[HIGH COURT OF AUSTRALIA.]

KOOP AND ANOTHER . . . . . APPELLANTS;
PLAINTIFFS,

AND

BEBB . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1951.

MELBOURNE, *Oct.* 12, 15, 16; *Dec.* 20.

Dixon, McTiernan, Williams, Fullagar and Kitto JJ.

Private International Law—Tort—Negligence—Fatal accident—Statute—Territorial limitation—Injury caused by negligent act in New South Wales—Death resulting in Victoria—Right of action in Victoria by dependants of deceased—Wrongs Act 1928 (*No.* 3807) (*Vict.*), *Part III.—Compensation to Relatives Act*, 1897-1946 (*N.S.W.*) (*No.* 31 *of* 1897—*No.* 23 *of* 1946).

Evidence—Action in Victoria in respect of tort committed in New South Wales—Proof of New South Wales law—Pleading—Statement of claim—Whether cause of action disclosed—New South Wales law not pleaded as fact—Judicial notice—State and Territorial Laws and Records Recognition Act 1901-1950 (*No.* 5 *of* 1901—*No.* 80 *of* 1950), *s.* 3.

In the present state of authority it must be accepted that an action of tort will lie in one State of the Commonwealth for a wrong alleged to have been committed in another State if two conditions are fulfilled: (1) the wrong must be of such a character that it would have been actionable if it had been committed in the State in which the action is brought; (2) it must not have been justifiable by the law of the State where it was done.

Per Dixon, Williams, Fullagar and *Kitto* JJ.: As to the second of the above conditions, it may be the true view that the act complained of must have been such as to give rise to a civil liability by the law of the place where it was done.

Walpole v. *Canadian Northern Railway Co.*, (1923) A.C. 113, at p. 119, and *McMillan* v. *Canadian Northern Railway Co.*, (1923) A.C. 120, at pp. 123, 124, applied.

Machado v. *Fontes*, (1897) 2 Q.B. 231, discussed.

Slater v. *Mexican National Railroad Co.*, (1903) 194 U.S. 120 [49 Law. Ed. 900], commented on.

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Naftalin v. *London Midland & Scottish Railway Co.*, (1933) S.C. 259, at pp. 274, 275, *M'Elroy* v. *M'Allister*, (1949) S.C. 110, *Canadian Pacific Railway Co.* v. *Parent*, (1917) A.C. 195, at p. 205, *Varawa* v. *Howard Smith Co. Ltd.* [*No.* 2], (1910) V.L.R. 509, and *New York Central Railroad Co.* v. *Chisholm*, (1925) 268 U.S. 29 [69 Law. Ed. 828], referred to.

In an action brought in the Supreme Court of Victoria on behalf of infant plaintiffs the statement of claim alleged that the plaintiffs' father was a passenger in a motor truck driven by the defendant; the truck overturned as a result of the defendant's negligence, causing injury to the father from which he died; the plaintiffs were dependent on their father for support. Under the heading " Particulars under the *Wrongs Act* 1928 " the statement of claim gave particulars of the persons on whose behalf the action was brought and of the nature of the claim. It appeared that the accident had occurred in New South Wales and that the plaintiffs' father had died in Victoria.

Held that the plaintiffs were entitled to maintain the action in Victoria.

By *Dixon*, *Williams*, *Fullagar* and *Kitto* JJ.: The action lay in either of two views: (1) The above-stated rule of private international law was part of the law of Victoria, and it supported the action in Victoria as an action on a foreign tort. This resulted from the coexistence of Victorian and New South Wales legislation substantially reproducing *Lord Campbell's Act* (Imp.): namely, the *Wrongs Act* 1928 (Vict.), Part III., and the *Compensation to Relatives Act*, 1897-1946 (N.S.W.), which did not differ in any respect here relevant. The Victorian Act fulfilled the first condition of the above rule in that it would have given the plaintiffs a right of action in respect of the alleged tortious act if it had been committed in Victoria; the New South Wales Act fulfilled the second condition of the rule in that the plaintiffs could have brought an action under it in New South Wales. (2) The Victorian Act, of its own force, gave a right of action in Victoria whenever the condition was fulfilled that the deceased (if he had survived) would have been entitled by the law of Victoria—including its rules of private international law—to recover damages for the act, neglect or default which caused his death. This condition was fulfilled in the present case by the application of the above rule of private international law, the negligence alleged being actionable according to the law of Victoria and that of New South Wales.

By *McTiernan* J.: The Victorian Act was limited to a wrongful act, neglect or default in Victoria; therefore the action could not stand upon that Act. However, the negligence alleged against the defendant being actionable by the law of Victoria, where the action was brought, and by the law of New South Wales, where it was committed, the case was one of a tort committed beyond the territorial jurisdiction of the Supreme Court of Victoria for which an action might be brought in that court. The correct law for the Victorian court to apply in so far as it governed the civil liability which the plaintiffs brought this action to enforce was the *Compensation to Relatives Act*, 1897-1946 (N.S.W.).

By the whole Court: The statement of claim sufficiently disclosed a cause of action by the plaintiffs against the defendant. The Victorian court was required by the *State and Territorial Laws and Records Recognition Act* 1901-1950 to take judicial notice of the New South Wales Act.

Decision of the Supreme Court of Victoria (*Dean* J.) reversed.

APPEAL from the Supreme Court of Victoria.

In an action in the Supreme Court of Victoria against William Ernest Bebb, the plaintiffs' statement of claim was substantially as follows:—

1. The plaintiffs, Rosalie Louise Koop and Bryan Leslie Koop, both of whom are infants, bring this action by their next friend Edward James Pittard for the benefit of themselves Rosalie Louise Koop and Bryan Leslie Koop, who are lawful children of Percy Louis Koop, late of Barooga in the State of New South Wales deceased.

2. There is no executor or administrator of the estate of Percy Louis Koop deceased.

3. On 3rd September 1949 Percy Louis Koop was a passenger in a motor truck which was being driven by the defendant along the Tocumwal-Barooga-road when it overturned at the intersection of that road and the Mulwala-road.

4. The said motor truck overturned as a result of the negligence of the defendant in the driving and/or management and/or control of the said motor truck.

5. As a result of the accident Percy Louis Koop received injuries from which he died at the Mooroopna Hospital on 7th September 1949.

6. Prior to and up to the time of the death of Percy Louis Koop the plaintiffs were dependent for their support upon him and by reason of his death they have been wholly deprived of such support and have thereby suffered damage.

Particulars under the Wrongs Act 1928.

