committeed a material breach justifying rescission of the contract, he was not refusing further performance of his obligations under the contract and in this sense probably had not "reprobated" it.

With regard to Coote's conclusion that "discharge by breach by itself can never be the cause of the non-application of exception clauses *otherwise than in respect of loss incurred after termination of the contract*"[27], this would produce odd results, even on his own premise. Damage flowing from the one breach (committed of course while the contract applies in full to the breach) is governed by the exception clause up until the moment that the breach is accepted but thereafter ceases to be so governed. To say that damages for anticipatory breach, that is, breach of future obligations, are not affected by an exception clause is little better because notwithstanding that the obligations are future the anticipatory breach is committed as soon as the repudiation occurs (again when the contract applies in full to the breach): "anticipatory breach means simply that a party is in breach from the moment that his actual breach becomes inevitable"[28] and an immediate right of action for damages for breach arises[29]. Moreover, Lord Wright in *Heyman* v. *Darwins* expressly stated that damages for anticipatory breach where rescission follows are, like damages for any other breach, governed by the contract[30].

It is accordingly submitted that the view expressed by the House of Lords in the *Suisse Atlantique* case as to the effect of rescission for breach upon an exception clause is mistaken. It is suggested that the effect to be given an exception clause in this circumstance ought to be no different from that given it in any other: *in every case* its operation will depend entirely upon the true construction of the contract.

M. J TREBILCOCK*

REGULATORY OFFENCES

Sheep straying — Interpretation of the Impounding Act 1920-1962, s. 46 (1)

Norcock v. Bowey[1] is a recent decision of the Court of Criminal Appeal of South Australia on the interpretation of a regulatory offence[2]. It is significant for two reasons[3]. First, it indicates that the doctrine of strict liability (to the extent that it exists in Australia[4]) is less draconic in operation than its English

27. (1967) 40 A.L.J. 336, at 346 (italics added). This view finds some support in the passage from the judgment of Lord Reid in the *Suisse Atlantique* case cited at p. 105, *supra*.
28. *Universal Cargo Carriers Corporation* v. *Citati* [1957] 2 Q.B. 401, at 438, *per* Devlin J.
29. *Hochster* v. *De La Tour* (1853) 2 E. & B. 678; *Frost* v. *Knight* (1872) L.R. 7 Ex. 111.
30. Cited at p. 108, *supra*.

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1. [1966] S.A.S.R. 250.
2. The term, "regulatory offence" embraces those classes of summary offences where proof of *mens rea* is usually not required. See Howard: *Strict Responsibility* (1963), 1, n. 3.
3. The second may seem to contradict the first. However, see the discussion of the court's reasoning, *infra*.
4. See generally, Howard, *Strict Responsibility* (1963).

counterpart. Secondly, the decision is notable for the preference shown by the court for English, as opposed to Australian, authority on the interpretation of regulatory offences.

In this case the appellant was charged with being the owner of a sheep found straying in a public place, an offence prescribed by the Impounding Act 1920-1962, s. 46 (1). This sheep had been one of a flock belonging to the appellant which had been moved by an employee from one paddock to another. It had been found on the road separating these two paddocks. The magistrate found that neither the appellant nor his employee had been negligent in failing to keep the sheep off the road and acquitted the appellant. Reliance was placed upon the decision of Napier C.J. in *Snell* v. *Ryan*[5], a case involving the same statutory provision. In that case D had depastured a cow in a paddock which was securely fenced and enclosed. The cow escaped onto a road when released by a stranger without D's authority or knowledge. D had in no way been negligent. He was convicted and appealed to the Supreme Court. In allowing the appeal Napier C.J. stated his reasons as follows:

> "I have too much respect for the legislature to suppose that it would have intended to penalize the owner of cattle, which are found straying, through no fault or neglect upon the part of anyone for whom the owner is responsible, but as the result of the wrongful and possibly criminal act of a stranger. . . . The onus was, of course, upon the appellant to show how his cow came to be upon the road, but when it appears that he had done everything that any reasonable man could be expected to do, in the way of securing his cattle, and ensuring that they would be kept off the road, it is plain that he ought not to be convicted under this section"[6].

