[HIGH COURT OF AUSTRALIA.]

GARDINER . . . . . APPELLANT;
PLAINTIFF,

AND

MOTOR VEHICLE INSURANCE TRUST . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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PERTH, *Sept.* 14;

MELBOURNE *Oct.* 25.

Fullagar, Kitto and Taylor JJ.

Negligence—Unidentified motor vehicle—Liability of nominal defendant—Proviso that judgment not to be obtained unless "as soon as possible after" the claimant "knew the identity of the vehicle could not be ascertained, he gave . . . notice of the claim and a short statement of the grounds thereof"—Collision—Plaintiff driving with right arm projecting from vehicle—Contributory negligence—Motor Vehicle (Third Party Insurance) Act 1943-1951 (*W.A.*), *s.* 7 (3).

Section 7 (3) of the *Motor Vehicle (Third Party Insurance) Act* 1943-1951 provides that: "Where the driver of a motor vehicle has caused death or bodily injury by negligence in the use of a motor vehicle but the identity of the vehicle cannot be ascertained, any person who could have obtained a judgment in respect of the death or bodily injury so caused against that driver may obtain by action against the Trust the judgment which, in the circumstances, he could have recovered against the driver of the vehicle: Provided that as soon as possible after he knew the identity of the vehicle could not be ascertained, he gave to the Trust notice of the claim and a short statement of the grounds thereof."

Held: (1) that if a notice tells the Trust that a claim is to be made against it in respect of an unidentified vehicle and states the time and place and nature of the wrongful act, or omission alleged and the general nature of the damage suffered it will, generally speaking, be a sufficient compliance with the subsection: (2) that the requirements of such proviso are satisfied if the claimant establishes, the burden being on him, that in giving the notice, there was no failure to act as promptly as could fairly be expected in the circumstances.

Decision of the Supreme Court of Western Australia (*Dwyer* C.J.), reversed.

APPEAL from the Supreme Court of Western Australia.

On 20th August 1954 Maxwell Charles Gardiner commenced an action in the Supreme Court of Western Australia against the Motor Vehicle Insurance Trust. The plaintiff claimed that on the night of 8th November 1952 whilst driving a motor vehicle along the Perth to Albany Road, his arm, which was projecting through the window of the vehicle, was struck and severely injured by a vehicle which was travelling in the opposite direction. He alleged negligence against the driver of that vehicle and claimed that the identity of that vehicle could not be ascertained and so he sued the trust under s. 7 (3) of the *Motor Vehicle (Third Party) Insurance Act* 1943-1951 (W.A.). To this claim the defendant trust pleaded, *inter alia*, that the action against it was not maintainable because the plaintiff did not give to it notice of his claim and a short statement of the grounds thereof as soon as possible after he knew the identity of the vehicle could not be ascertained.

The action was heard before *Dwyer* C.J., and the evidence then given, in so far as it was relevant to the question of notice, is as set out in the judgment of the Court hereunder. The trial judge held that of the two notices given by the claimant the first notice dated 2nd December 1952 did not contain a short statement of the grounds of the plaintiff's claim and that the second notice given dated 14th January 1953 was not given as soon as possible after the plaintiff knew the identity of the vehicle could not be ascertained.

Judgment was entered for the defendant trust and from that judgment the plaintiff appealed to the High Court.

P. L. Sharp, for the appellant. The notice of 2nd December 1952 was notice of " the claim " and was found to be so by the trial judge. This notice also states all the essential facts relating to the accident. This constituted a " short statement of the grounds ". It is not necessary in such cases that the notice should contain particulars of negligence and the essential allegation of negligence can be implied from the fact that the claim is being made. The notice of 14th January 1953 complies with the proviso so far as content is concerned and was given " as soon as possible after he knew the identity of the vehicle could not be ascertained ". The trial judge in coming to the contrary conclusion did not attach any or any sufficient significance to the fact that the plaintiff was in hospital until 18th December 1952 and during that period was incapacitated from making any inquiries. The trial judge decided the question of knowledge on an entirely objective basis. The use of the word " knew " indicates that the essential question of fact

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for decision is a subjective one: *Vines* v. *Djordjevitch* (1). The words " as soon as possible " cannot be interpreted literally. The most satisfactory paraphrase is to say that the notice must be given with all reasonable expedition which the circumstances allow.

