SOME ASPECTS OF THE PLEA

LIS ALIBI PENDENS

The recent decision of the Supreme Court of South Australia in *Gibbins v. Gibbins*[1] has raised once again the difficulties in the application of judicial discretion to the principles governing the plea of *lis alibi pendens*.

Some general rules governing the operation of the plea are well established. English courts, as courts of justice, have inherent jurisdiction to stay any proceedings which if continued may defeat the purposes of justice; thus the plea can be invoked whenever actions arising out of the same subject-matter are initiated in courts of concurrent jurisdiction.

When such actions are commenced in courts of concurrent jurisdiction in the same country, the second action is clearly an abuse of the course of justice and the plea of *lis alibi pendens* a good defence.[2] Where, however, the second suit is instituted in order to obtain relief independent of that which is obtainable in the first action, the plea is not necessarily sufficient. Thus in *Ricketson v. Barbour,*[3] Innes, J., refused to grant a stay, holding that "the plaintiff in the suit asks for relief substantially different from the prayer of the former suit and from anything that he could get under the decree in that suit."[4] But where the actions are commenced in courts of concurrent jurisdiction in different countries, it must be shown affirmatively that the second action is vexatious and oppressive. It must be established, not only that the defendant would suffer no injustice if the stay were refused, but also that the plaintiff would suffer no injustice if the stay were granted.[5]

In deciding upon which party lies the onus of proving vexation or oppression the Court of Appeal in *McHenry v. Lewis*[6] drew a doubtful distinction between the situation arising where the plaintiff

[1] [1948] S.A.S.R. 267. For an analogous position before the English courts see *Thornton v. Thornton,* (1886) L.R. 11 P.D. 176, and *Orr-Lewis v. Orr-Lewis,* (1949) 65 T.L.R. 269.

[2] *Ostell v. Lepage,* (1851) 5 De G. & Sm. 95, 105; Foote, *Private International Law* (5th edn.) 628; Graveson, *Conflict of Laws,* 260; *Webster v. Gipps,* (1886) 2 W.N. (N.S.W.) 73.

[3] (1890) 11 N.S.W.L.R. Eq. 92.

[4] *ibid.,* at 97.

[5] *McHenry v. Lewis,* (1882) 22 Ch. D. 397; *Cohen v. Rothfield,* [1919] 1 K.B. 410.

[6] See Cheshire, *Private International Law* (3rd edn.), 165, and *Cohen v. Rothfield.*

has instituted one suit in England and the second in some British dominion, and the situation where the second suit is instituted in some foreign country. In the former case the second proceedings are said to be *prima facie* vexatious so that the plaintiff is put to his election as to the suit with which he will proceed; in the latter case, however, vexation or oppression must be proved as a fact by the defendant. But the Supreme Court of New South Wales, in *Hollander v. McQuade*,[7] refused to accept the validity of this distinction, Cohen, J., putting the matter in these terms: "The broad principle where an action has been brought in a court in one country and then another action has been brought in another court in another country in respect of the same cause of action, and the judgment in the one could be enforced as a judgment in the other, is that the bringing of the second action is *prima facie* oppressive. But where it cannot be enforced as a judgment then the bringing of the two actions is not *prima facie* oppressive."[8]

Although it is clear, since *Pezet v. Pezet*,[9] that the separate jurisdictions of the Australian States are "foreign" to one another, yet it would seem that by virtue of the provisions of section 20 of the (federal) *Service and Execution of Process Act* 1901-1934 (if *Hollander v. McQuade* be accepted as correct) it is *prima facie* vexatious for the plaintiff to initiate proceedings in respect of the same cause of action in two Australian States. This leaves for consideration the position where the plaintiff in proceedings in one State becomes the defendant in proceedings which the defendant in the first suit begins in a second State.

In such circumstances the courts have tended to act with great caution. The matter was summed up by Scrutton, L.J., as follows: "Where it is proposed to stay an action on the ground that another is pending, and the action to be stayed is not in the Court asked to make the order, the same result is obtained by restraining the person who is bringing the second action from proceeding with it. But, as the effect is to interfere with proceedings in another jurisdiction, this power should be exercised with great caution to avoid even the appearance of undue interference with another Court."[10] The need for proceeding cautiously in such circumstances has often been reiterated, and it is not surprising, particularly in view of the general restrictions on the application of the plea, that the courts have shown a marked reluctance to grant a stay of proceedings in such cases.[11]

[7] (1896) 12 W.N. (N.S.W.) 154.
[8] *ibid.*, at 155.
[9] (1947) 47 S.R. (N.S.W.) 45.
[10] *Cohen v. Rothfield*, [1919] 1 K.B. 410, at 413.
[11] Such orders were made in *Bushby v. Munday*, (1821) 5 Madd. 297, and in *Russell v. Munroe*, (1886) 7 N.S.W.L.R. Eq. 50, but not to the writer's knowledge in any more recent case. See also *Orr-Lewis v. Orr-Lewis*, (1949) 65 T.L.R. 269, at 270.

