and the employee would be adequately protected.

Lister's Case[21] could have the result of placing the employee's resources in a very precarious position were similar actions to be brought in the future by insurance companies. Professor Parsons[22] has suggested that the decision would be used as a bargaining weapon to induce employees to accept workers' compensation rather than seek damages at common law since the latter course could expose the fellow employee to risks of heavy financial outlays. A more likely result is that insurance companies might use their right of subrogation very sparingly for fear that the unions might resort to widespread industrial action to protect their members' finances.[23]

The majority felt that to imply any term of protective insurance in the employee's favour would create a feeling of irresponsibility on the part of the employee. However, until the present case, insurance companies had never exercised this right of subrogation against employees and it could not be said that there was any general feeling of complacency among the working community. There are in existence certain sanctions such as the threat of dismissal, the loss of character and the difficulty of obtaining fresh employment which are, no doubt, sufficient restraints on the employee.

The decision, however, is a marked victory for the insurance companies. It was not unanimous and it may well be that the question will be raised again in the near future. The recent elevation of Lord Denning to the House of Lords has given supporters of enterprise liability hope that the decision in this case will be applied very restrictively. It must remain for the Legislature, however, to eradicate this unsatisfactory aspect of the law of employer and employee.

D. SINGER, Case Editor — Third Year Student.

SUBMISSION TO THE JURISDICTION OF A FOREIGN COURT

IN RE A. LUND & CO. (BILDEN TEXTILES) LTD. A. LUND & CO. (BILDEN TEXTILES) LTD. v. *WEMBLEY WEAR PTY. LTD.*

One of the broad rules of English and New South Wales private international law is that a court has jurisdiction in an action *in personam* if the defendant has been served within its jurisdiction or if he has submitted to its jurisdiction. Conversely, we (in England and in New South Wales) recognise that a foreign court has jurisdiction in the international sense if the defendant was served within its jurisdiction or submitted to it,[2] no distinction being drawn between what constitutes a submission to our own court's jurisdiction (apart from any special domestic legislation) and what constitutes a submission to a foreign court's jurisdiction.[3] The problem thus arises as to what constitutes a submission.

Analogous questions have arisen in other branches of the law and been satisfactorily answered. One example is drawn from the old group of cases which discussed the situation arising when a plaintiff obtained a rule for a special jury, and a common jury panel was returned together with a special jury panel, but, no special jurors appearing, the cause was tried before a common jury. This situation arose in *R.* v. *Franklin*[4] where it was held that if

[21] (1957) 2 W.L.R. 158.

[22] R. W. Parsons "Individual Responsibility versus Enterprise Liability" (1956) 29 *A.L.J.* 714 at 719.

[23] The attitude of the Transport Workers' Union could be well imagined were actions of this kind consistently taken against its members.

[1] N.S.W. Supreme Court, not yet reported; heard at first instance before Kinsella, J. in May 1956 and on appeal to the Full Court (Street, C. J., Owen and Walsh,, JJ.) on 18th June, 1957.

[2] G. C. Cheshire, *Private International Law* (4 ed. 1952) 97-103.

[3] *Id.* 602-609.

[4] Cited (1793) 5 T.R. 456.

the defendant in these circumstances consented to his case being tried by a common jury and took a chance of a verdict before them, he was deemed to have submitted to the court's jurisdiction and waived his right to object. In *Holt* v. *Meddowcroft*[5] the defendant argued his case before a common jury although protesting it had no jurisdiction as he had not submitted to it. On appeal it was argued by the plaintiff that *R.* v. *Franklin*[6] was authority for the proposition that "if a rule is made for a special jury, and the parties proceed to trial before a common jury the verdict shall not afterwards be impeached for the defendant must either challenge the array, or let judgment go by default; but if he appear, and a defence be made, he is by that precluded from making any objection to the jury afterwards".[7] Lord Ellenborough, delivering the judgment of the court, said: "I cannot agree that it amounts to a consent on the part of a defendant, because, being as it were tied to the stake and dragged to trial, he endeavours to make the best of it".[8] It was conceded *a fortiori* that if there were merely an appearance and no defence, no question of submission could arise.

Another instance where the question of whether a submission occurs or not is in arbitration cases. In *Ringland* v. *Lowndes*[9] the Court of Exchequer Chamber held that a party who attends before an arbitrator under protest does not submit to arbitration even if he argues the merits of his case there as well as protests. The Court of Exchequer Chamber in *Davies* v. *Price*[10] on similar facts came to the same conclusion. In both cases it was conceded that a protesting appearance by itself without further participation in the arbitral proceedings could never amount to a submission.[10a]

