[HIGH COURT OF AUSTRALIA.]

BONYTHON AND OTHERS . . . . PLAINTIFFS;

AND

THE COMMONWEALTH OF AUSTRALIA . DEFENDANT.

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MELBOURNE, 1947 *Oct.* 23, 24; 1948 *May* 31.

Latham C.J., Rich, Starke, Dixon and McTiernan JJ.

Currency—"Pounds sterling"—Meaning of "sterling"—Debentures—Redemption—Debentures issued by Government of Queensland in 1895, *payable in* 1945—*Conversion of debentures into Commonwealth inscribed stock—Sum expressed in pounds sterling payable at option of debenture holder in Brisbane, Sydney, Melbourne or London.*

In 1895, when the monetary system of the Colony of Queensland was the same as that of Great Britain, the Government of the Colony, pursuant to statutory authority, issued a series of debentures in denominations of £1,000 and £500, some of which were subscribed for in England and others in Australia. Except for the variation in the amount, the debentures provided:—"This debenture entitles the holder to the sum of one thousand pounds sterling . . . together with interest. . . . The principal sum will be payable on the first day of January 1945 either in Brisbane, Sydney, Melbourne or London at the option of the holder." In 1932, the Commonwealth of Australia having taken over the public debt of the State (as it had become) of Queensland, the holders of debentures which had been issued in Queensland surrendered them and were issued with Commonwealth inscribed stock, which, it was admitted, conferred on the holders rights conforming in all particulars with the rights conferred by the debentures. In 1945 the only currency which was legal tender in Australia was the Commonwealth currency which, except as to denomination, was distinct from that of Great Britain, the value in exchange of the £E. being higher then than that of the £A. The holders of the stock claimed that in respect of each debenture of £1,000 they were entitled to be paid £E.1,000 in London or the equivalent in Australian currency if the debentures were payable in Australia.

Held, by *Rich*, *Starke*, *Dixon* and *McTiernan* JJ., (1) that the proper law of the obligation of the debenture was the law of Queensland; and (*Latham* C.J. dissenting) (2) that the obligation of the debenture could not be described, by reason of the words "pound sterling," as an obligation to pay £E.1000,

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or the equivalent in Australian currency; (3) that the obligation was expressed in the money of account that was common to Great Britain and Australia; by *Rich*, *Dixon* and *McTiernan* JJ., that the monetary systems of the countries now having diverged the obligation belongs to the Australian system and that the obligation would be discharged by payment of £A.1,000, if the debenture was payable in Australia, or the equivalent in English currency if payable in London, but, by *Starke* J., that, if a debenture was payable in London, £E.1,000 must be paid, whereas, if it was payable in Australia, £A.1,000 would discharge the obligation.

Broken Hill Proprietary Co. Ltd. v. *Latham*, (1933) Ch. 373, *Adelaide Electric Supply Co. Ltd.* v. *Prudential Assurance Co. Ltd.*, (1934) A.C. 122, *Payne* v. *Deputy Federal Commissioner of Taxation*, (1936) A.C. 497, *Auckland Corporation* v. *Alliance Assurance Co. Ltd.*, (1937) A.C. 587, and *De Bueger* v. *J. Ballantyne & Co. Ltd.* (1938) A.C. 452, referred to.

CASE STATED.

In an action in the High Court by Sir John Lavington Bonython and others against the Commonwealth *Latham* C.J. stated for the opinion of the Full Court a case which was substantially as follows:—

1. The plaintiffs respectively are and since prior to 1st July 1944 have been inscribed in a stock ledger kept at a registry established by the defendant at Adelaide under the *Commonwealth Inscribed Stock Act* 1911-1945 as the holders of Commonwealth consolidated inscribed stock 3.5% maturing 1st January 1945 in the amounts in all of £80,400. The plaintiffs are and at all material times have been resident in Australia.

2. The stock referred to in par. 1 was originally issued by the defendant in or about the month of March 1932 to the Australian Mutual Provident Society upon the surrender of Queensland Government debentures hereinafter referred to. It is admitted that the stock was issued to the Society subject to the condition that the same conferred upon the registered holders thereof for the time being rights which conformed in all particulars with the rights conferred by the Queensland Government debentures.

3. By the provisions of Act 58 Vict. No. 32 of the Parliament of Queensland and known as *The Government Loan Act of* 1894 the Governor in Council of the Colony of Queensland was authorized to raise by way of loan for the Public Service of the Colony such several sums of money not exceeding in the whole the sum of two million pounds as might be required for purposes therein set out. Pursuant to the powers conferred by the Act the Governor in Council for the Colony of Queensland on 26th April 1895 raised by way of loan in London, England, the sum of £1,250,000, part of the sum authorized by the Act, and on 3rd July 1895 raised by way

of loan in Australia sums of £250,000 and £500,000 respectively, balance of the sum so authorized, and in respect of all the sums so raised issued debentures for varying amounts but otherwise in the form following [The form is set out in the judgment of *Latham* C.J. (1)].

4. The sum of £250,000 referred to in par. 3 was wholly subscribed by the Australian Mutual Provident Society, a company incorporated and carrying on business in Australia, and with respect thereto the Governor in Council in Queensland caused 150 of the debentures referred to in par. 3, each for the sum of £1,000, and 200 of the debentures, each for the sum of £500, to be issued in Queensland to the Society.

5. On each of the debentures referred to in par. 4 the place at which the purchaser wished the interest first falling due to be paid was indorsed as Sydney. No change in the place of payment of interest under the debentures was registered.

6. The following is a copy of the form of coupon annexed to the £1,000 debentures [The form appears in the judgment of *Latham* C.J. (2)]. The coupon annexed to the £500 debentures was in the same form except as to the sums mentioned therein.

7. Under and by virtue of an agreement made 12th December 1927 between the defendant of the first part and the States of New South Wales, Victoria, Queensland, South Australia, Western Australia and Tasmania of the second, third, fourth, fifth, sixth and seventh parts and under and by virtue of the *Financial Agreement Act* 1928 (No. 5 of 1928), the *Financial Agreement Validation Act* 1929 (No. 4 of 1929), and the *Financial Agreements (Commonwealth Liability) Act* 1932 (No. 2 of 1932) (all of the Parliament of the Commonwealth of Australia) the public debt of the State of Queensland, which included the liability of that State under and in respect of the debentures mentioned in par. 4, was taken over by the defendant.

8. Upon the issue to the Australian Mutual Provident Society of the stock referred to in par. 1 and for some time thereafter the same was inscribed in the stock ledger kept at the registry in Brisbane, and interest was paid there. Upon or subsequently to the plaintiffs' becoming the holders of the stock the same was transferred to the registry kept at Adelaide, and thereafter interest was paid there.

9. On or about 15th December 1944 the Treasurer of the Commonwealth sent to each of the holders of the inscribed stock referred to in par. 1 a letter in the following terms :—" I understand that

(1) *Post*, pp. 597-598. (2) *Post*, p. 598.

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you are a holder of tax-free stock originally issued by the Government of Queensland and maturing on the 1st January 1945. Under the provisions of the Financial Agreement between the Commonwealth and the States, made in 1927, repayment of the loan to stock-holders is the responsibility of the Commonwealth. I am hopeful that holders of securities maturing during the war period will assist us by converting their securities to a new issue, instead of requiring repayment in cash, and I would therefore ask you to give earnest consideration to the question of converting your maturing securities into new securities having the same terms and conditions as the last public loan issued by the Commonwealth. Securities of that loan bear interest as follows :—$2\frac{1}{2}$ per cent per annum maturing in 1948-49 ; or $3\frac{1}{4}$ per cent per annum maturing in 1950-60. Should you feel able to help in this way, will you please notify the Deputy Registrar of Inscribed Stock in the capital city where the stock is inscribed, and he will arrange the conversion. Should it not be possible for you to convert your securities, they will, of course, be redeemed on the due date, on presentation at the Commonwealth Bank." No reply was sent by the plaintiffs to this letter, and the plaintiffs did not convert.

10, 11 and 12. On 22nd December 1944 letters on behalf of the plaintiffs, addressed to The Deputy Registrar of Inscribed Stock, were delivered at the Commonwealth Inscribed Stock Registry at Adelaide, requesting that, " in accordance with the conditions on which the . . . stock was issued, the amount of the stock . . . be paid on maturity in London in sterling."

13. In reply the Deputy Registrar of Inscribed Stock on behalf of the defendant on or about 30th December 1944 wrote to the plaintiffs in the following terms :—" We refer to your letter of 22nd inst. and advise that your request for proceeds of above loan to be paid in London has been submitted to the Commonwealth Treasury. The conditions of the loan provided that six-months' notice of redemption in London would be necessary. Please have the attached forms completed and return."

14. The " attached forms " referred to in the letter of 30th December 1944 were forms of application for redemption of stock.

15. On or about 2nd January 1945 the Deputy Registrar of Inscribed Stock on behalf of the defendant wrote to the plaintiffs in the following terms :—" We refer to your letters . . . of 22nd ulto. requesting that holdings of above stock . . . be redeemed in London. The matter was referred to the Commonwealth Treasury and we are advised that the redemption provisions of the original debentures were as follows :—' The principal sum

will be payable on the first day of January 1945 either in Brisbane, Sydney Melbourne or London at the option of the holder; but notice must be given to the Treasurer of the Colony on or before the 1st July 1944 of the place at which it is intended to present this document for payment of such principal.' As the holders of the stock did not give the notice required by the terms of the debenture they are now precluded from exercising an option for payment in London."

16. None of the plaintiffs completed the forms referred to in par. 14 nor did they or any of them present the stock at the Commonwealth Bank.

17. The defendant has not paid to the plaintiffs or any of them the principal moneys due on maturity of the stock. On and from 1st January 1945 the defendant was at all times ready and willing to repay the principal moneys in Australian currency equal to the amount inscribed, but no larger amount, at Adelaide aforesaid or elsewhere in Australia as might be required by the holder. Save as appears from the letters hereinbefore set forth, no notice for the redemption of the stock has been given by the Treasurer of the Commonwealth to the plaintiffs or any of them.