The acquittal of the appellant in the instant case was then appealed against by the prosecution. Chamberlain J. of the Supreme Court of South Australia allowed this appeal, holding that the offence prescribed by the Impounding Act 1920-1962, s. 46 (1), was one of strict liability. In his Honour's opinion the English and Australian authorities indicated that either a regulatory offence imposes strict liability or requires proof of *mens rea*. There was no "half-way house"[7] between these two extremes and, since *Snell* v. *Ryan* suggested the contrary, that case had been incorrectly decided.

The appellant then appealed against the conviction ordered by Chamberlain J., relying, *inter alia*, upon the decision in *Snell* v. *Ryan*. The Court of Criminal Appeal of South Australia (Napier C.J., Hogarth and Walters JJ.) disallowed the appeal. Napier C.J. (in whose judgment Walters J. concurred) construed Section 46 (1) as imposing strict liability. However, in his Honour's opinion, the appellant would have been exculpated had he been able to establish, on the balance of probabilities, that the presence of the sheep on the road was attributable to circumstances beyond his control, as for example, an Act of God or some wrongful act on the part of a stranger whom the appellant had no means of controlling or influencing[8]. This the appellant was unable to do; merely establishing that he had taken reasonable care was insufficient.

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5. [1951] S.A.S.R. 59.
6. *Ibid.*, at 60.
7. See Glanville Williams: *Criminal Law—The General Part* (2nd ed., 1962), 262.
8. [1966] S.A.S.R. 250, at 266.

His Honour cited several English authorities, including the decision of the Privy Council in *Lim Chin Aik* v. *Queen*[9], and one Australian authority, *Snell* v. *Ryan*, in support of the above interpretation of Section 46 (1). In his Honour's opinion these authorities indicated that where a regulatory offence does not require proof of *mens rea*, "absolute" liability is not imposed. Instead, the defence of Act of God or wrongful act of a stranger is available to an accused and therefore liability is merely "strict"[10]. *Snell* v. *Ryan* was not regarded as supporting the wider proposition that it was a defence for an accused to establish an absence of negligence. His Honour made no reference to the considerable body of Australian case-law supporting this wider proposition[11].

Napier C.J. conceded that usually there is no indication in the wording of a regulatory offence that a distinction should be drawn between "absolute" and merely "strict" liability. However this distinction had to be inferred "as a matter of reason or common sense"[12]. In support of this contention his Honour relied mainly upon the Acts Interpretation Act 1913-1936, s. 22, which provides that every statute "shall be deemed remedial, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of [the statute] according to [its] true intent, meaning, and spirit". This provision is probably declaratory of accepted principles of statutory interpretation[13].

The judgment of Napier C.J. contains only one express argument against construing the Impounding Act 1920-1962, s. 46 (1), allowing an accused to exculpate himself by establishing an absence of negligence. This was to the effect that unless strict liability were imposed the object of the provision (to prevent animals straying onto public roads) would not be best ensured within the meaning of the Acts Interpretation Act 1913-1936, s. 22[14].

Hogarth J. was in substantial agreement with Napier C.J. but, unlike Napier C.J., did refer to *Proudman* v. *Dayman*[15], a decision of the High Court and perhaps the leading Australian authority on the interpretation of regulatory offences[16]. In that case Dixon J. (as he then was) stated that in the construction of regulatory offences there was a presumption that although the prosecution need not prove *mens rea*, an accused could exculpate himself by establishing that he made a reasonable mistake of fact[17]. This presumption applies "unless from the words, context, subject matter, or general nature of the enactment some reason to the contrary appears"[18]. Hogarth J. did not expressly refer to the defence of reasonable mistake of fact but stated that

9. [1963] A.C. 160.
10. [1966] S.A.S.R. 250, at 265.
11. See the cases collected and analysed in Howard: *Strict Responsibility* (1963), and note the authorities cited n. 38, *infra*. Also *cf.* Cardozo: *The Growth of the Law* (1924), 17, 18.
12. [1966] S.A.S.R. 250, at 265.
13. See *McCulloch* v. *Anderson* [1962] N.Z.L.R. 130; *United Insurance Co. Ltd.* v. *The King* [1938] N.Z.L.R. 885. See also Maxwell: *Interpretation of Statutes* (11th ed., 1962) 275; Cardozo: *The Nature of the Judicial Process* (1921), 113-116.
14. [1966] S.A.S.R. 250, at 266.
15. (1941) 67 C.L.R. 536.
16. Howard: *Strict Responsibility* (1963), 86.
17. (1941) 67 C.L.R. 536, at 540, 541.
18. *Id.*, at 540.