How similar are the private international law rules governing submissions to a court's jurisdiction? One contrast is clear: in the private international law field a defendant who wishes to deny that a court has jurisdiction must not argue the merits of his case before it; if he does so argue he is deemed to have submitted.[11] This rule is reasonable and must reduce the *cacoethes litigandi* which would otherwise confront the courts if a defendant, having argued his case at length before a foreign court, could again challenge the plaintiff when he was endeavouring to enforce the judgment in New South Wales. In most countries[12] procedural means are available for those defendants who wish to protest the court's jurisdiction without argument on the merits of their case in the form of a conditional appearance; hence it is assumed in such countries, at least *prima facie*,[13] that if a defendant enters an unconditional appearance he has done the equivalent of contesting the case on its merits. But if in an action *in personam* before a foreign court a defendant does no more than appear for the sake of protesting the court's jurisdiction, is he deemed to have

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[5] (1816) 4 M. & S. 467 (Lord Ellenborough, C. J., Le Banc and Bayley, JJ.).
[6] Cited (1793) 5 T.R. 456.
[7] (1816) 4 M. & S. 476, 468.
[8] *Id.* at 469.
[9] (1864) 17 C.B. (N.S.) 515 (Bramwell, B., Blackburn, J., Channell, B., Mellor, J., Piggott, B., and Shee, J.).
[10] (1864) 34 L. J. (Q.B.) 8; 11 L.T. (N.S.) 203.
[10a] It must be noted that the question of what constitutes a "submission" can arise in two distinct contexts in arbitration cases. In one sense the word is used as meaning a contract to submit any disputes arising. This is by far the most common meaning in these cases. Thus the N.S.W. Arbitration Act, 1902, s.3 defines a "submission" as "a written agreement to submit present or future differences to arbitration . . . ". The other, less common, usage of the term is in the sense relevant here, namely what actually is a submission apart from any agreement to submit.

It may be observed also that the normal usage of the word "submission" supports the view taken by the writer, i.e. it is something not far distant from voluntary acquiescence. This is, it is conceived, both the plain and popular meaning of the word and a meaning frequently given to it in legal contexts. Thus, for example, the (English) Prescription Act, 1832 (2 & 3 Will. IV, c.7, s.4) uses the term "submitted to or acquiesced in".
[11] *Roussillon* v. *Roussillon* (1880) 14 Ch.D. 351; *Luke* v. *Maryoh* (1922) S.A.S.R. 385.
[12] But not in all countries, and in different countries to different degrees.
[13] It is perhaps arguable that a defendant's appearance by means of an unconditional appearance is not fatal to him even although it would have been more appropriate to enter a conditional appearance. *Cf. Keymer* v. *Reddy* (1912) 1 K.B. 219, *per* Fletcher Moulton, L. J. at 219.

submitted? The reasoning of the jury and arbitration cases considered above would suggest that the answer must be in the negative, and some judges have reached this conclusion. As Lord Merrivale has said:

> I am not persuaded that an appearance . . . , qualified at all stages of the case by a distinct and reasoned denial of the existence of jurisdiction, could with any propriety be regarded as a submission to the exercise of the jurisdiction so denied.[14]

This view has been supported by Denning, L.J. (as he then was):

> I cannot see how it can be said that a man has voluntarily submitted to the jurisdiction of a court when he has all the time vigorously protested that it has no jurisdiction. If he does nothing and lets judgment go against him in default of appearance, he clearly does not submit to the jurisdiction. What difference in principle does it make if he merely does nothing, but actually goes to court and protests that it has no jurisdiction? I can see no distinction at all . . . When he only appears with the sole object of protesting against the jurisdiction I do not think that he can be said to submit to the jurisdiction.[15]

Nevertheless it is not clear if the decided authorities support these expressions of judicial opinion, with which the writer, if the problem were free of authority, would respectfully agree. The matter recently came before Kinsella, J. in Lund's Case,[16] and his Honour's decision at first instance has now been confirmed on appeal by the Full Court of the New South Wales Supreme Court. It will be here submitted that the reasoning of *Lund's Case*[17] does not solve the problems involved.

The history begins with *Keymer* v. *Reddy*,[18] in which the Court of Appeal discussed *inter alia* the steps open to a foreign defendant wishing to object to the jurisdiction of an English court. Fletcher Moulton, L. J. (with whose judgment Farwell, J. expressed his agreement) said: "Two courses are open to a defendant who wishes to object to the jurisdiction. He may disregard the writ and refuse to enter an appearance at all; or he may out of respect for the Court enter an appearance under protest, reserving his right to object to the jurisdiction".[19] The only difference between the two courses is apparently that the latter is more courteous; there is no suggestion that it might be fatal. However, the problem of what was the effect of a protesting appearance did not directly arise in this case.