The questions for the opinion of the Full Court were as follows:—

(*a*) With respect to the Commonwealth inscribed stock held by the plaintiffs was the defendant bound to pay the principal sums secured thereby in English currency in London six months after the date of the delivery of the letters referred to in pars. 10, 11 and 12 of this case?

(*b*) If nay when and where did such moneys become due and payable?

(*c*) If the principal sums are payable in Australia are the plaintiffs respectively entitled to be paid in Australian currency the equivalent of the principal sums in English currency?

(*d*) Are the plaintiffs respectively entitled to interest upon the amount of the said stock held by each of them at $3\frac{1}{2}\%$ per annum since 1st January 1945?

Coppel K.C. (with him *E. Phillips* K.C.), for the plaintiffs. The first contention for the plaintiffs is that, on the proper construction of the debentures, payment must be made in "sterling," that is, in lawful English currency, because that is what the debenture says. In this view, it is immaterial whether the place of payment is London or is in Australia; the amount must be paid in English currency or else an equivalent amount in Australian currency must

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be paid. In 1895, when the debentures were issued, they were of necessity expressed in terms of English currency because Queensland had no other currency, and they must now be given the meaning which they had in 1895. There was at that time no known " pound " except the English ; there was no separate Australian currency until after Federation. For the history of the legislation creating a separate Australian currency, see *Adelaide Electric Supply Co. Ltd.* v. *Prudential Assurance Co. Ltd.* (1). In this view, it may be that the word " sterling " is unnecessary to produce the result for which the plaintiffs contend. Further, it is not contended that the presence of the word " sterling " would be conclusive in all circumstances. It may be that the circumstances of a particular case will show that, although the word " sterling " is used, English currency cannot have been intended (Cf. *Maudsley* v. *Colonial Mutual Life Assurance Society Ltd.* (2)), but that is not the case here. Effect must be given to the word as part of the contract ; it had a clear meaning in 1895, and it still has the same meaning. It can be assumed that the parties did not, in 1895, contemplate the possibility of a separate Australian currency : That does not affect the plaintiffs' case. Speculation as to the form the contract might have taken if the parties had contemplated such a possibility is too uncertain to form the basis for an implication cutting down the clear words of the contract. [He referred to *Goldsbrough Mort & Co. Ltd.* v. *Hall* (3) ; *Feist* v. *Société Intercommunale Belge d' Electricité* (4).] An alternative view is that the appropriate currency depends on the place of payment of the debentures. For this purpose it is assumed that, if the plaintiffs had elected to be paid in Australia, Australian pounds would have been sufficient to discharge the obligation ; but, the plaintiffs having exercised their option to nominate London as the place of payment, the promise became one to pay pounds sterling in London. The only reasonable construction of the contract, so regarded, is that payment in English money was intended. The provision in the debenture as to the giving of notice before 1st July 1944 should not be treated as a condition precedent to the validity of the exercise of the plaintiffs' option as to the place of payment. [He referred to *Thorn* v. *City Rice Mills* (5).] If the plaintiffs are right in either of the views submitted, it follows that the defendant has been in default since 1st January 1945 and interest on the principal moneys since that date should be awarded under *Lord Tenterden's Act* : see *Common Law Practice Act* 1867 (Q.),

(1) (1934) A.C. 122, at p. 127.
(2) (1945) V.L.R. 161.
(3) (1948) V.L.R. 145.
(4) (1934) A.C. 161.
(5) (1889) 40 Ch. D. 357.

s. 72; *Supreme Court Act* 1928 (Vict.), s. 78; *Acts Interpretation Act* 1915-1936 (S.A.), s. 14.

Hudson K.C. (with him *Nelson*), for the defendant. The true construction of the debentures is that the contract is to pay in whatever are "pounds" in Queensland at the time of payment. The debentures were issued in Queensland by the Government of the Colony, as it then was, and it is the law of Queensland to which regard must be had to measure the obligation. Under the *Treasury Notes Act* 1893 (Q.), Queensland Treasury notes were legal tender. Therefore, it would not be accurate to say that none other than English currency was known in Queensland in 1895. On that account, however, it could hardly have been said that Queensland had a different monetary system from that of England. It is in the highest degree improbable that in 1895 it would have occurred to anyone to speak of a "Queensland pound" as being something different from an "English pound" or to use the word "sterling" as pointing a distinction as between England and Queensland. The defendant can accept the statement that in 1895 the Imperial currency was the currency of Queensland, but it need not accept the use which the plaintiffs seek to make of that statement. In effect the plaintiffs contend that, because in 1895 a "pound" meant the same thing in England and in Queensland, the expression "English pounds" can be substituted for "pounds" in the debenture. There would be at least as much warrant for the substitution of "Queensland pounds"; more so, it is submitted, if the defendant is right in regarding the law of Queensland as the proper law of the contract. The word "sterling" has no real significance unless it points a distinction, as it does when it refers to English currency by way of distinction from some foreign currency. In Queensland in 1895 it could not distinguish an "English pound" from some other sort of pound: There was no other sort. It is only since the creation of a separate Australian currency (as to which, see the Federal *Coinage Act* 1909-1936, s. 7 (corresponding with s. 6 of the English *Coinage Act* 1870); *Australian Notes Act* 1910, ss. 5, 6; *Commonwealth Bank Act* 1911-1943, s. 60H; *Commonwealth Bank Act* 1932, s. 5) and the variation in exchange values that the word has acquired its present significance in distinguishing the English from the Australian pound. Even now the word is sometimes used —as it often has been in the past—in contexts in which it plainly does not mean English currency but merely means the lawful currency for the time being of the Dominion, State or Colony. It was so used in the Federal *Land Tax Act* 1910 (No. 21 of 1910) and in the Act of each ensuing year up to 1938, and also in the *Income*

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Tax Acts from 1915 (No. 41 of 1915) up to 1931 : See also the *Treasury Bills Regulations* (Statutory Rules 1927 No. 156). It is not unimportant to notice that, although the word " sterling " is used in the debentures, it does not appear in the interest coupons attached to them, and, furthermore, that *The Government Loan Act of* 1894 (58 Vict. No. 32) (Q.), which authorized the issue of the debentures, did not use the word. [He also referred to *Ottoman Bank of Nicosia* v. *Chakarian* (1) ; *Mann* on *The Legal Aspect of Money*, p. 167 ; also, p. 138.] The considerations mentioned are sufficient, it is submitted, to dispose of the plaintiffs' primary contention and also of the alternative contention that, having elected to be paid in London, they were entitled to receive there, in respect of each £1,000 debenture, £1,000 (English). In any event the alternative contention is not open to the plaintiffs ; they did not, within the time limited by the debenture, exercise the option which it gave them, and it must be taken that no place of payment has been nominated. The result is that the plaintiffs cannot claim payment outside Australia : If they are to be regarded as still holding the debentures, they are, notionally, under an obligation to present them in Queensland ; regarded as stock holders, as they are in fact, their claim can only be to payment in Australia. Whatever may be the correct measure of the obligation as to principal, it is clear that no contractual right to interest after 1st January 1945 arises from the debentures. The plaintiffs are in no better position in this regard than any other holder of Commonwealth stock, and, by reason of ss. 8, 9, 11 of the *Inscribed Stock Act*, they are debarred from claiming such interest. Under *Lord Tenterden's Act* the power to award interest depends on " default " on the part of the debtor, and there has been no such default here. Moreover, the power is merely discretionary, to award interest by way of damages ; it cannot be said that the plaintiffs would have any *right* to interest under the Act. An affirmative answer to question (*d*) in the case stated would be tantamount to a declaration of right, and therefore would not be appropriate.

Coppel K.C., in reply.

Cur. adv. vult.

1948, May 31.

The following written judgments were delivered :—

LATHAM C.J. This is a case stated in an action brought by Sir John Lavington Bonython and others who hold £80,400 Commonwealth Inscribed Stock 3.5% maturing 1st January 1945 against the Commonwealth of Australia.

(1) (1938) A.C. 260, at pp. 270, 278.

This stock was acquired by the Australian Mutual Provident Society in March 1932, upon the surrender to the Commonwealth of certain Queensland Government debentures. It is agreed between the parties that the stock was issued to the A.M.P. Society "subject to the condition that the same conferred upon the registered holders thereof for the time being rights which conformed in all particulars with the rights conferred by the said Queensland Government Debentures."

The debentures were issued in pursuance of *The Government Loan Act of* 1894 (Q.). That Act authorized the Governor in Council to raise a loan not exceeding £2,000,000. This money was raised in two portions, £1,250,000 in England and £750,000 in Australia. Of the latter amount the A.M.P. Society took up an amount of £250,000. The debentures were all in the following form, except that some debentures were for £500 :—

GOVERNMENT

ONE THOUSAND POUNDS

QUEENSLAND Identical SI.TI

DEBENTURE

Series S.1.

No. 1

£1,000

ISSUED BY THE GOVERNOR in Council, by authority of the PARLIAMENT OF QUEENSLAND under the Act 58 Victoria No. 32.

THIS DEBENTURE entitles the HOLDER to the sum of ONE THOUSAND POUNDS STERLING, which, together with interest at the rate of THREE POUNDS TEN SHILLINGS PER CENTUM PER ANNUM is secured upon the CONSOLIDATED REVENUE OF QUEENSLAND.

THE PRINCIPAL SUM will be payable on the First day of January 1945 either in BRISBANE, SYDNEY, MELBOURNE or LONDON at the option of the holder ; but notice must be given to the Treasurer of the Colony, on or before the First July 1944 of the place at which it is intended to present this Debenture for payment of such principal.

THE INTEREST WILL commence on the first day of JANUARY 1896 and will be payable on the 1st JANUARY and 1st JULY in each year, at the Treasury in BRISBANE or at the offices of the Agents of the Government in SYDNEY, MELBOURNE or LONDON on presentation of such of the annexed coupons as shall then be due, and not otherwise.

WHEN THIS DEBENTURE is issued the place at which the Purchaser wishes the interest first falling due to be paid, shall be endorsed on the Debenture ; any change in the place of payment of interest must be registered at the Treasury in BRISBANE or at the Offices of the Agents of the Government in SYDNEY, MELBOURNE or LONDON

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six months prior to the date on which such interest shall be payable, and the transfer at the same time endorsed on the Debenture.

