[HIGH COURT OF AUSTRALIA.]

BARCELO . . . . . APPELLANT;
DEFENDANT,

AND

ELECTROLYTIC ZINC COMPANY OF AUSTRALASIA LIMITED AND OTHERS } RESPONDENTS.
PLAINTIFF AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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Financial Emergency—Company—"Mortgage"—Debentures—Statutory reduction of interest—Debentures on London register—Interest payable in London—Financial Emergency Act 1931 (*Vict.*) (*No.* 3961), *secs.* 14 (1)*, 19*, 22*.

Private International Law—Proper law of contract—Agreement that contract shall be "construed according to law of Victoria."

Company—Ultra vires—Payment of full rate of interest reserved by debentures after reduction by financial emergency legislation.

Constitutional Law (*Vict.*)—*Statute—Territorial operation.*

Sept. 27-29.
Nov. 21.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

A company incorporated in the State of Victoria created a series of first mortgage debentures which were secured by, and issued on the terms of, a deed made between the company and a trustee for the debenture holders.

*The *Financial Emergency Act* 1931 (Vict.), the relevant provisions of which came into operation on 1st October 1931, provides:—By sec. 14 (1): "'Mortgage' means any deed memorandum of mortgage instrument or agreement whereby security for payment of money is granted . . . over real or personal property or any interest therein; and, without affecting the generality of this definition, includes a mortgage given as security for moneys granted by a bank or corporation on overdraft; and also includes—(*a*) any debenture inscribed stock or mortgage issued created or given by any public or local authority; (*b*) an agreement for sale and purchase of real or personal property under which interest is payable in respect of the whole or any portion of the purchase money; (*c*) a conveyance or transfer to a society

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The trust deed, which was both executed and kept at Melbourne, provided (clause 63) that "these presents shall be construed according to the law of the State of Victoria." The deed created a fixed charge over real property of the company in Tasmania and a floating charge over the rest of its property. The debentures charged with payment of the principal and interest the undertaking and property of the company "in terms of" the trust deed. The company had property in Victoria, and other States of the Commonwealth, and elsewhere. The debentures were originally issued under the seal of the company in Victoria and were entered on the company's register of debentures in Melbourne in the names of the persons to whom they were originally issued. Certain of the debentures were subsequently transferred to other persons on the company's Melbourne register of debentures and certain of them were transferred to and entered upon the company's London register of debentures, the practice being that when a debenture was transferred to the London register the old debenture was cancelled and a new debenture was issued in London under the seal of the company at the company's London office, and when a debenture was transferred to the Melbourne register the old debenture was cancelled and a new debenture was issued in Melbourne under the seal of the company at its head office in Melbourne. Certain of the debentures were transferred to the Melbourne register from the London register after 1st October 1931, the date of the coming into operation of the *Financial Emergency Act* 1931 (Vict.). On 16th November 1931 the company paid in Melbourne to the holders of the debentures on the Melbourne register and in London to the holders of the debentures on the London register an amount for interest reduced in accordance with the provisions of the *Financial Emergency Act* 1931 and paid the difference between such reduced amount and the full rate of such interest provided by the debentures to a trust account. The holders of the debentures registered in Melbourne and the holders of the debentures registered in London claimed that the provisions of the *Financial Emergency Act* did not apply to the debentures held by them so as to reduce the extent of the obligation to pay interest thereon and claimed to be paid at the full rate of interest provided by the debentures.

Held:—

(1) The debentures answered the description of "mortgage" in sec. 14 (1) of the *Financial Emergency Act*.

registered under the *Building Societies Act* 1928 which is subject to a deed of defeasance and any other form of mortgage or security given to such a society; and (*d*) a hire-purchase agreement relating to chattels." By sec. 19 (1), that, subject to certain exceptions, "every mortgage shall for a period of three years from the date of the coming into operation of this Division be construed and take effect as if it were a term of the mortgage that on and from the coming into operation of this Part . . . the interest payable under the mortgage should be reduced at a rate equivalent to four shillings and sixpence for every pound of such interest." By sec. 22 (1): "Every payment of interest made in pursuance of the provisions of this Division . . . shall be a full discharge of the mortgagor's liability for interest under his mortgage in respect of the period to which such payment relates."

(2) The payments which had been made at the reduced rate constituted in Victoria a full discharge of the company's liability to the holders of the debentures, whether on the Melbourne or the London register, for interest in respect of the period to which the payments related—

By *Rich* J., because the governing law of the obligation arising from the debentures was Victorian; all the debts were substantially connected with Victoria and therefore came within the operation of secs. 19 and 22 of the *Financial Emergency Act*.

By *Starke* J., because the meaning and scope of the words "every mortgage" in the *Financial Emergency Act* were limited only by the constitutional authority of the State of Victoria; and that authority and, consequently, secs. 19 and 22 of the Act extended to all the debentures in question.

By *Dixon* and *McTiernan* JJ., because the general words of the enactment were restricted only by the rule of construction which presumes consistency with private international law, and the governing law of the obligation created by the debentures was Victorian, and therefore all the debentures came within the operation of secs. 19 and 22 of the Act.

By *Evatt* J., because, by clause 63 of the trust deed, providing for construction by reference to the law of Victoria, the parties had expressly agreed that the obligation of the debentures should be measured by such Victorian law as was applicable to debentures possessing Victorian elements only. Payment of the reduced rate of interest provided for in the *Financial Emergency Act* should be regarded, by a Victorian Court at least, as discharging the obligation because, admittedly, the Act did operate in respect of all such mortgage transactions as were entirely Victorian in character. In the circumstances, it was unnecessary to determine the precise extent to which the Act would, entirely of its own force, operate upon mortgage transactions possessing one or more non-Victorian elements.

(3) By *Rich*, *Dixon*, *Evatt* and *McTiernan* JJ., that there were not sufficient facts before the Court to enable it to determine whether the company had power, notwithstanding the provisions of the *Financial Emergency Act*, to pay the agreed rate of interest to the debenture holders.

(4) By *Starke* J., that, if the company was able to pay the agreed rate of interest and desired to do so, there was no reason in law preventing it from so doing: Such a matter was remitted by law to the business judgment of the directors of the company, exercised honestly and reasonably in the interests of the company and its shareholders.

Observations on the construction of statutes in relation to their territorial operation.

Principles of private international law relating to the ascertainment of the governing law of a contract discussed.

Decision of the Supreme Court of Victoria (Full Court): *Electrolytic Zinc Co. of Australasia Ltd.* v. *Knight*, (1932) V.L.R. 193, 346, varied.

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APPEAL from the Supreme Court of Victoria.

In an action brought in the Supreme Court of Victoria by the Electrolytic Zinc Co. of Australasia Ltd. against Hector Jacob Barcelo, who was sued on his own behalf and on behalf of all others the holders of the ordinary and of the preference shares issued by the Electrolytic Zinc Co. of Australasia Ltd., Frederick Arthur Herbert Knight, who was sued on his own behalf and on behalf of all others the holders of the debentures of the plaintiff Company for the time being registered in the said Company's register in Melbourne, William Clark, who was sued on his own behalf and on behalf of all others the holders of the debentures of the plaintiff Company for the time being registered in the said Company's register in London, and The Standard Trust Ltd., the trustee for all the said debenture holders under the deed whereby the debentures were secured, the parties concurred in stating a case. *Mann* J. made a representative order relating to four of the defendants and referred the case to the Full Court.

The case was substantially as follows :—

This action was commenced by writ of summons issued on 8th February 1932 whereby the plaintiff claimed :—(*a*) A declaration that payment on 15th November 1931 by way of interest payable on the plaintiff's debentures on the said date of the amount of such interest reduced in accordance with the provisions of the *Financial Emergency Act* 1931 (Vict.) discharged the plaintiff's liability under the said debentures in respect of such interest to the holders of (1) the said debentures on the Melbourne register, (2) the debentures on the London register. (*b*) A declaration that payment of any amount by way of such interest on the said debentures in addition to such reduced amount would be *ultra vires* the plaintiff Company and/or its directors. (*c*) An order that the amount paid by the plaintiff on 15th November 1931 to a trust account be paid to the plaintiff Company. (*d*) Such further order and relief as to the Court seems just. The parties hereto have concurred in stating the questions of law arising herein in the following case for the opinion of the Court :—

1. The plaintiff, Electrolytic Zinc Co. of Australasia Ltd., is a company incorporated under the provisions of the *Companies Act* 1915 of the State of Victoria.

2. The plaintiff Company, pursuant to the powers conferred upon it by its incorporation and its memorandum of association, in the year 1922 created a series of first mortgage debentures for the aggregate sum of £1,000,000 and thereupon issued such debentures to the total aggregate sum of £400,000.

3. The debentures were secured by and issued on the terms and conditions contained in a deed made on 15th May 1922 between the plaintiff Company of the one part and Melbourne Trust Ltd. of the other part whereby Melbourne Trust Ltd. became the trustee under the deed for the holders of the debentures. The deed was executed by both the parties thereto at Melbourne in the State of Victoria and the original deed is kept at Melbourne.

4. The whole of the debentures were originally issued under the seal of the plaintiff Company at its head office in Victoria to Richard Percy Clive Baillieu, Norman Howard Baillieu and Maurice Howard Lawrence Baillieu, carrying on business as E. L. and C. Baillieu, or their nominees pursuant to and in accordance with the terms of an agreement made in Victoria on 1st March 1922 between the Company and such named persons, and were thereupon entered on the Company's register of debentures in Melbourne in the names of such persons. Since such debentures were so issued and entered as aforesaid certain of them have been transferred to other persons on the Company's Melbourne register of debentures and certain of them have been transferred to and entered upon the Company's London register of debentures. When a debenture was transferred to the London register, the old debenture was cancelled and a new debenture was issued in London under the seal of the Company at the Company's London office. When a debenture was transferred to the Melbourne office, the old debenture was cancelled and a new debenture was issued in Melbourne under the seal of the Company at its head office in Melbourne. On 16th November 1931 some of the debentures were registered on the Melbourne register and some were registered on the London register. Certain of the debentures registered on the said Melbourne register on 16th November 1931 were transferred to the Melbourne register from the London register after 1st October 1931.

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5. Portion of the property of the Company, particulars of which are set out in the deed referred to in par. 3, was at the date of the deed situate in Tasmania.

6. In addition to the property referred to in par. 5 the plaintiff Company at the date of the deed and of the issue of the debentures owned property in Victoria and in other States of the Commonwealth of Australia and elsewhere.

7. The Company now has property situate in Tasmania, Victoria, certain other States of the Commonwealth of Australia, and elsewhere.

8. The Company is registered under the English *Companies Act* as a company incorporated outside Great Britain but having a place of business within Great Britain. It has an office in London and has a local board of directors in London who are appointed by the directors of the Company who meet in Melbourne. The Company keeps at its London office a branch register of members as well as the London register of debenture holders. The London office of the Company deals with matters of transfer and registration of shares and of debentures on the London register and the payment of dividends and interest in respect of the shares and debentures respectively on such register. The London office also receives proceeds of the sales of such of the Company's products as are sold for export to the United Kingdom and the Continent and pays thereout under the orders and instructions of the Melbourne directors such sums as may be required for the purchase of plant, equipment and stores and London administration expenses, and remits money from time to time to Melbourne as directed by the Melbourne directors.

9. The defendant Frederick Arthur Herbert Knight is the holder of certain of the debentures registered on the Melbourne register of the Company, and is sued on behalf of himself and all others the holders of the debentures registered on the Melbourne register.

10. The defendant William Clark is the holder of certain of the debentures registered on the London register of the Company, and is sued on behalf of himself and all others the holders of the debentures registered on the London register.

11. The defendant Hector Jacob Barcelo is the holder of certain of the ordinary and of the preference shares issued by the said Company, and is sued on behalf of himself and all other the holders of the said shares.

12. The defendant The Standard Trust Ltd. is the present trustee for the debenture holders under the deed made on 15th May 1922 and is sued as such.

13. On 16th November 1931 the plaintiff Company paid in Melbourne to the holders of the debentures on the Melbourne register and in London to the holders of the debentures on the London register by way of interest payable on the debentures on that date the amount of such interest reduced in accordance with the provisions of the *Financial Emergency Act* 1931 and paid the difference between the reduced amount and the amount of interest calculated at the full rate of eight pounds per cent per annum in accordance with the deed for the half year, after deducting income tax in certain cases, to a trust account in the joint names of the plaintiff Company and the defendant The Standard Trust Ltd.

14. The defendants Knight and Clark and holders of debentures whom they respectively represent claim that the provisions of the *Financial Emergency Act* 1931 do not apply to the debentures held by them respectively so as to reduce the extent of the obligation to pay interest thereon, and claim that the moneys standing to the credit of the trust account should be applied in payment upon the debentures held respectively by them and by those debenture holders whom they respectively represent of the full rate of interest covenanted to be paid in the respective debentures.

15. The defendant Barcelo and shareholders in the plaintiff Company whom he represents claim that the provisions of the said Act do apply to all or some such debentures so as to reduce the extent of the obligation of the Company to pay interest thereon to the extent of twenty-two and one-half per cent and claim that the moneys or part thereof standing to the credit of the trust account should be re-transferred to the credit of the plaintiff Company.

16. Unless the questions raised in the special case are determined by the Court, proceedings will be taken by such debenture holders (or some of them) to enforce their claims or by such shareholders

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(or some of them) to enjoin the plaintiff Company from satisfying the claims of the debenture holders respectively.

