[HIGH COURT OF AUSTRALIA.]

DELANEY . . . . . APPELLANT;
DEFENDANT,

AND

THE GREAT WESTERN MILLING COMPANY LIMITED . . . . . } RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 14, 15, 16, 17, 18; *Sept.* 1.

Griffith C.J., Barton, Isaacs, Gavan Duffy and Rich JJ.

Contract—Avoidance by State law—Ex post facto Statute—Recovery of money paid under contract—Party to contract resident out of State—Jurisdiction of State Court—Powers of State Parliament—Wheat Acquisition Act 1914 (*N.S.W.*) (*No.* 27 *of* 1914), *sec.* 8—*Service and Execution of Process Act* 1901-1912 (*No.* 11 *of* 1901—*No.* 18 *of* 1912), *sec.* 12—*Constitution Act* 1902 (*N.S.W.*) (*No.* 32 *of* 1902), *sec.* 5.

By sec. 8 of the *Wheat Acquisition Act* 1914 (N.S.W.) it is provided that "(1) Every contract made in the State of New South Wales prior to the passing of this Act, so far as it relates to the sale of New South Wales 1914-15 wheat to be delivered in the said State, is hereby declared to be and to have been void and of no effect so far as such contract has not been completed by delivery. (2) Any transaction or contract with respect to any wheat which is the subject matter of any contract or part of a contract which is hereby declared to be void shall also be void and of no effect, and any money paid in respect of any contract hereby made void or of any such transaction shall be repaid."

The defendant, who at all material times was a resident of Victoria, had in May 1914 entered into a contract with certain residents of New South Wales to purchase from them a certain quantity of New South Wales 1914-15 wheat to be delivered in Sydney early in 1915. By a contract made in October 1914 the defendant purported to assign and transfer to the plaintiffs all his interest in the contract of May 1914 in consideration of a certain sum of money,

"such sum to be payable £150 prompt cash and the balance to be adjusted at end of each month as wheat is delivered but no further payments to be made if wheat is not delivered"; and the defendant also agreed, if and when called upon by the plaintiffs, to give a full power of attorney to the plaintiffs to enable them to enforce the May contract. Both the May contract and that of October were, according to the evidence, made in New South Wales. The £150 was paid in New South Wales by the plaintiffs to the defendant. Subsequently, on 11th December 1914, the *Wheat Acquisition Act* 1914 (N.S.W.) came into operation. The plaintiffs brought an action in the Supreme Court of New South Wales against the defendant to recover the £150, and the defendant was served with the writ pursuant to the *Service and Execution of Process Act* 1901-1912.

Held, by *Isaacs*, *Gavan Duffy* and *Rich* JJ. (*Griffith* C.J. and *Barton* J. dissenting on all points), that the October contract was within the terms of sec. 8 (2) of the *Wheat Acquisition Act* 1914; that, construed as applying to that contract, the sub-section was not *ultra vires* the Parliament of New South Wales; that the defendant was, by virtue of sec. 12 of the *Service and Execution of Process Act* 1901-1912, subject to the jurisdiction of the Supreme Court of New South Wales: and, therefore, that the plaintiffs were entitled to judgment.

Per Griffith C.J. and *Barton* J.—The Legislature of New South Wales has no power to impose retrospectively upon a person who is not within its territorial jurisdiction a new liability in respect of a past and completed transaction. The *Service and Execution of Process Act* does not confer upon the Supreme Court of New South Wales jurisdiction to enforce such a law against a person served with process under that Act.

Decision of the Supreme Court of New South Wales: *Great Western Milling Co.* v. *Delaney*, 15 S.R. (N.S.W.), 516, affirmed.

APPEAL from the Supreme Court of New South Wales.

An action was brought in the Supreme Court by the Great Western Milling Co. Ltd., a company registered in New South Wales and carrying on business in Sydney, against Albert Edward Delaney, who at all material times was a resident of Melbourne in Victoria, and carried on business there as Delaney & Co., claiming £150 as being money paid by the plaintiffs to the defendant under a contract dated 16th May 1914 and repayable to the plaintiffs by virtue of the *Wheat Acquisition Act* 1914 (N.S.W.). The writ of summons was served upon the defendant in Melbourne pursuant to the *Service and Execution of Process Act* 1901-1912. The action was heard as a commercial cause before *Pring* J. without a jury, who found a verdict for the defendant. On motion by the plaintiffs to the Full

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Court that verdict was set aside and a verdict was directed to be entered for the plaintiffs for the amount claimed: *Great Western Milling Co.* v. *Delaney* (1).

The contract under which the £150 was paid was dated 12th October 1914, and was in the following terms :—

" Messrs. Delaney & Co. of Melbourne hereby assign and transfer to the Great Western Milling Co., Sydney, all their right title and interest in and to the within written contract for the delivery to them of 6,000 sacks wheat dated 16th May 1914 and made between Messrs. Pyke Bros., Coolamon, and Messrs. Delaney & Co., Melbourne, and in consideration of the assignment and transfer hereinbefore contained the said Great Western Milling Co. hereby covenant and agree to pay to Messrs. Delaney & Co. the difference between 3/8½ and 4/2 per bushel on the quantity of wheat mentioned, such sum to be payable £150 prompt cash and the balance to be adjusted at end of each month as wheat is delivered but no further payments to be made if wheat is not delivered.

" Messrs. Delaney & Co. agree when called upon by the Great Western Milling Co. to give a full power of attorney containing all usual clauses to enforce their contract with Messrs. Pyke Bros."

The contract of 16th May 1914 therein referred to was in the following terms :—

" Messrs. Delaney & Co., Melbourne, buy and Messrs. Pyke Bros., Coolamon, sell the undernoted goods, to be delivered in good merchantable condition and on the terms and conditions mentioned below :—

" Quantity, 6,000 sacks New South Wales season 1914-1915 fair average quality wheat in sound sacks fit for shipment.

" Price, 3/8½ (three shillings and eightpence halfpenny) per bushel on trucks Darling Harbour and/or Darling Island.

" Terms, Nett cash 90 per cent. against Consignment Note or Delivery Order balance as weights are adjusted.

