[HIGH COURT OF AUSTRALIA.]

IN RE THE AUSTRALIAN METAL COMPANY LIMITED.

H. C. OF A. 1923.

MELBOURNE, *Aug.* 27-29; *Oct.* 30.

KNOX C.J., ISAACS and GAVAN DUFFY JJ.

Trading with the Enemy—Enemy company—Business in Australia directed to be wound up—Interest on debts owing by company—Trading with the Enemy Act 1914-1921 (*No.* 9 *of* 1914—*No.* 23 *of* 1921), *sec.* 9H—*Supreme Court Act* 1915 (*Vict.*) (*No.* 2733), *sec.* 75.*

Pursuant to sec. 9H of the *Trading with the Enemy Act* 1914-1916 the Minister for Trade and Customs ordered that the business of the A company in Australia should be wound up, and appointed a controller to conduct the winding up. Certain claims by the B company and the C company against the A company under certain contracts were made to the controller and, upon application to the High Court under sec. 9H, the basis on which the B company and the C company were entitled to claim payment was declared, but no claim was then made or question raised as to their right to interest upon the respective amounts due to them. Subsequently, upon motion, the High Court was asked whether the B company or the C company was entitled to interest on the moneys due to it in respect of its claim.

Held, on the evidence, that there was no contractual right in either the B or the C company to such interest.

Held, also, that neither the B nor the C company was entitled to such interest under sec. 75 of the *Supreme Court Act* 1915 (Vict.).

MOTION.

By an order dated 7th December 1917 the Minister of Trade and Customs, purporting to act in pursuance of sec. 9H of the *Trading with the Enemy Act* 1914-1916, ordered that the business carried on

* Sec. 75 of the *Supreme Court Act* 1915 (Vict.) provides that "Upon all debts or sums certain hereafter to be recovered in any action, the Court at the hearing or the jury on the trial of any issue or on an assessment of any damages may if the Court or jury think fit allow interest to the creditor at a rate not exceeding eight per cent . . . from the time when such debt or sum was payable (if payable by virtue of some written instrument and at a date or time certain); or if payable otherwise then from the time when demand of payment has been made in writing giving notice to the debtor that interest would be claimed from the date of such demand" &c.

H. C. OF A. 1923.

IN RE AUSTRALIAN METAL CO. LTD.

in Australia by the Australian Metal Co. Ltd., a company incorporated in England, should be wound up; he appointed Samuel James Warnock of Melbourne, who had been appointed Controller of the Company by the High Court on 25th March 1915, as Controller to control and supervise the carrying out of the order and to conduct the winding up of the business; and he conferred upon the Controller powers (*inter alia*) subject to the provisions of the *Trading with the Enemy Act* to pay the debts and discharge the liabilities of the Company, and with the consent of the Minister for Trade and Customs to apply to the High Court or a Justice thereof to determine any question arising in the carrying out of the order. On 13th March 1917 an order had been made by the High Court of Justice in England ordering the winding up of the Company under the provisions of the *Companies (Consolidation) Act* 1908. On 16th December 1920 an order was, on the motion of the Controller, made by *Starke* J. ordering the Controller to publish advertisements for claims such as would be published in the winding up of a company in Victoria, and he reserved liberty to the Controller to make such application to the High Court or a Justice thereof on the claims received by him as he might be advised. Claims were made and proofs of debt were lodged by the Broken Hill Proprietary Co. Ltd. and by the Broken Hill South Silver Mining Co. No Liability. The claim of the Broken Hill Proprietary Co. was for £128,778 7s., which was stated to be as to £111,197 2s. 5d. for the price of zinc concentrates delivered by it to the Australian Metal Co. under a contract made in Victoria and dated 27th March 1914, and as to £17,581 4s. 7d. for interest on the above sum of £111,197 2s. 5d. at the rate of 6 per cent per annum from the dates when the several parcels of concentrates were delivered until 8th April 1918, the date when the claim was made, such interest being alleged to be due pursuant to the contract. Interest was also claimed on the sum of £111,197 2s. 5d at the rate of 6 per cent per annum from 8th April 1918 until the date of payment. The claim of the Broken Hill South Silver Mining Co. was for £15,327 4s. 9d. alleged to be due under a contract under seal made in Victoria and dated 22nd July 1911, whereby the Australian Metal Co. agreed to buy from it its output of leady sulphide concentrates of a certain grade from 1st January 1912 to 31st

December 1914, and also for interest upon the sum of £15,327 4s. 9d. at 6 per cent per annum from 6th March 1917, the date upon which the amount due was alleged to have been agreed upon.

By an order of the High Court of 11th May 1922 the basis upon which those two companies were entitled to claim payment was determined (*Broken Hill Proprietary Co.* v. *Warnock* (1)); but no question was then raised as to their right to interest.

The Controller applied on motion to the High Court to have the following questions answered:—

1. Is the Broken Hill Proprietary Co. entitled to interest on the moneys due to it in respect of its claim against the Australian Metal Co. or in respect to any and what part thereof; and, if so, for what period and at what rate?
2. If the Broken Hill Proprietary Co. is entitled to any interest for the period subsequent to the date of the order for the winding up of the business in Australia of the Australian Metal Co., namely, 7th December 1917, should such claim be allowed (a) absolutely or (b) subject to the prior payment of capital debts?
3. Is the Broken Hill South Silver Mining Co. entitled to interest on the moneys due to it in respect of its claim against the Australian Metal Co. or in respect to any and what part thereof; and, if so, for what period and at what rate?
4. If the Broken Hill South Silver Mining Co. is entitled to any interest for the period subsequent to the date of the order for the winding up of the business in Australia of the Australian Metal Co., namely, 7th December 1917, should such claim be allowed (a) absolutely or (b) subject to the prior payment of capital debts?

