SOME IMPRESSIONS OF PRIVATE INTERNATIONAL LAW IN AUSTRALIA.*

I must begin by acknowledging the enormity of my impertinence. I am going to describe some of my impressions of the private international laws of the States of this country formed during a very brief sojourn here. During the past two academic terms it has been my experience and good fortune to attempt to teach this branch of law as Visiting Professor in the Law School of Melbourne University. Although I have had the advantage of visiting all the Law Schools in Australia during my stay, that stay has been *in toto* of but four months duration. I am very conscious of the fact that I speak from ignorance and from inadequate experience. My comments and conclusions may well be superficial, over-generalised or just plain wrong. They purport to be but the impressions of an English law teacher whose qualifications to speak on the subject are no more than I have outlined.

It is difficult to make any simple and orderly classification of a large number of diverse, rapidly acquired, often ill-defined and often complexly interrelated impressions. However, four characteristics of private international law in Australia have struck me as marked. Even these are, of course, largely interconnected in their operation. But for convenience of exposition they can be dealt with separately.

The first thing is the quantitative poverty of material on the subject. There is no Australian general text book. The output of periodical literature is noticeably smaller than it is in, say, England or Canada. There is no great volume of statute law dealing with conflictual problems. But most important and most noticeable is the paucity of significant decided cases. This phenomenon renders more easy the task of the foreign visiting teacher; it also invites explanation. In a country containing several law districts one might have expected a substantial body of case law to have been built up. This has happened in the United States. The contrast between the vast wealth of material that has accumulated there and the Australian scarcity is in part simply a reflection of the fact that in America there are forty-eight States whereas in Australia there are only six. But Canada with her ten provinces is proportionately richer in case law in the conflicts field than is Australia. Other factors are contributory causes of the Australian phenomenon. Not only are the States few in number, but they, and particularly their large population centres, are far apart. Intercourse be-

* A lecture delivered in the Law School of the University of Western Australia on 31 July, 1953.

tween them is thus reduced and the possibilities of private international law problems coming before the courts are restricted. Europe and the United States both have a greater density of law districts than does Australia. The circumstance that the Common Law was received at an advanced stage of its evolution into all the States has also, no doubt, played its part in reducing the significance of inter-State conflicts: there has been little time for, and in fact relatively little, individual divergence between domestic laws in the States. The function of the High Court as a common court of appeal and the role of the Privy Council are positive factors making for the maintenance of uniformity. It has indeed been suggested that divergence, apart from that resulting from statutory enactment, is theoretically impossible or, at least, in principle undesirable. Even statutes, especially pre-Federation statutes, show a tendency to follow each other. Closely connected with this is the tendency, common to all the States, to accept English decisions as representing, subject only to local statutory modification, a "common" law. Here the fact that the Privy Council, the opinions of which bind Commonwealth and State courts, is composed mainly of English judges has been important. Furthermore it must be remembered that the High Court of Australia has accepted "a wise general rule of practice that in cases of clear conflict between a decision of the House of Lords and of the High Court, this Court, and other courts in Australia, should follow a decision of the House of Lords upon matters of general legal principle."[1]

This leads to the second impression which I would record. It is the excessive respect paid to English authority. This may be loyal or it may be slavish; it certainly gives the impression of being in many instances unquestioning. It is indeed a paradox that some English decisions, especially at first instance, should be more scrupulously followed in Australia than they are in England herself. This is perhaps only a facet of a general legal conservatism in Australia. A visitor senses that the liberal tendencies manifested for instance in recent decisions of the Court of Appeal cause more surprise (to use a neutral word) here than they do in England.

Whatever the case for following English decisions, it is particularly weak in the field of conflict of laws. There are several reasons for this. First, private international law is a backward area of the Common Law. There is here no rich harvest of the experience and judicial wisdom of past ages to be reaped. This branch of the law is still in an

[1] Per Latham C.J. in Piro v. Foster, (1943) 68 Commonwealth L.R. 313, at 320; see also Rich J. at 326, Starke J. at 326, McTiernan J. at 336, and Williams J. at 341.

early formative stage. Many of such rules as have emerged have not yet been adequately tested by time. It is scarcely credible that all will survive that test. Even those which do so will require detailed elaboration. Secondly, this is a field of law in which local factual conditions should be allowed greater influence than is the case in many fields. Thirdly, conflicts rules ought not to be evolved without regard to local legal conditions. The unitary or federal structure of the State, which the law district constitutes or to which it belongs, cannot be justifiably disregarded. This means *inter alia* that the appropriateness of applying English conflicts rules in inter-State cases should be the subject of particular scrutiny. Again, in Australia the implications of the Full Faith and Credit provisions of the Constitution may be far-reaching if and when they are fully worked out. That the Common Law is common is a dogma not worthy of too serious respect in private international law. Even as a play upon words its fascination is marred by realisation that the word common can mean not only "in general use" but also "of inferior quality or value."[2] As the embodiment of an immutable truth it should certainly, it is submitted, be viewed with suspicion.

Thirdly, and this again is bound up with what has already been said, one is struck by the apparent failure of the Australian courts to draw upon the experiences of other federations and of other "new" countries in which conditions are, at least in some respects, closer to those prevailing in Australia than are those of the Old World. The obvious instance of this failure is in respect of the United States of America.

