different decision in *Williams's* case.

It is true that Cox J. cited an oft-quoted passage from Lord Loreburn's judgment in *Ball* v. *Hunt*:

> 'Incapacity for work exists where a man has a physical defect which makes his labour unsaleable in any market reasonably accessible to him, and there is a partial incapacity for work when such a defect makes his labour saleable for less than it would otherwise fetch'.[5]

In that case the House of Lords adopted the principle, previously established in the Court of Appeal, that 'incapacity for work' meant incapacity

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2 97 C.L.R. 548 at 557.

3 (1952) 52 S.R. (N.S.W.) 95.

4 81 C.L.R. 585.

5 [1912] A.C. 496 at 499-500.

to earn wages or full wages. As Lord Shaw of Dunfermline, quoting Lord Collins M.R. in *Clark* v. *Gas Light & Coke Co.*,[6] put it:

> '. . . If the applicant, after repeated attempts, could not find an opportunity of putting his diminished powers of working into operation, he was justified in saying that his wage-earninng capacity was not the same as before'.[7]

In *Thompson's* case the expression 'incapacity' in the New South Wales Act was considered, and it was decided by a majority of the Court (Latham C.J., McTiernan, Fullagar and Kitto JJ.; Williams and Webb JJ. dissenting) that the worker had, during the period of his annual holidays, a total incapacity for work resulting from injury *notwithstanding that he had received full wages* for that period. Although the High Court was evenly divided on the principal question which fell for decision, namely, whether the worker was entitled to both wages and compensation during his annual holidays, it is the interpretation of 'incapacity' which is of importance.

It had been submitted for the employer that 'when full wages were paid there was no incapacity within the meaning of the Act because the fact that the worker was paid full wages showed that his economic capacity was unimpaired whatever might be the case with respect to his physical capacity', precisely what was claimed in *Williams's* case. That argument found no favour with Latham C.J.:

> 'The phrase "where total or partial incapacity for work results from the injury" must refer to physical injury resulting in physical incapacity for actually doing work. That incapacity is relevant where it produces an incapacity to earn his living as he did before the injury in a market for his labour which was reasonably accessible to him . . . *A payment of money by the employer does not and cannot terminate or in any way affect the existence of any physical incapacity*'[8]

And in the judgment of McTiernan J. there is a further elaboration of the principle that payment by the employer, or even re-engagement by that employer in the same work as before the accident, cannot conclusively negative the existence of incapacity. He quotes Dixon J. in *Williams* v. *Metropolitan Coal Co. Ltd.*[9]

> '. . . But it is not true that incapacity is a conception covering nothing but incapacity for the man's former work or for work in his former industry'.

McTiernan J. goes on to say:

> 'The phrase ("incapacity for work") does not merely mean inability to work for the employer in whose service the worker was injured. An injury results in incapacity for work, according to the intention of the Act, when it takes away or diminishes the power of the worker to earn wages in some suitable employment'.[10]

And Kitto J. likewise expresses the view that 'compensation is awarded, not for loss of wages, nor for impairment of physical condition *per se*, but for the economic aspect of that impairment, namely, a *lost or*

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6 21 T.L.R. 184.
7 [1912] A.C. 510.
8 81 C.L.R. 595.
9 76 C.L.R. 431 at 449.
10 81 C.L.R. 602.

diminished ability to obtain wages by working'.[11] The matter is perhaps best stated by Fullagar J.:

> 'A man is totally incapacitated for work when he is, by reason of his injury, physically unable to work. The words in their natural and primary sense mean that. When their meaning has been expounded by reference to inability to earn wages, the purpose has been to make the meaning more specific, and the result has been to extend rather than restrict the meaning. Thus in *Ball* v. *William Hunt & Sons Ltd.* the worker had recovered his ability to work, but, because the accident had left him with only one eye, he found it impossible to obtain employment. The House of Lords held that he was entitled to compensation. It was with reference to the facts of that case that Lord Loreburn delivered his often-quoted definition of incapacity for work'. . . .[12] Incapacity to earn wages by working includes physical inability to perform any work. The cases cited, and others to the same effect, decide that it includes more. To say that, although there is physical inability to do any work, yet, because wages have been paid, there is no incapacity for work is, I think, to misconceive the purpose and effect of what was said by the learned Lords in the cases cited and to attribute to the words "incapacity for work" a meaning which they cannot bear. . . .'[13]

Indeed, in *Williams's* case, Cox J. said, with reference to the quotation of Lord Loreburn in *Ball* v. *Hunt*:[14]

> 'If then this be the principle to be applied in construing the words in rule 4, there is no room for the contention that a defect, even a total physical loss, of a member inevitably entails loss of industrial capacity — capacity for work — however small it may be'.