The debentures were in the following form:—"1. Electrolytic Zinc Company of Australasia Limited (hereinafter called the Company) will on the fourteenth day of May 1942 or on such earlier day as the principal moneys hereby secured become payable in accordance with the conditions hereon pay to.....of.....or other the registered holder hereof on presentation of this debenture a sum equal to the aggregate amount of the principal moneys paid up hereon limited to.....pounds (£....). 2. The Company will during the continuance of the security and so long as interest shall be payable hereon pay interest half-yearly on the said principal moneys at the rate of £8 per centum per annum, the first payment to be made on the fifteenth day of November 1922 calculated from the fifteenth day of May 1922. 3. The Company hereby charges with such payments its undertaking and property in terms of the said trust deed. 4. The holders of the debentures of the total authorized series of £1,000,000 are and will be entitled *pari passu* to the benefit of and be subject to the provisions of the said trust deed. The holders of the present issue of £400,000 are and will be entitled to the benefits and rights and subject to the terms and conditions in respect thereof endorsed hereon and/or contained in the said trust deed. The remaining £600,000 debentures at present unissued if and when the same or any part thereof are from time to time issued will be in such amounts upon such terms and subject to such rights and at such rate of interest not exceeding £8 per centum per annum as the Company may from time to time deem fit and as may be provided for in a supplemental trust deed or supplemental trust deeds Provided however that any such subsequent issue shall not be redeemable before the date fixed for repayment of the before-mentioned issue of £400,000. 5. This debenture is issued subject to and with the benefit of the conditions indorsed hereon or contained in the said trust deed all of which are to be deemed part hereof and of which the holder shall be deemed to have notice."

The conditions indorsed on the debenture included the following:—"1. Each of the debentures shall confer upon the holder thereof equally with the holders of the other debentures of the same issue

the right to participate in the benefit of the trusts hereby and by the said trust deed declared." "6. A register of debentures for the time being registered at the Company's registered office in Melbourne and its office in London shall be kept at each such office and therein will be entered the names and addresses and descriptions of the registered holders in Australia and in England respectively and particulars of the debentures held by them respectively. After registration in either of such registers the Company shall upon receiving three months' notice from the registered holder hereof or his legal personal representative transfer this debenture to the other of such registers. Each of the registers will at all reasonable times during business hours be open to the inspection of the holders registered therein for the time being and their legal personal representatives and any person authorized in writing by them." "8. Every transfer of this debenture must be in writing under the hand of the registered holder hereof or his legal personal representative and of the transferee and must be registered in the register at Melbourne or London as the case may be wherein this debenture is registered at the date of the transfer. The instrument of transfer must be delivered at the office of the Company in Melbourne or London as the case may be and where necessary duly stamped and with such evidence of identity or title as the Company may reasonably require and thereupon the transfer will be registered and a note of such registration indorsed hereon. The Company shall be entitled to retain the instrument of transfer. The transferor shall be deemed to remain the owner of the debenture to be transferred until the name of the transferee is entered on the register." "11. All moneys payable to the registered holder hereof in respect of this debenture will be paid at the Company's office in Melbourne or London according as the holder shall be registered in Melbourne or London but the Company or the trustee or a receiver of the Company may make any payment on account of principal or of interest by cheque or warrant upon bankers forwarded through the ordinary post to the registered holder of the debenture in respect of which the same is made addressed to him her or it at the address stated in the register of debentures as his her or its last known residence place of abode or registered office as the case may be. And the sender

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shall not be answerable for any loss arising by reason of any such cheque or warrant miscarrying or being lost or being paid by bankers upon a forged indorsement but any such loss shall fall upon and be borne by the debenture holder to whom the same was made payable." " 13. Any notice may be served on the Company by the holder of the debenture by sending it through the post in a prepaid letter addressed to the Company at its registered office in Melbourne or at its office in London according as the holder is registered in Melbourne or in London."

By clause 2 of the trust deed the Company covenanted that, on demand by the trustee, it would vest in the trustee certain freehold and leasehold land situate in Tasmania. The deed, by clause 4, charged with payment to the trustee of the principal and interest secured by the debentures the whole of the business, undertaking and property of the Company, and provided that, except as to the property previously referred to, the charge should be a floating charge. Clause 29 excluded the application of sec. 37 of the Victorian *Conveyancing Act* 1915 to any sale of the assets charged by the debenture. Clause 46 made reference to the fact that " the trustee will or may be in the State of Victoria." Clause 56 provided that " any trustee retiring or being removed by the debenture holders shall be deemed to have become incapable of acting in the trusts and powers reposed in or conferred on it by these presents within the meaning of the *Trusts Act* 1915 or any statutory modification thereof." This apparently referred to the Victorian *Trusts Act* 1915. Clause 63 provided that " these presents shall be construed according to the law of the State of Victoria."

By its memorandum of association the Company had power " to raise or borrow money in such manner and upon such security (if any) as the Company shall think fit and in particular upon the security of any mortgage or mortgages of all or any of the Company's property and rights (both present and future) including its uncalled capital or upon the issue of debentures charged upon all or any of the Company's property and rights (both present and future) including its uncalled capital " ; and also power " to do all such things as are incidental or may be thought conducive to the attainment of " any of the objects expressed in the memorandum.

The questions for the opinion of the Court were :—

(*a*) Are the said debentures, or any and which of them, mortgages within the meaning of the word " mortgage " in Part III. of the *Financial Emergency Act* 1931 ?

(*b*) Do the provisions of Part III. of the said Act apply to and operate upon—

(i.) the said debentures on the Melbourne register ?

(ii.) the said debentures on the London register ?

(*c*) Did the payment to the holders of the debentures of the reduced amount of interest mentioned in par 13. hereof discharge the plaintiff's liability under the said debentures in respect of such interest to the holders of—

(i.) the debentures on the Melbourne register ?

(ii.) the debentures on the London register ?

(*d*) Has the plaintiff Company, or have its directors, notwithstanding the provisions of the *Financial Emergency Act* 1931, power to pay to the holders of the said debentures or any and which of them the whole of the interest covenanted to be paid to the said debenture holders under the debentures held by them respectively, or any amount by way of interest in addition to such reduced amount ?

The Full Court answered the questions as follows :—(*a*) and (*b*) All the debentures are mortgages within the meaning of the *Financial Emergency Act*, but that Act operates to bring about a reduction of interest only when the interest is paid in Victoria under and by virtue of the terms of the debentures. (*c*) (i.) Yes. (ii.) No. (*d*) Yes, the plaintiff has power to pay to all debenture holders the whole of the interest covenanted to be paid to them, but it is for the Company to determine whether such power should be exercised : *Electrolytic Zinc Co. of Australasia Ltd.* v. *Knight* (1).

From this decision the defendant Barcelo now appealed to the High Court, and the defendants Knight and Clark cross-appealed.

Eager (with him *Flannagan*), for the appellant. The *Financial Emergency Act* operates to bring about a reduction wherever the interest is paid. The operation of the Act is determined at the date

(1) (1932) V.L.R. 193, 346.

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it comes into operation. By mere transfer to London the debenture holders could not affect the question of reduction of interest. The Full Court took the view that the proper law of the contract had nothing to do with the matter and considered the statute as merely territorial legislation. The Act should be construed according to the rules of private international law (*Maxwell* on *Interpretation of Statutes*, 7th ed. (1929), p. 127).

[DIXON J. referred to *Forster* v. *Forster* (1).]

The statute cannot be detached from the rules of private international law, although it may have to be cut down territorially so that the contract of mortgage will be construed similarly elsewhere. The contract was made in Victoria, and the trust deed which says that it is to be construed according to the law of Victoria is in Victoria (*Peninsular and Oriental Steam Navigation Co.* v. *Shand* (2); *Hamlyn & Co.* v. *Talisker Distillery* (3); *Spurrier* v. *La Cloche* (4); *Jacobs* v. *Crédit Lyonnais* (5)).

[DIXON J. referred to *Ellis* v. *M'Henry* (6).]

The restriction to reduction of debenture interest payable in Victoria is not justified. It is a mortgage over property in Victoria. [Counsel referred to *Henderson* v. *Bank of Australasia* (7).]

Wilbur Ham K.C. (with him *Tait*), for Electrolytic Zinc Co. of Australasia Ltd. Sec. 19 of the *Financial Emergency Act* is a statutory modification of a contract and the question is into what contracts the modification should be read. If it is limited to transactions in the territory there is only one question left. The real question is: What is the proper law of the contract? Colonial Acts must be given a territorial limitation (*Attorney-General for Ontario* v. *Reciprocal Insurers* (8)). It is unsatisfactory to attempt to determine the territorial operation of the Act by reading words into the definition clause, because the earlier section may very well have a different operation so far as its territorial operation is

(1) (1907) V.L.R. 159, at p. 164; 28 A.L.T. 144, at p. 146.
(2) (1865) 3 Moo. P.C. (N.S.) 272, at p. 290; 16 E.R. 103, at p. 110.
(3) (1894) A.C. 202, at p. 206.
(4) (1902) A.C. 446.
(5) (1884) 12 Q.B.D. 589.
(6) (1871) L.R. 6 C.P. 228.
(7) (1888) 40 Ch. D. 170, at p. 174.
(8) (1924) A.C. 328, at p. 345.

concerned (*British South Africa Co.* v. *De Beers Consolidated Mines Ltd.* (1)).

[DIXON J. referred to *Croft* v. *Dunphy* (2).]

All these contracts were in existence at the date of the coming into operation of the Act and must be read as if the clause reducing interest were in them ; therefore, it is immaterial that the holders were exercising an option to be paid in London. There are three possible views : (1) The Company cannot pay anything above the reduced amount of interest ; (2) it can pay the contracted rate if it pleases and no one can question the payment, and (3) the payment of the difference between the contracted rate and the reduced rate, if made, is in the position of a gratuitous payment and the rules applicable to such payments apply thereto. The answer should be that it is in the absolute discretion of the Company to pay or not to pay without having to justify the payment by calling in principles applicable to gratuitous payments, or alternatively that it can pay in the exercise of its discretion in circumstances which would justify a gratuitous payment.

Fullagar (*Stanley Lewis* with him), for the respondent Knight.

Fullagar, for The Standard Trust Ltd.

Fullagar. The Act does not apply to these debentures at all. Debentures of this character are not within the definition of " mortgage " in the Act. The Legislature was intending to provide for things which would be called mortgages and then included four classes of things none of which would be included in the term " mortgage." Sec. 19 would not ordinarily be said to apply to a series of debentures where each holder must be a mortgagee if it is a mortgage at all (*Metropolitan Gas Co.* v. *McIlwraith McEacharn Ltd.* (3)). Under the trust deed the security is given to trustees. The money is payable under the debenture, but the security is given under the trust deed. Debentures are not within the term " mortgage " or within the definition of that word in sec. 14. There

(1) (1910) 2 Ch. 502, at pp. 512, 515, 524.

(2) (1932) 48 T.L.R. 652.

(3) (1932) V.L.R. 88.

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is no person who is a mortgagee. Consideration of what is the proper law has little bearing on the matter, because the question is: Does the Act operate upon the obligations created by the debentures or some and which of them? Sec. 27 carefully excludes from the operation of the Act certain transactions. By secs. 19 and 28 it is clear that the Legislature intended to legislate only with regard to property in Victoria. The real test is whether this is a mortgage of Victorian property or of property elsewhere. The Act benefits only Victorian mortgagors who are persons resident in Victoria at the time the Act came into operation. The Company has power to pay even if the Act applies. Although the Act operates directly upon the obligation, the provisions of the contract cannot be ignored (*Metropolitan Gas Co.* v. *McIlwraith McEacharn Ltd.* (1)).

Cohen K.C. (with him *Spicer*), for the respondent Clark. The English debenture holders do not come within the purview of the Act. The Company was registered in England and has an office in London and keeps in its London office the London register of debenture holders. The trust deed and the debenture contemplated that the money would be lent by persons resident in London and those London debenture holders had the right to be put on the London register. That puts them in a different category from the Victorian debenture holders. The *lex loci contractus* and the *lex loci solutionis* are in that case English. Clause 63 of the debenture deed providing that the deed shall be construed according to the law of the State of Victoria relates to matters of construction only. Sec. 17 (1) of the Act applies to all mortgages existing at the time of the coming into operation of the Act, and applies only to debentures in Victoria on 1st October 1931 (*Westlake, Private International Law*, 7th ed. (1925), pp. 299, 302; *Foote's Private International Law*, 5th ed. (1925), pp. 397, 398, 413). The *lex loci solutionis*, which is the law applicable, is English law so far as the English debentures are concerned (*Dicey* on *Conflict of Laws*, 5th ed. (1932), p. 631). If the law of Victoria does apply it comes to a question of the interpretation of the statute. The Act does not say that it is for the

(1) (1932) V.L.R., at p. 96.

benefit of mortgagors but it does say that there is to be a common sacrifice. What was intended was that there should be a common sacrifice among persons resident in Victoria. Consequently, it could not have been intended that the statute would apply to the English debenture holders. Sec. 19 (5) of the Act, which requires that applications under the section are to be made to the Court of Petty Sessions "nearest to the location of the property" which is the subject of the mortgage, implies that "the property" shall be situate wholly in Victoria. The provision in the agreement that Victorian law shall apply refers to the ordinary law of Victoria and does not include emergency legislation such as this (*In re Fried Krupp Actien-Gesellschaft* (1)).

Eager, in reply, referred to *Palmer's Company Precedents*, 13th ed. (1927), Part III., p. 461.

Cur. adv. vult.

The following written judgments were delivered :— Nov. 21.

RICH J. The main question in this case is whether the Victorian *Financial Emergency Act* 1931 reduces the interest on certain debentures given by a Victorian company, irrespective of the place where the debentures are situate or where they are payable. This depends on the true construction of the actual terms of the Act. The second or subsidiary question only arises if the Court is of the opinion that the Victorian Act does apply to all the debentures. The question then is whether, notwithstanding the relief conferred upon it by the Act, the Company would be entitled to pay debenture holders the full rate of interest. This is a question of *ultra vires* under the Victorian company law.

The debentures in question were issued by the respondent Company, a company registered under the Victorian *Companies Act*. They were secured by a trust deed, the object of which was no doubt to create a fixed charge on certain specified property, the remainder of the Company's property and its undertaking being subject to a floating charge. Registers of debentures were kept by

(1) (1917) 2 Ch. 188.

