EXTRATERRITORIAL SCOPE OF DESTITUTE PERSONS ACT 1910

HERMANS v. HERMANS [1962] N.Z.L.R. 1086

A provision on our Statute Books discussed recently in a reported judicial decision for the first time is s.25 of the Destitute Persons Act 1910 which states that

> Any complaint or order may be made under this Part of this Act whether the husband or wife against whom or in whose favour the order is sought is resident in New Zealand, or in the Commonwealth of Australia, or elsewhere.

The facts of the case insofar as they are relevant to the present discussion were as follows. The parties were husband and wife, the wife residing in Belgium, and the husband in Wellington. A complaint seeking a maintenance order was sworn under the provisions of the Destitute Persons Act by a law clerk (assumed by the Court to be a "reputable person" as required by s.17(1) of the Destitute Persons Act 1910; [1962] N.Z.L.R. 1086) on behalf of the appellant wife.

When the complaint first came up for hearing in the Magistrate's Court it was argued on behalf of the husband that the Court had no jurisdiction. This question was discussed as a preliminary issue, and the learned Magistrate held that under s.25 he had jurisdiction to make a maintenance order.

These present proceedings arose as the result of an appeal from the refusal by the learned Magistrate to make a maintenance order when the complaint was subsequently argued on the merits.

In the Supreme Court the learned Judge, McCarthy J., adopted the procedure followed in the Court below, and determined the question of jurisdiction first. He found no difficulty in holding that there was jurisdiction to hear and determine the complaint.

After reading the terms of s. 25 McCarthy J. said (at 1087) :

> Quite obviously... on a plain and ordinary reading of s.25 the [Magistrate's] Court was authorised to make an order against the husband wherever the wife was resident....

The learned Judge went on to say that the wording of the section left no room for the application of the *eiusdem generis* rule. He remarked (ibid.):

> The listing of one country, additional to New Zealand, provides little from which a class may properly be spelled . . . .

> [I]n this case I am satisfied, particularly in view of the use of the wide words "or elsewhere", that the rule cannot be invoked. The words are unambiguous and I see no need to resort to a maxim which is, at most, a subsidiary rule of construction.

The learned Judge then examined the argument put forward that if the section were interpreted literally the Court could make an order even though neither the husband nor the wife were living in New Zealand. McCarthy J. held that it was not necessary to decide that point saying that the Court has jurisdiction as long as the husband or the wife is resident in New Zealand. Nevertheless at one point in his judgment the learned Judge says (admittedly obiter at 1087) that the use of the conjunction "or" in the section

> ... implies that one of the parties must be resident in this country and that where both the husband and the wife are resident outside New Zealand, the Court would decline jurisdiction. [1]

With great respect, it is submitted that this is not a correct reading of the section at all. The section says that the complaint may be made whether the husband is resident in New Zealand, Australia or elsewhere, or the wife is resident in New Zealand, Australia or elsewhere - this means that neither, either, or both parties may be resident in New Zealand and that in any of these cases the Court could exercise jurisdiction. It is submitted that in theory at least the Court could make an order when both the husband and the wife are resident outside New Zealand, so plain and unambiguous are the words of the section.

On the face of it this appears to be a perfectly sensible and straightforward interpretation of this section. Further examination suggests that the matter may not be so clear cut, because of two points which do not appear to have been raised either in the arguments of counsel or in the judgment of the Court in *Hermans* v. *Hermans*. The first point relates to the legislative competence of the New Zealand Parliament in 1910 to enact s.25 of the Destitute Persons Act 1910.

Prior to the adoption in 1947 by New Zealand of the Statute of Westminster 1931 and the enactment of the New Zealand Constitution Amendment (Request and Consent) Act 1947 (U.K.) the legislative competence of our Parliament was determined by the New Zealand Constitution Act 1852 (U.K.) s.53 of which empowered the New

1. In making this statement the learned Judge may have been influenced by the terms of s.25 of the Act (as substituted by s.2 of the Destitute Persons Amendment Act 1955); see discussion of that provision below.