The motion coming on for hearing before *Knox* C.J. the above questions were by consent of the parties directed to be argued before the Full Court.

During the hearing of the motion a further motion was made on behalf of the Broken Hill Proprietary Co. and the Broken Hill South Silver Mining Co., asking to have the following questions (*inter alia*) decided:—

(1) (1922) 30 C.L.R., 362.

H. C. OF A. 1923.

IN RE AUSTRALIAN METAL CO. LTD.

1. Should the claim, or any part thereof, of the Broken Hill Proprietary Co. against the Australian Metal Co. for interest be allowed? If yes, at what rate and in respect of what period should such interest be allowed?

3. Should the claim, or any part thereof, of the Broken Hill South Silver Mining Co. against the Australian Metal Co. for interest be allowed? If yes, at what rate and in respect of what period should such interest be allowed?

Other material facts are stated in the judgments hereunder, where also the nature of the arguments sufficiently appears.

Ham and *C. Gavan Duffy*, for the Controller of the Australian Metal Co.

Latham K.C. (with him *Richardson*), for the Broken Hill Proprietary Co.

Stanley Lewis (with him *Tait*), for the Broken Hill South Silver Mining Co.

Cur. adv. vult.

Oct. 30. The following written judgments were delivered:—

KNOX C.J. AND GAVAN DUFFY J. This is an application by the Controller of the Australian Metal Co. for a decision on the question whether interest is payable to the Broken Hill Proprietary Co. Ltd. or to the Broken Hill South Silver Mining Co. Ltd. on the amounts of their respective claims against the Australian Metal Co. and, in the event of interest being held to be payable, for certain consequential directions. This application is made pursuant to leave reserved by the order of *Starke* J. dated 16th December 1920. These claims were the subject of an application to this Court by the Controller for the decision of certain questions, and on 11th May 1922 the Court declared the basis on which the respective Companies were entitled to claim payment, but no claim was then made or question raised as to their right to interest.

Dealing first with the case of the Broken Hill Proprietary Co., its right to recover the principal sum on which interest is now claimed

rests on a contract dated 27th March 1914 for the sale of zinc concentrates to the Australian Metal Co. The Company contends that interest is recoverable either under clause 18 of the agreement or by force of sec. 75 of the Victorian *Supreme Court Act* 1915.

Clause 18 of the contract is in the words following, namely :— "18. In the event of any delay in sampling and/or weighing and/or assaying and/or taking delivery and/or payment occurring through default on the part of the buyers the seller shall have the right to charge the buyers interest upon the value of each parcel or of any part thereof remaining unpaid in respect whereof such default shall occur at the rate of 6 per cent per annum from the time of commencement of such default until such parcel is paid for. The value of each parcel computed from assays to be made by the sellers shall be deemed correct and final for the purposes of this clause only." Payment is provided for by clause 10 of the contract, which is as follows, namely :—"10. Payment for each parcel to be made in Melbourne on *pro forma* account rendered so soon as practicable after delivery on the basis of agreed assays and market price for spelter and silver ruling in London on the date of agreement of assays and for lead contents as hereinbefore provided subject to adjustment as to spelter and silver values upon receipt of mail advice of the average prices as specified in clause 11. Date of sampling of each parcel to be taken as date of delivery thereof." The average prices as specified in clause 11 were average market prices taken over a period of six months or twelve months as the case might be.

We think the effect of clauses 10 and 11 is that the payment to be made on *pro forma* account was to be regarded as payment in full for the parcel in respect of which the account was rendered subject only to adjustment when the average prices should be ascertained. The "payment" referred to in clause 18 means the payment which was to be made on the *pro forma* account under clause 10, and the "delay" is the delay in such payment and in the operations which precede it and render it possible. The fact that clause 18 provides only for payment of interest by the buyers to the sellers supports this view, for it is apparent that the final adjustment might result in a reduction of the amount shown by the *pro forma* account to be payable, and a consequent liability on the seller to refund to the buyer part of the

H. C. OF A. 1923.

IN RE AUSTRALIAN METAL CO. LTD.

Knox C.J. Gavan Duffy J.

amount which had been provisionally paid, and, if interest were to be payable by the buyer on any sum payable by him on the final adjustment, one would expect to find a similar provision in case the final adjustment should show that the buyer was entitled to a refund of part of the amount already paid. Whatever be the meaning of the word "payment," a corresponding meaning must be given to the words "paid for" in the phrase "until such parcel is paid for." In the view we take of the contract this phrase means "until payment be made of the amount shown by the *pro forma* account rendered in accordance with clause 10." We think therefore that the contention based on clause 18 of the contract failed.

