[HIGH COURT OF AUSTRALIA.]

LAURIE . . . . . APPELLANT;
DEFENDANT,

AND

CARROLL AND OTHERS . . . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1957-1958. 1957, MELBOURNE, *Oct.* 30, 31; *Nov.* 1; 1958, *Mar.* 11. Dixon C.J., Williams and Webb JJ.

Private International Law—Jurisdiction—Action in personam—In Supreme Court of Victoria—Service of writ of summons—Defendant resident in England—Not connected with Victoria except that visiting State on business—Departure from State prior to issue of writ—Whether jurisdiction to order substituted service—Notice of motion by defendant to set aside ex parte order for substituted service—Claim for further relief going beyond objection that jurisdiction over him could not be obtained by substituted service—Whether waiver of right to object to jurisdiction—Rules of the Supreme Court of Victoria relating to Civil Proceedings 1957, *O. IX, r.* 2; *O. XI, rr.* 1-5; *O. XII, r.* 17.

Except in cases within the provisions of the *Service and Execution of Process Act* 1901-1953 (Cth.) or of the *Rules of the Supreme Court* 1957 (Vict.) O. XI, rr. 1-5, a writ of summons issued out of the Supreme Court of Victoria does not run outside the State.

In actions *in personam* the rules as to legal service of a writ define the limits of the court's jurisdiction.

If a defendant is within the jurisdiction at the time of issue of a writ for service within the jurisdiction but subsequently leaves, the foundation for an order for substituted service may exist. If, however, there could not be personal service of such writ at the time of issue, an order may not be made for substituted service.

Watt v. *Barnett* (1878) 3 Q.B.D. 183; 363 not followed, observations by Lord *Reading* C.J. in *Porter* v. *Freudenberg* (1915) 1 K.B. 857, at pp. 887, 888, not followed.

Order XII, r. 17 of the *Rules of the Supreme Court* 1957 (Vict.) provides that a defendant before appearing shall be at liberty without obtaining an

order to enter or entering a conditional appearance to serve notice of motion to set aside the service upon him of the writ or of notice of the writ or to discharge the order authorising such service. A defendant against whom an order for substituted service had been made *ex parte* without entering an appearance or conditional appearance served notice of motion to discharge the order and the service thereunder and a notice of motion on behalf of the plaintiff and affidavits in support thereof. He also sought the discharge of another order restraining him and a co-defendant from receiving and third parties from paying certain moneys and appointing a receiver of such moneys.

Held, that the defendant had not waived his right to object to the jurisdiction.

Decision of the Supreme Court of Victoria (*Herring* C.J.), reversed.

APPEAL from the Supreme Court of Victoria.

On 14th June 1957 Garnet Hannell Carroll, Catherine Stewart Carroll and John Garnet Hannell Carroll commenced an action in the Supreme Court of Victoria against James Thomas Laurie, James Laurie & Associates Ltd., J. C. Williamson Theatres Ltd. and the Education in Music and Dramatic Arts Society. So far as the defendant James Thomas Laurie was concerned, the plaintiffs claimed damages for breach of a contract variously alleged relating to the division of profits arising out of theatrical performances given by Dame Margot Fonteyn and associated artists in Australia in May and June 1957, an injunction to restrain him from receiving moneys payable to him for or in respect of such theatrical performances so given, the appointment of a receiver of such moneys and such further or other relief as might in the circumstances be thought proper.

On the same date on the *ex parte* application of the plaintiffs *Monahan* J. granted an interim injunction restraining J. C. Williamson Theatres Ltd. from paying to James Thomas Laurie or to James Laurie & Associates Ltd. any moneys for or in respect of such theatrical performances. By the same order his Honour authorised service of the writ out of the jurisdiction upon James Laurie & Associates Ltd. and service upon James Thomas Laurie with the writ of a notice of motion to continue the injunction, such service being service within the jurisdiction. The order further gave leave to serve the notice of motion by leaving it at the theatre in Melbourne, at which the performances were taking place, together with a copy of the writ, of the supporting affidavit and of the judge's order.

Due to a misapprehension as to the effect of the last part of the order made by *Monahan* J. James Thomas Laurie gave notice of

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motion for 20th June 1957 to set it aside. When the true nature of such part of the order was realised the motion to set aside was dropped. The notice of motion to set aside such order was filed by Messrs. Slater & Gordon, solicitors, of 422 Collins Street, Melbourne, Victoria, on behalf of James Thomas Laurie, who in an affidavit in support of the motion deposed that he had left Victoria on 13th June 1957, that he did not intend returning there, that he had not left Victoria for the purpose of evading service of process, his itinerary having been planned before his departure from London for Australia.

On 21st June 1957 *Herring* C.J. on the application *ex parte* of the plaintiffs ordered as follows: —(1) That the defendants James Thomas Laurie and James Laurie & Associates Ltd. their servants and agents and the servants and agents of either of them be and the same are hereby restrained until the hearing of the motion hereinafter referred to or until further order from receiving any moneys payable or hereafter to become payable to them or either of them for or in respect of or derived from the theatrical performances in Australia of Dame Margot Fonteyn and associate artists; (2) that the defendants J. C. Williamson Theatres Ltd. and Education in Music and Dramatic Arts Society and their respective servants and agents be and the same are hereby restrained until the hearing of the said motion hereinafter referred to or until further order from paying or accounting for or transmitting or transferring any moneys held by them or any of them in respect of or derived from the said theatrical performances to the defendant James Thomas Laurie and the defendant James Laurie & Associates Ltd. or either of them or to any other person or persons on behalf of the said defendants or either of them; (3) that Edward Ronald Smail of 31 Queen Street, Melbourne, be appointed interim receiver herein without security until the hearing of the said motion hereinafter referred to or until further order to receive all moneys payable to the defendants James Thomas Laurie and James Laurie & Associates Ltd. or either of them for or in respect of or derived from the said theatrical performances of the said Dame Margot Fonteyn and associate artists and that all questions as to passing the said receiver's accounts and payments thereunder and all further questions be reserved until further order; (4) that the aforesaid interim orders do continue until the hearing of the notice of motion returnable 1st July 1957 seeking interlocutory orders to continue the aforesaid interim orders until the hearing of this action or until further order; (5) that in lieu of personal service of the writ of summons herein and of the notice of motion on the defendant James Thomas Laurie service

may be effected thereof and of any other notices documents or proceedings herein including this order by leaving the said documents or true copies thereof with Messieurs Slater & Gordon, solicitors for the defendant James Thomas Laurie at their place of business situate at 422 Collins Street, Melbourne during office hours; (5) that service of the notice of motion hereinbefore referred to may be effected on James Laurie & Associates Ltd. by leaving a copy thereof and of any affidavits documents or other notices in connexion therewith in an envelope addressed to the secretary of James Laurie & Associates Ltd. with the said Messieurs Slater & Gordon.