" Delivery, 2,000 (two thousand) sacks each month Jan., Feb., March 1915.

" Seller to pay brokerage of ¼d. per bushel."

The May contract was negotiated by Robert J. Mulholland, a

(1) 15 S.R. (N.S.W.), 516.

Sydney broker, under instructions from Scarlett & Co., who were Melbourne brokers and agents for the defendant, and who worked in conjunction with Mulholland. The document was in duplicate, the defendant executing one copy which had been sent to Melbourne for that purpose, and Pyke Bros. executing the other, but there was no evidence as to which was signed first.

As to the October contract, Mark Block, a Melbourne broker and agent for the defendant, authorized Harold Cropper, a Sydney broker, to sell the defendant's interest in the May contract upon certain terms. Cropper thereupon entered into negotiations with the plaintiffs, who desired a certain alteration of the terms so as to provide that no further payments should be made if the wheat was not delivered. Cropper communicated this to Block, and received from him the October contract above set out signed by the defendant and also the copy of the May contract signed by Pyke Bros. These documents Cropper handed to the plaintiffs, and received from them a cheque for £150 drawn by them on their Sydney bank and endorsed as payable to the defendant's Melbourne banking account. Cropper sent this cheque to Block, to whom the defendant gave a receipt for £150, which was forwarded to Cropper and by him handed to the plaintiffs.

From the decision of the Full Court the defendant now, by special leave, appealed to the High Court.

Innes K.C. and *Pickburn*, for the appellant. The May contract is not within the terms of sec. 8 (1) of the *Wheat Acquisition Act* 1914 because it was not made in New South Wales, and therefore the Act has no application. The onus was upon the respondents to prove that the contract was made in New South Wales. There was no contract until the appellant signed the document in Melbourne, and there is no evidence whether he was the last to sign it. The October contract is not within either sub-section of sec. 8 because on the evidence it was not made or to be performed in New South Wales, it was not a contract for the sale of wheat, and it was not a contract with respect to wheat. Sec. 8 (2) must be limited to contracts made or to be performed in New South Wales, otherwise the Parliament of New South Wales has no power to

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legislate with respect to them. The contract was made when the appellant in Melbourne accepted the offer of the respondents to vary the terms. The assignment of the May contract was made in Melbourne, and the payments under the October contract were to be made in Melbourne, so that the October contract was to be performed in Melbourne. Wherever the October contract was made, there is no statutory obligation upon the appellant to repay the £150, for the New South Wales Parliament has no power to impose such an obligation upon a foreigner, and sec. 8 will be construed as not intending to impose it: *Pitt Cobbett's Leading Cases on International Law*, 3rd ed., Part I., p. 231; *Russell* v. *Cambefort* (1); *Macleod* v. *Attorney-General for New South Wales* (2); *Lopez* v. *Burslem* (3); *Story's Conflict of Laws*, secs. 260 (*a*), 261. The defendant did not contract to submit himself to *ex post facto* legislation by the Parliament of New South Wales. Sec. 8 (1) is *ultra vires* if and so far as it is in conflict with sec. 92 of the Constitution. The benefit of the May contract was situated in Victoria, and when that right was sold to a subject of New South Wales the Parliament of New South Wales had no power to put an embargo upon the contract: *Danubian Sugar Factories Ltd.* v. *Commissioners of Inland Revenue* (4). There is no obligation at common law to repay the £150, for the action for money had and received rests upon an implied promise made at the place where the money was had and received to repay it in a certain event. The law governing this contract is the *lex loci contractus*, which is the law of Victoria, of which there is no evidence. Assuming that there is no statutory obligation to repay the £150, there is no obligation to repay it at common law, because there has been no total failure of consideration, even according to the law of New South Wales: *Halsbury's Laws of England*, vol. VII., p. 481; vol. XXV., p. 188; *Bullen and Leake's Precedents of Pleading*, 3rd ed., p. 49; *Taylor* v. *Hare* (5). In any event there is no obligation to repay the £150, because the parties contracted themselves out of the Statute, if it applied, and out of the common law, if the Statute did not apply, and made their own code. The provision in the October contract that no

(1) 23 Q.B.D., 526.
(2) (1891) A.C., 455.
(3) 4 Moo. P.C.C., 300, at p. 305.
(4) (1901) 1 K.B., 245.
(5) 1 B. & P. N. R., 260.

further payments should be made if the wheat was not delivered, negatives any implied promise to repay the £150: *Chandler* v. *Webster* (1); *Elliott* v. *Crutchley* (2); *Sinclair* v. *Brougham* (3).

Ralston K.C. and *Curlewis*, for the respondents. The May contract was made in New South Wales. [Counsel were stopped on this point.] The October contract also was made in New South Wales. Cropper was agent for the appellant, and the contract was not completed until Cropper handed the document to the respondent Company and received their cheque. It was also a contract with regard to property in New South Wales and to be performed in New South Wales. It was, therefore, a contract over which the Legislature of New South Wales had complete control notwithstanding that one of the parties to it was not a resident of New South Wales. The October contract was in substance a contract relating to the sale of wheat and was therefore within sec. 8 (1) of the *Wheat Acquisition Act*. At least it is within sec. 8 (2). Sec. 8 (2) must be construed with relation to sec. 8 (1), and therefore as avoiding the October contract *ab initio*. The contract being one over which the Parliament of New South Wales has full control, it might avoid the contract *ab initio* and enact that the parties to it should be put in the same position as if they had never made it. It might accordingly direct that money paid under the contract should be repaid. A party to a contract is bound by *ex post facto* legislation with respect to the contract: *Rouquette* v. *Overmann* (4); *Halsbury's Laws of England*, vol. VI., p. 238. The fact that the appellant was a resident of Victoria does not affect his liability. If he is within the jurisdiction of the Courts of New South Wales when the question of his liability has to be determined, that is sufficient. The service of the writ upon the appellant pursuant to the *Service and Execution of Process Act* brought him within the jurisdiction of the Supreme Court, and the question then to be determined was whether, according to the laws of New South Wales, he was bound to repay the money. The respondents were entitled to recover the money at common law as on a total failure of consideration. The May contract is by virtue of sec. 8 (1) to be deemed

(1) (1904) 1 K.B., 493.
(2) (1904) 1 K.B., 565; (1906) A.C., 7.
(3) (1914) A.C., 398, at p. 417.
(4) L.R. 10 Q.B., 525.