The alternative contention rests on sec. 75 of the *Supreme Court Act* 1915 (Vict.). In October and November 1915 notices in writing that the Proprietary Company claimed interest on the principal amounts owing were given to the Australian Metal Co., and it is said that the effect of the section is to entitle the Proprietary Company to interest on the respective amounts in accordance with such notices. Sec. 75 is in the following words, namely:—"Upon all debts or sums certain hereafter to be recovered in any action, the Court at the hearing or the jury on the trial of any issue or on an assessment of any damages may if the Court or jury think fit allow interest to the creditor at a rate not exceeding eight per cent or (in respect of any bill of exchange or promissory note) at a rate not exceeding twelve per cent per annum from the time when such debt or sum was payable (if payable by virtue of some written instrument and at a date or time certain); or if payable otherwise then from the time when demand of payment has been made in writing giving notice to the debtor that interest would be claimed from the date of such demand. Provided that nothing herein contained shall extend to authorize the computation of interest on any bill of exchange or promissory note at a higher rate than eight per cent per annum where there has been no defence pleaded."

It may well be said that these notices do not comply with the terms of the section, but it is unnecessary to discuss that matter because, in our opinion, sec. 75 does not apply to a proceeding like the present one, and because, even if it did apply, the only question as to interest which arises under the Proprietary Company's claim is the question

as to interest under clause 18 of the contract with which we have already dealt. That claim is based explicitly on clause 18 of the contract, and on nothing else.

For these reasons we are of opinion that the Broken Hill Proprietary Co. is not entitled to interest on any part of the moneys due to it.

For the Broken Hill South Silver Mining Co. the arguments advanced were (1) that interest was payable at common law; (2) that the Australian Metal Company had agreed to deliver a security bearing interest and had failed to do so, and (3) that interest was payable under sec. 75 of the *Supreme Court Act* 1915 (Vict.).

With respect to the first proposition it is enough to say that no authority was or could be produced in support of it. It is clear that on a debt such as this, interest is not payable at common law.

With respect to the second proposition it would be enough to say that the Company's claim is for interest at 6 per cent from 6th March 1917 on the principal amount due to the Company and contains no reference to damages for the alleged breach of agreement; but, as we heard argument on the subject, we shall give our reasons for rejecting counsel's contention. It is founded on letters which passed between the Mining Company and the Metal Company in February and March 1917. On 15th February the Mining Company's solicitor wrote to the Metal Company requesting payment of £15,370 10s. in final settlement for concentrates delivered under its contract. On 2nd March the Metal Company replied correcting an item in the calculation, and added: "As regards payment we shall have to hand the South Company for part of the payment a certificate for £10,000 of inscribed stock in the 1916 war loan as we have not sufficient available funds to pay them otherwise." The solicitors for the Mining Company replied accepting the correction, and stating that the Company was willing to accept a certificate for £10,000 of inscribed stock in the 1916 war loan for part payment of the concentrates.

It was contended that these letters constituted an agreement by the Metal Company to transfer to the Mining Company £10,000 of inscribed stock which bore interest at 4½ per cent, and that, as the stock had not been transferred and the interest had been received by

H. C. OF A. 1923.

IN RE AUSTRALIAN METAL CO. LTD.

Knox C.J. Gavan Duffy J.

the Metal Company, the Mining Company was entitled to be placed in the same position as if the stock had been transferred, and was thus entitled to recover an amount equal to interest at 4½ per cent on £10,000 from the date of the alleged agreement. We think the true position of the parties on this correspondence was that the Mining Company intimated that it was willing to accept £10,000 of inscribed stock in part payment of the amount owing to it if it was more convenient to the Metal Company to discharge its liability in that way, and that there was no agreement enforceable against the Metal Company that the stock should be transferred to the Mining Company. In the absence of a binding agreement to transfer the stock, the claim of the Mining Company on this ground cannot be sustained.

The third contention of the Mining Company is founded on the letters above referred to. It is said that the Company's contract and these letters amount to an agreement to pay a debt or sum certain on a day certain, and that the words of sec. 75 "debts or sums certain . . . (if payable by virtue of some written instrument and at a date or time certain)" apply to the sum due under such agreement. We do not think that they do apply to that sum; but if they did it would not assist the Company, because, as we have already said, sec. 75 does not apply to a proceeding like the present one.

For these reasons we think that the Broken Hill South Silver Mining Co. is not entitled to interest on any part of the moneys due to it.

In our opinion, question 1 should be answered "The Broken Hill Proprietary Co. is not entitled to interest on any part of the moneys due to it in respect of its claim against the Australian Metal Co."; and question 3 should be answered "The Broken Hill South Silver Mining Co. is not entitled to interest on any part of the moneys due to it in respect of its claim against the Australian Metal Co. Ltd." It is not necessary to answer questions 2 and 4.

One-half of the costs of the Controller of this application should be paid by the Broken Hill Proprietary Co. Ltd. and the balance by the Broken Hill South Silver Mining Co. Ltd.

ISAACS J. In May 1922 this Court, not on the application of the Controller as originally made, but on the appeal of the Broken Hill Proprietary Co. Ltd., determined certain questions arising in the carrying out of a Minister's order dated 7th December 1917 to wind up, under the *Trading with the Enemy Act* 1914-1916, the business in Australia of the Australian Metal Co. Ltd., a company incorporated in England. The effect of the Court's determination was that it was established that the Metal Company was prior to 7th December 1917 indebted to the Broken Hill Proprietary Co. Ltd. and to the Broken Hill South Silver Mining Co. No Liability in large principal sums of money for concentrates sold and delivered by those Companies respectively to the Metal Company. Into the determination of the Court, which is recorded in the *Commonwealth Law Reports* (1), no question of interest upon the debt entered, no such question having been raised. On this occasion, however, that question comes before us for consideration. From the way in which it is presented and the various circumstances connected with it, the matter is one of considerable complexity and importance. It is very necessary to have regard to every step by which it has reached the Court.