(*a*) The persons for whom and on whose behalf the claim under pars. 1-6 hereof is brought are as follows:—Rosalie Louise Koop aged 12 years a daughter of Percy Louis Koop deceased and a plaintiff in this action; Bryan Leslie Koop aged 15 years a son of Percy Louis Koop deceased and a plaintiff in this action. (*b*) The nature of the claim in respect of which damages are sought to be recovered under pars. 1-6 is as follows:—Percy Louis Koop deceased at the time of his death was aged forty-five years and was employed as a labourer at a wage equivalent to about £10 per week. Prior

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to and up to his death Rosalie Louise Koop and Bryan Leslie Koop both of whom are lawful children of Percy Louis Koop deceased were dependent for their support upon him. By reason of his death which was brought about by the negligence above referred to they have been totally deprived of such support and they have thereby suffered damage.

The plaintiffs claimed £4,000 damages.

(The statement of claim also included a claim by the plaintiff Bryan Leslie Koop for damages for injury suffered by him in the same accident; but that claim is not here material.)

It appeared that the Mooroopna Hospital, where Percy Louis Koop died, was in Victoria. The action was commenced within twelve months after his death.

In his defence to the statement of claim the defendant denied negligence, alleged that the place where the accident occurred was in New South Wales and objected as matter of law that the facts alleged in the statement of claim did not constitute any cause of action by the plaintiffs against the defendant either under the *Wrongs Acts* (Vict.) or otherwise or alternatively did not constitute any cause of action which was recognized by or enforceable in or within the jurisdiction of the Supreme Court of Victoria.

The points of law raised by this objection were—by an order dated 15th March 1951—ordered to be set down for hearing " and disposed of forthwith and before the trial of the issues of fact in this action ".

The hearing took place before *Dean* J., who upheld the objection, made a declaration accordingly and, being of opinion that this decision substantially disposed of the plaintiffs' cause of action, ordered that judgment dismissing that cause of action be entered for the defendant with costs.

Dean J. subsequently granted the plaintiffs leave to appeal to the High Court " from the judgment given in this matter . . . in so far as the same is an interlocutory judgment ".

Pursuant to the leave so granted—and, alternatively, on the basis that an appeal from the judgment lay as of right—the plaintiffs appealed to the High Court.

H. A. Winneke K.C. (with him *H. T. Frederico*), for the appellants. The conclusion of *Dean* J. that the action would not lie because the cause of action conferred by s. 15 of the *Wrongs Act* is limited to cases where the wrongful act, neglect or default occurred in Victoria produces curious and anomalous consequences. The following are examples:—(a) But for his death deceased could have maintained

a personal action for damages against the defendant in Victoria. The purpose of the legislation was to fill the gap caused by the operation of the *actio-personalis* rule. If the Act is limited in the manner held by *Dean* J., the mischief aimed at by the legislation is only partially corrected (*McCarthy* v. *Hoyts Theatres Ltd.* (1); *Seward* v. "*Vera Cruz*" (2)). (b) Under the *Survival of Actions Act* 1942 (Vict.) the executors of the deceased could have maintained an action against the defendant. It is hard to imagine that "act or omission" in the sub-s. 2 (*c*) enacted by s. 2 (1) of that Act is limited to act or omission in Victoria. (c) Two Victorian residents collide in New South Wales and return to Victoria, where one dies. Although either could have sued the other in Victoria, the relatives must go to New South Wales; yet, if a foreigner temporarily in Victoria has an accident there in circumstances such as the Act describes and returns home and dies, his relatives may sue in Victoria. (d) The final event giving rise to the cause of action, i.e., the death, occurred in Victoria. The cause of action became complete or arose in Victoria. It would be curious if the Supreme Court of Victoria had no jurisdiction to entertain such a cause of action. *Dean* J. attached a wrong significance to the words "act neglect or default" as an element of the cause of action under the Act. Death is the important factor; it is the basis of the cause of action, not the wrongful act (*Seward* v. "*Vera Cruz*" (3); *Victorian Railways Commissioners* v. *Speed* (4); *Union Steam Ship Co. of New Zealand* v. *Robin* (5)). The words "act neglect or default" are descriptive of the kind of death which gives rise to the statutory actions, i.e., a death caused by a wrongful act &c. of such a kind as would have entitled deceased to sue had he lived (*Harding* v. *Lithgow Corporation* (6)). The important factor is the entitlement of deceased to maintain an action in Victoria at time of his death (*Harding* v. *Lithgow Corporation* (7); *British Electric Railway Co. Ltd.* v. *Gentile* (8)). Here the requirements of s. 15 are literally fulfilled. The death of Koop senior occurred; it was caused by the wrongful act of the defendant; the wrongful act was such that, if death had not ensued, it would have entitled Koop to maintain an action. This is the circumstance which attracts the legislative competence of the Parliament of Victoria, namely, the conferring of a cause of action in Victoria upon relatives of a person who was

(1) (1932) A.L.R. 326, at p. 329.
(2) (1884) 10 App. Cas. 59, at pp. 70, 71.
(3) (1884) 10 App. Cas., at p. 67.
(4) (1928) 40 C.L.R. 434, at pp. 437, 438, 440-442, 444, 445.
(5) (1920) A.C. 654, at p. 661.
(6) (1937) 57 C.L.R. 186, at pp. 190, 191, 194-196.
(7) (1937) 57 C.L.R. 186.
(8) (1914) A.C. 1034, at pp. 1041, 1042.