A neat illustration of several of these points is provided by the Australian attitude to the notion of the primacy of the domicil of origin and particularly to the doctrine of its revival. This doctrine was enunciated in England at a time when, as a matter of fact, if a European acquired a domicil of choice elsewhere and later abandoned it, the likelihood perhaps was that he would intend to return to the country of his domicil of origin. It was enunciated at a time when the concepts of nationality and domicil were less clearly separated than they have since become. Whatever may have been its merits as a rule of English law in the middle of the nineteenth century, they would seem to be much less as a rule of law in a country of immigration, such as Australia, in the middle of the twentieth century. Its unsuitability is (as is the unsuitability of many English rules) perhaps particularly clearly illustrated by its operation in inter-State cases within the Commonwealth. The doctrine has in fact been heavily

[2] SHORTER OXFORD ENGLISH DICTIONARY.

criticised even in its English context. It has nevertheless been accepted in Australia. The words of Isaacs J. in the High Court of 1913, "But a man's domicil of origin stands in an exceptional position. It is affixed to him *by law* at the moment of his birth, and is therefore involuntary; and, although he is free to relinquish it by acquiring a substituted domicil, provided both act and intention combine for that purpose, it never completely disappears,"[3] are but a bloodless echoing of what Lord Westbury said in *Udny v. Udny*[4] nearly half a century earlier. The rule has not been accepted in the United States. The final paradox is that at the *fons et origo mali* itself prolonged criticism may well be shortly rewarded, for the English Private International Law Committee has castigated the doctrine as "undesirable" and has proposed its abolition.[5]

So far I have said little that is laudatory. My last point, and the one upon which I wish to dwell, is that despite the operation of forces, some of which I have mentioned, working in the opposite direction, the contributions which Australia has made to private international law are substantial. To say this may sound condescending. To deny it would certainly be a travesty of the truth. No attempt will be made at a comprehensive statement, even in outline, of these contributions. Nor will any overall evaluation be essayed. What follows is no more than commentary upon some of the topics to which it has struck me that the Australian contribution has been particularly significant. These topics are placed in two categories. The first deals with Australian treatment of some problems which are novel in the sense they have not been previously posed before the English courts, or, if posed, have not been fully solved, particular aspects being perhaps ignored altogether. The second category is concerned with instances of divergence of a more positive sort between Australian and English rules.

I.

Divorce and choice of law.

At common law[6] in proceedings for dissolution of marriage the rules as to jurisdiction make it inevitable that the *lex fori* and the *lex domicilii* should coincide. This law is applied. It is said to be applied exclusively. Cheshire, for instance, states categorically that "The questions that arise in a suit for divorce properly brought in this

3 Fremlin v. Fremlin. (1913) 16 Commonwealth L.R. 212, at 232.
4 (1869) L.R. 1 Sc. & Div. App. 441.
5 *First Report of the Private International Law Committee* (Cmd. 9068), at 8, 14.
6 Divorce *a vinculo* was itself unknown to the common law. After it was introduced by statute in 1857, common law rules as to jurisdiction in international cases became necessary.

country are governed exclusively by English Law. This decides whether there is good cause for divorce, and determines the form of relief and the conditions upon which the decree will be made. Any other legal system, such as the law under which the parties married, or their *lex patriae* or the law of the place where the matrimonial offence was committed, is entirely ignored."[7] Doubts have been cast upon this exclusiveness by *dicta* in three Australian cases. In *Cremer v. Cremer*[8] the respondent had been domiciled in New Zealand when she married in 1893. In 1900 she acquired a Victorian domicil. It was found that she had been an habitual drunkard and had habitually neglected her domestic duties during a period of three years and upwards prior to the year 1902, but that part of that period was in New Zealand. By Victorian law such behaviour constituted a ground for divorce. By New Zealand law the necessary period was four years and upwards. Her husband successfully petitioned for divorce in Victoria. The Full Supreme Court said, "We think that the true conclusion is, that if the act complained of is lawful where done, the parties being then domiciled there, a divorce should not be granted here unless our legislation is specific on the point. But if the act is not lawful where committed, even though not a ground for a divorce there, then this court can dissolve the marriage, provided all other conditions are complied with."[9] The judgment in *Cremer's Case* is somewhat loosely worded; moreover, there is a confusion between jurisdiction and choice of law. What does seem to emerge, however, is the suggestion that the *lex domicilii* of the petitioner at the time of the petition is not in all cases the only law to be considered. That law will not be applied, at least where the following conditions are satisfied:— (1) At the time of the act complained of the parties were domiciled elsewhere. (2) The act complained of, or even part of it, was perpetrated elsewhere. (3) The *locus domicilii* at the time of the act and the *locus acti* coincided. (4) The act was in all respects lawful by the law (presumably as it stood at the time of commission of the act) of that place. (5) Not to apply the *lex domicilii* of the parties at the time of the petition would be to the advantage of the respondent.

In *Cremer v. Cremer,* condition (4) was regarded as not having been satisfied and the petitioner therefore succeeded, Victorian law being applied.

In *Boyd v. Boyd,*[10] another Victorian case, the husband, whose domicil of origin was in Victoria, had acquired a domicil of choice in

[7] PRIVATE INTERNATIONAL LAW (4th ed. 1952) 366.
[8] (1905) 30 Victorian L.R. 532.
[9] *Ibid.*, at 535.
[10] [1913] Victorian L.R. 282.