This may be a corollary to what was said in *Thompson's* case, but it is doubtful if the matter is thereby concluded. What then are the tests which should have been applied? They were, it is submitted, well stated in *Frost's* case[15] by Herron J.:

> 'In my opinion, the proper approach to the present case is that on the findings of the trial Judge there was undoubtedly a partial incapacity in the appellant in that his injury had destroyed his full physical ability to sell labour for wages. In other words, it was clearly established in this case that the appellant had suffered an incapacity for work in that he had suffered a physical injury which resulted in a want of full capacity as against his condition before the accident'.[16]

Kinsella J. to similar effect:

> 'I think that the test which His Honour should have applied is whether the worker was physically capable after the injury of performing the normal duties of his employment with his normal efficiency'.[17]

But in *Williams's* case that test was not applied. It was not capable of being applied because His Honour had conceived it to be unnecessary to solve the conflicting medical evidence. He came to that conclusion because of the view which he took of the meaning of 'incapacity'. But the cases show that the question whether or not incapacity existed could not be conclusively determined without a decision as to the physical and industrial effects of the injury upon the worker. Thus, a decision on the medical evidence was an essential prerequisite to a judgment of the

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11 *Ibid.* 620-621.
12 *Ibid.* 613.
13 *Ibid.* 613-614.
14 *Supra.*
15 *Supra*, n. 3.
16 (1952) 52 S.R. (N.S.W.) 100.
17 *Ibid.* 103.

claim. In the absence of actual change of employment or of unemployment caused by the injury the only basis on which the claim probably could have succeeded here was that of impairment of physical capacity, coupled with a reduced capacity to earn wages. But the former could have been established only by medical evidence such as was adduced by the plaintiff. It then remained to choose between that evidence and the testimony of the defendant's witness. Of course, in the event of His Honour rejecting the plaintiff's evidence, the latter would still not have succeeded. But in this case the learned Judge had unfortunately put it outside his power to determine the central question in issue. To that extent, therefore, it is respectfully submitted that *Williams's* case should not be followed.

H. A. Finlay

ATTORNEY-GENERAL FOR NORTHERN IRELAND v. GALLAGHER[1]

Murder—Insanity—Drunkenness

The defences of insanity and of drunkenness, even when considered separately, present questions not easy of solution. But when taken together, as was the case in *Attorney-General for Northern Ireland* v. *Gallagher*, the problem becomes still more aggravated. Nevertheless, the House of Lords (Lord Reid, Lord Goddard, Lord Tucker, Lord Denning and Lord Morris of Borth-y-Gest) negotiated with apparent ease the many difficulties and, in more or less simple terms, restated the relevant principles of the criminal law in the matter. The procedural hazards which had to be negotiated before the case reached the House of Lords need not concern us in Australia.

Gallagher was convicted and sentenced to death for the murder of his wife, from whom he had been separated. Obtaining leave from the mental hospital of which he was a temporary inmate, he proceeded to Omagh where he bought a knife and a bottle of whisky. Having made up his mind to kill his wife, he went to her home and emerged therefrom some three hours later in a state of drunkenness. He announced to the next-door neighbour that he had just killed his wife. It is not known how much whisky he had drunk before the killing, but only a small quantity remained in the bottle when it was impounded by the police. When interviewed, Gallagher said: 'I have no regrets, she gave me a hell of a life these past three years'. Later, after being cautioned, he said: 'I made up my mind to kill her about a fortnight or three weeks ago.'

Evidence was adduced to show that the accused was a psychopath, a condition which rendered him susceptible to 'explosive outbursts' when provoked or under the influence of liquor. This, together with other evidence, was relied upon by the defence to establish insanity within the meaning of the M'Naghten rules or, alternatively, that at the time of

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1 [1961] 3 W.L.R. 619.

the killing the accused was incapable of forming a specific intent to murder — by reason of which the crime should be reduced to one of manslaughter.