the Impounding Act 1920-1962 s.46 (1), was a provision where, in the words of Dixon J. in the above decision[19], "the legislature adopts penal measures in order to cast on the individual the responsibility of so conducting his affairs that the general welfare will not be prejudiced"[20]. In reaching this conclusion his Honour placed considerable reliance upon the fact that, according to the decision of the House of Lords in *Searle* v. *Wallbank*[21], a person who suffers injuries in a collision with a straying animal has no right of action against the owner of the animal[22]. If his Honour did in fact consider the possible application of the presumption that the defence of reasonable mistake of fact is available to an accused charged with a regulatory offence this may have been the reason[23] for excluding the defence from the operation of section 46 (1).

The conclusion reached by the Court of Criminal Appeal in the instant case is inconsistent with present English authority. In England no distinction is drawn between "strict" and "absolute" liability[24]. Reference need be made only to *Lim Chin Aik* v. *Queen*[25], one authority relied upon by Napier C.J. The extract from the judgment of the Privy Council citied by his Honour was as follows:

> "Where it can be shown that the imposition of strict liability would result in the prosecution and conviction of a class of persons whose conduct could not in any way affect the observance of the law, their Lordships consider that, even where the statute is dealing with a grave social evil, strict liability is not likely to be intended"[26].

It is quite clear from the rest of the judgment that where, on the above test, strict liability is not to be imposed, the regulatory offence is to be construed as requiring proof of *mens rea*[27]. In other words the offence is not construed as imposing strict liability subject to the availability of such defences as the defence of Act of God[28].

This criticism of the reasoning in the instant case is, however, minor. *Lim Chin Aik* v. *Queen* and the other decisions of English courts referred to by Napier C.J. are, it is submitted, not binding upon any court in an Aus-

19. (1941) 67 C.L.R. 536, at 540.
20. [1966] S.A.S.R. 250, at 267.
21. [1947] A.C. 341.
22. [1966] S.A.S.R. 250, at 267.
23. See text and n. 18, *supra*.
24. *Cf. Burns* v. *Bidder* [1966] 3 All E.R. 29. But see *Parker* v. *Alder* [1899] 1 Q.B. 20; *R.* v. *Larsonneur* (1933) 24 Cr. App. R. 74; and *Strong* v. *Dawtry* [1961] 1 W.L.R. 841. These decisions are not referred to in *Burns* v. *Bidder* or in Smith & Hogan: *Criminal Law* (1965), 58, 59 (where the view is also taken that in England liability is strict rather than absolute).
25. See n. 9, *supra*.
26. [1963] A.C. 160, at 174, 175. This principle is unworkable. See comment in 2 *Adelaide Law Review,* 397, at 403.
27. The same is true of *Reynolds* v. *C. H. Austin & Sons Ltd.* [1951] 2 K.B. 135 (except *per* Humphreys J.), another English authority upon which Napier C.J. placed considerable reliance.
28. This conclusion is also supported by the extra-judicial comments of Lord Devlin: *Samples of Law Making* (1962), 67 *et seq.*; and "Statutory Offences", (1958) *Journal of the Society of Public Teachers of Law*, 206 *et seq.*

tralian jurisdiction[29]. The conclusion reached by the Court of Criminal Appeal is substantially consistent with a line of Australian authority which indicates that the defences of impossibility, inevitable accident, and necessity are available even where the relevant regulatory offence is one imposing strict liability[30]. The only significant departure from this line of authority is the placing of a persuasive burden of proof upon the accused. This departure may be desirable[31].

However, one serious criticism is to be levelled at the decision in *Norcock* v. *Bowey*. No member of the Court of Criminal Appeal attempted to discuss whether the defence of reasonable mistake of fact was available on a charge under the Impounding Act 1920-1962, s. 46 (1). This is very surprising. On the facts of the case it would seem that this issue was central[32]. So much is evident from the judgment of Chamberlain J. who discussed the point in considerable detail. Furthermore in *Tanner* v. *Smart*[33], another recent decision on section 46 (1) Bright J. of the Supreme Court of South Australia held that the defence of reasonable mistake of fact was available to an accused charged under this provision. Numerous Australian authorities, both at the High Court and State Court of Criminal Appeal level, indicate that the defence is generally applicable to regulatory offences[34]. These authorities were clearly more relevant in the present case than the English authorities cited, especially since, as has been discussed above, the latter do not support the court's reasoning. Perhaps their Honours' silence on this issue could be construed as agreement with the views expressed by Chamberlain J. For this reason it is necessary to consider whether these views are sound.