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never to have existed, and therefore there was no subject matter for the October contract. That being so, any money paid under the October contract may be recovered: *Elliott* v. *Crutchley* (1). In the October contract there must be implied an agreement that the appellant would be bound by any law that the Parliament of New South Wales might thereafter make affecting the contract. There is no principle of law that a person contracts with respect to the existing law. *Mayor of Berwick* v. *Oswald* (2) and *Baily* v. *De Crespigny* (3) do not lay down such a principle. The law governing a contract is the law by which the parties intended, or may be fairly presumed to have intended, that it should be governed: *Dicey's Conflict of Laws*, 2nd ed., p. 529. The extent to which the appellant undertook to be bound by the law of New South Wales is to be ascertained by asking to what extent would an ordinarily honest and careful business man expect that any new law would apply if his attention had been directed to the question. See *Dicey's Conflict of Laws*, 2nd ed., pp. 556, 558.

[RICH J. referred to *Gibbs & Sons* v. *La Société Industrielle et Commerciale des Métaux* (4).]

The nature of the implied promise, and the extent to which the law will apply, depend upon the business sense of business men: *Chatenay* v. *Brazilian Submarine Telegraph Co.* (5); *Ex parte Ford*; *In re Chappell* (6).

[ISAACS J. referred to *Lloyd* v. *Guibert* (7).]

Pickburn, in reply. The appearance by the appellant to the writ does not make him liable if otherwise he would not be liable, but the Court has to determine what is the law applicable apart from the appearance: *Sirdar Gurdyal Singh* v. *Rajah of Faridkote* (8).

[GAVAN DUFFY J. referred to *Ashbury* v. *Ellis* (9).]

No agreement by the appellant to submit to a liability which under the principles of international law he would not have incurred

(1) (1906) A.C., 7.
(2) 3 El. & Bl., 653.
(3) L.R. 4 Q.B., 180.
(4) 25 Q.B.D., 399, at p. 406.
(5) (1891) 1 Q.B., 79, at p. 82.
(6) 16 Q.B.D., 305.
(7) L.R. 1 Q.B., 115, at p. 120.
(8) (1894) A.C., 670, at p. 685.
(9) (1893) A.C., 339.

can be implied. The Act is capable of being read as not interfering with the ordinary principles of international law, and should be so read.

Cur. adv. vult.

The following judgments were read :—

GRIFFITH C.J. This case, although it involves a small sum of money, raises some questions of great and general importance. The facts may be very briefly stated. On 16th May 1914 Messrs. Pyke Bros. of Coolamon in New South Wales entered into a contract in writing with the appellant, who is a resident of Victoria, by which they agreed to sell him 6,000 sacks of wheat of the coming season (1914-15) to be delivered in Sydney in the following January, February, and March, at the price of 3s. 8½d, a bushel. A contest was raised on the question whether this contract was made in New South Wales or in Victoria, which, as will be seen, was a very material question for determination. The Full Court, disagreeing on this point with the learned Judge of first instance, held that it was made in New South Wales. Apart from any point about granting special leave to appeal if the right depended upon a mere question of fact, I am unable to say that I think the conclusion of the learned Judges of the Full Court was erroneous. I proceed, therefore, on the basis that the contract was made in New South Wales. It was plainly to be performed in New South Wales. On 12th October the appellant executed a document, which was pasted on the back of Pyke Bros.' sale note, by which he purported to assign and transfer to the respondents all his right, title and interest in and to "the within written contract" (describing it), and in consideration of the assignment and transfer thereinbefore contained the respondents agreed to pay to the appellant a difference of 5½d. a bushel on the 6,000 sacks of wheat, "such sum to be payable £150 prompt cash and the balance to be adjusted at the end of each month as wheat is delivered but no further payments to be made if wheat is not delivered," and the appellant agreed, if and when called upon by the respondents, to give a full power of attorney to them to enable them to enforce the appellant's contract with

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Pyke Bros. The sum of £150 was duly paid to the appellant by the respondents a few days later.

Some argument was addressed to us as to the effect of this contract. It is plain that the parties contemplated that from some possible cause no wheat, or only a part of the wheat, might be delivered, and intended that in such case the sum of £150 was not to be returned as on failure of consideration. Non-delivery might occur from many causes. One cause might be Pyke Bros.' default, against the consequence of which provision was made by agreeing to give a power of attorney. It might also occur from the delivery becoming impossible or illegal. The respondents contend that the latter contingency was not contemplated by the parties. I feel great difficulty in accepting this contention, but in the view which I take of the other facts of the case it is not necessary to decide the point.

The effect of this contract was to transfer to the respondents absolutely and unconditionally all the appellant's rights as against Pyke Bros., and as between them the contract was completely executed. In such a contract there is no implied warranty of title, and there can be no failure of consideration if the contract assigned exists in fact. On payment of the £150, therefore, there was no further mutual obligation, either express or implied, existing between the parties except that relating to the power of attorney.

On 11th December 1914 the Legislature of New South Wales passed the *Wheat Acquisition Act* (No. 27 of 1914). The first paragraph of sec. 8 of that Act is as follows :—" Every contract made in the State of New South Wales prior to the passing of this Act, so far as it relates to the sale of New South Wales 1914-15 wheat to be delivered in the said State, is hereby declared to be and to have been void and of no effect so far as such contract has not been completed by delivery."