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the Company in London and Melbourne. Some of the debentures have been transferred from the Melbourne to the London register. Moneys are payable in London or Melbourne according to the place of registration of the debenture.

The provisions of the Victorian Act are expressed in wide and general terms:—"Every mortgage shall . . . be construed and take effect" (sec. 19). "Every payment of interest . . . shall be a full discharge" (sec. 22 (1)). Read as a whole it is plain that the intention of the Legislature was to contribute to the general reduction of interest rates by giving a certain measure of relief to debtors who were liable to pay interest to their creditors by enacting that the payment of a certain lower rate should satisfy the obligation. The Act itself does not give any indication that the Legislature intended to differentiate between the rights of local and foreign creditors. It concentrates on the relief of the local debtor, and, whatever else it may do, it prevents the enforcement in Victoria of a claim for interest made by a foreign creditor no less than a local creditor.

It is urged, however, that some limitation must be read into the general language of the Act. One possible limitation is that, as under the Victorian Constitution the Legislature is empowered to legislate for the peace, order and good government of Victoria, prima facie its legislation must be taken as intended to refer to transactions taking place within Victoria or at least in some way concerning the peace, order and good government of Victoria. Another possible limitation is that the Legislature must be taken not to have intended to interfere with obligations arising outside Victoria in any case in which those obligations are governed by the law of some other country. I do not see any sufficient reason for holding that the Victorian Legislature intended its enactment to be restricted to transactions which were wholly Victorian in the sense that the obligations involved arose in Victoria, that the instruments evidencing them were locally situate within Victoria and the obligations were to be performed in Victoria. It appears to be unnecessary to imply any further limitation than that the Legislature was dealing with transactions which in a real and practical sense concerned Victoria. As to the other limitation, there is no occasion in the

present case to dispute it inasmuch as it is clear that the governing law of the obligation arising from the debentures is Victorian.

Whether a Court in England would give effect to the Act is a question of English law. Such a Court would have to consider whether the obligations are governed by English or by Victorian law. There does not appear to be any hard and fast rule on such a question, and the answer really depends upon the true inference to be drawn from all the circumstances (*Dicey's Conflict of Laws*, 5th ed. (1932), p. 666). The debentures may, I think, fairly be described as Victorian debentures, and the mere fact that they may be transferred from the Victorian register and made payable in London does not, in my opinion, prevent the debentures from being governed by Victorian law.

I have dealt with this question of the proper law to be applied to the debentures, not because I think it is necessary to decide that the Act only deals with debentures which from the point of view of private international law are governed by Victorian law, but because the fact that the provisions of the Act extend to such debentures, as well as to the enforcement of claims in Victoria, bears on the question of *ultra vires*. On the question of enforcement, I think some light may be obtained by considering the law with regard to a discharge in bankruptcy under the *Bankruptcy Act* 1924-1932. Where a debtor is made bankrupt under that Act a creditor may prove in the bankruptcy and the certificate of discharge releases the bankrupt from all debts and claims, subject to those which are expressly excepted by the Act. The Act provides in general terms that, subject to those exceptions, the order of discharge shall release the bankrupt from all other debts provable in bankruptcy (sec. 121 of the *Bankruptcy Act* 1924-1932). It has apparently been taken for granted that where the Legislature is giving relief to bankrupt debtors it is not giving the relief subject to any implied saving clause in favour of creditors whose debts or claims arose outside the jurisdiction (*Dicey's Conflict of Laws*, 5th ed. (1932), pp. 373, 508-510); nor in that case is the Legislature concerned with the fact that its enactment will not discharge the debt in a foreign country—that is, will not prevent the creditor from suing the debtor in the foreign country in which the debt

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arose, if for any reason the debtor should be answerable to its jurisdiction (*Dicey's Conflict of Laws*, 5th ed., p. 506). It seems to me clear that all the debts are substantially connected with Victoria and come within the Act. I see no more reason for implying limitations in this Act with respect to the locality of the obligation or of its performance than in the *Bankruptcy Act*—in an Act which grants partial relief than in one that grants general relief.

In my opinion, therefore, all the debentures come within the operation of secs. 19 and 22 of the *Financial Emergency Act* 1931, and I answer the questions in the special case: (*a*) and (*b*) Yes; (*c*) (i.) Yes; and (*c*) (ii.) Yes, so far as enforcement in Victoria is concerned.

With regard to the question whether the Company by its directors is at liberty notwithstanding the reduction to pay the full rate of interest reserved by the debentures I have much difficulty in seeing how a final answer can be given upon the materials contained in the special case. In the Full Court, *Mann* J. who delivered the judgment upon this point appears to have regarded the matter rather as if it were a question whether the Legislature meant to inhibit the payment of the full rate. I cannot so regard it; it appears to me to be wholly a question of the power of the Company in the circumstances to pay money which it is not bound to pay, a question of *ultra vires*. The Legislature directs that the mortgage shall be construed as if it contained a provision for reduction. This direction must, of course, be implicitly obeyed. What power would the Company have to pay the higher rate if the mortgage did in fact contain such a provision? The answer upon the memorandum of this Company is no power, unless in all the circumstances the payment can reasonably be considered conducive to the attainment of some object, particular or general, within the Company's corporate powers. The special case does not suggest any facts raising such a case. Of course we know the date upon which the debentures mature, the rate of interest reserved, the options given to the debenture holders, the general nature of the statute; but whatever foundation these might afford for a case made up of additional circumstances they do not, in my opinion, in themselves justify us

in giving an answer to the question. In my opinion we should give no answer to the question.

STARKE J. This is an appeal from a decision of the Supreme Court of Victoria involving the construction of the *Financial Emergency Acts* of 1931, Nos. 3961 and 3970, and their application to facts set forth in a special case stated for the opinion of that Court. By these Acts it is provided (sec. 19) that every mortgage (with certain exceptions) shall for a period named be construed and take effect as if it were a term of the mortgage that the interest payable under the mortgage should be reduced at a rate equivalent to four shillings and sixpence for every pound of such interest; and (sec. 22) that every payment of interest made in pursuance of the Act shall be a full discharge of the mortgagor's liability for interest under his mortgage in respect of the period to which such payment relates. The principal questions agitated were whether certain debentures were mortgages within the meaning of the Acts, and whether the provisions of the Acts applied to and operated upon the obligation to pay interest under these debentures in Melbourne and London respectively.

The constitutional basis of the Acts is the authority given to the Legislature of the State of Victoria by the *Constitution Act* to make laws "in and for Victoria in all cases whatsoever." It is within its competence to make laws for persons and property within its territory, and it is not without its territorial jurisdiction to make laws in cases of contracts made or to be performed in Victoria (*Ashbury* v. *Ellis* (1); and cf. *Attorney-General for Canada* v. *Cain and Gilhula* (2); *Croft* v. *Dunphy* (3); *Robtelmes* v. *Brenan* (4); *Semple* v. *O'Donovan* (5)). The extent to which other States or countries will recognize and give effect to such laws is another question, and depends upon the municipal law of those States or countries. In England, for instance, the discharge of a contract generally depends upon the proper law of the contract, that is, the law by which the parties intended the contract to be governed (*Ellis* v. *M'Henry* (6);

(1) (1893) A.C. 339.
(2) (1906) A.C. 542.
(3) (1932) 48 T.L.R. 652.
(4) (1906) 4 C.L.R. 395.
(5) (1917) N.Z.L.R. 273.
(6) (1871) L.R. 6 C.P. 228.

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Spiller v. *Turner* (1); *Pass* v. *British Tobacco Co. (Australia) Ltd.* (2)). But the principles which govern the determination of the law with reference to which the rights and obligations of the parties are determined have no bearing upon the constitutional validity of legislation. Generally speaking, however, we assume that the Legislature confines its laws to matters within its competence. And it is no doubt also true that, if the meaning of an Act be doubtful, it should be construed so as not to violate the comity of nations, or, possibly, the generally accepted principles of what is described as private international law or the conflict of laws.

The words " every mortgage " in sec. 19—which mean any deed, memorandum of mortgage, instrument or agreement whereby security for payment of money is granted, whether by virtue of such deed, etc., or any Act, over any real or personal property or any interest therein (see sec. 14)—are general, and in themselves suggest no limitation. But there must necessarily be some limitation, or the provision would transcend the constitutional power of the Legislature of the State of Victoria. It therefore becomes necessary, as was said in *Macleod* v. *Attorney-General for New South Wales* (3), to search for limitations. Various limitations have been suggested, all based upon the territorial limitation imposed upon the Legislature of the State of Victoria by its Constitution in the power " to make laws in and for Victoria in all cases whatsoever."

A prior question however arises, namely, whether the debentures mentioned in the special case are mortgages within the meaning of the Acts. The facts are fully stated in the case, but I take a short summary from the judgment of *Cussen* A.C.J. in the Court below: —" The Electrolytic Zinc Co. is a company incorporated under the Victorian *Companies Acts*, with its registered office in Melbourne. Its property is situate in Victoria and certain other States of the Commonwealth and elsewhere, substantially the whole of its real property being situate in Tasmania. This company . . . has issued a series of first mortgage debentures creating a fixed charge over its real property in Tasmania, and a floating charge over the rest of its property. These debentures were in the first instance

(1) (1897) 1 Ch. 911.
(2) (1926) 42 T.L.R. 771.
(3) (1891) A.C. 455, at p. 457.

issued in Melbourne to a firm of stockbrokers in Melbourne. The Company has a register of debentures in Melbourne and another in London, and certain of the debentures have been transferred to and are now on the London register. Moneys payable are payable in Melbourne or in London, according as the debenture is registered in Melbourne or in London" (1). I add that the debentures are secured by a trust deed made between the Company and a company incorporated in England having a registered office in Victoria, and that clause 63 of this deed provides: "These presents shall be construed according to the law of the State of Victoria." These debentures, it is contended, do not constitute a mortgage, because the security is not given to a specific person but to a floating body of persons, and the security is given to the trustees under the trust deed. But the meaning given to the word mortgage in the Act (which I have already set out) is very wide. The debentures in the present case expressly charge with payment of principal moneys, and interest mentioned therein, the "undertaking and property" of the Company "in terms of the said trust deed." The debentures therefore carry a charge on the Company's property in terms of the trust deed. A security is thus created, for payment of money, over real and personal property, and an interest therein, within the terms of the Act. Accordingly, the debentures issued by the Company are within the term "mortgage" as defined by the Act. So the learned Judges of the Supreme Court held, and the judgment of *Cussen* A.C.J. in the case of *Metropolitan Gas Co.* v. *McIlwraith McEacharn Ltd.* (2) is to the like effect.

The next question is whether the *Financial Emergency Acts* apply to and operate upon the obligation to pay interest under these debentures in Melbourne and London respectively. Several constructions of the provisions of the Acts have been suggested, limiting the meaning of the words used:—1. To instruments whereby security is given for payment of moneys in Victoria over real and personal property in Victoria. 2. To instruments whereby security is given over real and personal property, wholly in Victoria, or substantially or in larger part in Victoria. 3. To instruments which are subject

(1) (1932) V.L.R., at p. 212. (2) (1932) V.L.R. 88.

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to or governed by the law of Victoria, or, in other words, the proper law of the contract. 4. To instruments of mortgage made or to be performed in Victoria. The Acts, on any of these constructions, would be within the legislative competence or territorial jurisdiction of Victoria. Cases, however, may be put which would fall within any of the suggested limitations, and others may be put which would fall within one or more of them. An examination of the Acts may suggest a limitation.

The reduction of interest is part of a plan "involving a common sacrifice," to quote the euphemistic language of the preamble. Interest must be reduced for the purpose of re-establishing financial stability and restoring prosperity. This suggests, it is said, relief from obligations for the benefit of persons or corporations in Victoria. Again, secs. 19 (5) and 28 (6) require that certain applications, if made to a Court of Petty Sessions, shall be made to the Court of Petty Sessions held nearest to the location of the property which is the subject of the mortgage. These sections indicate, it is argued, that the Act is limited to mortgages and property in Victoria. But they prescribe the venue of an application to a Court of Petty Sessions, and possibly indicate that such a Court has no jurisdiction in the case of property beyond Victoria. The privilege or right given or granted by these sections would not fail if the Court of Petty Sessions lacked jurisdiction, for other Courts have jurisdiction (see sec. 14: "Court"). A more useful indication is the use throughout the Act of the words "mortgages given as security" (see sec. 14: "mortgage," &c. (sub-sec. (1) (*a*), (*c*), sub-sec. (4)), secs. 15, 16, 17, 18 (4), 21, 24, 25, 26, 27, 31). In my opinion, these provisions, having regard to the territorial limitation upon the authority of the Legislature of Victoria and to their context, point to mortgages given in Victoria. I say "to their context" because they refer to mortgages given by public or local authorities and to mortgages given to banks, building societies, and pastoral companies. Perhaps the provisions of sec. 37 emphasize this view, for it exempts from the Act mortgages given as security for moneys raised by any public or local authority by way of loan outside Australia.

As I have already observed, there are no words of restriction in sec. 19, and it is clear that in the use of the words "every mortgage" (with certain express exceptions), the net is spread wide and Parliament seeks to include all that is within its power. If mortgages given in Victoria are indicated by the sections already mentioned, then it is manifest that the provisions of secs. 19 and 22 also cover and apply to them. But I see no reason for concluding that secs. 19 and 22 apply only to mortgages given in Victoria. Many mortgages exist over property in Victoria which may have been given in the other States, or perhaps abroad. And mortgages perhaps exist which have been given in other States or abroad over property elsewhere than in Victoria, but which stipulate for the performance in Victoria of the obligations of the mortgage. In my opinion, all such cases fall within the constitutional competence of the State of Victoria and the term "every mortgage" in sec. 19 and the provisions of sec. 22. In most cases, other countries will recognize the law because "the proper law of the contract" will be that of Victoria; but if and so far as they do not recognize it, still in Victoria the validity of the law and its full operation cannot be denied. The limitations upon the construction of the Act suggested in argument can now be dealt with.