Chamberlain J., after reviewing several authorities, including *Proudman* v. *Dayman*[35], concluded that a regulatory offence is to be interpreted as requiring proof of *mens rea* or as imposing strict liability. In his Honour's opinion, the defence of reasonable mistake of fact was merely a defence which could be relied upon to cast doubt on the case of the prosecution that the accused possessed *mens rea*. Furthermore a persuasive burden of proof did not lie upon an accused who pleaded the defence.

This approach is consistent with English authority, including *Lim Chin Aik* v. *Queen*. It is also consistent with the bulk of South Australian case-law[36],

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29. It is submitted that *Lim Chin Aik* v. *Queen* [1963] A.C. 160, being a decision of the Privy Council on appeal from Singapore, is not binding on Australian courts. See *Uren* v. *John Fairfax & Sons Pty. Ltd* [1965] N.S.W.R. 202, at 236, 237, *per* Wallace J.; *Walsh* v. *Walsh* [1948] 1 D.L.R. 630, 647; *cf. Bakhshuwen* v. *Bakhshuwen* [1952] A.C. 1. (The latter two references are taken from D. L. Mathieson, "Australian Precedents in N.Z. Courts", 1 N.Z.U.L.R., 102.) This view is reinforced by the complete absence of reference to decisions of the High Court by the Privy Council in *Lim Chin Aik* v. *Queen*. See *Rejfek* v. *McElroy* (1965) 39 A.L.J.R. 177, at 178. It is significant that the decision has yet to be followed in Australia. (It has however been misapplied—see, *e.g.*, *August* v. *Fingleton* [1964] S.A.S.R. 22; *Hancock* v. *Cooley* [1964] V.R. 639; *Norcock* v. *Bowey*.)

30. See Howard: *Strict Responsibility* (1963), 204-207, and also *Blyth* v. *Hudson* (1929) 41 C.L.R. 465, at 471.

31. See Howard: *Strict Responsibility* (1963) 39-44.

32. However, see discussion *infra*.

33. [1965] S.A.S.R. 44 (an authority not cited in the present case).

34. See n. 4, *supra*, and n. 38, *infra*.

35. (1941) 67 C.L.R. 536. See text to n. 15, *supra*.

36. *E.g.*, *O'Sullivan* v. *Harford* [1956] S.A.S.R. 109; *August* v. *Fingleton* [1964] S.A.S.R. 22. *Cf.*, however, *Belling* v. *O'Sullivan* [1950] S.A.S.R. 43; *Lenzi* v. *Miller* [1965] S.A.S.R. 8; *Hann* v. *Butcher* [1963] S.A.S.R. 197 (Chamberlain J.).

except that usually the view has been taken that a persuasive burden of proof lies upon an accused to establish the defence[37]. However his Honour's views and the bulk of the South Australian case-law (except in respect of the issue of burden of proof) are inconsistent with the interpretation of High Court authority on the defence of reasonable mistake of fact adopted in other Australian jurisdictions. The Australian case-law indicates that the defence does not apply in the case of offences requiring proof of *mens rea* but only to those which do not[38]. The defence is pleaded to establish the absence of negligence, not the absence of *mens rea*. This is because an accused will not be exculpated unless the court considers that the mistake of fact relied upon was reasonable *as a matter of law*[39]. It is also clearly established that a persuasive burden of proof lies upon an accused who pleads the defence[40].

Chamberlain J. did not review the Australian authorities referred to above and for this reason it is submitted, with respect, that his Honour's views on the defence of reasonable mistake of fact are unsound[41]. Although his Honour's approach is consistent with several decisions of the Privy Council, including *Lim Chin Aik* v. *Queen*, this would seem immaterial. None of these appeals were from an Australian jurisdiction and therefore, it is submitted, are not binding upon Australian courts[42]. Furthermore since the Privy Council has yet to examine the Australian case-law[43] any of its past pronouncements would appear to be of scant persuasive value[44].