This Court has affirmed the validity of this provision (*New South Wales* v. *The Commonwealth* (1)). The effect of it, as applied to the present case, is that the subject matter of the contract between the appellant and respondents ceased to exist. If sec. 8 had stopped there, there can, I think, be no doubt that the respective rights of

(1) 20 C.L.R., 54.

the parties would have been as explained by *Collins* M.R. in the case of *Chandler* v. *Webster* (1), one of the coronation cases :—" The plaintiff contends that he is entitled to recover the money which he has paid on the ground that there has been a total failure of consideration. He says that the condition on which he paid the money was that the procession should take place, and that, as it did not take place, there has been a total failure of consideration. That contention does no doubt raise a question of some difficulty, and one which has perplexed the Courts to a considerable extent in several cases. The principle on which it has been dealt with is that which was applied in *Taylor* v. *Caldwell* (2)—namely, that, where, from causes outside the volition of the parties, something which was the basis of, or essential to the fulfilment of, the contract, has become impossible, so that, from the time when the fact of that impossibility has been ascertained, the contract can no further be performed by either party, it remains a perfectly good contract up to that point, and everything previously done in pursuance of it must be treated as rightly done, but the parties are both discharged from further performance of it. If the effect were that the contract were wiped out altogether, no doubt the result would be that money paid under it would have to be repaid as on a failure of consideration. But that is not the effect of the doctrine ; it only releases the parties from further performance of the contract. Therefore the doctrine of failure of consideration does not apply."

Up to the time of the passing of the Act the contract of 12th October was a perfectly good contract, and the respondents had enjoyed the benefit of it, which included that of assignability. In the old case of *Taylor* v. *Hare* (3) *Heath* J. said :—" There never has been a case, and there never will be, in which a plaintiff, having received benefit from a thing which has afterwards been recovered from him, has been allowed to maintain an action for the consideration originally paid." The learned Judge may have been too confident in his prophecy, but I accept his view of the law.

So far, I understand that the respondents do not seriously contest the appellant's case. They rely upon a further provision of

(1) (1904) 1 K.B., 493, at p. 499.
(2) 3 B. & S., 826.
(3) (1805) 1 B. & P. N. R., 260.

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sec. 8 of the *Wheat Acquisition Act*, which is as follows:—"(2) Any transaction or contract with respect to any wheat which is the subject matter of any contract or part of a contract which is hereby declared to be void shall also be void and of no effect, and any money paid in respect of any contract hereby made void or of any such transaction shall be repaid"; which, they contend, should be construed as avoiding contracts within it *ab initio*.

The appellant does not dispute that this provision is applicable to the contract of 12th October, or that the effect of it was to annul the contract as from the date of the passing of the Act. But he contends that as against him its effect stopped at that point. He contends that as a matter of construction the enactment, so far as it avoids the contract, is not retrospective. In support of this contention he relies both upon the form of the enactment as contrasted with the form of the enactment in par. 1, which is in terms retrospective, and also upon a well-known rule of law which is thus stated by *Lindley* L.J. in the cause of *Lauri* v. *Renad* (1): —"It is a fundamental rule of English law that no Statute shall be construed so as to have a retrospective operation unless its language is such as plainly to require such a construction; and the same rule involves another and subordinate rule to the effect that a Statute is not to be construed so as to have a greater retrospective operation than its language renders necessary."

I think that the appellant is right in both contentions.

The respondents, however, rely upon the express words which follow:—"Any money paid in respect of any contract hereby made void . . . shall be repaid." The appellant does not dispute the unlimited authority of the Parliament of New South Wales to impose such an obligation upon any person subject to its jurisdiction, but he denies that he was so subject. The same point is made by the respondents in another form as a necessary inference from the asserted avoidance of the contract *ab initio*. Assuming that the first part of the enactment bears that construction, which I have already dealt with in a contrary sense, the effect would or might be to impose, by necessary inference, upon the appellant an implied obligation to return the £150, which would be a new

(1) (1892) 3 Ch., 402, at p. 421.

obligation. Two questions therefore arise, whether the Legislature of New South Wales could, and if they could, intended to, impose a new obligation upon a person not subject to their territorial jurisdiction. The subject was fully considered in the case of *Macleod* v. *Attorney-General for New South Wales* (1). In that case the question was whether a Statute of New South Wales which enacted that any person who being married marries another person during the life of the former husband or wife " wheresoever such second marriage takes place " shall be liable to penal servitude. The words " wheresoever &c." apparently indicated an intention that the operation of the law should not be limited to offences committed in New South Wales. (I may here remark that it is an historical fact that this was the actual intention of the Legislature, founded upon grounds which, though plausible, were held insufficient.) In the judgment of the Judicial Committee, which was delivered by Lord *Halsbury* L.C., the Board first expressed the opinion that the suggested construction that the enactment meant that any person caught in New South Wales was amenable to its criminal jurisdiction was an impossible construction. They said (2): "the Colony can have no such jurisdiction, and their Lordships do not desire to attribute to the Colonial Legislature an effort to enlarge their jurisdiction to such an extent as would be inconsistent with the powers committed to a colony, and, indeed, inconsistent with the most familiar principles of international law."

They then proceeded to construe the enactment on this basis, and held that the word " wheresoever " must be construed to mean " wheresoever in New South Wales." This was the formal *ratio decidendi*. Their Lordships, therefore, treating the matter as one of construction, held that the general words of a Statute of a legislature of limited jurisdiction must be construed as applying only to persons and things subject to their jurisdiction. They went on to point out again, quoting from the language of *Parke* B. advising the House of Lords in the case of *Jefferys* v. *Boosey* (3), that "the Legislature has no power over any persons except its own subjects—that is, persons natural-born subjects, or resident, or

(1) (1891) A.C., 455.

(2) (1891) A.C., at p. 457.

(3) 4 H.L.C., 815.

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whilst they are within the limits of the kingdom. The Legislature can impose no duties except on them ; and when legislating for the benefit of persons, must, *primâ facie*, be considered to mean the benefit of those who owe obedience to our laws, and whose interests the Legislature is under a correlative obligation to protect."

Applying the law as so declared to the present case, it follows (1) that the Legislature of New South Wales could not impose a new obligation upon a person not subject to its jurisdiction, and (2) that an enactment which *primâ facie* purports to do so must, as a matter of construction, be construed as not so extending. Either of these rules is sufficient to protect the appellant from the effects of the second paragraph of sec. 8 of the Act, unless it can be shown that he was subject to the jurisdiction of New South Wales.