The Lord Chief Justice of Northern Ireland, Lord MacDermott, in his address to the jury, instructed them to apply the M'Naghten test not to the time when the accused killed his wife but to the morning of that day before he opened the bottle of whisky. After the jury retired counsel for the defence objected that the direction concerning the question of *time* was wrong as being inconsistent with the M'Naghten rules. The learned judge, however, refused to amend his direction, and an appeal on that issue to the Court of Criminal Appeal of Northern Ireland was successful. The problem, therefore, confronting the House of Lords was simply which of those two diametrically opposed views was correct.

It is suggested, with respect, that the admirable judgment of Lord Denning places the matter in clear perspective. 'My Lords, this case differs from all others in the books in that the accused man, whilst sane and sober, before he took to the drink, had already made up his mind to kill his wife. This seems to me far worse—and far more deserving of condemnation—than the case of a man who, before getting drunk has no intention to kill, but afterwards in his cups, whilst drunk, kills another by an act which he would not dream of doing when sober. Yet by the law of England in this latter case drunkenness is no defence even though it has distorted his reason and his will-power. So why should it be a defence in the present case? And is it made any better by saying that the man is a psychopath?[2]

His Lordship then discussed and illustrated the fact that, under English law, self-induced drunkenness offers no privilege to a person save in circumstances such as were described in *D.P.P.* v. *Beard* (1920) A.C. 479. It is submitted that the principles of that case were embodied in section 17 of the Tasmanian Criminal Code 1924.

> '17 (1) The provision of section sixteen (relating to insanity) shall apply to a person suffering from a disease of the mind caused by intoxication.
>
> (2) Evidence of such intoxication as would render the accused incapable of forming the specific intent essential to constitute the offence with which he is charged shall be taken into consideration with the other evidence in order to determine whether or not he had that intent.
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> (3) Evidence of such intoxication not amounting to any such incapacity as aforesaid shall not rebut the presumption that a person intends the natural and probable consequences of his acts.'

Lord Denning pointed out that Gallagher's conduct did not fall within the exceptions above referred to, and he disposed of the question of drunkenness by adopting the words of the trial judge: 'If this man was suffering from a disease of the mind it wasn't of a kind that is produced by drink.' What then of the psychopath whose disease is dormant until affected by drink and who, while it is still dormant, forms an

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2 At 639.

intention to kill, knowingly gets himself drunk so that his disease becomes active, and then kills? Lord Denning would answer in the following terms: 'I think the law on this point should take a clear stand. If a man, whilst sane and sober, forms an intention to kill and makes preparation for it, knowing that it is a wrong thing to do, and then gets himself drunk so as to give himself Dutch courage to do the killing, and whilst drunk carries out his intention, he cannot rely on this self-induced drunkenness as a defence to a charge of murder, nor even as reducing it to manslaughter. He cannot say that he got himself into such a stupid state that he was incapable of an intent to kill. So also when he is a psychopath, he cannot by drinking rely on his self-induced defect of reason as a defence of insanity. The wickedness of his mind before he got drunk is enough to condemn him, coupled with the act which he intended to do and did do. A psychopath who goes out intending to kill, knowing it is wrong, and does kill, cannot escape the consequences by making himself drunk before doing it.'[3]

It may well be that scholars will criticize the views of Lord Denning and, doubtless, formulate situations in which this 'splitting' of the *mens rea* from the *actus reus* could lead to injustice. But it is submitted, nevertheless, that the realistic judgment in this case is not merely 'down to earth' sound sense but also good law.

T. Syddall

LLOYD v. LLOYD[1]

Private International Law—Domicil—Commonwealth Matrimonial Causes Act 1959—Australian domicil for purposes of the Act—International recognition

This Victorian case is interesting in so far as it concerns the possible effect of the Commonwealth Matrimonial Causes Act 1959 on the orthodox common law concept of domicil. In particular, the question arises whether decrees pronounced by Australian courts exercising jurisdiction on the basis of the domicil of the parties in Australia as such, rather than in any particular State or territory, are entitled to international recognition.

The petitioner had in 1960 instituted proceedings for the dissolution of her marriage under the provisions of Part III A of the Commonwealth Matrimonial Causes Act 1945-1955. The parties were married in New South Wales and lived there until in 1953 the respondent, in the course of his employment, went to New Guinea, where the petitioner and their two children joined him.