It is arguable that the bulk of the South Australian case-law on the defence of reasonable mistake of fact (except in respect of the issue of burden of proof) is also unsound. Significantly, a review of the recent relevant Australian case-law has yet to be undertaken by a South Australian court.

The failure of the Court of Criminal Appeal in *Norcock* v. *Bowey* to discuss whether or not the defence of reasonable mistake of fact was available to the appellant may be explicable on one other ground. Their Honours may have thought some reason existed for excluding the defence, a possibility contemplated by Dixon J. in *Proudman* v. *Dayman*[45]. Some evidence of this is to be found in the judgment of Hogarth J. who placed reliance on the fact that, according to the House of Lords decision in *Searle* v. *Wallbank*, an owner of straying animals which injure road-users escapes civil liability[46]. However it is submitted that the above decision would not be a sufficient reason for

37. See *O'Sullivan* v. *Harford* [1956] S.A.S.R. 109; *August* v. *Fingleton* [1964] S.A.S.R. 22; *Tanner* v. *Smart* [1965] S.A.S.R. 44; *Lenzi* v. *Miller* [1965] S.A.S.R. 8, at 16 *per* Bright J.

38. See *R.* v. *Coventry* (1938) 59 C.L.R. 633; *R.* v. *Martin* [1963] Tas. S.R. 103; *Coysh* v. *Elliott* [1963] V.R. 114; *Madsen* v. *Western Interstate Pty. Ltd.* [1963] Q.R. 434, at 465 *per* Wanstall J.; *Crichton* v. *Victorian Dairies Ltd.* [1965] V.R. 49. See also Howard: *Strict Responsibility* (1963), 99-105, and *cf.* Hannan, "Mens Rea in Statutory Offences", 16 A.L.J. 91, an article of interest in 1943, but which is not relevant today.

39. See n. 36, *supra.*

40. See *Maher* v. *Musson* (1934) 52 C.L.R. 100; *Dowling* v. *Bowie* (1952) 86 C.L.R. 136; *Bergin* v. *Stack* (1953) 88 C.L.R. 248; *Vines* v. *Djordjevitch* (1955), 91 C.L.R. 512; *R.* v. *Martin* [1963] Tas S.R. 103. None of these authorities was reviewed by Chamberlain J.

41. And *cf. Hann* v. *Butcher* [1963] S.A.S.R. 197 (Chamberlain J.).

42. See n. 29, *supra.*

43. *Cf.* the cursory reference to Australian authority in *Patel* v. *Comptroller of Customs* [1965] 3 W.L.R. 1221, P.C.

44. See *Rejfek* v. *McElroy* (1965) 39 A.L.J.R. 177, at 178.

45. See text to n. 18, *supra.*

46. See text to n. 22, *supra.*

excluding the defence of reasonable mistake of fact from the operation of section 46 (1) of the Impounding Act[47], especially since the exclusion results in the imposition of a higher duty of care than would exist under the tort of negligence.

Further evidence that this was the reasoning implicit in the present case could be found in the judgment of Napier C.J. His Honour was of the opinion that the Impounding Act 1920-1962, s. 46 (1), could not be best implemented, within the meaning of the Acts Interpretation Act 1913-1936, s. 22, if it were a defence to prove merely that reasonable care had been taken[48]. However, it is submitted that this also would be an insufficient reason for excluding the defence of reasonable mistake of fact. As one commentator has pointed out, it has not been proven that regulatory offences are less adequately enforced where such a defence is made available[49]. Furthermore, consider the following illustration. D forbids his employee Z to leave any gates open on D's station property. Z, while acting in the scope of his employment[50], deliberately or negligently leaves a gate open contrary to D's express instructions. As a result several of D's sheep stray onto a road. D hears of Z's actions and dismisses him immediately. Assuming that D has not been negligent in any way, according to the interpretation of section 46 (1) by the Court of Criminal Appeal in the present case, D would still be convicted since the presence of the sheep on the road would not be attributable to an Act of God or the wrongful act of a stranger. It is difficult to appreciate how, as a matter of "fair and common sense" (the test approved and applied by Napier C.J.)[51], the imposition of liability in such circumstances assists the implementation of the statute. If anything it encourages disrespect for the law.