He was, and so far as appears, always has been, a resident of Victoria. The respondents maintain that he was nevertheless subject to the jurisdiction of the New South Wales Legislature in respect of the contract of 12th October, because, they say, the law of New South Wales was what is called the " law of the contract." That term extends to all matters " applicable to it as a contract " (*Gibbs & Sons* v. *La Société Industrielle et Commerciale des Métaux* (1), *per Esher* M.R.), that is, as I understand the expression, all matters relating to it as an executory contract, including its validity, interpretation and continuance, and to its performance within the country by whose law it is governed, so long as anything remains to be done under it. But it has never, so far as I know, been laid down by any Court that the doctrine extends to an *ex post facto* law which purports to add a new term to the contract after it has been fully performed and executed, or has been annulled by competent law. We are asked to lay down that doctrine for the first time. I respectfully decline to do so. This Court, indeed, lately held (*R. S. Howard & Sons Ltd.* v. *Brunton* (2)) that sec. 8 has no application to contracts the operation of which is exhausted.

An ingenious argument was addressed to us by Mr. *Curlewis* to the effect that a person not resident within the jurisdiction of a country who personally or by his agent makes a contract within

(1) 25 Q.B.D., 399, at p. 405. (2) 21 C.L.R., 366.

the jurisdiction makes an implied promise that he will be bound by any such *ex post facto* law as I have just suggested. There is no support for such a doctrine to be found in the books, and I cannot find any in reason.

The case must, therefore, be treated on the footing that at the time of action brought the appellant's alleged indebtedness to the respondents in respect of the £150 sued for would not have been recognized in any part of the world except New South Wales.

I find some difficulty in apprehending the exact attitude taken up by the respondents in this aspect of the case. Sometimes I understood Mr. *Ralston* to say that the case must be determined on the same principles as if it were tried in Victoria; sometimes that the Court of New South Wales, at any rate, were bound to decide it on the Statute law of New South Wales as they find it on the Statute book.

The writ in the action was served on the appellant in Victoria under the provisions of the Commonwealth *Service and Execution of Process Act* 1901-1912, which enacts that when judgment has been given against a defendant under its provisions the judgment shall have the same force and effect as if the writ had been served in the State in which it was issued, *i.e.*, as if the defendant had been found and served in that State. In my judgment the Act is a mere procedure Act, and does not affect the substantive law to be applied by the Court in deciding a case under the jurisdiction conferred by it. If, therefore, the appellant did not owe the money when the writ was issued, the Supreme Court were not empowered by that Act to decide that he did.

The case of *Ashbury* v. *Ellis* (1) related only to procedure for bringing a defendant before the Court, and had nothing to do with his substantive liability. It would be a singular thing if the effect of the *Service and Execution of Process Act* were to impose upon a person not a resident of New South Wales a liability which does not exist under any law recognized beyond that State. *Ferguson* J. felt constrained to accept this view, but I cannot agree with him.

If the appellant had actually come within New South Wales the question whether the second paragraph of sec. 8 of the *Wheat*

(1) (1893) A.C., 339.

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Acquisition Act would thereupon have attached a new liability to him might have formally arisen for decision, and in my opinion would have had to be decided in accordance with the case of *Macleod* v. *Attorney-General for New South Wales* (1).

For these reasons I am of opinion that the appeal should be allowed.

Barton J.

BARTON J. I agree in the judgment of the learned Chief Justice.

ISAACS J. I agree with the unanimous opinion of the Judges of the Supreme Court, and for the reasons they gave, that both the May contract and the October contract were actually made in New South Wales. At this point I would add a quotation from the case of *Pattison* v. *Mills* (2) enunciating a principle which, in my opinion, has an ultimately decisive bearing on the case. Lord *Lyndhurst* L.C. there said (3): "If I, residing in England, send down my agent to Scotland, and he makes contracts for me there, it is the same as if I myself went there and made them." Delaney, therefore, must be regarded as if he were personally for the moment in New South Wales when the October contract was made.

The position then was, that by the October transaction Delaney agreed in New South Wales to assign, and did in equity but not at law assign, to the Milling Company all his interest in the May contract; and the Milling Company expressly agreed to pay him 5½d. a bushel profit on the 6,000 sacks of wheat the subject of the May contract, and of that profit to pay him £150 at once, that is, in New South Wales, but guarded themselves against paying any of the balance of the profit in any case except in respect of wheat actually delivered. Delaney impliedly agreed that the Milling Company should receive the wheat as his agent from Pyke, and retain it as their own, because he agreed when called on to give a full power of attorney, and they impliedly agreed to indemnify him from payment of the original price stated in the May contract. But, as stated, the law of New South Wales regarded Delaney still as the contractor with Pyke, and therefore it was that Delaney

(1) (1891) A.C., 455.
(2) 1 Dow. & Cl., 342.
(3) 1 Dow. & Cl., at p. 363.

undertook that when called upon he would give the Milling Company a power of attorney. The £150 was paid to Delaney in New South Wales, and the contracts awaited performance. Both contracts were New South Wales contracts, in every sense. Not only were they made in New South Wales, but they were to be performed in New South Wales, and the £150 the subject matter of this action was actually paid there.

The Milling Company sued Delaney in August 1915 for the return of the £150, and that broad issue was the one ordered to be tried. Admissions were formally made, but, as we were informed, the primary object of the admissions, in accordance with practice, was to bring the case within the law as a commercial cause so as to be tried without a jury. When the trial was on, both parties, disregarding the formal admissions, relied on the actual facts as disclosed by evidence. Further, the contest was whether by direct force of the *Wheat Acquisition Act* 1914, considered as a legislative command addressed to Delaney by the State, *in invitum*, or by its effect *inter partes* as a law to which they had voluntarily agreed to submit themselves, or by reason of the common law operating upon the whole circumstances of the case, there was a liability on Delaney to refund the £150 claimed in the action.