K. W. Hatfield, for the respondent. Compliance with the proviso to s. 7 (3) of the *Motor Vehicle* (*Third Party Insurance*) *Act* is a condition precedent to action. The plaintiff had arrived at no belief as to whether the identity of the vehicle could be ascertained or otherwise when he gave his notice of 2nd December 1952. This notice was given too soon, and furthermore it does not contain a short statement of the grounds of the claim. The notice is deficient in many respects, but particularly because it does not state the locus of the accident. It was quite apparent long before the date of the second notice that the identity of the motor vehicle would not be ascertained and this notice was, therefore, given too late. The onus is on the plaintiff to show that the proviso to the section has been complied with and the plaintiff made no attempt to discharge such onus. It is incumbent upon a plaintiff who seeks to satisfy the proviso to show the date upon which he first acquired his knowledge because unless he can do this it is impossible for him to show the notice given was given " as soon as possible after he knew ".

P. L. Sharp, in reply.

Cur. adv. vult.

Oct. 25.

THE COURT delivered the following written judgment:—

This is an appeal by an unsuccessful plaintiff against a judgment of the Supreme Court of Western Australia in an action which was tried before *Dwyer* C.J. The case arose out of an accident which occurred between Cranbrook and Mount Barker on the main highway from Perth to Albany. The plaintiff, who is a young man, was driving a motor vehicle towards Mount Barker on the night of 8th November 1952. He had his right arm resting on the bottom of the window opening, with his elbow projecting from the vehicle. About 9.20 p.m. a vehicle travelling in the opposite direction grazed the side of the plaintiff's vehicle in passing, and struck and severely injured the plaintiff's projecting elbow. The damage to the plaintiff's vehicle was merely superficial, and it is quite possible that the driver of the other vehicle never knew that any damage of any moment had been caused by him. In any

(1) (1955) 91 C.L.R. 512.

case he was never found or identified, and the plaintiff brought his action under s. 7 (3) of the *Motor Vehicle* (*Third Party Insurance*) *Act* 1943-1951 (W.A.).

The defendant trust is a corporation constituted under s. 3A of that Act. Section 7 (3) is in the following terms :—" Where the driver of a motor vehicle has caused death or bodily injury by negligence in the use of a motor vehicle but the identity of the vehicle cannot be ascertained, any person who could have obtained a judgment in respect of the death or bodily injury so caused against the driver may obtain by action against the Trust the judgment which, in the circumstances, he could have recovered against the driver of the vehicle : Provided that, as soon as possible after he knew the identity of the vehicle could not be ascertained, he gave to the Trust notice of the claim and a short statement of the grounds thereof."

The defendant by its defence denied negligence, and alleged that the plaintiff had been guilty of contributory negligence in (*inter alia*) driving with his elbow projecting through the window. It also alleged that the action did not lie because the plaintiff " did not give to the defendant notice of his claim and a short statement of the grounds thereof as soon as possible after he knew that the identity of the unknown vehicle could not be ascertained as required by " the proviso to s. 7 (3) of the Act. The defence originally relied also on non-compliance in two respects with the provisions of s. 29 of the Act, but it was later amended by deleting these allegations, and it is unnecessary to refer to s. 29.

At the trial of the action the learned Chief Justice found that negligence on the part of the driver of the unknown vehicle was established, but he also found that the plaintiff had been guilty of contributory negligence in driving with his elbow projecting through the window. These findings necessitated an apportionment under s. 4 (1) of the *Law Reform* (*Contributory Negligence and Tortfeasors' Contribution*) *Act* 1947 (W.A.), which provides that, where contributory negligence is established in such cases, " the defendant shall not for that reason be entitled to judgment, but the court shall reduce the damages which would be recoverable by the plaintiff if the happening of the event which caused the damage had been solely due to the negligence of the defendant to such extent as the court thinks just in accordance with the degree of negligence attributable to the plaintiff." Acting under this provision, his Honour assessed the " degree of negligence attributable to the plaintiff " at twenty-five per cent and accordingly assessed damages at seventy-five per cent of the sum which he would otherwise have

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considered proper. The amount of damages which he would have awarded on this basis was £523 7s. 0d. His Honour, however, was of opinion that the plaintiff had not given notice of intention to make his claim with a short statement of the grounds thereof as soon as possible after he knew that the identity of the vehicle which did the damage could not be ascertained. The defence based on the proviso in s. 7 (3) of the *Motor Vehicle* (*Third Party Insurance*) *Act* accordingly prevailed, and judgment was given for the defendant.