In conclusion it is submitted that since there seems no adequate reason for excluding the defence of reasonable mistake of fact from the operation of section 46 (1) of the Impounding Act, it should have been available to the appellant in the instant case. Had the defence been available he would have been acquitted if he had consciously believed that none of his sheep were straying on a road[52] since, according to the finding of the magistrate, he had taken reasonable care to ensure that his sheep would not stray onto a public road. However, if the appellant had merely made an unconscious assumption that none of his sheep were straying on a road[53], it is less clear that he would have been acquitted. Although such an assumption would have been reasonable (in view of the magistrate's finding) there is authority to the effect that the defence of reasonable mistake of fact requires an accused to establish that he made a conscious mistake of fact[54]. It has been argued, however, that it is still an open question whether a reasonable unconscious assumption is excluded from the scope of the defence[55].

BRENT FISSE*

47. And see *Fleming* v. *Atkinson* (1959) 18 D.L.R. (2d.) 81.
48. See text to n. 14, *supra*.
49. Howard: *Strict Responsibility* (1963), 24-26.
50. See Edwards: *Mens Rea in Statutory Offences* (1955), 220-224. Possibly, although this is not at all clear from the present case, if Z were acting outside the scope of his employment his actions might be equated with those of a stranger whom D had no means of controlling or influencing.
51. See text to n. 12, *supra*.
52. This is not clear from the facts stated in the judgment.
53. This again is not clear from the facts stated in the judgment.
54. *E.g.*, *Proudman* v. *Dayman* (1941) 67 C.L.R. 536.
55. Howard: *Australian Criminal Law* (1965), 324-327.

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NEGLIGENCE

Standard of care in child negligence

The recent case of *McHale* v. *Watson and Others*[1] raised a question upon which there was, as Owen J. said[2], no direct English or Australian authority. The basic point at issue on appeal, and the one with which it is intended to deal in this note, was whether a child's age could be taken into consideration in determining whether or not he was negligent. This problem may be expected to assume much greater importance as society presses the privileges and responsibilities of adulthood upon children at an increasingly young age. In addition, of course, it raises the fundamental issue of the extent to which tortious liability should depend upon subjective criteria.

Since *McHale* v. *Watson* at first instance[3] also was concerned with whether trespass to the person must be either negligent or intentional, and upon whom the burden of proof lies in such an action, it may well be termed a most important case. With the matters just mentioned it is not intended to deal—Windeyer J., who heard the case at first instance, agreed with Diplock J. in *Fowler* v. *Lanning*[4] that a trespass must be either intentional or negligent, and this point was not contested on appeal. But his Honour disagreed with Diplock J. as to the burden of proof, which he felt was on the defendant[5]. This opinion was referred to only briefly on appeal, and was not examined[6].

The case arose from an incident in Portland, Victoria, in January 1957[7] and was brought on before Windeyer J. sitting in the original jurisdiction of the High Court[8]. Barry Watson and Susan McHale, aged twelve years and nine years respectively, were playing a game of "chasings, a children's game also known as tag"[9], with some other children. When the game ended Susan and Barry were on opposite sides of a tree guard, which formed a square enclosure the sides of which were about two feet long, with a four feet high post at each corner. Between the posts were low pickets, approximately two feet high. On the view of the facts taken by the learned judge at first instance and accepted by the majority of the High Court on appeal[10], Barry then threw a sharpened six-inch length of metal welding rod at one of the corner posts, about one foot away. It struck the post and was deflected towards Susan who was at most four to five feet away, and to Barry's left.

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1. (1966) 39 A.L.J.R. 459.
2. *Ibid.*, at 470.
3. (1964) 111 C.L.R. 384.
4. [1959] 1 Q.B. 426.
5. For a case note on the original hearing, see (1966) 5 Melbourne University Law Review, 243.
6. (1966) 39 A.L.J.R. 459, at 459, *per* McTiernan A.C.J.
7. No problem as to limitation of actions arose because the action was by an infant: (1964) 111 C.L.R. 384, at 386.
8. *I.e.*, under the Commonwealth Constitution, s. 75 (iv), since the parties came from different states—the plaintiff from New South Wales and the defendant from South Australia, and the events took place in Victoria.
9. (1966) 39 A.L.J.R. 459, at 459, *per* McTiernan A.C.J.
10. Menzies J. expressed doubts; (1966) 39 A.L.J.R. 459, at 469.