By notice of motion dated 28th June 1957 the defendant James Thomas Laurie applied for the following relief:—That the order of *Herring* C.J. made on 21st June 1957 be discharged in so far as the same restrains the said James Thomas Laurie and James Laurie & Associates Ltd. their servants and agents from receiving moneys in respect of or derived from the theatrical performances in Australia of Dame Margot Fonteyn and associate artists and in so far as it restrains J. C. Williamson Theatres Ltd. and Education in Music and Dramatic Arts Society, their respective servants and agents from paying or accounting for or transmitting or transferring moneys to James Thomas Laurie and/or James Laurie & Associates Ltd. or any person or persons on his or its or their behalf and in so far as it appoints Edward Ronald Smail to receive moneys payable to the said James Thomas Laurie and James Laurie & Associates Ltd. for or in respect of or derived from the said theatrical performances and in so far as it orders that service of the writ of summons herein, a notice of motion returnable 1st July 1957 and any other notices, documents or proceedings therein including the said order, may be effected on the said James Thomas Laurie by leaving the said documents or true copies thereof with Messieurs Slater & Gordon, solicitors and that any service or purported service pursuant to the said order of any writ, notice of motion, other notice, document or proceedings or any order or any copy of the same, upon the said James Thomas Laurie be set aside on the following grounds:—(a) That the court had no jurisdiction; (b) that at all times material the said James Thomas Laurie was not within the jurisdiction of this Honourable Court and was domiciled and usually resident in England; (c) that *Herring* C.J. had no jurisdiction to make an order for service upon the said James Thomas Laurie in the form that he did; (d) that service (if any) by leaving documents at the office of Messrs. Slater & Gordon was not effective service; (e) that on the evidence on

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which such order was made there was no concluded contract between the plaintiffs or any of them and the defendant James Thomas Laurie and James Laurie & Associates Ltd. or either of them; (f) that on the evidence on which such order was made there was no enforceable trust constituted as alleged or otherwise; (g) that on the evidence in which such order was made there was no partnership constituted between the plaintiffs or any of them and the defendants James Thomas Laurie and James Laurie & Associates Ltd. or either of them; (h) that on the said evidence there was no cause of action disclosed against any person firm or corporation within the jurisdiction.

On 5th July 1957 the application was heard before *Herring* C.J. and was dismissed.

From this decision, by special leave, the defendant James Thomas Laurie appealed to the High Court.

E. S. J. Miller Q.C. (with him *E. E. Hewitt*), for the appellant. *Porter* v. *Freudenberg* (1) is not an authority for the course taken by *Herring* C.J. There the defendant had been carrying on business in London for a number of years by means of the agent who was using the premises in respect of which rent was claimed and an order had been made giving leave to issue a concurrent writ for service out of the jurisdiction. Here, if there was a contract between the plaintiff and the defendant it was made in England with a person resident and carrying on business there. The only writ was for service within the jurisdiction. There has never been a concurrent writ issued. There is no evidence that the defendant was within the jurisdiction on or since the day of the issue of the writ. The passage in *Porter* v. *Freudenberg* (2) is not applicable to the present facts. The cases referred to by Lord *Reading* C.J. for the proposition namely, *In re Urquhart*; *Ex parte Urquhart* (3) and *Watt* v. *Barnett* (4) were cases of a special nature. [He referred also to *Moubray* v. *Riordan* (5); *Jackman* v. *Broadbent* (6).] The *Rules of the Supreme Court* (*Vict.*) 1957, O. IX and O. XI constitute a code. As the defendant was not within the jurisdiction at the time the writ was issued and as there was no evidence that he was ever likely to return it was a proper case for service out of the jurisdiction if it could be shown that the action was founded upon a breach or alleged breach within the jurisdiction of any contract wherever made. There was no evidence of any completed contract between

(1) (1915) 1 K.B. 857.
(2) (1915) 1 K.B. 857, at p. 888.
(3) (1890) 24 Q.B.D. 723.
(4) (1878) 3 Q.B.D. 183; 363.
(5) (1889) 15 V.L.R. 354.
(6) (1931) S.A.S.R. 82.

the plaintiff and the defendant. If there was a contract it was with the other defendant James Laurie & Associates Ltd. There must be reasonable evidence of a contract. [He referred to *Johnson* v. *Taylor Bros. & Co. Ltd.* (1); *Hemelryck* v. *William Lyall Ship Building Co. Ltd.* (2).] The writ was not endorsed for service under the *Service and Execution of Process Act* 1901-1953 (Cth.).

L. Voumard Q.C. (with him *T. Rapke*), for the respondent. *Herring* C.J. found that on the evidence the defendant had left Victoria with the intention of evading service of the writ which had been issued for service within the jurisdiction. The principle set out in *Porter* v. *Freudenberg* (3) must extend to a case where a person has come into the jurisdiction for the purpose of transacting business there and the writ arises out of the business which he is transacting. Either the defendant James Laurie or James Laurie & Associates Ltd. was under an obligation to the plaintiff to contract as a trustee for him. The cause of action had a real commercial connexion with Victoria inasmuch as the profits in question were earned in Victoria. If personal service can be effected on a party within the jurisdiction, even though for a very limited time, then an action *in personam* can be brought against him no matter where he is domiciled or normally resides or where the cause of action arose. [He referred to *Dicey's Conflict of Laws*, 6th ed. (1949), pp. 171-173.] Whenever a person could have been served with the writ if at the time of service he were in Victoria then if the evidence shows that he left Victoria for the purpose of evading service, the court may order substituted service of a writ issued for service within the jurisdiction. [*He* referred to *In re Urquhart*; *Ex parte Urquhart* (4); *Porter* v. *Freudenberg* (5); *Watt* v. *Barnett* (6); *Wilding* v. *Bean* (7); *Jay* v. *Budd* (8); *Trent Cycle Co. (Ltd.)* v. *Beattie* (9); *Western Suburban & Notting Hill Permanent Benefit Building Society* v. *Rucklidge* (10); *Margrett* v. *Emanuel* (11).] It is not open to the appellant in these proceedings to contend that *Herring* C.J. was wrong in rejecting the appellant's affidavit. By reason of his notice of motion of 28th June 1957 in moving to set aside orders made against James Laurie & Associates Ltd. the appellant submitted to the jurisdiction of the Supreme Court. He was, of course,

(1) (1920) A.C. 144, at pp. 151, 152.
(2) (1921) 1 A.C. 698, at pp. 700, 701.
(3) (1915) 1 K.B. 857, at p. 888.
(4) (1890) 24 Q.B.D. 723, at p. 725.
(5) (1915) 1 K.B., at pp. 887, 888.
(6) (1878) 3 Q.B.D. 183, at p. 186.
(7) (1891) 1 Q.B. 100, at p. 102.
(8) (1898) 1 Q.B. 12, at pp. 15, 18, 19.
(9) (1899) 15 T.L.R. 176.
(10) (1905) 2 Ch. 472.
(11) (1890) 6 T.L.R. 453.

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entitled to apply to set aside the orders so far as they affected him personally. [He referred to *Fry* v. *Moore* (1); *Boyle* v. *Sacker* (2).]

E. S. J. Miller Q.C. in reply. If there could not be personal service at the time of issue of the writ there may not be substituted service. [He referred to *Wilding* v. *Bean* (3); *Fry* v. *Moore* (4); *Field* v. *Bennett* (5); *Hillyard* v. *Smyth* (6); *Jurisdiction of Inferior Courts where the Defendant is Resident outside the State* by *G. L. Wright* (7); *J. E. Lindley & Co.* v. *Pratt* (8); *Ex parte Blain*; *In re Sawers* (9); *Permanent Building & Investment Association* v. *Hudson* (10); *Sirdar Gurdyal Singh* v. *Rajah of Faridkote* (11); *City Finance Co. Ltd.* v. *Matthew Harvey & Co. Ltd.* (12).]

Cur. adv. vult.

1958, Mar. 11.