Queensland and had married there. He was then deserted by his wife. Afterwards he returned to Victoria, his domicil of origin revived, and he brought an action in the Victorian Supreme Court for divorce on the ground of desertion. By Victorian law desertion was a ground for divorce, but by Queensland law it was a ground for judicial separation only. As the desertion constituted a wrong (even though not a ground for divorce) in Queensland, the Full Court found for the petitioner. It is interesting to note that Hodges J. may have envisaged limitations upon the exception to the established rule less stringent than those enumerated above. He said, "The general rule has been many times stated that where a wrong is committed by one person against another in a foreign country and the two parties afterwards come to this country, and one sues the other for that wrong, the Court has to determine:— (1) whether what was done was a wrong in the foreign country, and (2) whether it is wrong here. If both these conditions are satisfied the injured party is entitled to redress . . . "[11] The analogy with tort is obvious. The absence of any reference to domicil at the time of the act is also noticeable, but, it would seem from its context, perhaps not intentional.

In *Russell v. Russell,*[12] which came before the Supreme Court of Victoria nearly thirty years later, the material facts were similar to those in *Boyd v. Boyd.* O'Bryan J. accordingly found for the petitioner. The judgment is noteworthy in several respects. The learned judge clearly regarded domicil at the time and place of the act complained of as an essential condition for the operation of the *Cremer* rule.[13] He apparently, however, took a wider view of the fourth condition enumerated above, for he restricted the requirement of lawfulness by the *lex acti* to conformity with that matrimonial law.[14] The learned judge made it clear too that when the law of the place of acting is looked to, it is that law as it stood at the time of the act which is relevant: he pointed out, *obiter,* that in the instant case as a result of a change in the law of South Australia (where the desertion had taken place, the parties being then domiciled there) the petitioner would be entitled at the time of the Victorian petition (although he would not have been so entitled at the time of act) to a decree according to the domestic law of South Australia; but, said O'Bryan J., that circumstance could not assist the petitioner.[15]

11 *Ibid.,* at 285.
12 [1941] Victorian L.R. 46.
13 *Ibid.,* at 51.
14 *Ibid.,* at 51. Some support for this could be culled from the judgment in Cremer v. Cremer.
15 *Ibid.,* at 54.

What is striking in *Russell v. Russell* is the fact that it was by counsel for the respondent that *Cremer's Case* and *Boyd's Case* were criticised, and on the ground that they were based upon an unjustifiable analogy taken from the law of torts. O'Bryan J. found this argument attractive but considered himself bound by the authorities. This seems to mark a complete reversal of the traditional approach. Far from regarding the *dicta* in those two cases as creating an exception to principle, the learned judge seems to have regarded the decisions (in fact in conformity with principle) as, although binding, regrettable.

A few comments on this corner of the law may be made. Whether an exception to a rule is justifiable depends largely upon the nature of the rule and the policy considerations underlying it. It is not clear whether the English courts have applied English law *qua* lex fori or *qua* lex domicilii. The leading writers, Dicey, Wolff, Cheshire, and Morris,[16] assume that it is the former. It seems to me that a good case could be made for its being the latter. The courts have not had occasion to pronounce upon the matter. We will consider the present problem upon each hypothesis.

If the traditional rule is that the *lex fori* is applied, it is because "the question whether the court will dissolve a marriage is one that 'touches fundamental English conceptions of morality, religion and public policy', and one that is governed exclusively by rules and conditions imposed by the English legislature . . . "[17] On this view to make a concession to the petitioner by applying another law would be impossible. On the assumption, but only on the assumption, that the English precepts of morality, religion and public policy may prohibit but never require dissolution, the making of a concession to the respondent by applying another law might be permissible. Because divorce can be granted only on a ground permitted by a statute of the forum, it does not follow that therefore divorce cannot be refused owing to application of a foreign law. It is to the respondent that the concession under discussion is made.

If, however, the traditionally chosen law is chosen not only because it is the *lex fori* but also because it is the *lex domicilii,* this is for the obvious reason that the personal law should govern status. In this case it must be fully realised that to take account of any law other than the personal law of the parties at the time of the petition can be

16 DICEY, CONFLICT OF LAWS (6th ed. 1949) 236-237; WOLFF, PRIVATE INTERNATIONAL LAW (2nd ed. 1950) 373-374; CHESHIRE, PRIVATE INTERNATIONAL LAW (4th ed. 1952) 366-367; MORRIS, CASES ON PRIVATE INTERNATIONAL LAW (2nd ed. 1951) 105.

17 CHESHIRE, *op. cit.* 366-367; see too WOLFF, *op. cit.* 373-374, and DICEY, *op. cit.* 236-237.

justified only if divorce is not regarded as being exclusively a matter of adjusting, for the present and for the foreseeable future, the relationship of the parties with each other and with the community to which they belong. To look to the law of the domicil at the time of the act or to the law of the place of the act would seem to rest on the notion that there is a quasi-penal or quasi-tortious[18] element in divorce proceedings. It is the idea that it would be unfair to impose "liability" on a party who has done nothing wrong by the laws which he or she might reasonably have supposed to govern his or her conduct at the relevant time. This idea has increased force where the respondent is a wife whose domicil has merely followed that of her petitioning husband to a country of easier divorce. The ultimate question is a policy one: What is the juridical nature and policy purpose of divorce proceedings? Perhaps the answer is that although the overwhelmingly predominant purpose is the adjustment of personal relations between the parties and with society, the imposition of liability aspect cannot however be completely ignored. If this is so, the general rule should be that the *lex domicilii* at the time of the petition is applied; but, exceptionally, justice to the respondent may require account to be taken of another law, namely the law which at the time of the act he might reasonably have supposed to govern his conduct. The conditions which emerge in the Victorian cases as fixing the limits of this exception are consistent with this view. The suggestion, however, implicit in the observations of O'Bryan J. in *Russell v. Russell*,[19] that, even if the respondent's conduct was criminal or tortious by the *lex acti*, provided it did not constitute a matrimonial offence, the petitioner should not succeed, seems to favour the respondent unduly. A wrongdoer can scarcely claim the benefit of a concession made only very exceptionally on grounds of justice.

