REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

[HIGH COURT OF AUSTRALIA.]

GOLDSBROUGH MORT & COMPANY LIMITED Appellant; Plaintiff,

AND

HALL AND ANOTHER . . . . . Respondents. Defendants,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. of A. 1948-1949.

Melbourne, 1948. *Oct.* 15, 18, 19; 1949. *Feb.* 22.

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

Currency—Liability expressed in "pounds"—Money of account, whether English or Australian—Liability incurred before existence of separate Australian currency—Australian company financed in England—Debenture stock secured by trust deed—Trustees resident in England.

The appellant company was incorporated under the law of Victoria in 1893. Its business was carried on, and its property was situated, in Australia. It was formed as part of a scheme of reconstruction pursuant to which it took over the business and the liabilities of a pre-existing company. This company had been largely financed in England, and it was indebted in a large amount to debenture holders there. The appellant issued to the debenture holders and other creditors of the old company debenture stock secured by a trust deed entered into in 1895—and in 1939 by a further deed which superseded that of 1895—with trustees in England for the stock holders. By the deeds the appellant covenanted that when the security became enforceable it would pay the principal amount of the stock to the trustees, and it was provided that "nothing herein contained shall be taken as making the company directly liable to the holders of . . . stock but as regards

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contractual relations with the company all holders of . . . stocks shall be represented by the trustees." The forms of stock certificates provided for by the deeds were headed with the name of the appellant, followed by a statement that it was incorporated in Victoria; its capital was then stated in pounds, and the document certified "that of is the holder of £ of the above-mentioned stock." The stock being redeemable in 1948, the appellant raised the question whether its liability was to be measured in English money (which was the currency of Victoria in 1895) or by reference to the Australian currency which had been created prior to the deed of 1939.

Held, by *Rich*, *Dixon* and *McTiernan* JJ. (*Latham* C.J. and *Starke* J. dissenting), that the obligation of the appellant was to make payment in English currency or its equivalent at the appropriate rate of exchange in the place of payment.

Decision of the Supreme Court of Victoria (*Fullagar* J.): *Goldsbrough Mort & Co. Ltd.* v. *Hall*, (1948) V.L.R. 145, affirmed.

APPEAL from the Supreme Court of Victoria.

For some years prior to 1893 a company having the same name as the present appellant carried on business in Victoria. It had been largely financed in England, and its indebtedness there included a sum of over £2,000,000 owing on debentures to holders thereof in England. It was unable to meet its indebtedness, and a scheme of reconstruction was arranged. This scheme involved the incorporation in Victoria of a new company, and as a result of it the present appellant was incorporated. The scheme also involved the issue of debentures to the amount of over £2,000,000 to the creditors of the old company; these debentures were secured by a trust deed (dated 20th December 1893), the trustees of which were English. The scheme was confirmed by the Supreme Court of Victoria and was dealt with in a facilitating Act, the *Reconstructed Companies Act* 1893 (Vict.). In 1895 a further scheme of arrangement was adopted, and it was confirmed by an Act of the Parliament of Victoria, the *Goldsbrough, Mort and Company Limited Arrangement Act* 1895. A trust deed, the trustees again being English, was executed in England on 12th December 1895. It secured the issue to the debenture holders of "A" and "B" debenture stock in lieu of the previous debentures. Further schemes of arrangement were found necessary, and supplemental trust deeds were executed between the company and the trustees for the time being (always resident in England) on 21st October 1901, 12th October 1910, 27th August 1912 and 5th January 1923. Finally, on 15th March 1939, a supplemental trust deed was executed, consolidating and superseding—though preserving certain provisions of—the prior

deeds. The execution of all the trust deeds by the trustees took place in England. All except that of 1939 were executed on behalf of the company in England; that of 1939 was executed by the company in Victoria.

By the deeds the company covenanted (1939 deed, clause 2) that when the security became enforceable it would pay the principal amount of the stock to the trustees, and it was provided (1939 deed, clause 49) that "nothing herein contained shall be taken as making the company directly liable to the holders of . . . stock but as regards contractual relations with the company all holders of . . . stocks shall be represented by the trustees."

The debentures issued in 1893 were headed with the name of the company, which was described as having been incorporated under the *Companies Acts* of Victoria on 31st August 1893. Then followed the words and figures:—

"£100. No.

Issue of £2,473,800 debentures bearing interest at the rate of £5 per cent per annum."

The form of "A" debenture-stock certificate issued in 1895 (and, so far as here material, the certificate for "B" debenture stock was similar) contained the name of the company and the reference to its incorporation as in the prior debentures and proceeded:—

"Nominal capital: £4,275,000, divided into 900,000 shares of £4 15s. each. . . .

Note.—This capital is subject to modification, as provided by the scheme of arrangement dated 31st July 1895, which has been sanctioned by the *Goldsbrough, Mort and Company Limited Act* 1895 of the legislature of the Colony of Victoria.

Issue of 'A' debenture stock being part of a total issue of £1,500,000. . . .

This is to certify that of is the holder of pounds being sums of £50 each of the above-mentioned debenture-stock numbered" &c.

The forms of stock certificates provided for by subsequent deeds (in particular, that of 1939) contained similar descriptions of the capital of the company and other similar uses of the word "pound" and the £ sign without any express mention of either the English or Australian pound. The form of certificate scheduled to the 1939 deed is set out hereunder in the judgment of *Latham* C.J.*

The company kept two stock registers, one in London and one in Melbourne. The latter included all holders whose registered

* *Post*, p. 6.

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addresses were in Australia ; the former, all those whose registered addresses were outside Australia.

Pursuant to provisions in the trust deeds the company proposed to redeem the debenture stock in 1948. In respect of stock holders on the London register who were resident in England the company accepted the view that its liability was to be measured in English currency and made payment accordingly. To determine its liability to other stock holders the company proceeded by originating summons in the Supreme Court of Victoria. The defendants to the summons were Harold Wesley Hall, of London, and Gordon Leroy Burnham, of Sunningdale, Berkshire, England, who were sued as trustees of the trust deeds and as representing all persons interested in the stock secured thereby.

The question material to this report (numbered 2 in the summons) was as follows :—(i) In what currency must payment of the amount expressed to be payable be made to the defendants in order to discharge each obligation as aforesaid in the case of stock upon the London register at the date for redemption the registered holders of which are then resident in Australia. (ii) In what currency must payment of the amount expressed to be payable be made to the defendants in order to discharge each obligation as aforesaid in the case of stock upon the Melbourne register at the date for redemption the registered holders of which are then resident in : —

(*a*) The United Kingdom.

(*b*) Australia.

(*c*) Another country in which the pound is the unit of account.

(*d*) A country in which the pound is not the unit of account.

Fullagar J. answered this question : The obligation of the plaintiff if payment is made to the defendants is to pay the number of pounds outstanding on the stock in money which is legal tender in England for that number of pounds.

From this decision the company appealed to the High Court.

Hudson K.C. (with him *T. W. Smith* K.C.), for the appellant. In the transactions here relevant which took place before Australia developed a separate currency it is not to be supposed that the parties in fact directed their minds to the possibility of such a separation. It is not to be expected, therefore, that the documents evidencing those transactions would afford any evidence of an actual intention in that regard. What has to be looked for, in so far as the earlier documents are now material, is an " inferred " or presumptive intention which is to be ascertained by considering with what system of law the transactions are most intimately

connected. However, even as to the transactions and documents after the separation of the English and Australian currencies, the problem is not greatly different, seeing that " pounds " are referred to in the documents without any express statement as to whether Australian or English pounds are intended. Nevertheless, the later documents do, as a matter of construction, afford stronger support for the appellant's contention. In the forms of debenture-stock certificates scheduled to the trust deed of 1939 the statement of the capital of the appellant company must be taken as referring to the local currency because it is the statement of the capital of a local company fixed in accordance with the requirements of local law. It follows that the subsequent references to " pounds " in the certificates must be construed as referring to the same currency unless there is something to show that the intention was otherwise. There is nothing in the certificates themselves to show such an intention, nor is there anything in the earlier documents from which such an intention can be inferred. All the schemes of arrangement involved the settlement of local liabilities which necessarily would be settled in whatever money was sufficient to discharge them in Australia. The same view must be taken of the liability on the debentures. As to both the earlier and the later documents, because the factors in the case are predominantly Australian, the conclusion must be that when the pound was adopted as a measure of liability it was adopted because it was a unit of Australian currency, not because it was a unit of English currency. Accordingly, although it is not suggested that the stock holders or the trustees on their behalf in the earlier transactions in fact had any conception of being paid in some new currency thereafter to be created, the proper construction of the documents is that the liabilities were to be discharged in whatever money was sufficient to discharge them in Australia when they came to be discharged.

Dean K.C. (with him *Winneke*), for the respondents. The schemes of arrangement, as such, are not relevant to the determination of the obligations to the stock holders; these depend on the deeds of trust. The deeds of arrangement were no part of the contract between the borrower and lender, and they throw no light on the meaning of the word " pounds " for the purposes of the trust deeds. It does not follow that the word has the same meaning as between borrower and lender as it would have as between the company and its shareholders. There is no reason to think that stock holders and shareholders were being put on the same footing. The shareholders were not parties to the trust deed which ultimately

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settled the rights of the stock holders. The money had already been lent by the stock holders before the schemes of arrangement, which did not purport to vary their rights. *Fullagar* J. rightly concluded that the setting of the transactions here in question was English. He has applied the correct test and has correctly balanced the various considerations. His decision should be upheld.