THE COURT delivered the following written judgment:—

This is an appeal by special leave from an order of the Supreme Court of Victoria made by *Herring* C.J. on 5th July 1957. His Honour pronounced two orders in the action upon that date but the order appealed from is that which dismissed with costs an application by the appellant, who is a defendant in the action, seeking the discharge of certain parts of an order dated 21st June 1957 which his Honour had made in chambers. The order of 21st June 1957 was made *ex parte* upon the application of the plaintiffs, who are the respondents in this appeal. Among other things for which the order provided it was ordered that in lieu of personal service upon the defendant-appellant of the writ of summons in the action and of a notice of motion, service of the writ of summons and of any other notices documents or proceedings including the order itself might be effected by leaving the said documents or true copies thereof with a named firm of solicitors for the defendant-appellant at their place of business in Melbourne during office hours. The notice of appeal, which is by no means as specific as it might be, appears to be chiefly if not entirely directed to this provision of the order of 21st June 1957 which the order of 5th July 1957 now appealed against refused to set aside. At all events the question in the appeal is whether an order for substituted service upon the defendant-appellant can be sustained. He maintains that it cannot

(1) (1889) 23 Q.B.D. 395, at p. 397.
(2) (1888) 39 Ch. D. 249.
(3) (1891) 1 Q.B., at p. 102.
(4) (1889) 23 Q.B.D. 395.
(5) (1886) 3 T.L.R. 239; 56 L.J. Q.B. 89.
(6) (1887) 4 T.L.R. 7.
(7) (1930) 4 A.L.J. 113.
(8) (1911) V.L.R. 444.
(9) (1879) 12 Ch. D. 522, at p. 528.
(10) (1896) 7 Q.L.J. 23, at p. 24.
(11) (1894) A.C. 670, at pp. 683, 684.
(12) (1915) 21 C.L.R. 55, at p. 64.

be supported because he does not belong in any way to the State of Victoria, that is to say he is not connected with the State by birth, domicile or residence, if these things matter, or in any other way, and he was not within the State when the writ (one for service within the jurisdiction) was issued nor at any time afterwards. The plaintiffs-respondents support the order on the ground that he had been within the State of Victoria for two or three days in connexion with a transaction portion of the profits whereof arose in Victoria and had left the State in anticipation of the issue of the writ and to avoid service. For the plaintiffs-respondents it is also said that the defendant-appellant in his application to the Chief Justice of Victoria to set aside his Honour's order of 21st June 1957 went further in the relief sought than could be warranted by an objection that jurisdiction over him could not be obtained by substituted service and that accordingly the order for such service and substituted service under it should be set aside. By doing this, so the plaintiffs contend, the defendant-appellant waived the objection to service of the writ and to the jurisdiction of the Victorian court.

The case cannot properly be understood without some statement of the events culminating in the issue of the writ, but the statement must necessarily be provisional; for these interlocutory proceedings did not form the occasion for going into the merits or, for that matter, for discovering what facts, if any, were in controversy. The narrative will be made simpler by calling the defendant-appellant by his name, Laurie, and the plaintiffs-respondents by their name, Carroll. The latter are husband, wife and son who carry on business as theatrical entrepreneurs in partnership under the father's name, Garnett H. Carroll. Laurie, who was born in New South Wales, has lived for some years in London where he has become a theatrical agent. If it be material, his work was done for a company called Concerts Management (London) Ltd. which he seems to have come to control and in August 1955 he had formed another company called James Laurie & Associates Ltd., which company was made a defendant in the action. In July 1956 Garnett Carroll visited London, and there Laurie saw him for the purpose of putting certain proposals before him which Carroll did not think practicable. But the upshot was that Carroll suggested that Laurie should attempt to obtain the consent of Dame Margot Fonteyn to come to Australia with some supporting dancers and there perform with a ballet company which Carroll would arrange to form for a special season. Naturally there were many matters incidental or consequential upon such a proposal and some of these were discussed. Before

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Carroll left London Laurie had secured the interest of Dame Margot Fonteyn in the proposal and a long not to say protracted correspondence between him and Carroll ensued. The letters went over questions of expense and possible profit, they reported negotiations with Dame Margot and they discussed what might be done in Australia not only in relation to performance but also in relation to the ballet company. Needless to say the terms as between Laurie and Carroll did not escape mention. But all seemed indefinite and on the same date as it chanced, viz. 22nd October 1956, Laurie and Carroll each wrote a letter suggesting that the proposal should be brought to a head or at least to definition. In the meantime Laurie had written saying that J. C. Williamson Theatres Ltd. had approached him with a proposal that Laurie should secure Dame Margot Fonteyn for them or perhaps for them in conjunction with Carroll, which is not clear. It was not however until 28th November 1956 that Laurie advanced the matter by raising certain definite points in a letter to Carroll. In this letter Laurie said in effect that if in Carroll's answer he could not give Laurie definite facts upon which he could base a contract he would have to transfer the negotiations to the J. C. Williamson company. "Needless to say" he wrote, "I would prefer to do business with you because this is where the negotiations began, but we cannot carry on in this state of indecision any longer, and it is useless to think that I can contract an artist for a venture that is still so vague at your end." This letter crossed with one from Carroll in which he referred to the matter but only for the purpose of saying he would deal with it in a separate letter. That letter was written on 12th December 1956 and it put forward more detailed views. The letter confirmed a telegram which Carroll had sent to Laurie on the same day stating that the Elizabethan Theatre Trust were willing to join him with respect to Dame Margot Fonteyn and asking Laurie to endeavour to hold the position. On the following day Laurie sent a telegram to Carroll stating terms involving Carroll which he had offered Dame Margot Fonteyn. Laurie wrote clarifying his cable and the clarification showed that J. C. Williamson's were still concerned, but in any case from a letter of the same date from Carroll crossing his it would seem that Carroll supposed that this would or might be so. For present purposes it is unnecessary to say much concerning the sequel. It appears that about 31st December 1956 J. C. Williamson's company announced that Dame Margot Fonteyn would perform in Australia and that Carroll telegraphed and wrote to Laurie seeking information. His letter seemed to assume that he in some way would participate. On

4th January 1957 Laurie replied giving some account of the arrangement with J. C. Williamson's both in relation to Dame Margot Fonteyn and the other performers and in relation to himself or his company, James Laurie & Associates Ltd. The letter concluded by giving an estimate of the net amount which that company might receive and saying, " I shall be happy to associate with you but how much do you suggest is a fair basis for sharing ? I should be glad if you would cable your proposal." To this there was no immediate reply from Carroll. On 19th February 1957 Laurie wrote complaining of delay then and earlier, but for which, he said in effect, Carroll might have had the contract with Dame Margot Fonteyn and he, Laurie, would not have been forced to negotiate with the J. C. Williamson company, negotiations which he had been able to conclude with no help from Carroll. " I can only assume from this " he wrote, " that you do not expect to be a partner to this particular tour and frankly there is little point in sharing it with you now that the work is done. You had suggested offering your organization's services for management in Australia, but that will not be necessary as I shall be there myself." To this Carroll replied on 4th March 1957 stating in substance that the original position was that Laurie was to be his agent in the matter and since then they had agreed definitely that they would share profit and loss equally and he put forward no other terms than those and would agree to no variation of the arrangement. Laurie's reply was that he could not agree with what Carroll said, that there was no point in discussing it from a distance and that he would see Carroll in Australia.