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entitled to sue in Victoria at the time of his death; or making liable in Victoria a person who was liable in Victoria to the deceased at the time of his death. It is not anomalous that this would apply aptly in respect of accidents happening anywhere in the world, because deceased himself would have had a cause of action in such circumstances. The defendant might be liable in more than one jurisdiction, but that was so in the case of the deceased; and, in any event, other awards of damages would have to be given credit for (*Kohnke* v. *Karger* (1)). Alternatively, s. 15 gives a right of action where the death occurs in Victoria. Death is the event which completes the cause of action, and it is reasonable to suppose Parliament was legislating for that event. This is not necessarily inconsistent with the existence of the cause of action also where the negligence occurs here although death occurs elsewhere. There are five possible tests:—(1) Death in Victoria. (2) Negligence in Victoria. (3) Either negligence or death in Victoria. (4) Both death and negligence in Victoria. (5) Neither in Victoria, but deceased with a cause of action in Victoria. Either the third or fifth of these will lead to less anomalies than any of the others. As both the death and the wrongful act are elements in the cause of action, it is difficult to see why the judge should fasten on the act rather than the death, especially as the latter is the actual event for which damages are given. The judge's reference to "felony" in the section does not assist. Section 15 certainly includes cases where the wrongful act occurred in Victoria, and this provision was clearly included to prevent the "felonious-tort" rule in any such case (*Salmond* on *Torts*, 10th ed. (1945), pp. 178, 348). The word "wrongful" does not assist; it means wrongful according to Victorian law, but that must be so in any event to give the deceased the right to sue. In *Walpole* v. *Canadian Northern Railway Co.* (2) this point was left open by the Privy Council; but in argument (3) counsel for the respondent put the test as death within the jurisdiction. *Whitford* v. *Panama Railroad Co.* (4) was decided in 1861 before the nature of the cause of action under the Act was as well settled as it is now. Cf. the judgment of the Chief Justice (5), where he proceeded on the basis that it was deceased's cause of action. In that case the death occurred outside the State of New York. *Denio* J. (6) refers to a "transaction" outside the State. The case is unconvincing, for it does not appreciate that the legislation was providing for an event within

(1) (1951) 2 K.B. 670.
(2) (1923) A.C. 113, at p. 119.
(3) (1923) A.C., at p. 115.
(4) (1861) 23 N.Y. 465.
(5) (1861) 23 N.Y., at pp. 484 et seq.
(6) (1861) 23 N.Y., at p. 475.

the State, i.e., extinction by death of a cause of action within the State. It proceeds on the false premise that deceased's own action would be an action under foreign law and not by local law (1). *New York Central Railroad Co.* v. *Chisholm* (2) has no application; the Act there was not a fatal-accidents statute at all. In *Davidsson* v. *Hill* (3) *Phillimore* J. treated the case on the basis that the *lex loci* was either English maritime law or the law of Norway. He concluded that the action lay in either event (4). *Kennedy* J. treated the case on the basis that maritime law was the *lex loci*. Most of his language suggests that the action lies in the present case (5). *Mynott* v. *Barnard* (6) is distinguishable. It turned purely on the construction of the *Workers' Compensation Act*—a very different Act from the *Wrongs Act*. The subject matter legislated for was accidental injury. It was natural to read the Act as providing for such events in Victoria. Here the purpose is entirely different. A new right is being given where the deceased had a right to sue in Victoria; that is the event legislated for, and there is no need to imply any further territorial limitation.

C. I. Menhennitt, for the respondent. At common law the plaintiffs did not have a cause of action. As the wrongful act took place in New South Wales, the only source of their cause of action is the *Compensation to Relatives Act*, 1897-1946 (N.S.W.): see *Northern Pacific Railroad Co.* v. *Babcock* (7). That Act provides that, in specified circumstances, compensation, which is to be calculated subject to specified rules, is to be payable for the benefit of specified persons and is to be divided among them in a specified manner. The procedure for determining the compensation is also specified. The right to compensation under the New South Wales statute is enforceable only in New South Wales courts because (*a*) the Parliament of New South Wales so intended; (*b*) the right to compensation is a right of a kind not enforceable except in the courts of the place where the right was created by the legislature; (*c*) convenience and a proper regard for the interests of the defendant require that there should not exist the possibility of a number of actions in different States instituted by different relatives of the deceased. The construction primarily contended for on behalf of the plaintiffs, namely, that the Victorian

(1) (1861) 23 N.Y., at pp. 474, 475.
(2) (1925) 268 U.S. 29 [69 Law. Ed. 828].
(3) (1901) 2 K.B. 606.
(4) (1901) 2 K.B., at pp. 616-618.
(5) (1901) 2 K.B., at pp. 610, 613-615.
(6) (1939) 62 C.L.R. 68, at pp. 75, 86, 93.
(7) (1894) 154 U.S. 190 [38 Law. Ed. 958].

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Act gives a cause of action whenever the deceased could have sued the wrongdoer in a Victorian court, should be rejected because (*a*) on its true construction the Victorian Act applies only to wrongful acts which occur in Victoria; (*b*) the Victorian Parliament did not intend to give to the relatives of a deceased person anywhere in the world a right to compensation regardless of where the wrongful act occurred and whether or not such relatives had such a cause of action by the law of the place where the wrong occurred, merely because the deceased could have enforced a foreign tort in a Victorian court; (*c*) the construction contended for would result in the creation of a separate and independent cause of action under each State statute; (*d*) if the Victorian Parliament did intend the construction contended for, the statute would have no real territorial connection with Victoria and would be invalid. The Act must be read territorially (Victorian Constitution Act (18 & 19 Vict. c. 55 (Imp.), Schedule (I.)), s. 1; *Macleod* v. *Attorney-General* (*N.S.W.*) (1); *Maxwell, Interpretation of Statutes*, 9th ed. (1946), p. 148; *Mynott* v. *Barnard* (2)). The further construction contended for on behalf of the plaintiffs, namely, that the Victorian Act gives a cause of action whenever the death occurs in Victoria should be rejected because (*a*) the place of death is entirely fortuitous—the true test is that the statute is confined to wrongful acts occurring in Victoria; (*b*) the construction contended for would result in the creation of two separate and independent causes of action—one in the place where the wrongful act occurs and one in the place where death occurs; (*c*) if the Victorian Parliament intended the construction contended for, the statute would have no real connection with Victoria and would be invalid. Neither the Victorian nor the New South Wales Act should be construed as altering the municipal laws of torts, because (*a*) the statutes create entirely new rights to compensation, in contrast with statutes which merely modify existing rights; (*b*) having regard to the nature of such statutory rights to compensation, it is not possible to apply the private international law tests of a " wrongful " or " unjustifiable " act, especially as the persons entitled to share the compensation and the bases of calculating compensation are different in different States; also, the statutes cover deaths caused by breach of contract as well as tort. In general the American authorities support our submissions. [He referred to *New York Central Railway Co.* v. *Chisholm* (3); *Whitford* v. *Panama*

(1) (1891) A.C. 455, at pp. 457, 458.
(2) (1939) 62 C.L.R., at pp. 77-83, 87, 89, 91, 93, 94.
(3) (1925) 268 U.S., at pp. 30-32 [69 Law. Ed., at pp. 831, 832].

