[HIGH COURT OF AUSTRALIA.]

LUKE . . . . . APPELLANT;
PLAINTIFF,

AND

MAYOH . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. OF A. 1921.

ADELAIDE, *Sept.* 19, 22.

Knox C.J., Rich and Starke JJ.

Practice—Writ for service out of jurisdiction—Issue of writ in South Australia—Action for breach of contract—Breach not in South Australia—Service and Execution of Process Act 1901-1918 (*No.* 11 *of* 1901—*No.* 29 *of* 1918), *secs.* 4, 11, 13—*Rules of the Supreme Court* 1913 (*S.A.*), *Order* II., r. 4; *Order* X., r. 1.

By Order II., r. 4, of the *Rules of the Supreme Court* (S.A.) it is provided that "No writ of summons for service out of the jurisdiction . . . shall be issued without leave of the Court or a Judge." By Order X., r. 1, it is provided that "Service out of the jurisdiction of any originating proceeding . . . may be allowed by the Court or a Judge . . . (III.) When the relief sought against the party is in respect of a breach within the jurisdiction of a contract wherever made."

By sec. 4 of the *Service and Execution of Process Act* 1901-1918 it is provided that "(1) A writ of summons issued out of or requiring the defendant to appear at any Court of Record of a State or part of the Commonwealth may be served on the defendant in any other State or part of the Commonwealth."

Held, that, on an application to a Judge of the Supreme Court of South Australia for leave to issue a writ for service in another State, he should not restrict the issue of such a writ to cases in which it could have been effectively served under the law of South Australia, and should grant the leave without considering whether the cause of action was within the cases specified in sec. 11 of the *Service and Execution of Process Act*.

Decision of the Supreme Court of South Australia reversed.

H. C. OF A. 1921.

LUKE v. MAYOH.

APPEAL from the Supreme Court of South Australia to the High Court.

An application was, on 16th August 1920, made to *Gordon* J. in Chambers on behalf of Ernest Henry Luke for leave to issue a writ for service upon Joseph Mayoh in New South Wales, and the learned Judge granted a fiat for the issue of such a writ. A writ was thereupon issued for service on the defendant in New South Wales; and upon it were indorsed a statement that the plaintiff's claim was for the sum of £2,500, being the balance of an amount due and owing by the defendant to the plaintiff under an agreement made between the plaintiff and the defendant, and a notice that "this summons is to be served out of the State of South Australia and in the State of New South Wales," and a notice that "your appearance to this writ of summons must give an address at some place within five miles of the office of the Supreme Court of South Australia at Adelaide at which address proceedings and notices for you may be left." The writ having been served on the defendant in New South Wales, he entered a conditional appearance "without prejudice to an application to discharge the fiat dated 16th August 1920 giving leave to issue the writ and serve it out of the jurisdiction, and to set aside the writ and the service thereof for irregularity of the said fiat." The defendant then moved before *Gordon* J. in Chambers to discharge the fiat and to set aside the writ and the service thereof, on the ground that there had been no breach within the jurisdiction of the Court of the contract to enforce which the action was brought. On 4th November 1920 *Gordon* J. made an order ordering that the fiat of 10th August 1920, the writ and the service thereof, and all subsequent proceedings be set aside on the ground stated in the motion. An appeal from that decision was heard by *Murray* C.J. and *Angas Parsons* J., who differed in opinion, and the order appealed from was therefore, on 4th July 1921, affirmed.

From that decision the plaintiff now appealed to the High Court.

Villeneuve Smith K.C. (with him *Alderman*), for the appellant. The writ was properly served under the *Service and Execution of Process Act* 1901-1918. Sec. 4 of that Act enables any writ issued

out of the Supreme Court to be served in any other State provided it bears the indorsements required by sec. 5, as was the case here; and it is immaterial that the writ was issued under Order II., r. 4, of the *Rules of the Supreme Court* 1913. The Supreme Court would clearly have had jurisdiction to entertain this action if the writ had been served within South Australia, and therefore sec. 13 of the *Service and Execution of Process Act* was satisfied. [Counsel referred to *McGlew* v. *New South Wales Malting Co.* (1); *Delaney* v. *Great Western Milling Co.* (2).] [Counsel was stopped.]

McLachlan (with him *Reed*), for the respondent. Until the appellant got an order under Order II., r. 4, of the *Rules of the Supreme Court* a writ for the purposes of the *Service and Execution of Process Act* could not be issued. The latter Act does not interfere with the law of the States as to the issue of writs, but only deals with the service of writs when issued. Reading Order II., r. 4., and Order X., r. 1, together, there is a limitation upon the jurisdiction of the Supreme Court to issue writs for service out of the jurisdiction, and it is only upon a writ properly issued that the *Service and Execution of Process Act* operates. The plaintiff sought the benefit of Order II., r. 4, when he applied for leave to issue a writ for service out of the jurisdiction, and he must take it with its limitations—one of which is that the writ can only be issued if the breach of contract upon which he sues has taken place in South Australia. He cannot now abandon that position and rely on the writ as one issued without leave and served under the *Service and Execution of Process Act*.