What is more disturbing about the general tenor of the judgment in *Russell v. Russell* is that it seems to reflect a revolutionary change of emphasis. It is one thing and a desirable thing to refrain from mechanically applying an established rule to a particular category of case where to do so might work injustice. This the Victorian courts have expressed an enlightened willingness to do. But it is another thing to regard decisions, upon facts clearly outside the exceptional category, in which the principle was applied, as unfortunate. Much of what was said in *Boyd v. Boyd* particularly was, it is true, based on an analogy from the law of tort. As a matter of strict principle this

[18] If it is quasi-tortious, the parallel is with tortious liability based on fault rather than strict liability.

[19] [1941] Victorian L.R. 46, 51.

analogy may be objectionable. As a matter of justice it is submitted that it is not. But be this as it may, it is the exclusion not the application of the *lex domicilii* at the time of the petition which that analogy would support.

The rule in The Halley.[20]

This rule is embodied in the first arm of the classic formulation by Willes J. of the English choice of law rule governing the actionability of torts committed outside England. "First", he said, "the wrong must be of such a character that it would have been actionable if committed in England."[21] This requirement has been heavily criticised for placing undue emphasis upon the accident of the forum. It is no longer accepted in the United States where the influence of the forum is generally limited to the prevention of actions the bringing of which would be contrary to local public policy. It has, however, been accepted in Australia. It is perhaps in inter-State cases that this is particularly unfortunate. If the only justification for the rule is respect for local policy (and it would be difficult to contend convincingly otherwise), the American position would seem to be the right one. Moreover, in inter-State cases it might be argued, and this has been tentatively hinted at in the field of contract,[22] that an action allowable by the law of one State of the Commonwealth cannot be regarded as contrary to the public policy of another State of the Commonwealth. If this is so, the tort law of the forum should, in inter-State cases, have no part to play at all.

Given the existence of the rule, what is interesting is consideration of its internal meaning. This has apparently never been attempted in England. It was, however, fully discussed in the Victorian case of *Potter v. Broken Hill Pty. Co. Ltd.*[23] This was an action brought in Victoria for an alleged breach in New South Wales of a New South Wales patent. The majority of the Supreme Court of Victoria held that the court had no jurisdiction as the action was local to New South Wales. Hood J. and à Beckett J. considered also the problem of choice of law and came to different conclusions as to the meaning of the first arm of the rule in *Phillips v. Eyre.* Hood J. took the view that the requirement of actionability in the forum means that the very act must be such that if it had been committed in the forum it would have given rise to a cause of action there. This was not so in

20 (1868) L.R. 2 P.C. 193.
21 Phillips v. Eyre, (1870) L.R. 6 Q.B. 1, 28.
22 Merwin Pastoral Co. Pty. Ltd. v. Moolpa Pastoral Co. Pty. Ltd., (1933) 48 Commonwealth L.R. 565, per Evatt J. at 587-588.
23 (1905) 30 Victorian L.R. 612; affirmed by the High Court in (1906) 3 Commonwealth L.R. 479 on grounds not relevant here.

the instant case as the breach of a New South Wales patent, even if perpetrated in Victoria, would not contravene the domestic law of Victoria. à Beckett J. took a more liberal view of the requirement. He contended that it is satisfied if the *lex fori* recognises a similar kind of liability to that for which the plaintiff is seeking a remedy. In the instant case, therefore, the plaintiff should succeed as Victoria has a patent law analogous to New South Wales patent law. That this is the interpretation intended by Willes J. is suggested by his use of the word "wrong" in formulating this first requirement in contrast with his use of the word "act" in his formulation of the second requirement that "the act must not have been justifiable by the law of the place where it was done."[24] Not only the act but the wrong, i.e., the act plus some of its legal consequences in the place of commission, should be hypothetically imported into the forum. This interpretation has the desirable effect of reducing considerably the influence of the domestic law of the forum. It might be regarded, in fact, as more than a half way step towards limiting the rule in *The Halley* to a public policy qualification. It is to be hoped that, when an opportunity arises, the views of à Beckett J. will commend themselves to judges in other parts of the Common Law world.[25]

Legitimation: Two interesting problems.

The Common Law rule[26] that a foreign legitimation by subsequent marriage will be recognised only where it is permitted by the law of the father's domicil both at the time of the child's birth and at the time of the subsequent marriage was received into the Australian States. In *Public Trustees v. Wilson (No. 2)*[27] the father was domiciled in England at both these times. The English Legitimacy Act was passed after the marriage and by English law it rendered the child legitimate. A New South Wales court refused to recognise the legitimation on the ground that the child was not capable of legitimation by the law of the father's domicil as that law stood at the two specified times—birth and subsequent marriage.

This interpretation of the rule in *In re Goodman's Trusts* has not been followed. In *Thompson v. Thompson*,[28] another New South

24 (1870) L.R. 6 Q.B. 1, at 28, 29.