The question arose for determination in *Harris* v. *Taylor*,[20] a decision of the Court of Appeal composed of Buckley, Pickford and Bankes, L.JJ. The material facts were these: the plaintiff sued in the Isle of Man the defendant, who did not reside there; the plaintiff obtained leave of the Manx Court to serve the writ outside the jurisdiction, and did so. The defendant appeared "conditionally" through counsel and argued that the Manx rules of court did not authorise service out of the jurisdiction, that no cause of action existed within the jurisdiction, and that he was not domiciled in the jurisdiction. The Manx Court held that as the cause of action did arise within the jurisdiction, the rules of court permitted service out of the jurisdiction and dismissed the defendant's application. Thereupon the defendant took no further part in the Manx proceedings. The Court of Appeal held that his actions had constituted a submission to the Manx Court's jurisdiction and therefore recognised and enforced the judgment delivered against him by the Manx Court. In the present submission the ratio of the case is clear: any appearance, conditional or unconditional, constitutes a submission. As Buckley, L. J. says: "But the defendant was not content to do nothing; he did something which he was not obliged to do. . . . He went to the court and contended that the court had

[14] *Tallack* v. *Tallack* (1927) P. 211, 222.
[15] In *Re Dulles (No. 2)* (1951) Ch. 842, 850.
[16] *Op. cit.*, n.l.
[17] *Ibid.*
[18] (1912) 1 K.B. 219.
[19] *Id.* at 219.
[20] (1915) 2 K.B. 580.

no jurisdiction over him".[21]

The writer has argued above that the arbitration cases decide that an appearance before an arbitration tribunal in order to protest its jurisdiction does not amount to a submission even if accompanied by a limited participation in the proceedings before the tribunal by contesting the case on its merits. The writer has further contended that it is not unreasonable to have a rule that a defendant cannot protest the jurisdiction of a court and at the same time argue the merits of his case before it, in this respect distinguishing courts from arbitration tribunals. But *Harris* v. *Taylor*[22] goes to the length of deciding that any appearance by a defendant is a submission to a court's jurisdiction without further ado, whether for the purpose of protesting the court's jurisdiction or not, and whether accompanied by argument on the merits of the case or not. It thus affirms the dubious proposition that a distinct and reasoned denial of a court's jurisdiction can be a submission to the exercise of the jurisdiction so denied. It is submitted that this affirmation does not spring from any logical compulsion, as it certainly does not from practical convenience. It is easy to see how unsatisfactory such a principle would be in practical application.[22a] It is, therefore, not surprising that it has met with unfavourable criticism from legal writers. As Dr. Cheshire says:

> A person who has property in a foreign country where legal proceedings are threatened against him is clearly in a difficult position. If he takes no part in the proceedings, a judgment obtained against him by default will be satisfied by the seizure of his foreign property . . . If, on the other hand, he appears in the proceedings, but only in protest of the jurisdiction, and fails, then if an appearance of such a qualified nature constitutes submission, the ultimate enforcement of the judgment may lead to the seizure of his English property.[23]

In view of these considerations, it is not surprising that attempts have been made to distinguish *Harris* v. *Taylor*.[24] Thus the Canadian courts have held that taking proceedings in a foreign country to have the judgment set aside after it was given does not amount to a submission, although an appearance in the original proceedings does[25] — small consolation to the defendant if the Rules of Court of the foreign country preclude an appearance in the execution proceedings. Another line of cases suggests that an appearance is not submission if its object is to protect property seized under the process of the foreign court.[26]

Dr.Cheshire[27] clutches at a more slender straw in his endeavour to disburden the law of conflicts of the weight of *Harris* v. *Taylor*[28]; he suggests that the defendant did more than protest the jurisdiction, presumably that in some way the defendant argued his case on its merits, although, with the best good will, this is difficult to follow. According to the reports, in effect he argued before the Manx Court: "Your rules permit service out of the jurisdiction if the cause of action arose within the jurisdiction; but the cause of action did not arise in the jurisdiction; therefore you have no jurisdiction", on the determination of which argument he withdrew from further proceedings. It is hard to see how he could have argued less if he wished to protest the court's jurisdiction at all. Professor Schmitthoff[29] has argued that *Harris* v.

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[21] *Id.* at 587-88. [22] *Ibid.*

[22a] Its correctness is not affected by the trenchant *dictum* of Lord Merrivale, P. in *Tallack* v. *Tallack* (1927) P. 211, 222, quoted above, as that case (a) was a case at first instance; (b) concerned the problem of what constitutes a submission only tangentially.

[23] *Private International Law* (4 ed. 1952) 603. [24] (1915) 2 K.B. 580.

[25] *McLean* v. *Shields* (1885) 9 O.R. 699; *Esdale* v. *Bank of Ottawa* (1920) 51 D.L.R. 485.

[26] *De Cosse Brissac* v. *Rathbone* (1861) 6 H. & N. 301; *Voinet* v. *Barrett* (1885) 55 L. J. (Q.B.) 39; *Guiard* v. *de Clermont* (1914) 3 K.B. 145; *Gaborian* v. *Maxwell & Co.* (1908) *The Times newspaper*, 12th Dec., 1908.

[27] *Private International Law* (4 ed. 1952) 603.

[28] (1915) 2 K.B. 580.

[29] C. M. Schmittoff, *The English Conflict of Laws* (1945) 417-19.

Taylor[30] laid down no clear rule, but that whether an appearance amounts to a submission is a question of fact in every case. It is submitted that it would require some hardihood to argue that no question of law arises; the problem surely is, what sort of facts constitute a submission as a matter of law when the defendant has appeared conditionally ?