The first is important because it is that adopted by the learned Judges of the Supreme Court. I agree that, upon this construction, the Acts are within the competence of the Legislature of Victoria, but I think it unduly confines the words "every mortgage." No principle of international law, public or private, suggests such a construction. Nor, in my opinion, does any provision of the Acts themselves indicate it. It also has the manifest drawback in the present case—and, no doubt, in others too—of creating inequalities between debenture holders, and leaving it to the accident of registration to determine whether the reduction provided can be made.

The second suggestion is based upon the view that all questions in relation to real property should be decided by the law of the country in which the real property is situate. If real property, as Mr. *Foote*, in his work on *Private International Law*, 5th ed. (1925), p. 223, observes, "could always be . . . freed from its many

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complicated relations with the contracts, acts, and capacities of persons, no conflict of law would ever arise with regard to it; but these necessary relations have brought about considerable modification in the primary principle" (cf. *British South Africa Co.* v. *De Beers Consolidated Mines Ltd.* (1)). Again, the choice of the law regulating the capacities, contracts and acts of persons in relation to real property does not govern the constitutional authority of the Legislature of Victoria. There is no doubt that this authority extends to real property within its territory, but it is not restricted to property within its territory: it has also authority, as already pointed out, over the acts of persons within its territory in making contracts or giving mortgages. Consequently, in my opinion, the second suggestion restricts too narrowly the constitutional authority of the State and the construction of the Acts.

The third suggestion is that the Acts should be so limited that their construction coincides with the law which governs the obligation of the contract or of the instrument of mortgage. But the law which governs the nature or obligation of a contract—the proper law of the contract—depends largely upon the intention of the parties to it (*Hamlyn & Co.* v. *Talisker Distillery* (2)), and to apply such a principle in the interpretation of the *Financial Emergency Acts* would lead, I think, to amazing diversities in their operation. Thus, a mortgage given in Victoria over property in Victoria but in which it was stipulated that payment of principal and interest should be made in England or elsewhere and that the law of England or of such other place should be the proper law of the contract, would not, if effect were given to the stipulation, be within the meaning of the words "every mortgage" in sec. 19. In my opinion, the constitutional authority of Victoria, however, extends to such a case, whether other countries would or would not recognize the law, and the phrase "every mortgage" in sec. 19 is amply sufficient, as a matter of language and of construction, to cover it. The body of law, whether that of Victoria or of another country, by reference to which the rights of parties in a given transaction must be ascertained does not determine the limits of the legislative authority of the

(1) (1910) 2 Ch. 502. (2) (1894) A.C. 202.

State or the extent to which that authority has been exercised, though it may in cases of ambiguity assist as a matter of construction.

The fourth suggestion is founded upon the decision in *Ashbury* v. *Ellis* (1). The legislative authority of Victoria extends, I agree, to the case stated, but it is not exhaustive of that authority. Nor do I think that the words " every mortgage " in sec. 19 should be restricted to that case. Cases may be put in which neither is the mortgage given in Victoria nor is the property mortgaged situate in Victoria, and yet the proper law of the contract might be the law of Victoria. The legislative authority would extend to such cases, and the words " every mortgage " in the *Financial Emergency Acts* are sufficient to cover them.

In my opinion, therefore, the meaning and scope of the words " every mortgage " in the *Financial Emergency Acts* are only limited by the constitutional authority of the State of Victoria. It is not necessary in this case to consider the utmost limit of that authority. But I think it extends to, and has been exercised in, the *Financial Emergency Acts* (subject to express exceptions contained in the Acts, e.g., in sec. 18) in respect of every mortgage of property in Victoria, and every mortgage given or to be performed in Victoria, and every mortgage of which the proper law of the contract is that of Victoria.

It follows, in my opinion, that the judgment of the Supreme Court should be varied, and the questions (*a*), (*b*), and (*c*) stated in the special case answered as follows :—(*a*) Yes. (*b*) Yes. (*c*) Yes.

The final question stated in the case is : Has the plaintiff Company, or have its directors, notwithstanding the provisions of the *Financial Emergency Acts* 1931, power to pay to the holders of the said debentures or any and which of them, the whole of the interest covenanted to be paid to the said debenture holders under the debentures held by them respectively, or any amount by way of interest in addition to such reduced amount ? The special case does not state the facts necessary to enable the Court to decide this question. But, as I gather, the parties, before the Supreme Court, desired to ascertain whether the *Financial Emergency Acts* prohibited

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

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such payments, and, if not, whether it is within the power of the Company and its directors, for the purpose of preserving the credit of the Company, to make what may well be described, in view of the provisions of the Acts, as gratuitous payments of interest. I entirely agree with the learned Judges of the Supreme Court that the Acts do not prohibit such payments, or make them illegal, and the question really turns upon the powers of the Company and its directors in the circumstances as they arise. The objects of the Company are wide, and it is authorized to carry on metallurgical operations and allied businesses, to raise or borrow moneys on such security, if any, as the Company shall think fit, and to do all things incidental and conducive to the attainment of any of these objects. The articles of the Company (clause 105 (5)) empower the directors to adopt all such measures and do all such acts as they may consider advisable for the proper and efficient carrying on of the business of the Company or likely in any respect to be advantageous to the Company. Under such a constitution, the Company and its directors have authority to make payments, even though they be gratuitous, if "conducive to the objects and the interests of the Company." "The test must be what is reasonably incidental to, and within the reasonable scope of carrying on, the business of the company . . . They are not to keep their pockets buttoned up and defy the world unless they are liable in a way which could be enforced at law or in equity. Most businesses require liberal dealings. The test there again is not whether it is bona fide, but whether, as well as being done bona fide, it is done within the ordinary scope of the company's business, and whether it is reasonably incidental to the carrying on of the company's business for the company's benefit" (*Taunton* v. *Royal Insurance Co.* (1); *Hutton* v. *West Cork Railway Co.* (2); *Cyclists' Touring Club* v. *Hopkinson* (3)). The power must not be exercised in an arbitrary and capricious way, but reasonably and honestly in the interests of the company. The directors are in a fiduciary position, and must only exercise their powers for the benefit of the company and its shareholders. If a company is able to pay interest that it contracted to pay, and

(1) (1864) 2 Hem. & M. 135 : 71 E.R. 413.

(2) (1883) 23 Ch. D. 654, at pp. 671, 672.

(3) (1910) 1 Ch. 179.

desires to do so to support its credit and reputation, in the face of legislation such as the *Financial Emergency Acts*, there is no reason in law preventing it from so doing. The matter is remitted by law to the business judgment of the directors of the company, exercised honestly and reasonably in the interests of the company and its shareholders. I agree in substance with the answer of the learned Judges of the Supreme Court to this question, and have merely added the foregoing observations to indicate the sense in which I understand the answer.

DIXON J. The order under appeal declares that debentures issued by the respondent Company are mortgages within the meaning of the word "mortgage" in Part III. of the Victorian *Financial Emergency Act* 1931, but that the Act operates to bring about a reduction of interest payable under the debentures only when the interest is payable in Victoria under and by virtue of the terms of the debentures, and that payment of the reduced interest is a discharge of the Company's liability to those debenture holders who at the date of payment are on the Melbourne register of debentures, but not those who are then on the London register. Place of registration was adopted as a *discrimen* because the debentures contain a condition which makes the place of payment Melbourne in the case of debentures upon the Melbourne register and London in the case of the debentures upon the London register. The order further declares that, notwithstanding the provisions of the *Financial Emergency Act* 1931, the Company has power to pay to all debenture holders the whole of the interest covenanted to be paid to them respectively, but that it is for the Company to determine whether such power should be exercised.

The appellant is a shareholder who was sued and authorized to defend on behalf of himself and all other shareholders in the Company. He is aggrieved by the order because it declares that no reduction has been effected in the rate of interest payable upon debentures for the time being on the London register, a register to which it is competent to every debenture holder to transfer his debentures, and because it declares that it is open to the Company, out of moneys

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which might otherwise be available for distribution among shareholders, to pay to debenture holders the full rate of interest named in the debentures, notwithstanding the statutory reduction of the amount for which the Company is liable. The correctness of these two declarations depends upon quite independent considerations. Whether interest payable in London is reduced depends upon the meaning and application of some provisions of the Victorian *Financial Emergency Act* 1931. Whether the Company may pay interest for which its liability is discharged by statute, is altogether a question of *ultra vires*. But a question preliminary to both these questions is whether the debentures are at all within the operation of the provision reducing interest. This provision is sec. 19, the first sub-section of which enacts that, except as thereinafter provided, every mortgage shall for a period of three years from the date of coming into operation of the Division, namely, 1st October 1931, be construed and take effect as if it were a term of the mortgage that on and from the coming into operation of the Part the interest payable under the mortgage should be reduced at a rate equivalent to four shillings and sixpence in every pound of such interest. By sec. 22 (1) payment of the reduced amount is given the effect of a full discharge of the mortgagor's liability for interest under his mortgage in respect of the period to which such payment relates. By sec. 14 (1) the word " mortgage " is defined to mean any deed, memorandum of mortgage, instrument or agreement whereby security for payment of money is granted (whether by virtue of such deed, memorandum, instrument or agreement or of any Act) over real or personal property. The definition proceeds to extend this description by including by express reference some other contractual documents. The first category which it so includes is " any debenture inscribed stock or mortgage issued created or given by any public or local authority." The respondent Company is not a public or local authority but a trading company. In 1922, of a series of registered debentures ranking *pari passu*, it issued an amount of £400,000 bearing interest at eight per cent per annum. The series was secured by a trust deed which contained covenants by the Company to vest in the trustee for debenture holders, on

demand, specified property in land, and it created a floating charge over the remainder of the Company's property and undertaking. It conferred wide powers upon the trustee in case of default, but it imposed a qualified restraint upon the right of individual debenture holders to pursue their remedies without the consent of the trustee or the authority of a meeting of debenture holders. By the debentures themselves, the Company charged its undertaking and property in terms of the trust deed. Further, every debenture was expressed to be issued subject to and with the benefit of the conditions contained in the trust deed, all of which were to be deemed to be part of the debenture. The charge over the interests in land in Tasmania appears to be specific, but over the remaining property of the Company, including that in Victoria, a floating charge only is created. The Supreme Court considered that in the definition of " mortgage " the general statement of what that word means is not satisfied unless the real or personal property over which the security is given includes property situated in Victoria. Upon this hypothesis, as the charge over Victorian property is not specific, the question arises whether a floating charge over an undertaking given to secure the payment of a series of registered debentures falls within the meaning of the word " mortgage " in sec. 19.

In support of the contention that such debentures are outside the application of sec. 19 a number of considerations is relied upon in combination. Instruments creating a floating charge do not, it is suggested, grant a security over real or personal property, or, at any rate, their operation is not aptly described by such language, because, until the floating charge becomes specific, no estate or interest in any item of property contained in the undertaking is vested in the debenture holders or their trustee. Then the specific reference to debentures issued, created or given by any public or local authority is relied upon as evidence supporting this view of the language, notwithstanding the prohibition expressed in the words occurring before this reference, namely, " without affecting the generality of this definition." These words are said to be grammatically detached from the expressions which include debentures. Further, it is argued that the trust deed creates whatever security is given, but the debentures confer the right to payment, and

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" mortgagee " is defined as the person entitled to receive payment of any moneys payable under a mortgage. In addition to these considerations which arise in the definition clauses, reliance is placed upon difficulties felt to exist in applying sub-secs. 3 and 4 of sec. 19 to a large body of persons holding debentures, and upon the suggested improbability of marketable securities of such a character being dealt with by a provision primarily directed to fixed mortgages. This argument logically must be founded upon the nature of a floating charge, but it does not appear justly to describe its character. A floating charge is commonly regarded as a security over property. In *Evans* v. *Rival Granite Quarries Ltd.* (1) *Buckley* L.J. said:— " The nature of a floating security has been discussed and described in *In re Florence Land and Public Works Co.* (2), *Simultaneous Colour Printing Syndicate* v. *Foweraker* (3), *Governments Stock Investment Co.* v. *Manila Railway Co.* (4), *Illingworth* v. *Houldsworth* (5), and other cases. The outcome of the decisions may be thus summarized. A floating security is not a future security; it is a present security, which presently affects all the assets of the company expressed to be included in it. On the other hand, it is not a specific security; the holder cannot affirm that the assets are specifically mortgaged to him. The assets are mortgaged in such a way that the mortgagor can deal with them without the concurrence of the mortgagee. A floating security is not a specific mortgage of the assets, plus a licence to the mortgagor to dispose of them in the course of his business, but is a floating mortgage applying to every item comprised in the security, but not specifically affecting any item until some event occurs or some act on the part of the mortgagee is done which causes it to crystallize into a fixed security." Although some degree of abstraction is involved in this description of the operation of a floating charge as a present security over assets, it makes it clear that in legal understanding it is a security over property for the payment of money and answers the description contained in the definition of " mortgage." Nor can the attempt to distinguish between the debentures and the trust deed be supported.

(1) (1910) 2 K.B. 979, at p. 999.
(2) (1878) 10 Ch. D. 530.
(3) (1901) 1 K.B. 771.
(4) (1897) A.C. 81.
(5) (1904) A.C. 355.

The provisions of the trust deed form part of the agreement contained in the debentures because they expressly adopt them. When sec. 19 is interpreted in the light of definitions which prima facie include such debentures and debenture holders in the expressions " mortgage" and " mortgagee," it is impossible to find in the remaining considerations enough to exclude them from its operation. Accordingly, except in so far as the territorial restrictions adopted by the Supreme Court may bring about a different result, the debentures are within the application of sec. 19.