In 1956 the wife and children returned to New South Wales and subsequently went to Melbourne. The marriage broke up and the petitioner took proceedings for dissolution of marriage in Victoria; she had at that time been resident in Victoria for three years immediately

[3] At 641.
[1] (1961) 2 F.L.R. 349.

prior to the institution of proceedings, as required by section 12A (1) of the Commonwealth Matrimonial Causes Act 1945-1955. The proceedings were initiated on September 28, 1960, before the commencement of the Matrimonial Causes Act 1959 (February 1, 1961) but the case was heard after the Act had come into operation. Barry J. held that, since the respondent had not acquired a domicil of choice in New Guinea, he retained his New South Wales domicil of origin and that the parties were therefore domiciled in New South Wales.

In dealing with pending proceedings instituted before the commencement of the Commonwealth Matrimonial Causes Act 1959 the court may, by virtue of section 112 (6) of that Act, exercise jurisdiction either on any basis that would have been applicable if the Act had not been passed or on any basis applicable to proceedings under the Act for the same relief. Following his decisions in *Tweedie* v. *Tweedie*[2] and *Morkunas* v. *Morkunas*[3] the learned judge held that in a case such as the present the court should exercise jurisdiction not by virtue of the Matrimonial Causes Act 1945-1955 but on the basis of the Australian domicil of the parties, seeing that a decree granted under Part III of the Matrimonial Causes Act 1945-1955 might not be recognised outside Australia.

In dealing with the question of an Australia domicil the learned judge said: 'The Parliament of the Commonwealth of Australia has legislated either on the basis that, independent of the Act, there is an Australian domicile, or that, for the purposes of the law it has made relating to matrimonial causes, there is now an Australian domicile by virtue of the Act'.[4] He also expressed the opinion that the power to prescribe the foundations of jurisdiction was necessarily incidental to the power of the Parliament of the Commnwealth to make laws with respect to matrimonial causes.

It would probably not be contested that, as a matter of Australian law, the Commonwealth Parliament has the power to create an Australian domicil or that, by the Matrimonial Causes Act 1959, it has in fact done so. As Barry J. pointed out,[5] it is the view of Professor Zelman Cowen and Mr Mendes da Costa that 'the creation of an Australian domicil is one of the major changes effected by the Act'.[6] The real problem is that of foreign recognition of Australian decrees. Where the parties are domiciled in an Australian State other than the State in which the decree was made, the decree would be entitled to recognition under the rule in *Armitage* v. *Attorney-General*,[7] because the decree would, by virtue of section 95 (1) of the Matrimonial Causes Act 1959, be recognised by the courts of the domicil. However, difficulties may arise in cases where the husband, having a domicil or origin outside Australia,

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2 (1961) 2 F.L.R. 21.
3 (1961) 2 F.L.R. 24.
4 (1961) 2 F.L.R. 349, 350.
5 *Ibid.* at 351.
6 Z. Cowen and D. Mendes da Costa, *Matrimonial Causes Jurisdiction* (1961), at 30.
7 [1906] P. 135.

has come to Australia intending to remain there permanently, but has not acquired a domicil of choice in any particular State or Territory.

In this connection, reference may be made to two cases decided before the Matrimonial Causes Act 1959, though the judicial observations in question were *obiter*. In *Armstead* v. *Armstead*[8] the Full Court of the Supreme Court of Victoria said: 'Indeed, it is not too much to say that in the light of political, economic, social and scientific developments during the last forty years, the concept of a State domicil is a legal anachronism, a vestigial remnant in legal science which has no relevance to the realities of Australian social conditions, and which should be replaced by an Australian domicil'.[9]

In *Fullerton* v. *Fullerton*,[10] decided by the Supreme Court of the Northern Territory, Kriewaldt J. specifically referred to the question of an immigrant who has come to Australia with the intention never to depart, but has not yet selected the State or Territory which is to be his permanent home. His Honour felt that in such a case, the intention to settle in Australia should 'suffice to extinguish the domicil of origin'.[11] The learned judge, however, was dealing with the question of domicil in relation to jurisdiction in proceedings for nullity of marriage and did not discuss the more serious problem of choice of law which would arise under a system such as he suggested in cases where the laws of the various States and Territories differ. In the case of matrimonial causes, however, this objection does not apply since the commencement of the Matrmonial Causes Act 1959.