The facts with regard to the giving of notice are these. Immediately after the accident on 8th November 1952 the plaintiff was taken to the Mount Barker hospital. He was in hospital until 18th December. The accident was reported to the police at Mount Barker on the morning after the accident by his mother, and Constable Waltham of Mount Barker interviewed the plaintiff in hospital. The constable said: "I didn't come to the conclusion that the vehicle couldn't be traced, but I didn't think there was much hope. I probably told Mrs. Gardiner that". The accident was reported in the press and over the air. The plaintiff's mother also communicated with the police stations at three other towns on the road, and requested certain other persons who lived on the road to keep a look out for a motor vehicle slightly damaged on the right side. These persons said that they kept a look out for three or four weeks. Mrs. Gardiner called several times to ask these persons whether they had any information. One of them said:—"She called about four times over a period of two months". About the end of November she appears to have consulted a solicitor, Mr. Le Fanu, who on 2nd December wrote to the defendant a letter in the following terms:—"Dear Sir, *Maxwell Charles Gardiner*. The above-named licensed driver who was injured on the night of 8th November in a collision with another vehicle, has instructed me to forward the enclosed notice to you. The other vehicle and driver are unknown, unless the police have been able to trace them. My client was driving his father's vehicle." The enclosed notice is headed "*Motor Vehicle* (*Third Party Insurance*) *Act* 1943-1951, s. 29", and is in the following terms:—"I hereby notify you that it is my intention to claim damages (on behalf of myself) for bodily injuries as a result of an accident arising out of the use of a motor vehicle particulars of which are as follows:—(a) Date of Accident:—8 Nov. 1952. (b) Name and address of persons injured:—Maxwell Charles Gardiner. (c) Name of owner of motor vehicle Horace Godfrey Gardiner. (d) Identification No. of Motor Vehicle GN 409. Stephen Le Fanu Solicitor to the Claimant Mount Barker."

The plaintiff said that, after he came out of hospital on 18th December, he and his mother made further inquiries, but the nature of these inquiries is not stated. Presumably he followed on the lines which his mother had been pursuing. Mrs. Gardiner said :— "After three months or so we gave up hope of finding it or him " (i.e., the guilty vehicle or its driver). She also said :—" We had no news when I consulted Mr. Le Fanu, and I told him that ". Both the plaintiff and his mother said that they thought that they had to find the driver of the unknown vehicle before they could take any action at law. Early in 1953 the plaintiff consulted another firm of solicitors, Messrs. Maxwell & Lalor, who, on 14th January 1953 wrote to the defendant a letter in the following terms :—" We have been consulted by Mr. Maxwell Charles Gardiner of Cranbrook, aged 27, cartage contractor, who on the 8th day of November 1952 whilst driving a 1949 Ford V8 sedan, registered number GN 409, at about 9.45 p.m. on the main Perth-Albany road, was struck by a vehicle, the identity of which cannot be ascertained, which said vehicle struck our client's vehicle on the wrong side of the road. We are instructed that our client formerly employed as his Solicitor, Mr. S. Le Fanu, who gave you notice of intention to claim damages. Our client has requested now that we act in place of Mr. Le Fanu. As a result of the collision, our client sustained personal injuries, and we are accordingly making a claim for damages on his behalf. If formal notice has not already been given, we should be pleased if you would accept this letter as formal notice of intention to claim damages. Our client gave a statement to the Mt. Barker police on the day following the accident, and we have written to them requesting them to forward us any information regarding the ascertaining of the identity of the vehicle, which failed to stop. We should be pleased to hear from you in this matter at your convenience." During the next eighteen months a good deal of further correspondence, relating mainly to the condition of the plaintiff's arm, took place between the plaintiff's solicitors and the defendant and its solicitors. There was no suggestion at any time on the part of the defendant that insufficient notice of claim had been given, or that any question of liability was going to be raised, but on 2nd August 1954 its solicitors wrote denying liability. The writ was issued on 20th August 1954.