The case of *Macleod* v. *Attorney-General for New South Wales* (1) is relied on by the appellant to exclude the operation of the Act of New South Wales on Delaney, a Victorian. The argument is that the Act cannot operate so as to control the conduct of persons who are foreigners to New South Wales. That is true. The principle has been frequently recognized and enforced in this Court. (See *Commissioners of Stamps (Qd.)* v. *Wienholt* (2).) Where the sole ground of responsibility of the individual is the sovereign will of a territorially limited legislature assuming to regulate the fact or event which takes place beyond the territory, then, unless the power asserted is, as in *Attorney-General for Canada* v. *Cain* (3), the complement of an admitted power, *Macleod's Case* applies. It was there said "crime is local." That case might well be urged in support of the view that, at all events apart from the Imperial Parliament, no legislature

(1) (1891) A.C., 455. (2) 20 C.L.R., 531, at pp. 539, 540.
(3) (1906) A.C., 542.

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other than that of New South Wales could regulate the contracts under consideration. But the case does not decide that if a person does an act within the territory, and therefore while he is subject to its legislative jurisdiction, an *ex post facto* law cannot validly be enacted with respect to that act so as to affect the actor, if and whenever he is found within the territory, if only he can show that at the time the Statute was passed he was resident beyond its boundaries. If that is the law, and if it is relevant to this case, it must be found elsewhere than in *Macleod's Case*.

It is argued for Delaney—and this is a separate argument, being founded on jurisdiction over the person, and not over the transaction—that he is not bound because he is not a "subject" of New South Wales. It is of course true that as long as he is outside New South Wales, the laws of that State have no controlling force on him personally. But with reference to the operation of the New South Wales law on the transaction to which he was a party, it is difficult to locate the exact meaning of the contention. At what moment of time must he be a "subject" of New South Wales? In a case like *Macleod's*, the moment of time is precisely ascertainable—it is the moment when the "act" is done. If at that moment the person is beyond the territory, then, considered from the standpoint of personal jurisdiction, he is untouched, and it matters not that he afterwards comes within it. But in Delaney's case, if the moment is not when the contract is made and the money paid, when is it? Is it when the Act is passed, or when the action is commenced? Or is it suggested that so long as Delaney remains outside New South Wales he is free, but if and whenever he comes into New South Wales he instantly becomes liable, by reason of the construction and validity of the Act, to pay the money, and in that case does the responsibility attach to him irrevocably for all jurisdictions or only for the tribunals of New South Wales on the principle of *Ashbury* v. *Ellis* (1)?

It is desirable to see what is meant by a "subject" in this connection. *Parke* B., in advising the House of Lords in *Jefferys* v. *Boosey* (2), says:—"It is clear that the Legislature has no power over any

(1) (1893) A.C., 339.

(2) 4 H.L.C., 815, at p. 926.

persons except its own subjects, that is, persons natural-born subjects, or resident, or whilst they are within the limits of the Kingdom. The Legislature can impose no duties except on them; and when legislating for the *benefit* of persons, must, *primâ facie*, be considered to mean the benefit of those who owe obedience to our laws, and whose interests the Legislature is under a correlative obligation to protect." I italicize the word "benefit." Apart from the reference to "natural-born subjects," which is not applicable to an Australian legislature, the description is useful both on the point of jurisdiction and of construction. If, as a matter of construction, the New South Wales Act is held as not including a Victorian resident as a seller, it would by parity of reasoning exclude him as a buyer, and no Victorian could enforce against a New South Wales seller the provisions of sec. 8 (2) as to repayment. As a matter of construction of an English Act in similar words, it would be an astonishing result that an American coming to England and there selling wheat would not, if properly made a party to an action in England, be held bound to refund the part payment on the ground that the Statute was never intended to bind him, as he generally lived in America.

In my opinion the determination of this case is placed beyond doubt by reason of the fact that the contract sued on was a contract made in New South Wales to be performed in New South Wales.

Whatever might be the result if the contract were made outside New South Wales, two undeniable principles of law are clearly applicable. First, there is what *Story* calls (sec. 261) "the general sovereignty possessed by every nation to regulate all persons and property and transactions within its own territory." Next, with regard to such a contract, the general rule applies that the law of the place where it is made governs as to its nature, obligations and interpretation, because the parties are presumed *de jure* to have agreed to submit to the law there prevailing and to agree to its actions upon their contract: *Peninsular and Oriental Steam Navigation Co.* v. *Shand* (1); *Lloyd* v. *Guibert* (2); *Spurrier* v. *La Cloche* (3).

(1) 3 Moo. P.C.C. (N.S.), 272, at p. 291.
(2) L.R. 1 Q.B., 115, at pp. 120, 121, 122, 123.
(3) (1902) A.C., 446, at p. 450.

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I am not to be understood as inferring that, even if the contract had been in fact made in Victoria, Delaney would escape, but as it is, there is the indisputable consideration that among other things the parties, contracting in New South Wales, must have understood or must be presumed to have understood, for it was a fundamental fact of the local sovereignty, that the Legislature had power to dissolve the contract, to undo the *vinculum* which its own law created, and to restore the parties to the situation which its law acting upon their consensus of minds had obliged each of them to leave.

Every contract made in New South Wales is necessarily affected by that inherent possibility, just as much as if it were contained in express terms in the bargain between the parties; as *Turner* L.J. said in *Shand's Case* (1), "there is no difference as to effect between that which is expressed in terms and that which is implied and clearly understood."