Dame Margot Fonteyn commenced a season in Sydney on 25th May 1957 under the direction of J. C. Williamson Theatres Ltd. in conjunction with James Laurie & Associates Ltd. The season in Sydney ended on 8th June 1957 and a season opened on 11th June 1957 in Melbourne where it closed on 22nd June 1957. This was done under a formal contract dated 17th January 1957 between J. C. Williamson Theatres Ltd. and James Laurie & Associates Ltd. The J. C. Williamson company undertook to present in their theatres in the two cities the performances of the artists and undertook the various incidental obligations while the Laurie company engaged to secure the exclusive services of the artists, to pay their fees and the cost of transport between London and Melbourne. The agreement of course contained a large number of terms including the important provisions concerning the division of the proceeds. These dealt *inter alia* with the checking of box office receipts by representatives of the Laurie company and with

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the place of payment. A particular clause provided that all moneys payable by the J. C. Williamson company to James Laurie & Associates Ltd. were payable in Australian currency and in the Commonwealth of Australia. Laurie came to Australia and on 6th May 1957 Carroll and he met by arrangement at the theatre in Sydney. The meeting, however, produced nothing new, nor did another meeting on 14th May. On 31st May 1957 Carroll suing as the sole plaintiff issued a writ of summons out of the Supreme Court of New South Wales against Laurie, whose address was stated as of the hotel at which he stayed in Sydney. The writ was endorsed simply with a money claim of £30,000. On 7th June 1957 Carroll swore a long affidavit setting out his version of the negotiations with Laurie but not the correspondence. On this affidavit an application was made under the *Arrest on Mesne Process Act* 1902 (*N.S.W.*) to a judge of the Supreme Court of New South Wales for leave to issue a *ca. re.* to prevent Laurie leaving that jurisdiction. The deponent submitted in his affidavit that the only inference that could be drawn was that Laurie had in or about July 1956 entered into a contract to become Carroll's agent in the enterprise of engaging Dame Margot Fonteyn and associate artists and procuring for Carroll a contract with them to come and appear in Australia and that in breach of that contract he had caused them to contract on terms which, put shortly, excluded Carroll. The reason for seeking a *capias* was stated in a paragraph which said that Laurie had his home and carried on business in England and had visited Australia especially for the tour of Dame Margot Fonteyn and would return at its conclusion; he would go to Melbourne at the end of the Sydney performances and so leave New South Wales. An *ex parte* application for a *ca. re.* was made on 7th June but was refused. It was renewed on notice on the following day, when Laurie appeared by counsel, and it was again refused. An attempt to obtain leave to issue a concurrent writ endorsed under the *Service and Execution of Process Act* for service in Victoria also failed, apparently because at that time the defendant was not in Victoria and was in Sydney. In any event he would return to Sydney before leaving for England. On 10th June 1957 the action in the Supreme Court of New South Wales was discontinued. The season of Dame Margot Fonteyn opened in Melbourne on Tuesday, 11th June 1957, and Laurie came to Melbourne on or before that date. In response to a request from Carroll's Melbourne solicitor he telephoned to the latter in the late afternoon of that date. There was some discussion of the possibility of compromising the matter ending in a statement that Carroll wished to have a conference without prejudice with

Laurie in the presence of Carroll's advisers at some time on the following day, Wednesday, and unless Laurie communicated with him before 9.30 in the morning a writ would be issued. On Thursday, 13th June 1957, Laurie left Melbourne by air for Sydney. He left Sydney on 20th June for New Zealand whence he returned to London through the United States.

In the meantime on 14th June 1957 the writ in this action was issued out of the Supreme Court of Victoria. On the same day, upon an *ex parte* application to a judge in chambers, the plaintiffs obtained an interim injunction restraining J. C. Williamson Theatres Ltd., which was joined as a defendant, from paying to Laurie or to James Laurie & Associates Ltd. any moneys for or in respect of the theatrical performances in question. The same order authorised service of the writ out of the jurisdiction upon Laurie's company and service upon him with the writ of a notice of motion to continue the injunction, that is of course service within the jurisdiction upon Laurie. The order further gave leave to serve the notice of motion by leaving it at the theatre in Melbourne together with a copy of the writ, a copy of the supporting affidavit and of the judge's order. Laurie's advisers misread this as a grant of leave to serve the writ by substituted service and gave notice of motion for 20th June 1957 to set it aside. Explanations led to the motion, which was mentioned to *Herring* C.J., being dropped. But it meant, of course, that the notice of motion formally gave the name and address of solicitors in Melbourne acting for Laurie. It also meant that Laurie made an affidavit stating among other things his movements and intended movements including the fact that he had left Victoria on 13th June 1957 and would not return. This affidavit contained a statement that he had not left Victoria for the purpose of evading service and a statement that his itinerary had been planned before his departure from London.

On 21st June 1957 *Herring* C.J. made as an *ex parte* order in chambers the order containing the leave to serve the writ by substituted service within the jurisdiction. Doubtless taking advantage of the naming of his solicitors in Melbourne in Laurie's notice of motion already mentioned to set aside the order misread as one for substituted service of the writ, the Chief Justice's order of 21st June 1957 directed that substituted service of the writ and other documents should be upon them. Among the affidavits the reading of which the order recited, is that of Laurie already mentioned stating his movements. It is to be distinguished from a later affidavit which was subsequently excluded because Laurie was not available for cross-examination. Another affidavit recited in

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the order was sworn by an acquaintance of Laurie. According to this deponent Laurie had borrowed money from him in London which he had not repaid. On Thursday, 13th June 1957, he saw Laurie at his hotel in Melbourne and requested him to come outside. When he did so, Laurie told the deponent that he was sorry that he was in a hurry: there was a man trying to serve a writ upon him. On the deponent saying that he had heard of that, Laurie is said to have rejoined: "They tossed it out in New South Wales but my solicitor has advised me to get out of Victoria and back to New South Wales as quickly as possible; I am going today." With apparent inconsistency Laurie is said to have told the deponent that he would be back on Thursday which must mean 20th June, and would see him then.

The order made by *Herring* C.J. on 21st June 1957 deals with other matters besides the service of the writ but at this place these may be passed over. For a point has been reached at which it is better to turn to the question whether it was competent and proper to make the order for substituted service of the writ of summons. Primarily the question is one of jurisdiction. The action is *in personam* and it is transitory; and in such an action the jurisdiction of the Supreme Court of Victoria depends not in the least on subject matter but upon the amenability of the defendant to the writ expressing the Sovereign's command in right of the State of Victoria. The common law doctrine is that the writ does not run beyond the limits of the State. By the federal *Service and Execution of Process Act* 1901-1953, however, it may, if endorsed under that statute, be served elsewhere within the Commonwealth and its Territories, the conditions in which this may be done and the consequences being defined by the provisions of the Act. Further, by rules made under s. 139 of the *Supreme Court Act* 1928 replacing, but based upon, the fifth schedule of that Act and now contained in O. XI, rr. 1-5 of the *Rules of the Supreme Court* 1957, it is provided that in cases answering any of the descriptions in r. 1, service of the writ or of notice of the writ in any place outside Victoria may be allowed by the court or a judge. It may be that the cause of action which the plaintiffs seek to set up will fall neither within any of the paragraphs of r. 1 of O. XI nor within any of those of s. 11 of the *Service and Execution of Process Act* 1901-1953. If so that may explain the importance apparently attached by the parties to this appeal. For except for these extensions of the principle of the common law, it remains true that a writ issued out of the Supreme Court of Victoria does not run outside that State. And in actions *in personam* this must determine the jurisdiction of the

court over the defendant. "The root principle of the English law about jurisdiction is that the judges stand in the place of the Sovereign in whose name they administer justice, and that therefore whoever is served with the King's writ and can be compelled consequently to submit to the decree made, is a person over whom the Courts have jurisdiction", per Viscount *Haldane*: *John Russell & Co. Ltd.* v. *Cayzer, Irvine & Co. Ltd.* (1). *Holmes* J. regarded the principle as based upon the capacity to exert actual power. "The foundation of the jurisdiction is physical power, although in civilized times it is not necessary to maintain that power throughout proceedings properly begun, and although submission to the jurisdiction by appearance may take the place of service upon the person. . . . No doubt there may be some extension of the means of acquiring jurisdiction beyond service or appearance but the foundation should be borne in mind": *McDonald* v. *Mabee* (2). It must be remembered that the rule of the common law was *non potest quis sine brevi agere* and that the original writ thus necessitated issued out of Chancery under the Great Seal in the name of the King. It was directed to the sheriff and, if a writ of summons, it required him to command the defendant to satisfy the plaintiff's claim and in default of his doing so to summon him to appear before the Justices of, for example, the Common Pleas at Westminster to show why he had not done so. It is in this that the source is to be found of our conception of the foundation of the jurisdiction of our own courts in actions *in personam* and to that source both Viscount *Haldane* and *Holmes* J. refer. The defendant must be amenable or answerable to the command of the writ. His amenability depended and still primarily depends upon nothing but presence within the jurisdiction. "The service of the writ, or something equivalent thereto, is absolutely essential as the foundation of the court's jurisdiction. Where a writ cannot legally be served upon a defendant the court can exercise no jurisdiction over him. In an action *in personam* the converse of this statement holds good, and wherever a defendant can be legally served with a writ, there the court, on service being effected has jurisdiction to entertain an action against him. Hence, in an action *in personam*, the rules as to the legal service of a writ define the limits of the court's jurisdiction. Now, a defendant who is in England can always, on the plaintiff's taking proper steps, be legally served with a writ. The service should be personal, but if personal service cannot be effected, the court may allow

(1) (1916) 2 A.C. 298, at p. 302.