The Court (consisting of *Cussen* A.C.J., *Mann* and *Lowe* JJ.) was of opinion that a territorial limitation should be implied in the material part of the definition of " mortgage " ; that is, in the expression " instrument . . . whereby security for payment of money is granted . . . over real or personal property." Their Honors considered that to give these words the meaning which was intended there should be understood after the words " payment of money " and also after the words " real or personal property " the words " in Victoria." In applying this interpretation of the definition to instruments such as the debentures in this case, which enable one of the parties to change the place of payment, the Court decided that payments of interest which in the event fell to be made in Victoria were reduced by the statute, and payments which fell to be made elsewhere were not so reduced. It does not appear whether in the case of movable property their Honors would regard the application of sec. 19 as dependent upon the situation of the property in Victoria at the time of the grant of the " mortgage," or on 1st October 1931, the date of the coming into operation of the provision, or at the time when interest accrued or is deemed to accrue, i.e., from day to day (sec. 14 (3)), or at the time when it becomes due and payable, but it is necessarily involved in the decision that the situation in Victoria of some only of the property covered by the security is sufficient for the application of the statute.

The language of secs. 19 and 22 (1) is universal : " Every mortgage shall . . . be construed and take effect as if it were a term . . . that . . . interest . . . should be reduced " ; " every payment of interest made in pursuance of the provisions

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of this Division . . . shall be a full discharge of the mortgagor's liability." Considered with the general language of the definition, the enactment is expressed in terms which, literally construed, would apply to all instruments whatsoever of the required description, however foreign the transaction might be to the State of Victoria. Proceeding from the acknowledged necessity of confining the meaning of the provisions to transactions which in some way concerned Victoria, the Supreme Court implied the double limitation by which the place of payment and the situation of some of the property are required to be within the State. In adopting these implications the learned Judges were guided by what *Cussen* A.C.J. calls " such light as is afforded by other provisions of Part III." They found confirmation in the preamble of the statute which speaks of restoring prosperity " by means involving a common sacrifice and including among other things certain reductions in the expenditure of the Commonwealth and State Governments and the conversion of the internal public debts of the Commonwealth and States on the basis of a reduction of the interest payable," and they obtained some further assistance from sec. 37 which excludes from the operation of Part III. any mortgage given as a security for moneys raised by any public or local authority by way of loan outside Australia.

I have been unable to find in these sources matter which upon examination affords a satisfactory support for the inference that the words " in Victoria " are understood in the definition of mortgage so as to qualify both the expressions " payment of money " and " real or personal property." Indeed, as soon as this restriction is applied to one of these expressions, the prima facie need for a territorial limitation is met and to that extent there is less reason for the other. The light obtainable from the other provisions of Part III. is very small. The reference in sub-sec. 5 of sec. 19 and sub-sec. 6 of sec. 28 to " the Court of Petty Sessions held nearest to the location of the property which is the subject of the mortgage " appears to me to supply very weak evidence of an intention to exclude securities over real and personal property out of Victoria, if it is remembered that it is dealing with no more than

an alternative tribunal in cases where the principal is less than £1,000. But whether on general grounds it is right to make such an implication, the further restriction, which concerns this appeal, namely, the restriction by reference to the locality of payment, is an implication for which I cannot find any firm support. The exception contained in sec. 37 at best suggests that no part of what may be considered public liability shall be impaired if it is owing abroad, and from this I do not see that an inference any more arises that private indebtedness is to be in the same category, if owing abroad, than the opposite inference that indebtedness owing abroad is deliberately excluded from the exception if private. Nor do I think that any real indication of such legislative intention is provided by the reference in the preamble to a conversion of the internal debts of the Commonwealth and States.

On the other hand, the partial and haphazard operation of such a definition so restricted is illustrated by the facts of this case, an operation which does not accord with the general policy upon which the legislation seems to have proceeded. The truth appears to be that general words were employed because the enactment, which formed part of the execution of a general plan agreed upon by the seven Australian Governments, was framed without any advertence or conscious regard to any territorial *discrimen*. The operation of sec. 19 (1) is upon the debt or obligation, and although the policy of the Legislature was to reduce interest upon secured debts only, yet it is the obligation to pay interest and not the property over which the debt is secured that is the object of legislative concern. Locality is not a natural attribute of obligations and, in varying their tenor, a statute might be expected to disregard it as a criterion of its application. The introduction into the definition of "mortgage" of references to real and personal property is not for the purpose of distinguishing between Victorian property and that situated in another State or country, but for the purpose of differentiating between secured and unsecured debts. I have come to the conclusion that in such a situation the only safe course to pursue is to apply the settled, if artificial, rule of construction for confining the operation of general language in a statute to a subject matter under the effective control of the Legislature. "Every statute is to be so interpreted

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and applied, as far as its language admits, as not to be inconsistent with the comity of nations or with the established rules of international law" (per *Hannen* P. in *Bloxam* v. *Favre* (1), adopting *Maxwell* on *Statutes*). "It is always to be understood and implied that the legislature of a country is not intending to deal with persons or matters over which, according to the comity of nations, the jurisdiction properly belongs to some other sovereign or State" (per *James* L.J. in *Niboyet* v. *Niboyet* (2), and see, too, per *Brett* L.J. (3), whose judgment has prevailed). Thus the Victorian *Marriage Act* "is to be construed so as to harmonize with the rules of international law. General words, such as 'any wife,' 'any husband,' are to be construed as 'any wife (any husband)' domiciled in Victoria at the time of the institution of the suit; and perhaps in the case of the wife as meaning also 'any wife who has been deserted by her husband and who at the time of the desertion was domiciled in Victoria.' It seems probable that an English or Victorian Court would, apart from any express statutory provision, claim jurisdiction in such a case of desertion, and would recognize a decree of a foreign Court given in similar circumstances. In construing the Act, therefore, the general words would be held to cover such a case, which would produce no conflict with the rules of international law" (per *Cussen* J. for the Full Court in *Forster* v. *Forster* (4)). Again, sec. 9 of the English *Wills Act* 1837 says: "No will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned." "Notwithstanding this language, it is the practice of the Probate Division, on the principle just stated, to admit to probate or otherwise recognize as valid the wills of persons domiciled abroad, although not executed as prescribed by the Act" (*In re Price*; *Tomlin* v. *Latter* (5)). That principle is the rule of private international law that a will of movables, valid according to the law of the domicil, is valid in England, from which it follows that the provisions of the English statute prescribing formalities with reference to wills do not apply to wills disposing

(1) (1883) 8 P.D. 101, at p. 107.
(2) (1878) 4 P.D. 1, at p. 7.
(3) (1878) 4 P.D., at p. 20.
(4) (1907) V.L.R., at p. 164: 28 A.L.T., at p. 146.
(5) (1900) 1 Ch. 442, per *Stirling* J., at p. 451.

of movables made by persons not domiciled in England (cf. *In re Price*; *Tomlin* v. *Latter* (1)). In *Cope* v. *Doherty* (2) *Page Wood* V.C. said by way of illustration: "It would be a presumption of a most singular character to suppose that the Legislature intended to frame a contract contrary, as Lord *Stowell* expresses it, to the natural law to be binding upon two foreigners, neither of whom it could have a right in any way to affect, by interfering either with the general law of nations, or with the peculiar municipal law, if I may so term it, to which the foreigners in question would have recourse in their dealings with each other." These principles of construction should apply to limit the operation of the general words of sec. 19 (1) and sec. 22 (1) to debts or obligations which, according to the rules for the exterritorial enforcement of rights recognized and administered by British Courts, are governed by the law of Victoria.

These enactments amount to a variation and partial discharge of a pecuniary obligation. According to the rules of private international law which we ourselves administer, a discharge to be good must be considered so by the law which gives rise to the obligation. "In the first place, there is no doubt that a debt or liability arising in any country may be discharged by the laws of that country, and that such a discharge, if it extinguishes the debt or liability, and does not merely interfere with the remedies or course of procedure to enforce it, will be an effectual answer to the claim, not only in the Courts of that country, but in every other country. This is the law of England, and is a principle of private international law adopted in other countries. . . . Secondly, as a general proposition, it is also true that the discharge of a debt or liability by the law of a country other than that in which the debt arises, does not relieve the debtor in any other country" (*Ellis* v. *M'Henry* (3)).

A debt which arises under the municipal law of Victoria is considered proper to be discharged by or under Victorian law, and, if the general words are confined in their operation to such debts, the particular rule of construction is satisfied. It is true that the Victorian Parliament is empowered only to make laws in and for

(1) (1900) 1 Ch., per *Stirling* J., at p. 451.
(2) (1858) 4 K. & J. 367, at pp. 383, 384; 70 E.R. 154, at p. 161.
(3) (1871) L.R. 6 C.P., per *Bovill* C.J., at p. 234.

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Victoria, and from this circumstance a territorial limitation of a constitutional character arises. But there is no reason to doubt the competence of the State Legislature to discharge obligations flowing from Victorian law. Speaking of the Canadian Legislature, Lord *Macmillan* says in *Croft* v. *Dunphy* (1): "It may be that legislation of the Dominion Parliament may be challenged as *ultra vires* on the ground that it is contrary to the principles of international law, but that must be because it must be assumed that the *British North America Act*, 1867, has not conferred power on the Dominion Parliament to legislate contrary to these principles." He had already said that "their Lordships see no reason to restrict the permitted scope of such legislation by any other consideration than one applicable to the legislation of a fully sovereign State."

The real difficulty which these principles involve lies in the somewhat unsettled condition of our law in reference to the true or final test by which the proper or governing law of an obligation should be ascertained. Possibly this consideration contributed to the adoption by the Supreme Court of another mode of interpreting the enactment. But in truth the difficulty is more theoretical than practical, more apparent than real. Little doubt usually exists as to the governing law of an obligation, perhaps less than in determining the place of payment. In the multitude of transactions affected by sec. 19, no doubt there will be many in which there is uncertainty. Of the three cases before the Supreme Court, two did present difficulties in ascertaining the governing law, and in this Court one should be careful not to allow the fact that the third, which is now under appeal, does not do so to lessen the weight to be attached to this consideration. But, on the other hand, a failure to give effect to the rule of construction which restrains general words from an operation upon foreign rights would lead to the undesirable consequence that a right which the Victorian Legislature purported to discharge partially might be enforced in any other forum. If the limitation of the place of payment to Victoria were supported, it would be unlikely that such cases would arise, but, otherwise, they would be common. In the case of securities over Victorian immovables which do not include property situate elsewhere, it is

(1) (1932) 48 T.L.R., at p. 654.

not probable that the governing law of the obligation should be other than Victorian, whether the mortgage debt be accounted a movable or an immovable (cf. *In re Ralston*; *Perpetual Executors and Trustees Association* v. *Ralston* (1) and *In re Hoyles*; *Row* v. *Jagg* (2)).

The rule of construction confining general words to an operation which accords with the principles adopted in our Courts for the exterritorial recognition of rights would, I think, be applied to a statute of the sovereign British Parliament containing provisions expressed as those of the Victorian enactment. There is no reason to consider it less applicable to the statute of a subordinate legislature. The circumstance that the power of the subordinate legislature is territorially restricted affords, if anything, rather more than less reason for applying the prima facie rule. The statute contains no express or implied indication of any fact, matter or thing, in, or connected with, the territory, which it adopts as a criterion of its operation. A statute discharging obligations might be considered a law in and for Victoria if its operation were expressly based upon any one of a great number of things which touch and concern Victoria. It might be enough if it were based upon some connection of the obligee or of the obligor with Victoria, such as domicil, residence, or presence there, or perhaps even upon a remoter connection, such as official employment in or out of the State under the Government, or liability to the State in respect of taxes or other Crown debts. The connection might suffice if the enactment were based upon some fact occurring in Victoria affecting the creation of the obligation, such as the delivery of an instrument, the communication of an offer or of an acceptance, or the presence of one of the parties there when any of these things took place anywhere; or upon some circumstance or event affecting the existence of the obligation considered as property, such as the local situation of a bond or negotiable instrument, or affecting its performance considered as a contract, such as payment in Victoria. Again, the Legislature might fasten upon the situation within the State of property over which the obligation is secured. But if any such enactment were

(1) (1906) V.L.R. 689, at pp. 693, 694; 28 A.L.T. 45, at pp. 46, 47.
(2) (1911) 1 Ch. 179.

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considered a law in and for Victoria the reason would be that it is a law made with respect to the matter upon which its operation is based and that the matter is one of Victorian concern. Where the enactment relates to or deals with no matter involving a connection with Victoria and indicates no intention of conditioning its operation on any fact, circumstance, or event, in or connected with Victoria, but is expressed in general terms and deals with a subject matter which is independent of locality, like the discharge of private obligations, the constitutional restriction, while it reinforces the need of a restrictive interpretation, gives no further assistance in determining upon what connection with Victoria the operation of the enactment must be understood to depend. To ascribe to it an operation defined as co-extensive with the power of the Legislature may perhaps appear a possible, even an attractive, alternative to applying the rule of construction which presumes consistency with the principles of private international law. But the extent of the power to legislate in and for Victoria cannot provide a definition of the extent of the operation of a general enactment relating to the discharge of obligations, because the power includes authority to adopt any fact or matter or thing concerning Victoria as the ground of exercising legislative jurisdiction over any right or obligation affecting such fact, matter or thing; and this is precisely what the Legislature has not done. In short, the operation of an enactment dealing with personal obligations irrespective of any ascertainable territorial consideration remains indeterminate except for the presumption that the Legislature is dealing with rights and duties over which it has an effective authority and not with those acquired under foreign law.

In the present case, the governing or proper law of the obligation is clearly Victorian. The respondent Company, incorporated under Victorian law, raised money in Victoria on debentures. The trust deed enables the debenture holder to convert his debenture into shares within a limited time. It provides for meetings of the debenture holders in Melbourne, requires a register in Melbourne with another in London, contemplates the trustees being in Melbourne (clause 46), refers to Victorian statutes (clauses 45 and 56),

empowers investment under the authority of Victorian and English law, and, to make the matter conclusive, expressly provides that the deed shall be construed according to the law of the State of Victoria. In the face of these considerations, the fact that the deed states that the mortgaged hereditaments will be wholly or for the most part situate in Tasmania, and the further fact that operations of the Company are conducted in that State, are of small importance. Of even less are the register in England and the references to the law of England. For these reasons all the debentures come within the operation of secs. 19 and 22 of the *Financial Emergency Act* 1931, and in answer to questions (*a*), (*b*) and (*c*) in the special case it should be so declared.

