3, 1971

No.12 of 1969

IN THE PRIVY COUNCIL

ON APPEAL FROM THE COURT OF APPEAL OF THE SUPREME COURT OF NEW SOUTH WALES

B E T W E E N

THE DISTILLERS COMPANY (BIO-CHEMICALS) LIMITED (First Defendants) Appellants

- and -

LAURA ANNE THOMPSON BY ARTHUR LESLIE THOMPSON HER NEXT FRIEND (Plaintiff) Respondent

- and -

THE DISTILLERS COMPANY BIO-CHEMICALS (AUSTRALIA) PTY. LIMITED (Second Defendants) Respondents Pro Forma

CASE FOR THE APPELLANT

Record

1. This Appeal is from a judgment of the Court of Appeal Division (Sir Gordon Wallace, President, and Justices of Appeal Asprey and Holmes) of the Supreme Court of New South Wales delivered on 4th September 1968.

2. The Appellant is an English Company, incorporated in England and having its registered office in England which has been sued as one of the defendants in an action instituted in the Supreme Court of New South Wales by the Plaintiff, the Respondent to this Appeal. The Appellant is not resident in or in any way registered in New South Wales or any other part of Australia and does not carry on business anywhere in Australia

3. Shortly, the point involved in this Appeal is whether or not the Supreme Court of New South Wales has jurisdiction to entertain that action against the Appellant.

4. The plaintiff in the action, Laura Anne Thompson, is an infant and has sued both the

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Appellant and the Distillers Company (BioChemicals) (Australia) Pty. Limited, a company registered in New South Wales (hereinafter called "the Australian Company"), by Writ of Summons claiming unliquidated damages, issued out of the Supreme Court of New South Wales and dated 26th July, 1966.

5. The plaintiff has not yet filed a declaration (or Statement of Claim) in the action, nor, because of the steps which have been taken by the Appellant to have the Writ set aside, has the Plaintiff been required to do so under the Rules of the New South Wales Supreme Court. However the allegations of fact upon which the Plaintiff will frame her declaration are, in substance, that her mother (while pregnant with the plaintiff in August 1961) purchased from a pharmacist and consumed in Australia a preparation known as Distaval and containing thalidomide, which had been manufactured by the Appellant in England and distributed by the Australian Company to retailers in Australia, and that this preparation caused her to be born with certain deformities. The Appellant had sold the said preparation to the Australian Company so as to pass the property therein to the Australian Company in England and has done nothing whatever in Australia in connection with the distribution or sale of the said preparation or its assumed consumption by the plaintiff's mother.

6. The Writ was served upon the Appellant pursuant to the provisions of Section 18 sub-sections (1) (a) and (3) (b) of the New South Wales Common Law Procedure Act, No.21 of 1899, as amended. Section 18, in full form, is in the following terms :

> "18. (1) In any action against a defendant who
>
> (a) being a corporation is not resident incorporated or registered within the jurisdiction of the Court and is not registered under Part VI of the Companies Act, 1936, as amended by subsequent Acts; or

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(b) being any other person is not resident within the jurisdiction of the Court

the plaintiff may issue a writ of summons in the form prescribed.

(2) Either the writ of summons or a notice thereof in the form prescribed shall be served upon the defendant as may be prescribed.

(3) Until otherwise prescribed the writ of summons shall be served in the following cases :-

(a) Where the writ of summons may be served under the provisions of the Service and Execution of Process Act 1901 (as amended by subsequent Acts) of the Parliament of the Commonwealth.

(b) Where the defendant is a British subject or being a corporation is incorporated in the United Kingdom or in Australia or in any of the other realms and territories of Her Majesty the Queen.

(c) Where the defendant is in the United Kingdom or in Australia or in any of the other realms and territories of Her Majesty the Queen.

(4) If the defendant does not appear to the writ of summons within the time prescribed, a Judge, upon being satisfied -

(a) that there is a cause of action which arose within the jurisdiction or in respect of the breach of a contract made within the jurisdiction; and

(b) that service of the writ or notice thereof, as the case may be was duly effected or that the writ or the notice thereof came to the defendant's knowledge

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may, if he thinks fit, by order, permit the plaintiff to proceed to sign final or interlocutory judgment in such manner and subject to such conditions as may be prescribed or as he in all the circumstances may deem fit."