(2) (1916) 243 U.S. 90, at p. 91 [61 Law. Ed. 608, at p. 609].

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substituted or other service. In other words, the court has jurisdiction to entertain an action *in personam* against any defendant who is in England at the time for the service of the writ": *Dicey—Conflict of Laws*, 6th ed. (1949), p. 172. It will be noticed that in this passage presence within the jurisdiction at the time of service is regarded as essential. The statutory qualification or exception as to service out of the jurisdiction was of course not under the author's consideration in the foregoing passage. But what is of great importance for the purposes of the case in hand is that to insist on the presence of the defendant within the jurisdiction at the time of service is to exclude the possibility of substituted service when he is no longer within the jurisdiction. In some measure the view that the defendant must be within the jurisdiction at the time of service may depend upon what is conceived to amount to the exercise of the sovereign authority, the issue of the command or the communication of the command. Of this two views have been expressed. "The mere issue of a writ", wrote *F. T. Piggott* in his *Service Out of the Jurisdiction* (1892) at page lvii, "is not of itself an act of jurisdiction: it is but an inchoate command until it is served on the person to whom it is addressed. The service perfects the exercise of jurisdiction. And therefore the mere issue of an ordinary eight-day writ directed to a person abroad, is not of itself an exercise of jurisdiction: and as it cannot be served abroad it is inoperative. It may be however served should the person afterwards come within the jurisdiction. And moreover the issue of this writ can never be perfected by service abroad. Its issue therefore does not even pave the way for the exercise of extra-territorial jurisdiction." The other view is taken by Dr. *Schmitthoff* in his book *The English Conflict of Laws*, 3rd ed. (1954), p. 428: "The decisive moment when the defendant must be within the jurisdiction is that of the *issue* and not of the *service* of the writ. If after the issue of the writ the defendant has left the jurisdiction (even though not for the purpose of evading service) so that personal service cannot be effected, an order for *substituted service* . . . may be granted." In *Jay* v. *Budd* (1), a case cited by Dr. *Schmitthoff* for his proposition, the defendant had been irregularly served with the writ before he sailed from England, irregularly because the original writ was not produced at his request when he was given a copy, and an order for substituted service was upheld. *Collins* L.J. said (2): "I agree that, if the writ had not been issued until after the defendant had left this country, the only way in which the defendant could have been properly served would have been by proceeding

(1) (1897) 77 L.T. 335; (1898) 1 Q.B. 12.

under the practice as to writs for service out of the jurisdiction. In *Wilding* v. *Bean* (1) the decision was that, where the defendant is out of the jurisdiction when the writ issues, the plaintiff cannot have the benefit of the provision for substituted service with regard to a writ which is not for service out of the jurisdiction; he can only get that benefit by proceeding under the rules providing for the issue of writs for service out of the jurisdiction" (2). The decision is based upon the fact that the writ had been issued, a fact which *Collins* L.J. inferred; and, although no particular point is made of it, the further fact referred to by *Collins* L.J. that the command of the writ had been communicated to the defendant, though not by formal or regular service of the writ. Lord *Halsbury*, who with *Collins* L.J. formed the majority, emphasised the latter fact but placed his decision on general grounds going to the justice of ordering substituted service in the particular circumstances of the case. *Rigby* L.J. dissented. In *Fry* v. *Moore* (3) an eight-day writ of summons, that is to say a writ for service within the jurisdiction, was issued against a defendant who was not within the jurisdiction. An order for substituted service within the jurisdiction was obtained. It was held in the Court of Appeal that this was bad and the order and the proceedings under it were, but for waiver on the part of the defendant, liable to be set aside. This decision was placed specifically upon the ground that there cannot be substituted service of a writ which could not at the time it was issued be served personally. Were it otherwise the strict conditions regulating and limiting service out of the jurisdiction upon defendants abroad would be ineffective; for they could be avoided by obtaining an order for substituted service within the jurisdiction. Upon this consideration *Lindley* L.J. relied: see (4). The same thing had been decided in *Field* v. *Bennett* (5) and in *Hillyard* v. *Smyth* (6). There was however a reported decision of the Court of Appeal which seems to ignore not only the consideration mentioned but the principle that if a writ could not be served personally at the time when it was issued there cannot be substituted service. The case was *Watt* v. *Barnett* (7). The facts must be collected from the various reports but briefly they were that a writ for service within the jurisdiction was issued against five defendants in an action of tort, the alleged tort being committed apparently within the jurisdiction. Of the five defendants one had taken up his permanent residence in France

(1) (1891) 1 Q.B. 100.
(2) (1898) 1 Q.B., at p. 19.
(3) (1889) 23 Q.B.D. 395.
(4) (1889) 23 Q.B.D., at p. 398.
(5) (1886) 56 L.J. Q.B. 89; 3 T.L.R. 239.
(6) (1887) 4 T.L.R. 7.
(7) (1878) 3 Q.B.D. 183; 363; (1878) 38 L.T. 63; 903; (1878) 26 W.R. 400; 745; (1878) 47 L.J. Q.B. 329.

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before the cause of action arose. At the time of the issue of the writ he was abroad and remained abroad. The writ was issued on 1st September 1876 and it would seem that at that date he had resided in France from at latest the beginning of 1875 (see (1)) where it is said that he swore he had been permanently resident in France for the last three years and 14th April 1875 is mentioned as a date at which he was residing there. An order was made for substituted service of the writ upon the absent defendant by serving it upon solicitors in England acting for the defendants or at all events for that defendant in connexion with another action by a different plaintiff. The solicitors neither accepted the documents nor informed the defendant, but they protested that in obtaining the order the plaintiff had not disclosed that the defendant was abroad. Another order was accordingly obtained by the plaintiffs who abandoned the old one. It seems certain that in applying for it they disclosed that the defendant was abroad. The defendant was not informed of the proceedings and was unaware of them until he saw a report of the trial at which the other defendants appeared or some of them. Interlocutory judgment had been entered against him in default of appearance. The question before the Divisional Court and the Court of Appeal was whether he was entitled unconditionally to have the judgment set aside. Both Courts held that he was not so entitled. The judgment was however set aside on terms so that he might come in and defend on the merits. The decision was that the order for substituted service was regularly made. It is to be noted however that *Cotton* L.J. said that the court need not consider whether in the circumstances it could have been discharged which seems to mean that on the facts that came to light it might have been set aside. There is nothing in any of the reports to suggest that when the writ was issued the defendant happened to be visiting England or that at any time afterwards the defendant visited England and came within the jurisdiction for however short a time. He had not left the jurisdiction to avoid service: no question of that sort arose. Order IX, r. 2 of the Rules of 1875 (which are to be found in vol. 10 of the *L.R. Statutes*, at pp. 778 et seqq.) was in the same form as at present, although Order IX, r. 1 was very different, if that matters. The decision may mean no more than that on the materials upon which the order for substituted service was made it was regular and that was enough, but that is a somewhat difficult view. Unless however that is the explanation the decision must mean that substituted service within the jurisdiction of an eight-day writ may be ordered