25 They have commended themselves to one of the leading writers on international torts; see Hancock, *Torts in the Conflict of Laws*, (1940) 3 U. Toronto L.J. 400. The decision of the Supreme Court of New Brunswick in Papageorgiou v. Turner, (1906) 37 New Brunswick R. 449, seems to be based on the same approach.

26 In re Goodman's Trusts, (1881) 17 Ch. D. 266.

27 (1948) 65 Weekly Notes (N.S.W.) 234.

28 (1951) 51 State R. (N.S.W.) 102.

Wales case, the father was domiciled in England at the time of the birth, the marriage, and the passing of the English Act. The three events occurred in that order. Sugerman J. held that New South Wales law would regard the children as legitimated. He pointed out that the facts gave rise to a case of legitimation not by subsequent marriage but by statute. If the father is (as he was in the instant case) domiciled in the country of the statute both at the time of the birth and at the time of the passing of the statute, the legitimation by statute will be recognised. In the instant case domicil at the time of the marriage was also necessary, but this was because, and only because, the applicable English Act required it. It was not required by the choice of law rule of the New South Wales forum.

It is submitted that the approach of Sugerman J., based as it is upon recognition of the distinction between cases of legitimation by subsequent marriage and cases of legitimation by statute, is to be preferred to that adopted in *Wilson's Case*. Otherwise Australian courts would never recognise legitimation by statute when the statute was passed after the birth of the child. It is a pity that Sugerman J., in addition to differentiating between the two categories of case, did not decline to follow in its entirety the analogy of the rule applicable to legitimation by subsequent marriage when formulating a rule to govern legitimation by statute. He was sitting alone. He could have succeeded therefore where the dissentient Scott L.J. had failed in a case involving yet another type of legitimation, namely, by recognition.[29] Reference to the law of the father's domicil at the time of the child's birth could have been declared unnecessary—although on the facts of *Thompson's Case* this would have made no difference. On the score of pure elegance there is, of course, something to be said for applying analogous rules to all types of legitimation. In view of the very dubious merit of the rule established for subsequent marriage cases that the law of the father's domicil at the time of the birth is relevant, one might have hoped that judicial courage would have prompted the sacrifice of elegance to common sense.

That in a case of legitimation by statute the father should be domiciled in the country of the Act at the time of the Act is essential. This was decided in an earlier New South Wales case, *Re Pritchard*.[30] There the father was domiciled in England at the time of the birth and at the time of the subsequent marriage, but he came to Australia and acquired a domicil here before the commencement of the Act.

[29] In re Luck's Settlement Trusts, [1940] 1 Ch. 864.
[30] (1940) 40 State R. (N.S.W.) 443; see too Re Davey, (1937) New Zealand L.R. 56.

Nicholas, C.J. in Equity, held that, the legitimating event being the passing of the statute not the subsequent marriage, the legitimation could not be recognised.[31]

Another interesting problem on legitimation has been raised by some Victorian cases. In *In the Estate of Beatty,*[32] the father was domiciled in New York at the date of the birth and at the date of the subsequent marriage. In both *Re Williams*[33] and *Re James*[34] the father was domiciled in England at those two dates. In each case, after the death of the father, an Act legitimating the children became part of the law of the country where the father had been domiciled at the time of his death. The question in each case was whether the child could take as issue under a Victorian will. It was held in all cases that it could not. The problem was treated as one of legitimation by statute. For the children to be regarded as legitimated in Victoria the father must be domiciled both at the time of the birth and at the time of the legitimating event, i.e., at the time of the passing of the statute, in the country of the statute. The second requirement was not satisfied. In each case the father was dead at the time of the passing of the statute and dead men do not have a domicil.[35]

This is not the place to investigate anew fundamental controversies about legitimacy and legitimation in the conflict of laws. On the present state of the case law it must be accepted that legitimation, at least, is treated not as a matter of construction but, even in the context of succession, as a matter of status. Furthermore the nature of the rule laid down in *In re Goodman's Trusts* seems to indicate that the essence of the problem is not the status of a single individual but the relationship of two individuals, the father and the child. Given this approach, the Australian cases mentioned would, with the exception of *Public Trustee v. Wilson (No. 2),* appear to represent entirely consistent development.[36] The law most appropriate to govern the personal relationship of father and child is clearly the personal law at the time that the relationship is created, i.e., at the time of the legitimating event, be that event subsequent marriage, a change in the law, or, one would have thought, recognition. If the father loses his

31 Public Trustee v. Wilson (No. 2) is a later decision and difficult to reconcile with this approach.

32 [1919] Victorian L.R. 81.

33 [1936] Victorian L.R. 233.

34 [1942] Victorian L.R. 12.

35 DICEY (6th ed. 1949) 509, somewhat cryptically says of these decisions that they "appear to rest on a strict application of the foreign *(sic) lex successionis.*" In fact it seems fairly clear that the Victorian forum applied the Victorian conflicts rules relating to recognition of foreign legitimation.

36 This is without prejudice to the criticism voiced earlier of the failure of Sugerman J. to reject the dual time test in cases of legitimation by statute.

domicil in the country, by the law of which the event creates the relationship, before the event happens, either by acquiring a domicil elsewhere or by dying, the relationship is never created.

II.

Mortgage Debts: Movables or Immovables.