7. Order IX Rule 6 of the General Rules of the Supreme Court of New South Wales is in the following terms :

"6. In all cases where a defendant desires a writ issued against him to be set aside upon the ground that the Court has no jurisdiction to entertain the action he may file a notice of conditional appearance in, or to the effect of, Form No.7 in the First Schedule hereto and the foregoing rules shall apply, mutatis mutandis, to a conditional appearance.

Such appearance shall become unconditional if no summons to set aside the writ is taken out by the defendant within seven days of filing the notice of conditional appearance".

8. On 9th December 1966 the Appellant filed a conditional appearance, and on 14th December 1966 took out a Summons to set aside the Writ. The Summons was supported by the affidavit of Derek Jack Hayman. Affidavits on behalf of the plaintiff were subsequently filed by Audrey Emmalie Thompson and David Louthean Patten. An affidavit in reply by the said Derek Jack Hayman was also filed.

p.1
p.2
p.7
p.8
p.11

9. These affidavits constitute the whole of the filed evidence for the Summons, but, during the hearing, it was agreed between Counsel for the parties that it was to be assumed (for the purposes of the Summons only) that the plaintiff's mother had taken the Distaval which had been prescribed for her by a doctor in New South Wales.

10. The point at issue between the parties is whether the plaintiff's cause of action against the Appellant is "a cause of action which arose within the jurisdiction", within the meaning and intendment of section 18(4)(a) of the New South Wales Act (supra).

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11. On 9th November 1967 His Honour Mr.Justice Taylor delivered judgment dismissing the Appellant's summons with costs. On 4th September 1968 the Court of Appeal Division of the Supreme Court gave judgment dismissing the Appellant's appeal from His Honour's judgment.

Taylor p.12
Wallace p.25
Asprey p.35
Holmes p.45

12. The Appellant's submissions, are, shortly as follows :-

(a) The construction which has been applied by English Courts (and followed in Australia and in effect in Canada) to the words appearing in R.S.C. (England) Order XI, Rule 1 (1) (h), namely, "action ..... founded on a tort committed within the jurisdiction" is correct, and that a similar construction should be applied, in respect of the present case, to the words "a cause of action which arose within the jurisdiction" in Section 18(4) of the New South Wales Act, in so far as they relate to a tort. If this construction is right, then it is submitted that the point at issue in the Appeal will be determined by the answer to the question: where was the assumedly wrongful act of the Appellant, from which the damage flowed, in fact committed? Or: where did the substance of the assumed wrongful conduct of the Appellant in fact occur? (This is referred to below as the "First Submission");

(b) Alternatively, if either the above construction of the English Rule is incorrect, or - if it is correct - the material words of the New South Wales section should be construed without regard to the construction of the words of the English Rule, then it is submitted that on the true construction of the words in the New South Wales Act the "cause

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of action" in the present case did not "arise" in New South Wales because either:

(i) the act on the part of the Appellant which gave the plaintiff her cause of complaint in the present case occurred in England; (This is referred to below as the "Second Submission"); or

(ii) all the ingredients of the cause of action did not occur in New South Wales. (This is referred to below as the "Alternative Second Submission").

(c) If there be any doubt as to the construction of the relevant words in Section 18 (4) of the New South Wales Act, it is submitted that this should be resolved in favour of the Appellant. (This is referred to below as the "Third Submission").

13. It is submitted that since the manufacture and sale of the package containing the preparation in question occurred in England, the (assumed) wrongful act of the Appellant took place in England. The Appellant respectfully adopts that portion of the judgment of
p.39 Asprey, J.A. in the present case which holds that the (assumed) want of due care on the part of the Appellant took place in England, as follows :

> "In the Donoghue v. Stevenson (supra) type of case the want of due care on the part of the English Company as the manufacturer consisted in the sale of "Distaval" in the contemplation that, in the ordinary course, it would be consumed in that form in which it was prepared and sold with the knowledge that, if consumed by a woman in the early stages of pregnancy, injury would be sustained by the foetus. This act took place in England."

