in this Court. We can only make such order as the Supreme Court ought to have made.

In the result the appeal, in my opinion, entirely fails.

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WILLIAMS v. SILVER PEAK MINES LTD.

Gavan Duffy J.

GAVAN DUFFY J. In this case my mind is not free from doubt, but on the whole I am of opinion that the order appealed against is right. If it were necessary to determine the question I should be disposed to say that reg. 43, published in the *Government Gazette* of 27th February 1885, is *ultra vires* in so far as it provides that a *Gazette* notice shall be conclusive evidence in all Courts of law, &c.

Appeal dismissed with costs.

Solicitor for the appellant, *J. V. Tillett*, Crown Solicitor for New South Wales.

Solicitors for the respondents, *A. J. Taylor & Greenwell*; *A. C. Roberts*.

B. L.

[HIGH COURT OF AUSTRALIA.]

THE CITY FINANCE COMPANY LIMITED . APPELLANTS; PLAINTIFFS,

AND

MATTHEW HARVEY & COMPANY LIMITED RESPONDENTS. DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Nov.* 17, 19; *Dec.* 3.

Griffith C.J., Isaacs and Gavan Duffy JJ.

District Court of New South Wales—Jurisdiction—Defendant not within New South Wales—Contract made in New South Wales—Foreign corporation—Carrying on business—District Courts Act 1912 (*N.S.W.*) (*No.* 23 *of* 1912), *secs.* 5, 7, 41.

Sec. 5 of the *District Courts Act* 1912 (N.S.W.) provides that the Governor may divide New South Wales into districts for the purposes of the Act and may define the limits within which each of the District Courts appointed to

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be held shall have jurisdiction. Sec. 7 (1) provides that "The several Courts appointed to be held at towns and places within such districts, respectively, shall have jurisdiction—(*a*) when the defendant, or one of two or more of the defendants, as the case may be, is resident or carries on business, or (*b*) when the debt sued for was contracted, or the liability for damages arose, within the districts for which such Courts respectively are ordered to be held." Sec. 41 (1) provides that "The jurisdiction of the District Courts" (except in certain cases) "shall extend to every claim or cause of action cognizable on the common law side of the Supreme Court," within certain limits of value.

Held, that sec. 7 is not directed to the question of jurisdiction of District Courts over persons who are not within the territorial jurisdiction of the State, but relates only to the distribution amongst the several District Courts of the jurisdiction elsewhere conferred upon them collectively, and does not, therefore, confer jurisdiction over a person who is not, at the time of action brought, within the territorial limits of the State.

The G. company, which were incorporated in New South Wales, had issued two debentures charging all their property and effects in favour of an English company. By a trust deed made between the G. company and A. as trustee, that company covenanted to pay the principal and interest of the debentures when such principal and interest should become due. The deed provided that the principal moneys should become payable and the security enforceable in certain specified events, that upon any of them happening A. might appoint a receiver, and that he or the receiver so appointed might take possession of, collect and get in the mortgaged premises. A. was in fact the representative in New South Wales of the English company for the purpose of getting in the debt. Default having been made, A. took possession of the property of the G. company, which was the stock-in-trade of a saddlery business, and proceeded to dispose of it.

Held, that, even if a foreign company carrying on business in New South Wales can be regarded as constructively present in the State, A. in disposing of the property was acting as trustee under the deed and not as agent for the English company, that consequently the English company was not carrying on business in New South Wales so as to constitute a presence of the company in New South Wales.

Held, therefore, that a District Court had no jurisdiction to entertain an action against the English company.

By *Isaacs* J.—Even if A. were agent of the company the nature of the agency must be considered, and the company could not be deemed to be present unless A. directly represented the company so as to make his acts not merely acts *for* the company, but the acts *of* the corporation itself.

Decision of the Supreme Court of New South Wales: *City Finance Co. Ltd.* v. *Matthew Harvey & Co. Ltd.*, 14 S.R. (N.S.W.), 438, affirmed.