1. *Nature of the Proceeding.*—To begin with, there was originally a notice of motion by the Controller, dated 28th May 1923, asking in effect (1) whether the creditor Companies were respectively " entitled " to any and what interest ; and (2) whether, if the Companies were so entitled, the interest should be paid absolutely or subject to the prior payment of capital debts. The Controller's notice of motion was given under the authority of par. 14 of the Minister's order, which empowers the Controller " with the consent of the Minister for Trade and Customs to apply to the High Court or a Justice thereof to determine any question in the carrying out of the order." In the affidavit of the Controller in support of the application, it is stated, in par. 13, " that the Minister's consent was to make an application to refer to this Honourable Court or a Justice thereof the proofs of " the Broken Hill Companies " for principal and interest." The only way in which the proofs were referred to the Court was by the notice of motion asking the questions as to *interest*.

(1) (1922) 30 C.L.R., 362.

H. C. OF A. 1923.

IN RE AUSTRALIAN METAL CO. LTD.

ISAACS J.

During the argument the word "entitled" gave rise to doubt as to whether it could include the alternative argument on behalf of the Broken Hill Companies that the Court could in its discretion allow interest though not actually contracted for. To meet this position, those Companies on 29th August, that is, in the course of the argument and by consent, filed an independent notice of motion asking in effect whether the claim or any part thereof of the Broken Hill Companies against the Australian Metal Company for *interest should be allowed*, if so at what rate and for what period, and whether absolutely or subject to capital debts or debts owing at the date of the Minister's order. The creditors' notice was given under the authority of the Act No. 23 of 1921, which amended sec. 9 (H) of the Act by adding sub-sec. 3A to that section. For precaution sake the Companies obtained the consent of the Minister to their application as made.

There are thus two distinct applications before the Court, both of which we have to determine. It is desirable to point out distinctly that none of the motions ask anything as to the principal debt, and do not even as to interest ask for an order to pay it. The orders asked for are simply of a declaratory nature. The Metal Company itself was not represented otherwise than by the Controller, but we were informed by counsel that the English liquidator had been made aware, though not by formal notice, of the proceedings taken by him. Apparently neither he nor the Metal Company has had any notice whatever of the creditor's application. There were two grounds upon which the Broken Hill companies rested their claim for interest. The first was contract. The second was a demand for payment of the principal, and in the case of the Proprietary Company a claim for interest until payment. It was also urged on behalf of the South Company that no specific claim for interest was necessary. If the claim for interest can be supported on the first ground—contract—the creditors are unquestionably entitled to it, subject to the further question raised as to its subordination to capital debts existing at the date of the winding-up order. Counsel for the Controller not only contested the contractual right to interest but also strenuously contended for subordination to capital debts.

2. *Claim under Contract.*—The question of contract is inherently independent of some other questions of difficulty, and may be dealt with at once. The Proprietary Company contends that clause 18 of its general contract with the Metal Company provides for interest on the ultimate sum due by the Metal Company after "adjustment of final invoice" (clause 11), as well as for interest on the sum payable "on *pro forma* account" (clause 10). It is urged in support of that contention that the word "payment" in clause 18 is naturally applicable to whatever money is due to the sellers by the buyers, and that this natural meaning should not be cut down. I agree that the primary meaning of the word should not be cut down unless the context requires it. Reading clause 18 as a whole and reading also the contract as a whole, I am of opinion the word "payment" in clause 18 has no reference to any additional sum that may possibly become payable by the buyers to the sellers on "adjustment." The contract is not consistently drawn. In more than one place expressions are found which are not in accordance with provisions found elsewhere. But the operations enumerated in clause 18, namely, "sampling," "weighing," "assaying," "taking delivery," and "payment," are operations leading up to and terminating in a complete transfer of ownership and risk, on the one hand, and an ascertainable sum at once definitely payable, on the other, in respect of each distinct parcel or portion of such parcel. Those operations are all governed by the words "delay" and "default on the part of the buyers." The provisions in clause 18, where it operates, is not that the buyers promise to pay interest, but that the sellers "shall have the right to charge" interest, and upon the value of each parcel or any part thereof remaining unpaid. The time for which such right is exercisable is not during the time the money is payable and unpaid, but "from the time of commencement of such default until such parcel is paid for," that is, fully "paid for," within the meaning of the clause. Suppose, for instance, a week's delay of the buyers in sampling or assaying, but followed by full *pro forma* payment on the rendering of the *pro forma* account; then, unless the right to charge interest stopped there, the sellers would have the right to charge interest on whatever sum afterwards appeared payable to the sellers on adjustment, not from the time it so appeared,

H. C. OF A. 1923.

IN RE AUSTRALIAN METAL CO. LTD.