The difficulty of obtaining such an order being well illustrated by *Gibbins v. Gibbins*,[12] it seems to the writer that at this stage there is little hope of the plea succeeding in such cases. Judicial restrictions seem to have effectively strangled the efficacy of a plea that might otherwise have had a convenient and useful operation.

The facts in *Gibbins* were that the plaintiff (wife), on 10th May, 1948, began in the Supreme Court of South Australia an action for dissolution based on desertion. Jurisdiction to entertain the action was vested in the Court by sec. 43 (1) of the (South Australian) *Matrimonial Causes Act* 1929-1941 which provides that for the purposes of the Act a deserted wife domiciled in that State at the time of the commencement of the desertion shall be deemed to have retained her South Australian domicil in spite of any subsequent change in her husband's domicil. In April, 1945—i.e., at the time of the commencement of the alleged desertion—the husband was domiciled in South Australia. On 17th May, 1948, the husband filed a petition for restitution of conjugal rights in the Supreme Court of New South Wales and then applied to the Supreme Court of South Australia for an order staying his wife's suit pending the hearing of the New South Wales petition, he claiming to have acquired a domicil in the latter State since 1945.

It may be noted that statutory provisions similar to the South Australian Act are to be found in the divorce legislation of a number of the Australian States whereby jurisdiction is conferred on the domestic court.[13] It is clear, however, that a decree granted by a court exercising such statutory jurisdiction, the husband being in fact domiciled in some other country at the time of the institution of the suit, can command *per se* no recognition outside the State in which it was granted. "International" competence to grant such a decree, which is a judgment *in rem*, is vested exclusively in the courts of the domicil[14]—subject, however, to the rule in *Armitage v. Attorney-General*.[15] The position was clearly stated by Bonney, J., in *Gane v. Gane*,[16] as follows:—"Jurisdiction to dissolve a marriage is exerciseable only by the courts of the country in which the parties are domiciled at the time of the institution of the petition. . . . The courts of two countries cannot have at the same time concurrent jurisdiction to dissolve one and the same marriage." Hence in

[12] [1948] S.A.S.R. 267.

[13] See *Matrimonial Causes Act* 1899-1943 (New South Wales), sec. 16; *Matrimonial Causes Act* 1860-1932 (Tasmania), sec. 9 (4); *Supreme Court Act* 1935-1947 (Western Australia), sec. 71, now *Matrimonial Causes and Personal Status Code* 1948, sec. 14 (1) (c).

[14] *Le Mesurier v. Le Mesurier*, [1895] A.C. 517; *Attorney-General for Alberta v. Cook*, [1926] A.C. 444.

[15] [1906] P. 135.

[16] (1941) 58 W.N. (N.S.W.) 83, at 84.

Gibbins, apart from the purely internal, statutory jurisdiction, the South Australian court had no power to grant a decree; such a decree, if in fact granted, would not be entitled to interstate recognition.

The decision of Fullagar, J., in *Harris v. Harris*[17] has clarified some questions with regard to the recognition of judgments as between the Australian States, but it is submitted that it does not in any way affect the conclusion already reached. There the question before the Court was, to what extent was a decree of divorce, pronounced by the Supreme Court of New South Wales and having final and conclusive force in that State, to be recognised in Victoria when it was established to the satisfaction of the Victorian court that the jurisdictional fact of domicil in New South Wales, upon which the decree was based, did not exist. The issue raised, therefore, was how far full faith and credit should be given to the New South Wales finding as to the jurisdictional fact of domicil since that finding, if correct—and apart altogether from statutory provision—would entitle the decree to recognition in Victoria. Fullagar, J., held that, apart from specific enactment, the New South Wales decree was open to challenge in Victoria on the ground that it was pronounced without jurisdiction, and if it were found that the husband was not domiciled in New South Wales the decree would not be recognised by the Victorian courts; but he also held that by virtue of section 18 of the (federal) *State and Territorial Laws and Records Recognition Act* 1901-1928 the decree must be recognised as valid. The Court was in no way concerned with the question of how far, if at all, it should recognise a decree based solely on statutory jurisdiction, but whether it should accept without question the determination, by the New South Wales court, of the facts which gave it jurisdiction on the ground of domicil. Thus *Harris v. Harris* is no authority for requiring one State to treat as valid, for the purpose of recognition by its courts, a decree granted by another State where the jurisdiction of the latter was not based on a true domicil in the "international" sense but was expressly conferred by statute as an exception to the rule.