T. W. Smith K.C., in reply.

Cur. adv. vult.

1949, Feb. 22. The following written judgments were delivered :—

LATHAM C.J. The respondents to this appeal are the trustees under a deed of trust made on 15th March 1939 for the holders of debenture stock issued by the appellant company, Goldsbrough Mort and Company Limited. The company took out an originating summons in the Supreme Court of Victoria asking for a decision upon a number of questions, the most important of which inquired as to the currency according to which payments of the amount expressed to be payable to the trustees should be made in order to discharge the obligations in respect of the debenture stocks—first in the case of stock upon the London register at the date of redemption, the registered holders of which were then resident in Australia ; and secondly, in the case of stock upon the Melbourne register, the holders of which were, at the date of redemption, resident in—" (*a*) The United Kingdom (*b*) Australia (*c*) Another country in which the pound is the unit of account (*d*) A country in which the pound is not the unit of account."

There were two classes of stock—A four per cent and B five per cent. The conditions of the debentures were the same in the case of each class, except that the A stock had priority over the B stock. The certificate of debenture stock in the case of A stock was in the following form :—

" GOLDSBROUGH MORT AND COMPANY LIMITED

(Incorporated under the Companies Acts of the State of Victoria, Australia.)

CAPITAL .. £2,400,000

DIVIDED INTO 2,400,000 SHARES OF £1 EACH

FOUR PER CENT. " A " DEBENTURE STOCK.

This is to certify that of is the holder of £ of the above mentioned Stock. The holders of the said Stock are entitled (pari passu and rateably as between themselves and in priority to the holders of the Company's ' B '

Debenture Stock) to the benefit of the security created by and are subject to the provisions contained in a Trust Deed dated the 20th day of December 1893 and made between the Company of the one part and Marlborough Robert Pryor George Dunlop and Finlay Campbell of the other part and five Deeds supplemental thereto dated respectively the 12th day of December 1895 the 21st day of October 1901 the 12th day of October 1910 the 27th day of August 1912 and the 5th day of January 1923 as modified by a consolidating Supplemental Trust Deed dated the 15th day of March 1939 and made between the Company of the one part and Harold Wesley Hall and Gordon Leroy Burnham of the other part constituting and securing the said 'A' and 'B' Debenture Stocks. The said 'A' Debenture Stock (hereinafter and in the Conditions endorsed hereon called 'the Stock') is also held subject to the conditions endorsed hereon. Interest is payable on the Stock half-yearly on the 1st day of January and the 1st day of July in every year.

Given under the Seal of the Company this day of 19

The Seal of the Company was affixed hereto in the presence of } Seal

Director (or London Manager).

Secretary (or London Secretary).

Note.—This Certificate must be surrendered before any transfer of the whole or any part of the Stock comprised in it can be registered and no fraction of £50 of Stock can be transferred."

The conditions were then set out.

Before the Supreme Court the argument for the company was that the liability under the debenture stock should and could be discharged according to the money of account of the place where payment was made. That argument was not presented upon this appeal and it is unnecessary to deal with it. It is plain that the adoption of any such criterion, having regard to the fact that no place was fixed for payment of redemption moneys and that debenture holders might change their residence from time to time, would meet grave difficulties. I agree with the reasons of *Fullagar* J. for rejecting this argument.

His Honour Mr. Justice *Fullagar* answered the questions submitted to the court by declaring, first, that the plaintiff company was entitled to redeem the stock by payment of the amount of principal moneys, premium as provided in the deed, and interest, by payment to the defendants, that is, to the trustees, and not necessarily to the stockholders themselves. As to this question there is no doubt that the terms of the deed in accordance with

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which the debenture stock was issued entitle the company to pay the trustees, and do not require the company to pay the stockholders, although a payment to the stockholders would discharge *pro tanto* the obligation to pay the trustees.

Secondly (and this is the substantial matter which arises upon this appeal) it was declared that the obligation of the plaintiff company, if payment is made to the defendants, is to pay the number of pounds outstanding on the stock in money which is legal tender in England for that number of pounds.

The appellant company challenges this decision, contending that it will perform its obligations if it pays to the trustees or the stockholders in Australian pounds the amount specified in the case of each certificate of debenture stock.

The amounts of stock outstanding at the time when the deed was executed, on 15th March 1939, were A stock £838,177 10s., and B stock £579,525. It will be observed that the questions asked in the originating summons do not make any inquiry with respect to the obligations of the company in the case of stock upon the London register the registered holders of which are resident elsewhere than in Australia. The court was informed that in fact payment had been made to these stockholders in English pounds. The question which arises upon this appeal is important both to the company and to the other stockholders, because if it is held that the obligation to repay £1,000 upon a particular debenture is to be satisfied by payment of that amount in English legal currency, the stockholders will be entitled to receive an amount which will be equivalent to £A1,250, because the rate of exchange as between England and Australia at the date when payment became due in accordance with an option exercised by the company with the consent of the trustees, namely, 1st January 1948, was £E100 to £A125.

The question which arises must be determined upon the construction of the contract by which the company is bound, viz., the contract between the company and the trustees. It is contained in a consolidating deed of 15th March 1939, in the First Schedule of which forms of the certificates of debenture stock are set out. In the body of the certificate it is provided that the stockholders are entitled to the benefit of the security created by and are subject to the provisions contained in six specified trust deeds as modified by the consolidating deed of 15th March 1939. The certificate states that the stock is held subject to the indorsed conditions. Those conditions provide (clause 2) that the company may at any time with the previous consent in writing of the trustees of the trust deed redeem the whole or any part of the stock at a premium

of five per cent upon giving to the holders of the stock to be redeemed not less than six months' previous notice. The company has given the necessary notice with the consent of the trustees, the date of redemption being fixed at 1st January 1948. Clause 11 of the conditions provides that the interest on the stock may be paid by cheque sent to the registered address of the holder, and clause 16 provides that the right of any stockholder to take or prosecute proceedings against the company shall be subject to the provisions relating to meetings of the stockholders contained in the Third Schedule to the consolidating trust deed. The Third Schedule provides for meetings of stockholders to be summoned upon seven days' notice to be held in London. A meeting of the stockholders has power (Third Schedule, clause 20) to sanction schemes for the reconstruction of the company, amalgamation with another company, modification or compromise of the rights of the stockholders &c.

In the consolidating deed it is recited that the deed is supplementary to the other six deeds to which reference is made in the stock certificate. Another recital states that, as modifications had been made in the earlier deeds, and the complication of the provisions of the various deeds, together with the modifications, had made it difficult to ascertain what provisions were in force, and for other reasons, it was desired (recital (F)) to amend the trust deeds by cancelling certain provisions thereof considered no longer to be required, by modifying other provisions thereof, and by embodying in a single deed for convenience of reference all or substantially all the provisions of the deeds continuing in force after such deletions and modifications had been effected. Clause 48 of the deed provides that the provisions of the deed shall replace and be deemed substituted for all provisions of the Second, Third, Fourth, Fifth and Sixth Deeds (other than certain specific provisions) all of which provisions shall be deemed cancelled and no longer be operative but not so as to affect the validity of anything done thereunder previously nor so as to revive or render operative any of the provisions of the first deed cancelled by any later deed. It has not been argued that there are any specific uncancelled provisions of the first deed which confer upon the stockholders any rights beyond those created by the consolidating deed. The result, therefore, is that the provisions of the prior deeds are cancelled and are no longer operative and that the rights of the parties depend entirely upon the provisions of the consolidating deed of 1939.

Clause 2 of the deed states the obligation of the company in respect of debenture stock. It is in the following terms :—" The Company

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will as and when the 'A' Stock security becomes enforceable as hereinafter provided pay to the Trustees the principal amount of the 'A' Stock for the time being outstanding with a premium thereon of five per cent. and will in the meantime and until such payment pay to the Trustees or to the holders of the 'A' stock interest on the principal amount of the 'A' Stock for the time being outstanding at the rate of four per cent per annum by equal half-yearly payments on the dates mentioned in the Stock Certificates. Provided that every payment to the 'A' Stockholders on account of principal premium or interest upon the 'A' Stock held by them respectively shall be a satisfaction pro tanto of the covenant by the Company in this clause contained. This covenant is in substitution for the Covenant to the like effect contained in Clause 1 of the Second Deed." Clause 49 of the deed provides :—"Nothing herein contained shall be taken as making the Company directly liable to the holders of the 'A' and 'B' Stock but as regards contractual relations with the Company all holders of 'A' and 'B' Stocks shall be represented by the Trustees." It is, I think, clear that the contract of the company is a contract with the trustees, and not with the stockholders, though the stockholders may enforce their rights through the trustees.