Isaacs J.

but from the original " commencement of such default," until final payment of the adjustment balance. And in exercising that right the " value of each parcel " would, for that purpose and according to the final paragraph of clause 18, be computable from the sellers' assays alone. On the other hand, if on adjustment it were found that the *pro forma* payments were in excess, so that the buyers were entitled to a refund, no corresponding right to charge interest in case of delay appears to arise. Further, in the event of the buyers being entitled to a refund in respect of one parcel and being bound to make a further payment in respect of another, there is no provision for any set-off. A very extraordinary position is thus created if the sellers' view is right. But the contract itself contains other provisions which assist in construction. The word " payment " in clause 18 is also found in clause 10, but only as referable to the *pro forma* account. True, in a legal sense payment is not complete until all demands are fully satisfied, but the question is in what sense is the word " payment " used in clauses 10 and 11 ? Is it there used as embracing the whole solution of indebtedness, or as denoting merely the primary payment corresponding to the handing over of the goods—the " cash " on " delivery " ? It appears to be the latter, when we regard the use of the word in clauses 10 and 11 in contradistinction to the word " adjustment." " Adjustment " is a distinct operation, separated by a lapse of time and by uncertainty from " payment " as used in the contract, and is altogether omitted from clause 18. Again in clause 19, the words " paid for " are used in the " *pro forma* " sense, although the words " at the full value " are used. I therefore conclude that the contract of the Proprietary Company does not provide for the interest here claimed.

As to the South Company, there being no original provision for interest and no subsequent notice that interest would be claimed, the " contract " claim for interest rests entirely on the effect of three letters. The first is a letter dated 15th February 1917 from the solicitor of the South Company to the Metal Company stating certain weights of lead and certain London prices and claiming £15,370 10s. as principal due. The second is a letter dated 2nd March 1917 from the Metal Company to the South Company's solicitor. It contested the weights and pointed out the accurate

weights. It also said:—"As regards payment we shall have to hand the South Company for part of the payment a certificate for £10,000 of inscribed stock in the 1916 war loan, as we have not sufficient available funds to pay them otherwise." The third letter is undated, but is a reply to the second. It agrees to the weights, and adds that the South Company is "willing to accept a certificate for £10,000 of inscribed stock in the 1916 war loan for part payment of the concentrates. We shall be glad of an early settlement." The position put for the South Company upon the arrangement for payment contained in those letters was that it amounted to a definite contract on the one side to give, and on the other side to accept, in part payment inscribed stock for £10,000 which, as is known, carries interest. That, it was contended, entitles the South Company as a matter of absolute right—since equity regards that as done which ought to be done—to interest by way of damages on £10,000 at the rate fixed for the inscribed stock. *Marshall* v. *Poole* (1) was relied on. It was said also that "a day certain" could be gathered from a fair construction of the letters referred to, and *Duncombe* v. *Brighton Club and Norfolk Hotel Co.* (2) was said to be consonant with *London, Chatham and Dover Railway Co.* v. *South-Eastern Railway Co.* (3). Whether "a day certain" can be extracted from those letters, it is not material to inquire. Nor is it necessary to refer further to the effect of the equity rule or the doctrine of *Marshall* v. *Poole*. It is sufficient to say that the substructure of a contract binding the buyers to give and the sellers to accept the inscribed stock does not exist. The buyers intimated their financial difficulty, and what means they had of paying their debt, and the sellers intimated their willingness to accept those means. But "willingness to accept," unsupported by any consideration and retractable at will, does not constitute an obligation —and still less an obligation on the opposite party. Those considerations dispose of the claims of the Broken Hill companies to interest as a matter of *right*, whether as a *debt* or as a *liability* for breach of contract.

3. *Discretionary Interest.*—We have then to consider their alternative position, namely, a right to ask the Court to award interest

(1) (1810) 13 East, 98.
(2) (1875) L.R. 10 Q.B., 371.
(3) (1892) 1 Ch., 120; (1893) A.C., 429.

H. C. OF A. 1923.

IN RE AUSTRALIAN METAL CO. LTD.

Isaacs J.

if it thinks that course just in the circumstances. This position has been supported on various grounds, which may be thus enumerated: (1) The inherent force of sec. 75 of the Victorian *Supreme Court Act* 1915 as part of the general law of the land applicable to the case, and thereby enabling either this Court or the Controller to exercise the same power with respect to interest as the Victorian Supreme Court could in a like case; (2) the common law, to the same effect as sec. 75 of the *Supreme Court Act* 1915; (3) the practice under the Companies Acts, as part of the general law of the case; (4) the effect of secs. 79 and 80 of the Commonwealth *Judiciary Act* as bringing into operation some or all of the three preceding elements of law. Opposed to those contentions, and as affirmative qualifications, it was urged on behalf of the Controller and contested on the part of the claimants that (1) the common law alone applies; (2) dividends should be paid only ratably on the basis stated in *Halsbury's Laws of England*, vol. v., par. 868, and therefore the solvency of the Company had to be established before the debts were payable in full; (3) interest stops at winding up on the principle of *In re Humber Ironworks and Shipbuilding Co.* (*Warrant Finance Co.'s Case*) (1), unless and until complete solvency is established.