Whether property is movable or immovable is, it is said, a matter for the *lex situs.* In *In re Hoyles,*[37] a case concerned with a mortgage over land situated in Ontario, the English Court of Appeal held that the mortgage was an immovable. There is at least one Australian case, *Re F. Donelly,*[38] in which a similar view was taken. The mortgaged land was situated in Queensland; the New South Wales forum held that the mortgage debt was an immovable. The general Australian practice, however, has been to treat mortgage debts as movables. In *In re Ralston,*[39] Cussen J. in the Supreme Court of Victoria held that Victorian law governed the character of debts secured on Victorian land. Victorian law would regard them as movables; "our law," said the learned judge, "looks primarily at the personal obligation." But this is not a decisive case for the land was situated in the forum. This was also the case in *In re Young*[40] in which Martin J. in the Supreme Court of Victoria rejected, however, in terms the doctrine of *In re Hoyles.* In a later Victorian case, *In re Williams,*[41] the Full Supreme Court characterised mortgages on lands situated in New South Wales and in England respectively as movables. The court regarded the English decision of *In re Hoyles* as inconsistent with the opinion of the Privy Council in *Harding v. Commissioners for Stamps for Queensland*[42] and declined to follow it.

It might be thought that this conflict of authority is concerned with domestic rather than with private international law. In all these cases the land was situated in a common law country. It might seem that the courts, applying the rule that the law of the *situs* determines whether property is movable or immovable, were differing only as to the content of the applicable domestic law of the *situs,* in each case the common law. That this could not be the proper analysis is, however, obvious when it is remembered that, even if it is for the *lex situs* not the *lex fori* to determine whether the property is movable or immovable, the *lex situs* in this context should mean the private inter-

37 [1911] 1 Ch. 179.
38 (1928) 28 State R. (N.S.W.) 34.
39 [1906] Victorian L.R. 689.
40 [1942] Victorian L.R. 4.
41 [1945] Victorian L.R. 213.
42 [1898] A.C. 769.

national law of the *situs*. The dispute must in any event be as to the nature of private international law rules.

But, as was indicated by O'Bryan J. in *In re Williams,* there is a more fundamental difficulty here. O'Bryan J. said, "The general rule of private international law is that the *lex situs* determines the character of a *res—i.e.,* whether it is a movable or an immovable—but that merely removes the problem one stage further back. What is the *situs* of a mortgage debt—the place where the land is, or the *locus* of the debt?"[43] It is clear that before any question can be submitted to a *lex situs* there must be a preliminary characterisation of the property in order to determine where it is situated. The difficult question which underlies these cases, although it is not squarely raised by them, is as to the proper preliminary characterisation. In *In re Williams* O'Bryan J. went on, "this problem [i.e., what is the *situs* of a mortgage debt?] does not arise here, because, unquestionably, in the one case both land and debt are situated in England, and in the other case they are both situated in New South Wales. It is, therefore, to the law of England and New South Wales respectively that we must refer the problem of the character of the *res*. Here again there is no question but that the law of England and the law of New South Wales is the same on this matter; both depend upon fundamental principles of English common law."[44] Had the lands and the mortgage debts had different locations, it would have been necessary for the Victorian forum to determine whether it was concerned with a problem of movables or a problem of immovables at a stage before the *situs* could be known. This would appear to depend upon the essential nature of a mortgage debt. The Australian courts generally, and it is respectfully submitted sensibly, have taken the view that its essential nature is personal obligation.

Machado v. Fontes.[45]

In *Phillips v. Eyre* Willes J. said, "Secondly, the act must not have been justifiable by the law of the place where it was done."[46] In *Machado v. Fontes* an act, criminal although not tortious, was held to be "not justifiable" in this context. This is one of the most heavily criticised decisions in the private international law of England. It is based on an interpretation of the words of Willes J. which fails to take account of the special circumstances in which they were uttered.

43 [1945] Victorian L.R. 213, at 223.
44 *Ibid.,* at 223-224.
45 [1897] 2 Q.B. 231.
46 (1870) L.R. 6 Q.B. 1, at 29.

It is inconsistent with any rational theory of tort liability. It involves the indirect enforcement of a foreign penal law. It can be reconciled only mechanically with cases like *The Mary Moxham.*[47] It is a decision which has deservedly received harsh treatment in Australian courts. Three times it has been the object of hostile *obiter dicta.* In *Varawa v. Howard Smith Co. Ltd. (No. 2)*[48] Cussen J. in the Supreme Court of Victoria considered the rule at length. He concluded that "not justifiable" did not mean "not innocent", but rather behaviour which would give rise in the foreign country to some form of proceedings which may result in the establishment of a liability enuring for the benefit of the plaintiff at the expense of the defendant. The learned judge contended that *Machado v. Fontes* is not supported by *Phillips v. Eyre* or *The Mary Moxham* upon which it purports to be based. He gave convincing authority and argument for this contention. In *Musgrave v. The Commonwealth*[49] Latham C.J. in the High Court of Australia referred to the fact that *Machado v. Fontes* had been the object of criticism, but would apparently, had it been relevant, have felt bound to follow it. More recently, however, much stronger criticism has been voiced in the High Court. In *Koop v. Bebb,*[50] Dixon, Williams, Fullagar, and Kitto JJ. in a joint opinion said, "It seems clear that the last word has not been said on the subject, and it may be the true view that an act done in another country should be held to be an actionable wrong in Victoria [the forum] if . . . secondly, it was such as to give rise to a civil liability by the law of the place where it was done." In all these cases the criticism of *Machado v. Fontes* has been *obiter.* It seems clear, however, that, if the opportunity presents itself, the High Court may well repudiate the doctrine. It is to be hoped that should a similar opportunity present itself to the House of Lords, the more rational approach advocated in the learned judgment of Cussen J. in *Varawa v. Howard Smith Co. Ltd. (No. 2)* and by the High Court in *Koop v. Bebb* may be preferred to that adopted by the English Court of Appeal in *Machado v. Fontes* itself.