APPEAL from the Supreme Court of New South Wales.

An action was brought in the District Court, Sydney, by the

City Finance Co. Ltd., a company incorporated in New South Wales, against Matthew Harvey & Co. Ltd., a company incorporated in England, to recover the sum of £39 3s. 3d. being the amount of a cheque drawn by Albert Gregory Ltd., a company incorporated in New South Wales, and endorsed by the defendant Company by their attorney, Ernest Adams, and of which the plaintiffs were the holders. The defendants appeared under protest and objected to the jurisdiction of the District Court on the ground that they were not resident and did not carry on business in New South Wales. They also raised certain defences, one of them being that the defendants were never indebted as alleged.

The District Court Judge found as a fact that the defendants by their agent, Ernest Adams, carried on business in New South Wales, and he gave judgment for the plaintiffs for the amount claimed. The defendants then obtained a rule *nisi* for a prohibition on the grounds (1) that the District Court had no jurisdiction to try the action and that the defendants' objection to jurisdiction should have been sustained, (2) that there was no evidence that the defendants were resident within the district for which the said Court was ordered to be held, and (3) that there was no evidence that the defendants carried on business within such district.

The Full Court made the rule absolute for a prohibition to restrain the plaintiffs from further proceeding on the judgment: *City Finance Co.* v. *Matthew Harvey & Co. Ltd.* (1).

From that decision the plaintiffs now, by special leave, appealed to the High Court.

The material facts are stated in the judgments hereunder.

Monahan, for the appellants. Under sec. 7 of the *District Courts Act* 1912 it is sufficient to give the Court jurisdiction that the contract was made in New South Wales. Even if that is not so, the District Court had jurisdiction inasmuch as the respondent Company were resident in New South Wales when the proceedings were instituted. On the evidence, the respondent Company were carrying on business in New South Wales, and that is sufficient to constitute a residence there. Adams, the agent of the respondent Company

(1) 14 S.R. (N.S.W.), 438.

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in Sydney, was authorized by his power of attorney to do all that that Company could have done in New South Wales; and that is a test of the residence of the Company. [He referred to *Okura & Co. Ltd.* v. *Forsbacka Jernverks Aktiebolag* (1); *Saccharin Corporation* v. *Chemische Fabrik von Heyden Aktiengesellschaft* (2); *Actieselskabet Dampskib "Hercules"* v. *Grand Trunk Pacific Railway Co.* (3); *Guy v. Ferguson Syndicate Co.* (4). The realization of the assets of Albert Gregory Ltd. was part of the business of the respondent Company. The respondents having appeared and defended the action, even though under protest, and the District Court having jurisdiction over the subject matter of the action, the respondents are bound by the judgment. Any irregularity in the service of the summons was cured by appearance: *Oulton* v. *Radcliffe* (5). [Counsel also referred to *Chichester* v. *Marquis of Donegal* (6).]

Alec Thomson (with him *Power*), for the respondents. The test of whether a company are carrying on business in a particular country is whether they are conducting their ordinary business or some part of it there. It is not sufficient that they are doing something there which is ancillary to their business: *Allison* v. *Independent Press Association of Australia* (7). That which was relied on as constituting the business of the respondents carried on in New South Wales was the realization of the assets of Albert Gregory Ltd., but that realization was carried out by Adams as trustee under the debenture trust deed. The trustee under such a deed is not an agent for the debenture holders, and the fact that there is only one debenture holder makes no difference. Sec. 7 of the *District Courts Act* gives no jurisdiction where a person or corporation is not present in New South Wales.

[GRIFFITH C.J. referred to *Pritchard* v. *Howard Smith & Sons Ltd.* (8).]

In regard to the exercise of jurisdiction over foreigners the strictest regard must be had to the conditions laid down by the Legislature:

(1) (1914) 1 K.B., 715.
(2) (1911) 2 K.B., 516, at p. 524.
(3) (1912) 1 K.B., 222.
(4) 10 N.Z.L.R., 405.
(5) L.R. 9 C.P., 189.
(6) 6 Madd., 375.
(7) 28 T.L.R., 128.
(8) 4 Q.L.J., 64.