Lord *Esher* M.R. in *Gibbs & Sons* v. *La Société Industrielle et Commerciale des Métaux* (2) said that where a contract is by law to be considered the contract of any particular country, the law of that country "is the law which governs such contract; not merely with regard to its construction, but also with regard to all the conditions applicable to it as a contract." His Lordship added: —"I say, 'applicable to it as a contract' to exclude mere matters of procedure, which do not affect the contract as such, but relate merely to the procedure of the Court in which litigation may take place upon the contract. . . . Therefore, if there be a bankruptcy law, or any other law of such country, by which a person who would otherwise be liable under the contract would be discharged, and the facts be such as to bring that law into operation, such law would be a law affecting the contract, and would be applicable to it in the country where the action is brought." The learned Master of the Rolls does not suggest that the Bankruptcy Act which might discharge a party to a contract must be one existing at the time the contract is made, and his reference to "any other law of such country" must stand on the same footing as the bankruptcy law. If this is a correct interpretation of the learned Judge's words, it is an implicit

(1) 3 Moo. P.C.C. (N.S.), at p. 292. (2) 25 Q.B.D., 399, at p. 405.

recognition that, in submitting to the law of a country, the contractors, wherever the contract is made, do not merely tacitly incorporate, so to speak, the existing laws of that country as terms of their contract, but tacitly submit to the system of law of that country in relation to the contract. And if that system includes power of subsequent legislation, that is part of the matter submitted to. It is the " system of law " which is submitted to, according to Lord *Herschell* L.C. and Lord *Watson* in *Hamlyn & Co.* v. *Talisker Distillery* (1). If it be not so, then the contract made in one country between a resident of that country and a resident of another country and to be performed in the other country, so as to make the law of the latter country the proper law of the contract, would be practically an " outlaw," because no single legislature could affect it so as to compel mutual restitution.

But, as before observed, however that may be with regard to such a contract, the present is clear from any possible difficulty, because the law of the place where it is made is also the proper law of the contract. The parties cannot, I apprehend, deny the right of the territory which created the *vinculum* and imposed incidental obligations to undo that *vinculum* and restore the *status quo ante*, provided only there still as in this case remains, as a living existent thing, the transaction to which its authority gave birth—an authority which must be invoked in any jurisdiction for enforcement of the contractual obligations.

Upon these considerations the parties are, as between themselves, as contracting parties bound by the action of the Parliament of New South Wales in respect of all such contracts made within the territory. The original Act (No. 27 of 1914) declared that it should cease to have effect on 30th September 1915, but sec. 8 has been made perpetual by sec. 7 of the amending Act (No. 28 of 1915). The legal effect of sec. 8, sub-sec. 2, is to declare the October contract void; and to require the refund of the part payment. The latter provision I do not regard as a peremptory and arbitrary command to Delaney as a subject of New South Wales and based on personal jurisdiction over him. Nor is it a legislative command unconnected with the contract or attaching to its dissolution some element

(1) (1894) A.C., 202, at pp. 207, 208, and p. 212.

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outside the sphere of the transaction. It is simply a regulation by the local legislature of a New South Wales transaction still alive, and in force and operative in the territory. Consequently Delaney, who was properly summoned and made justiciable, is in my opinion clearly bound to return the £150 claimed.

Another question, however, was raised, as to which it is not necessary to express any opinion.

It arises in this way. It is not denied that sub-sec. 1 of sec. 8 validly nullifies the Pyke contract *ab initio* so far, at all events, as New South Wales is concerned. It is said that, therefore, it must be taken that there never was a valid May contract and so the consideration for the October contract failed. There are difficulties in the way of accepting this view, which was, however, adopted by *Cullen* C.J. No doubt, utter failure of consideration entitled a party to restoration of the money paid for it (*Jones* v. *Ryde* (1)). But there was no mistake of fact here ; the facts were all as contemplated ; it was the effect of the law acting on the known facts that the bargain is made void. If it were necessary to rest the case on this point I should require further consideration before coming to the conclusion that the plaintiffs were entitled to succeed.

On the first point, however, they sustain the judgment in their favour, and the appeal should be dismissed.

GAVAN DUFFY and RICH JJ. The appellant who is, and at all material times has been, a resident of the State of Victoria, by a contract made in May 1914, purchased wheat to be delivered to him in New South Wales. By an agreement made in October 1914 he assigned and transferred to the respondent Company all his right, title and interest in that contract, and in consideration of the assignment and transfer the respondent Company agreed to pay to the appellant the difference of 5½d. a bushel on the wheat, such sum to be payable, £150 prompt cash, and the balance to be adjusted at the end of each month as the wheat was delivered, but no further payment was to be made if no wheat was delivered. The sum of £150 was paid in New South Wales, but nothing further was done before 11th December 1914. On that day the *Wheat Acquisition*

(1) 5 Taunt., 488.

Act 1914 came into operation ; its object was to enable the Government of New South Wales to acquire wheat for the use of His Majesty, and, while achieving that object, to release from liability persons who had already engaged themselves by contract with respect to wheat which might be so acquired. Sec. 8 is as follows :—" 8 (1) Every contract made in the State of New South Wales prior to the passing of this Act, so far as it relates to the sale of New South Wales 1914-15 wheat to be delivered in the said State, is hereby declared to be and to have been void and of no effect so far as such contract has not been completed by delivery. (2) Any transaction or contract with respect to any wheat which is the subject matter of any contract or part of a contract which is hereby declared to be void shall also be void and of no effect, and any money paid in respect of any contract hereby made void or of any such transaction shall be repaid."

The respondent Company now sues for the return of the sum of £150 and relies on sec. 8 (2). We agree with the other members of the Court in thinking that the contract of May 1914 was made and was to be performed in New South Wales, and that the agreement of October 1914 was made in New South Wales, and we think that that agreement was a transaction or contract within the meaning of sec. 8 (2). There remains the question whether that section is *ultra vires* the Legislature of New South Wales.

The *Wheat Acquisition Act* 1914 was considered by this Court in *State of New South Wales* v. *The Commonwealth* (1), and it was then assumed, both by the Bench and the Bar, that sec. 8 was valid unless it contravened the provisions of sec. 92 of the *Commonwealth of Australia Constitution Act*. A new objection is now urged against it on the ground that, if read literally, it applies to parties to a contract who are outside, as well as to those who are within, the territorial jurisdiction of New South Wales. The appellant admits that he was properly before the Supreme Court of New South Wales and subject to its jurisdiction, and that the Court was bound to administer the provisions of sec. 8 as part of the law of New South Wales if it was valid legislation ; but he contended that, if it was to be read

(1) 20 C.L.R., 54.