Villeneuve Smith K.C., in reply.

Cur. adv. vult.

Sept. 22.

THE COURT delivered the following written judgment:—

The initial step in this action was an application by the present appellant under Order II., r. 4, of the *Rules of the Supreme Court* of South Australia for leave to issue a writ for service in New South Wales outside the jurisdiction of the Supreme Court of South

(1) 25 C.L.R., 416, at p. 420. (2) 22 C.L.R., 150, at p. 172.

H. C. OF A. 1921. LUKE v. MAYOH.

Australia. An order was made, or fiat granted, by *Gordon* J. on this application for the issue of the writ granting twenty-one days after service for appearance on an allegation—rather obscurely stated—that the breach of contract in respect of which the action was brought took place in South Australia. A writ was issued out of the State Court in the form prescribed by Appendix A to the *Rules of the Supreme Court* 1913, and bearing the indorsements required by sec. 5 of the Federal *Service and Execution of Process Act* 1901-1918. The time limit for appearance was not less than that required by sec. 8 of the Act. Upon being served with this writ in New South Wales, the present respondent entered a conditional appearance "without prejudice to an application to discharge the fiat," and subsequently made the application, on which *Gordon* J. ordered that the fiat and the writ and service thereof and all subsequent proceedings thereon be set aside. From this order the present appellant appealed to the Supreme Court. The appeal was heard before *Murray* C.J. and *Angas Parsons* J., who differed in opinion, and the order appealed from was therefore affirmed. The only question argued before *Gordon* J. and the Supreme Court was whether the breach of contract on which the action was brought took place in South Australia.

From the decision of the Supreme Court this appeal was brought, and counsel for the appellant insisted that the writ was rightly issued and the service properly effected under sec. 4 of the Federal Act. This Act was not referred to in argument in either of the Courts below. We feel no doubt that the point now raised by the appellant, which involves a pure question of law not depending on any controverted facts, is open to him on this appeal (see *Misa* v. *Currie* (1); *Connecticut Fire Insurance Co.* v. *Kavanagh* (2)).

Apart from statutory provisions the Courts in Australia, following the principles of English law, did not directly claim or exercise jurisdiction over a defendant who was not at the time of the service of the writ within the territorial jurisdiction of the Court out of which the writ issued (*Dicey on Conflict of Laws*, 2nd ed., p. 48). By various statutes the power of the Courts in this respect was extended in certain cases, the relevant extension in South Australia being now

(1) 1 App. Cas., 554, at p. 559.

(2) (1892) A.C., 473, at p. 480.

found in Order X. of the *Rules of the Supreme Court* 1913. Sec. 4 of the Federal Act gives further authority for the service of process of Courts of Record of a State outside the boundaries of that State in any other State or part of the Commonwealth, and this authority is not limited to the classes of actions specified in Order X. of the *Rules of the Supreme Court*. We agree with the contention that under the provisions of the State law it was the duty of a Judge to refuse to allow the issue of a writ under Order II., r. 4, unless he was satisfied that effective service of the writ could be authorized under Order X. But on such an application the Judge should now also consider the provisions of the Federal Act which authorize effective service within Australia of every writ issued out of a Court of Record of a State, and should not restrict the issue of such a writ to cases in which it could have been effectively served under State law.

Two other provisions of the Federal Act require consideration, sec. 13 and sec. 11. It was argued that sec. 13 of the Act provided that the jurisdiction of the Supreme Court should not be extended by the Act. The proposition was that in an action "*in personam*" the rules as to legal service of a writ define the limits of the Court's jurisdiction (*Dicey on Conflict of Laws*, 2nd ed., p. 218). This proposition is, of course, true; but the argument based on it omits to take into account the extension of the area of legal service effected by sec. 4 of the Act. As to sec. 11 it was argued that before giving leave to issue a writ the Court should consider whether the cause of action was within the cases specified in sec. 11. But the argument is untenable; for the defendant might appear to the writ and thereby submit himself to the jurisdiction of the Court, in which case this question would not arise. If the defendant does not appear to the writ and the plaintiff applies under sec. 11 for leave to proceed in the action, then, and not till then, it becomes necessary for the Court to determine whether the case is one in which leave to proceed can be given. Consequently, the order of *Gordon* J. allowing the issue of the writ, and the service of the writ on the defendant, were, in our opinion, proper. In this view of the case it is unnecessary for us to consider

H. C. OF A. 1921. LUKE v. MAYOH.

the point dealt with by the learned Judges in the Supreme Court, and we express no opinion on it.

As the point on which the appellant succeeds was raised for the first time in this Court, we think the parties should pay their own costs both in this Court and in the Supreme Court.

The order will be that the appeal be allowed, and the order of the Supreme Court of 4th July 1921 and the order of *Gordon* J. of 4th November 1920 be discharged.

Appeal allowed. Order of Supreme Court of 4th July 1921 *and order of Gordon J. of 4th November* 1920 *discharged. Parties to abide their own costs in the High Court and in the Supreme Court.*

Solicitor for the appellant, *H. G. Alderman.*

Solicitors for the respondent, *McLachlan & Reed.*

B. L.