Croft v. *King* (1). The Legislature, by sec. 7, intended to define the jurisdiction of District Courts *inter se*, and not to confer extra-territorial jurisdiction on them. If a District Court can acquire jurisdiction over a person by his submission to it, that submission must be voluntary.

Monahan, in reply.

Cur. adv. vult.

Dec. 3.

The following judgments were read :—

GRIFFITH C.J. and GAVAN DUFFY J. The question for decision in this appeal is whether the District Courts established under the law of New South Wales have jurisdiction over foreign corporations, *i.e.*, corporations not incorporated under the laws of the State. The respondents are a joint stock company registered in England. The appellants having brought an action against them in a District Court for debt, they appeared under protest and disputed the jurisdiction of the Court.

The coercive jurisdiction of the Legislature of New South Wales is limited to persons and things for the time being within the territorial limits of the State, although it may, by appropriate legislation, indirectly affect persons not within the jurisdiction through property belonging to them which is within it, as was done, for instance, in New South Wales by the Act 4 Vict. No. 6 (passed in 1840) which introduced the process called Foreign Attachment, and in New Zealand by the Act which was under consideration in the case of *Ashbury* v. *Ellis* (2). But the intention to do so must be clearly expressed. *Primâ facie* a Statute conferring jurisdiction on a Court will be construed as limited, in its application, to persons within the territorial jurisdiction. The Legislature has, of course, no larger jurisdiction with respect to foreign corporations than with respect to foreign individuals.

The *District Courts Act* No. 23 of 1912, which was a consolidation of earlier Acts, authorizes the Governor to order that Courts, to be called District Courts, shall be holden at such towns and places as he thinks fit (sec. 4) ; and that he may divide New South Wales

(1) (1893) 1 Q.B., 419. (2) (1893) A.C., 339.

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into districts for the purposes of the Act and define the limits within which each of the Courts appointed to be held shall have jurisdiction (sec. 5). Sec. 6 enacts that "every District Court . . . shall have jurisdiction as hereinafter provided." Sec. 41 provides that the jurisdiction of the District Courts (except in certain cases) shall extend to every claim or cause of action cognizable on the common law side of the Supreme Court within certain limits of value. Sec. 7, on which the appellants rely, enacts that "the several Courts appointed to be held at towns and places within such districts, respectively, shall have jurisdiction—(*a*) when the defendant, or one of two or more defendants, as the case may be, is resident or carries on business, or (*b*) when the debt sued for was contracted, or the liability for damages arose, within the districts for which such Courts respectively are ordered to be held." The appellants allege that at the time of action brought the respondents, by their agents or servants carried on business within the district of the Metropolitan District Court, and that the debt was contracted by them within that district.

It is ordinarily a condition of the administration of justice that the person against whom relief is sought shall have an opportunity of being heard. Hence the necessity for service or notice of the writ or other originating proceeding.

Sec. 62 of the Act provides that an action is to be commenced by plaint, and directs that upon the plaint being entered a summons stating the substance of the action shall be issued under the seal of the Court according to such form, and be served on the defendant at such time and in such manner, as is directed by the rules of the Court. This service is an essential preliminary to the entertaining of the plaint.

It is a settled rule that the process of the Court does not run beyond its territorial jurisdiction, so that service of a summons outside that jurisdiction is *primâ facie* a nullity. The legislative authority may, however, by appropriate legislation such as we have indicated, get over this difficulty. This is generally done by express provisions for service of the writ abroad, or, if the defendant is in a foreign country, for service of notice of the writ. But any law of this kind, although it must be obeyed by the Courts of the country

in which it is made, will not be recognized in any other country as binding upon the defendant.