In *Lloyd* v. *Lloyd*, Barry J. pointed out that there is no 'reason inherent in the common law concept of domicile why the Parliament of the Commonwealth of Australia is not competent to create or recognise the existence of an Australian domicile for the purposes of its law with respect to matrimonial causes even though for other purposes the domicile of an Australian citizen may be connected only with a State or Territory'.[12]

The learned judge dealt with the decision of the Privy Council in *Attorney-General for Alberta* v. *Cook*[13] and, in particular, with the following passage:

> 'Uniformity of law, civil institutions existing within ascertained territorial limits, and juristic authority in being there for the administration of the law under which rights attributable to domicil are claimed, are indicia of domicil, all of which are found in the Provinces. Unity of law in respect of the matters which depend on domicil does not at present extend to the Dominion. The rights of the respective spouses in this litigation, therefore, cannot be dealt with on the footing that they have a common domicil in Canada, but must be determined upon the footing of the rights available to them under the municipal law of one or other of the Provinces'.[14]

8 [1954] V. L. R. 733.
9 *Ibid.* at 736.
10 (1958) 2 F.L.R. 391.
11 *Ibid.* at 399.
12 (1961) 2 F.L.R. 349, 351.
13 [1926] A.C. 444.
14 *Ibid.* at 450, cited (1961) 2 F.L.R. 349, 351.

His Honour referred to the criticisms of that decision collected by Sissons J. in *Voghell* v. *Voghell and Pratt.*[15] Even if, contrary to his opinion, *Cook's* case laid down that there could not be a Canadian domicil, it would be inapplicable to the situation in Australia which, since the Matrimonial Causes Act 1959, was widely different from that which the Privy Council had to consider.

In *Voghell* v. *Voghell*, Sissons J. seems to have based his refusal to apply *Cook's* case not so much on the ground that there was in fact a Canadian domicil, but rather that in the courts of the North-West Territories of the Dominion of Canada domicil is not the only basis for jurisdiction in divorce. His Honour came to this decision for three reasons:

(a) By virtue of the Northwest Territories Act 1952, the law in force in the Northwest Territories of Canada was the law of England as at July 15, 1870 except as altered in respect of the Territories by any Act of the Imperial Parliament or of the Canadian Parliament or by any ordinance. In 1870 and, in fact, until *Le Mesurier* v. *Le Mesurier*[16] English courts exercised jurisdiction on other bases than the domicil of the parties, as is shown by *Niboyet* v. *Niboyet.*[17] 'It would seem', said His Honour, 'that the rule that domicile in the strict sense must be established in order to found jurisdiction in a suit for dissolution of marriage is "judge-made law" developed in England and the Provinces after 1870 and not "respecting the Territories".'[18]

(b) The decision in *Cook's* case was unrealistic in not giving due consideration to the practical circumstances of Canadian life, which often involve frequent changes of residence from one province to another. This is the burden of the various criticisms gathered by His Honour, and mentioned by Barry J.[19]

(c) In any event, the decision in *Cook's* case dealt with a matter concerning two Provinces of Canada and should not be extended to cases involving the Territories, especially as in the present case the parties were domiciled in the Province of Alberta where the law of divorce was the same as the law of the Territories.

It is respectfully submitted, therefore, that the foregoing criticism of *Cook's* case does not support the view of Barry J. that there is an Australian domicil so far as matrimonial causes are concerned.

It is true, on the other hand, that the Privy Council in *Cook's* case did not say that there could not be Canadian domicil. In the passage quoted above Lord Merrivale said: 'Unity of law in respect of the matters which depend on domicil does not at present extend to the Dominion'.[20]

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15 (1960) 22 D.L.R. (2d) 579.
16 [1895] A.C. 517.
17 (1878) 4 P.D. 1.
18 (1960) 22 D.L.R. (2d) 579, 596.
19 *Cf. Armstead* v. *Armstead, supra.*
20 [1926] A.C. 444, 450.

In that case, it was common ground that the various Provinces had different laws relating to marriage and divorce. The exclusive legislative authority of the Dominion did extend to marriage and divorce, but had only been exercised in numerous private Acts of Parliament dissolving particular marriages. In Australia, on the other hand, there is now, as Barry J. pointed out, unity of law with respect to matrimonial causes. Since the Marriage Act 1961 has come fully into operation, there is also unity of law with respect to marriage. *Cook's* case is therefore not entirely applicable to the Australian situation.