(1) (1878) 38 L.T., at p. 83, col. 2.

upon a defendant who resided beyond the jurisdiction at the issue of the writ and has not come within the jurisdiction then or thereafter. It seems impossible to reconcile such a decision with principle or with subsequent authority. The judgment of *Mellor* J. as reported in the *Law Reports* contains a statement that the object of r. 2 of O. IX was to obviate the difficulties to which a plaintiff might be exposed by reason of the defendant's going abroad and keeping abroad and its being impossible to effect personal service and to prevent the plaintiff's right being entirely defeated by reason of such difficulties. The passage, which does not accord with the other reports of the judgment, seems sometimes to have been read as if it referred to going abroad to evade or prevent service. But it is difficult to believe that that was its intended meaning. For the defendant did not go abroad for any such purpose. He resided abroad. *Jessel* M.R. expressed his concurrence in the opinion of *Mellor* J. but according to what version of his judgment one cannot be sure. It perhaps should be noted that reliance was placed by counsel on the principles governing substituted service in Chancery as formulated in *Hope* v. *Hope* (1), principles which would perhaps support the decision. But it is now clear that these principles have been superseded: *In re Busfield; Whaley* v. *Busfield* (2); *In re Eager; Eager* v. *Johnstone* (3).

The proposition that where a writ may not be served on a party personally, it cannot be effected indirectly by substituted service was affirmed again in *Wilding* v. *Bean* (4). There the defendant had left the jurisdiction eight days before the issue of the writ in order to reside abroad. Clearly enough in these circumstances an order for substituted service could not be supported, but in so deciding both Lord *Esher* M.R. and *Lopes* L.J. remarked that the case might have been otherwise if it had been shown that the defendant had gone abroad in order to evade service. That view was applied afterwards in a case where the writ having been issued during the presence in England of the defendant, a domiciled Irishman visiting London frequently, it could not be served because he successfully evaded service and returned to Ireland: *Trent Cycle Co. (Ltd.)* v. *Beattie* (5). When a defendant against whom a writ has been issued has left England to avoid service the authority to order substituted service has been found in O. IX, r. 2. There has been no intention to depart from the settled principle that there cannot be an order for substituted service upon a defendant upon whom

(1) (1853) 19 Beav. 237, at pp. 247, 248 [52 E.R. 340, at pp. 344, 345]; (1854) 4 DeG. M. & G. 328, at pp. 341, 342 [43 E.R. 534, at p. 539].
(2) (1886) 32 Ch. D. 123.
(3) (1882) 22 Ch. D. 86, at p. 89.
(4) (1891) 1 Q.B. 100.
(5) (1879) 15 T.L.R. 176.

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personal service could not be validly effected. It appears simply to have been assumed that it was enough that the defendant had been liable to personal service of the writ and had evaded it by going abroad. The assumption is not consistent with the theory that the issue of the writ is merely an inchoate exercise of jurisdiction completed by service. For upon that theory the defendant would be beyond personal service before the inchoate exercise of the jurisdiction had been completed. If jurisdiction had not been exercised over him by means of an ordinary writ while he was still amenable to the jurisdiction logic would seem to demand that resort must be had to the rules governing the exterritorial exercise of jurisdiction by service (or notice) out of the jurisdiction. But the rival theory that the critical time is the issue of the writ means that the issue of the writ is the exercise of jurisdiction over the defendant and accordingly it is enough that he is then present within the jurisdiction. At that moment he may be regarded as falling under the command of the writ as an exercise of jurisdiction. The obligation of its command falls upon him in virtue of his presence within the jurisdiction and his consequent amenability to the writ. Service remains necessary as a condition of his incurring the consequences of default and in that way as a condition perfecting the duty of obedience to the command of the writ. If a defendant knowing of the issue of the writ goes abroad before personal service or, although he does not positively know of the fact of the issue of the writ, goes abroad to evade service, doubtless he may be treated as under notice of the obligation of its command. But without deserting the traditional principle which has governed the jurisdiction of our courts in actions *in personam* and finding a new basis of jurisdiction it is impossible to go back to a point when no writ had been issued, no exercise of jurisdiction had taken place, and to say that because there had been a time when the defendant was amenable to the jurisdiction so that it might then have been exercised over him and because he had quitted the jurisdiction in order that he might cease to be amenable to it, he none the less remained subject to the jurisdiction. For it means that, jurisdiction being based on personal presence it must have ceased when he left, yet none the less he is subject to the jurisdiction still. It must mean this if he is to be served with the writ, not as an extra-territorial exercise of jurisdiction by means of a writ for service out of the jurisdiction, but by substituted service within the jurisdiction of an eight-day writ.

There is however a *dictum* the authority of which must carry the greatest weight and it seems to countenance the view that an order may be made for substituted service of an ordinary writ when even

before issue of the writ the defendant leaves the jurisdiction to avoid service. In *Porter* v. *Freudenberg* (1) in the judgment delivered by Lord *Reading* C.J. on behalf of himself and six other members of the Court of Appeal the following passage occurs: "The general rule is that an order for substituted service of writ of summons within the jurisdiction cannot be made in any case in which, at the time of the issue of the writ, there could not be *at law* a good personal service of the writ because the defendant is not within the jurisdiction. 'If the writ had not been issued until the defendant had left the country, the only way in which the defendant could have been properly served would have been by proceeding under the practice as to writs for service out of the jurisdiction': per *Collins* L.J. in *Jay* v. *Budd* (2). 'There cannot be a good substituted service where personal service would not be legally possible': per Lord *Esher* M.R. and *Lopes* L.J. in *Worcester City and County Banking Co.* v. *Firbank* (3). 'There cannot be substituted service on a person on whom personal service could not be validly effected': per *Davey* L.J. (4). See also *Fry* v. *Moore* (5); *In re Urquhart* (6); *Wilding* v. *Bean* (7), especially per Lord *Esher* M.R. (8). The rule was also acted upon by *Farwell* J. in *Western, &c., Building Society* v. *Rucklidge* (9). This general rule is *not* applied where the Court is satisfied that the defendant went outside the jurisdiction *before* the issue of the writ *in order to evade the service of the writ within it:* see *In re Urquhart* (6); *Watt* v. *Barnett* (10). If the defendant went out of the jurisdiction *after the issue of the writ,* although not for the purpose of evading service, substituted service may be allowed *if the Court is satisfied that the issue of the writ came to his knowledge before he went* outside the jurisdiction and special circumstances show that such substituted service would be just within O. IX, r. 2: see *Jay* v. *Budd* (11), per Lord *Halsbury* L.C. and *Collins* L.J., *Rigby* L.J. dissenting" (12). In the present case *Herring* C.J. acted on the *dictum* that the general rule is not applied where the court is satisfied that the defendant went outside the jurisdiction before the issue of the writ in order to evade the service of the writ within the jurisdiction. The first matter to notice with reference to this statement of Lord *Reading* is that it is supported only by the citation of *In re Urquhart* (6) and *Watt* v. *Barnett* (10).

(1) (1915) 1 K.B. 857.
(2) (1898) 1 Q.B., at p. 19.
(3) (1894) 1 Q.B., at pp. 788, 790.
(4) (1894) 1 Q.B., at p. 792.
(5) (1889) 23 Q.B.D. 395.
(6) (1890) 24 Q.B.D. 723.
(7) (1891) 1 Q.B. 100.
(8) (1891) 1 Q.B., at foot of p. 101.
(9) Unreported, but see the report of that case before *Swinfen Eady* J. (1905) 2 Ch. 472.
(10) (1878) 3 Q.B.D. 183; 363.
(11) (1898) 1 Q.B. 12.
(12) (1915) 1 K.B., at pp. 887, 888.