It is sobering to note that in another common law jurisdiction, far from rejecting *Machado v. Fontes* a court of high authority has apparently interpreted it liberally. The Supreme Court of Canada in *McLean v. Pettigrew*[51] allowed the plaintiff, who brought an action

47 (1876) L.R. 1 P.D. 107.
48 [1910] Victorian L.R. 509.
49 (1939) 57 Commonwealth L.R. 514, 532.
50 (1951) 84 Commonwealth L.R. 629, 643.
51 [1945] 2 Dominion L.R. 65. It is just possible to defend this actual decision on grounds not even mentioned by the Supreme Court and for which there is little authority. The domestic law of Quebec was applied to a controv-

in Quebec in respect of injury in an accident in Ontario, to succeed, notwithstanding the fact that by the law of Ontario he would not have been entitled to recover damages in a civil action. The defendant had been criminally prosecuted under an Ontario statute in Ontario, but had been acquitted. The Supreme Court of Canada took the view, however, that his act was "not justifiable" by the law of Ontario because, in the opinion of the Quebec Courts and of the Supreme Court, he was guilty of an offence and liable to a penalty under the Ontario statute. Comment is scarcely called for.

Legitimation by subsequent marriage: Inadequate statutory reform.

A type of divergence between the private international law of Australia and that of England which arouses less enthusiasm is provided by cases in which an Australian State, having accepted the legacy of an English rule of doubtful merit, has failed to follow the English example of subsequent statutory abrogation of that rule. The private international law of legitimation provides an example of this. At common law a foreign legitimation by subsequent marriage would be recognised only where it was permitted by the law of the father's domicil both at the time of the child's birth and at the time of the subsequent marriage. The policy justification for the former requirement has never been convincingly demonstrated. But this whole rule was received into all the States of Australia. One of the effects of the English Legitimacy Act, 1926,[52] was to render the law of the father's domicil at the time of the child's birth generally immaterial. Although all the Australian States[53] have generally made statutory provision for legitimation *per subsequens matrimonium* in cases in which the marriage was celebrated in the forum or where the father was domiciled there at the time of the subsequent marriage, the Australian States with one exception have, however, not made any statutory inroad into the common law relating to the recognition of foreign legitimations, analogous to that achieved by the English Act. The State of South Australia[54] forms the solitary exception and has followed the English example.

ersy involving two persons domiciled in Quebec who were temporarily in Ontario (see Falconbridge, *Annotation: Torts in the Conflict of Laws*, [1945] 2 Dominion L.R. 82, at 87); this result is on these special facts perhaps just. See, on this general approach, Morris, *The Proper Law of a Tort*, (1951) 64 HARV. L. REV. 881.)

52 16 & 17 Geo. 5. c. 60, sec. 8.

53 New South Wales: Legitimation Act 1902. Victoria: Registration of Births, Deaths and Marriages Act 1928. Queensland: Legitimation Acts 1899-1936. South Australia: Births and Deaths Registration Act 1936. Western Australia: Legitimation Act 1909-1940. Tasmania: Legitimation Act 1905.

54 Births and Deaths Registration Act 1936, sec. 43.

Change of domicil.

The English law of domicil has been generally received complete with its anachronisms into Australia. Part of this legacy is reluctance to recognise the acquisition of a domicil of choice. An attempt has been made to escape in inter-State cases from this particular defect of the English law. The suggestion is that in inter-State cases change of domicil is easier than in inter-national cases.[55] It is perhaps interesting to attempt analysis of the principle underlying this suggestion and indeed the precise nature of the suggestion itself. In *Walton v. Walton,*[56] Barry J. in the Supreme Court of Victoria said, "But in the Australian community, where social ideas and customs are substantially the same throughout the continent, and where there is a common nationality and a common language, the same significance or importance cannot be ascribed to a person's conduct in moving from one State to another as when the question arises in connection with the action of a person moving to a community where, by reason of a difference of language and national traditions, institutions and usages, he takes on the character of a foreigner. The notion that the people of each State form a separate community is held much less firmly and generally than formerly, and changing political conceptions, deriving from domestic and international pressures, and operating co-incidentally with improved transport and communication facilities, are contributing generally to a weakening of the notion. There are, therefore, not the same obstacles in the way of drawing inferences of fact in this case as there would be if the question under investigation were whether an Australian had acquired a domicil in a country where he was regarded as an alien. I find nothing incredible about the petitioner's claim that he went to New South Wales with the intention of living there permanently, and that his residence in that State between 1934-1941 was in fulfilment of that intention."[57]

That in the view of the learned judge it ought to be, and is, easier to effect a change of domicil in inter-State cases than in international cases is clear. But this might mean one or more of at least three different things.

(1) The doctrine might mean that the substantive rules are different, i.e., that the mental state required is qualitatively different in the two types of case. The *dictum* of Barry J., viewed in its context,

55 JOSKE, LAWS OF MARRIAGE AND DIVORCE IN AUSTRALIA (3rd ed. 1952); PATON (ed.), 2 THE BRITISH COMMONWEALTH: THE COMMONWEALTH OF AUSTRALIA 32.