These various contentions render it absolutely necessary to clear the ground by stating the true situation of parties in present circumstances. In the former proceedings above referred to, and reported in the *Commonwealth Law Reports* (2), I found it necessary, when dealing with the question of jurisdiction, to emphasize the effect of the Minister's order requiring the business to be wound up. I said (3):—"It will be observed that it is not the 'company' to be wound up, any more than it is the 'person' or the 'firm.' It is simply *so much of its business as is carried on in Australia.*" I went on to point out that "the 'winding up' would be purely independent of State law unless the Minister consented (sub-sec. 8)." Again I said:—"Sub-sec. 3 gave the Minister *further powers*. If he thought it expedient in the interests of *public safety* he might appoint a Controller to conduct the winding up of the business." And again I added:—"He might *further*, as occasion required, arm the Controller so appointed with

(1) (1869) L.R. 4 Ch., 643. (2) (1922) 30 C.L.R., 362.
(3) (1922) 30 C.L.R., at p. 380.

'such powers as are exercisable by a liquidator in a voluntary winding up of a company'" &c. Further on I stated: "The authority to the Minister is *not to confer on the Controller the powers of any State legislation as such*, but to confer on him powers which, if conferred, he would have *under Federal law*, corresponding to powers which a liquidator ordinarily has under State law." I pointed out (1) that "it is essential to find the power . . . conferred by the Minister's order, because the *Act is not self-operating* in this regard." Those observations I adhere to; and they, with their obvious corollaries, go to the heart of the matter. They are in strict accordance with the line of decisions upon the corresponding English Act, both before and since; but, as these in their major aspect, as well as my own endeavour to elucidate the legal position of the Controller under such a winding-up order as exists in this case, appear to have escaped notice, it appears essential to state that position so as to prevent any misconception.

The legislation, of which sec. 9 (H) is a part, was not introduced for the purpose of protecting or benefiting creditors (see *In re Fried Krupp Aktien-Gesellschaft* (2)), nor for the purpose of equalizing the distribution of a debtor's assets (*In re Fr. Meyers Sohn Ltd.* (3)). The genesis of the English Act (5 & 6 Geo. V. c. 105), on which sec. 9H of our own Act is based, is found in the decision of the Court of Appeal in *Continental Tyre and Rubber Co.* (*Great Britain*) v. *Daimler Co.* (4). To speak more accurately, it is found in the suggestion of Lord *Wrenbury* (*Buckley* L.J. as he then was) that the matter "calls urgently for legislation" (5). The decision was given on 15th January 1915. For some time no appeal was heard of (see *Law Quarterly Review*, vol. XXXI., at p. 250, dated July 1915). But already Lord *Lindley* and Lord *Wrenbury*, in May, had written to the *Times* urging, if not appeal, then legislation. Ultimately, an appeal was taken to the House of Lords and came on in February 1916, judgment being given in June 1916 reversing the decision of the Appeal Court (6). But in the meantime the relevant English Act was passed on 27th January 1916, followed in Australia in May 1916, though not

(1) (1922) 30 C.L.R., at p. 381.
(2) (1916) 2 Ch., 194, at p. 198.
(3) (1918) 1 Ch., 169.
(4) (1915) 1 K.B., 893.
(5) (1915) 1 K.B., at p. 918.
(6) (1916) 2 A.C., 307.

H. C. OF A. 1923.

IN RE AUSTRALIAN METAL CO. LTD.

Isaacs J.

proclaimed till September of that year. *The dominant purpose of the legislation as apparent both from its language and its history was public safety*, and in Australia, under the defence power. Whatever other purposes are found enacted are ancillary and incidental to that dominant purpose. That is the first point to grasp. The next is to remember that, as previously stated, whether the *persona* (so to speak) to be affected was an individual, a firm or a company, the winding up was restricted to the " business " in Australia. The *status* of the "*persona*" remained unaffected ; the rights and property of the "*persona*," outside the scope of the business, were equally unaffected : within the area covered by the business and all that is appurtenant to it, the order operated ; *beyond that it had no effect whatever*. For instance, the " assets of the business " in sub-sec. 4 of sec. 9H do not include a company's uncalled capital (*In re Th. Goldschmidt Ltd.* (1)). Nor does the purpose of the Act extend to personal liabilities outside the business, or to claims in the future which may materialize against the *persona* carrying on the business (*In re W. Hagelberg Aktien-Gesellschaft* (2), *In re Th. Goldschmidt Ltd.* (3) and *In re Dieckmann* (4)). The whole scheme of the Act is to wind up the business so as to *extinguish that business*. The Legislature regarded such a business as a source of public danger. *Younger* L.J. (when *Younger* J.) called it " a sort of statutory plague spot " (*In re Kastner & Co.* ; *Auto-Piano Co.* v. *Kastner & Co.* (5)). But while the " business " is a separate entity for the purposes of the legislation, it is so only for those purposes. The general law is in no way interfered with, unless the legislation itself requires it by express words or necessary implication. Thus it has been established that, although " enforcement " of rights is forbidden except by consent of the designated authority, yet a creditor is at liberty to bring an action to *establish* his right (*Holt* v. *A. E. G. Electric Co.* (6)), and the business is not itself an entity in the sense of being a distinct legal *persona* (*Arnold Otto Meyer & Co.* v. *Faber* (7)). In short the scheme of the Act is to wind up the business as soon as may be, consistently with the provisions of the Act.

(1) (1917) 2 Ch., 194.
(2) (1916) 2 Ch., 503, at p. 513.
(3) (1917) 2 Ch., at p. 197.
(4) (1918) 1 Ch., 331, at pp. 336-337.
(5) (1917) 1 Ch., 390, at p. 398.
(6) (1918) 1 Ch., 320.
(7) (1923) 39 T.L.R., 550.