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Now this judgment has already discussed *Watt* v. *Barnett* (1) somewhat fully. The discussion, it may be hoped, shows that the decision has no reference to going out of the jurisdiction to evade service and that it would be a mistake to interpret the judgment of *Mellor* J. as based on such a test. It is indeed a decision which on the facts of the case could not now be treated as representing the law if ever it could be supported. For the decision uses O. IX, r. 2, as a means of extending the jurisdiction exterritorially, a function performed exclusively by O. XI now, if not always. *In re Urquhart* (2) is not a decision upon the service of writs in actions *in personam* but upon the service or giving of a bankruptcy notice and the service of a petition in bankruptcy. To say this is to say that the case takes us into an entirely different realm. Neither the rules nor any of the principles with which we are concerned in truth apply. In his judgment in *In re Urquhart* (3) Lord *Esher* M.R. mentioned *Fry* v. *Moore* (4) but only to say that it had no application because that case was one in which leave to issue a writ for service out of the jurisdiction was necessary, an observation that must logically imply that *In re Urquhart* (2) belongs to a different field. *Lopes* L.J. cited a passage from the judgment of *Mellor* J. in *Watt* v. *Barnett* (1) as reported in the *Law Reports* and said that it had been over and over again approved (5). In this citation lies the only true connexion of *In re Urquhart* (2) with the subject in hand. But already enough has been said about *Watt* v. *Barnett* (1) and the judgment of *Mellor* J., or so it may be hoped, to show on the facts of the case how difficult it now is to accept either the decision itself or the reasons of *Mellor* J. so reported, to accept them that is as providing any sound authority for the condition of the law at all events as it now stands. It may therefore be fairly said that the two cases cited by Lord *Reading* L.C.J. in *Porter* v. *Freudenberg* (6), as authority for the *dictum* under discussion do not in truth provide any support for it. The *dictum* really seems to derive from the observation made by Lord *Esher* M.R. and by *Lopes* L.J. in *Wilding* v. *Bean* (7) already referred to as to the difference which evading service might have made in that case.

The next matter to be noticed in connexion with the *dictum* of Lord *Reading* is that it is compendiously expressed and could hardly have been intended as a complete statement of the conditions in which the departure of a prospective defendant from the jurisdiction in order to avoid service of the expected, but as yet unissued,

(1) (1878) 3 Q.B.D. 183; 363.
(2) (1890) 24 Q.B.D. 723.
(3) (1890) 24 Q.B.D., at pp. 725, 726.
(4) (1889) 23 Q.B.D. 395.
(5) (1890) 24 Q.B.D., at p. 726.
(6) (1915) 1 K.B. 875, at pp. 887, 888.
(7) (1891) 1 Q.B. 100.

eight-day writ would justify an order for substituted service of the writ once it was issued. There is for instance nothing said of the connexion which the prospective defendant must have with the jurisdiction. In the case of personal service within the jurisdiction of a writ of summons in an action *in personam* the view seems to be accepted that it is enough that the defendant is present in England at the time of service. It does not matter why, so long as he has not been enticed there fraudulently for the purpose. It does not matter whether he is a foreigner or a subject of the Crown. It does not matter how temporary may be his presence, how fleeting may be his visit. See *Dicey—Conflict of Laws*, 6th ed. (1949), pp. 172, 173; *Schmitthoff—The English Conflict of Laws*, 3rd ed. (1954), p. 428. Does the statement of Lord *Reading* mean that if the most transient visitor quickens his departure because he fears that if he delays a writ will be issued and served personally upon him he thereby renders himself liable to an exercise by substituted service of the very jurisdiction which otherwise must depend on his actual physical presence? It is to be noticed that Lord *Reading* in the critical sentence used the expression "went outside the jurisdiction". The expression seems to imply that normally the defendant would be found within the jurisdiction. It surely is somewhat absurd to say that a complete stranger to the jurisdiction who comes for the most temporary purpose remains liable to its exercise by substituted service, after he has left the jurisdiction, if, but not otherwise, he is animated by a desire to avoid personal service in fixing the time of his departure. The reason why the most temporary presence of an alien in England exposed him to an exercise of jurisdiction by personal service of the writ is said to be that while in England everyone owes a temporary allegiance. Yet in the words of Lord *Sumner* "*ligeantia localis* . . . begins no earlier than and continues no longer than the presence of the alien army within the realm": *Johnstone* v. *Pedlar* (1). It must of course be borne in mind that in questions of jurisdiction and conflict of laws each Australian State is to be treated (subject to the Commonwealth Constitution and legislation under it such as the *Service and Execution of Process Act*) as a distinct and separate country or "law area" and accordingly doctrines developed in England such as that under discussion are applied within the local limits as they would be in England and without regard to the constitutional sovereignty of the Crown in right of other States and Dominions or of the consequences of general British nationality. If the local allegiance (the *ligeantia localis*) of Laurie to the State

(1) (1921) 2 A.C. 262, at p. 292.

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of Victoria rendering him liable to comply with the mandate of a writ issued from the Supreme Court of Victoria began no earlier and continued no longer than his presence in Victoria, it is surely incongruous that he should be held liable to comply with the mandate of a writ issued after his departure. It is no less incongruous if the ground is that he hastened his departure lest his presence should be used to invoke the exercise over him of the jurisdiction which arose from his presence. It does not seem likely that the *dictum* in the judgment read by Lord *Reading* L.C.J. was intended to apply to cases where there was no closer tie or connexion with England (that is for our purposes Victoria) than a mere temporary or fleeting visit. But however much the *dictum* should be qualified, it must involve or imply some extension extra-territorially of jurisdiction; some invasion in other words of the field occupied by or belonging to O. XI. The hypothesis is that before the issue of an ordinary writ of summons for service within the jurisdiction the defendant has left the jurisdiction definitely, that is to say that he has left it in such a sense that leave to issue a writ for service out of the jurisdiction might properly be given under O. XI, in a case falling within that order, or resort might properly be made to the *Service and Execution of Process Act*, in a case appropriate to that legislation. The better view appears clearly enough to be that on that hypothesis the defendant is no longer amenable to the territorial jurisdiction exercised by an ordinary writ for service within the jurisdiction and the want of jurisdiction cannot be overcome by an order for substituted service. His motive for leaving cannot matter. It cannot give jurisdiction. Any other view seems open to the objection, first that it departs altogether from the principles upon which the exercise of English Jurisdiction in actions *in personam* rests; secondly, that it cannot be reconciled with the doctrine, established by authority and dictated by principle, that where the writ may not be served personally, an order for substituted service may not be made; thirdly, that it ignores the implications of O. XI, r. 1; fourthly, that in truth it does not involve a matter of procedure but an extension of jurisdiction. The acceptance of the view stated leaves no room for the order for substituted service in this case.