The learned Chief Justice was of opinion that Mr. Le Fanu's letter of 2nd December 1952 complied with the requirement of s. 7 (3) of the Act as to time, but that it did not otherwise comply with that sub-section in that it did not contain a sufficient " short statement of the grounds of claim ". With regard to the letter of

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Maxwell & Lalor of 14th January 1953, his Honour was of opinion that this letter contained a sufficient notice of claim and a sufficient statement of the grounds of claim, but that it was not given as soon as possible after the plaintiff knew that the identity of the offending vehicle could not be ascertained. His Honour said :—" The notice of 2nd December indicates that the Plaintiff then knew that the identity of the vehicle could not be ascertained, and I do not think there was any real inquiry afterwards or any belief that further information leading to identification could be got."

The question of compliance with the proviso to s. 7 (3) is ultimately a question of fact, and, if there is a jury, is a question for the jury. And the burden of proving compliance rests on the plaintiff: see *Vines* v. *Djordjevitch* (1). But, in such a case as the present, the trial being had without a jury, this Court is in the same position as the court of first instance, and can and should determine the question for itself on the evidence. We agree with the learned Chief Justice that the communication of 2nd December 1952 did not contain a sufficient " short statement of the grounds of claim ". The letter and the accompanying notice must, of course, be read together. So read, they tell the defendant that the plaintiff has suffered bodily injuries in a collision on the night of 8th November 1952 between his father's motor vehicle, which he was driving, and another motor vehicle, and that the identity of that vehicle and the identity of its driver are then unknown to the plaintiff. They also tell the defendant that the plaintiff intends to claim damages in respect of the injuries which he has suffered. But the place of the collision is not stated, and that is, of course, an important fact for the defendant to know. It has been held under similar statutory enactments that a notice before action is insufficient if it does not state the place of the material occurrence : see *Breese* v. *Jerdein* (2); *Forbes* v. *Lloyd* (3); *Cobb* v. *Duffy* (4). Moreover, there is no statement of any wrongful act or omission as constituting " grounds of claim ". Nor is it even stated that the claim for damages is to be made against the defendant trust. The author of the letter and notice seems indeed to have set out to comply with s. 29 of the Act (to which the notice refers) and not to have had s. 7 (3) in mind at all.

A number of the cases decided on more or less similar statutory enactments have been recently considered by *Dean* J. in *Baldwin* v. *Victorian Railways Commissioners* (5). Section 7 (3) is not to be

(1) (1955) 91 C.L.R. 512, at p. 521.
(2) (1843) 4 Q.B. 585.
(3) (1876) 10 Ir. R.C.L. 552.
(4) (1887) 21 S.A.L.R. 142.
(5) (1950) V.L.R. 108.

taken as requiring anything in the nature of a pleading. In *Leeder* v. *Town of Ballarat East* (1), *A'Beckett* J., dealing with a provision *in pari materia*, spoke of " the manifest hardship of a strict construction ". If the notice tells the insurer that a claim is going to be made against it in respect of an unidentified vehicle, and states the time and place and nature of the wrongful act or omission alleged and the general nature of the damage suffered, we think, generally speaking, that it will be sufficient to comply with s. 7 (3). But the letter and notice of 2nd December did not fulfil these requirements.