Railroad Co. (1); *Debevoise* v. *New York, Lake Erie and Western Railway Co.* (2); *Slater* v. *Mexican National Railroad Co.* (3); *Beale, Conflict of Laws* (1935), pp. 1306, 1316; *American Restatement of the Law*; *Conflict of Laws*, p. 479, s. 391; p. 484, s. 397.] In *Johnson* v. *Phoenix Bridge* (4) it was held that the right under the Canadian Act was enforceable in New York State but that the requirement that the action be commenced within one year was a condition precedent. *Davidsson* v. *Hill* (5) was a case of a collision on the high seas. The maritime law of England applied English municipal law to such a case. The question then was whether an alien could claim the benefit of *Lord Campbell's Act* as part of that municipal law. The alien concerned was resident abroad, but the issue would have been the same if he had resided in England. See *Cheshire, Private International Law*, 2nd ed. (1938), pp. 387-391; *Halsbury's Laws of England*, 2nd ed., vol. 6, p. 282. If—contrary to the respondent's submissions—the plaintiffs can enforce the New South Wales statute in a Victorian court or the right of action is one in tort which can be sued upon as a foreign tort, the plaintiffs' cause of action is none the less founded on the New South Wales statute and that cause of action is not available to the plaintiffs on the present statement of claim. An amendment should not be permitted; it would deprive the defendant of the defence that the proceedings to enforce that cause of action were not commenced within twelve months of the date of the deceased's death, as the New South Wales Act requires. The statement of claim, as it stands at present, expressly relies on the Victorian Act and makes no mention of that of New South Wales; the latter should have been pleaded as a fact, if it was sought to rely on it: See *Supreme Court Rules* (Vict.), Order XIX., rule 4; *Wolfe* v. *Wilson* (6). Neither the *State and Territorial Laws and Records Recognition Act* 1901-1950 nor the *Evidence Act* 1928 (Vict.), s. 70, relieves the plaintiffs of the obligation to plead their case in such a way as will show the nature of their claim. As to the refusal of an amendment to include a statute-barred claim, see *National Bank* v. *Gaunt* (7); *Haylan* v. *Purcell* (8); *Horton* v. *Jones* (9). [He referred also to *Commissioner of Stamp Duties (N.S.W.)* v. *Millar* (10); *Cheshire, Private International Law*, 3rd

(1) (1861) 23 N.Y. 465, at pp. 470, 471, 480-483.
(2) (1885) 98 N.Y. 377.
(3) (1904) 194 U.S. 120 [48 Law. Ed. 900].
(4) (1910) 197 N.Y. 316.
(5) (1901) 2 K.B. 606.
(6) (1911) 11 S.R. (N.S.W.) 51, at p. 54; 28 W.N. 20, at p. 21.
(7) (1942) 2 All E.R. 112, at p. 116.
(8) (1949) 49 S.R. (N.S.W.) 1, at pp. 3, 4, 9, 10; 65 W.N. 228.
(9) (1939) 39 S.R. (N.S.W.) 305; 56 W.N. 161.
(10) (1932) 48 C.L.R. 618.

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ed., pp. 381, 382, 832; *Dicey, Conflict of Laws*, 6th ed., p. 861; *Walpole* v. *Canadian Northern Railway* (1); *McMillan* v. *Canadian Northern Railway Co.* (2); *State of Minnesota* v. *District Court of Hennepin County* (3); *Potter* v. *Broken Hill Pty. Co. Ltd.* (4).]

H. A. Winneke K.C., in reply.

Cur. adv. vult.

Dec. 20.

The following written judgments were delivered :—

DIXON, WILLIAMS, FULLAGAR AND KITTO JJ. The appellants in this case are the plaintiffs in an action in the Supreme Court of Victoria, in which two claims for damages against the respondent (the defendant) are made. The first is a claim by both plaintiffs for damages in respect of the death of their father, and the second is a claim by the male plaintiff alone for damages in respect of personal injuries sustained by him. By their statement of claim the plaintiffs allege that the defendant was guilty of negligence while driving a motor truck, in which the father was a passenger, at the intersection of the Tocumwal-Barooga Road and the Mulwala Road, and that by reason of the defendant's negligence the truck was overturned, with the result that the father received injuries of which he died in a hospital in Victoria. The plaintiffs allege that there is no executor or administrator of the estate of their father, that they were dependent upon their father for their support, and that by reason of his death they have been wholly deprived of support and have thereby suffered damage. The statement of claim also alleges that the male plaintiff was a passenger in the motor truck, and that as a result of the accident he sustained physical injuries and suffered damage.

The defendant apparently resides in New South Wales. It does not appear whether the writ in this action was served upon him in Victoria, but he entered an appearance in the action and by so doing he submitted to the jurisdiction of the court. He filed a defence putting in issue the allegation of negligence and certain other allegations in the statement of claim, and setting up that the intersection of the Tocumwal-Barooga Road and the Mulwala Road is in the State of New South Wales, and that if he was negligent his negligence took place in New South Wales. He objected, as a matter of law, that in these circumstances the facts alleged in the statement of claim did not constitute any cause of action by the plaintiffs against him which is recognized by or

(1) (1923) A.C. 113.
(2) (1923) A.C. 120.
(3) (1919) 1 Am. L.R. 145.
(4) (1906) 3 C.L.R. 479.

enforceable in or within the jurisdiction of the Supreme Court of Victoria.

The points of law raised by this objection were ordered to be set down for hearing and disposed of before the trial of the issues of fact, and they were argued before *Dean* J. His Honour held that the objection was a complete answer to the action so far as relief was claimed by both plaintiffs in respect of the death of their father, and he made an order dismissing the action to that extent. From that order the plaintiffs appeal to this Court.

The plaintiffs rely upon Part III. of the *Wrongs Act* 1928 (Vict.), which in substance repeats the provisions enacted in England by *Lord Campbell's Act* (9 & 10 Vict. c. 93). The leading provision is contained in s. 15, which is in the following terms :—

" 15. Whensoever the death of a person is caused by a wrongful act neglect or default and the act neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death of the person injured and although the death has been caused under such circumstances as amount in law to felony ".

Every such action is to be for the benefit of the wife, husband, parent and child of the person whose death has been so caused ; such damages may be given as the jury or the court think proportional to the injury resulting from such death to the parties respectively for whom and for whose benefit such action is brought ; and the amount so recovered after deducting the costs not recovered from the defendant is to be divided amongst the before-mentioned parties in such shares as the jury or the court by their or its verdict find and direct (s. 16). The action is to be brought in the name of the executor or administrator of the person deceased (s. 16) ; but where there is no executor or administrator, or no action is brought by the executor or administrator within six months after the death, it may be brought by all or any of the persons for whose benefit such action would have been (s. 17).