A further attempt to confine *Harris* v. *Taylor*[31] within narrow limits has been made by Professor H. E. Read[32] who accepts it as good authority only in the circumstances which arise when the rules of court of a foreign country make no provision for a conditional appearance. The writer will revert to this proposition later.

Another attempt to distinguish the case was made when the issue was again raised before the Court of Appeal in *Re Dulles (No. 2)*,[33] a case involving proceedings which resulted in an infant's being declared a ward of court. The infant (by his mother as next friend) took out a summons requiring his mother to be appointed guardian, and that provision for maintenance be made. The infant's father, an American resident abroad, appeared by his solicitor in the proceedings and contested the first claim on the ground that a French court had awarded him custody of the infant, and the second request on the ground that his absence from England meant that the court had no jurisdiction over him. The court (Evershed, M. R. and Denning, L. J.) held that the father's appearance did not amount to a submission to the jurisdiction. Denning, L. J. (with whom Evershed, M. R. agreed) distinguished *Harris* v. *Taylor*[34] in the following manner: in that case the defendant had argued that the cause of action had not arisen in the Isle of Man, this being the ground on which leave to serve out of the jurisdiction was granted; this was a question of fact which was decided against the defendant, who did not appeal; thereafter, the matter was *res judicata* between the two parties, the defendant's appearance being a submission as to the determination of the facts of the case founding jurisdiction under Manx law, though not a submission to the jurisdiction generally; and as the Manx rule of court authorising service out of the jurisdiction had its parallel in an English rule of court which the Court of Appeal would expect to be recognised reciprocally, so the English court should recognise Manx judgments.

A comparison of *Harris* v. *Taylor*[35] and *Re Dulles*[36] shows that the reasoning of the Court of Appeal in the one does not square with Denning, L. J.'s rationalisation of it in the other. *Harris* v. *Taylor*[37] was decided on the simple ground that every appearance, conditional or unconditional, constitutes a submission; it is silent on the doctrine of *res judicata* and the merits of reciprocity.

As far as can be seen, the legal effect of accepting Denning, L. J.'s reasoning in *Re Dulles*[38] may be summarised thus: (1) In cases where the foreign court exercised "ordinary jurisdiction" (i.e. where by the law of the foreign country the foreign court has no jurisdiction over a defendant unless he has been served within the jurisdiction or has submitted to it), a New South Wales court would recognise a foreign judgment if the defendant had appeared, although of the opinion that some fact grounding jurisdiction had been incorrectly adjudicated upon. Thus, if D on being served appears conditionally and argues that service was effected outside the jurisdiction, and P alleges service occured within the jurisdiction, and the foreign court disallows D's objection, a New South Wales court would recognise that judgment. According to the reasoning of Denning, L. J., in *Re Dulles*, it would do so because D's appearance was a submission to the determination of the facts grounding jurisdiction under the foreign law (i.e. where service was affected).

[30] (1915) 2 K.B. 580. [31] *Ibid.*
[32] *Recognition and Enforcement of Foreign Judgments* (1938) 165-170.
[33] (1951) Ch. 842. [34] (1915) 2 K.B. 580. [35] *Ibid.*
[36] (1951) Ch. 842. [37] (1915) 2 K.B. 580. [38] (1951) Ch. 842.

A similar result would be reached on the reasoning of *Harris* v. *Taylor*[39] on the ground that D's appearance was a submission. (2) In cases where the foreign court exercised "extraordinary jurisdiction" of a kind which a New South Wales court itself exercises (for example, where by the law of a foreign country the foreign court has jurisdiction over a defendant if a cause of action arose within the jurisdiction), a New South Wales court would recognise the foreign judgment if the defendant had appeared, although of opinion that the *factum* grounding jurisdiction under foreign law had been incorrectly adjudicated upon by the foreign court. *Harris* v. *Taylor*[40] would make the defendant's appearance a submission. *Re Dulles*[41] would give the same solution on the *res judicata* doctrine. But, *semble*, *Re Dulles*[42] would not treat the defendant's appearance as a submission if, no facts being in dispute, the New South Wales court thought that the foreign court had drawn incorrect conclusions of law therefrom, as the doctrine of *res judicata* only applies to facts in dispute. (3) In cases where the foreign court exercised "extraordinary" jurisdiction of a kind unknown in New South Wales (e.g. where the foreign law authorises its courts to assume jurisdiction over defendants who own property within the jurisdiction), a determination of the necessary facts by the foreign court on a defendant's appearing (i.e., in this example, that the defendant owns the necessary property) does not prevent the defendant from arguing against the recognition of the foreign judgment in New South Wales on the ground of lack of jurisdiction. In this case, *Re Dulles*[43] would give a result diverging from that given by *Harris* v. *Taylor*,[44] which would deem the defendant to have submitted to the foreign court's jurisdiction merely by filing his appearance.