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as applying to him, it was not valid legislation. His contention may be put thus : If sec. 8 (2) is read as applying to persons living outside New South Wales it is *ultra vires*, if it is not so read, it does not apply to him. The respondent Company disputes the accuracy of the first of these hypothetical propositions, and so joins issue as to the validity of the section. The objection is somewhat elusive ; it is not said that the legislation is extra-territorial in the sense that it prescribes a course of conduct to be pursued outside the territorial limits of the State ; the appellant admits that the Parliament of New South Wales might properly enact sec. 8 provided it limited the operation of the section to persons living within New South Wales. During the argument our brother *Isaacs* asked appellant's counsel what persons came within this class, and could get no satisfactory answer. Who are persons living within New South Wales ? Are they persons who lived in New South Wales at the time the Act came into operation and have lived there ever since, or persons who were living there at the time when the Act came into operation, or persons who usually live there, or persons who were living there at some other period or periods ? The appellant cannot admit that persons who were in New South Wales at the time the contracts or transactions mentioned in sec. 8 were entered into are necessarily within the class because then it would include the respondent Company, which was present by its agent when the contract of May 1914 and the agreement of October 1914 were made. Nor can he include persons owing allegiance to New South Wales as opposed to persons not owing such allegiance, for the law does not recognize any such distinction. The true position would seem to be that the Legislature has power to deal with the subject matter of contracts and transactions mentioned in the section, and that the Courts of New South Wales are bound to apply the legislation in adjudicating on the rights and liabilities of all such persons, whether parties to such contracts and transactions or not, as may properly come within their jurisdiction, either by submitting to it, or by having it forced upon them as in this case, where the appellant, a resident within the Commonwealth of Australia, was made subject to the jurisdiction of the Supreme Court of New South Wales by being served with process under the *Service and Execution*

of Process Acts. The extent of the jurisdiction of the Parliament of New South Wales must be determined by the language in which it is conferred; the British Parliament could bestow on it any power which it might itself exercise, or any portion of such power. What power has it in fact bestowed? In the case of *Merchant Service Guild of Australasia* v. *Commonwealth Steamship Owners Association* (1) we said:—"In English law it is not a universally true proposition that subordinate legislatures have no extra-territorial jurisdiction. The Imperial Parliament may itself assume the right to bind British subjects, or even foreigners, whether within or without the territorial limits of Great Britain, with respect to acts done in any part of the world; and may in whole or in part confer the same right on any subordinate legislature. If it is clear that Parliament intended to assume, or to confer, any such power, the British Courts will recognize and enforce its exercise, although in foreign Courts such exercise may be deemed inconsistent with the principles of international law. The true rule with respect to subordinate legislatures is that they will not be held to possess any extra-territorial jurisdiction unless it is conferred on them expressly or by necessary implication." Let us investigate the source of the legislative power of the Parliament of New South Wales and consider whether it justifies the provisions of sec. 8. That power is defined by sec. 5 of the *Constitution Act* 1902; the relevant portion of the section is as follows:—"The Legislature shall, subject to the provisions of the *Commonwealth of Australia Constitution Act*, have power to make laws for the peace, welfare, and good government of New South Wales in all cases whatsoever." Under legislative provisions identical with those just set out, except that they did not contain the words "subject to the provisions of the *Commonwealth of Australia Constitution Act*," the Privy Council held that there was no power in the Parliament of New South Wales to enact that a bigamous marriage contracted by any person anywhere in the habitable globe should be a crime, and we think it will be conceded that such an enactment could not in any circumstances be for the "peace, welfare, and good government" of New South Wales; indeed, it is not easy to suggest a case in which these words would

(1) 16 C.L.R., 664, at p. 703.

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justify legislation prescribing conduct outside the State, though we do not desire to say that there could be no such case. But when two years later it was attempted on the authority of this case and others to argue that the Parliament of New Zealand, having power to make laws for the peace, order and good government of the State, was not at liberty to legislate exterritorially, not in the sense of imposing a course of conduct to be pursued outside the State but in the sense of legislating so as to affect persons outside the State, the proposition did not obtain the approval of the Privy Council. Lord *Hobhouse*, delivering the judgment of their Lordships, said, "but it was said that the moment an attempt is made by New Zealand law to affect persons out of New Zealand, that moment the local limitations of the jurisdiction are exceeded, and the attempt is nugatory," and, having thus stated the argument, refused to accept it: *Ashbury* v. *Ellis* (1). The objection there was that the Legislature of New Zealand had no power to subject to the judicial tribunals of that country persons who neither by themselves nor by their agents were present in the Colony. Their Lordships proceeded to inquire whether the legislation could be considered to be for the peace, order and good government of New Zealand, and came to the conclusion that it could be so considered, and was therefore *intra vires*; and they held that they must come to this conclusion even though the legislation were of such a nature that a judgment obtained under it would not be recognized by the Courts of other countries, and could not be enforced beyond the limits of New Zealand. For trying the validity of the New Zealand laws it was sufficient to say that the peace, order and good government of New Zealand were promoted by the enforcement of the decrees of their own Courts in New Zealand. Applying the same test here, we would say that the Legislature of New South Wales may properly have considered that the peace, welfare and good government of that State require that where the Crown was given the right to take all the wheat in the State, persons who before that right was given had bound themselves by contract should be released from their contractual obligations so far as they related to the sale of any such wheat to be delivered within the State. If this were

(1) (1893) A.C., 339, at p. 341.

done it would seem to follow as a matter of strict propriety that other arrangements entered into with respect to such wheat on the strength of such contracts should also be avoided, and that as nothing could pass by virtue of such contracts or arrangements any moneys paid under them should be returned. The scheme could be worked out only by making it applicable to all parties to such contracts and arrangements, for the direst injustice and confusion would follow if those within the jurisdiction were subject to the scheme and those outside the jurisdiction were not. If all this be so, it follows that the whole of sec. 8 is *intra vires*, and is none the less so because it affects persons outside New South Wales. Whether the Courts of other countries would question its validity is a matter of no importance in the present discussion, but we do not desire to be taken as suggesting that they would be justified in doing so.

Appeal dismissed with costs.

Solicitors for the appellant, *Perkins, Stevenson & Co.*
Solicitors for the respondents, *Sly & Russell.*

B. L.