The undertaking to pay the principal depends upon the stock security becoming enforceable. The stock security becomes enforceable under clause 6 (A) if, with the consent in writing of the trustees, the company proposes to redeem the stock at a premium of five per cent. upon giving to the holders not less than six months' notice. Clause 6 (A) provides that at the expiration of such a notice the company shall be entitled and bound to pay off the stock. If the company then failed to pay the stock the security would become enforceable. Clause 13 provides for other cases in which the security may become enforceable, such as default in payment of interest or principal, the winding up of the company, &c.

The deed contains provisions for drawing stock to be redeemed in the case of redemption of part only of the stock, and clause 8 provides that any drawing of stock shall be made at the office of the company in London. Clause 9 provides that when stock becomes liable to redemption interest shall cease to accrue unless the company refuses to pay upon the registered holder demanding on or after the due date " and at the place fixed for redemption of such Stock " payment of the redemption moneys payable in respect thereof and tendering the certificate and a duly signed receipt. There are no provisions in the deed which fix any place for the redemption of stock. It may be that under this clause it should

be implied that the company fixes the place because the reference is to a single place and not to several places, and if the stockholders had an option of fixing a place it is plain that many different places might be fixed. But in the view which I take of the case it is not important to determine the place where payment should be made when stock is redeemed.

Clause 33 of the deed provides that the company shall keep at its offices in Melbourne and London separate registers of the A stock and the B stock. It is provided that there shall be entered in the first instance in the Melbourne register the names, addresses and descriptions of all holders of A and B stock whose addresses are within Australia, and that there shall be entered in the first instance on the London register the names, addresses and descriptions of all other the holders of A and B stock. The clause also provides that any stockholder shall be entitled, subject to the approval of the Board of Directors, to have his name transferred from one register to another. After the execution of the consolidating deed two new registers were prepared. In the Melbourne register there were entered the names of all stockholders whose registered addresses were in Australia and the names of no other persons, except one holder resident in New Zealand. Interest payments to these holders were made in Australian currency. In the London register the names of all other holders whose registered addresses were outside Australia were entered together with the names of two persons who took transfers from stockholders upon the London Register and were entered on that register. The registered address of one stockholder in the London Register was in Switzerland. The interest payments to holders on the London register were made in English currency, it being stated that the payments to the two Australian holders were so made by inadvertence. The amount of the stock now outstanding is £1,407,549, consisting of: A debenture stock £828,030, and B debenture stock £579,519.

The material placed before the Supreme Court related the history of the company from 1893, when there was a severe financial crisis in Victoria. A former company was wound up, a new company (the present company) was formed, and there were several subsequent reconstructions and modifications of the rights of debenture holders, creditors and shareholders.

In 1893 the then company owed £2,473,800 to debenture holders and depositors and about £900,000 to secured creditors. The paid-up capital of the company was only £450,000. A new company was formed under the same name which took over the liabilities of the old company and provision was made for allowing the

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liability to the debenture holders and depositors to stand at the same amount, the other secured creditors to be paid off by calls which it was hoped that the shareholders would be able to meet, and the paid-up capital of the company was reduced by fifty per cent. New capital was to be subscribed. This scheme was one of a number of reconstruction schemes which were validated by the *Victorian Reconstructed Companies Act* 1893. The shareholders, however, did not meet their liabilities, and in 1895 the capital was further reduced and another effort was made to obtain new capital from the shareholders. The existing debentures were replaced by four per cent A debenture stock and three per cent B debenture stock but interest on the B stock was payable only if the company earned sufficient income to meet it. The value of the assets was written down. It was necessary, however, to modify this scheme in its turn, and in 1901 the B debenture stock was reduced by forty per cent, nearly £400,000 of share capital was written off and the value of assets was written down by over £800,000. Debenture holders, depositors, creditors and shareholders were all affected by these rearrangements of liabilities and revaluations of assets. The ultimate result was to put the finances of the company upon a practicable basis.

The company had at all times carried on business in Australia. It was a Victorian company. At all times calls made upon shareholders would be payable in Victorian or Australian money. The liabilities of shareholders for calls, the liabilities of the company to its business creditors and the liabilities of business debtors to the company must necessarily at all times have been measured in Victorian or Australian money. It is contended for the company that the liabilities of the company to all debenture holders must be measured in the same way. It is argued that the financial readjustments which took place, involving as they did provisions for meeting liabilities of large amounts which necessarily were liabilities according to an Australian money standard, were intelligible only if all the obligations of the company were measured by the same standard. The revaluation of assets resulted in valuations which, though varied from time to time, have, ever since the currencies of Great Britain and Australia became different currencies, always been expressed in Australian money. Thus the history of the company in relation to the various reconstructions which took place, to which reconstructions the debenture holders were parties, is relied upon as showing that a single standard must be applied in measuring the obligations of the company, and that, as in the case of some of those obligations it is obvious that the obligations have always been measured according to a local monetary system and not to an

English monetary system, that same measure must be applied to the obligations to the debenture holders.

It is unnecessary to expound again the distinction between money of account—the money according to which the amount payable under an obligation is to be measured—and the money of payment—the money by payment of which the obligation may be performed and so discharged: see *Bonython* v. *The Commonwealth* (1). If a contract unambiguously provides for these matters, it is unnecessary to look beyond the terms of the contract, whatever may have been the course of the negotiations or transactions which finally resulted in the contract. I therefore consider in the first place the terms of the contract made on 15th March 1939 between the company and the trustees. If the terms of that contract show that the obligation to the debenture holders is an obligation stated and measured in English money, any such historical considerations as those which have just been mentioned are irrelevant. Similarly, if the terms of that contract show that the obligation is to be measured by Australian money the contract governs, whatever may have been the antecedent history of the relations of the parties. In *Bonython* v. *The Commonwealth* (1) I was of opinion that the inclusion in the contract of the word "sterling" was decisive as showing that the measure of the obligation was actually expressed in English money. The other members of the Court were not of this opinion, but no member of the Court dissented from the proposition that if the terms of the contract itself clearly dealt with the subject of the money of account there would have been no room for further argument as to the measure of liability.

The terms of the debenture certificates have already been set out. They were issued in 1939. The monetary systems of England and Australia were then quite different and distinct, except that they both used the words "pounds shillings and pence." They were as different as Canadian dollars are different from United States dollars: *Bonython's Case* (1). At the head of the debenture the following appears:—

"GOLDSBROUGH MORT AND COMPANY LIMITED
(Incorporated under the Companies Acts of the State of Victoria, Australia).
CAPITAL .. £2,400,000
DIVIDED INTO 2,400,000 SHARES OF £1 EACH.
FOUR PER CENT. "A" DEBENTURE STOCK.
(OR "B" DEBENTURE STOCK.)"

The capital of £2,400,000 must be regarded as a sum of money

(1) (1948) 75 C.L.R. 589.

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expressed in relation to Australian money. Similarly, each £1 share is a share described by reference to Australian money. It would be impossible to contend that the symbol for pounds in the part of the debenture quoted referred to pounds sterling, so that in Australian money each pound would be represented by A25s.

The heading is immediately followed by the principal words of the certificate—" This is to certify that . . . of . . . is the holder of £.... of the above mentioned Stock." The symbol for pounds in this sentence must in my opinion be read in the same manner as the symbol for pounds where it appears elsewhere in the certificate. In my opinion it would be unreasonable to attach two different meanings to the symbol for pounds in the debenture certificates. It is clear that in the description of the capital and the shares in the company the reference to pounds is a reference to Australian money. The references to pounds in the body of the debenture should be similarly construed. On this ground I therefore conclude that the obligation under a £1,000 debenture can be discharged by payment of £A1,000.

If, however, the view is taken that the symbol for pounds where it appears in the body of the certificate is ambiguous, other questions arise. In the present case there is more justification than in most cases for resolving an ambiguity by taking into account the conduct of the parties. The current trust deed is, it is true, substituted for all its predecessors, which are expressly cancelled, but it is a " consolidating " deed and it was not intended to vary pre-existing rights in relation to the substance of the obligation of the company.

At the times when the prior deeds were executed there was no difference between the money of England and the money of Victoria. The parties did not contemplate the divergence which has since taken place. Their contracts made no provision for any such event. It is, I suggest, useless here to ask the question which has in some cases been made the test in the frustration cases—What would the parties have said if they had, when they were making their contract, known what would happen ? If this question is asked in relation to the actual facts—viz. the divergence of currencies and of values of currencies which in fact has taken place, making it necessary to provide £A1,250 to pay a debt of £E1,000, it is most likely that the company would have declared for Australian money and the debenture holders and other creditors would have declared for English money. If any transactions were to take place, the parties would have had to hammer out an agreement, the terms of which it would be quite impossible now to state, except by an effort of imaginative speculation. If the proper

question to be asked is a question which picks out one element only of what has in fact happened, namely, a difference in the relative value of the currencies of Australia and England, it not being supposed to be known which currency would go up and which would go down—then again the answer must be speculative. I should think that the company would probably have adhered to local currency—the currency in which it received payment of moneys owed to it and paid all its trading debts, and the Australian creditors might have agreed with the company, while the English creditors would have insisted upon payment being secured to them according to the English monetary standard. Thus, if the terms of the contract are ambiguous, the ambiguity cannot be resolved by asking the question—What would the parties have agreed upon if they had known, at the time of making their contract, that that which has happened would in fact happen ?