It would be difficult to deny that this novel doctrine of reciprocity would be socially beneficent and make for a diminution of the practical and logical anomalies of *Harris* v. *Taylor*[45] discussed already. But it is submitted that the Court of Appeal, having long ago discovered its own infallibility, is not in a position to depart from its prior decisions. *Re Dulles*,[46] of course, purports to "explain" the previous decision after a "close examination" of its implications and reasoning, and not to disregard it. A better path, perhaps, for the court in *Re Dulles*[47] to follow was to have doubted the validity of the reasoning in *Harris* v. *Taylor*,[48] piously hoped that it would be overruled by the House of Lords, begged the legislature to change the law, and reluctantly followed and applied it.

In *Lund's Case*,[49] the plaintiff, A. Lund & Co., a company incorporated in England, issued a writ out of the High Court for service out of the jurisdiction and, after obtaining special leave, caused it to be served on the defendant in New South Wales. It then filed and served a Statement of Claim for breach of contract. The defendant caused a conditional appearance to be entered in England and then took out a summons for an order to set aside the writ, service of the writ and all later pleadings on the grounds that no contract was made within the jurisdiction of the English High Court, and that the proper law governing the contract was that of New South Wales. The court dismissed the summons and ordered that the defendant's appearance stand as an unconditional appearance. The defendant took no further part in the proceedings. The plaintiff, having obtained judgment in its favour, registered it in the New South Wales Supreme Court under s.5 of the Administration of Justice Act, 1924. The defendant, contending on the strength of *Re Dulles*[50] that it had not submitted to the High Court's jurisdiction, applied under s.5(2) of the Act to have the registration set aside. Section 5(2) reads (insofar as it is relevant):

[39] (1915) 2 K.B. 580.
[40] *Ibid.*
[41] (1951) Ch. 842.
[42] *Ibid.*
[43] *Ibid.*
[44] (1915) 2 K.B. 580.
[45] *Ibid.*
[46] (1951) Ch. 842.
[47] *Ibid.*
[48] (1915) 2 K.B. 580.
[49] *Op. cit. supra* n.1.
[50] (1951) Ch. 842.

> No judgment shall be ordered to be registered under this section if:
> (a) the original court acted without jurisdiction; or
> (b) the judgment debtor being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of that court; or . . .

Kinsella, J. held that the defendant had submitted to the jurisdiction of the English court.

His Honour held that *Harris* v. *Taylor*[51] was an authority which squarely laid down that a conditional appearance by a defendant was a submission to the court's jurisdiction; that the reasoning of Denning, L. J. in *Re Dulles*[52] was inconsistent with *Harris* v. *Taylor*[53] but did not dislodge its authority, the result of *Re Dulles*[54] depending on the peculiarities of its facts. The infant's father in *Re Dulles*,[55] his Honour pointed out, was not strictly a party to the proceedings; one can only submit to proceedings to which one is a party; and although the infant could have chosen alternative procedures to that in fact chosen whereby the father was a party, the fact was that he did not. His Honour did not pretend that the grounds on which he distinguished *Re Dulles*[56] from *Harris* v. *Taylor*[57] were the same as those offered by Denning, L. J. in *Dulles' Case*[58] itself.

It is interesting to see the consequences of his Honour's interpretation of *Re Dulles*.[59] Apparently his Honour would say that one cannot submit to the jurisdiction of a foreign court, however hard one tries, unless one is a party to the foreign proceedings. But this is open to criticism. In the first place, such a distinction is removed from the fundamental question of whether or not a party concerned has argued the merits of his case before the court. In the second place, what is the position if the legal system of the foreign country considers the defendant a party to the action and the New South Wales court does not ? Or if the foreign country is innocent of the distinction which the common law makes between the parties to a suit in the strict sense and other participants in it ? Endless vistas of arid argument on problems of classification arise from such a solution.

Another (and presumably alternative) means of distinguishing *Harris* v. *Taylor*[60] from *Re Dulles*[61] was suggested by his Honour by considering the situation which arises if the rules of court of the foreign country admit of a procedure whereby a defendant may protest the court's jurisdiction without appearing conditionally or otherwise. His Honour points out that the English High Court rules provide this loophole for defendants in Rule 30 of Order 12, which is as follows:

> A defendant before appearing shall be at liberty without obtaining leave to enter or entering a conditional appearance, to take out a summons in the Queen's Bench Division . . . to set aside the service upon him of the writ, or to discharge the order authorising such service.[62]

His Honour points out that if the defendant in the foreign court has utilised some such procedural means of protesting the court's jurisdiction which does not involve his appearance, he will not suffer the heavy consequences of a submission. His Honour did not pursue the matter further, but it is submitted that one of two consequences must follow: either that one cannot protest the foreign court's jurisdiction unless some such procedure is available, or that a defendant must be deemed to have submitted on entering a conditional appearance in circumstances where he had an option of protesting the jurisdiction without appearing. If the first alternative be correct, it is

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[51] (1915) 2 K.B. 580. [52] (1951) Ch. 842. [53] (1915) 2 K.B. 580.
[54] (1951) Ch. 842. [55] *Ibid.* [56] *Ibid.*
[57] (1915) 2 K.B. 580. [58] (1951) Ch. 842.
[59] *Ibid.* [60] (1915) 2 K.B. 580. [61] (1951) Ch. 580.
[62] The Rules of Court of the N.S.W. Supreme Court do not contain a similar provision; however, the High Court Rules do, *viz.* Order 11, r.5.

submitted that to make the question of whether a defendant has submitted or not to the jurisdiction hinge on such niceties is too sophisticated a solution to what should be a relatively uncomplex problem. It savours too much of casuistry.