In *Dieckmann's Case* (1) *Younger* J. says: "The whole purpose of the Act is to extinguish speedily and completely these businesses which are directed to be wound up as being obnoxious to it." In practical terms that means that the business is as soon as practicable to cease operations entirely. I doubt if it is to be carried on even for a more beneficial winding up, because that appears foreign to the main purpose of the Act; at all events, all its assets are without unnecessary delay to be converted into cash if they are not so already, all debts of that business are as soon as reasonably possible to be paid out of the assets of that business so far as they will permit, any debts unpaid being left to the general liability of the debtor and any surplus remaining to be his property. The Act contemplates that it may become necessary by other proceedings to affect the status of the true *persona* carrying on the business (sub-sec. 8), but the winding-up order under sub-sec. 1 is not of that nature. There need not indeed be any Controller. The Minister may be satisfied with directing the winding up, leaving it to the owner of the business to obey. If he does—and it is useful to consider that event—it is plain that no such claim for discretionary interest could arise except in an action against the debtor himself to recover the debt. See *Halsbury's Laws of England*, vol. XXI., par. 75, and cases there cited. See also the very clearly reasoned statements of the learned editor of the fourth edition of *Henry Blackstone's Reports*, in the notes to *Trelawney* v. *Thomas* (2). That edition appeared in 1827, after *Higgins* v. *Sargent* (3) in 1823—where see the doubt of *Holroyd* J. at end of his judgment. The learned editor, however, says at p. 303: "Since the modern decisions, it is difficult to imagine a case in which the Courts would allow a party to recover interest as damages resulting from the non-payment of the debt, where there is no contract either express or implied." Two years later, in 1829, *Page* v. *Newman* (4) was decided practically so holding; and in 1893 the House of Lords accepted this as final, Lord *Watson* regarding the Act of 1833 as based on *Page* v. *Newman* being accurate. It is undoubted that discretionary interest is appendant to the debt and only when the debt itself is "recovered." It is true "action" as

(1) (1918) 1 Ch., at p. 337.
(2) (1789) 1 H. Bl., 303.
(3) (1823) 2 B. & C., 348.
(4) (1829) 9 B. & C., 378.

H. C. OF A. 1923.

IN RE AUSTRALIAN METAL CO. LTD.

Isaacs J.

defined in the *Supreme Court Act* is very wide; but, even if that section were attracted by Commonwealth legislation in the *Judiciary Act* (as to which I give no opinion), the present proceeding is not one to recover the "debt," that is, the principal sum owing. Nor is it a proceeding to recover a sum certain—if the contract basis be eliminated—because the allowance of any interest at all and the rate are discretionary (*Coane and Grant* v. *Thomas Bent Land Co.* (1)). If there had been no Controller, and if the Metal Company had instituted an action for a declaration as to its principal indebtedness and if the same answers had been given as were given in *Broken Hill Proprietary Co.* v. *Warnock* (2), that would not have been an action to "recover" the debt. And if, on the same assumption, the Metal Company had instituted further proceedings to declare its liability or non-liability to pay interest, that would a fortiori not have been an action to recover a debt or sum certain. If on the same assumption the Broken Hill companies had first obtained a declaration as to principal debt, and then in a totally independent proceeding had sued for a declaration as to interest, that would not, consistently with what I have said, have been a proceeding to recover a debt or sum certain, and no interest could have been awarded under the provisions of sec. 75 of the *Supreme Court Act*.

Since the appointment of a Controller is no necessary part of the Minister's winding up order, but is a possible accessory step which the Minister may adopt and, if so, only for the better and surer carrying out of what would be the governing purpose of the legislation in any case, how does his presence alter the character of the proceeding? He is only a statutory officer with such powers and duties as are consonant with his position and with the governing purpose of the enactment (*In re Fr. Meyers Sohn* (3)). The original proceedings were not to recover the debt. No doubt the Broken Hill companies, once that decision was obtained, could have sued for debt and interest in the Supreme Court. They could have sued not the Controller, but the Metal Company. The Controller would have had the conduct of the defence, but in the name of the Company. (See par. 5 of the order of 7th December 1917, and in *In re*

(1) (1891) 17 V.L.R., 198; 12 A.L.T., 182.

(2) (1922) 30 C.L.R., 362.

(3) (1918) 1 Ch., 169.