No-one can suggest that the obligations in respect of the debenture stock have become nugatory by reason of the divergence of the currencies. The problem can be solved only by making an implication derived from all the circumstances of the transaction as to the intention which can most fairly and reasonably be imputed to the parties : see per *Rich* J. and *Dixon* J. in *Bonython's Case* (1). All the circumstances of the transactions between the parties should be taken into account. They were financial transactions. They are intelligible only in relation to some financial system, and more particularly in relation to company law and currency law. They contain both Australian elements and English elements. The question to be determined in this case is that of identifying the financial and monetary system with which the transactions should be regarded as having the most real connection.

Fullagar J. in his reasons for judgment set out the Australian and English elements. The company was a Victorian company, and it carried on business in Victoria. The property which provided the security for the debenture holders was in Australia. The debentures were originally issued in pursuance of a scheme authorized by an Act of the Parliament of Victoria and approved by the Supreme Court of Victoria. There was a Melbourne register of stockholders. All the ordinary business transactions of the company would be conducted in relation to the currency system which from time to time applied in Victoria. Many of the debenture holders were resident in Australia. There was a large amount of money owing to secured creditors in Australia in respect of portion of which debentures were issued. On the other hand, the earlier deeds were

(1) (1948) 75 C.L.R. 589.

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executed in England. (The deed of 1939 was executed by the trustees in England and by the company in Australia.) Most of the debenture holders were resident in England. The trustees were English trustees (though there was no necessity for the trustees to reside in England). There was a London register of stockholders and meetings of stockholders could take place only in London. The powers of a receiver are specified in the earlier trust deeds by reference to English legislation—the *Conveyancing and Law of Property Act* 1881, and in the last deed by reference to the English *Law of Property Act* 1925. His Honour was of opinion that the English factors outweighed the Australian factors, and that it should be held that the parties in 1895 (the date of the first deed) and at all times thereafter were contracting with reference to English money of account.

The mere enumeration of these factors does not show on which side the balance lies. But in my opinion it is possible, upon a view of the transactions between the parties as a whole, to reach a satisfactory conclusion as to the financial system within which the trust deed and the debenture stock should be understood and construed. The deed of 1939 dealt with matters which had been variously adjusted between the parties (or their predecessors in interest) from time to time since 1893. If the symbol for pounds in the certificates and references to pounds in the deed have become ambiguous (and this is the alternative which is now under consideration) it is permissible to look at the manner in which the relevant rights and the duties of the parties have been dealt with as between themselves in relation to the liability represented by the debenture stock. When consideration is given to the history of the rearrangements to which reference has already been made, it will be seen that the transactions would become financially incoherent and would be ineffective to produce the plainly intended result, namely a balancing of assets and liabilities, if the figures relating to the liabilities to debenture holders were taken as representing liabilities in English pounds, though all the other figures related to liabilities stated or assets valued in Australian pounds. All these figures must in my opinion be taken throughout to be upon the same basis in order to show the true position of the company. As to some of them (capital of the company, liabilities of shareholders, liabilities of the company to trade creditors, and liabilities of trade debtors to the company), it is clear that the figures must be taken as representing liabilities in Australian pounds. In my opinion the reasonable conclusion is that the other figures which represent other parts of the same financial reconstruction also refer to Australian pounds.

Accordingly, on this ground also it should be declared that the liabilities of the debenture holders can be discharged by the payment in Australian pounds of the amount of each debenture.

I am therefore of opinion that the appeal should be allowed and that the answer to the second question in the originating summons should be: "The obligation of the plaintiff if payment is made to the defendants is to pay the number of pounds outstanding on the stock in money which is legal tender in Australia for that number of pounds." The answer to the fifth question should be amended by substituting "legal tender in Australia" for "legal tender in England" and by substituting "Australian pounds" for "English pounds."

RICH J. The facts in this case are already in statement and I need not "stuff the record" by recapitulation. The question which emerges for our determination is the construction of a deed dated 15th March 1939 relating to debenture stock issued by the company which consolidated and superseded three existing trust deeds. And the company in compliance with the deed took the necessary steps to redeem the whole of the stock on 1st January 1948. Thereupon a controversy arose with respect to the medium of payment. The trustees of the deed are and always have been English trustees resident in England. As to the stockholders, some are resident in England and some in Australia, one is resident in New Zealand and one in Switzerland. The trustees to whom payment is to be made on behalf of the stockholders claim to be paid in money which is legal tender in England. Under the deed payment may also be made direct to the stockholders and the trustees make the same claim on their behalf. The expressions "money of account" and "money of payment" are well known—the former expression appears in the statute of 6 Geo. IV., c. 79—"the currencies and monies of account throughout the United Kingdom of Great Britain and Ireland" (*The Legal Aspect of Money* (1938) Dr. *F. A. Mann*, at p. 29). And well known cases in the House of Lords and the Privy Council have applied them to the determination of the particular instruments concerned in those cases. No dispute would have arisen had the unit of account and the unit of payment been common to both England and Australia. At the date of the original deeds this was the case, but since that date and the date of repayment changes occurred whereby the unit of payment became disparate—in other words there came into existence two units of payment, an English pound and an Australian pound: cf. *Bonython*

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v. *The Commonwealth* (1). In that case the question the subject of our decision was similar to that in the instant case. And if I may quote from my judgment—" 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." And the implication of law now to be made depends substantially on the terms of the relevant documents and the circumstances under which they were issued. The contest between the opposing considerations—the English factors and the Australian factors—creates a serious difficulty in finding what should be the proper implication. On the one hand the company was registered under the *Companies Act* of Victoria ; its substantial business is carried on and its property is situated in Australia. While these are important considerations they are outweighed by more weighty considerations. The company was apparently obliged to resort to London for the means to carry out its reconstruction. The negotiations for the issue of the debentures took place in England, and the money subscribed for the debentures was mainly supplied by English creditors. The trustees were and remained English trustees, and under the consolidated deed the company had a right to redeem but with the previous consent in writing of the trustees. In the case of redemption of part of the stock clause 8 of the deed provided that any drawing shall be made at the office of the company in London. The third schedule to the deed also provided for meetings of stockholders to be held in London upon a seven days' notice—the shortness of notice rather suggesting that the stockholders were substantially English stockholders. And in the event of a receiver being appointed his powers were expressly governed by English legislation.

The effect of these considerations satisfies me, to use the language of the learned primary judge, that the whole setting seems to be English, and that the unit of payment should be the English pound.

For these reasons I would dismiss the appeal.

STARKE J. Appeal from an order of the Supreme Court of Victoria upon an Originating Summons issued pursuant to Order LIVA. of the *Rules of the Supreme Court.*

In 1939 a Consolidating Trust Deed was executed by the appellant and the trustees named in the Deed, who are the respondents here. It recited a Trust Deed of 1893 and Supplemental Deeds of

(1) (1948) 75 C.L.R. 589, at p. 607.

1895, 1901, 1910, 1912 and 1923, that some of the provisions of those deeds were no longer required, that complications were created by so many deeds and that it was difficult to ascertain what provisions were still in force. It also recited that it was desirable to embody in a single deed for convenience of reference all, or substantially all, the provisions of the deeds continuing in force after various deletions and modifications had been effected. The provisions of the 1939 Deed replaced and were substituted for all the provisions of the earlier deeds but did not affect property specifically charged or in respect of which a floating charge was created under those deeds though the premises were henceforth held by the trustees of the 1939 Deed upon trusts and with and subject to the powers and provisions for securing the stock hereinafter declared and contained concerning the same in substitution for the trusts and powers by and in the Trust Deeds declared and contained concerning the same for the like purpose.

Two issues of Debenture Stock, A Debenture Stock and B Debenture Stock, were created by the appellant in 1895 in substitution for an issue of debentures secured by a Trust Deed of 1893.

The formal difference, it has been said, between debentures and debenture stock is this—(*a*) Debenture is the name given to an instrument embodying a contract, usually under seal; (*b*) Debenture Stock is the name given to a debt usually created by a trust deed. Debenture stock holders of a company "have not, in general, any direct contract with the company; the contract is between the company and the trustees, who are prima facie the proper persons to enforce it; but the stock holders are the persons equitably entitled to the benefit of that contract—the *cestuis que trust*, and their title is evidenced by certificates under the company's common seal. Their equitable rights a Court of Equity recognizes and at their instance enforces the obligations imposed on the company by the deed if the trustees cannot or will not proceed" (See *Palmer's Company Precedents*, 14th ed. (1933), Part III, Debentures, pp. 6-10). But the deed may confer upon each of the stockholders the right to sue for the performance and observance of the provisions of the trust deed so far as his stock is concerned (See ibid, at p. 344).