14. In support of the First Submission, referred to in paragraph 12(a) above the Appellant

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respectfully relies on the following cases:

(a) George Monro Limited v. American Cyanamid & Chemical Corporation. /1944/ K.B.432.

Reference is in particular made to the judgments of du Parcq, L.J. (as he then was) at pp.440-441:

> "I am willing to infer that the negligence alleged is that the corporation put on the market a dangerous substance with written instructions to use it in a dangerous way. That act of commission was done in America and it is highly artificial to say that the tort was committed within the jurisdiction of the English Courts. The principle of the rule is plain. Looking at the substance of the matter without regard to any technical consideration, the question is: Where was the wrongful act, from which the damage flows, in fact done? The question is not where was the damage suffered, even though damage may be of the gist of the action;"

and of Goddard, L.J.(as he then was) at p.439:

> ".....We now know that the negligence alleged by the plaintiff is that the corporation sold in America, the property passing in America, a substance which was dangerous and in respect of which it is said a warning ought to have been given..... .... Here the alleged tort which was committed was a wrongful act or default. It was the sale of what was said to be a dangerous article without warning as to its nature. That act was committed in America, not in this country."

(b) Cordova Land Co.Limited v. Victor Brothers Inc.(1966) 1 W.L.R.793,and in particular

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the judgment of Winn, J. (as he then was) at pp.797 (H) to 801(B).

(c) Abbott-Smith v. Governors of University of Toronto, (1964) 45 D.L.R. (2d) 672, and in particular the judgment of Ilsley C.J. at p.687:

> "It seems to me that it smacks of artificiality or technicality to consider that where an intended defendant is not alleged to have done anything within the jurisdiction, the fact that what he did outside the jurisdiction should be regarded as the commission of a tort or the doing of a wrong within the jurisdiction."

(d) The Australian (Victorian) case of Lewis Construction Co. Pty. Ltd. v. M.Tichauer Societe Anonyme /1966/ V.R.341, in which Monro's case (supra) was followed: the Victorian Rule in question having in its relevant sub-paragraph words identical with those of the English Rule.

15. In support of the Second Submission referred to in paragraph 12 (b) (i) above the Appellant will refer to section 18 of the (English) Common Law Procedure Act 1852, of which the material terms were as follows:

> "XVIII. In case any Defendant, being a British Subject, is residing out of the Jurisdiction of the said Superior Courts, in any Place except in Scotland or Ireland, it shall be lawful for the Plaintiff to issue a Writ of Summons.....
> .....
> purporting that such Writ is for Service out of the Jurisdiction of the said Superior Courts;.....
> .....; and it shall be lawful for the Court or Judge, upon being satisfied by Affidavit that there is a Cause of Action, which arose within the Jurisdiction, or in respect of the Breach of a Contract made within the Jurisdiction,.....
> .....to direct from Time to

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Time that the Plaintiff shall be at liberty to proceed in the Action in such Manner and subject to such Conditions as to such Court or Judge may seem fit;.....
....."

16. The Appellant will in particular rely on the following cases in which this section was construed:

(a) Jackson v. Spittall, (1870) L.R.5 C.P. 542; and in particular to the passage of the judgment of the Court at pp.551-2:

"Now, in the drawing of the Act, that phrase is made applicable to two subsidiary phrases. If the section were expanded, it would read thus:- 'That there is a cause of action which arose within the jurisdiction, or a cause of action in respect of the breach of a contract made within the jurisdiction.' In the second collocation, the phrase 'cause of action' clearly does not mean the whole cause of action, as contended for on behalf of the defendant. It means the breach of contract, which breach occurs out of the jurisdiction. But, if the phrase 'a cause of action', when applied to the second subsidiary phrase, does not mean the whole cause of action in the sense contended for, can it be properly said to have that sense when applied to the first subsidiary phrase? Can the same phrase have two different meanings? Is not the natural reading rather this, that which in a popular meaning, - for many purposes,in legal meaning, - is 'the cause of action', viz. the act on the part of the defendant which gives the plaintiff his cause of complaint. In the first collocation, that is supposed to occur within the jurisdiction, in the second, without the jurisdiction."