Zealand Parliament to make laws "for the peace, order, and good government of New Zealand, provided that no such laws be repugnant to the law of England... ". After the adoption of the Statute of Westminster 1931 doubts as to the validity of *future* laws having extraterritorial operation were put at rest by s.3 of that Act which provides that

> It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extraterritorial operation.

The validity of laws enacted before the adoption is, however, not so clear, due to the unsatisfactory decisions of the Privy Council in *Macleod* v. *Attorney-General for New South Wales* [1891] A.C. 455 [1] and our own Court of Appeal in *R* v. *Lander* [1919] N.Z.L.R. 305. The legislative authority given the New Zealand Parliament under the New Zealand Constitution Act 1852 (U.K.), s.53, was for some considerable time watered down by the doctrine that a Dominion Parliament had no power to make laws having extraterritorial operation. This rule is commonly regarded as established by the decision of *Macleod* v. *Attorney-General*. In that case the Privy Council expressed the opinion that if a New South Wales statute had provided that bigamy committed outside the territory of New South Wales was an offence punishable in that territory, such a provision would be ultra vires. The Board had already interpreted the statutory provisions as applying only to offences committed *within* New South Wales and accordingly its following comments (at 458) on the present question are obiter:

> Their Lordships think it right to add that they are of the opinion that if the wider construction had been applied to the statute... it would have been beyond the jurisdiction of the Colony to enact such law. Their jurisdiction is confined within their own territories....

No authority is cited by the Privy Council for the rule so laid down as to the limitation of the power of a colonial legislature, except a passage from *Jefferys* v. *Boosey* (1854) 4 H.L.C. 815,926; 10 E.R. 681,725. This passage relates however to the legislation of the *Imperial* Parliament, and cannot be regarded as an authority for a rule which imposes upon *colonial* legislatures a limitation which does not exist in the case of the Imperial Parliament. Moreover the passage which their Lordships cited relates to a rule of statutory interpretation and not to the limitations of legis-

1. Characterized by Professor R. McGechan as probably the worst piece of judicial reasoning the Privy Council has perpetrated since laymen ceased to sit upon it. New Zealand and the Statute of Westminster (1944) ed. J.C. Beaglehole, 86.

lative authority. It further would appear that the rule that colonial statutes cannot have extraterritorial effect laid down in *Macleod's* case was due to a misapplication by the Privy Council of the maxim *extra territorium ius dicenti impune non paretur.* This maxim, when used in its original sense, quite correctly means that no colonial legislature can make laws for a place outside the limits of the colony. Although it is used in referring to the power of Courts to enforce their decrees, it has nothing whatever to do with legislative competence. It would appear that the Privy Council in the above case failed to realise the essential distinction between making laws in one place to have effect in another, and making laws in one place to have effect in that place with respect to things done in another. [1]

Although, then, the reasoning on this point may be regarded as unsound, the dictum was expressly applied by our Court of Appeal in *R.* v. *Lander.* The Court, by a majority, held that legislation making bigamy committed abroad a crime was ultra vires of the New Zealand Parliament. However it is worth noting both the arguments put forward by Sir John Salmond ([1919] N.Z.L.R. at 307 ff.) on behalf of the Crown and the very strong dissenting judgment of the Chief Justice, Sir Robert Stout, (ibid., 314) where he declared that

> if a law comes within the ambit of the jurisdiction of being a law to maintain peace, order, and good government in the Dominion, the Dominion Parliament has full power to enact it.