In an article entitled *The Unity of Domicile*,[21] Professor Zelman Cowen and Mr Mendes da Costa discuss this problem. The learned authors point out that whereas the present editors of Dicey reject the view that a man might have different domicils for different purposes, Graveson in his *Conflict of Laws*[22] advocates a more flexible interpretation of the common law doctrine, having regard to the emergence of federal systems in many of which the various matters subject to the law of the domicil are governed partly by federal law and partly by state law. They conclude that the question is still unresolved by authority, but consider that the view of Barry J. is sound in principle and that, as suggested by Graveson, the doctrine of domicil should be interpreted in the light of the realities of federal systems of government.

Dicey[23] points out that in no case has an English court refused to follow a previous decision as to domicil merely because the purpose of the enquiry in that decision was different from the one before the court. It is respectfully submitted that this merely shows that the courts apply the same criteria to determine the domicil of a person, no matter what the purpose of the inquiry. It does not necessarily mean, for instance, that a person cannot acquire a domicil of choice in Australia for the purpose of matrimonial causes if he satisfies those criteria while, for other purposes, he retains his domicil of origin. The reason is not to be found in the different criteria to be applied, but in the absence of any Australian domicil for those purposes, seeing that unity of law in relation to those purposes does not exist in Australia.

Furthermore, the emphasis on the rule that a person can have only one domicil at a time is due to the importance of certainty in determining certain rights and obligations.[24] This, of course, need not exclude an interpretation of the rule by which *different* matters depending on domicil might be governed by the law of different countries.

Thus, the questions raised in *Lloyd* v. *Lloyd* may have far-reaching effects on the theory of domicil, although in practice they may not arise very often. There is, at the moment, lack of authority on the point, and the questions of principle are not canvassed very fully in that judgment.

R. Plehwe

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21 *L.Q.R.* 78 (1962) 62.
22 4th ed. at 75.
23 *Conflict of Laws* (7th ed.), at 89.
24 Cheshire, *Private International Law* (6th ed.), at 172.

WILKINSON AND OTHERS v. SPOONER[1]

Torrens System — Tasmanian Real Property Acts — Indefeasibility of Title — Whether affected by creation of unregistered Easement by Prescription

An ever-present source of controversy since the introduction of the Torrens System, governed in Tasmania by the Real Property Acts 1862-1960, has been the question of the indefeasibility of the title received by the registered proprietor of land held under the Acts. A complementary problem is that of interests in land, created by other statutes, whose recognition appears to be in conflict with this general principle of indefeasibility.

A specific example of this is the creation of easements by prescription over Real Property land. *Wilkinson* v. *Spooner* establishes that in Tasmania land held under the Real Property Acts may become subject to an easement acquired by prescriptive user under the Prescription Act 1934. Not only may the land thus become subject to an unregistered easement, but such an easement is incapable of registration.

At first sight there is something paradoxical about allowing at all a prescriptive acquisition of a right against Torrens-system land. Prescription, even under the Prescription Act 1833 or its local equivalent, has always been based upon a notional grant. The policy of the Real Property Acts, on the other hand, has always been to invalidate any grant which does not appear on the register.

Nevertheless, since *Delohery's* case[2] it has been generally accepted that the allegations of a grant must be regarded as a procedural fiction, and that in Australian law, whether the claim is framed under the lost modern grant theory or under a Prescription Act, the essence of the claim is simply the acquisition of a substantive right by long user.

The question how far one may prescribe against Torrens land in any particular State, therefore, is one which falls to be decided by the legislation of the State concerned.

The position is thus stated by the learned Chief Justice in *Wilkinson* v. *Spooner*: 'No general answer to this question which would be valid in all States is possible. As Hogg on the Australian Torrens System says: "The Statutes exhibit a singular variety in their provisions on this subject".'[3] In Tasmania, section 40 of the Real Property Act 1862 (as amended) provides that the title of a person who is the registered proprietor of land under the Acts shall be held to be paramount, except in case of fraud, and that such a title will be subject only to the interests registered on the folium of the record book; saving three exceptions. The second (and relevant) exception reads as follows:

> 'II. So far as regards the omission or mis-description of any [reservations, exceptions conditions and powers contained in the Crown Grant of land or the interest of any tenant therein, or of any public or other] right of way or other easement created in or existing upon any land.'

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1 [1957] Tas. S.R. 121.

2 *Delohery* v. *Permanent Trustee Co. of New South Wales* (1904) 1 C.L.R. 283.

3 [1957] Tas. S.R. 121, 127. The quotation is from Hogg, *Australian Torrens System* (1905), p. 816, where the relevant sections of the statutes of the different States are cited.