The Trust Deeds constituting the Debenture Stock conform to this general description. The Consolidating Trust Deed of 1939 declared that the principal amounts of the A and B Debenture Stocks then outstanding were, "A" Stock £838,177 10s., "B" Stock £579,525. And it was these amounts or such part thereof as for the time being remained outstanding that were constituted

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A and B Stocks respectively by and for the purposes of the Consolidating Deed. By this deed the company agreed as and when the A and B Stock security became enforceable to pay to the Trustees the principal amount thereof for the time being outstanding with a premium thereon of five per cent and also in the meantime and until payment to pay to the trustees or the holders of the Stock interest on the principal amount for the time being outstanding at specified rates by equal half-yearly payments. It was also agreed that nothing in the Trust Deed should be taken as making the appellant directly liable to the holders of the A and B Stock who should, as regards contractual relations, be represented by the trustees. But there is a provision in the Deed that any payment to stockholders on account of principal, premium or interest upon stock held by them should be a satisfaction *pro tanto* of the covenant by the company and also another provision that interest upon stock might be paid by cheque sent through the post to the registered address of stockholders. The Deed further provided in common form that the stock security should become enforceable by a default in payment of interest, the winding up of the appellant or ceasing to carry on business and so forth. Also it provided for the issue of Stock Certificates and that every stockholder was bound when called upon by the company to deliver up existing certificates for stock held by him against the issue to him by the appellant of new certificates for that stock.

The appellant was required to keep at its offices in Melbourne and London respectively separate registers of the A and B Stock. In the first instance there was to be entered in the Melbourne register the names, addresses and descriptions of all stockholders whose addresses were within the Commonwealth of Australia and in the London register all other stockholders. The Stock Certificates were in common form certifying that a certain person or body was the holder of a certain amount of the A or B Stock respectively; but the B Stock Certificates provided that the holders thereof were entitled *pari passu* and ratably as between themselves but subject to the prior rights of the holders of outstanding A Debenture Stock to the benefit of the security created by and subject to the provisions of the various Trust Deeds.

The Trust Deed of 1939 also provided for the redemption of the whole or any part of the A and B Stock at a premium of five per cent with the previous consent in writing of the trustees and giving six months' notice in writing to the holders of the stock.

The appellant duly exercised this right of redemption.

And the questions raised by the Originating Summons are as to the mode of performance of the obligations secured by the Trust Deeds and the relevant Stock Certificates.

The learned primary Judge held that where payment was made in England the obligation of the appellant was to pay the number of pounds owing on the stock held by each stockholder in money which is legal tender in England for that number of pounds and where payment was made elsewhere than in England the obligation of the appellant was to pay in the local currency the equivalent of the number of English pounds owing on the stock held by each stockholder calculated according to the rate of exchange for telegraphic transfer ruling on 1st January 1948, the date fixed for redemption.

The appeal brought to this Court is from that decision.

One of the grounds relied upon by the appellant in its notice of appeal is that there was a common money of account of England and Australia and that the obligation of the Trust Deeds was, therefore, to pay a sum of money expressed in a money of account common to England and Australia and therefore when payment was made in Australia it could be made in what was legal tender in Australia for the sum expressed in the common money of account and similarly in England in what was legal tender there for the sum expressed in the common money of account. The appellant referred to the case of *Adelaide Electric Supply Co. Ltd.* v. *Prudential Assurance Co. Ltd.* (1) but did not pursue the argument in this Court in view of the decision of the majority of this Court in the case of *Bonython* v. *The Commonwealth* (2). The argument, however, was not abandoned in the event of an appeal to His Majesty in Council.

Perhaps some reference to the history of the matter so far as relevant to this case may prove useful.

At common law the Crown enjoyed the exclusive right of making and issuing money: but that right has long been regulated by statute.

The Constitution, s. 51 (xii.), conferred power upon the Parliament of the Commonwealth to make laws with respect to currency, coinage, and legal tender; but this power was not exercised until 1909 when an Act relating to currency, coinage, and legal tender was passed (Act No. 6 of 1909). And in 1910 another Act was passed, the *Australian Notes Act* 1910 (No. 11 of 1910), authorizing the Treasurer to issue Australian Notes: this authority was subsequently transferred to the Commonwealth Bank (see No. 43 of 1920, *Commonwealth Bank Act* 1920).

(1) (1934) A.C. 122. (2) (1948) 75 C.L.R. 589.

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Before these Acts were passed the currency in Australia consisted of gold, silver and bronze coins minted in England at the Royal Mint or by branches of that Mint established in Sydney, Melbourne and Perth and of paper money issued by the trading banks. The *Treasury Notes Acts*, 30 Vict. No. 11 and 56 Vict. No. 37, of Queensland are here irrelevant.

The Act 56 Geo. III, c. 68 (*Liverpool's Act*) 1816, regulated the currency of the gold and silver coin of the realm. A Branch of the Royal Mint was established in Sydney by Royal Proclamation before the year 1855 (see *New South Wales Act* 19 Vict., No. 3, *Oliver's Statutes*, vol, 1. p. 589). And a branch of the Royal Mint was established in Melbourne by Royal Proclamation in the year 1869 (see *Victorian Government Gazette* 1869, vol. 2, pp. 1763, 1764). Another Royal Proclamation in the same *Gazette* issued under the authority of the Act, 29 and 30 Vict., c. 65, declared that coins made at the Branch Mint and being of the same weight and fineness as are required by law with respect to gold coins issued from the Royal Mint at London should be legal tender for payment within all parts of the King's dominions in which gold coins issued from the Mint in London were at the date of the issue of the proclamation a legal tender. And in Victoria in 1864 an Act was passed, *The Banks and Currency Statute* 1864 (27 Vict., No. 194), which provided, s. 14, that certain gold coins called Australian sovereigns and half-sovereigns struck at the Sydney branch of the Royal Mint should be current and lawful money within Victoria together with and in like manner as current coin of the realm.

The Imperial *Coinage Act* 1870, (33 Vict., c. 10,) repealed *Liverpool's Act* and the Acts relating to the Branch Mints. It was declared that the Act should not extend to any British possession save as provided in the Act which however provided that every branch of the Royal Mint which at the passing of the Act issued coins in a British possession should until otherwise proclaimed continue in all respects to have the same power of issuing coins and be in the same position as if the Act had not been passed and coins so issued should be deemed for the purpose of the Act to have been issued from the Royal Mint.

Further, the Act provided a standard of weight and fineness for gold, silver and bronze coins.

So stood the law in Victoria until the passing of the Commonwealth Acts.

The metallic currency of England and Australia was, therefore, the same. Substantially the denominations of the coins were the same and their standards of weight and fineness were regulated by

the Imperial law which was in force in Victoria or which was introduced into Victoria by force of the provisions already noticed. The paper money issued by the trading banks was payable in gold coin but it was not legal tender. In 1909, as already stated, the Commonwealth passed the *Coinage Act* of that year, No. 6 of 1909. It authorized the Treasurer to make and issue silver and bronze coins of certain denominations. It declared the standard fineness of gold, silver and bronze coins of certain denominations. The denominations of the silver and bronze coins were not identical with those of the English *Coinage Act* 1870, e.g. the crown and the half-crown were not specified in the Commonwealth Act as they are in the English Act though the crown was subsequently authorized by the Act No. 86 of 1936 and the farthing is not specified amongst the bronze coins of the Australian Act though specified in the English Acts. But the standards of the weight and fineness of the various gold, silver and bronze coins in the Australian Act are precisely the same as those specified in the English *Coinage Act*. An English Act, (10 Geo. V., c. 3), altered in some respects the standard of fineness of the silver coin but this was followed in Australia by the *Coinage Act* of 1947, No. 25 of 1947.

Further the Australian Act declared that a tender of payment of money if made in coins which are British coins or Australian coins of current weight should be legal tender in the case of gold coins for the payment of any amount, in the case of silver coins for the payment of an amount not exceeding forty shillings but for no greater amount and in the case of bronze coins for the payment of an amount not exceeding one shilling but for no greater amount. British coin means coins which have been issued in accordance with the laws of the United Kingdom and which have not been called in in pursuance of those laws. Australian coin means coins which have been issued in accordance with the Australian *Coinage Act* and which have not been called in in pursuance of that Act. The *Australian Notes Act* of 1910 (No. 11 of 1910) authorized the issue of Australian notes of certain denominations which should be legal tender throughout the Commonwealth and be payable in gold coin on demand at the Commonwealth Treasury. It further provided for a reserve in gold coin against the note issue. However, the provision that the notes should be payable in gold has been repealed and the provision as to the reserve has been altered. The repeals and alterations can be traced through the Acts repealed by the *Commonwealth Bank Act* 1945, First Schedule, and the present law is found in Part VII. of that Act. It also prohibited any person or company carrying on the business of banking from circulating

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Bank Notes issued by States. And a tax imposed upon the issue, by any person or company carrying on business, of notes for the payment of money to bearer upon demand and intended for circulation made it unprofitable to issue any such notes (Act No. 14 of 1910). It appears from these Acts that the metallic currency of England and Australia was still the same. Authority to issue gold coins was not taken under the Australian Act: the minting of gold coins remained with the Imperial Authorities under the *Coinage Act* 1870.

Authority, however, was taken to issue silver and bronze coins. Substantially the denominations of the coins were the same and the standards of weight and fineness were the same (see Schedules to *Coinage Act* 1870, The Act of 10 Geo. V., c. 3, and the Australian *Coinage Acts* of 1909 and 1947). And the Australian *Coinage Act* provided that a tender of money in British coins of current weight should be legal tender as in the Act prescribed. It is questionable whether the silver and bronze coins minted under the authority of the Australian *Coinage Act* were legal tender in England: Australian notes were not.