The question raised by the defendant's objection and answered in his favour by the learned Judge below is whether, having regard to these provisions, the children of a person whose death resulted from an act of negligence committed in New South Wales can maintain an action in Victoria for damages against the wrongdoer. His Honour observed that, read literally, s. 15 is free of all territorial limitation ; and, because the Victorian Parliament has

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power, under s. I. of the Constitution Act (Schedule (I.) of the Imperial Act 18 & 19 Vict. c. 55), to make laws "in and for Victoria" only, his Honour treated the question before him as depending for its answer upon the selection of an appropriate point at which to read into the section the words "within Victoria". His Honour considered that three choices were open to him, namely, to insert the restrictive words either after "the death of a person", or after "maintain an action", or after "a wrongful act neglect or default"; and he decided in favour of the last after weighing the consequences which would flow from the adoption of each, and considering which of them was the most likely to have been intended by the legislature.

It is true that Part III. contains no words expressly confining its operation to Victoria, and it is also true that its provisions cannot operate, and should not be construed as operating, beyond the borders of the State. But it does not follow that restrictive words should be imported by implication into the text of the section. It is sometimes necessary to imply such words into an enactment passed by a Parliament whose powers are defined by reference to area, in order that the seeming generality of its terms may not lead to the conclusion that the enactment is invalid as being in excess of power. The enactment considered by the Privy Council in *Macleod* v. *Attorney-General (N.S.W.)* (1) is a familiar example. In such cases the warrant for the implication lies in the presumption that the Parliament intended not to overpass the limits of its authority. In a second class of enactments effect may be given to a restriction which, though unexpressed, exists by necessary implication from the apparent object of the enactment itself. Thus in *Mynott* v. *Barnard* (2) the *Workers' Compensation Act* 1928 (Vict.) was held to apply only (according to one view) in respect of personal injury by accident in Victoria arising out of and in the course of employment, or (according to another view) in respect of personal injury by accident arising out of and in the course of employment in Victoria. Part III. of the *Wrongs Act*, however, belongs to neither of these categories. There is no need to imply words into s. 15 in order that its operation may not transcend the limits of legislative power or fail to conform to the apparent object of the legislation. The connection of its operation with the State of Victoria is inherent in its nature; for, taken as it stands, it purports only to enact a rule to form part of the general body of the law of Victoria relating to civil liability for

(1) (1891) A.C. 455.

(2) (1939) 62 C.L.R. 68.

wrongful acts, neglects and defaults: cf. *Washington* v. *The Commonwealth* (1).

The legislation produces the same effect upon the law of Victoria as its prototype produced upon the law of England. In each country the principles of the common law gave a remedy in damages in respect of wrongful acts, neglects and defaults causing damage; but those principles had no application where the damage flowed from the death of a human being. *Lord Campbell's Act* described in a recital the situation to which it was addressed: "Whereas no Action by Law is now maintainable against a Person who by his wrongful Act, Neglect, or Default may have caused the Death of another Person, and it is oftentimes right and expedient that the Wrongdoer in such Case should be answerable in Damages for the Injury so caused by him." The mischief of the Act was thus revealed as a *lacuna* in the law of liability for wrongs. As Lord *Sumner* pointed out in *Admiralty Commissioners* v. *S.S. Amerika* (2), Scotland was excluded from the operation of the Act because the *lacuna* did not exist in Scottish law. Existing in the common law, it was filled for England by *Lord Campbell's Act*, and it was filled for Victoria by the provisions now contained in Part III. of the *Wrongs Act*, by creating in favour of certain relatives of the deceased person a right to complain of his death as an injury to themselves: cf. *Woolworths Ltd.* v. *Crotty* (3).

Section 15 should therefore be considered as enacting a rule of the law of Victoria, to be applied in the Victorian courts, and to be applied as it stands, without textual emendation. Its effect in relation to a case which includes an extra-Victorian element depends upon the application of the rules of private international law which form part of the law in Victoria. The section may be considered as simply creating an addition to the category of actionable wrongs by reference to which, in a case involving a foreign element, the rules of private international law give a right of action in Victoria in conditions which they define. Alternatively the section may be regarded as giving a right of action in Victoria whenever the condition is fulfilled that the deceased person (if he had survived) would have been entitled by the law of Victoria, including its rules of private international law, to recover damages for the act, neglect, or default which caused his death. If the first view be accepted, the question in the present case is whether the rules of Victorian private inter-

(1) (1939) 39 S.R. (N.S.W.) 133, at p. 139; 56 W.N. 60, at p. 61.
(2) (1917) A.C. 38, at pp. 51, 52.
(3) (1942) 66 C.L.R. 603, at pp. 611 618.

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national law operate to give the plaintiffs a right of action against the defendant in Victoria, having regard to the fact that they would have had a right of action against him under Part III. of the *Wrongs Act* if his negligence had been committed in Victoria. On the other hand, if the second view be accepted, the question is only whether the rules of private international law would have given the plaintiffs' father, if he had survived, a right of action in Victoria against the defendant for his negligence committed in New South Wales.

Whichever of these views be adopted, it is necessary to ascertain the rule of private international law which defines the conditions of civil liability in Victoria for an act done in New South Wales. In the present state of authority it must be accepted that an action of tort will lie in one State for a wrong alleged to have been committed in another State, if two conditions are fulfilled: first, the wrong must be of such a character that it would have been actionable if it had been committed in the State in which the action is brought; and secondly, it must not have been justifiable by the law of the State where it was done: *Walpole* v. *Canadian Northern Railway Co.* (1); *McMillan* v. *Canadian Northern Railway Co.* (2).