Suppose country X had a procedure like that laid down in the English rule, and Y had not (as New South Wales has not); suppose P initiates an action against D, resident in New South Wales, who gives his solicitor instructions to protest the foreign court's jurisdiction — why should D be deemed to have submitted if the foreign country whose court is involved be Y and not to have submitted if it be X? Surely the question whether D has submitted should not depend on the procedural vagaries of the courts of the *lex fori*. At least for the sake of simplicity — a virtue not to be underestimated in private international law — the rule should be that either no appearance is a submission unless the defendant has taken some steps to argue the case on its merits, or else any kind of appearance is *eo ipso* a submission.

If the second alternative be correct, in the example given above D would be deemed to have submitted if the foreign country were X, and not if it were Y. This would reconcile *Re Dulles*[63] and *Lund's Case*[64] by narrowing the ratio of the latter considerably; but it would be contrary to *Harris* v. *Taylor*,[65] both because the latter case decided that every appearance was a submission (option or no option) and because on the facts of that case no procedure for protest alternative to entering a conditional appearance existed under the Manx Rules of Court. It would suffer the additional disadvantage of also producing highly artificial results.

The writer submits that the solution advocated by Professor Read noted above should be rejected for similar reasons. Conceding his argument that the Manx Rules of Court gave the defendant in *Harris* v. *Taylor*[66] no opportunity of filing a conditional appearance, it seems an unhappy solution of the problem whether or not a protest-to-jurisdiction be a submission to make the outcome depend on the existence of procedural deficiencies in the rules of the foreign court. Surely the deciding factor should be whether, on the one hand, the defendant contented himself with arguing the merits of his case without protest, or, on the other, he attempted to protest the court's jurisdiction by whatever was the appropriate means available to him. The consequences of a defendant's protest should not, it is submitted, vary according to the number of means of effecting such protest provided by the foreign court, thereby making considerable substantive rights depend on procedural peculiarities. The possible unpleasant consequences of Professor Read's suggestion become more apparent when one considers that on his principle if a plaintiff has a choice of jurisdictions in which to bring his action, the defendant's rights on appearance might vary out of all proportion according to the selection of the *forum*.

A third suggested refinement on the doctrine of *Harris* v. *Taylor*[67] emerges from Kinsella, J.'s judgment in *Lund's Case*.[68] In England, the Rules of Court provide that "an appearance is to stand as unconditional unless the defendant applies within . . . days to set aside the writ or the service thereof and obtains an order to that effect". The equivalent rule of the New South Wales Supreme Court is noticeably different: "Such appearance shall become unconditional if no summons to set aside the writ is taken out by the defendant within . . . days of filing the notice of conditional appearance" — there is no requirement that the writ must be set aside as well, only that a summons be taken out. His Honour's suggestion is that if the plaintiff in *Lund's Case*[69] were resident in New South Wales and the defendant in England, and if the defendant were served in England and entered a conditional appearance in New South Wales, the result might have been different. The writer feels that this

[63] (1951) Ch. 580.
[64] *Op. cit. supra* n.1.
[65] (1915) 2 K.B. 580.
[66] *Ibid.*
[67] *Ibid.*
[68] *Op. cit. supra* n.1.
[69] *Ibid.*

distinction is as unsatisfactory as the other procedural distinctions just discussed on the ground that it would give unreal solutions.[70]

On appeal to the Full Court of New South Wales (Street, C. J., Owen and Walsh, JJ.) the decision of Kinsella, J. was sustained but on reasoning rather dissimilar from his Honour's.[71] The learned Chief Justice (with whom Owen and Walsh, JJ. concurred) argued that little assistance could be derived from *Re Dulles*,[72] the decision in which rested on its own particular facts: that *Harris* v. *Taylor*[73] and the South Australian case of *Luke* v. *Mayoh*[74] were also of little assistance (the former even less than the latter), since it was not certain whether the decisions therein rested on the basis of *res judicata*, on the one hand, or on the question of the effects of an appearance before a foreign court on the other hand. Their Honours then pointed out, what Kinsella, J. had noted in the court below, that by the English rules of court, a conditional appearance is deemed to be an unconditional appearance on the refusal of the court to set aside the writ; and since, their Honours argued, an unconditional appearance is a submission to the jurisdiction, the defendant must have been deemed to have submitted and therefore rendered himself unable to object to the registration of the English judgment in New South Wales.