The words in brackets were inserted by the Real Property Act 1893.

In *Wilkinson* v. *Spooner* the personal representatives of the late T. W. Wilkinson were entitled to be registered as proprietors for an estate in fee simple of a block of land in Lenah Valley, Hobart, held under the Real Property Acts. The defendant was the registered proprietor of an adjacent block which was also held under the Acts. Both blocks, together with adjacent lands, had been owned at one and the same time by Co-operative Estates Ltd., who sold the dominant tenement to Wilkinson in 1917 and the servient tenement in 1941 to one Oakes, a predecessor in title of the defendant. From the back gate of the dominant tenement there ran a rough road over the servient tenement to Doyle Avenue. Both the roadway and the back gate were constructed by Co-operative Estates Ltd. No right of way had ever been granted to the late T. W. Wilkinson, but both parties to this action agreed that from 1918 to 1957 Wilkinson or his tenants had used the right of way continuously and without interruption by the owner of the servient tenement. The plaintiffs claimed a right acquired by prescription and sought an injunction restraining the defendant from closing the road. The defendant pleaded that such an easement could not be created over Real Property land and since there was no mention of an easement on either his title or on that of the plaintiffs no easement could be said to exist.

The learned Chief Justice held that prescriptive user *nec vi nec clam nec precario* for twenty years prior to the date of action, as required by sections 3 and 4 of the Prescription Act 1934, had been established. He then went on to determine whether or not the easement so acquired by prescription fell within the relevant exception in section 40, para. II of the Real Property Act. 'An easement created in . . . any land for the purposes of section 40 (II) of the Real Property Act 1862 probably refers to an easement created by express grant. (*Cf.* sections 42 and 43 of the 1862 Act and sections 27 and 27A of the 1886 Act). But an easement established by prescription is an easement "existing" upon land for the purposes of section 40. Paragraph II refers to any public or other right of way or other easement created in or existing upon any land. Easements falling within section 40 paragraph II are not expressly confined to easements created or existing upon land before it was brought under the provisions of the Real Property Act. Are they so confined by necessary implication?' [4]

Section 40 recognizes that certain interests in land held under the Act may arise otherwise than under the provisions of the Act itself, but as to those interests the Act is not exclusive. The learned Chief Justice then referred to *Delohery* v. *Permanent Trustee Co. of N.S.W.*[5]

Clearly an easement established by prescription prior to the servient tenement being brought under the Act is within the exception in para. II. The Victorian case of *James* v. *Stevenson*,[6] on appeal to the Privy Council,

4 At 128.
5 *Supra.*
6 [1893] A.C. 162.

although not directly on the point before the court in *Wilkinson* v. *Spooner*, clearly establishes that an easement, even though not endorsed upon the title, has not been destroyed by the issue of the original certificate.

The learned Chief Justice continued[7]: 'Assuming twenty years uninterrupted user of a right of way as of right to be established under the Acts, why should the easement which would ordinarily be established not answer the description of an easement omitted from any subsequent certificate of title and fall within the section?'

'Section 40 must be read as a whole, and it would require very strong indications to justify an interpretation which would result in some of the excepted interests being confined to interests arising before the land was brought under the Act and others to interests arising at any time.'

The court therefore held that on the true construction of section 40, the second exception did allow the creation of easements by prescription over Real Property land.

Section 114 of the Real Property Act 1862 provides that a purchaser from a registered proprietor shall not be affected by any unregistered easements in the absence of fraud on the part of the purchaser. The learned Chief Justice pointed out that section 40 (as amended) and section 114 must be read together, and thus exceptions to section 40 must be treated as unaffected by section 114.

Perhaps still more important from the practical point of view were the *obiter* remarks of the learned Chief Justice regarding the registration of such easements, for he held that they were incapable of registration. The reason for his opinion was in substance simply that the Acts do not provide any mechanism whereby a prescriptive easement can be registered. Sections 42 and 43 provide for registration of easements, but apply in terms only where the easement is created by a document which can be registered. Similar observations apply to sections 26 and 27, which are applicable where the grant of an easement is made upon a conveyance of the dominant tenement.