Since the passing of the *Gold Standard (Amendment) Act* 1931, 21 and 22 Geo. V., c. 46, gold coins have not been minted in Australia but Australian silver and bronze coins have been minted in Australia and also for Australia at mints in the United States of America and India. Arrangements, however, were made between the governments of England and Australia to withdraw English silver coins from circulation in Australia and now but few such coins circulate within Australia (see *Commonwealth Year Book* 1944, 1945, pp. 616-623, *Commonwealth Bank of Australia in the Second World War* (1947) pp. 201-209.

All this leads to the crucial question whether England and Australia have a common unit or money of account.

Now metallic standards do not determine that question for standards may change. Alteration of a currency or fluctuation in exchange may affect its value or purchasing power but leave the unit of account untouched. Thus when England went off the gold standard "the unit of account remained untouched." "A debt," said Lord *Russell* of Killowen in the *Adelaide Case* (1) "is not incurred in terms of currency, but in terms of units of account." *Keynes, A Treatise on Money*, vol. 1 (1930), pp. 3, 4, thus expounds the matter: "Money-of-Account, namely that in which Debts and Prices and General Purchasing Power are expressed, is the primary concept of a Theory of Money. A Money-of-

(1) (1934) A.C., at p. 148.

Account comes into existence along with Debts . . . and Price-Lists . . . Such Debts and Price-Lists . . . can only be expressed in terms of a Money-of-Account. Money itself, namely that by delivery of which debt-contracts and price-contracts are discharged, and in the shape of which a store of General Purchasing Power is held, derives its character from its relationship to the Money-of-Account since the debts and prices must first have been expressed in terms of the latter. . . . money-of-account is the description or title and the money is the thing which answers to the description."

And Dr. *F. A. Mann*, *The Legal Aspect of Money* (1938), at p. 138 thus states the difference: " money-of-account is that currency in which an obligation is expressed, while the money of payment is the currency with which the obligation is to be discharged."

Debts and prices are expressed in the same terms in both England and Australia. The units of account are the same. And the money, the means whereby debts are discharged, is related to those units and expressed in the same terms. Moreover English currency is legal tender in Australia. In these circumstances it is not surprising that in the *Adelaide Case* (1) the majority of the Lords held that the unit or money of account in England and Australia was the same.

Lords *Warrington* of Clyffe, *Tomlin* and *Russell* of Killowen held in that case that at the relevant date, October 1921, there was no Australian unit or money of account distinct from the English pound. Lord *Warrington* of Clyffe said (2): " After consideration of the history of Australian and English money I have come to the conclusion that, merely as a unit of account, the pound symbolised by the £ is one and the same in both countries, and that the difference in the currencies merely concerns the means whereby an obligation to pay so many of such units is to be discharged." Now this was said as matters stood in Australia in the year 1921, that is, after the *Coinage Act* of 1909 and the *Australian Notes Act* of 1910. No doubt Lord *Wright* did not agree with this view. Dr. *Mann* in his book on *The Legal Aspect of Money* (1938), pp. 32-45, discusses the matter at large. His view (see pp. 40, 41) is that a monetary system peculiar to a country exists where the monetary affairs of the country have been organized into a systematic entity. " The State must have assumed, and made use of, its sovereignty over the circulating medium in general . . . in short the State must have combined the various types of money and their legal position into a complete system." The learned primary judge in this case

(1) (1934) A.C. 122. (2) (1934) A.C., at p. 138.

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said that the *Adelaide Case* (1) must be read in the light of certain other cases in the Privy Council. (The cases are discussed by Dr. *Mann*, pp. 169-180.) I do not think any of them actually depart from the *Adelaide Case* (1), unless it be the case of *Payne* v. *Deputy Federal Commissioner of Taxation* (2). I rather sympathise with the view of the learned primary judge that it is difficult to maintain the conclusion reached in *Payne's Case* (2) if the English pound and the Australian pound were in 1930-1931 to be taken as expressions of a common money of account. Still Lord *Russell* of Killowen, who in the *Adelaide Case* (1) had said that he was satisfied that the pound in Australia was originally the same unit of account as the pound in England, not merely a unit of account with the same name, and that it was impossible to say that any other or different unit of account has ever taken its place, in delivering the opinion of their Lordships of the Judicial Committee in *Payne's Case* (2) said there was nothing in the views expressed in the *Adelaide Case* (1) which would justify, still less necessitate, a construction of the Income Tax Acts of the Commonwealth other than that in order to calculate Australian income tax at a rate of so many pence per pound of taxable income it was essential that the assessable income should be expressed in terms of Australian currency. And in *Auckland Corporation* v. *Alliance Assurance Co.* (3) it was said that *Payne's Case* (2) was decided upon the construction of the Australian Income Tax Acts.

If the unit or money of account in England and Australia be the same it is not important whether the law of England or Victoria is the proper law of the Trust Deeds. The law which governs the rights and obligations of the parties for the payments in question here might then be discharged in whatever was legal tender in England if paid there or whatever is legal tender in Victoria if paid here. As to payment in other currencies the measure of value would be the unit or money of account common to England and Australia. *Bonython's Case* (4), even though I did not agree with the conclusion there reached, is binding in this Court, but I have thought it proper to state more at large in this case the reasons which led me to conclude in that case that the unit or money of account in England and Australia is the same.

There I must leave the matter.

I pass, therefore, to the main argument of the appellant which proceeded upon the footing that the pound as a unit of account was distinct from the English pound. And it was contended that

(1) (1934) A.C. 122.
(2) (1936) A.C. 497.
(3) (1937) A.C. 587.
(4) (1948) 75 C.L.R. 589.

the obligation of the appellant under the Trust Deeds was to pay in Australian pounds.

The rates of exchange Australia on London telegraphic transfers are set forth in the *Commonwealth Year Book* 1945-1946. In 1931 the Commonwealth Bank undertook the responsibility of regulating sterling exchange. It was pegged at £125 Buying: £125 10s. Selling, but the rate is purely artificial and a form of protection rather than a commercial determination. In a free market parity would follow and possibly move in favour of Australia.

The rights and obligations of the parties are governed by the proper law of the contract: the system of law with reference to which the contract was made or the system with which the transaction has the closest and most real connection. It is the law which the parties intended to apply though even an expressed intention is not conclusive if the contract and the circumstances in which it was made negative that intention (*The Torni* (1)). If no intention be expressed the intention will be presumed from the terms of the contract and the surrounding circumstances. There is nothing express in the Trust Deeds on the subject. Prima facie the legal system with which a contract has the most real connection is that which prevails in the place where the parties made their contract—the *lex loci contractus*. Here the primary Judge said that the original contract was negotiated and executed in England, that the great bulk of the indebtedness of the appellant at that time seems to have been to English creditors, but the trustees of the Deeds were at all times English trustees and that the Deeds when they referred to legislation referred to English legislation. All this is true but it is not by any means the whole story.

A company of the same name as the appellant had been incorporated in the State of Victoria. Its head office was in Melbourne but it also had offices in Sydney and London. Its issued capital was 450,000 shares of £10 each of which £1 had been paid up. In August of 1893 it owed £2,091,470 the bulk of which, it may be assumed, was raised in England by the issue of Debentures. It also owed £383,456 on fixed deposits. In 1893 this company became financially embarrassed and had to consult its creditors. A scheme of reconstruction was proposed. A new company was proposed to take over substantially the whole of its assets and liabilities as from 31st August 1893. The scheme of reconstruction or arrangement proposed and accepted is scheduled to the Trust Deed of 1893. A new company, the appellant, was formed with a share capital of £4,275,000 in 900,000 shares of £4 15s. each. All

(1) (1932) P. 27.

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creditors of the old company on Debentures, Debenture Stock and fixed deposits, it was provided, should take debentures in the new company for the full amount of their debts carrying interest at five per cent per annum to be paid off after the expiration of twenty years or earlier as provided by the arrangement. Every shareholder in the old company was entitled to two shares in the new company with 5s. per share credited as paid up for each share held by him in the old company so soon as he should have paid up in cash the sum of £1 on each of the shares in the new company. By this arrangement the payment of debentures and fixed deposits would be postponed and fresh capital amounting to £900,000 would be found for the purpose of discharging secured debts which amounted to £900,000 or thereabouts. The Trust Deed of 1893 was executed for the purpose of securing the Debenture Holders under this scheme of arrangement. The Debentures issued in series pursuant to this scheme were in common form whereby the appellant promised to pay the bearer on the presentation of the Debenture a specified number of pounds.

The scheme was sanctioned by the Supreme Court of the State of Victoria, the High Court of Justice in England and is also covered by an Act of the Parliament of Victoria No. 1356 to facilitate carrying it out and also reconstruction schemes of other companies.

But the results anticipated from this scheme were not achieved.

In 1895 623,350 shares had been taken up under the 1893 scheme on which £439,057 was paid (£247,132 paid in cash, £36,088 paid in advance and £155,837, being 5s. per share, credited as paid under the scheme). There was due to Banks and other secured creditors £821,000 and there were also contingent liabilities amounting to some £960,000.

In 1895 a new scheme of arrangement was proposed and subject to some modifications was accepted and confirmed and declared binding upon the company, its shareholders, Debenture Holders, and other creditors by an Act of the Parliament of Victoria 1895 No. 1397.