It may be objected that their Honours' view of the irrelevance of *Harris* v. *Taylor*[75] is perhaps difficult to understand. In the first place, the judgments in that case itself do not mention or suggest the doctrine of *res judicata*, which was the text writers' rationalisation of the case. In the second place, since the case decided that the appearance by the defendant in question before the Manx court constituted a submission, it is submitted that it must have been in point in determining whether the defendant in *Lund's Case*[76] had submitted to the jurisdiction of the English court, whatever be its ratio. But, in the writer's view, more fundamental objection may be taken to the view expressed by their Honours on the effect of the English court's refusing the defendant's application to set aside the writ. We have already seen that there is no insuperable reason for holding that in all cases an unconditional appearance before a foreign court does constitute a submission. In addition, the fact that the English rules of court deem that a defendant's failure to set aside the writ makes his appearance unconditional need not in the writer's view necessarily mean that he has submitted according to the private international

[70] At this point it is perhaps pertinent to remark that the draftsmen of the Administration of Justice Act, 1924 must have proceeded on the basis that *Harris* v. *Taylor* (1915) 2 K.B. 580 correctly stated the law on the doctrine of submission to the jurisdiction of a foreign court.

The purpose of the Act, which is similar to the English Administration of Justice Act, 1920 (10 & 11 Geo. V, c.81) is to provide, broadly speaking, for the enforcement by the N.S.W. Supreme Court of all judgments for the payment of money given by the courts of the United Kingdom and other parts of the Empire proclaimed by the governor where he is satisfied that reciprocal arrangements have been made, provided, in cases in which the foreign court did not have jurisdiction in the international sense, that the defendant appeared in the proceedings which resulted in the judgment or was served within the jurisdiction of the foreign court. The Act enables a person who has thus obtained a judgment in a part of the Empire to which it applies to enforce that judgment in a summary way by registration in N.S.W., thereby avoiding the necessity of following the more circuitous common law methods (i.e. either to sue afresh on the original cause of action, or to bring an action in N.S.W. on the judgment if it complied with certain requirements) of procedure preliminary to enforcement.

However, if the doctrine of Denning, L. J. in *Re Dulles (No. 2)* (1951) Ch. 842 be correct and *Lund's Case* wrongly decided, there would be a gap in the Act, as a defendant who had merely appeared conditionally before the foreign court to protest its jurisdiction could effectively prevent the plaintiff who had won the foreign action from registering the foreign judgment in N.S.W. and thus force him to fall back on the common law methods of enforcing his judgment notwithstanding that a N.S.W. Court would have statutory jurisdiction in similar circumstances.

This state of affairs would have the ironical result that the defendant in *Lund's Case* would then find *Re Dulles (No. 2)* in his favour on the question of submission in his attempt to prevent registration of the foreign judgment by the plaintiff under the Act, and against him in the common law proceedings on the question of reciprocity.

[71] *Cf. supra* n.1. [72] (1951) Ch. 842. [73] (1915) 2 K.B. 580.
[74] (1922) S.A.S.R. 385. [75] (1915) 2 K.B. 580. [76] *Cf. supra* n.1.

law of New South Wales. It would seem unfortunate for the domestic law of the foreign country to determine our rules of recognition of foreign judgments to that extent.

To take an extreme example, if the domestic law of England deemed that a defendant had submitted to the jurisdiction of an English court by possessing property within the jurisdiction of the court, a New South Wales court could hardly say that he had submitted according to the private international law of New South Wales. The writer's view that their Honours did not sufficiently distinguish between the domestic law of England and the private international law of New South Wales is further confirmed by the fact that Street, C. J. at least thought that *Luke* v. *Mayoh*[77] was relevant in some degree to the case before the court, because in *Luke* v. *Mayoh*[78] no question of the recognition of the foreign judgment arose. The question to be decided in that case was, if the rule of the foreign court is the same as the English rule now being discussed, does the overruling of the defendant's objections by the court automatically make his appearance an unconditional one in that Court ? All the South Australian court had to do was to construe one of its rules in a case initiated in it. It is difficult to see how any problem of private international law of the kind under discussion could have arisen in such circumstances; but in *Lund's* Case[79] the question was the international significance to be accorded to the domestic rules of a foreign country.

The writer's conclusions may be summarised thus:

1. Logically, the sensible rule would be that if a defendant protests a court's jurisdiction he does not submit to its jurisdiction. The essence of the idea of submission is that the defendant voluntarily accepts a court's arbitration. If any sort of protest be a submission, we have people submitting against their will, which is a logical contradiction. This is the conclusion reached by the "arbitration cases".

2. Since this be so, it should be irrelevant whether by the rules of court of the foreign country concerned:

(a) the defendant must appear unconditionally if at all, there being no provision for a conditional appearance, or not; or

(b) the foreign court's overruling of the defendant's protest makes his conditional appearance unconditional (as in England) or not (as in N.S.W.); or

(c) whether the defendant by protesting the jurisdiction be a party to the foreign proceedings *stricto sensu*, or not.