(b) Durham v. Spence, (1870) L.R.6 Exch.46

(c) Vaughan v. Weldon, (1874) L.R.10 C.P.47.

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(d) The Australian case of Chidzey v. Breckler [1920] V.L.R. 558, in which the meaning of the phrase "a cause of action arose" in section 141 of the (Victorian) Supreme Court Act, 1915 was considered.

17. It is respectfully submitted, for the reasons stated in Paragraph 13 above that the (assumed) "act on the part of the Appellant which gives the Plaintiff her cause of complaint" took place in England and that accordingly the Plaintiff's cause of action against the Appellant did not arise in New South Wales.

18. In support of the Alternative Second Submission under Paragraph 12 (b) (ii) above the Appellant relies on the following reported decisions under various statutes dealing with jurisdiction, the relevant words being "cause of action arose". It is respectfully submitted that these decisions clearly indicate that for a cause of action to "arise" within a particular territory, all the ingredients of the cause of action must be found within it.

(a) Borthwick & Anor. v. Walton & Ors. (1855) 15 C.B.501 (which was concerned with section 60 of 9 and 10 Vict. c.95, in the following terms):

"That such summons may issue in any district in which the defendant or one of the defendants shall dwell or carry on his business at the time of the action brought; or, by leave of the Court for the district in which the defendant or one of the defendants shall have dwelt or carried on his business, at some time within six calendar months next before the time of the action brought, or in which the cause of action arose, such summons may issue in either of such last-mentioned Courts."

(b) Hernaman v. Smith (1855) 10 Ex.659 (also concerned with the foregoing section);

(c) Newcomb & Anor. v. DeRoos (1859) 29 L.J.Q.B. (N.S.) 4 (also concerned with the foregoing section);

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(d) Aris v. Orchard (1860) 30 L.J. Ex.(N.S.)21 (also concerned with the foregoing section);

(e) Allhusen & Anor. v. Malgarejo (1868) L.R. 3 Q.B.340 (which was concerned with section 18 of the (English) Common Law Procedure Act, 1852);

(f) Cooke v. Gill (1873) L.R. 8 C.P. 107 (which was concerned with section 12 of the Mayor's Court of London Procedure Act 1857 in the following terms):

"Where the debt or damage claimed in any action shall not exceed the sum of £50., no plea to the jurisdiction shall be allowed, provided the defendant or one of the defendants shall dwell or carry on business within the city of London or the liberties thereof at the time of the action brought, or provided the defendant or one of the defendants shall have dwelt or carried on business at some time within six months next before the time of the action brought or if the cause of action, either wholly or in part, arose therein."

(This case was referred to in Robinson v. Unicos Property Corporation Limited (1962) 1 W.L.R.520 at 525).

(g) Cherry v. Thompson (1872) L.R. 7 Q.B.573 (concerned with section 18 of the Common Law Procedure Act 1852). This case was decided after Jackson v. Spittall and Durham v. Spence but before Vaughan v. Weldon (see Paragraph 16 above.)

(h) Macken & Son v. Ellis (1874-5) 8 I.R. 151 at 156 per Fitzgerald J.;

(i) Read v. Brown (1888) 22 Q.B.D.128 (concerned with section 12 of the Mayor's Court Procedure Act 1857). This case was referred to with approval, as was Cooke v. Gill, by the Judicial Committee of the Privy Council in Trower & Sons Limited v. Ripstein /1944/ A.C.254 at 263;

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(j) Payne v. Hogg [1907] 2 Q.B.43 (which was concerned with section 6 of the Salford Hundred Court of Record Act, 1868).

19. In further support of the Alternative Second Submission the Appellant refers to the following cases decided in Australia:

(a) Buckingham v. Indramayo Steamship Co. (1900) 21 L.R. (N.S.W.) 215;

(b) J.E.Lindley & Co. v. Pratt [1911] V.L.R.444.