The learned Chief Justice and Sir John Salmond in this case indicate the attitude which the Courts have adopted in later decisions, at first cautiously but later more boldly. First, however, in *Tagaloa* v. *Inspector of Police* [1927] N.Z.L.R. 883 the full Supreme Court said that the New Zealand legislature had no power under the Constitution Act to legislate for territories outside the boundaries of the Dominion including its mandated territory of Samoa; (it held that it had legislative power under an Imperial Statute and Order in Council). There may be doubts as to the correctness of this rigid dictum; certainly Evatt J. in the Australian decision of *Jolley* v. *Mainka* (1933) 49 C.L.R. 242, 274-281, took the opposite view; and a South African Court in *R.* v. *Christian* [1924] App.D. (S.Af.) 101 assumed that extraterritoriality was no bar to South Africa legislating in respect of the mandated territory of South West Africa.

1. See Salmond, 'The Limitations of Colonial Legislative Power' (1917) 33 L.Q.R. 117, 118-121. (Salmond was draftsman of the 1910 Act.)

Be that as it may, in the classic case of *Croft* v.*Dunphy* [1933] A.C. 156, J.C., the doctrine that extraterritoriality did not per se invalidate Dominion legislation was expressed in even more definite terms. The Privy Council had to consider the extension of anti-smuggling laws beyond territorial limits, and it was held that a jurisdiction extending beyond territorial waters was conceded by international law and usage. This case shows that the only question to ask in matters such as the present is whether the legislation is for the peace, order, and good government of the Dominion; the test is definitely not whether its legislation is intraterritorial in operation.

As Lord Macmillan speaking for the Privy Council puts it (ibid., 163),

> Once it is found that a particular topic of legislation is among those upon which the Dominion Parliament may competently legislate as being for the peace, order and good government of Canada . . . their Lordships see no reason to restrict the permitted scope of such legislation by any other consideration than is applicable to the legislation of a fully Sovereign State.

In arriving at this conclusion, it is interesting to observe that the attitude of the Privy Council is almost the complete antithesis of that in *Macleod's* case. In fact, it seems that the Privy Council was not altogether happy about its reasoning in *Macleod's* case. Certainly in *Croft* v. *Dunphy*, although the point involved, and the argument called for, a reconsideration of that reasoning, the judgment does not even mention it.

The most recent case discussing the position in New Zealand prior to the adoption of the Statute of Westminster with regard to the validity of extraterritorial legislation was *Woolworths (New Zealand) Ltd.* v. *Wynne* [1952] N.Z.L.R. 496. [1] The question of extraterritoriality arose because the Justices of the Peace Amendment Act 1946, s.5 (2) provided that in certain criminal proceedings

> . . the Court of Appeal may give leave to either party to appeal to the Privy Council.

After discussing the cases on extraterritoriality F.B. Adams J. (with whom Hay J. concurred) concluded (at 519):

> . . . the test of a Dominion's legislative power is not whether its legislation is intraterritorial. If the topic is within the powers, and requires or justifies a statute having extraterritorial operation, then there may be extraterritorial legislation.

1. See 'A Decision of Constitutional Importance' (1953) Vol.1 Part 1 V.U.C.L.R. 32.

It is now necessary to examine s.25 of the Destitute Persons Act 1910 to decide whether it was ultra vires of the New Zealand Legislature at the time of its enactment. The cases already discussed suggest that a Dominion Parliament could successfully enact legislation prior to 1947 having extraterritorial effect, so long as the legislation complied with one condition, namely, that it was for "the peace, order, and good government of New Zealand". If in accordance with *Hermans* v. *Hermans* and the foregoing discussion a wide interpretation is given to s.25 it is strongly submitted that this provision would not be "for the peace, order, and good government of New Zealand" at the time of its enactment, and it would then be ultra vires to a certain degree.