The remaining question is whether the plaintiff Company and its directors have, notwithstanding the provisions of the *Financial Emergency Act* 1931, power to pay to the holders of the debentures the whole of the interest covenanted to be paid to the debenture holders under the debentures or any amount by way of interest in addition to such reduced amount. In *Metropolitan Gas Co.* v. *McIlwraith McEacharn Ltd.* (1), *Cussen* A.C.J. points out that directors are bound to treat such a security as containing a term that on and from 1st October 1931 the interest payable thereunder should be reduced at the rate of four shillings and sixpence in the pound. The answer to the question must, therefore, depend on the application to such a condition of things of the powers and objects taken by the Company in its memorandum.

In the present case, apart from objects which show the general character of the Company's undertaking, the material provisions of the memorandum consist of a power of borrowing and a power to do all such things as are incidental or may be thought conducive to the attainment of the other objects or any of them. Such a power enables the Company to expend money in any way which may reasonably be considered to promote the fulfilment of any of its purposes or powers and is honestly believed to advance such an end. Whether it is reasonably capable of doing so, or of being considered likely to do so, is a question of relevance in determining which the actual situation of the Company and the past and anticipated course

(1) (1932) V.L.R., at p. 96.

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of its affairs are of much importance. The simple facts upon which the Court is asked to decide this question are that the money was borrowed in 1922 at eight per cent per annum and the debentures are payable on 14th May 1942, and that every debenture holder may call upon the Company to repay the amount secured by his debenture earlier by annual payments of ten per cent. Upon these bare facts it is difficult to affirm, at any rate with certainty, that payment of the difference between the reduced and the contract rate of interest falls within the incidental power. Additional facts might show it to be within the power, but some facts are conceivable which quite well might lead to the other conclusion. It is therefore undesirable that the question should be answered in the present proceedings.

The appeal should be allowed; the order of the Supreme Court in so far as it answers the questions in the special case and makes declarations thereon should be discharged, and, in lieu thereof, it should be declared in answer to questions (*a*), (*b*) and (*c*) that all the debentures are within the operation of sec. 19 (1) of the *Financial Emergency Act* 1931, as amended, and that payment to the holders of such debentures of the reduced rate of interest made in pursuance of sec. 19 is a full discharge of the respondent Company's liability for interest under such debentures in respect of the period to which such payment relates, and it should further be declared that no answer ought to be given to question (*d*). The Company offering no objection, the costs of all parties should be paid by the Company as between solicitor and client.

EVATT J. This is an appeal from the Supreme Court of Victoria, and this Court has necessarily to regard from the viewpoint of a Victorian Court, the controversy which has arisen.

From par. 13 of the special case it appears that, on November 16th, 1931, the plaintiff Company paid to the debenture holders in Melbourne and London an amount of interest calculated, not at the full rate of eight per cent provided in the deed of trust, but at a rate of eight per cent reduced by twenty-two and one-half per cent of eight per cent, in accordance with the provisions of the Victorian *Financial Emergency Act* 1931.

The general scheme of the statute mentioned is to alter the rights and obligations of the parties to mortgages, firstly by adding a new term to the mortgages reducing the rate of interest payable thereunder, and, secondly, by providing for a full discharge of the mortgagor's liability in the event of his payment of interest at the reduced rate (secs. 19 (1) and 22 (1)). The statute applies to mortgages in actual existence at its coming into operation (sec. 17 (1) (*a*)).

The first three questions in the special case (as amended by the Supreme Court of Victoria) are as follows :—

(*a*) Are the said debentures, or any and which of them, mortgages within the meaning of the word "mortgage" in Part III. of the *Financial Emergency Act* 1931 ?

(*b*) Do the provisions of Part III. of the said Act apply to and operate upon—

(i.) the said debentures on the Melbourne register ?

(ii.) the said debentures on the London register ?

(*c*) Did the payment to the holders of the debentures of the reduced amount of interest mentioned in par. 13 hereof discharge the plaintiff's liability under the said debentures in respect of such interest to the holders of—

(i.) the debentures on the Melbourne register ?

(ii.) the debentures on the London register ?

Perhaps the form of the questions, particularly question (*b*), has suggested that the answer to the only real question which is in issue between the parties (that stated in (*c*)), is to be discovered by ascertaining whether the statute, entirely of its own force, operated directly upon the transactions entered into by the plaintiff Company and the debenture holders. At any rate, the Supreme Court adopted this method of approach and concluded that the *Financial Emergency Act* applied only to those mortgage instruments by which security for payment of money in Victoria was granted over any real or personal property situate in Victoria. And so it was adjudged that the obligation of the plaintiff Company to pay interest to the debenture holders was or was not discharged by payment of the rate reduced in terms of the statute, according as the *payments* were made in Melbourne or London respectively.

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There is nothing startling about this result once it is appreciated that the Victorian Legislature must have intended to draw some hard and fast line between those transactions with which it did, and those with which it did not, wish to be concerned. But the result is very startling if attention is paid to the express terms of the contract between the parties.

All the debentures issued by the plaintiff were part of a series of "first mortgage debentures," and were issued subject to the conditions of the trust deed, which was deemed to be part of each debenture. The debenture holders were expressed to be entitled, *pari passu*, to the benefit of the deed, and condition 1, indorsed upon each debenture, also affirmed equality of benefit as between all the debenture holders.

But this is not all. In the year 1922, when the deed of trust was executed, it was apparent that some of the debenture transactions, at least, would present a "foreign" or non-Victorian element. It was contemplated that, from time to time, new debentures would be issued in London by the Company, and that registration of such debentures would be made at the register situated at the London office. Further, most of the assets of the Company were situated, not in Victoria, but in the State of Tasmania.

The parties desired to anticipate any difficulties as to the proper system of law to be applied in relation to their mutual rights and obligations under the debentures. Clause 63 of the trust deed therefore provided that "these presents shall be construed according to the law of Victoria." By clause 29 the possible application of one section of a Victorian *Conveyancing Act* was excluded. Clause 56 regarded the Victorian *Trusts Act* 1915 "or any statutory modification thereof" as applicable to the deed.

Nowadays, clauses resembling clause 63 are by no means uncommon in dealings where "foreign" elements are present (*Salmond and Winfield, Law of Contracts* (1927), p. 531). But what does clause 63 mean? It occurs to one immediately that the parties wanted to do two things. They wanted the Victorian system of law to be used in order to measure the obligation, its interpretation, and any question as to its discharge, and they also wanted to exclude any competing

system such as that (say) of Tasmania or England. If so, why cannot their express agreement be given effect to ?

But it is contended that a construction of the Victorian *Financial Emergency Act* must still be attempted so as to see whether its territorial sweep is sufficiently wide to include the present mortgage debentures, and that, if the statute does not, of itself and by itself, " operate upon " any of these instruments, they must continue to remain quite unaffected by its terms.

In my opinion this contention is quite fallacious. I have found part of the present problem discussed most convincingly in *Salmond and Winfield's* book on *Contracts*. Within certain limits, not material to the present question,

> " the parties to a contract have a right when making that contract to select by mutual agreement the *lex* by which it is to be governed, and . . . the territorial system so selected by them ought, in justice to the parties and for the fulfilment of their real agreement, to be applied by every Court in which the contract comes up for interpretation and enforcement. The law so contemplated and selected by the parties as that by which their contract is to be governed may be termed the *conventional law* of the contract (*lex conventionalis*) " (p. 530).

Later the learned authors say :—

> " It is now to be observed that the general principle so formulated, while it imposes a stringent limit on the right of the parties to exclude the application of English law by choosing instead some system of foreign law as the *lex propria* of the contract, imposes no similar limit on their right to select English law itself for that purpose, even in a case to which it would not otherwise be applicable. If the parties to a contract made abroad or otherwise containing a foreign element choose expressly or by implication to agree that the contract shall be governed in all or any respects by English law, there is commonly no reason why, in an English Court, they should not be taken at their word, and why the validity and effect of the contract should not be determined by English law accordingly. In such a case the distinction between the peremptory and the merely provisional portions of English law is irrelevant, for the parties are not attempting by private agreement to exclude English law which would otherwise be applicable, but are agreeing to the extension of English law to a case which would not otherwise be within its scope. If two Englishmen in Paris make a contract and agree that it shall be construed and shall operate as an English contract, there is no reason why the whole of the English law of contracts should not apply to it for all purposes, just as if it had been made in London. The result may even be that the contract is invalidated by some English rule which is unknown to the law of France " (pp. 540, 541).

The object of clause 63 is, by agreement, to treat the rights and obligations of the contracting parties upon the same footing as if *all*

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of the material and relevant parts of the transaction were taking place, and to take place, within the State of Victoria. And the real question is whether, upon such footing, the *Financial Emergency Act* would apply. Of course it would not apply if debentures can never, under any circumstances, be governed by the Act, and it will be necessary to refer to that question later. But if Victorian debentures are governed by it, and the present debentures should be regarded as purely Victorian in character, then the plaintiff Company discharged its obligation to *all* debenture holders when it paid the rate reduced as provided in the statute. For it is indisputable that the *Financial Emergency Act* does affect all mortgages which are entirely Victorian in character, e.g., a transaction where (1) all the property charged is situate in Victoria, *and* (2) all the parties are both domiciled and resident in Victoria, *and* (3) all the moneys secured by the mortgage are advanced in Victoria, *and* (4) both the principal and interest are payable in Victoria alone, *and* (5) the mortgage has been entered into in Victoria. Mortgages displaying all such features are, *ex hypothesi*, devoid of any " foreign " or non-Victorian element, and such mortgages, at the very least, the Victorian Parliament sought to, and did, regulate.

Therefore, if the construction placed on the statute by the Supreme Court is correct, and the reduced rate of interest obtains only where the payment of interest takes place in Victoria and some of the property secured is there situate, the present debentures must yield to the statute ; because the place of payment of interest and the residence of all the debenture holders are, so to speak, deemed to take place in Victoria for the purpose of attracting the whole body of Victorian law applicable to analogous debenture transactions. I am still assuming, of course, that debentures come within the general scope of the " mortgages " regulated by the Act.

If a mortgage is entered into in New Zealand and relates solely to acts and things in New Zealand, but expressly provides that the law of Victoria shall be the *lex conventionalis*, I fail to see why a Victorian Court, having seisin of the relevant litigation, should refuse to apply the Victorian system of law relating to mortgages merely because that system is not " intended " to govern transactions which are purely of a New Zealand character. It is true that

the Victorian system of mortgages is part of a legal system in and for its own territory, but that is true of all, or nearly all, systems of civil law. The parties themselves, not the Victorian Legislature, " intended " their rights and liabilities to be ascertained and enforced by reference to the Victorian law of mortgages, and, for this purpose, their agreement is meaningless unless it implies that the general law of Victoria is to be applied to the transaction, without paying regard to the limited territorial application, which is a characteristic and inevitable feature of all Victorian laws.

The very purpose of clauses like clause 63 is to prevent actual or threatened recourse to any non-Victorian system of law by agreeing, as it were, to regard all non-Victorian features of the transaction as not existing. It may very well be that the Courts of some other countries would refuse to give full or any effect to such a clause; e.g., in the case I have supposed, the Courts of New Zealand would not refrain from applying a New Zealand statute, otherwise applicable to the transaction, because the New Zealand parties had agreed that it should not apply. Further, a Victorian Court itself might refuse to give effect to any part of the agreement, if it offended against some " peremptory rule " of Victorian law.

In the present case, however, there is no possible reason for the Victorian Court's refusing to give full effect to clause 63, as introducing Victorian law for the purpose of measuring the obligations and regulating the discharge of the agreement. " Victorian law " must mean, if it means anything, the system of law which applies in Victoria to local transactions of the same general character as those represented by the present debentures.

But the question remains, as I have already pointed out, whether the *Financial Emergency Act* would apply to debentures such as the present, if they were entirely devoid of " foreign " or non-Victorian elements. In my opinion the Act would apply, because such debentures and deeds as those before us are correctly described as instruments " whereby security for payment of money is granted . . . over real or personal property " (*Financial Emergency Act* 1931, sec. 14). On this part of the case I concur with the opinion of *Cussen* A.C.J., who points out that

> " the language used in the definition clause is extremely wide, and it is the constant usage of lawyers to speak of floating debentures as security, as indeed

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the debentures themselves in question do. Moreover, it is beyond doubt that such a debenture creates an equitable charge on the assets for the time being which is capable of being enforced by injunction if the mortgagor seeks to use the assets subject to the charge otherwise than in the ordinary course of business or contrary to the terms of the debenture " (1).

It may be further urged that clause 63 should not be interpreted as allowing to trench upon the obligation of the debenture and its discharge, statutes passed by the Victorian Legislature *after* the execution of the trust deed and the issue of the debentures. On this point, however, the opinion of *Isaacs* J. in *Delaney* v. *Great Western Milling Co.* (2), should be followed. He said that the judgment of Lord *Esher* M.R. in *Gibbs & Sons* v. *Société Industrielle et Commerciale des Métaux* (3), impliedly recognized 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 " (4).

It may be conceded that the parties did not anticipate that, during the currency of their agreement, there would be passed, in Victoria, legislation which would have the effect of discharging the plaintiff Company's obligation to pay the agreed rate of interest upon payment of a lower rate ; but they clearly agreed to accept the Victorian legal system with all faults (if any) as well as with all virtues (if any). And their agreement must control.

The observations of *Isaacs* J. in *Delaney's Case* (4), which I have quoted, were applied by him to the incorporation of *ex post facto* legislation passed in the country the law of which was the " proper law " of the contract. On this part of the case, I have felt most difficulty by reason of the temporary or " emergency " character of the Victorian legislation. But I have come to the conclusion that a Victorian Court cannot, on that account, exclude it from consideration in enforcing the agreement, but it is bound to treat it as part of the relevant body of law and as securing the discharge *pro tanto* of the obligations originally created.