But it is only right to add that unless an almost unlimited power is assumed to make orders for substituted service, the contrary view does not mean that the order for substituted service made by *Herring* C.J. can be supported. Except for the fact that Laurie had secured the contract with Dame Margot Fonteyn and her associates for the tour which included the brief season in Melbourne

and was interested financially and as a matter of business therein, Laurie had no connexion with Victoria. His visit to Melbourne was in any case to have been very brief, one of some days only. It was for the most temporary purpose although no doubt it was a business purpose. A writ had been issued in the Supreme Court of New South Wales upon the same alleged cause of action or at all events upon a common law version of it. There had been nothing to prevent the service of that writ, but the action had been discontinued when an attempt to hold the defendant to bail on mesne process had failed. It is evident that the plaintiffs were seeking to serve the defendant personally in order to avoid difficulties under O. XI, r. 1, or under the *Service and Execution of Process Act.* (As to the latter see *Tallerman & Co. Pty. Ltd.* v. *Nathan's Merchandise* (*Vict.*) *Pty. Ltd.* (1)). No doubt an object of commencing an action was to obtain an injunction and receiver so as to prevent Laurie receiving payment. Apart from this there would have been no difficulty in suing Laurie in the High Court in England and that was the *forum rei.* There was no difficulty in suing in the equitable jurisdiction of the Supreme Court of New South Wales, at all events if the plaintiffs were prepared to rest upon the cause of action put forward by Carroll's counsel in this Court when we manifested some curiosity as to its nature. Counsel said that the contention for the plaintiffs Carroll would be that a partnership existed between them and Laurie (or perhaps his company) in relation to the venture and that Laurie as a partner had made a contract in his own name with a third party (the J. C. Williamson company) stipulating that all payments from that contracting party should come to him: accordingly Laurie would hold the moneys coming to his hands under the contract as a trustee or fiduciary for the parties interested, the plaintiffs and himself. It may be conjectured that the parties were each attempting to choose his forum. Of the three jurisdictions, England, New South Wales and Victoria, the last was doubtless the least suitable to Laurie. But it may be supposed that it was the most suitable to Carroll who resides in Melbourne and one where he could at once seek an *ex parte* injunction. Laurie neither by reason of past history nor by reason of present domicile, residence or course of business stood in any general relation to the State of Victoria which would make him naturally or prima facie subject to the jurisdiction of the courts of the State. He was about to leave the State within a short time and all that can be meant by the inference that he left to evade service is that he accelerated his departure because of the threat of suit. In all these circumstances the substance of the matter was that, unless

(1) (1957) 98 C.L.R. 93, at pp. 108, 142, 143.

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the case could be brought within O. XI or the *Service and Execution of Process Act*, a contingency that must have appeared very dubious, the Supreme Court by ordering substituted service was really asserting a jurisdiction over the defendant Laurie which otherwise it could not possess, save in so far as it arose from the accidental circumstances of his brief visit to Melbourne. These are considerations which show that O. IX, r. 2, ought not to have been used. It was invoked by the plaintiffs only for the purpose of giving the Supreme Court of Victoria jurisdiction where otherwise it did not exist. Accordingly the order for substituted service of the writ of summons ought not to have been made.

For the respondents Carroll, however, it is argued that in moving to set the order aside the appellant Laurie included in his notice of motion applications for relief which he could not make save at the expense of submitting to the jurisdiction and that accordingly he has waived his right to object or has voluntarily submitted to the jurisdiction. To explain this contention it is necessary to go back to the order of 21st June containing the provision for substituted service. It also contained an order adding an additional defendant in the action, the Education in Music and Dramatic Arts Society, as being interested, under the J. C. Williamson company, in the contract. But nothing turns upon this in the appeal. The order went on to grant an interim injunction restraining, as the earlier *ex parte* injunction had done, not only Laurie but James Laurie & Associates Ltd., from receiving any moneys for or in respect of or derived from theatrical performances in Australia of Dame Margot Fonteyn and her associate artists. Then followed an interim injunction restraining the J. C. Williamson company and the newly joined defendant from paying over any such moneys to Laurie or to James Laurie & Associates Ltd. Next came the appointment of an interim receiver of such moneys. The order then proceeded to provide that the foregoing orders should continue until the hearing of a notice of motion to continue the same until the hearing of the action, or until further order. Leave was given to amend the endorsement of the writ. Then followed the order for substituted service of the writ and that was followed by a like order for substituted service of the notice of motion. Order XII, r. 17, provides that a defendant before appearing shall be at liberty without obtaining an order to enter or entering a conditional appearance to serve notice of motion to set aside the service upon him of the writ or of notice of the writ or to discharge the order authorising such service. In the notice of motion on behalf of Laurie to discharge the *ex parte* order of 21st June 1957 for substituted service

and the service thereunder he included not only the writ of summons but the plaintiffs' notice of motion and affidavits. Moreover he sought also the discharge of the order of that date in so far as it restrained Laurie and James Laurie & Associates Ltd. from receiving and J. C. Williamson Theatres Ltd. and the added defendant from paying to them the moneys for or in respect of or derived from the performances of Dame Margot Fonteyn and associate artists and in so far as it appointed a receiver. Now clearly this went beyond O. XII, r. 17. But does it follow that the defendant giving the notice has voluntarily submitted or waived the objection to jurisdiction or to the order for substituted service ? Order LXX, r. 2, is not in point. No " fresh step " was taken. The notice of motion carries on its face the objection to the jurisdiction and to the order and seeks to have service set aside. The appointment of the receiver and the two interim injunctions, so far as they directly operated against Laurie, were provisions made pending service upon him and his answer thereto and, although it be outside O. XII, r. 17, and therefore incompetent to him to object to them without appearing at least conditionally, there could be no basis for treating his attempt to do so as a waiver of the very objections upon which he was then and there insisting or submitting to the jurisdiction he was denying. But to seek the setting aside of the same orders as they affect James Laurie & Associates Ltd. is another matter. The order as against the company does not depend upon the jurisdiction over Laurie or upon the order for substituted service of the writ. But however misconceived was the application to set aside the orders as against Laurie's company, it seeks no relief from the court, except the rescission of an order which Laurie claims to be adverse to his interests and to have been improperly made. It is coupled with an objection to the jurisdiction and an application to be absolved from the court's processes. There is no analogy to such a case as *Boyle* v. *Sacker* (1) where there was an appearance by counsel upon a motion for an injunction which was contested on the merits before an objection was raised to the order for substituted service. Not until that proceeding had been decided on the merits was a substantive application made to discharge the order for substituted service. It was held then to be too late.

In *Fry* v. *Moore* (2) the defendant applied by summons that a judgment by default should be set aside and a statement of claim delivered. That of course treated the action as a competent proceeding to be answered by a defence on the merits. The very contrary is true of the present case. The fact is that the defendant Laurie insisted upon his objection to jurisdiction and substituted

(1) (1888) 39 Ch. D. 249.

(2) (1889) 23 Q.B.D. 395.

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service but carried his objection to what had been done further than was open to him. That could not be construed as a waiver of the objections upon which he was insisting nor could it be considered as in any way inconsistent with those objections.

It follows from the foregoing that the order for substituted service should be set aside. But the order made in lieu thereof should not go further than is warranted by O. XII, r. 17.

The appeal from the order of the Supreme Court dated 5th July made by *Herring* C.J. on the defendant's notice of motion should be allowed with costs. The said order should be discharged. In lieu thereof it should be ordered that so much of the order dated 21st June 1957 and made *ex parte* by *Herring* C.J. in chambers be discharged as orders that in lieu of personal service of the writ of summons service thereof may be effected in the manner stated in such order and that the purported service of such writ in pursuance of such order be set aside.

It should be ordered further that the plaintiffs pay the costs in the Supreme Court of the defendant Laurie of such motion. There are orders made in the Supreme Court which are necessarily affected by the foregoing order setting aside the order for substituted service of the writ of summons and the purported service thereof in pursuance of such order. They are not however before us in the present proceedings and it will be for the Supreme Court to deal with them.

Allow the appeal from the order of the Supreme Court dated 5th July 1957, *made by Herring C.J. on the defendant's notice of motion. Order that the respondents pay the costs of the appeal.*

Discharge the said order. In lieu thereof order that so much of the order dated 21st June 1957 *and made ex parte by Herring C.J. in chambers be discharged as orders that, in lieu of personal service of the writ of summons, service thereof may be effected in the manner stated in such order and that the purported service of such writ in pursuance of such order be set aside; and further order that the plaintiffs (respondents in this appeal) pay the costs in the Supreme Court of the defendant Laurie of such motion.*

Solicitors for the appellant, *Slater & Gordon.*
Solicitors for the respondents, *M. S. & R. M. Williams.*

R. D. B.