We come now to sec. 7. In our opinion, the words "the Courts shall have jurisdiction when" &c. are not directed to the point whether the defendant is within or without the territorial jurisdiction of the Legislature, but relate merely to a distribution *inter se* of the collective jurisdiction of the District Courts of New South Wales, so that, the jurisdiction of some one or other of these Courts over the defendant being assumed, it is only to be exercised by a Court with respect to which one of the two prescribed conditions exists. The words are, in effect, in the nature of a provision or qualification to sec. 41, and not enabling words. There is no other provision in the Act that can be pointed to as indicating an intention to confer jurisdiction over persons not within the territorial limits of the State.

With regard to the allegation that the defendants were at the time of action brought carrying on business in New South Wales, the Court on a motion for prohibition must find the facts for itself. In our judgment they are as follows:—Albert Gregory Ltd., a joint stock company registered in New South Wales, had issued two debentures, charging all their property and effects with the sums of £8,000 and £3,500 in favour of the respondents. By an indenture of 27th November 1911 (called the trust deed) made between them and one Ernest Adams, described as the trustee, the company covenanted to pay the principal and interest when it should become due. The deed provided that the principal moneys should become payable and the security enforceable in certain specified events, that upon any of them happening Adams might appoint a receiver, and that he or any receiver so appointed might take possession of, collect, and get in the mortgaged premises. Adams was in fact the representative of the respondents for the purpose of getting in the debt.

Default having been made, Adams took possession, and proceeded to dispose of the property, which was the stock-in-trade of a saddlery business. The appellants contend that in doing so he was carrying on business for the respondents. He was in fact carrying it on for

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their ultimate benefit, just as any trustee carrying on the business of a trust estate carries it on for the benefit of the beneficiaries. But the beneficiaries do not carry on the business. So here, we think that Adams was himself carrying on the business under the powers conferred upon him personally by the trust deed, and that the fact that he was doing so for the ultimate benefit of the respondents did not make him their agent.

For these reasons we think that the appeal fails.

ISAACS J. Learned counsel for the appellants contended that the District Court had jurisdiction under both pars. (*a*) and (*b*) of sec. 7 of the *District Courts Act* 1912. As to (*a*) he said the facts establish that the defendant Company did reside or carry on business within the district at the date of service ; and as to (*b*) he said that the single fact, which is undisputed, that the debt was contracted within the district in law satisfies the statutory condition, but, if not, the defendants were present in New South Wales when the plaint was served. He also added, that the circumstances of the defendants' appearance at the trial and contesting the merits, though objecting to the jurisdiction of the Court, amounted in law to an admission that the defendants were so present.

All the contentions involve considerations both of fact and law.

As to the findings of fact by the learned District Court Judge it must be remembered that the question we have to deal with is one preliminary to the exercise of his jurisdiction. No Court can, by an erroneous finding on such a question, enlarge the scope of its own jurisdiction, and so the Supreme Court on the prohibition was bound to inquire, and we have on this appeal to inquire, whether in fact and law the conditions essential to jurisdiction were satisfied. This is not one of the cases where the primary tribunal is specially empowered by the Legislature to inquire into and determine the preliminary point, in which case the finding would, of course, be within jurisdiction, and, if challenged as wrong, would have to be corrected, if at all, in another way.

The result of this appeal depends on the true construction of sec. 7 of the *District Courts Act* 1912, No. 23. And that construction is to be arrived at after reading the whole Act by the light

not merely of its mere words, but also of its history and of some relevant rules of construction.

The Act, which consolidates prior enactments, provides for the division of New South Wales into districts each of which is to have a tribunal called a District Court, with local jurisdiction. Jurisdiction, which means the right to hear and determine, connotes, where exercised *in personam*, not only causes of action, but also parties. As to causes of action, the Legislature has used language of a very wide import. It has not merely referred to them by character, but by sec. 41 has said the jurisdiction of the District Courts except in an action in which title to land is in question and except in an action of ejectment shall extend to every claim or cause of action cognizable on the common law side of the Supreme Court in which the sum of £400 or its value is not exceeded. By sec. 149 rules may be made regulating the practice and procedure of the Courts, and in the absence of any other provision the general principles of practice in the Supreme Court may be adopted so far as applicable.