The language in which these conditions are expressed is that of *Willes* J. in *Phillips* v. *Eyre* (3). For his statement of the first condition, his Lordship relied upon the decision in *Liverpool, Brazil, and River Plate Steam Navigation Co. Ltd.* v. *Benham* ("*The Halley*") (4), although (it may be remarked) in that case the Privy Council decided that the defendant was not liable in England for an act done abroad by another person, not because of the character of the act according to English law, but because the person who did it was not one for whose defaults the defendant was responsible according to English law. At least the first condition is free from ambiguity. The second is not. It was interpreted by a Court of Appeal consisting of *Lopes* and *Rigby* L.JJ. in *Machado* v. *Fontes* (5) as meaning that the act complained of must not have been "innocent" in the country where it was done. Their Lordships held that if the act was contrary in any respect to the law of that country, then, although it gave rise to no civil liability there, it was not "justifiable" there, and the second condition was therefore fulfilled. No previous decision had gone so far. The statement that the act must not have been

(1) (1923) A.C. 113, at p. 119.
(2) (1923) A.C. 120, at pp. 123, 124.
(3) (1870) L.R. 6 Q.B. 1, at pp. 28, 29.
(4) (1868) L.R. 2 P.C. 193.
(5) (1897) 2 Q.B. 231.

justifiable by the law of the place where it was done was framed by *Willes* J. for the purposes of a judgment directed to the effect to be conceded in an action in England to a statute of indemnity, which had been passed in the country where the act was committed and which had the effect of curing retrospectively the wrongfulness of the act in that country. The statement of the condition does not in terms deny that the act complained of must be of a character which attracts civil liability in the country where it was done; and it would be difficult to reconcile such a denial with the principle which *Willes* J. had previously stated (1), that "the civil liability arising out of a wrong derives its birth from the law of the place, and its character is determined by that law". The learned Lords Justices in *Machado* v. *Fontes* (2) relied also upon the judgments in "*The M. Moxham*" (3), which was the converse of "*The Halley*" (4), in the sense that the question was whether liability for an act of negligence in another country could be imposed in England upon a person who, according to the law of that other country, was not responsible for the fault of the person who did the act, and it was decided that it could not. The judgments fall short of supporting the doctrine of *Machado* v. *Fontes* (2). That case has been dissented from in *Naftalin* v. *London Midland and Scottish Railway Co.* (5), and has been much criticized by text writers. (See further, *M'Elroy* v. *M'Allister* (6).) Its correctness was questioned and left undecided by the Privy Council in *Canadian Pacific Railway Co.* v. *Parent* (7). In the judgment of *Cussen* J. in *Varawa* v. *Howard Smith Co. Ltd.* [*No.* 2] (8) will be found a critical analysis of the case and of the authorities which it purported to apply. 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 if, first, it was of such a character that it would have been actionable if it had been committed in Victoria, and, secondly, it was such as to give rise to a civil liability by the law of the place where it was done. Such a rule would appear to be consonant with all the English decisions before *Machado* v. *Fontes* (2) and with the later Privy Council decisions. It may be added that, however the rule should be stated, courts applying the English rules of private international law do not accept the theory propounded by *Holmes* J. in *Slater* v. *Mexican National Railroad Co.* (9) (see also *New York*

(1) (1870) L.R. 6 Q.B., at p. 28.
(2) (1897) 2 Q.B. 231.
(3) (1876) 1 P.D. 107.
(4) (1868) L.R. 2 P.C. 193.
(5) (1933) S.C. 259, at pp. 274, 275.
(6) (1949) S.C. 110.
(7) (1917) A.C. 195, at p. 205.
(8) (1910) V.L.R. 509.
(9) (1904) 194 U.S. 120 [48 Law. Ed. 900].

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Central Railroad Co. v. *Chisholm* (1)), when he said :—"The theory of the foreign suit is that although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an *obligatio*, which, like other obligations, follows the person, and may be enforced wherever the person may be found . . . But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation, . . . but equally determines its extent." English law as the *lex fori* enforces an obligation of its own creation in respect of an act done in another country which would be a tort if done in England, but refrains from doing so unless the act has a particular character according to the *lex loci actus*. Uncertainty exists only as to what that character must be.

There is no necessity to express a concluded opinion upon the controversy which surrounds *Machado* v. *Fontes* (2). It is enough that, on any view, an act, which would have been actionable in Victoria if committed there, is actionable in Victoria though committed in New South Wales if it is actionable in New South Wales. If the defendant in this case is guilty of the negligence alleged against him, his negligence was, when the action was commenced, actionable in New South Wales at the suit of the plaintiffs, and would have been actionable in New South Wales at the suit of their father if he had survived. This is so because the law of New South Wales includes both the *Compensation to Relatives Act*, 1897-1946, which enacts provisions not differing in any relevant respect from those of Part III. of the Victorian *Wrongs Act*, and also the rules of the common law with respect to liability for negligence. The plaintiffs are therefore entitled to maintain their present action, either because the coexistence of Part III. of the *Wrongs Act* and the *Compensation to Relatives Act* (N.S.W.) gives them under the rule of private international law above discussed, a right of action against the defendants for causing the death of their father by negligence in New South Wales, or because Part III. of the *Wrongs Act* applies to this case of its own force, the condition that their father would have been entitled to sue the defendant in Victoria for injuring him by negligence in New South Wales being satisfied by the application of the same rule of private international law.

One matter remains to be mentioned. It was objected on behalf of the defendant that it is not open to the plaintiffs to rely for any

(1) (1925) 268 U.S. 29, at p. 32 [69 Law. Ed. 828, at p. 832].

(2) (1897) 2 Q.B. 231.

purpose upon New South Wales law, because the content of that law is in Victoria a question of fact and the statement of claim contains no allegation as to the law of New South Wales. This objection should not be sustained. The Supreme Court of Victoria takes judicial notice of the provision made by the Imperial Act, 9 Geo. IV. c. 83, s. 24, whereby all laws and statutes in force in England at the time of the passing of that Act (1828) were made applicable in the administration of justice in the courts of New South Wales so far as the same could be applied within that colony. The Victorian court also takes judicial notice of all statutes of New South Wales, being required so to do by s. 3 of the *State and Territorial Laws and Records Recognition Act* 1901-1950 : cf. s. 70 of the *Evidence Act* 1928 (Vict.). It is therefore within its judicial cognizance that the *Compensation to Relatives Act* of New South Wales entitled the plaintiffs to sue in that State for damages in respect of the death of their father, and also that, by the principles of the common law, applicable in New South Wales under 9 Geo. IV. c. 83 and unaffected by statutes enacted in that State since 1828, the conduct of the defendant alleged in the statement of claim amounted to a wrong which would have been actionable in New South Wales at the suit of the plaintiffs' father if he had survived.

The appeal should therefore be allowed, the order appealed from should be discharged, and in lieu thereof it should be declared that the allegations contained in pars. 1 to 6 inclusive of the statement of claim disclose a cause of action by the plaintiffs against the defendant.