Dated at Brisbane this 1st day of November 1895.

Coupons which were in the following form were attached to the debentures :—

QUEENSLAND GOVERNMENT DEBENTURE

£1,000 SERIES S.1. £1,000

Half year's Dividend at the rate of Three pounds ten shillings per cent per annum, due 1st January 1945. £17 10s.

Under the *Financial Agreement Act* 1928 and other legislation the Commonwealth took over the public debt of the State of Queensland and assumed the liability of the State under the debentures. The interest on the inscribed stock was paid first at Brisbane and afterwards at Adelaide. In 1944 the plaintiffs, who had become the holders of the stock, were invited to convert the stock into new securities but the invitation was not accepted. On 22nd December 1944, and 3rd January 1945, the plaintiffs asked that the amount of the stock be paid on maturity in London in sterling. The Deputy Registrar of Inscribed Stock replied stating that the option as to place of payment could be exercised only if notice were given on or before 1st July 1944, that the plaintiffs' notices were out of time, and that they were accordingly precluded from exercising an option for payment in London.

The Commonwealth is prepared to repay the principal monies in Australia by paying £A.1,000 in the case of each £1,000 debenture. The plaintiffs claim that the money should be paid in sterling in London, i.e., £1,000 sterling, which is equivalent to £A.1,250 or thereabouts.

The questions submitted in the case enquire whether the sum is payable in English currency in London as demanded by the plaintiffs and if not, when and where the monies are due and payable ; whether if the principal sums are payable in Australia the plaintiffs are entitled to be paid in Australian currency the equivalent sum in English currency ; and whether the plaintiffs are entitled to interest upon the amount of the stock at $3\frac{1}{2}$ per cent per annum since 1st January 1945.

The principal matter to be determined is the substance of the obligation undertaken by the Government of Queensland. That obligation was an obligation to the holder of the debentures and was an obligation to pay " the sum of one thousand pounds sterling ". There was a single promise to pay which could be discharged by performance in any one of several places. But the promise was the same wherever it might be performed.

The sum was payable either in Brisbane, Sydney, Melbourne or London at the option of the holder but the right to require payment to be made at any particular one of these places depended on notice being given to the Treasurer of the Colony on or before 1st July 1944, of the place at which it was intended to present the debentures for payment. The obligation accordingly was an obligation to pay the principal only on presentation of a debenture by a holder, and to pay in London only if notice requiring payment in London was given on or before 1st July 1944.

In 1895 when the debentures were issued the currency of Queensland was the same as the currency of Great Britain. The English *Coinage Act* 1870 applied in Queensland and under that Act gold coins were the only legal tender for amounts of more than 40/-. There was no difference in any respect between English and Queensland units of account and currencies in circulation. The pound in England and in Queensland represented the same unit in the same monetary system and an obligation to pay any sum above £2 in either country could be discharged, and could only be discharged, in one and the same way. Further, the currencies exchanged at par or nearly at par.

In 1945 when the principal became payable the position was very different both legally and commercially. In the first place, although the same word "pound" was used in Queensland and Great Britain, the control of currency and coinage had been assumed by the Parliament of the Commonwealth. The currency and coinage of Australia were no longer controlled by English legislation. The Federal *Coinage Act* 1909 prescribed the coins which were to be currency in Australia. The Act authorized the Treasurer to cause silver and bronze coins to be issued. Section 5 provided that a tender of payment of money if made in coins which were British coins or Australian coins of current weight should be a legal tender, in the case of gold coins for the payment of any amount and in the case of silver and bronze coins for amounts up to 40/- and 1/- respectively. Gold coins were minted at British mints in Australia as well as in England.

It is by virtue of this legislation and not by virtue of any English legislation that British coins after 1909 were legal tender in Australia.

Section 7 of the Act reproduced s. 6 of the English *Coinage Act*. It was in the following terms:—"Every contract, sale, payment, bill, note, instrument, and security for money and every transaction, dealing, matter, and thing whatever relating to money, or involving the payment of or the liability to pay any money, which is made, executed, or entered into, done or had, shall be made, executed,

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entered into, done and had according to the coins which are current and are a legal tender in pursuance of this Act, and not otherwise, unless the same be made, executed, entered into, done or had according to the currency of some British possession or some foreign State."

The course of English and Australian legislation with respect to coinage and currency is described by Lord *Tomlin* in *Adelaide Electric Supply Co. Ltd.* v. *Prudential Assurance Co. Ltd.* (1).

After the enactment of the *Coinage Act* 1909 the coinage and currency of Australia depended upon Australian legislation and not upon English legislation. The legal basis of the two monetary systems had become different. This difference was emphasized when the *Australian Notes Act* 1910, s. 6 made Australian notes legal tender. This provision was later placed in the *Commonwealth Bank Act*—see *Commonwealth Bank Act* 1911-1943, s. 60H and *Commonwealth Bank Act* 1945, s. 43. The *Commonwealth Bank Act* 1932, s. 5 made Australian notes no longer convertible into gold. Australian notes have never been legal tender in Great Britain. It is now Australian not English law which determines what is legal tender for the discharge of monetary obligations which are to be performed in Australia.

In the second place, from a commercial and financial point of view the currencies of England and Australia were the same in 1895, but are now different. In 1895 there was no difference in the value of £100 in Australia and £100 in England. In 1945, however, £100 sterling exchanged for £125 Australian.

The terms of the debenture were not altered by any subsequent legislation. The obligation, in 1945 as in 1895, was an obligation to pay £1,000 sterling.

Where there is a contract to pay money expressed in terms of the currency of another country or to pay any money in a foreign country, it becomes necessary to distinguish between the " money of account " and the " money of payment "—though they may be the same in a particular case. The " money of account " is that money which is referred to for the purpose of measuring the obligation, i.e., of determining the amount to be paid. The " money of payment " is that money which can be used to discharge the obligation. If the obligation is to pay 1,000 United States dollars in London, the money of account is United States dollars. The money of payment, in the absence of agreement to the contrary, will be English currency and the payment of an amount in that

(1) (1934) A.C. 122, at pp. 142-144.

currency, determined by the rate of exchange at the appropriate date, will discharge the debt. A clear explanation of the distinction between money of account and money of payment is to be found in the judgment of *Fullagar* J. in *Goldsbrough Mort & Co. Ltd.* v. *Hall* (1), where the authorities on this branch of the law are fully set out. Where the same word, such as "pounds," is used to describe units in different currency systems and the parties have not, in their contract, specified any particular "pound," the money of account may be found to be either what is money as determined by the law of the place of payment (as was held in *Adelaide Electric Supply Co. Ltd.* v. *Prudential Assurance Co. Ltd.* (2)—dividends previously paid in London made payable only in Australia and only in pursuance of declarations of dividend made in Australia); or what is money in a monetary system to which the parties have referred for the purpose of defining their obligations (as in *De Bueger* v. *J. Ballantyne & Co. Ltd.* (3)—contract made in London in 1932 for services in New Zealand at a salary expressed in pounds sterling).

When the meaning of the obligation in respect of the money of account has been determined in this case the method of discharging it by money of payment presents no difficulty. The plaintiffs say that the obligation is to pay £1,000 in English money: the defendant says that the obligation is to pay £1,000 in Australian money. If the payment is due in London, the obligation will be satisfied by paying £1,000 English currency in London or the equivalent in sterling of £A.1,000 as the case may be; if the payment is due in Australia, the obligation will be satisfied by paying the equivalent of £1,000 sterling in Australian currency or £A.1,000, as the case may be. The important matter to be decided is that of the character of the substantive obligation.

The construction of a contract is determined according to the proper law of the contract—i.e. the law or laws by which the parties intended or may be presumed to have intended the contract to be governed: *Hamlyn & Co.* v. *Talisker Distillery* (4); see *Mann* on *The Legal Aspect of Money*, pp. 154, 162, 169. The proper law of a contract is the law of the place with which, to use the words of many cases, it has the most real connection—*South African Breweries Ltd.* v. *King* (5). That place is usually the place where the contract is made: *Peninsular & Oriental Steam Navigation Co.* v. *Shand* (6). But if the contract is to be performed in another place, it may be

(1) (1948) V.L.R. 145.
(2) (1934) A.C. 122.
(3) (1938) A.C. 452.
(4) (1894) A.C. 202.
(5) (1899) 2 Ch. 173.
(6) (1865) 3 Moo. P.C.C. (N.S.) 272 [16 E.R. 103].

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the law of that place—*Chatenay* v. *Brazilian Submarine Telegraph Co. Ltd.* (1). The actual intention of the parties if expressed is prima facie decisive of the question. In all cases it is a question of the intention, actual or presumed, of the parties: *Mount Albert Borough Council* v. *Australasian Temperance & General Mutual Life Assurance Society Ltd.* (2).

In the present case the contract was made by the Government of Queensland under the authority of a Queensland statute. The fact that a Government is a contracting party is a weighty circumstance in determining what is the proper law of a contract—*R.* v. *International Trustee for the Protection of Bondholders Aktiengesellschaft* (3). In the case of persons subscribing to the loan in Queensland or elsewhere in Australia there could be no doubt that the law of Queensland would be the proper law. The proper law determining the substance of the obligations created by the contract should, in my opinion, be held to be the same in the case of all the debentures. It would be unreasonable to impute to the Government of Queensland and to a person who took up a debenture in some other country in which he happened to be at the time an intention that the law of that country should be the governing law. At least it can be said that, in the case of the present plaintiffs, who are to be regarded as holders of debentures issued in Australia, there is no circumstance which could be relied upon to suggest that any other law than the law of Queensland is the proper law of the contract.

It was argued that where a debenture-holder duly exercised an option to be paid in London, the debenture became a contract to pay in London (see *Auckland Corporation* v. *Alliance Assurance Co. Ltd.* (4)) and that English law became the proper law of the contract. But the proper law of the contract is a law which is ascertainable when the contract is made—it does not change from time to time if performance of the contract takes place from time to time in different countries—though the laws of those countries may be relevant as the laws of the place of performance in determining what is due performance. But even if English law were held to be the governing law in the present case it would not affect the rights and duties of the parties, because there is no difference between the English law and the law of Queensland with respect to the interpretation of contracts.