The Chief Justice went on to observe that there was nothing to suggest that those sections constituted an 'exhaustive code as to the creation of easements'. Section 26, also, which provides that a certificate of title containing a statement that the person named therein is entitled to an easement is conclusive evidence that he is so entitled, cannot be taken to imply that if there is no such certificate of title there can be no easement. 'Section 26 gives conclusive probative effect to a statement in the certificate of title to a dominant tenement that the registered proprietor is entitled to an easement, but even as to the dominant tenement it is not the only evidence of the existence of an easement'.[8]

If this view is accepted, however, one is led to consider the Chief Justice's earlier interpretation of the word 'omission' as it occurs in section 40 (II). *Prima facie* one would have supposed that the term

[7] [1957] Tas. S.R. 121, 130.
[8] *Ibid.* at 132.

omission or misdescription' in that section was meant to cover accidental omissions or misdescriptions of interests which were capable of registration, and could not cover omissions of matters which were in any case incapable of inclusion. The Chief Justice gave the word 'omission' a wider meaning. He said: 'So far as section 40 of the Tasmanian Act as amended is concerned, I think the word "omission" is clearly not limited to the case of an omission of an interest capable of registration. This I think is made quite clear by the reference to the "interest of any tenant" and also by the reference to "public right of way". There is no provision for registering the interest of a tenant unless he has a lease for more than three years. And until the Highways Act 1951 there were no provisions for the registration of highways on certificates of title'.[9]

Finally, the Chief Justice held that there was no room for the view that a prescriptive easement acquired or being acquired against a registered proprietor of land under the Real Property Act is extinguished when a new certificate of title is issued to a purchaser from the registered proprietor. The principle of adverse possession, it was held, has no application to easements acquired by prescription. If section 40 excepts prescriptive easements arising at any time from the indefeasibility of the certificate of title then that is sufficient.

Thus, no longer is perusal of the folium of the Record Books in the Titles Office sufficient. Actual inspection of the land by the solicitor or his surveyor will be necessary to determine if any rights have been acquired, or are in the process of being acquired, by prospective user. Once such an easement has been created, there is nothing to stop the parties registering the easement provided the owner of the servient tenement is amenable. But once it is registered the prescriptive acquisition can be disregarded, for the registration would amount to a grant of easement. Nevertheless, there is nothing to compel the servient tenant to agree to such a registration even if the easement is clearly established.

The decision in this case may well be the logical inference from the wording used in the relevant sections of the Acts. One cannot but regret, however, that yet one more inroad has been made into the principle of indefeasibility of title. The recognition of unregistrable interests in and over Real Property Act land must necessarily detract from the intended simplicity and utility of the Torrens System.

In conclusion, it is interesting to note the case of *Howells* v. *Adkins* (1935), an unreported judgment of the Court of Requests, Hobart, which was apparently not cited to the court in *Wilkinson* v. *Spooner*. There is a brief note about the case in the *Australian Law Journal* of 1935. The action, before Commissioner Dr N. A. Lewis (heard on April 9, 1935, some five months after the passing of the Tasmanian Prescription Act), was for trespass. The defendant pleaded that he had acquired a right of way by prescriptive user over the plaintiff's land. The plaintiff contended that his certificate of title issued in 1934 (it appears that the

[9] *Ibid.* at 134.

previous certificate of title was issued in 1910) showed no right of way, and therefore his land was not subject to it. The Commissioner commented upon the lack of judicial authority and the conflicting opinions of text-book writers, but held that section 40 of the Real Property Act was the relevant section and that it did allow in such cases the creation of prescriptive easements. In view of the learned Chief Justice's remarks in *Wilkinson* v. *Spooner* concerning adverse possession it may be noted that the *Australian Law Journal*[10] appears to have thought the vital part of the judgment to be the finding that the issue of new certificates since 1910 did not affect the defendant's right to claim this right of way, although section 135 was inapplicable on the ground that an easement by prescription could not be regarded as adverse possession.[11]

P. C. James

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10 *Australian Law Journal*, 9 (1935) 101.

11 Section 135 provides: 'Any Certificate of Title issued upon the first bringing of land under the provisions of this Act, and every Certificate of Title issued in respect of the same land, or any part thereof, to any person claiming or deriving Title under or through the Applicant Proprietor, shall be void, as against the Title of any person adversely in actual occupation of and rightfully entitled to such land, or any part thereof, at the time when such land was so brought under the provisions of this Act, and continuing in such occupation at the time of any subsequent Certificate of Title being issued in respect of the said land; but every such Certificate shall be valid and effectual as against the Title of any other person whomsoever'.