In outline the scheme was as follows:—" A " Debenture Stock to the amount of £1,500,000 was to be created carrying interest at four per cent per annum. " B " Debenture Stock to the amount of £1,234,350 was also to be created carrying interest at three per cent per annum. And the company was to issue to each holder of A and B stocks in equal moieties to an amount equal to their holding of Debentures and such A and B stocks were to be accepted by each holder of Debentures in satisfaction of all their claims upon the company in respect of their debentures which were

to be surrendered to the company in exchange for stock and cancelled. Any balance of A stock remaining after satisfaction of claims of holders of existing debentures was to be issued to the banks and other creditors having claims amounting to £821,000 or thereabouts in satisfaction or part satisfaction of their claims upon terms which should be approved by the Trustees of the existing (1893) Trust Deed. The company was to have power to redeem stock at a premium of five per cent but A stock was to be paid off before B stock. Shareholders of the company could elect to pay up the whole or any part of the shares held by them in cash to an amount sufficient with any sum already paid or credited as paid up to make the total amount paid or credited as paid up equal to £2 15s. per share, and provided such sums were paid, then, subject to certain conditions shareholders were entitled to fully paid Preference shares of £2 5s. for every share upon which £2 15s. was paid or credited as paid and thereupon such last-mentioned share should be cancelled and all further liability should cease. Provision was made for the case of shareholders who did not elect. All moneys received from shareholders were to be applied by the company in paying off its liabilities to the banks and other creditors until such liabilities were fully discharged.

In 1895 a Trust Deed was executed giving effect to this scheme. Debenture Stock in accordance with the scheme was constituted and provision was made for securing the stock. Forms of Stock Certificates were given in a Schedule to the Deed. They were in common form and certified that a named person or body was the holder of so many pounds of the A or B Stock respectively and that the holders of the stock were entitled to the benefits of and subject to the provisions of the Trust Deeds of 1893 and 1895.

By this scheme it was anticipated that the issued shares 623,350 would be paid up to £2 15s. (623,350 shares of £2 15s. less already paid up or credited as paid up £439,057) and fresh capital amounting to £1,275,155 would thus be made available to the company to meet its liabilities.

But this scheme did not achieve the results anticipated.

And in 1901 another scheme was propounded. At this time the nominal share capital of the company consisted of £3,476,435 divided into 161,838 ordinary shares of £4 15s. each, which had not been issued, 178,028 ordinary shares of £4 15s. each which had been forfeited for non-payment of calls, 319,426 preference shares of £2 5s. each, which had been issued and 240,708 ordinary shares of £4 15s. each, which had been issued.

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Some ordinary shares had been cancelled under the scheme of arrangement in 1895.

The debenture debt of the company was in respect of A Stock £1,481,050 and B Stock £1,234,350. Of the A Debenture stock £246,700 was held by a Trust company and four banks which they were entitled to realize in 1901 unless sums amounting to £195,300 were paid to them. The book value of the company's assets amounted to £3,691,536 but the real value it was estimated did not exceed £2,803,800.

The scheme agreed upon and sanctioned by the Supreme Court of Victoria was in outline :—Capital was reduced to £558,995 10s. divided into 319,426 shares of £1 15s. each. The Preference capital was subdivided into shares of 5s. each fully paid and were thenceforward called ordinary shares. Substantially, this scheme was carried out by cancelling 145,696 ordinary shares upon which £1 5s. per share was paid up by writing off 10s. per share of the 319,426 Preference Shares and by cancelling 95,012 Forfeitable Shares upon which there was paid up in all £393,321, and by writing off forty per cent B Debenture Stock £493,740. The company was then enabled to write down its assets to their estimated value, £2,803,800 or thereabouts.

In 1910 the trustees for the Debenture Holders consented to the company increasing its capital to £798,565 divided into 798,565 shares of £1. And a new form of B stock certificate was issued. This certificate described the issue of the Debenture Stock as made under the authority of an Act of the legislature of the Colony of Victoria. In 1910 the same form was adopted to the A stock.

The Act referred to is, I take it, the Act of 1895 No. 1397.

Nothing thereafter takes place of any material importance to this case until the execution of the Trust Deed of 1939 unless it be the appointment of new Trustees resident in England in 1916, 1919, 1921 and 1923 for the purposes of the Trust Deeds.

It is, as appears from its terms, a Consolidating Deed. It constituted, however, as already stated, the sum of £838,177 then outstanding on A Debenture Stock as A Debenture Stock under the Deed and the sum of £579,525 then outstanding on B Debenture Stock as B Debenture Stock under the Deed and required holders of the A and B Debenture Stock outstanding to deliver the relevant certificates for new certificates for that stock in the form already indicated.

In an earlier part of this judgment I have outlined the general provisions of this Deed and now merely refer to them.

It is necessary, I think, to consider the various Deeds that I have outlined and the terms of the Debentures and the Debenture Stock certificates mentioned in them for the purpose of determining the proper law of those Deeds—the system of law which governs the rights and obligations of the parties—the system with which the transactions effected by them have the closest and most real connection.

It is clear from them that the Deeds and the issue of the Debentures and the Debenture Stock were not isolated transactions but were part of the schemes of arrangement and reconstruction already mentioned.

The monetary rights and obligations arising under them are expressed in the same terms.

The capital is so many pounds divided into shares of so many pounds, the capital is reduced by so many pounds, debts are expressed in pounds and the assets are written down or written off by so many pounds. The issues of Debentures and Debenture Stock are of so many pounds and the amount of each Debenture and each Stock Certificate is expressed in pounds. An illustration from the 1901 Trust Deed is worth noticing. The B Debenture Stock on 31st December 1900 was £1,234,350 or thereabouts. The Trust Deed of 1901 provides that as from 31st December 1900 forty per cent of the principal amount of B Stock outstanding should be treated as written off and cancelled and accordingly each sum of £50 of B stock outstanding on that day should as from that day be treated for all purposes as a sum of £30 of B Stock. The expression pounds or the symbol £ in these Deeds and Certificates must in respect of capital and its reduction necessarily relate to the monetary system of Australia if it be distinct and separate from that of England for the appellant was incorporated in the State of Victoria, Australia, and must state its capital in the terms of the monetary system there in force and it can only reduce its capital in manner provided by the law of the State : cf. *Companies Act* 1938, ss. 5, 55, and corresponding prior enactments.

Further, the company must under these Acts keep full and true complete accounts of its affairs and transactions : cf. Act, ss. 122 et seq. These accounts in the case of a Victorian company are properly kept in terms of the monetary system of Australia. The value of the assets and the writing down of those assets and the debts of the company (I am referring to the amount of debts other than the Debentures and Debenture Stock debts) would be expressed in the terms of that system in pounds shillings and pence.

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As a matter of construction one expects that the same word or symbol is employed in the same sense in the same instrument unless the subject matter or the context indicates a contrary intention.

Thus one would not expect in the 1901 scheme of arrangement that forty per cent was to be written off the B Debenture Stock (to take the case mentioned above) according to the monetary system of England and ten shillings per share off 319,426 Preference Shares according to the monetary system of Australia. And when in Australia the Trust Company and the four Banks took up A Debenture Stock amounting to £246,700 under the scheme of 1895 one would not expect that the obligation upon this stock was expressed in the terms of the English monetary system and not in the terms of the Australian system.

The context of the Deeds does not indicate any such intention on the part of the parties and the subject matter does not require that construction. The parties appear to have regarded the monetary systems of England and Australia as a system common to both countries: the pound in England, so far as they were concerned, was the same unit of account as the pound in Australia.

The fact that the appellant is an Australian company, that its control and assets and the security for Debenture Stock holders are here, are neutral facts, but they are facts that may be considered for the purpose of ascertaining the system of law with which transactions of the Trust Deeds, Debentures and Debenture Stock have the most real connection. Likewise the Acts of the legislature and the orders of the courts sanctioning the schemes of arrangement which have already been referred to are also, I think, neutral facts. The Acts do not create the rights and obligations of the parties under the Trust Deeds, Debentures and Debenture Stock, but only give effect to those rights and obligations when duly ascertained. Still they are also matters which may be considered in determining the system of law which should govern the rights and obligations of the parties under the Trust Deeds, Debentures and Debenture Stock.

The conclusion at which I have arrived, taking all these various circumstances into consideration, is that the system of law which governs the rights and obligations of the parties under the Trust Deeds, Debentures and Debenture Stock is that system of law in force in Victoria which includes the Australian monetary system if it be distinct from the English monetary system.

It was said at the Bar that the appellant had in fact paid stock holders in England in English currency and that the question really agitated by the Originating Summons in this case was in what currency the Stock holders in Australia should be paid.

In my opinion, the result is that the appeal should be allowed. And, assuming that there is no unit or money of account common to England and Australia, that it should be declared that the obligation of the appellant where payment is made in Australia is to pay the number of pounds outstanding on the Debenture Stock in money which is legal tender in Australia. And where payment is made elsewhere than in Australia the obligation of the appellant is to pay in the currency of Australia the equivalent of the number of Australian pounds owing on the stock held by each stock holder calculated according to the rate of exchange for telegraphic transfers ruling on the 1st January 1948.