The applicability of Supreme Court practice depends on the scope of the Act taken as a whole. But it is plain that so far as subject matter is concerned, and so far as relates to all necessary machinery, there is nothing wanting to the District Courts to entertain such a controversy as the present just as competently as the Supreme Court, provided the other essential to jurisdiction, namely, in respect of the defendant, is present. Whether that essential does or does not exist depends entirely upon the meaning of sec. 7, and upon whether the facts here bring the case within the section. If Parliament intended that the Court should have power to proceed to judgment notwithstanding the defendant's absence from New South Wales, I can see no reason for doubting the validity of the judgment so far as New South Wales is concerned. The case of *Ashbury* v. *Ellis* (1), a New Zealand case, settles the point, for the Constitution of New South Wales is as wide as that of New Zealand. How far such a judgment would be enforced in another jurisdiction is a different question, with which we are not now concerned.

But before an Act not expressly providing for such power is to

(1) (1893) A.C., 339.

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be construed as conferring it, regard must be had to a principle alluded to by the Privy Council in *Sirdar Gurdyal Singh* v. *Rajah of Faridkote* (1). That was a case of international law, but Lord *Selborne* in the judgment (2) refers to "the general rule, that the plaintiff must sue in the Court to which the defendant is subject at the time of the suit (*Actor sequitur forum rei*); which is rightly stated by Sir *Robert Phillimore* (*International Law*, vol. IV., sec. 891) to 'lie at the root of all international, and of most domestic, jurisprudence on this matter.' All jurisdiction is properly territorial, and *extra territorium jus dicenti, impune non paretur.* Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory while they are within it; but it does not follow them after they have withdrawn from it, and when they are living in another independent country." Further on, his Lordship says of a decree pronounced in a personal action against a defendant *in absentem*, that "it must be regarded as a mere nullity by the Courts of every nation except (when authorized by special local legislation) in the country of the forum by which it was pronounced." And it was held that the fact that the contract was made in the foreign country made no difference in the application of those principles.

Therefore, in construing the Act for the purpose of seeing whether it means to give jurisdiction over an absent defendant, we have to remember such a course is unusual, and requires exceptional and distinct provision.

Par. (*a*) of sec. 7 excludes that notion for itself, because it requires as a condition of jurisdiction "that the defendant is resident or carries on business" in the district. It will be observed that mere presence in the district at time of service is not sufficient for that paragraph. Consequently so far as par. (*a*) is concerned, even though a foreigner were present in New South Wales, unless he were "resident" or "carrying on business" there, he would not be amenable to the process of any District Court whatever.

Par. (*b*) however, which is an independent provision, is not expressly restricted to residence or carrying on business, and if an individual foreigner were present in New South Wales having

(1) (1894) A.C., 670.

(2) (1894) A.C., at p. 683.

made a contract in a given district, I see no reason why he could not be sued by virtue of that provision, because the case would answer both par. (*b*) and sec. 41. (See per *Stirling* L.J. in *Logan* v. *Bank of Scotland* (1).)

To that extent I would modify the words of *Pring* J. (2) that "the only thing the Legislature was aiming at was the extension of the jurisdiction of the District Courts *inter se*," because apparently the effect of par. (*b*) is to enlarge the conditions under which the jurisdiction of all District Courts in respect of subject matter created by sec. 41 can be exercised, and to include persons whose presence in bringing them within local jurisdiction offends no principle of law. No doubt his Honor was not thinking of this aspect, but of the final conclusion contained in the succeeding words, with which I agree, namely, that "they never contemplated the giving of any extra-territorial jurisdiction to any of the District Courts in New South Wales."