What then was the meaning according to Queensland law in 1895 of a promise to pay "sterling"? At that time what was "sterling" was determined by English law which was in force in

(1) (1891) 1 Q.B. 79.
(2) (1938) A.C. 224, at p. 240.
(3) (1937) A.C. 500, at p. 531.
(4) (1937) A.C. 587, at p. 597

Queensland. The result is that "sterling" in a contract governed by the law of Queensland then meant sterling as determined by English law. "Sterling" in relation to currency, means, according to the *Standard Dictionary* "having a standard of value or fineness established by the British Government; said of British money of account." See definition of "sterling" in *Webster's Dictionary*—"Lawful money of England or later of Great Britain or of those British Possessions having no separate coinage"—i.e. sterling means lawful English currency as distinct from a Dominion or Colonial currency which is established independently of English law. This was held to be the meaning of "sterling" in *De Bueger* v. *J. Ballantyne & Co. Ltd.* (1), this meaning being said to have obtained from the 17th and 18th centuries.

The meaning of "sterling" has not changed since 1895. The money now current in Queensland as "pounds" is not pounds sterling. It is a different money both in respect of the law which makes it money (which is now Australian law) and in respect of its exchange value. Accordingly, in my opinion, the substance of the obligation under each of the £1,000 debentures is, according to the law of Queensland, to pay £1,000 in English currency. That is what is owed. Payment of what is owed may be made in legal tender in the place of payment. If payment is made in Australia the money of payment may be Australian and in that case the equivalent in Australian currency of £1,000 sterling must be paid.

But it is argued for the defendant that the law of the place where payment is due determines not merely the currency in which payment may be made, but, in this case, determines also what amount is to be paid. As already stated that law determines what is legal tender in that place, and, unless the parties have agreed to the contrary, determines the currency by means of which the obligation is to be performed—"In determining what currency is intended, the general rule prima facie applies that the law of the place of performance is to govern"—*Adelaide Electric Supply Co. Ltd.* v. *Prudential Assurance Co. Ltd.* (2); *Ottoman Bank of Nicosia* v. *Chakarian* (3). But the measure of the obligation—the determination of the amount of indebtedness, as distinct from the mode of payment of the debt—is fixed by the proper law of the contract. The application of the law of the place of performance for the purpose of determining the mode of performance cannot properly be "extended so as to change the substantive or essential conditions of the contract"—*Auckland Corporation* v. *Alliance Assur-*

(1) (1938) A.C., at p. 461.
(2) (1934) A.C. 122, at pp. 145, 151, 156.
(3) (1938) A.C. 260, at p. 271.

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ance Co. Ltd. (1). The present case is a case in which the parties have expressly stipulated that the obligation is to be measured in " sterling " and the obligation remains the same wherever it is to be, or is in fact, performed.

The Commonwealth contends that, as the option to require payment in a particular place was not exercised on or before 1st July 1944, the holders of the debentures lost the right to require payment in London. The plaintiffs argue that notice could effectively be given at any time, as long as six months' notice was given. But the debenture says nothing about six months' notice. It requires notice on or before 1st July 1944 if the holder desires to receive payment at any particular one of the places mentioned. When a question arises as to whether a failure to comply with a provision as to time entitles the other party to a contract to be discharged from the obligations of the contract, it must be determined whether " time is of the essence " of the contract. But no such question arises in this case. The right to be paid in one particular place, e.g. London, was expressly made conditional on the due giving of the notice, and the notice was not so given. The words of the debentures are clear—" but notice must be given . . . on or before 1st July 1944." The result, in my opinion, is that there is no provision in the contract which, in the case of the plaintiffs, effectively specifies a place of payment, which must therefore be determined upon the general rules of the relevant law.

The obligation is to pay only the holders of debentures, on presentation of debentures. The identity of the holders of debentures at maturity cannot be known to the Government until debentures are actually presented for payment. Thus the ordinary rule that the debtor must seek out his creditor in order to pay a debt if the creditor is within the realm cannot be applied in the present case. Until a debenture is presented there is no obligation to pay on that debenture. The Government of Queensland was bound to have representatives in London for the purpose, but only for the purpose, of payment to holders of debentures who duly exercised their option to be paid in London. In respect of other holders, the position is that they must, in order to obtain payment, present their debentures to the Government of Queensland (now to the Government of the Commonwealth) where that Government is—namely, in Australia. Thus if the rights of the debenture holders as to prescribing a particular place for payment are regarded as having been transferred to the plaintiffs in this action, those

(1) (1937) A.C. 587, at p. 606.

rights, owing to the delay in the giving of the notice, do not entitle the plaintiff to require payment elsewhere than in Australia.

But the debentures have in fact been exchanged for certain Commonwealth inscribed stock. If, therefore, the plaintiffs are to be treated as having agreed to substitute for their rights with respect to place of payment under the debentures the rights which they acquire as owners of such inscribed stock, then, in respect of place of payment, they are in the same position as other owners of that stock. No argument has been addressed to the Court to show that owners of that stock are entitled to be paid in London.

Accordingly, whether the plaintiffs are treated as being holders of the debentures or as being owners of inscribed stock, they can, in my opinion, claim payment of principal only in Australia. But this circumstance does not alter the substance of the obligation to pay sterling. " Sterling " is an express term which it is impossible to ignore and the use of which excludes the prima-facie rule that the obligation is an obligation to pay in " pounds " in legal tender in the place of payment (*De Bueger* v. *J. Ballantyne & Co. Ltd.* (1)).

In *Maudsley* v. *Colonial Mutual Life Assurance Society Ltd.* (2) it was held by O'Bryan J. that a life insurance policy for " one thousand pounds sterling " issued in 1890 imposed an obligation to pay only in Australian pounds. His Honour relied on various circumstances, such as the facts that the policy was issued by an American company, and that the proposal (which was accepted by the issue of the policy) was for a policy assuring a sum in Australian pounds, but particularly based his conclusion on his opinion that sterling did not mean " lawful money of England." I have given my reasons for taking a different view of the meaning of " sterling."

Thus I am of opinion that the obligation under the debentures is an obligation to pay in Australia on 1st January 1945 the specified sum in sterling, i.e. in English money, and that it may be paid in Australian money calculated by reference to a proper rate of exchange.

A question arises as to what is the proper rate of exchange. The debentures became due on 1st January 1945. The plaintiffs, if they had presented the debentures in Australia, were then entitled to payment of the Australian equivalent of the amount of the debentures in English money at the then current rate of exchange. I can see no reason for holding that the amount of Australian currency payable should be increased or decreased by reason of subsequent variations (if any) in the rate of exchange.

(1) (1938) A.C., at p. 461. (2) (1945) V.L.R. 161.

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The plaintiffs claim interest on the whole of the principal monies from either 1st January 1945 or from six months after they gave notice requiring payment in London. Interest is not payable under the contract between the parties after 1st January 1945. Interest as damages for non-payment of the monies due cannot be claimed at common law—*London, Chatham & Dover Railway Co.* v. *South Eastern Railway Co.* (1). The plaintiffs claim interest under *Lord Tenterden's Act* (3 & 4 Will. IV., c. 23, s. 28) which, it is argued, applies either as Queensland law, the proper law of the contract, or as Victorian law—the law of the place where the Court is now exercising Federal jurisdiction—*Judiciary Act* 1903-1947, s. 79. *Lord Tenderden's Act* in Queensland is *The Common Law Practice Act of* 1867, s. 72 and in Victoria is the *Supreme Court Act* 1928, s. 78. No notice in writing claiming interest has been given, but the principal sum claimed is a sum certain, payable by virtue of a written instrument and at a date or time certain. In such a case the Court " may if it thinks fit " allow interest.

The plaintiffs required payment of sterling. The Commonwealth offered only payment of Australian money. The Commonwealth was in my opinion wrong on this point. But the plaintiffs did not present or offer to present the debentures for payment in Australia. They insisted on payment in London. The Commonwealth was entitled to refuse to pay in London and was, in my opinion, right on this point. The Commonwealth therefore was not in default. Interest under *Lord Tenterden's Act* is given only by way of damages for default. In my opinion no interest should be allowed.

I would therefore answer the questions in the case as follows :—

(*a*) No.

(*b*) On 1st January 1945 in Australia.

(*c*) Yes.

(*d*) No.

RICH J. The substantial question which arises in the case stated is whether the plaintiffs are entitled to the payment of certain monies in English or Australian currency. The facts giving rise to this question can be stated in brief outline. In 1895 the Queensland Government decided to raise a loan by the issue of debentures secured upon the Consolidated Revenue of Queensland. The principal monies were payable on the 1st day of January 1945 either in Brisbane, Sydney, Melbourne or London at the option of the debenture holder and the holders were entitled to the amount payable thereunder in " pounds sterling." One further term of

(1) (1893) A.C. 429.

these debentures should be mentioned. While the principal sum was made payable in various places at the option of the holder, it was provided that notice should be given to the Treasurer of the Colony on or before the 1st day of July 1944 of the place at which it was intended to present the debentures for the payment of such sum.

The debt of the then Colony of Queensland under these debentures was taken over by the Commonwealth pursuant to the *Financial Agreement Act* 1928, and the debenture holders received in place of their debentures Commonwealth inscribed stock maturing on the 1st January 1945. The plaintiffs now claim that they are entitled to be paid the amount of the stock held by them in London in English currency while the defendant claims to be entitled to repay this amount in Australian currency.

The question for our consideration is one of the construction of this particular contract. When the contract was made in 1895 between the Colony and the debenture holders there was then both in England and Australia a common unit of account and a common unit of payment. The unit of payment i.e., pound sterling, was the same in England and Australia and it was obviously assumed that throughout the currency of the contract this state of affairs would remain. Between the date of the contract in 1895 and the date of repayment in 1945 changes occurred whereby the common unit of payment became disparate—in other words there came into existence two units of payment—an English pound and an Australian pound.