56 [1948] Victorian L.R. 487.

57 *Ibid.,* at 489.

is an attempt to avoid the implications of Lord Cranworth's *dictum* in *Moorhouse v. Lord*,[58] as followed and elaborated by Lord Halsbury in *Huntley v. Gaskell*,[59] to the effect that there must be an intention to cast off nationality. If that doctrine were accepted in inter-national cases, it would obviously be necessary to have a qualitatively different intention in inter-State cases. But, as Dicey points out, "this doctrine has now been pronounced erroneous by the highest authority."[60]

(2) The doctrine might mean that although the required intention is the same as in inter-national cases, the quantum of proof of this intention is less in inter-State cases. This is juridically distinct from a third possibility,

(3) that although the same intention must be proved and to the same degree of probability, the fact of change of residence has greater probative value on the issue of intention in inter-State cases than it has in inter-national cases; if a man goes to a country like his own he is more likely to intend to stay there than if he goes to a country unlike his own. This may well be so, but there are countervailing considerations. The fact that going to a strange country is such an important step makes its occurrence more significant on the issue of intention rather than less so. The fact that an Italian migrant comes to Western Australia is, one might have thought, in many respects more indicative of an intention to stay here than is the fact that a Victorian comes here. The point was put by Isaacs J. in the High Court in *Fremlin v. Fremlin*:[61] "It would be most serious for an Australian to change his domicil of birth for that of a domicil in China, but less serious in the United States, and still less in England, and least of all in a neighbouring State of the Commonwealth, where not merely conditions of life, currents of thought and law are similar, but in many cases are identical. The strength of the individual facts would, therefore, vary in each case. *But while there would be less serious consequences arising from the change, the necessity and inducements of change, and, consequently, the likelihood of intended change, are diminished.* The intention is to be judged upon all available testimony."[62] The true position would seem to be that the probative value of the fact of change of residence on the issue of intention is in some respects

58 (1863) 10 H.L.C. 272, at 283; 11 E.R. 1030, at 1035.

59 [1906] A.C. 56, at 66.

60 DICEY, CONFLICT OF LAWS (6th ed. 1949) 94. For authority see, for example, Udny v. Udny, (1866) L.R. 1 Sc. & Div. App. 441, at 460; Winans v. Attorney-General, [1904] A.C. 287, at 299, 300; and Wahl v. Attorney-General, (1932) 147 Law Times 382.

61 (1913) 16 Commonwealth L.R. 212.

62 *Ibid.*, at 234 (italics supplied).

greater and in some respects less in inter-State cases than it is in international cases. It is impossible to say in general terms that overall it is greater or less in one type of case than it is in the other. Indeed it is wrong to lay down any rule at all, let alone two different ones. It is a matter of weighing the evidence in individual cases. This is done by exercising the logical faculty and referring to experience, not by applying rules of law.

It is submitted that the only defensible, and in fact positively desirable, meaning is the second, namely that the quantum of proof should be less. The reason for this is that as a matter of policy a court should be willing to reach a finding on less strong evidence if the consequences of the finding are likely to be less serious. That this is the true meaning of this doctrine and that this is its justification seems to be implicit in two observations of Mayo J. and Macrossen J. respectively. "An intention [to fix a permanent home] will be the more readily presumed when the change of domicil is merely from one Australian State to another, and not to foreign parts."[63] "I think, in the experience of us all, a change of domicil from one State of the Commonwealth to another frequently does not constitute a proceeding of a very serious nature, particularly where neither State is the domicil of origin."[64] Angas Parsons J., delivering the judgment of the Supreme Court of South Australia, succinctly stated the position thus: "The consequences of a change of domicil, from one State in Australia to another, are much less serious than in the case of a change to or from a foreign country, with an entirely different system of law, and it follows that the onus of displacing a domicil in the State of Victoria, by the acquisition of a domicil of choice in this State, is less serious than the onus in cases like *Winans v. Attorney-General* or *Ramsay v. Liverpool Royal Infirmary.*"[65]

That the quantum of proof of intention in inter-State cases ought to be less than it is in inter-national cases, is, of course, without prejudice to the validity of the oft-made criticism of the English standard that it is itself too high even for inter-national cases.

I emphasise once more that what I have said in the latter half of this lecture purports to be no more than a disconnected commentary

[63] Carey v. Carey, [1942] South Australian State R. 62, at 64.
[64] Union Trustee Co. of Australia Ltd. v. Commissioner of Stamp Duties, [1926] Queensland State R. 304, at 317.
[65] Bradford v. Bradford, [1943] South Australian State R. 123, at 125. It will not be forgotten that Ramsay's Case, [1930] A.C. 588, was concerned with an alleged change of domicil from Scotland to England. For a Scot to acquire a domicil in England is perhaps so serious for the propositus that the higher international quantum is appropriate !

upon some aspects of Australian private international law which have interested me personally. The Australian contribution to private international law has, it goes without saying, been far far greater than these random observations would suggest. I cannot resist the regret, however, that the contribution has not been greater still—and bolder.[66]

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66 I owe a great debt to Mr. Haddon Storey, LL.M., of the University of Melbourne, which I wish to acknowledge here. If I had not had the advantage of reading the results of his scholarly researches into this subject, much Australian material would never have come to my notice.

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