(1) (1932) V.L.R., at p. 216.
(2) (1916) 22 C.L.R. 150.
(3) (1890) 25 Q.B.D. 399.
(4) (1916) 22 C.L.R., at p. 169.

The view I have come to is that the plaintiff Company's obligation to pay interest at the agreed rate became discharged, not by the direct force of the *Financial Emergency Act* (which may or may not apply to some or all of the debentures or some or all of the payments for which they call), but by the direct force of the agreement introducing the Victorian system of law. I feel greatly strengthened in my opinion by the remarks of Lord *Russell of Killowen* in *In re Annesley*; *Davidson* v. *Annesley* (1), where he suggested that the *circulus inextricabilis* could, and perhaps should, be avoided, even in the administration of the personal estate of a British subject domiciled in a foreign country. "Speaking for myself," he said,

> "I should like to reach the same conclusion by a much more direct route along which no question of *renvoi* need be encountered at all. When the law of England requires that the personal estate of a British subject who dies domiciled, according to the requirements of English law, in a foreign country shall be administered in accordance with the law of that country, why should this not mean in accordance with the law which that country would apply, not to the *propositus*, but to its own nationals legally domiciled there? In other words, when we say that French law applies to the administration of the personal estate of an Englishman who dies domiciled in France, we mean that French municipal law which France applies in the case of Frenchmen. This appears to me a simple and rational solution which avoids altogether that endless oscillation which otherwise would result from the law of the country of nationality invoking the law of the country of domicil, while the law of the country of domicil in turn invokes the law of the country of nationality, and I am glad to find that this simple solution has in fact been adopted by the Surrogates' Court of New York."

The judgment I have quoted from has become the subject of the keenest interest and discussion in relation to the supposed recognition by British Courts of the doctrine of the *renvoi* (see *Law Quarterly Review*, vol. 47, p. 271; vol. 46, p. 465, by *John D. Falconbridge* K.C., and cf. *E. O. Schreiber*, jun., 31 *Harvard Law Review*, p. 523).

It will not escape observation that the aspect of the doctrine of the *renvoi* discussed in the passage I have quoted from *In re Annesley* bears a close analogy to the problem at present before the Court. But the case is a fortiori where the parties to a contract have expressly agreed to refer its obligation and discharge to "the law of country A," the Courts of which are asked, as here, merely to give effect to the agreement. Those Courts, at all events, should hold that there

(1) (1926) Ch. 692, at pp. 708, 709.

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is introduced, by such reference, the whole of the general law in force in country A with respect to its own local contracts.

In my opinion, question (*c*) alone need be answered, and it should be answered: (*c*) (i.) Yes; (*c*) (ii.) Yes. As to question (*d*), which concerns the powers of the plaintiff Company, or its directors, to pay the whole of the interest originally agreed upon, I do not think it should be answered. There is no evidence of any suggestion or proposal to pay such sum, and no facts are before the Court which enable a satisfactory answer to be given.

The order appealed from should be varied and question (*c*) answered: (i.) Yes; (ii.) Yes. No other question should be answered.

McTIERNAN J. The respondent, Electrolytic Zinc Co. of Australasia Ltd., is incorporated under the *Companies Act* 1915 of Victoria. Its head office, where the directors meet, is in Melbourne, and it carries on business in Victoria and elsewhere in the Commonwealth. The Company is registered under the English *Companies Act* as a company incorporated outside Great Britain, but having a place of business there. In London it has an office, also directors who are appointed in Melbourne. There are branch registers, of members and debenture holders respectively, in the London office. This office attends to the transfer and registration of the shares and debentures of the Company on its London registers and the payment of dividends and interest due in respect of such shares and debentures. It also receives the proceeds of the sales of the Company's products which are sold abroad and deals with these moneys according to the instructions of the directors in Melbourne. Pursuant to its powers the directors of the Company in Melbourne determined to provide for the creation and for the issue from time to time of a series of first mortgage debentures securing in the aggregate the sum of £1,000,000, and decided to issue a portion thereof, namely, £400,000, at the rate of £8 per cent per annum, leaving the remaining £600,000 for subsequent issue, if and when required, at such rate not exceeding £8 per cent per annum as the Company should deem fit.

The terms and conditions, upon which the debentures constituting the above-mentioned portion of such series were issued and secured,

are contained in the indenture described as the debenture trust deed made between the Company of the one part, and the respondent, Melbourne Trust Ltd. of the other part, which became a trustee for the holders of these debentures. This latter company is incorporated in London, and has a registered office in Melbourne. The debenture trust deed was executed by both parties at Melbourne and is kept there. The whole of these debentures were issued under the seal of the Electrolytic Zinc Co. of Australasia Ltd. at its head office to persons in Victoria, and were entered upon the Company's register of debentures in Melbourne in the names of these persons. Transfers of some of these debentures were subsequently made to other persons whose names were entered on the Melbourne register of debentures, and certain debentures have since been transferred to or entered upon the register in London. In the latter case a new debenture was issued under the seal of the Company in its London office in lieu of the debenture registered in Melbourne and the old debenture was cancelled. Debentures registered in London may be transferred to the register in Melbourne in a similar manner.

The deed created a specific charge over the Company's freehold and leasehold land situated in Tasmania and a floating charge over all the other property and assets of the Company to secure payment to the trustee for the debenture holders of the principal moneys and interest due under the terms of the debentures. The Company has property and assets in Victoria and other States of the Commonwealth and elsewhere. A condition of each debenture is that it is issued subject to and with the benefit, *inter alia*, of the conditions contained in the debenture trust deed, all of which are to be deemed part of it, and the undertaking and property of the Company are by each debenture charged with the payments thereby agreed to be made. It is an express condition of the debenture trust deed that it is to be construed according to the law of Victoria. Sec. 19 of the *Financial Emergency Act* 1931 of Victoria came into operation on 1st October 1931. After sec. 19 came into operation some of the debentures were on the Melbourne register of the Company, others on its London register. Certain debentures which were on the Melbourne register after 1st October 1931 had been transferred

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from the London register since that date. It was a condition of each debenture that all moneys payable to the registered holder would be paid at the Company's office in Melbourne or London according as the holder should be registered in Melbourne or London, but the Company or the trustee or a receiver of the Company could make any payment on account of principal or of interest by cheque or warrant upon bankers forwarded through the ordinary post to the registered holder of the debenture in respect of which such payment was made to such debenture holder on the register of debentures.

Upon these facts the question arises whether the *Financial Emergency Act* 1931 operates to reduce the amount of interest payable according to the tenor of each of these debentures. But, assuming that the Act does not fail to reach that obligation on account of the situation of the property upon which payment of the moneys due under the debentures is secured or the place where payment was agreed to be made or for any other consideration of this kind, a question lies at the threshold, whether a debenture in the issued portion of the above-mentioned series answers the description "mortgage" in sec. 14 of the Act. The Supreme Court decided this preliminary question in the affirmative. It also decided that secs. 19 and 22 of the *Financial Emergency Act* operated to discharge the Company from its liability to pay to the debenture holders on the Melbourne register the whole amount of interest due to them under the terms of their debentures, but did not operate to reduce the amount of interest which the Company was liable to pay to the debenture holders on the London register according to the terms of their debentures. It made a further finding that the Company has power to pay all debenture holders, including those whose debentures are on the Melbourne register, the whole of the interest agreed to be paid to them; but it is for the Company to determine whether such power should be exercised. The appeal and cross-appeals put into contention the correctness of all these findings.

On the preliminary question it was contended by Mr. *Fullagar*, who appeared for the Melbourne debenture holders, and by Mr. *Cohen*, who represented the London debenture holders, that none of the debentures answered the description of a "mortgage" contained

in the Act. It was sought to support this contention on the following grounds:—(*a*) The language of sec. 14 showed that the Legislature intended to provide only for things ordinarily called "mortgages." The addition of the words "and also includes" and the following four clauses (*a*), (*b*), (*c*) and (*d*), it was said, expanded the definition only for the purpose of including four instruments which would not ordinarily be described as "mortgages." I think that this contention is rebutted by the insertion of the words "without affecting the generality of this definition." This phrase does not admit of the inference which, it is suggested, should be drawn from the strict enumeration following the words "and also includes." That phrase relates, I think, to the words "and also includes" as well as "includes." But whether this view be correct or not, I think that the words "any deed memorandum of mortgage instrument or agreement whereby security for payment of money is granted . . . over real or personal property or any interest therein," are descriptive of an instrument creating a floating security as well as an instrument creating a specific security. It should be noted that such debenture declares on its face that it belongs to a series of "first mortgage debentures." (*b*) Another ground taken in support of a negative answer to the preliminary question was that the security is given by the trust deed to the trustee but the money is payable to the debenture holders. The answer to this contention is that each debenture contains a condition that the Company charges with the payment of the principal and interest due thereunder its property and undertaking in terms of the debenture trust deed. Detailed reference was also made to other provisions of the deed, which, it was argued, gave the transaction characteristics rendering it substantially different from those which the Legislature contemplated would be within the purview of the Act when it defined "mortgage," "mortgagee" and "mortgagor." But prescinding from the elaborate analysis of certain parts of sec. 14 and the debentures and trust deed, which was made by Mr. *Fullagar*, I think that, upon a consideration of the Act as a whole, with special reference to secs. 14 (1), definition of "mortgage," par. (*a*), 14 (2) and 37, each one of these debentures is a mortgage in the sense in which that word is used in the Act.

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Mr. *Fullagar* further contended that none of these debentures was a mortgage within the scope of the Act, because the property upon which each debenture is secured is not wholly or substantially situate in Victoria. He contended that for this reason sec. 28 (6) would not work in this case and Parliament did not intend that the Act should apply to it. I agree with other members of the Court in the view that such a conclusion should not be drawn from the presence of this provision in the Act (see *Krzus* v. *Crow's Nest Pass Coal Co.* (1)). Mr. *Eager*, on behalf of the appellant Barcelo, who represented the ordinary and preference shareholders, contended that the obligation to pay interest, whether a debenture is registered in Melbourne or London, is modified by secs. 19 and 22, while Mr. *Fullagar* and Mr. *Cohen*, who appeared for the debenture holders on the Melbourne and London registers respectively, contended that those sections did not operate on the obligation expressed in any of the debentures.

These rival contentions raise the question whether the general expressions in secs. 14, 19 and 22 respectively, that is " any deed memorandum of mortgage instrument or agreement," " every mortgage," and " every payment of interest " should as a matter of necessary intendment be read subject to a limitation the effect of which would be to leave these debentures unaffected by the Act. The Supreme Court decided that the generality of these expressions should be limited by implying the words " in Victoria " after " payment of money " and after " real and personal property " in sec. 14. The result of this construction is that the terms of an instrument otherwise answering the description of a mortgage are not affected by secs. 19 and 22 unless it provides that payment of the money thereby secured should be made in Victoria and the security for such payment is granted over property in Victoria. It is a matter of surmise whether the Legislature adverted to the difficulties which would arise in determining what, if any, application the Act should have in the case of a mortgage which had one or more extra-territorial elements. Sec. 37 is the only expressed reference which it seems to have made to this problem. Mortgages with an inter-State aspect would have

(1) (1912) A.C. 590, at p. 595.

been suitable subjects for legislation by the Parliament of the Commonwealth, if its power extended to such cases. In the absence of any Federal legislation with respect to such case, the application of the Act to such mortgages, as well as to mortgages which were made, or concerned property, or provide for the discharge of obligations, outside Australia, must be determined by the rules that are applied in construing a statute containing general expressions, the literal force of which affects persons or things, rights or obligations, outside the territorial jurisdiction of the Legislature or arising under the law of some other country. The literal force of the words "every mortgage" in sec. 19 is capable of extending to the obligation in every mortgage in the world. The construction of the Act, must, therefore, in the first place, be governed by the presumption that the Legislature did not intend to exceed the limits of its authority (*Macleod* v. *Attorney-General for New South Wales* (1); *Maxwell, Interpretation of Statutes*, 3rd ed. (1896), p. 195; *Tomalin* v. *S. Pearson & Son Ltd.* (2)). The authority of the Legislature is to legislate in and for Victoria (*Bartley* v. *Hodges* (3)). If the Legislature had provided expressly that secs. 19 and 22 should apply to debentures made in Victoria according to Victorian law and similar in all respects to those now in question, I think that the Courts in Victoria would be bound to enforce such a provision (*Ashbury* v. *Ellis* (4)). But the conclusion does not necessarily follow that the Act does, upon its true construction, operate upon the obligation to pay interest expressed in each debenture in the present series. "It is not because general words are used in an Act of Parliament every case which falls within the words is to be governed by the Act. It is the duty of the Courts of justice so to construe the words as to carry into effect the meaning and intention of the Legislature" (*Cope* v. *Doherty* (5)). The Legislature has not given any clearly expressed indication as to what are the limits of the sphere in which it intended the Act to operate. The question of its application may arise with respect to many mortgages, all possessing various extra-territorial elements. Abnormal consequences may follow if the

(1) (1891) A.C. 455.
(2) (1909) 2 K.B. 61.
(3) (1861) 1 B. & S. 375; 121 E.R. 754.
(4) (1893) A.C. 339.
(5) (1858) 2 DeG. & J. 614, per *Turner* L.J. at pp. 623, 624; 44 E.R. 1127, at p. 1131.

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scope of the general words in secs. 19 and 22 were confined only by the legal limits of the Legislature's authority (see *Harding* v. *Commissioners of Stamps for Queensland* (1)). As the Legislature has not indicated precisely the category of characteristics which should distinguish the mortgages which it intended the Act to affect, I do not think that the Court should undertake that task.