In these circumstances little importance can be given to the use of the words " pounds sterling " in the original debentures. If the words " pounds sterling " had been used in a contract made after the time when Australian pounds were different from English pounds, it would be good ground for holding that the parties intended that the pounds sterling should be English pounds: cf. *De Bueger* v. *J. Ballantyne & Co. Ltd.* (1).

The position is that a situation has developed which the parties to the debentures never envisaged and the question to my mind which must be considered is whether any and what implication as a matter of law can be made in the new situation as to the form and means of payment to the plaintiffs. This rather suggests the problem relating to the question of frustration of contracts.

In my opinion such an implication can be made depending substantially on the circumstances in which the debentures were

(1) (1938) A.C. 452.

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issued. The original contracts between the Colony and the debenture holders were made pursuant to the statutory law of Queensland: the moneys repayable by these debentures to the holders were secured on the Consolidated Revenue of Queensland and the moneys so repayable were repayable in a currency which was the then currency of Queensland, as well as the currency of other parts of the Empire. Having regard to these considerations it should, I think, be implied that the proper law of these contracts was the law of Queensland and that the moneys repayable thereunder should be repaid in the then currency of Queensland. The implication of law to which I have referred entitled the State of Queensland, when the Australian pound came into existence, to pay the debenture holders in Australian pounds, and as the rights of the holders of the inscribed stock are agreed to be the same as or similar to the rights of the original debenture holders, the Commonwealth in my opinion is entitled to repay the holders of the inscribed stock in Australian currency. This conclusion substantially disposes of this case.

Another matter was argued on behalf of the defendant, viz., that as the plaintiffs had not exercised the option mentioned in the debenture on or prior to 1st July 1944 they could not exercise an option requiring payment in London. The clause relating to this option could never have been intended to affect the rights of the debenture holders to receive payment of their principal sums whether in English or Australian currency and must be regarded as machinery for the convenience only of the borrower, and as not affecting the rights of the lenders to receive repayment of these sums in accordance with their substantial rights under their contract.

I may add that on the facts of this case the plaintiffs are not entitled to interest.

For these reasons I answer questions (*a*), (*c*) and (*d*), No and question (*b*), The principal sums are payable at the places mentioned in the debentures upon presentation of the inscribed stock as the rights of the registered holders of the stock "conformed in all respects with the rights conferred by the said Queensland Government debentures" (par. 2 of the case stated).

STARKE J. Case stated for the opinion of the Court.

The plaintiffs are the registered holders of inscribed stock issued by the Commonwealth. The stock was issued pursuant to a debt-conversion scheme whereby the Commonwealth took over (*inter alia*) the liability of the State of Queensland upon various debentures issued by it: see *The Government Loan Act of* 1894 (Q.)

(38 Vict. No. 32); *Financial Agreement Acts* 1928, 1929 and 1932; *Debt Conversion Agreement Act* 1931; *Commonwealth Inscribed Stock Act* 1911-1945. By the conditions under which this stock was issued the holders for the time being were entitled to the rights which conformed in all particulars with the rights conferred by the Queensland Government debentures.

These debentures entitled the holder to the principal sum therein mentioned in " pounds sterling " and which, together with interest at the rate of $3\frac{1}{2}$ per cent per annum, were secured upon the Consolidated Revenue of Queensland.

The principal sums were payable on 1st January 1945 either in Brisbane, Sydney, Melbourne or London, at the option of the holder but notice was required to be given to the Treasurer of the Colony on or before 1st July 1944 of the place at which it was intended to present the debentures for payment of such principal.

But it must be observed that the debentures were surrendered and the stock issued in lieu thereof was Commonwealth stock charged upon the Consolidated Revenue Fund of the Commonwealth appropriated for that purpose: see *Commonwealth Inscribed Stock Act* 1911-1945, s. 6. And also it must be observed that the stipulation requiring notice to the Treasurer of the Colony of the place at which it was intended to present the debentures for payment became inapplicable for the debentures were surrendered and the Commonwealth took over the liability by the issue of its own stock, which is inscribed in a stock ledger, but the owner may apply for stock certificates to bearer which are transferable by delivery. It does not appear in the case that stock certificates were applied for or issued to the plaintiffs.

The option, however, of the holders to require payment at Brisbane, Sydney, Melbourne or London remained.

And it is further to be observed that the currency in Queensland appears to have been regulated by the *Coinage Act* of New South Wales of 1855 (19 Vict. No. 3), and the *Treasury Notes Act* of Queensland (30 Vict. No. 11 and 56 Vict. No. 37). All that need be said of these Acts is that the gold coin issued from the Royal Mint or the Branch Mint at Sydney were the only legal tender for payments except as therein provided.

The law which governs the interpretation and the extent of the liability of the Commonwealth on the stock issued by it is undoubtedly the Australian law. That law is the proper law of the contract because it is the system which has the closest and most real connection with the transaction (*Mount Albert Borough Council*

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v. *Australasian Temperance & General Life Assurance Society Ltd.* (1); *R.* v. *International Trustee for the Protection of Bondholders Aktiengesellschaft* (2)).

The Australian law and the English law do not differ in this respect.

The word "pound" or the words "pound sterling" designate English moneys: the money or unit of account in which debts and prices are expressed.

The monetary systems of England and Australia doubtless rest upon independent constitutional powers. But the money of account of both England and Australia is and always has been the same: see *Adelaide Electric Supply Co. Ltd.* v. *Prudential Assurance Co. Ltd.* (3). Debts and prices are expressed in terms of pounds, shillings and pence. The pound was and is the unit of account in both England and Australia. A pound in Australia is, as in England, a pound whatever its value in exchange (*The Baarn* (4)). "It is a mistake to define the unit of account in terms of the metallic standard; for the unit of account is that which persists even when the standard changes" (*Hawtrey, Currency and Credit*, 3rd ed. (1928), p. 212).

Money as a means whereby debts are discharged derives its character from its relationship to the money of account since the debts must have been expressed in the terms of the latter. The money of account is the description or title and money is the thing which answers the description: see *Keynes, A Treatise on Money*, vol. 1, pp. 3-4.

The question is what is the proper construction of a contract to pay a certain number of pounds sterling at the option of the holder of stock in Brisbane, Sydney, Melbourne or London. The words should, I think, be referred to the money of account which was common to England and Australia and not to money whereby the obligation might be discharged. It is an obligation to pay a sum of money expressed in a money or unit of account common to England and Australia.

How then is that obligation to be discharged? A comparison of the decisions in *Broken Hill Pty. Co. Ltd.* v. *Latham* (5) and *Adelaide Electric Supply Co. Ltd.* v. *Prudential Assurance Co. Ltd.* (3) solves, I think, that problem.

In *Latham's Case* (5) mortgage debentures were issued promising to pay a certain number of pounds in either Australia or London

(1) (1938) A.C. 224, at pp. 240-1.
(2) (1937) A.C. 500.
(3) (1934) A.C. 122.
(4) (1933) P. 251, at p. 265.
(5) (1933) 1 Ch. 373.

at holder's option. The Australian law appears to have been the proper law of the contract: see *Latham's Case* (1). The primary judge held that the payment to debenture holders electing to be paid in London must, both as to principal and interest, be in sterling without deduction of the exchange value of the pound in Australia. By a majority the Court of Appeal resolved that the debentures should in all cases be paid in Australian currency and converted into sterling at the rate of exchange current in London on the due date for payment.

In the *Adelaide Case* (2) this decision was overruled. The company was an English company. Its capital included certain preference shares issued in England and held by parties registered in England as the holders thereof. The shares were converted into stock. The company passed a special resolution that all dividends should be paid in and from Adelaide or elsewhere in Australasia. The company paid dividends on its stock by delivery to its stockholders of warrants payable in South Australia. The stockholders registered in England claimed that they were entitled to be paid their dividends in sterling in England in English legal tender for the full nominal value thereof and not subject to deduction for Australian exchange.

But it was held that the company discharged its obligation by paying in Australian currency that which was in Australia legal tender for the nominal amount of the dividends.

Lord *Tomlin* said (3): "Now where in an English contract governed prima facie by English law there is a provision for performance in part in another country the prima facie presumption is that performance is to be in accordance with the local law. . . . That must mean, applied to the facts of this case . . . that the obligation to pay is an obligation to pay a sum of money expressed in a money of account common to the United Kingdom and Australia, and that when the payment under the terms of the obligation has to be discharged in Australia it has to be made in what is legal tender in Australia for the sum expressed in that common money of account. It cannot mean that it is an obligation to pay a sum of money expressed in money of account which is not Australian money of account and that therefore if payable in Australia it must be discharged there by payment either in English legal tender of the amount expressed in the English money of account or in Australian legal tender of such an amount expressed in the money of account of Australia as will buy in London the amount in English

(1) (1933) 1 Ch., at pp. 388, 409-410.
(2) (1934) A.C. 122.
(3) (1934) A.C., at pp. 145-146.

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legal tender of the obligation expressed in the English money of account." The Lords *Warrington of Clyffe* and *Russell of Killowen* agree, as I read their judgments, in this view.

The fact that the obligation is expressed in pounds sterling and not in pounds makes no difference in principle for the money of account whether expressed in pounds or in pounds sterling is the same both in England and Australia. Before fluctuations in exchange occurred in the value of the currencies of England and Australia it was not unusual in commercial documents operating within Australia, e.g. cheques, to find the obligation expressed in pounds sterling, for that was the unit of account in Australia, but the obligation was discharged in currency which was legal tender according to Australian law. But that no doubt was a matter of construction.