To argue otherwise would be to admit that an order could be made under the Act when neither the complainant nor the defendant has any nexus with New Zealand at all. A complaint could be entertained when the complainant lived in Tibet, the defendant in Alaska, and the acts complained of occurred in South Africa. There would not need to be any nexus with New Zealand in any way. Clearly such a course would be undesirable, both from a practicable point of view and also from considerations of justice. Accordingly it is respectfully submitted that if s.25 is construed as having substantive effect and as allowing a complaint to be entertained by our Courts no matter where the parties are resident and no matter where the acts complained of occurred then it must be held to be, at least in part, ultra vires of the New Zealand Parliament of 1910: it could not be for the peace, order and good government of New Zealand for its courts to deal with such matters as these. On the basis of *Ashbury* v. *Ellis* [1893] A.C. 339, J.C., it would probably be valid in relation to cases when one party was in New Zealand at all material times and the cause of action arose here; [1] the invalid portion of the section – relating to cases where neither party was in New Zealand – could possibly be severed: *R.v. Jackson* [1919] N.Z.L.R. 607.

It is, however, the writer's submission – and this is the second point not raised in *Hermans* v. *Hermans* – that s.25 has little or no substantive effect and that it does not widen in any way the jurisdiction of the Magistrate's Court. The provision does not say that "Any complaint or order may be made under this act *if* the husband or wife . . . is resident in New Zealand . . . or elsewhere". The operative word is "whether", a word which it is submitted postulates that the Court *already has jurisdiction under some other provision*. If there is some other provision giving jurisdiction

1. And see *Poingdestre v. Poingdestre* (1909) 28 N.Z.L.R. 604, F.C., where it was held that a statute giving a wife a separate domicile for divorce purposes regardless of the domicile of her husband was for the peace, order, and good government of New Zealand. See further *Worth* v. *Worth* [1931] N.Z.L.R. 1109, C.A.

then, says s.25, the fact that parties are not resident in New Zealand does not deprive the court of that jurisdiction. This submission is strongly supported by the repeal and replacement in 1955 of the provision parallel to s.25 relating to affiliation proceedings: s.14. This provision which was *mutatis mutandis* the same as s.25 was replaced by s.2 of the Destitute Persons Amendment Act 1955:

> (1) Any complaint or order may be made under this Part of this Act *if*, when the complaint is made, the father or mother resides or is domiciled in New Zealand.
>
> (2) Subject to the provisions of subsection one of this section, any complaint or order may be made under this Part of this Act *notwithstanding that* –
>
> (a) The child resides or was born outside New Zealand;
>
> (b) The mother was domiciled outside New Zealand when the child was born;
>
> (c) The mother or the child is dead, or the child was born dead. (Emphasis added)

The immediate impression is that, if the old s.14 was to be read as widely as the above discussion of s.25 would suggest, then this new provision would actually *restrict* the Court's jurisdiction: it is now necessary for one of the parties to be resident in New Zealand. This was, however, quite clearly not Parliament's intention. Thus the then Minister of Justice, the Hon. J.R. Marshall, in moving the second reading of the Bill, said

> Clause 2 deals with the giving of jurisdiction to the Court to make affiliation orders in certain cases. This has arisen because of recent decisions in England which may be applicable in New Zealand, and which make it doubtful whether an affiliation order can be made when the mother is not domiciled in New Zealand and the child is born outside New Zealand. In those cases if the father is living in New Zealand it may be important that the mother should be able to get an order from a Court.(18 October 1955, 307 New Zealand Parliamentary Debates, 3139.)

That this was Parliament's intent appears also from the English cases: *O'Dea* v. *Tetau* [1951] 1 K.B. 184 and *R.* v. *Wilson, ex parte Pereira* [1953] 1 Q.B. 59.