McTIERNAN J. This action was brought in the Supreme Court of Victoria. It consisted of two counts. The first was a claim for compensation for the pecuniary loss suffered by the plaintiffs in consequence of their father's death, which they alleged was caused by the defendant's negligence. The second count was for damages for physical injury and damage sustained by one of the plaintiffs in consequence of the same negligence. This appeal is concerned only with the first count. The question is whether or not that claim can be enforced by an action brought in the Supreme Court of Victoria. It appeared that the alleged negligence took place on 3rd September 1949 in New South Wales and caused physical injury to the plaintiff's father, from which he died in Victoria on 7th September 1949. No executor or administrator of his estate was appointed. The plaintiffs, a daughter and a son, brought the action for their own benefit : being infants, they sued by their next friend. The first count is contained in pars. 1 to 6 inclusive

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of the statement of claim and the second count in the seventh paragraph. To the first count there are appended (citing the words which describe them): "Particulars under the *Wrongs Act* 1928". This heading refers to Part III. of the *Wrongs Act* 1928 (Vict.). This part of the Act follows the pattern of *Lord Campbell's Act* (Imp.) (9 & 10 Vict. c. 93). Section 15, which is in Part III., creates a right of action for a wrongful act, neglect or default causing death, subject to the conditions which are usual in legislation of which *Lord Campbell's Act* is the model.

The defendant set up as a defence to the claim set forth in pars. 1 to 6 inclusive of the statement of claim the fact that the alleged negligence took place in New South Wales. Upon that the defendant submitted that as a matter of law the facts alleged in those paragraphs do not constitute any cause of action under the *Wrongs Act* of Victoria or any cause of action enforceable in the Supreme Court of Victoria. In an interlocutory proceeding *Dean* J. upheld this submission and gave judgment dismissing the cause of action set forth in pars. 1 to 6 inclusive of the statement of claim.

In s. 15 of the *Wrongs Act* the legislature has used the general words "a wrongful act neglect or default". Literally, these words apply to an act neglect or default which falls within the scope of the words of the section, wherever it was committed. Read without any limitation, the effect of the section is to create a civil liability for such an act neglect or default whether it was committed in Victoria or in another part of Australia or in any other place. *James* L.J. said in *Niboyet* v. *Niboyet* (1): "It is always to be understood and implied that the legislature of a country is not intending to deal with persons or matters over which, according to the comity of nations, the jurisdiction properly belongs to some other sovereign or State". This rule of construction was applied in *Barcelo* v. *Electrolytic Zinc Co. of Australasia Ltd.* (2). *Dixon* J. said (3) that the object of this rule of construction is to confine the operation of general language in a statute to a subject matter "under the effective control of the legislature". *Turner* L.J. said in *Cope* v. *Doherty* (4): "It is not because general words are used in an Act of Parliament every case which falls within the words is to be governed by the Act. It is the duty of the Courts of Justice so to construe the words as to carry into effect the meaning and intention of the Legislature". The legislature did not expressly declare that

(1) (1878) 4 P.D. 1, at p. 7.
(2) (1932) 48 C.L.R. 391, at pp. 423, 425, 443-447.
(3) (1932) 48 C.L.R., at p. 423.
(4) (1858) 2 De G. & J. 614, at pp. 623, 624 [44 E.R. 1127, at p. 1131].

it was dealing with wrongful acts, neglects, or defaults, whether they took place within or beyond Victoria. The proper construction to place upon s. 15 is that Parliament intended to deal only with such persons or things as are within the general words of the section and also "within its proper justification" (*Colquhoun* v. *Heddon* (1), per Lord *Esher*). It is clearly within the proper jurisdiction of the legislature to impose civil liability for a wrongful act, neglect or default having the consequences described in s. 15, if it takes place in Victoria. As regards any extra-territorial wrongful act, neglect or default falling within the general words of the section, it is difficult to affirm that it is a thing within the "proper" jurisdiction of the legislature of Victoria. The legislature has no power to make its laws apply extra-territorially but the present question is not strictly one as to the extent of its legislative jurisdiction: it is rather whether the Court ought to attribute to the legislature the intention that the general words should apply to an extra-territorial wrongful act, neglect or default. A matter which is of importance is that the legislature contemplated that a wrongful act, neglect or default which falls within the general words of s. 15 may be a felony. The section expressly says that a right of action is created in respect of such a wrongful act, neglect or default, even although the death has been caused under such circumstances as amount to a felony. Locality is an appropriate criterion having regard to the subject matter, for limiting the general words "a wrongful act, neglect or default" in s. 15. See *American Banana Co.* v. *United Fruit Co.* (2); *New York Central Railroad Company* v. *Chisholm* (3). In my opinion the intention ought not to be attributed to the legislature of dealing with extra-territorial wrongful acts, neglects or defaults. Upon the true construction of s. 15 it is, in my opinion, limited to a wrongful act, neglect or default which is committed in Victoria. The negligence alleged in the statement of claim took place in New South Wales. It follows that the cause of action set forth in pars. 1 to 6 inclusive cannot stand upon Part III. of the *Wrongs Act* 1928 of Victoria.

The *Compensation to Relatives Act*, 1897-1946 (N.S.W.) is, essentially similar to Part III. of the above-mentioned *Wrongs Act*. Section 3 of the *Compensation to Relatives Act* applies to the negligence alleged in the present case because it was a wrongful act, neglect or default which took place in New South Wales. The

(1) (1890) 25 Q.B.D. 129, at pp. 134, 135.
(2) (1909) 213 U.S. 347, at p. 356 [53 Law. Ed. 827, at p. 832].
(3) (1925) 268 U.S. 29, at pp. 31, 32 [69 Law. Ed. 828, at pp. 831, 832].

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death of the plaintiffs' father, however, occurred in Victoria. In the case of the *Compensation to Relatives Act* of New South Wales the death of the injured person is essential to give the right of action created by the Act. This element is common, of course, to all Acts based upon the pattern of *Lord Campbell's Act*. It has been held that under such provisions the relatives of the injured man would have no cause of action, if before his death from the injury caused by a wrongful act, neglect or default, he had sued the tortfeasor and recovered damages. This result followed because the statutory right of action created by the Act is to an extent identified with the common-law right which accrued to the injured person upon the happening of the wrongful act, neglect or default (*Read* v. *Great Eastern Railway Co.* (1); *Griffiths* v. *Earl of Dudley* (2)). The statutory right of action given to the relatives is nevertheless a "new action" (*Seward* v. *Owners of the "Vera Cruz"* (3)). It is an action for the wrong for which the injured person could have brought an action against the wrongdoer, had the wrong not caused death. The plaintiffs' father could have brought an action for the negligence alleged in the statement of claim if he had survived; upon his death another right of action for compensation for the pecuniary loss accrued under the *Compensation to Relatives Act* of New South Wales to the plaintiff's dependent children. *Du Parcq* L.J. said in *George Monro Ltd.* v. *American Cyanamid & Chemical Corporation* (4): "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". In the present case the *locus delicti commissi* was in New South Wales. The plaintiffs could, within twelve months from the death of their father, the period limited by s. 5 of the *Compensation to Relatives Act*, have brought an action under that Act in the Supreme Court of New South Wales. As there is no executor or administrator of their father, the plaintiffs would have been entitled under s. 6B to bring the action within the abovementioned period, but as that period has elapsed the plaintiffs would be met by s. 5 if they sued in the Supreme Court of New South Wales under the Compensation to Relatives Act of that State.