Winterbottom; *Ex parte Winterbottom* (1).) Whether they could have succeeded in obtaining interest in such an action would depend on several things. First, it would have depended on whether the proof of debt lodged with the Controller, and therefore limited to the assets of the business, could be said to answer the general description in sec. 75 of the *Supreme Court Act* " demand of payment . . . in writing giving notice *to the debtor* that interest would be claimed from the date of such demand." Next, it would have depended on the discretion of the Supreme Court, having regard to the circumstances, including the enforced inability of the debtor created by the law to touch a single penny of the business assets and the obligation of the Controller to proceed with the carrying out of the winding-up order. Whether, if in such an action interest had been awarded for a period subsequent to the winding-up order against the debtor *on its general liability*, that interest could have been required of the Controller out of the assets of the business would depend on the true construction of the Commonwealth Act and the Minister's order. (See *Fried Krupp's Case* (2).) But the fact remains that no such action has been brought and no such liability has been established. The jurisdiction of this Court is contained in two passages in sec. 9H. The first is in sub-sec. 3, where the Controller may be (and he is here) given power to " apply to the High Court . . . to determine any question arising in the carrying out of the order." The second is sub-sec. 3A, added by Act No. 23 of 1921. The first provision was taken from the common enactment in Companies Acts that in voluntary winding up the liquidator may " apply to " the Court " to determine any question arising in the matter of the winding up " (see English Acts of 1862, sec. 138, and of 1908, sec. 193, and sec. 194 of the Victorian *Companies Act* 1915). But significantly the Legislature omitted the additional words as to " powers which the Court might exercise if the company were being wound up by the Court." (See *Black & Co.'s Case* (3).) The second provision is an adaptation of sec. 25 of the English Act of 1900, enabling a creditor to make the application referred to in sec. 138 of the Act of 1862, a provision incorporated in the Act of 1908, sec. 193, and

(1) (1886) 18 Q.B.D., 446.
(2) (1916) 2 Ch., at p. 203.
(3) (1872) L.R. 8 Ch., 254, at p. 263.

H. C. OF A. 1923.

IN RE AUSTRALIAN METAL CO. LTD.

Isaacs J.

in the Victorian Act of 1915, sec. 194. The concluding words of sub-sec. 3A of sec. 9H of the Act we are now concerned with were probably inserted in view of the question as to discretion that arose on the prior application in this winding up. But it is plain that this Court is not given the power to determine the questions submitted on the basis of a winding up by the Court. Nor are the provisions of State Acts such as the *Supreme Court Act* 1915, sec. 75, or the winding-up provisions of the Companies Acts applicable as part of the general law of the case regulating the relative rights of the parties. In an action brought in the County Court neither of those enactments could be said to be part of the general law of the case. Inherent principles of justice, such as that enunciated in the *Warrant Finance Co.'s Case* (1), may well be applicable, but in a way only analogous to the point of that case. Such a principle would tell against compelling a debtor whose means of payment were forcibly taken from him, for the public safety, to pay interest as damages for delay, particularly when the creditor might have sued and obtained judgment in the meantime. It is unnecessary for me to say what would have been the result if the Broken Hill companies, instead of confining their motion to "interest," which in the words of sub-sec. 3A is the "question referred to in the application," had moved for an order to pay principal and interest. That might have raised a serious question as to the application and construction of secs. 79 and 80 of the *Judiciary Act*, as to which I offer no opinion even inferentially. But it would also have raised other very difficult questions, which have been already indicated. I refer to that only to show more sharply why the present motion even of the creditor companies is not one to recover a debt or sum certain.

The claim for interest therefore must, for the reasons stated, be considered, as things stand, to be neither a "debt" nor a "liability" which the Controller is bound to pay or should be required by the Court to pay; and I am of opinion that the Court should so declare.

Order as stated in the judgment of Knox C.J. and Gavan Duffy J.

(1) (1869) L.R. 4 Ch., at pp. 646-647.

Solicitors for the Controller, *Malleson, Stewart, Stawell & Nankivell.*

Solicitors for the Broken Hill Proprietary Co., *Moule, Hamilton & Kiddle.*

Solicitors for the Broken Hill South Silver Mining Co., *Blake & Riggall.*

H. C. OF A. 1923.

IN RE AUSTRALIAN METAL CO. LTD.

B. L.

[HIGH COURT OF AUSTRALIA.]

WM. KUHNEL & COMPANY LIMITED . . APPELLANT;

AND

THE DEPUTY FEDERAL COMMISSIONER OF TAXATION (SOUTH AUSTRALIA) } RESPONDENT.

War-time Profits Tax—Assessment—Deductions from profits—Commonwealth income tax—Taxpayer a company—Shareholder a trustee—War-time Profits Tax Assessment Act 1917-1918 (*No* 33 *of* 1917—*No.* 40 *of* 1918), *secs.* 15 (4), (5), 18—*Income Tax Assessment Act* 1915-1916 (*No.* 34 *of* 1915—*No.* 39 *of* 1916), *sec.* 26 (1)—*Income Tax Assessment Act* 1915-1918 (*No.* 34 *of* 1915—*No.* 18 *of* 1918), *sec.* 26.

H. C. OF A. 1923.

ADELAIDE, *Oct.* 3, 4.

SYDNEY, *Dec.* 7.

Knox C.J., Isaacs, Higgins, Rich and Starke JJ.

Held, that the proper method for determining the deduction, from the profits of a company provided for by sub-secs. 4 and 5 (*c*) of sec. 15 of the *War-time Profits Tax Assessment Act* 1917-1918, of Commonwealth income tax paid in respect of the profits is (a) as to the accounting periods 1916-1917 and 1917-1918, to find the amounts of income tax that would have been payable by each shareholder of the company if the share of the profits credited or paid to him had been the only income derived by him from sources within Australia, whether the shareholder is a trustee or not; and (b) as to the accounting period 1918-1919, to find the amounts of income tax that would have been payable by each shareholder of the company if the share of the profits credited or paid to him had been the only income derived by him from sources within Australia, but limited where the shareholder is a trustee to the amount for which the trustee is to be separately assessed and liable under sec. 26 (2) of the *Income Tax Assessment Act* 1915-1918.