20. It is respectfully submitted that there is no relevant distinction between the phrase "a cause of action" (being the expression used in section 18 (4) (a) of the Common Law Procedure Act 1899 (N.S.W.)) and the phrase "the cause of action". Although in Payne v. Hogg [1907] 2 Q.B. 43 at 54 Collins L.J. distinguished between "a cause of action" and "the cause of action", no such distinction was drawn by A.L.Smith, L.J. in that case, nor does it appear that Jackson v. Spittall, supra, was decided upon a distinction between these two phrases. The Appellant refers particularly to Jackson v. Spittall, supra, at page 552. Although, in the present case, Asprey, J.A. refers to Payne v. Hogg for an explanation of the difference between "a cause of action" and "the cause of action", it is submitted that, apart from the judgment of Collins, L.J. in that case, none of the other judgments rest upon any assumed distinction between these two phrases.

p.44

21. The Appellant submits that the foregoing cases, commencing with Borthwick & Anor. v. Walton & Ors. (1855) 15 C.B.501, require that for a cause of action to "arise" within a certain jurisdiction, all of the elements requisite to found the cause of action must occur within the jurisdiction. In the present case it is submitted that the only element which occurred within the jurisdiction was the assumed damage to the plaintiff.

22. In Williams v. Milotin (1957) 97 C.L.R. 465 at 474 the High Court of Australia defined the expression "a cause of action" and this

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definition was approved by Lord Pearce in Cartledge v. E. Jopling & Sons Limited [1963] A.C. 758 at 783. It is submitted that, applying this definition, before a cause of action can be said to "arise" all the essential ingredients of the right which it is proposed to enforce must themselves "arise".

23. In support of the Third Submission under Paragraph 12(c) hereof the Appellant relies in particular on the words of Farwell, L.J. in The Hagen [1908] P.189 at 201, adopting the statement of Pearson J. in Societe Generale de Paris v. Dreyfus Brothers, [1885] 29 Ch.D.239, at 242, which were quoted by Lord Hanworth M.R. in In re Schintz, Schintz v. Warr. [1926] 1 Ch.710, at 717:

> "If on the construction of any of the sub-heads of Order XI there was any doubt, it ought to be resolved in favour of the foreigner."

24. The Appellant respectfully submits that in the light of the above submissions the judgments of Taylor, J. and the members of the Court of Appeal are open to criticism as summarised in the following paragraphs.

25. As regards the judgment of Taylor J. the Appellant respectfully submits as follows:

(a) When His Honour stated (referring to the time when the Plaintiff's mother consumed Distaval) that it was then that the defendants committed the wrongful act in relation to the plaintiff's cause of action and that "it committed the wrongful act so far as this plaintiff is concerned in supplying or causing to be supplied the dangerous substance to the plaintiff's mother which injured her" His Honour did not distinguish between the concepts of a defendant's acts and of a plaintiff's rights. It is submitted that the acts of the Appellant "supplying" or "causing to be supplied" were done in England and completed there. p.19

(b) It is submitted that, while in the

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construction of a section of an Act concerned with limitation of action (as was the case in Watson v. Winget Limited (1960) S.L.T.321, on which His Honour relied) it is relevant to examine the position "so far as the plaintiff is concerned", because such a section is by its nature directed to curtailing enforcement of a plaintiff's rights, in a section of an Act dealing with the jurisdiction of a Court in respect of a foreign defendant it is paramount to examine the position rather "so far as the defendant is concerned", because the matter involves bringing a defendant to litigate before a foreign Court.

26. Of the three judgments in the Court of Appeal, Asprey J.A. held that the (assumed) wrongful act of the Appellant occurred in England, but that there was a material difference between the words of the English Rule and the words in the New South Wales Act and that "the cause of action arose" in New South Wales. But Wallace P. and Holmes J.A. held that all the ingredients of the alleged tort occurred in New South Wales.