Returning now to *Gibbins* and assuming[18] that the husband's allegation of the acquisition of a new domicil in New South Wales could be substantiated, it seems clear that the South Australian decree, if granted, would be ineffective outside the jurisdiction of that Court and could not be relied on by either party, as proof of dissolution of the marriage, in any other State or country. It can be readily seen that this result could have disastrous effects on future questions that might arise as to bigamy, legitimacy, succession, etc.; both parties would be placed in a most unfortunate posi-

[17] [1947] V.L.R. 44.

[18] As was necessarily assumed by the learned judge himself, for if the husband had not acquired a domicil of choice in New South Wales he had retained his South Australian domicil of origin — in which event *cadit quaestio.*

tion. Similar results could not, of course, flow from a decree granted by the New South Wales court since such a decree would be "internationally" valid on the assumption of the husband's domicil being in that State. It may even be interesting to speculate as to the position that might arise if a decree for dissolution (based, as it might be, on the wife's refusal to obey an order for restitution of conjugal rights if granted on the husband's petition) were later made in favour of the husband in a New South Wales court, and the question of its recognition in South Australia came before the courts of that State.

Reed, J., of the Supreme Court of Australia, did not regard any of these considerations as sufficient to constitute vexation or oppression, and refused to grant a stay of proceedings. The learned judge attached a great deal of weight to the fact that a specific South Australian enactment gave the petitioner the right to prosecute these proceedings, and to the fact that she could not obtain in the New South Wales proceedings the relief sought by her. But it is suggested that even if, as Reed, J., himself states, "The inconvenience or expense to one or other of the parties in having to conduct litigation here or in New South Wales would not be such as to be vexatious or oppressive,"[19] a stay of proceedings might well have been granted. The limited effect of the South Australian decree, if granted, has already been stated. If the wife could in fact prove desertion by her husband (which she must do in order to obtain relief from the South Australian court), she might be able to obtain from the New South Wales court, by way of cross-petition to her husband's petition for restitution, the relief which she was seeking in South Australia;[20] if she could, she would not have been prejudiced nor would she have lost any material advantage if the stay of the South Australian proceedings had been granted; moreover, the undesirability and inconvenience of there being two, possibly conflicting, decrees would be avoided. However, the habit of judicial caution in such cases has perhaps become too deeply ingrained in the law for it to be suggested with any conviction that the courts could and should, by a more liberal interpretation of actual situations, restore greater elasticity to the plea of *lis alibi pendens*.

It is believed that this could be achieved by a wide, instead of a narrow, interpretation of vexation and oppression, and that it would not be contrary to authority since the courts have consistently refused to define those terms. In the words of Bowen, L.J., "I agree

[19] [1948] S.A.S.R. 267, at 277.

[20] *Sed quaere.* Reed, J, was of opinion (*ibid.*, at 277) that she could not — "it appears that the plaintiff can not in the suit for restitution ask for or obtain a decree nisi for divorce on the ground of her husband's desertion, as the provisions of sec. 25 of the New South Wales Act do not extend to such a case. If the plaintiff should desire to seek a divorce in that State . . . she would have to file a petition under sec. 16 . . . " See also Mackenzie, *Divorce Practice* (*N.S.W.*), 113-114, and Joske, *Laws of Marriage and Divorce in Australia*, 70.

that it would be most unwise . . . to lay down any definition of what is vexatious or oppressive, or to draw a circle, so to speak, round this Court unnecessarily, and to say that it will not move outside it. I would much rather rest on the general principle that the Court can and will interfere whenever there is vexation and oppression to prevent the administration of justice being perverted for an unjust end."[21] It is hoped that the circle has not already been unnecessarily drawn.

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[21] *McHenry v. Lewis,* (1882) 22 Ch. D. 397, at 407-8.