It is now necessary to consider the letter of 14th January 1953. We think the learned Chief Justice was clearly right in holding that this communication was sufficient in content. But the question remains whether the notice conveyed by it was given in due time. We are, with respect, unable to agree with his Honour that the letter of 2nd December indicates that the plaintiff then knew that the identity of the offending vehicle could not be ascertained. We cannot regard it as indicating any more than that the plaintiff (who was at that date still in hospital) was not then aware of the identity of that vehicle. This, however, does not carry us very far towards the solution of a problem, some of the difficulties of which were considered in *Vines* v. *Djordjevitch* (2). They are difficulties of the same kind as those which *Cussen* J. so carefully considered in *Leeder* v. *Town of Ballarat East* (3). The main difficulty is in connection with the word " knew ". In *Australian National Airways Pty. Ltd.* v. *Vines* (4), *O'Bryan* J., after observing that it could never be said that it was beyond the bounds of possibility that an unknown vehicle might be identified, expressed the opinion that there was " knowledge " on the part of a claimant when he was " in possession of facts which in the case of an ordinary reasonable person would lead to a sure judgment that the identity of the motor car cannot be established " (5). But, as was pointed out in *Vines* v. *Djordjevitch* (6), what is required is knowledge, and, while knowledge may readily be inferred from possession of such facts, it would be wrong to say that possession of such facts is conclusive. In other words, the fact in issue is one thing, and evidence of that fact is another thing. Direct evidence of the fact is, of course, admissible. For example, a plaintiff might say that he did not believe until a given date that the car in question could not be identified. Where the case depends on such evidence, the matter

(1) (1908) V.L.R. 214, at p. 218.
(2) (1955) 91 C.L.R. 512.
(3) (1908) V.L.R. 214, at pp. 224-226.
(4) (1950) V.L.R. 510.
(5) (1950) V.L.R., at pp. 513, 514.
(6) (1955) 91 C.L.R., at pp. 521, 522.

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is one of credibility, to be considered in the light of all the circumstances, but it will often have its own peculiar difficulties. The mere fact that the belief in question is a negative belief tends to complicate, rather than simplify, the problem. Again, " an opinion that a state of fact exists may be held according to indefinite gradations of certainty " (*Briginshaw* v. *Briginshaw* (1)). Such gradations may range from confidence of success through many degrees of alternating doubt and hope to assurance of failure. It is for this reason likely, more often than not, to be very difficult for a plaintiff to say with sincerity—perhaps, as here, two years or more after the event—that at any definite point of time he believed something which he had not believed before. Whether direct evidence of belief or " knowledge " is given or not, there will almost always be circumstantial evidence, which may tend to support or refute the direct evidence, if any. Perhaps the most formidable source of difficulty attending the consideration of either direct or circumstantial evidence arises where—as must very often happen—the person whose belief is in question is entirely unaware of the fact that it is material that he should have a belief. As is pointed out in *Vines* v. *Djordjevitch* (2), " knowledge " implies a degree of consciousness. It might even perhaps be said that such a person could never be taken to " know " the material fact. But, while such unawareness, where it exists, is a factor which must be regarded as material, the manifest purpose of the proviso to s. 7 (3) would be defeated unless it were held that " knowledge " must at some stage be attributed to every person affected by that proviso.

It should be observed too that the words " as soon as possible " have a simplicity that is deceptive. They cannot be read quite literally and objectively. If they were, a letter written and posted on the day after the attainment of " knowledge " would not comply with the proviso : an urgent telegram on the previous day would be the least that would comply. Such a view would clearly, in our opinion, be wrong. We think that the proviso is satisfied if it is established that there was no failure to act as promptly as could fairly be expected in the circumstances.

We have mentioned these considerations not because they appear to have been overlooked by the learned Chief Justice in this case, but because of the argument, presented by counsel for the respondent, that it was incumbent on the plaintiff to state with some precision the date when he first acquired " knowledge " in order that the question whether he had acted " as soon as possible "

(1) (1938) 60 C.L.R. 336, at p. 361. (2) (1955) 91 C.L.R. 512, at p. 522.

might be considered. That question, he suggested, *could* not be considered unless and until the date of knowledge was established. We cannot accept this view. Having regard to the practical realities to which it must necessarily be applied, we think that the question posed by the proviso to s. 7 (3) must be approached as a single question. For the purposes of such cases as the present, the date when notice was in fact given is to be taken as the starting point, and the question may be stated by asking :—Was this notice given as promptly as could fairly be expected after the plaintiff in fact realized, or must necessarily have realized if he had adverted to the matter, that the vehicle which had injured him could not be traced ? The burden of proof is on the plaintiff, but he must, of course, be taken to have sustained that burden if, on the whole of the evidence, the reasonable inference is that that question should be answered in the affirmative.