The case of *Auckland Corporation* v. *Alliance Assurance Co. Ltd.* (1) accords with the *Adelaide Case* (2) though some of the reasoning of Lord *Wright* is not easy to follow (cf. the *Auckland Case* (3)). *Payne* v. *Deputy Federal Commissioner of Taxation* (4) " throws no light upon the matters at issue here " (See the *Auckland Case* (5)). It was decided upon the construction of the Australian *Income Tax Acts*. In *De Bueger* v. *J. Ballantyne & Co. Ltd.* (6) the parties stipulated in an English contract for the payment of pounds sterling in New Zealand. In the agreement there in question it was said that the word " sterling " was an express term intended to exclude and in part excluding the prima-facie rule according to which New Zealand pounds would be meant as being the currency of the place of payment. That construction is conclusive of that case, but the observations upon the *Adelaide Case* (2) do not, I think, quite accord with the views of the Lords *Warrington of Clyffe*, *Tomlin* and *Russell of Killowen* with respect to money of account and money whereby debts are discharged. Stock issued by the Government of Australia, I would add, is not a common form of business document and it seems improbable that the Australian Government by the use of the word " sterling " meant English currency or its value and nothing else.

It appears to me that the debentures issued by the Queensland Government and the stock issued by the Commonwealth were referring to the money of account common to both England and Australia and not to the money whereby debts are discharged or the money of payment.

(1) (1937) A.C. 587.
(2) (1934) A.C. 122.
(3) (1937) A.C., at pp. 604, 605, 606.
(4) (1936) A.C. 497.
(5) (1937) A.C., at p. 609.
(6) (1938) A.C. 452.

Both England and Australia are now off the gold standard. And exchange has been pegged so that in effect £100 in English currency is equivalent to £125 in Australian currency in case of telegraphic transfer. But if and when England and Australia return to the gold standard the position will be precisely the same as that described by Lord *Tomlin* in the *Adelaide Case* (1).

The English currency is now regulated by the *Coinage Acts* of 1870, 1891 and 1920, the *Currency and Bank Notes Act* of 1928 and the *Gold Standard Acts* of 1925, 1931, and any subsequent amendments. The Australian currency is regulated by the *Coinage Acts* of 1909, 1947, the *Commonwealth Bank Act* 1945 and the *Banking Act* 1945. But the gold content and the standard fineness of the metallic currency remains the same. The English *Coinage Acts*, however, provide for various denominations of silver and bronze coins that are not mentioned in the Australian Acts.

It follows, if I am right, that the Commonwealth can only discharge the indebtedness, in respect of the stock in question here, which the holders elected to be paid in London, by payment in English currency without deduction on account of the exchange value of the pound in Australia, and in respect of payments which the holders elected to be paid in Brisbane, Sydney or Melbourne, by payment in Australian currency without conversion into the equivalent amount in English currency at the due date of payment.

The Commonwealth contended that the holders had not exercised their option for payment in London in due time; that they had not given the notice required by the debentures before 1st July 1944. But the contention is, I think, untenable, for the debentures were surrendered and converted into stock and the notice required by the debentures necessarily lapsed. The holders of the stock were doubtless bound to exercise their option before they could insist upon payment at any particular place. They did so exercise that option on 22nd December 1944 and required payment in London and that, I think, was a due exercise of the option in the circumstances of the case.

The stock holders are not entitled to interest upon the amount of the stock held by them at 3½ per cent per annum since the 1st January 1945: see *London, Chatham and Dover Railway Co.* v. *South Eastern Railway Co.* (2). But I should think that they might claim for damages for breach of contract in not paying moneys owing to them on the appointed day of 1st January 1945. And the damages might be measured by the interest payable on

(1) (1934) A.C. 122.

(2) (1893) A.C. 429.

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the stock (*Cook* v. *Fowler* (1) ; *In re Roberts* ; *Goodchap* v. *Roberts* (2) ; *Mellersh* v. *Brown* (3)).

The questions stated should be answered :—

(*a*) Yes on 1st January 1945.

(*b*) Unnecessary to answer.

(*c*) No.

(*d*) No, but to damages for detention of the debt.

DIXON J. These proceedings are by way of case stated in an action brought against the Commonwealth in the original jurisdiction of the Court. The chief question for the Full Court concerns the measure of the Commonwealth's liability upon some Consolidated Inscribed Stock which fell due on 1st January 1945. The plaintiffs are holders of a quantity of the stock. There is a further question which is subsidiary or consequential. It is whether the Commonwealth is under a liability to pay interest upon the principal amount of the stock held by the plaintiffs from the due date until payment or judgment.

The questions concerning the measure of the Commonwealth liability arise from an uncertainty as to the money, English or Australian, to be used for ascertaining the substance of the obligation, which is of course expressed in pounds. As commonly happens in questions of such a kind, for the purpose of resolving the uncertainty the parties attach much importance to determining the place where payment should be made. There is an option of place in the debenture and the plaintiffs claim that they effectively chose London, a claim the Commonwealth disputes. But it may be doubted whether the measure of the liability should be governed by the stockholders' exercise of an option of place of payment. There is the anterior and overriding question of determining as between Australian and English money, in which money the obligation may be said to sound.

The Commonwealth Inscribed Stock in question represents Queensland Government debentures that were issued by the Colony of Queensland in 1895 with a currency of fifty years.

The liability upon the debentures passed to the Commonwealth as on 1st July 1929 pursuant to Part III. of the Financial Agreement (p. 175 of vol. 42 of the Commonwealth Acts) and to s. 4 of the *Financial Agreements* (*Commonwealth Liability*) *Act* 1932.

In March 1932 the debentures were surrendered in exchange for Commonwealth Consolidated Inscribed Stock, presumably pursuant

(1) (1874) L.R. 7 H.L. 27.
(2) (1880) 14 Ch. D. 49.
(3) (1890) 45 Ch. D. 225, at pp. 228-229.

to the *Commonwealth Debt Conversion Act* 1931. It is conceded that there was conferred upon the registered holders for the time being of the stock rights which conformed in all particulars with the rights conferred by the debentures. Compare s. 12 (4) of the last-mentioned Act, which speaks of "stock conforming with the conditions of the existing securities in respect of duration redemption rate of interest and in all other respects."

The debentures were originally issued by the Governor in Council of the Colony of Queensland under the authority of a statute of that colony entitled *The Government Loan Act of* 1894. The statute authorized the Governor in Council to raise by way of loan such several sums not exceeding two million pounds as might be required. A particular authority was included for the sale of the debentures or inscribed stock securing the amounts, in places beyond the limits of Queensland, and the employment of agents for the purpose. The statute provided that all sums borrowed under the authority of the Act should be repayable on 1st January 1945. In the exercise of these powers an amount of one and a quarter million pounds was first raised in London. Then two or three months later two sums, one of a quarter of a million and the other of half a million pounds, were raised in Australia. These loans were all secured by debentures in the same form, in denominations of £1,000 and £500. The particular debentures which were afterwards transmuted into the Commonwealth Inscribed Stock now held by the plaintiffs formed part of the loan of £250,000 raised in Australia. The amount was wholly subscribed by one lender, a body carrying on business in Queensland and elsewhere in Australia, and debentures securing the loan were issued to the lender in Queensland.

The debentures were dated 1st November 1895 at Brisbane and bore the signatures of the Governor and the Colonial Treasurer and of two officials. They were expressed to be issued by the authority of the Parliament of Queensland, citing the statute. The operative words then proceeded—"This debenture entitles the holder to the sum of one thousand pounds sterling which together with interest at the rate of three pounds ten shillings per cent per annum is secured upon the consolidated revenue of Queensland. The principal sum will be payable on the first day of January 1945 either in Brisbane, Sydney, Melbourne or London at the option of the holder; but notice must be given to the Treasurer of the Colony, on or before the first July 1944, of the place at which it is intended to present this debenture for payment of such principal."

The rest of the form of debenture was given up to interest and provided that interest coupons might be presented at any of the

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same four places but required that the place where "the purchaser," as he was called, wished interest to be paid should be endorsed on the debenture when issued and that any change should be registered at the Treasury in Brisbane six months before the interest date.

It will be noticed that each of the four places named for the repayment of principal has an equal status, none has any prima-facie priority over the others, and that nothing is said as to place of payment if the holder fails to choose one of them before 1st July 1944 or at all. In fact the stockholders failed to name any place until 22nd December 1944, when they sent to the Deputy Registrar of Inscribed Stock at Adelaide, the place of registry, a request that "in accordance with the conditions on which the stock was issued the amount of the stock . . . be paid on maturity in London in sterling."

It would have been absurd to notify the Colonial Treasurer of Queensland, as the terms of the debenture prescribed, and of course the debentures could not be presented in London or anywhere else, for they had already been surrendered in exchange for the stock. No point seems to be taken that in these respects there was a non-compliance with the terms of the debenture, but the Deputy Registrar refused the request for payment of the loan in London, stating that the conditions provided that six months' notice to redeem in London would be necessary.

The contention of the Commonwealth is that unless the choice as to the place of payment was exercised before 1st July 1944 it was lost. What would be the result in ascertaining a place of payment is not clear. Presumably it is of small importance in the decision of the case whether the consequence of the loss of the option of place of payment would be that the choice passed to the Commonwealth or that the stock became redeemable as ordinary inscribed stock is or that the Commonwealth became liable to pay at the place of residence of the stockholder. Whichever was the result, the place would be within Australia. A fourth position, however, was put for the Commonwealth, namely, that the terms of the debenture contemplated that payment should be made on presentation of the debenture and that once the option of place was lost it would naturally be implied that the holder must present the debenture at the Treasury of the Government concerned, which originally was Queensland.

These contentions assume that in requiring notice before 1st July 1944 the debenture made time an essential condition of the holder's right to choose the place of payment. It might have been reasonable so to understand the provision if a place had been

designated as the place where prima facie payment was to be made and the option had been to change it to some other place. But, as the debenture is expressed, there is no place of payment named unless and until the holder exercises his choice among the four places included within his option, all of them having equal status and none having a priority. If time is of the essence of his right to choose, a failure to give notice before the expiry of the time limited would leave the determination of the place of payment to implication. It therefore appears to be a better interpretation to associate the length of notice required with the obligation of the Government to provide the money on the due date at any of the places named, and not with the existence of the option. That is to say, the more natural meaning to ascribe to the provision is that unless notice of the place where the holder intends to present his debenture is given before the specified date, he cannot insist on payment at that place on the due date. In other words, before he can insist on payment anywhere he must give notice of the place and it must be a reasonable notice, the length being fixed, if payment is to be made on the due date, at six months. Full effect is thus given to the words, payable either in Brisbane, Sydney, Melbourne or London at the option of the holder " and the ensuing words as to notice on or before 1st July 1944 are treated as a qualification of the words, on the first day of January 1945."