The right of action given by this Act to the relatives of the deceased is statutory, but it is a right to bring an action of tort. The action is essentially different from a claim under a Workers' Compensation Act; such a claim does not "properly arise *ex*

(1) (1868) L.R. 3 Q.B. 555.
(2) (1882) 9 Q.B.D. 357.
(3) (1884) 10 App. Cas. 59.
(4) (1944) K.B. 432, at p. 441.

delicto ": *Dicey's Conflict of Laws*, 6th ed. (1949), at p. 801. *Mynott* v. *Barnard* (1), a case involving the construction of the *Workers' Compensation Act* 1928 (Vict.) is not parallel with the present case. An Act of the type of the *Compensation to Relatives Act* of New South Wales or of Part III. of the *Wrongs Act* of Victoria or any Act fashioned after *Lord Campbell's Act* makes "a statutory addition" to the common law of the State which enacts such an Act. In *Davidsson* v. *Hill* (2) an action under the *Fatal Accidents Act* (*Lord Campbell's Act*) was described by *Kennedy* J. as "an action in tort". *Phillimore* J. said (3): "*The Fatal Accidents Act* is a statutory addition to the common law of England". *Kennedy* J. made in the last-mentioned case this observation (4): "The basis of the claim to which they" (the *Fatal Accidents Act*) "give statutory authority is negligence causing injury, and that is a wrong which I believe the law of every civilized country treats as an actionable wrong . . . the purpose and effect of the legislation is to extend the area of reparation for a wrong which civilized nations treat as an actionable wrong". The negligence alleged in the statement of claim was actionable by the law of Victoria, where the action was brought, and by the law of New South Wales, where it was committed. It is a clear case of a tort committed beyond the territorial jurisdiction of the Supreme Court of Victoria for which an action may be brought in that court. The *Compensation to Relatives Act* of New South Wales created the civil liability for the negligence because it was committed in New South Wales. The remedy is statutory and, as the *locus delicti commissi* was New South Wales, the action which could be brought in Victoria was under the *Compensation to Relatives Act*, not under Part III. of the *Wrongs Act*: see *New York Central Railroad Co.* v. *Chisholm* (5). The action is accessory to the civil liability created by the *Compensation to Relatives Act* of New South Wales. *Willes* J. said in *Phillips* v. *Eyre* (6): "A right of action, whether it arise from contract governed by the law of the place or wrong, is equally the creature of the law of the place and subordinate thereto . . . in like manner the civil liability arising out of a wrong derives its birth from the law of the place, and its character is determined by that law". Section 5 of the *Compensation to Relatives Act* bars the right of action given by this Act unless the action is commenced within twelve months after the death in respect of which it is given.

(1) (1939) 62 C.L.R. 68.
(2) (1901) 2 K.B. 606, at p. 609.
(3) (1901) 2 K.B., at p. 619.
(4) (1901) 2 K.B., at p. 614.
(5) (1925) 268 U.S. 29 [69 Law. Ed. 828].
(6) (1870) L.R. 6 Q.B. 1, at p. 28.

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It follows that the plaintiffs have lost their right of action under the *Compensation to Relatives Act* of New South Wales if the action which they brought in the Supreme Court of Victoria cannot be treated as an action under the *Compensation to Relatives Act* of New South Wales. Section 6 of this Act and s. 20 of the *Wrongs Act* provide for the delivery of particulars with the statement of claim (which in the former case is a " declaration ") of the persons for whom the action is brought and of the nature of the claim in respect of which damages are claimed. In the present case the plaintiffs entitled the particulars " *Under the Wrongs Act* ". Part III. does not require that the particulars should be so entitled. The heading " *Under the Wrongs Act* " distinguished the particulars under pars. 1 to 6 of the statement of claim, from the particulars under the count for damages, which it also contains, for the physical injury and damage alleged to have been caused to one of the plaintiffs. The proof, which was given in the interlocutory proceeding, that the negligence was committed in New South Wales stamps the action as one which is authorized by the *Compensation to Relatives Act* of New South Wales. The heading " *Under the Wrongs Act* " is not an essential part of the statement of claim. It is a false description of the Act which sanctioned the action and directed the particulars to be furnished. Having regard to the substance of the matters pleaded in pars. 1 to 6 and the substance of the particulars referring to those paragraphs, I am not prepared to decide that the plaintiffs did not, in accordance with s. 5 of the *Compensation to Relatives Act*, 1897-1946, of New South Wales, take proceedings within twelve months of their father's death to enforce the right of action which arose under that Act upon his death.

The Supreme Court of Victoria is bound by the Federal Act, the *State and Territorial Laws and Records Recognition Act* 1901-1950, s. 3, to take judicial notice of the *Compensation to Relatives Act*, 1897-1946, of New South Wales. This Act is the correct law for the Supreme Court of Victoria to apply in so far as it governs the civil liability which the plaintiffs brought this action to enforce: but the law of the forum governs all matters of procedure in connection with the action.

The defence set up by the defendant that pars. 1 to 6 inclusive do not plead a cause of action which is enforceable in the Supreme Court of Victoria should not, in my opinion, be sustained.

Litigation involving questions like those in this appeal may increase with the growth of travel between the States and the Territories of the Commonwealth. It seems desirable for the

States and the Commonwealth to take any action which is within their constitutional powers to prevent the recurrence of like questions in such litigation.

I should allow the appeal.

Appeal allowed with costs.

Order of the Supreme Court dated 11*th May* 1951 *discharged.*

In lieu thereof declare that the allegations contained in pars. 1 *to* 6 *inclusive of the statement of claim disclose a cause of action by the plaintiffs against the defendant and that the costs of the argument of the points of law which the order of the Supreme Court dated* 15*th March* 1951 *directed to be set down to be argued be paid by the defendant (the respondent in this Court).*

Solicitor for the appellants, *F. G. Menzies*, Crown Solicitor for Victoria.

Solicitors for the respondent, *Alex. Grant, Dickson & King.*

E. F. H.