To summarise at this point: on their face ss.7 (maintenance of destitute relatives), 14(2)(as enacted in 1955), 25 and 28 (maintenance of children) appear to give the Court jurisdiction wherever the parties may be resident or domiciled; the new s.14

was intended to *widen* the Court's jurisdiction; but it seems that it *restricts* that jurisdiction to cases where one of the parties is resident or domiciled in New Zealand. One or other of the propositions must be incorrect: it is submitted that the principal error lies in the first. As was suggested above it is argued that s.25 does not *give* the Court jurisdiction; it merely says, possibly *ex abundanti cautela*, that if the Court has jurisdiction the fact that the parties are resident or domiciled outside New Zealand does not deprive it of that jurisdiction. On the other hand s.14 (1) actually *gives* the Court jurisdiction additional to that given by the other provisions of Part III of the Act in the circumstances mentioned; by contrast, subs. (2) says – like ss.7 and 25 – that *if* the Court has jurisdiction it may exercise it notwithstanding the fact that the mother etc. may be outside New Zealand: this subsection does not *give* jurisdiction; it merely forestalls any argument that since the parties are outside New Zealand the Court should not exercise the jurisdiction given by some *other* provision.

If this argument is correct it becomes necessary to consider the limits of the jurisdiction given by that *other* provision. The other provision here is s.17 which empowers the making of a maintenance order when the Magistrate is satisfied (subs. (1)(a)) "That the husband of that woman has failed or intends to fail to provide her with adequate maintenance; . . .". In accordance with the presumption that legislation is taken to apply only in respect of persons and events within the territory of the Legislature this provision would be given a territorial interpretation (see *Jefferys* v. *Boosey*). This leads to the result that the failure to provide maintenance must be a failure *within New Zealand*. According to *Clarke* v. *Clarke* [1943] P.1 the failure to maintain occurs both in the omission of payment and in the non-receipt of payment; accordingly on this basis it would under s.17(1)(a) be necessary to show that either the husband *in New Zealand* had failed or intended to fail to maintain his wife or that the wife *in New Zealand* had not been or would not be maintained.

It is not however necessary for either the wife or the husband to be present in New Zealand at the time of the proceedings since the causes of action in s.17(1)(a) include a *past* failure: in the *Hermans* situation it is submitted that the Court would still have had jurisdiction if the defendant had gone to Australia shortly before the proceedings were commenced. Similarly, the other grounds for an order stated in s.17(1)(a) would – in accordance with the territorial presumption – be interpreted so as to apply only to acts which occurred at least partly in New Zealand. If, when the provisions are so interpreted, the Court has jurisdiction, then the fact that the case may have foreign elements is irrelevant (s.25). In the case of affiliation proceedings, however, the Courts will have jurisdiction not only if the facts themselves occurred in New Zealand (see ss.8 and 9), but also – as a result of the 1955 amendment – if

either of the parents resides or is domiciled in New Zealand, wherever the acts complained of occurred.

In other words all that ss.7, 25 and 28 (and subs. (2) of the new s.14) do is merely ensure that once the Court has jurisdiction under the substantive provisions then the absence of the parties will not prevent it from acting. When read in this way s.25 probably has no substantive effect but merely ensures that s.17 is not interpreted restrictively.

It should be noted that the above discussion is not meant to detract in any way from the learned Judge's reasoning in *Hermans* v. *Hermans*. Within his terms of reference, it is with respect submitted that the learned Judge came to a correct conclusion; it is however suggested that counsel for the respondent husband neglected two arguments: (a) that s.25 is *ultra vires;* (b) that, alternatively, s.25 is not a separate source of jurisdiction and jurisdiction could not in the circumstances be founded on s. 17.

To summarise then, the following conclusions may be drawn :

1. At first glance, s.25 of the Destitute Persons Act 1910 appears to give jurisdiction to entertain a complaint when neither party has any nexus whatever with New Zealand and no part of the cause of action arose here.

2. If this wide interpretation is given to the section, it is *ultra vires* of the New Zealand Legislature of 1910, because it could not be described in 1910 as being for "the peace, order, and good government of New Zealand".

3. In actual fact, this provision may have little or no substantive effect, and it may merely support the normal presumption that legislatures intend to legislate only for persons and in respect of acts within their territories. On this basis, before the Court can entertain a complaint under the Act, some part of the cause of action must have occurred in New Zealand, unless, as in the case of affiliation proceedings, there are express provisions to the contrary.

J. O. U.