In the present case the plaintiff did not give any direct evidence of his own belief or knowledge as to the possibility of identifying the vehicle at any stage, but it appears that both he and his mother believed that no claim for damages could be made unless the unknown vehicle or its driver could be found, and his mother (who had been acting for and with him in the making of inquiries) said : "After three months or so we gave up hope of finding it or him ". This evidence was admitted without objection. It is far from being inherently incredible, and it must be taken to mean that they did not " give up hope " until something like three months after the accident.

The time which actually elapsed between the accident and the giving of notice was only a little over nine weeks, and for nearly six weeks of this period the plaintiff was in hospital. It is true that, while the plaintiff was in hospital, his mother was making inquiries, the result of which she appears to have reported to him. But it would, in our opinion, be wrong to attribute " knowledge " that the unknown vehicle could not be traced to the plaintiff at any time before he came out of hospital. In the absence of evidence to the contrary it is far more probable that he would have a more or less open mind and intend to see what he could do for himself in the way of inquiry when he came out. We attach no importance to the fact that the mother consulted a solicitor at the beginning of December : that solicitor does not seem himself to have been aware of the requirements of s. 7 (3). The plaintiff came out of hospital on 18th December. Notice was given within a month of that date, and that month included a holiday period, for a substantial part of which it is usual for solicitors' offices to be closed. When

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the notice of 14th January was given, no suggestion that it was insufficient in any respect was made, and, so far as appears, the point was not taken until the defence was delivered in the action.

The strongest point against the plaintiff lies perhaps in the fact, which was emphasized by the Chief Justice, that it was inherently improbable from the beginning that the unknown vehicle would be discovered. It is easy, however, to exaggerate such an improbability, which may be said to exist in most cases of this type. In any case, what is material is not that fact itself but the effect which that fact might be expected to have upon the plaintiff's mind. He was not cross-examined on this point, and there is no evidence that he believed in the beginning that there was little more than a remote possibility of tracing the unknown vehicle. Even if there were such evidence, it would be only one factor in the situation. Having regard to the mother's evidence, and to all the circumstances of the case, we think the proper inference, on the whole, is that the plaintiff did not reach a belief that the vehicle could not be identified until very shortly before the giving of the notice, and that the case is not that of a person who has failed to act as promptly as might fairly be expected after he must be taken to have realized that the vehicle in question could not be identified.

The view that the plaintiff should succeed in the action makes it necessary to consider two other points raised on his behalf in this appeal.

In the first place, the plaintiff challenges the finding of the Chief Justice that he was guilty of contributory negligence in driving with his right arm projecting from the window of his vehicle. This was, in our opinion, a finding which was open upon the evidence. The degree of risk involved in such a practice must, of course, vary with circumstances, but it can by no means be said to be insubstantial when a driver is proceeding at night along a narrow road upon which there is considerable traffic to and fro. These were the circumstances as they were found to exist on this occasion, and we see no reason why we should disagree with this finding.

The other matter argued by counsel for the appellant was that the damages assessed were inadequate. The amount actually assessed was £697 16s. 0d., of which £247 16s. 0d. was "special" damage, and from this total his Honour, as we have said, deducted twenty-five per cent on account of the plaintiff's contributory negligence, arriving at £523 7s. 0d. as the sum to be awarded. The apportionment in respect of contributory negligence was not challenged. The plaintiff suffered some permanent disability in the shape of a limitation of movement at the elbow and a muscular

weakening of the hand, and, although he said that he did not suffer much pain, the injury was serious and kept him in hospital for some seven weeks. We should have been disposed to award a somewhat larger sum, but, having regard to the principles on which an award of damages can be set aside on the ground that it is excessive or inadequate, we think it is out of the question for us to interfere with his Honour's assessment in this case. The latest case on the subject in this Court is *Miller* v. *Jennings* (1).

The appeal should be allowed, and there should be judgment for the plaintiff for £523 7s. 0d.

Appeal allowed with costs. Discharge judgment of Supreme Court of Western Australia, and in lieu thereof adjudge that plaintiff recover from defendant £523 7*s.* 0*d. with costs of action.*

Solicitors for the appellant, *Maxwell, Lalor & Sharp.*
Solicitor for the respondent, *K. W. Hatfield.*

F. T. P. B.

(1) (1954) 92 C.L.R. 190.