27. The Appellant respectfully submits as follows in relation to the judgment of Asprey J.A.:-

p.43 (a) In stating that for a cause of action "'to arise' in this context means 'to come into existence'", he did not distinguish between cause of action and right of action;

p.39 (b) because (as he had held) an essential ingredient of the cause of action - the act of want of due care - occurred in England, the "cause of action" could not in the relevant sense "come into existence" or "arise" in New South Wales; though a right of action could;

p.39 (c) having held that the assumed wrongful act the Appellant (the want of due care) took place in England, his construction of the words "a cause of action which

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arose within the jurisdiction" is not consistent with the case of Jackson v. Spittall supra, and the cases following it quoted in his judgment;

(d) having earlier held that the phrase "cause of action" connotes the essential ingredients of the cause of action, and having held that one such ingredient occurred in England, his conclusion that in the present case the cause of action "arose" within the jurisdiction is out of line with the cases quoted in Paragraphs 18 and 19 above; p.39

(e) having held that in relation to the phrase "action....founded on a tort committed within the jurisdiction", it is necessary that all matters requisite for the cause of action must occur within the jurisdiction, he should have held that the same view should be applied in respect of the phrase "a cause of action arose within the jurisdiction"; p.42

(f) in construing the phrase "cause of action arose" he did not construe it with regard to the nature and intendment of the section in which it appears.

28. In so far as Wallace P. and Holmes J.A. relied on the principles enunciated in Donoghue v. Stevenson /1932/ A.C.562 and Grant v. Australian Knitting Mills /1936/ A.C. 85, the Appellant respectfully submits as follows:

(a) the nature of the Donoghue v. Stevenson duty as expounded in these two cases is not determinative of the construction of words in a statute concerned with the jurisdiction of a court over foreign defendants;

(b) Lord Wright's judgment in Grant's case does not support their conclusion;

(c) the fact that the duty "only can become vested by the fact of actual use by a particular person" is not relevant to the p.33

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question now being considered; and that it "smacks of artificiality" (per Ilsley C.J., in Abbott-Smith v. Governors of University of Toronto 45 D.L.R. (2d.) at 689), or rests upon a "technical consideration" (du Parcq, L.J. in George Monro Limited v. American Cyanamid. /1944/ K.B. at 441), to suggest that such vesting of the duty is an act of the defendant.

(d) no significance at all was placed (as it should have been) on the question whether the Appellant did any relevant act, or, if the Appellant did any relevant act, on the question where it was done. The judgments fix the point of concurrence of all necessary ingredients of a tort (which is necessarily and only the point when and where the damage occurs, in a case in which damage is essential to the cause of action) as identifying where the cause of action arose.

(e) It is respectfully submitted that the concept of a "notional" act being sufficient to bring a defendant, in cases of tort, within the jurisdiction of a foreign Court (a fortiori when in a particular case as here it is known as a fact that all the relevant acts or omissions of the Appellant were committed outside the jurisdiction) is unsound and against existing authority.

29. In so far as Wallace P. relied on the principles in Watson's case, supra, the Appellant respectfully submits as follows :-

(a) Cases dealing with the construction of Statutes of Limitation are of little assistance in cases dealing with the ambit of jurisdiction of a Court. The purpose and intendment of provisions providing for limitation of actions are to limit the time within which a plaintiff may institute an action after his right of action accrues, and inevitably such right cannot accrue until his cause of action is complete. The Court in such a case is

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therefore concerned with the time when the Plaintiff could first have started an action rather than with the jurisdiction question as to where the defendant committed a wrongful act. It is therefore submitted that this consideration is of importance in evaluating judgments which were concerned with Statutes of Limitation;

(b) an enquiry as to where "a cause of action arose" is very different from an enquiry as to what "gives rise to an action" which in Watson's case (supra) were the material words in section 6 (1) of the Law Reform (Limitation of Actions) Act 1954, especially when the former words are in a "jurisdiction" section of an Act, and the latter are in a "limitation of action" section of an Act and relate to the question as to when the institution of an action is barred by lapse of time;

(c) no case dealing with a question of jurisdiction appears to have been cited in Watson's case, supra; nor does it appear that since that case it has been itself referred to in any subsequent case dealing with the jurisdiction of a Court (apart from the present case).