Par. (*b*) is the wider of the two, and if the appellants cannot succeed under that, they must fail under par. (*a*). In the case of an individual it is clear that presence in the jurisdiction may exist without his "residence" or "carrying on business" there. In the case of a corporation there, owing to its nature, different considerations arise. But presence is essential, whatever in the case of a corporation is necessary or sufficient to constitute it. The House of Lords in the leading case of *La Bourgogne* (3) adopted the expression that the company must be "here." There are many cases of high authority dealing with the evidence which will establish the presence of a corporation in one jurisdiction, where it is incorporated in another. For instance, per *Romer* L.J. in the *Dunlop Case* (4), followed by *Fletcher Moulton* L.J. in the *Saccharin Co. Case* (5). Whether the tests there stated are essential or whether they are the "best" (per *Buckley* L.J. in the *Hercules Case* (6)) is not necessary now to be determined, because the only ground upon which the defendant Company is said to have been present is that it was in fact carrying on business in the district. If it was, both paragraphs of sec. 7 are satisfied; if it was not, then the case is outside both.

(1) (1904) 2 K.B., 495, at p. 499.
(2) 14 S.R. (N.S.W.), at p. 445.
(3) (1899) A.C., 431.
(4) (1902) 1 K.B., 342.
(5) (1911) 2 K.B., 516.
(6) (1912) 1 K.B., 222.

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Now, " carrying on business " is an ambiguous term. In such a connection as the present, it means personally carrying on business, so that the place where it is carried on is occupied by the corporation itself so far as an abstraction can occupy any place. It can occupy a place only by the same means as it can do anything else, by agents. But the nature of the agency has to be considered. If the agent directly represents the corporation so that his act is not merely an act for the corporation, but is done in circumstances which make it the act *of* the corporation itself, then the corporation is deemed to be present. It is otherwise when the agent's act is on the basis that his principal is not in truth acting, but that the agent's own act is to be vicariously imputed to the absent principal.

This distinction has been constantly emphasized and acted on, as by *Gorell Barnes* J. in the *Princesse Clémentine* (1) and by the Court of Appeal in *Allison* v. *Independent Press Cable Association* (2); by *Channell* J. in *Goerz* v. *Bell* (3); by *Stirling* L.J. in *Logan* v. *Bank of Scotland* (4); by *Kennedy* L.J. in the *Hercules Case* (5); by *Buckley* L.J. in the *Okura Co.'s Case* (6).

If that distinction be kept in mind the question then becomes a pure question of fact: Was the defendant Company itself carrying on business on the relevant date, the date of service? Did Adams, when he was served, directly represent the Company so that service on him was service on him as an officer or servant of the Company, in the strict sense—that is, a person by whom the Company itself was carrying on some part of its operations in New South Wales?

Adams had a power of attorney, and it might be conceded that under that power he might have so acted as to establish what would really be a branch of the Company in Sydney. But there is no evidence that he ever did establish a branch, and certainly none that could satisfy me of that fact.

Reliance was chiefly placed on his disposal of the Gregory company's stock under the trusts of the debenture deed.

That deed is one by which the debtor, Albert Gregory Ltd., constitutes Adams a trustee, declares that he shall stand possessed

(1) (1897) P., 18.
(2) 28 T.L.R., 128.
(3) (1904) 2 K.B., 136, at p. 149.
(4) (1904) 2 K.B., 495, at p. 499.
(5) (1912) 1 K.B., 222, at p. 226.
(6) (1914) 1 K.B., 715, at p. 718.

of the company's property and assets, upon trust to permit the company to carry on its business therewith until default in payment of the debenture and in case of default to appoint a receiver, or himself take possession and carry on or concur in carrying on "the business of the company." All moneys received by the trustee or the receiver are, after expenses repaid, to be applied to payment of the debt, and the balance to be paid to the company. The trustee or receiver is not to be liable as mortgagee in possession, but to be deemed "the agent of the company." The power of appointing a new trustee is in the debenture holder.