3. However, *Harris* v. *Taylor*,[80] a decision of the Court of Appeal, is clear authority that any appearance, conditional or not, is a submission;

4. *Harris* v. *Taylor*[81] is an unhappy decision and possibly incorrect, but it binds the Court of Appeal; it should be followed in N.S.W. until overruled by the House of Lords or disapproved by the High Court or Privy Council;

5. *Re Dulles*[82] finds *Harris* v. *Taylor*[83] authority for the proposition that a conditional appearance is a submission only insofar as it goes to the facts giving the foreign court jurisdiction in the international sense (i.e. if its purported grounds of jurisdiction are similar to the grounds of jurisdiction recognised by N.S.W. courts);

6. The *Re Dulles*[84] interpretation of *Harris* v. *Taylor*[85] is unsupportable, however socially desirable the principles of reciprocity it seeks to father on the older case;

7. Kinsella, J. in *Lund's Case*,[86] it is respectfully suggested, correctly held that the reasoning of Denning, L. J. in *Re Dulles*[87] cannot be reconciled with *Harris* v. *Taylor*[88] and that the latter is still good authority;

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[77] (1922) S.A.S.R. 385.
[78] *Ibid.*
[79] *Cf. supra* n.1.
[80] (1915) 2 K.B. 580.
[81] *Ibid.*
[82] (1951) Ch. 842.
[83] (1915) 2 K.B. 580.
[84] (1951) Ch. 842.
[85] (1915) 2 K.B. 580.
[86] *Cf. supra* n.1.
[87] (1951) Ch. 842.
[88] (1915) 2 K.B. 580.

8. The grounds on which Kinsella, J. in *Lund's Case*[89] sought to distinguish *Re Dulles*[90] are tenuous.

9. The judgments of the New South Wales Full Court upholding Kinsella, J.'s decision at first instance perhaps inadequately consider the private international law aspects of the effects of a defendant's appearance before a foreign court.

R. P. MEAGHER, B.A., Case Editor — Fourth Year Student.

NEW BOUNDARIES FOR DONOGHUE v. STEVENSON
ANDREWS v. HOPKINSON
RIDEN v. A. C. BILLINGS & SONS LTD.

Two recent English decisions illustrate judicial approval of new rules of liability fathered by the principle in *Donoghue* v. *Stevenson*[1] at the expense of old rules of immunity.

Though he decided the case primarily in contract the trial judge, McNair, J., in *Andrews* v. *Hopkinson*[2] was prepared to extend the duty of care formulated in *Donoghue* v. *Stevenson* to the vendor of a defective chattel who had done nothing active to make the chattel defective. The facts were that a servant of a second-hand car dealer, the defendant in the case, assured the plaintiff that a small 1934 saloon car was a "good little bus" upon which "he would stake his life". Consequently the plaintiff paid a small deposit and secured the balance by way of hire-purchase agreement after having first acknowledged in a delivery note that he was satisfied with the car's condition. Due to defective steering mechanism rendering the car unsafe for use on a highway, the car collided with a lorry and the plaintiff thereby suffered serious injury. McNair, J. found as a fact that the defective condition of the car causing the collision could have been easily discovered by any competent mechanic and further that any motor dealer should have appreciated that in a car of the kind sold to the plaintiff the steering mechanism was one of the most likely places to find excessive and dangerous wear. He held that:

1. The words spoken by the defendant's servant cited above amounted to a warranty of fitness and the plaintiff could recover on the contract with the defendant, concluded by his accepting delivery and entering into a hire-purchase agreement. His Honour thus called on the device used in *Routledge* v. *McKay*[3] for escaping the difficulty created by the fact that a hire-purchase transaction is normally not between dealer and purchaser but between finance company and purchaser.

2. The plaintiff's injuries were a direct and natural result of the breach of the warranty and damages were recoverable in respect of those injuries.

3. The defendant was also liable in tort to the plaintiff for his servant's negligence which lay in delivering to the plaintiff a motor car with a dangerous defect discoverable by reasonable diligence and in failing either to have the car examined by a competent mechanic prior to sale or to warn the plaintiff that it had not been so examined.

The finding of liability in tort was not essential to the decision but the principle accepted by McNair, J. may yet prove to be of considerable significance. Here it would seem is the first case in English law where the duty of care formulated in *Donoghue* v. *Stevenson* has been imposed on the vendor in a combination of circumstances where—

(a) the chattel was not dangerous *per se;*

(b) the vendor did nothing active to make or change the defective chattel. Thus we may distinguish the cases of similar liability imposed on manu-

[89] *Cf. supra* n.1. [90] (1951) Ch. 842.
[1] (1932) A.C. 562. [2] (1956) 3 All E.R. 422 (Q.B.).
[3] (1954) 1 All E.R. 855 (C.A.).