The basal consideration justifying this interpretation of the provision as to the time for giving notice is a consideration which lies at the foundation of the whole case. It is that in 1895 when the debentures were issued it could be of no substantial importance in which of the four places named the sum denominated was paid. The same sovereign formed the basis of the currency of Queensland and of Great Britain. The exchange between the two countries was unlikely to move outside the gold points. The Australian colonies were regarded as enjoying the same monetary system as Great Britain and it is safe to assume that the possibility of a divergence was as little considered as that of an inconvertible paper currency. Accordingly a choice among three Australian capitals and London could be regarded as affecting only the convenience of payment and not the measure of the liability.

For much the same kind of reason it is difficult to find any significance in the use of the word " sterling." It was of course not used at that date to distinguish the money of the United Kingdom from Australian money, that is money current in the Australian colonies. The distinction did not exist. Measures had been taken in 1826 by 7 Geo. IV. No. 3 to drive out the Spanish

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dollar and " to promote the circulation of sterling money of Great Britain in New South Wales " and 19 Vict. No. 3 had declared that for payments over forty shillings gold coin from H.M.'s Royal Mint in London or from the Royal Mint in Sydney should be the only legal tender. For the rest it is enough to refer to the legislative and administrative history given in the argument of the *Adelaide Electric Supply Co. Ltd.* v. *Prudential Assurance Co. Ltd.* (1). The debentures were thus issued when the same money of account and legal tender prevailed in Australia and in Great Britain and no other state of affairs was in contemplation. Although no doubt the use of the word " sterling " to denote the British money of this system when distinguishing it from foreign money had long obtained within the system itself the word added nothing to the meaning or effect of a monetary expression to which it was attached. Tradition and the persistence of habit were responsible for its frequent use in a document after the word " pounds " in any monetary expression. It rounded off the statement of the amount and it sometimes served the humble but perhaps more useful purpose of preventing an unauthorized addition of shillings and pence to the pounds. To employ the word " sterling " or to fail to employ it in expressing a sum of money had no significance. It was a fuller and more formal description of the only money in use in Australia and in Great Britain whether as money of account or as currency. But in all domestic transactions it was an otiose addition to the expression of a sum of money. When the changes of currency and the separation of the money systems made the use of the word in Australia somewhat inappropriate some difficulty was experienced in breaking people from the habit of writing it in cheques after amounts of money. How accidental its former use here had been is well illustrated by the money expressions occurring in Federal statutes to which counsel for the Commonwealth referred during the argument. Since the divergence of the two monetary systems and the establishment of a high premium on exchange on London it has become the custom to use the word " sterling " to distinguish the £E from £A. But that more recent usage appears to have no bearing upon the meaning or application of the monetary expression employed in the debentures.

On the part of the plaintiffs an attempt was made to place upon the word " sterling " in the debentures a meaning which identified the money intended by the debenture with the English pound as sterling par excellence and then to treat that money as being continued only in Great Britain and as discontinued in Australia.

(1) (1934) A.C. 122, at pp. 128-131.

From this it was said to follow that the measure of the liability was in English money. But the contention involves more than one fallacy in the use of terms. The intention of the debenture was to denote the money of Queensland, and of Australia generally, at least as much as that of Great Britain, and the connotative names which it used for that purpose were pounds sterling. It used these names because they denoted what was then the money obtaining in the " sterling " parts of the Empire.

Upon the divergence of the money of this country from that of the United Kingdom, the continuity within Australia of the country's money system was no more broken than the continuity within the United Kingdom of the money system of Great Britain. The " links " in the chain of forms of currency were just as unbroken here as they were in England. Continuity or unbroken succession is a mark of moneys of account and in this sense the historical continuity in the two countries of their moneys of account was, almost necessarily, complete. Indeed it was the inability to discern a point of change that led Lord *Tomlin* to the conclusion that up to 1932 the moneys of account had not diverged but were still one : *Adelaide Electric Supply Co. Ltd.* v. *Prudential Assurance Co. Ltd.* (1). The experience, however, of the last fifteen years has made it impossible to doubt that the monetary systems are no longer one. Naturally, when the divergence took place the word " sterling " followed the money of the United Kingdom, not because Australia left the gold standard earlier but because the world was accustomed to use it of British money, the money of a great financial nation. Nevertheless, the sense, the denotation, of the word " sterling " underwent some change because it no longer applied to the money of Australia and New Zealand except according to an extended and secondary meaning. The accident that the word " sterling " was used in the debentures, for in truth it is little more than an accident, is no warrant for the conclusion that when a difference developed between the money of account of Great Britain and that of Australia, the debentures applied only to the former.

More substantial considerations must determine the money by which the liability is to be measured. It is a case of an obligation incurred under one undivided monetary system but maturing after a division in the system has taken place, the obligee having an option of place of payment which was not intended to give him an option between two differing monetary systems as measures of value.

(1) (1934) A.C. 122, at p. 145.

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As has already been said, at this date there can hardly be any doubt that the Australian pound, considered not only as money of payment but also as money of account, is different from the English pound. In cases arising before the development was complete much judicial difference of opinion was disclosed upon the subject, particularly when read with some decisions upon New Zealand obligations : see *Westralian Farmers* v. *King Line* (1) ; *Broken Hill Proprietary Co.* v. *Latham* (2) ; *Adelaide Electric Supply Co. Ltd.* v. *Prudential Assurance Co. Ltd.* (3) ; *Auckland Corporation* v. *Alliance Assurance Co. Ltd.* (4) ; *De Bueger* v. *J. Ballantyne & Co. Ltd.* (5). But the necessary implication of *Payne* v. *Deputy Federal Commissioner of Taxation* (6) appears to be that, by the time when the facts of that case arose, the English pound and the Australian pound had become different measures of value, different expressions in which to calculate debts, prices and therefore income.

However that may be, it has long been clear that although the Australian pound and the English pound have a common origin and a common denomination they now lack every other attribute which would make them a single money of account. The monetary systems of the two countries depend upon two independent legal sovereignties, or perhaps it would be better to say supremacies, each exercising their separate legislative authority and exercising it differently. The currency of the United Kingdom is entirely different except in denomination from that of Australia. It depends upon a different note issue, a different coinage and a different banking system. No Australian legal tender that is in circulation is legal tender in Great Britain and, except for a tender of not more than forty shillings in silver and not more than one shilling in bronze, no English legal tender in circulation in England is legal tender in Australia. Finally, there is the perhaps decisive fact that since December 1931, when the Commonwealth Bank Board undertook the responsibility of regulating the exchange between the £E. and the £A., a fixed rate of exchange has existed in which the buying rate of £E.100 is £A.125. It is fixed by governmental authority. There are thus two independent monetary systems established by the governments of two different countries adopting or continuing the same nomenclature but expressing different measures of value in terms of one another.

This must mean that they provide separate moneys of account. The expression " money of account " now appears to be recognized

(1) (1932) 43 Ll.L.R. 378, at p. 381.
(2) (1933) Ch. 373.
(3) (1934) A.C. 122.
(4) (1937) A.C. 587.
(5) (1938) A.C. 452.
(6) (1936) A.C. 497, at p. 509.

in English law. Indeed the expression was used in a statute as early as 1826. For 6 Geo. IV. c. 79 spoke of "assimilation of the currencies and monies of account throughout the United Kingdom of Great Britain and Ireland." When the world passed away from metallic money and the conception of money as a commodity chosen for its intrinsic value and bearing the imprimatur of the State, it was doubtless inevitable that the courts should adopt the distinction drawn by economists between currency and money as a unit of account. For it became more apparent that the distinction was reflected in practical consequences that could not be ignored. Plainly a monetary expression could not be considered a numerical reference to metallic currency or coins, concrete things. The conception, so familiar to economists, of money as a description of a standard or measure of value, as a unit in which debts and therefore prices might be calculated or expressed, was found to be one that was needed for some of the purposes of the law. For it is involved in the not unimportant legal proposition that the obligation to which a contract to pay a sum of money gives rise is to pay, in whatever the law regards as legal tender at the time when payment is made, as many of the units of currency as amount to the sum. This proposition lay at the foundation of the decision of the Supreme Court of the United States in the *Legal Tender Cases* (1) that the *Legal Tender Acts* did not impair the obligation of contracts. The Court acknowledged that in consequence of the Acts a debt contracted before they were passed might be discharged with the notes the Acts authorized instead of the gold or silver coins forming legal tender when the debt was incurred. But the Court denied that this impaired the obligation of a contract to pay money generally as distinguished from some defined species of money. "It was not a duty to pay gold or silver, or the kind of money recognized by law at the time when the contract was made, nor was it a duty to pay money of equal intrinsic value in the market. . . . But the obligation of a contract to pay money is to pay that which the law shall recognize as money when the payment is to be made"—per *Strong* J. (2). The distinction between money as the expression of a standard or unit of value, as the means of measuring an obligation, and the money which forms the means or instrument of discharging the obligation, the legal tender or the representative money by which it is paid, has another importance for the law. For where two or more countries are involved in a transaction, as

(1) (1871) 79 U.S. 382 [20 Law. Ed. 287].

(2) (1871) 79 U.S., at p. 548 [20 Law. Ed., at p. 311].

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apparently is thought to be the case here, the court may be called upon to decide what is the money that the obligor or debtor owes.