30. It is respectfully submitted that in a statute dealing with jurisdiction, as distinguished from one dealing with limitation of actions, the proper approach is indicated, in the judgment of Winn,J.(as he then was) in the Cordova Case (1966) 1 W.L.R., at p.798(E):

> "But whether one is concentrating upon the moment when the tort becomes actionable or upon the moment when the tort is complete, it does not seem to me that either of those tests is the appropriate one when one is considering the proper effect to be given to the words 'founded on a tort committed within the jurisdiction'. Ex hypothesi, not the whole of the tort complained of was committed within the English jurisdiction. It was completed in the sense of Lord Tucker's

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> dictum and it becomes actionable within the jurisdiction, but it was not a tort the whole of which was committed within the jurisdiction. I am not disposed to say that the appropriate criterion in such a case as this is so simple as that referred to by Goddard L.J. in George Monro Ltd. v. American Cyanamid and Chemical Corporation, viz.that there must be such a straightforward case as one of negligently driving a motor car within the jurisdiction. But I think it is right to look at the substance of the wrong conduct alleged to be a tort."

31. Wallace P., beyond stating that "such phrases as 'tort committed' and'wrong done' are not necessarily synonymous with 'where the cause of action arose'", did not express an opinion as to the comparability of the relevant words of the English Order II Rule 1(1)(h) with those of the N.S.W. section. If such comparability exists, his view as to the sufficiency of a "notional" act of the defendant would run counter to the cases referred to in Paragraphs 14 and 16 above. Such a view would also run counter to all the cases cited in Paragraph 18 above, in which the words "cause of action arose" in section 18 of the English Common Law Procedure Act of 1852 (or similar words in other Acts) were construed. In particular, it would run counter to that portion of the judgment of the Court of Common Pleas in Jackson v. Spittall (supra) which appears at p.552:

> "It is that which in popular meaning - for many cases, in legal meaning - is 'the cause of action', viz. the act on the part of the defendant which gives the plaintiff his cause of complaint."

It is submitted that the words "act" and"on the part of the defendant" were intended by that Court to bear their ordinary meaning and implication. The words indicate something done in fact, and in reality, by the defendant; not something arrived at notionally by analysis of the legal constituents of a tort.

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32. The Appellant accordingly respectfully submits that the Order of the Court of Appeal Division of the Supreme Court of New South Wales dismissing with costs the appeal from Taylor J. should be set aside and that this appeal should be allowed, the Order of Taylor J. set aside, and an Order made setting aside the writ herein as against the Appellant, alternatively setting aside service of the writ herein upon the Appellant, or alternatively ordering that all proceedings against the Appellant be permanently stayed for the following amongst other

REASONS

(1) That the Court of Appeal and Taylor J. were in error in holding that the plaintiff had a cause of action which arose within the jurisdiction of the Supreme Court of New South Wales;

(2) That the Court of Appeal and Taylor J. were in error in holding that the Supreme Court of New South Wales had jurisdiction to entertain the action of the Plaintiff against the Appellant;

(3) That the judgments of the Court of Appeal and of Taylor J. were wrong and should be reversed.

[redacted] Q.C.

JOHN WILMERS Q.C.

DAVID SULLIVAN

No.12 of 1969

IN THE PRIVY COUNCIL

ON APPEAL FROM THE COURT OF APPEAL OF THE SUPREME COURT OF NEW SOUTH WALES

B E T W E E N :

THE DISTILLERS COMPANY (BIO-CHEMICALS) LIMITED (First defendants) Appellants

- and -

LAURA ANNE THOMPSON BY ARTHUR LESLIE THOMPSON HER NEXT FRIEND (Plaintiff) Respondent

- and -

THE DISTILLERS COMPANY BIO-CHEMICALS (AUSTRALIA) PTY. LIMITED (Second Defendants) Respondent Pro Forma

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CASE FOR THE APPELLANT

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Hale Court,
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London, W.C.2.
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