Adams did, after default, enter into possession and do what he was empowered to do as trustee under the deed. So far as that conduct is concerned, the argument that he carried on the business of realizing in the ordinary way of trade the Gregory company's property as agent of the defendants is hopeless. Even if it could be established, there would still be the difficulty already alluded to, that the agent's presence in New South Wales is not sufficient; and the further step would have to be taken of showing that his acts were in fact, and not by mere legal imputation, the acts of the defendant Company itself. But even as to the first step, the case is covered by authority of the highest character. In *Cox* v. *Hickman* (1) two of the learned Lords made observations precisely in point.

Lord *Cranworth*, after adverting to the principle that the question of partnership then under consideration is only a branch of agency, says (2):—"The mere concurrence of creditors in an arrangement under which they permit their debtor, or trustees for their debtor, to continue his trade, applying the profits in discharge of their demands, does not make them partners with their debtor, or the trustees. The debtor is still the person solely interested in the profits, save only that he has mortgaged them to his creditors. He receives the benefit of the profits as they accrue, though he has precluded himself from applying them to any other purpose than the discharge of his debts. The trade is not carried on by or on account of the creditors; though their consent is necessary in such a case, for without it all the property might be seized by them in execution. But the trade still remains the trade of the debtor

(1) 8 H.L.C., 268. (2) 8 H.L.C., at p. 306.

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or his trustees ; the debtor or the trustees are the persons by or on behalf of whom it is carried on."

He went on to show what is material on the supposition that the defendants here had in some way interfered in the conduct of the business—that even that would not necessarily have constituted the trustee their agent in carrying it on.

Lord *Wensleydale* says (1) :—" The deed in this case is merely an arrangement by the Smiths to pay their debts, partly out of the existing funds, and partly out of the expected profits of their trade ; and all their effects are placed in the hands of the trustees, as middlemen between them and their creditors, to effect the object of the deed, the payment of their debts. These effects are placed in the hands of the trustees as the property of the Smiths, to be employed as the deed directs, and to be returned to them when the trusts are satisfied. I think it is impossible to say that the agreement to receive this debt, so secured, partly out of the existing assets, partly out of the trade, is such a participation of profits as to constitute the relation of principal and agent between the creditors and trustees."

The later case of *Gosling* v. *Gaskell* (2) follows and further applies the principle.

No independent circumstances appear which in any way constitute Adams the agent of the defendants in respect of the Gregory company's business, and still less the defendants' direct representative in the sense required.

The view presented that the defendants, by appearing to contest the merits, although disputing the jurisdiction, admit amenability to the jurisdiction, cannot be supported.

There was no admission that the defendants were present in New South Wales when the plaint was served on Adams, or that service on him was service on the defendants. All that was disputed, and the point cannot hold. There is, therefore, nothing to show that the defendant Company was itself ever " here."

I agree that the appeal must be dismissed.

I cannot, however, refrain from observing that, in view of the clear liability for the small sum of £39 3s. 3d. contracted here, the objection

(1) 8 H.L.C., at p. 313. (2) (1897) A.C., 575.

that the creditor must go to England to recover it, is shabby and oppressive. More especially is that so in view of the fact that the defendants hold the entire and exclusive security over the Gregory company's property, and that the creditor was only induced to advance the money to the Gregory company by the guarantee created by the defendants' endorsement. It is within the law, and that is all that can be said for it.

Appeal dismissed with costs.

Solicitors for the appellants, *Saywell & Saywell.*
Solicitor for the respondents, *A. G. de L. Arnold.*

B. L.

[HIGH COURT OF AUSTRALIA.]

THE COMMISSIONER OF STAMP DUTIES (NEW SOUTH WALES) . . . . APPELLANT;

AND

THE PERPETUAL TRUSTEE COMPANY LIMITED . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Stamp Duty—Settlement—Trust to take effect after death of settlor—Trust for wife during joint lives of settlor and for survivor for life—Stamp Duties Act 1898 (*N.S.W.*) (*No.* 27 *of* 1898), *secs.* 49, 58.

Sec. 49 of the *Stamp Duties Act* 1898 (N.S.W.) enacts, first, that duties according to the Third Schedule to the Act shall be levied upon and in respect of all estate whether real or personal which belonged to any person dying