In deciding such a question the distinction enables the law to avoid a confusion between the money which the parties intended to use for the purpose of expressing the obligation, the money of account which serves to measure the obligation, and the money in which the debt so ascertained is to be discharged. Where the monetary units of the two countries have different names the parties may be expected to express their contract in a way which observes the distinction. For instance, if in New York a debt is contracted in dollars and made payable in Paris, there may be a question whether it was meant that the debtor should produce dollar bills in Paris and pay them over to the creditor or that he should convert the amount of the dollar debt into francs at the current rate of exchange and pay over the equivalent, but there could be no doubt that the amount of the indebtedness was to be measured in United States dollars. On the other hand, if the debt contracted in New York were payable in Vancouver it might be a question whether the parties intended that the obligation should be measured by United States dollars, even though paid in Canadian dollars. It is obvious that once it is determined in what money the obligation is measured the question in what currencies it may be paid can seldom have much bearing upon the value of the obligation, involving, as it will, no more than a question of conversion from one money to another at prevailing rates of exchange. To fail to distinguish between the two questions is to fall into an error of reasoning which may lead to a quite erroneous and unjust conclusion. But a confusion between the two questions is made easier by the natural presumption that when parties contract to pay a sum of money expressed in a form capable of describing the money of account of the place of payment they are referring to that money, not only as the money of payment but as the money of account, a presumption which applies notwithstanding that it is equally capable of describing the money of account of some other place with which one or other or both of the parties are associated, as for instance by domicile or residence or as the *locus contractus celebrati* : see *Auckland Corporation* v. *Alliance Assurance Co. Ltd.* (1). This presumption of course yields to any sufficient indication of intention arising from the language of the contract or the circumstances of the case. So in a contract of service made in England but to be performed in New Zealand in which the rate of remuneration was expressed in money described as " sterling," it was decided

(1) (1937) A.C. 587, at p. 606.

that in the circumstances the use of the word "sterling" had the purpose and effect of distinguishing between the two currencies and displacing the presumption: *De Bueger* v. *J. Ballantyne & Co. Ltd.* (1). In that case the money of account was the £E but the money of payment was the £N.Z.

The presumption that the money of the place of payment was intended as the money of account for the measurement of the obligation can scarcely have any validity when alternative places are stated in the contract. It is true that contracts may, and sometimes do, give an option to the obligee between two different systems of money for the ascertainment of the debt. An example may be seen in the "gold note" forming the subject of *R.* v. *International Trustee for the Protection of Bondholders Aktiengesellschaft* (2) set out by Lord *Atkin* which stated the debt in dollars and made it payable at the option of the holders in New York in gold coin of the United States of specified weight and fineness or in London in sterling at the fixed rate of $4.865 to the pound. The latter alternative said nothing about gold and by fixing the rate of conversion translated the amount of dollars named in the note into a fixed sum of pounds sterling. Thus the obligee took an option of measuring the obligation in American gold dollars or in English sterling. Annexed to the alternatives were different places of payment. But the option was not merely one of place but one of payment, that is to say it involved two alternative standards for the quantification of the debt.

But while, as this example shows, options of payment involving different measures of liability are in practice conferred on obligees in order better to secure them against the deterioration of the money of one country, that is no ground for presuming that when a money instrument names alternative places having different currencies as places at which the obligee may demand payment, the purpose is to give him an option to change the money of account in which the liability is to be ascertained. Options of place are given for the convenience of the payee who may thus obtain the money where he desires and in the form appropriate to the place. They are not directed to a different quantification of the substance of the obligation. Something much more definite is needed to warrant an interpretation ascribing an intention to the parties that there shall be alternative moneys of account for the measurement of the obligation.

Where one place of payment is specified and there is otherwise an ambiguity as to the money of account intended, it is not unreason-

(1) (1938) A.C. 452, at p. 460.

(2) (1937) A.C. 500, at pp. 548-549.

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able to find in the place of payment an indication of what the parties intend. But all foundation for the inference fails when the place of payment is not fixed but is left to the choice of one of the parties. Other considerations must in such a case determine in which money of account the debt is to be calculated.

It is well settled that under English law the money of account of an obligation must be determined as a matter of interpretation when the question is to which of two or more monetary systems does the obligation refer for its expression. In many cases, however, it must be necessary to decide as a first step whether the question is to be governed by English law or some other law. As the measure of the obligation is the matter to be decided it is governed by the proper law of the contract. Most systems of law made the question by what money of account the obligation is measured depend on the intention of the parties, but there are of course differences in the rules for working out the intention. In the present case, however, the choice of law is of no moment ; for in both jurisdictions the same common law supplies the rule. In any case it is difficult to see how any but the law of Queensland could be the proper law of the obligation of the debentures which were issued in Queensland in respect of the loan of £250,000 raised there, whatever may be the case with the loan raised in the United Kingdom.

The result of the foregoing considerations is that the question whether the obligation of the debentures is to be treated as expressed in English or in Australian money must be determined as a matter of interpretation. This means that it depends upon an intention to be extracted from the transaction. It is important to see what is the point to which the supposed intention must be taken to be directed. Where a contract uses a money expression capable of referring to either of two moneys of account which at the time the contract is made are separate and are known to belong to two different recognized monetary systems, it is easy to see that the required intention must be directed to an adoption of or a reliance upon one of the two systems to the exclusion of the other. But in a case such as the present the point is somewhat different. When the contract was made there was one money of account only. There being a subsequent divergence and a separation into two moneys of account, the point must be to which of the two does the obligation " belong," on which does it depend, which does it follow. Clearly enough, no actual intention existed with reference to such a question. The parties never gave it a thought. The " interpretation " of the transaction must be worked out from its character, from the

elements which are contained within it. The nature and circumstances of the transaction must supply the grounds from which the so-called "intention" must be deduced as a reasoned consequence. It may be called an implication. Lord *Watson* in a well-known passage in *Dahl* v. *Nelson* (1) explained how a problem of the same general kind is dealt with when it arises under commercial contracts such as a charterparty. His Lordship said:— "I have always understood that, when the parties to a mercantile contract such as that of affreightment, have not expressed their intentions in a particular event, but have left these to implication, a Court of Law, in order to ascertain the implied meaning of the contract, must assume that the parties intended to stipulate for that which is fair and reasonable, having regard to their mutual interests and to the main objects of the contract. In some cases that assumption is the only test by which the meaning of the contract can be ascertained. There may be many possibilities within the contemplation of the contract of charterparty which were not actually present to the minds of the parties at the time of making it, and, when one or other of these possibilities becomes a fact, the meaning of the contract must be taken to be, not what the parties did intend (for they had neither thought nor intention regarding it), but that which the parties, as fair and reasonable men, would presumably have agreed upon if, having such possibility in view, they had made express provision as to their several rights and liabilities in the event of its occurrence."

In the present case the transaction giving rise to the obligation was connected in every way with Queensland except for the reference to London, Sydney and Melbourne in the option of place of payment. The borrower issuing the debentures was the Government of Queensland. The loan was raised under a statute of the Queensland legislature. The statute secured it on the public revenues of the colony. The statute even fixed the currency of the loan and made it repayable on 1st January 1945. The debentures were issued in Queensland. The loan was raised in Queensland. The lender who "purchased" the debentures from the Government was a body carrying on business in Queensland, as well as elsewhere in Australia. In these circumstances the transaction was bound up with Queensland. The tenor of the debentures and the localization of the particular transaction therefore suggest that pounds sterling formed the money of account of the obligation in virtue of its being the money used in Queensland rather than in virtue of its being the money used in the United Kingdom. If about the

(1) (1881) 6 App. Cas. 38, at p. 59.

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same time a local authority of the colony had raised moneys by the sale of debentures in Queensland expressed to be repayable in Queensland on 1st January 1945 (see now *Local Government Act of* 1936, s. 22 and s. 28 (11)) it is to be assumed that without question the money of account would have followed that of Queensland, or in other words of Australia, throughout. Is there any substantial reason why the debentures of the Government of Queensland which have given rise to the present controversy should occupy any different situation ? Apart from the use of the word " sterling " and the reference to London and possibly Sydney and Melbourne as alternative places of payment, matters about which it is unnecessary to say anything further as indications of the money of account quantifying the obligation of the debentures, there appears to be only one other consideration tending against the view that the money of account is that of Queensland or Australia. That consideration is that under the authority of the same Loan Act debentures identical in form were issued in England, presumably in respect of moneys lent in England. We have no details of this transaction and we do not know what has been the history or fate of those debentures and whether they have been paid off in English sterling or not.

It is easy to see that so far as the construction of the language of the debentures goes, it ought not to receive one meaning in one country and another meaning in the other country. But it is not a question of verbal or grammatical construction. It is a question of the intention to be ascribed to the parties as a consequence to be deduced from the nature of the transaction and the situation in which they stood. The question may be propounded in somewhat the form of the test which Lord *Watson* framed. That is to say, it may be asked which of the two moneys of account would the parties have presumably adopted as fair and reasonable men, if, having the possibility of a separation of the two money systems in view, they had expressly provided for its occurring. But if the question is so propounded it is important to remember that the contingency for which they are supposed to be providing in advance is not that of a rate of conversion unfavourable to Australia. The contingency is simply of a separation of the moneys of account, without any foreknowledge of the rate of conversion. In fact the rate has not always been unfavourable to Australia and it may not continue always to be so.

On the limited hypothesis stated, the answer that a Queensland purchaser of debentures from the Government of Queensland must be assumed to make is that he would abide by the monetary system

of the country where his business was and his investments were to be made. The answer of the Queensland Government would of course have been that its financial dealings in Australia must be governed by Australian money. From the foregoing reasoning it follows that the debentures are redeemable in Australian money of the same amount as is expressed in pounds in the debentures. Upon this footing no question as to interest since 1st January 1945 can arise, because the Commonwealth has not been in default. In any case, it is a question whether the Crown in right of the Commonwealth would be under a liability for interest. See *Clode, Petition of Right*, p. 96 and *quaere* as to the sufficiency of s. 64 of the *Judiciary Act* 1903-1947 to carry such a liability.

I would answer the questions lettered (*a*), (*c*) and (*d*) in the case stated: No. It is unnecessary to answer question (*b*).

McTIERNAN J. I agree with the answers proposed by my brother *Dixon* to the questions in this case; I also agree with his Honour's reasons for such answers.

Questions in case answered as follows:—(*a*) *No.* (*b*) *Unnecessary to answer.* (*c*) *No.* (*d*) *No. Case remitted to Chief Justice.*

Solicitor for the plaintiffs, *J. F. Astley*, Adelaide, by *Malleson, Stewart & Co.*

Solicitor for the defendant, *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

E. F. H.