For the purpose of answering the particular questions in this case, it is sufficient to determine whether there is any sound basis for implying any limitation on the general expressions in secs. 19 and 22 of the Act, the result of which would leave the mortgages in question unaffected by its provisions. The principle which should govern the selection of any such limitation is stated in *Maxwell, Interpretation of Statutes*, 3rd ed. (1896), at p. 200, in these terms: "Under the same general presumption that the Legislature does not intend to exceed its jurisdiction, every statute is to be so interpreted and applied, as far as its language admits, as not to be inconsistent with the comity of nations, or with the established rules of international law." There are many instances of interpretations by which the scope of general expressions has been limited. Some may be cited. In *Cope* v. *Doherty* (2) it was held that the words "any sea-going ship" in the *Merchant Shipping Act* 1854, which *Turner* L.J. said (3) "would embrace every vessel navigating the sea, which is not propelled by oars," were held not to extend to the case of a collision between foreign ships owned by foreigners. *Turner* L.J. said (4):—"This is a British Act of Parliament, and it is not, I think, to be presumed that the British Parliament could intend to legislate as to the rights and liabilities of foreigners. In order to warrant such a conclusion, I think that either the words of the Act ought to be express or the context of it to be very clear." (See also *Cail* v. *Papayanni*; *The "Amalia"* (5).) In *Ex parte Blain*; *In re Sawers* (6), it was held that the true interpretation of the word "debtor" in the English *Bankruptcy Act* 1869 is a debtor subject to

(1) (1898) A.C. 769.
(2) (1858) 2 DeG. & J. 614; 44 E.R. 1127.
(3) (1858) 2 DeG. & J., at p. 623; 44 E.R., at p. 1131.
(4) (1858) 2 DeG. & J., at p. 624; 44 E.R., at p. 1131.
(5) (1863) 1 Moo. P.C. (N.S.) 471; 15 E.R., at p. 778.
(6) (1879) 12 Ch. D. 522.

English bankruptcy law. *Cotton* L.J. said (1):—"I say to the English bankruptcy law, and not to the English law generally, for this reason, that we are dealing with a question of bankruptcy; and it may be that there are English statutes which give our Courts power to deal with foreigners who are not here as regards matters which, according to all principles, ought to be adjudicated upon by our Courts, such as, for instance, questions relating to real property situate in England. . . . We have to consider what is the fair interpretation of the Act, and we must not give to general words an interpretation which would, in my opinion, violate the principles of law admitted and recognized in all countries." *James* L.J. said (2):—"It is not consistent with ordinary principles of justice or the comity of nations that the Legislature of one country should call on the subject of another country to appear before its tribunals when he has never been within their jurisdiction. Of course, if a foreigner has come into this country and has committed an act of bankruptcy here, he is liable to the consequences of what he has done here; but, in the absence of express legislative provision, compelling me to say that the Legislature has done that which, in my opinion, would be a violation of international law, I respectfully decline to hold that it has done anything of the kind." (See also *Cooke* v. *Charles A. Vogeler Co.* (3), which approved of *Ex parte Crispin*; *In re Crispin* (4).) In the latter case (5) it was held that the expression "that the debtor has, in England or elsewhere, made a conveyance or assignment of his property to a trustee for the benefit of his creditors generally" in the English *Bankruptcy Act* of 1869 "seems clearly intended to relate to a conveyance which is to operate according to English law, which a conveyance executed by a domiciled Englishman, although out of England, may do; but a conveyance executed by a domiciled foreigner in his own country must necessarily operate according to the foreign law, and we think it was never intended that such a conveyance should be an act of bankruptcy." In *Colquhoun* v. *Heddon* (6), *Pollock* B. in deciding that a limitation should be put upon the words "any insurance company" in 16 & 17

(1) (1879) 12 Ch. D., at pp. 532, 533.
(2) (1879) 12 Ch. D., at p. 527.
(3) (1901) A.C. 102.
(4) (1873) 8 Ch. App. 374.
(5) (1873) 8 Ch. App., at p. 380.
(6) (1890) 24 Q.B.D. 491.

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Vict. c. 91, sec. 1, said (1):—"It is clear that Parliament contemplated the passing of some Act dealing with the registration of companies. But, apart from that, I am convinced that when in an English Act of Parliament the words 'any insurance company' are used, those words mean a company within the United Kingdom and within the cognizance of English law and legislation. In the first place the word 'company' in itself denotes—not a mere firm of persons, which in a mercantile sense might be the same in whatever part of the world it was established—but an entity, and a legal entity the validity and effect of which must depend upon the laws of the country within which that company is established. Therefore upon all ordinary principles, it seems to me sufficient to say that the words 'insurance company' in this English Act of Parliament mean an insurance company within the purview of the English Legislature, and therefore within England." In affirming the judgment of the Queen's Bench Division in this case, Lord *Esher* M.R. in the course of his judgment in the Court of Appeal said (2):—"Now, supposing the words 'any insurance company' stood alone, and there were nothing else in the section to modify the view which one would take of their meaning, would it or would it not be right to say, that those words in an English Act of Parliament would include all foreign insurance companies, wheresoever they might be? What is the rule of construction which ought to be applied to such an enactment, standing alone? It seems to me that, unless Parliament expressly declares otherwise, in which case, even if it should go beyond its rights as regards the comity of nations, the Courts of this country must obey the enactment, the proper construction to be put upon general words used in an English Act of Parliament is, that Parliament was dealing only with such persons or things as are within the general words and also within its proper jurisdiction, and that we ought to assume that Parliament (unless it expressly declares otherwise) when it uses general words is only dealing with persons or things over which it has properly jurisdiction. . . . If, therefore, those words stood alone, I should be of the opinion that the insurance companies mentioned

(1) (1890) 24 Q.B.D., at p. 497.
(2) (1890) 25 Q.B.D. 129, at pp. 134, 135.

must be insurance companies over which our Parliament has jurisdiction, and that the section would be confined to such companies." The Master of the Rolls came to the conclusion that other sections of the Act assisted the view that the only companies referred to in the section are companies amenable to the jurisdiction of the English Parliament. (See also *Harding* v. *Commissioners of Stamps for Queensland* (1), in which a limitation was placed on the words " every . . . disposition of property " in sec. 4 of the Queensland *Succession and Probate Duties Act* 1892 ; *Thomson* v. *Advocate General* (2), where it was held that the words " every legacy . . . given by any will . . . of any person " in 55 Geo. III. c. 184 were subject to a necessary limitation and did not extend to the will of any person domiciled out of Great Britain, whether the assets are locally situate or not.) In *Wallace* v. *Attorney-General* (3), Lord *Cranworth* L.C. in interpreting the words " every . . . disposition of property " by reason whereof any person shall on the death of another become entitled to any property shall be deemed to confer on the person so becoming entitled, a succession, in sec. 2 of the *Succession Duty Act* (16 & 17 Vict. c. 51) said :—" Parliament has, no doubt, the power of taxing the succession of foreigners to their personal property in this country ; but I can hardly think we ought to presume such an intention, unless it is clearly stated. The ground on which my opinion rests is that to the generality of the words in the second section under which a duty is imposed upon every person who becomes entitled to property on the death of another, some limitation must be implied, and that limitation can only be a limitation confining the operation of the words to persons who become entitled by virtue of the laws of this country." (See also *Winans* v. *Attorney-General* (4), *Commissioners of Inland Revenue* v. *Maple & Co. (Paris) Ltd.* (5), and *R.* v. *Jameson* (6).)

If the general words of the Act are interpreted in the light of the principles enunciated in these cases, no limitation need be adopted which would exclude the debentures in the present case from its

(1) (1898) A.C. 769.
(2) (1845) 12 Cl. & Fin. 1 ; 8 E.R. 1294.
(3) (1865) 1 Ch. App. 1, at p. 9.
(4) (1910) A.C. 27, at pp. 35, 36, and p. 48.
(5) (1908) A.C. 22.
(6) (1896) 2 Q.B. 425, at p. 430.

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operation. The fact that the debentures were or might become payable abroad would in itself be no ground for taking the debentures outside the application of the general words read in the light of these principles. The first material characteristic of each debenture is that it was executed in Victoria according to Victorian law. That law gave life to each instrument and regulates its construction. The obligation to pay interest created by each debenture is within the cognizance of Victorian law and legislation. It is clearly within the purview of the Act unless some other feature of the debentures, such as the situation of some of the mortgaged property or the place at which interest due under some of the debentures should be paid, does, on the true interpretation of the Act, place it outside the scope of the Act. Although part only of the property upon which payment of the money due under the debentures is charged is in Victoria, yet that part of the property is charged with the payment of the whole of these moneys. The fact that some of the property subject to the mortgage is situated outside Victoria does not therefore suggest any reason for saying that the literal force of the words of the Act should be modified so as to prevent secs. 19 and 22 having any application to this case. The inference that the Legislature intended to confine the Act to obligations to pay interest, which were to be performed in Victoria, is not one which is required by the presumption that the Legislature intended to maintain consistency between the Act and the rules of private international law as administered in the Courts of Victoria. If the clause of the debenture trust deed, declaring that the instrument is to be construed according to the law of Victoria, were not present, nevertheless all the main features of the transaction should, I think, lead to the conclusion that the governing law of the debentures is the law of Victoria. In the case of all of them the obligation to pay interest is, in my opinion, a matter " within the proper jurisdiction of the Legislature " (*Colquhoun* v. *Heddon* (1)). " The distinction between that part of the law of the foreign country where a personal contract is made, which *is* adopted, and that which *is not* adopted by our English Courts of law, is well known and established; namely, that

(1) (1890) 24 Q.B.D. 491.

so much of the law as affects the rights and merit of the contract, all that relates '*ad litis decisionem*,' is adopted from the foreign country; so much of the law as affects the remedy only, all that relates '*ad litis ordinationem*,' is taken from the '*lex fori*' of that country where the action is brought" (per *Tindal* C.J. in *Huber* v. *Steiner* (1)). The learned Chief Justice after referring to a restriction which was relevant in that case, but not in the present case, continued (2): "It does indeed appear but reasonable, that the part of the *lex loci contractus* which declares the contract to be absolutely void at a certain limited time, without any intervening suit, should be equally regarded by the foreign country, as the part of the *lex loci contractus* which gives life to, and regulates the construction of the contract; both parts go equally '*ad valorem contractus*,' both '*ad decisionem litis*.'" (See also *Ellis* v. *M'Henry* (3) and *Phillips* v. *Eyre* (4).) In delivering the judgment of the Court in the latter case, *Willes* J. said (5):—"The obligation is the principal to which a right of action in whatever Court is only an accessory, and such accessory, according to the maxim of law, follows the principal, and must stand or fall therewith. '*Quæ accessorium locum obtinent extinguuntur cum principales res peremptæ sunt*.' A right of action, whether it arise from contract governed by the law of the place or wrong, is equally the creature of the law of the place and subordinate thereto. The terms of the contract or the character of the subject matter may show that the parties intended their bargain to be governed by some other law; but, prima facie, it falls under the law of the place where it was made. And in like manner the civil liability arising out of a wrong derives its birth from the law of the place, and its character is determined by that law. Therefore, an act committed abroad, if valid and unquestionable by the law of the place, cannot, so far as civil liability is concerned, be drawn in question elsewhere unless by force of some distinct exceptional legislation, superadding a liability other than and besides that incident to the act itself. In this respect no

(1) (1835) 2 Bing. N.C. 202, at p. 210; 132 E.R. 80, at p. 83.
(2) (1835) 2 Bing. N.C., at p. 211; 132 E.R., at p. 83.
(3) (1871) L.R. 6 C.P. 228.
(4) (1870) L.R. 6 Q.B. 1.
(5) (1870) L.R. 6 Q.B., at p. 28.

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sound distinction can be suggested between the civil liability in respect of a contract governed by the law of the place and a wrong." The judgment continues (1): "But if the foreign law extinguishes the right it is a bar in this country equally as if the extinguishment had been by a release of the party, or an act of our own Legislature." (See also *Potter* v. *Brown* (2); *Gardiner* v. *Houghton* (3).)

For the purpose of answering the particular questions presented for decision in this case, it is not necessary to decide whether, upon the true construction of the Act, secs. 19 and 22 affect the obligation to pay interest expressed in a mortgage which in its contractual aspects is plainly governed by the law of Victoria but was granted over immovable property entirely outside the State. I think that questions (*a*), (*b*) and (*c*) should be answered in the affirmative.

As to question (*d*).—The *Financial Emergency Act* does not prohibit the payment of interest according to the tenor of a mortgage which is within its purview. But in the present case, there is not, in my opinion, sufficient information before the Court relating to the facts and circumstances which should be taken into consideration to determine whether the making of any such payment at any time would be a proper exercise of any power, which the Company may have, to make payments of money pursuant to its memorandum of association. I do not think that this question should be answered.

The appeal should, in my opinion, be allowed and the questions answered in the following way:—Questions (*a*), (*b*) and (*c*): Yes. (*d*): This question should not be answered.

Appeal allowed. Order of the Supreme Court discharged in so far as it answers the questions in the special case and makes declarations thereon. In lieu thereof declare in answer to questions (*a*), (*b*), *and* (*c*) *that all the debentures are within the operation of sec.* 19 (1) *of the Financial Emergency Act* 1931, *as amended, and that payment to the holders of such debentures of the reduced rate of interest made in pursuance of sec.* 19 *is a full*

(1) (1870) L.R. 6 Q.B., at p. 29.
(2) (1804) 5 East 124; 102 E.R. 1016.
(3) (1862) 2 B. & S. 743; 121 E.R. 1247.

discharge of the respondent Company's liability for interest under such debentures in respect of the period to which such payment relates. Declare further that no answer ought to be given to question (d). The Company offering no objection, order that the costs of all parties of and incidental to this appeal be taxed and paid by the Company. If the Company consent, the order may be drawn up for costs as between solicitor and client as in the Supreme Court.

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

Solicitors for the respondent Electrolytic Zinc Co. of Australasia Ltd., *Pavey, Wilson & Cohen.*

Solicitors for the respondents Frederick Arthur Herbert Knight and The Standard Trust Ltd., *Blake & Riggall.*

Solicitors for the respondent William Clark, *Arthur Robinson & Co.*

H. D. W.