DIXON J. This is an appeal from an order made on an application by way of originating summons pursuant to Order LIVA. for the determination of certain questions of construction arising under some trust deeds securing debenture stock and under the stock certificates. The application was made by the appellant company, which had issued the debenture stock. None of the holders of the stock was made a defendant but by the order under appeal the trustees of the deeds who are the only defendants were appointed to represent for the purpose of the application all persons who are or have been entitled to or interested in the stock.

The stock was originally created in 1895. The transaction was closely connected with England, although the appellant is a Victorian company carrying on business in Australia. At that time the monetary system of the Australian colonies was the same as that of England and of course the sums secured by the debenture trust deeds and stock were expressed in pounds. The stock is now to be paid off and the divergence of the two monetary systems has made it necessary to determine whether the measure of the liability is the English pound or the Australian pound. In submitting this question for the determination of the Court the appellant company confined it to the case of stockholders who were on the register kept in Melbourne or if upon the register kept in London resided in Australia. There was no third register. We were informed that stockholders who were on the London register and did not reside in Australia have been paid upon the footing that they were entitled to the amounts denominated by their debentures in English pounds.

The distinction thus drawn may be in part due to an unwillingness on the part of the appellant company to contest the right of the holders of debenture stock to receive sterling to the amount of the stock if their title was English and they were not identified with Australia by residence. But it may also be due in part to the

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company's entertaining a view that when the common currency or money of the two countries diverged so that different results were produced by measuring the obligation in Australian pounds and in English pounds, it became necessary, not to choose between one pound and the other as a measurement of the obligation of the whole issue of debenture stock, but to discriminate by reference to the place of registry of the debenture stock and of residence of the holder. Doubtless the basis of the discrimination, which is not entirely logical or symmetrical, consists in the factors, that is place of registration and of residence, which were thought by the appellant company to control the determination of the place of payment of any given holding of stock. If this be so, it will be seen that it implies two underlying assumptions. The first is that each stock certificate represents a separate and distinct contractual obligation so that it need not sound in the same money as stock the subject of other certificates. The second is that place of payment is a determining criterion. In the judgment appealed from *Fullagar* J. rejected both these assumptions, the first as a matter of interpretation, the second as a matter of law. When it has become necessary to decide between systems of money for the purpose of saying to which a debt belongs much confusion has frequently existed between two matters which are essentially distinct. One matter is the choice of one or other system of money as that for ascertaining or measuring the liability. The other is the actual currency by which the liability so measured is to be paid. If today a merchant in London were to engage a man to go from London to Australia and there serve him at a salary expressed as so many pounds sterling payable monthly in Australia, no one would doubt that by the contract the English system of money was chosen for measuring the remuneration but that when measured it was necessary to ascertain by conversion the Australian equivalent and make the actual payment in Australian money.

The first is the money of account, the money determining the substance or subject matter of the obligation. The second is the money of payment, the money which because it is the currency of the place where actual payment of a money obligation is to be made furnishes the means or instrument for discharging the debt.

The choice of the money of account is a matter of contract. It depends upon the contractual intention of the parties and is therefore a question of interpretation. If the intention is not express, it must as in any other case of unexpressed intention be ascertained by considering the nature of the transaction and all the circumstances of the case. The place of payment, if expressed or indicated, is of

course one of the matters to be considered and it may be one of great weight. If in the example I have given the salary had not been stated to be in sterling the fact that it was to be paid in Australia might be considered as evidence that it was to be measured in Australian currency. But it would be an evidentiary consideration only and might readily be outweighed by other circumstances in the case.

There are not a few existing examples of two or more different currencies or money systems employing the same nomenclature or designation for their money of account and for the denominations of their currency. There are French, Belgian and Swiss Francs. There are United States and Canadian Dollars. There are English, Australian, New Zealand, South African, Cypriote and other pounds. This identity of designation gives room for ambiguity and uncertainty in contracts of the present day requiring the payment of francs, dollars, pounds or the like, if the contract in any way touches more than one of the countries using the same designation for their respective moneys of account. It is out of contracts made at a time when the difference exists between the systems using the same nomenclature that the usual case arises involving an uncertainty as to the money to be used in measuring an obligation. In such a case the parties have contracted so to speak in full view of an existing difficulty or ambiguity and the problem is the consequence of their failure to express their intention, or to express it unambiguously, about a question confronting them. In such a case their actual or presumed intention should be discoverable by processes of inquiry and reasoning the use of which is commonplace. But it is a special case presenting greater difficulties if the problem arises from a contract made in relation to two countries possessing at the time a common money system that has afterwards divided into two. It may be more difficult to resolve such a case by means of a presumed contractual intention. But I cannot see what other test there can be. When the substance of an obligation is in question, it must depend upon contract. To inquire in what money of account is the obligation to be ascertained is to raise a question of the substance of the obligation. Such a question of contract must come back to the real or imputed intention of the agreement. It is a question of " interpretation " in the full sense of that word. In the judgment under appeal *Fullagar* J. gives his reasons for holding " that the question is one of the substance of the obligation and is to be decided as a matter of construction ". The very full and convincing discussion of the subject in Dr. *F. A. Mann's* book,

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The Legal Aspect of Money ((1938), Ch. V., ss. 6-8 ; Ch. VI., ss. 1 and 2, pp. 140 to 179), supports the same conclusion.

With the advantage of both the reasons of *Fullagar* J. and the discussion by Dr. *Mann* before us, the members of the Court in *Bonython* v. *Commonwealth* (1), except *Starke* J., adopted the interpretation of the contract as the criterion, though the Court was not unanimous in its conclusion, and *Latham* C.J. and *Starke* J. dissented from it. I am not sure that *Starke* J. took the principle of interpretation or intention into the choice between Australian and English money. For his Honour, after construing the contract as giving rise to an obligation to pay a sum of money expressed in a money of account common to the two countries, went at once to the manner in which such an obligation is to be discharged.

I shall not repeat the reasons which I then gave for the opinion that the question whether such an obligation is to be treated as expressed in English or Australian money must be determined as a matter of interpretation. It is, however, necessary perhaps to state again what is the question governed by the intention to be extracted from the nature and circumstances of the transaction. It is hardly the same question as that arising when at the time the contract is made there are two money systems and it is uncertain to which it refers for the money of account. As the separation of the common money system into two took place here after the debenture stock was issued the question must rather be to which in the division of a single system into two does the contract belong, which does it follow, on which country did the contract rely as affording the money of account ? Thus the point to which the imputed intention must go is reliance upon one of the two countries rather than the other as the source or home of the money of account the contract uses. To state it in another way, the intention to be implied must be an intention to use the pound as the money of England or as the money of Australia as the case may be, an intention to rely upon the pound as the money of account because it is the money used in one country rather than because it is the money used in the other.

It is apparent that the interpretation must be of the transaction in the wide sense, and the intention must be reasoned out from the nature and circumstances of the transaction which is the subject of the contract and the elements found within it, just as an implication is worked out.

In dealing with such an inquiry it is necessary to examine the facts for the purpose of extracting from them all the material

(1) (1948) 75 C.L.R. 589.

considerations. For reasons which will become apparent it is better in the present instance to proceed chronologically.

The appellant company was incorporated in Victoria in 1893 as part of a plan of reconstruction. An earlier company of the same name found itself in the midst of the financial crisis of that period with assets predominantly consisting of bills receivable and other advances, and with an answerable amount on the liabilities side made up of debentures and fixed deposits and of bills payable and other such liabilities. The issued share capital was 450,000 shares of £10 each of which £1 each had been paid up. The shareholders' funds included also an amount at the credit of a reserve fund account and an amount at the credit of profit and loss. The company's business was carried on in Australia, but apparently the debenture debt had been contracted in London. On the London books there was a debt of £2,091,470 comprising £1,757,700 secured by terminable debentures and £333,770 by interminable debentures. In addition the company held £383,456 on fixed deposit; of this £85,012 stood on the London books, the rest on the Australian. It is unnecessary to go into all the details of the scheme for reconstructing the company. It is sufficient to say that the plan involved these steps among others :—(*a*) forming the appellant company with a capital of 900,000 shares of £4 15s. each to be issued paid up to 5s. each to the members of the old company, two shares for one, thus leaving £4,050,000 to be called up; (*b*) the immediate calling up of another £1 a share or £900,000; (*c*) a calling up in the winding up of the old company of the uncalled capital of £9 a share, to be satisfied, however, by the taking up of two shares for one in the new company and the payment of the call thereon of £1 each; (*d*) the issue by the new company to the debenture holders and depositors of the old company of debentures of the new company in satisfaction of the liabilities to them. As at the date when this conversion was made it meant the issue in London, that is " on the London books," of debentures to secure £2,176,482 and " on the Australian books " to secure £297,400. It was part of the purpose of the scheme to bring in £900,000 of new paid-up capital and to apply it in paying off an approximately equivalent amount of secured liabilities and thus to release assets. It was also part of the plan to write £458,000 off shareholders' funds consisting of old share capital and amounts at the credit of profit and loss and correspondingly to write down the value of the assets, so as to meet the fall in values. The scheme was negotiated in London where apparently the approval of the debenture holders was obtained. It was confirmed by the Supreme Court of Victoria and was

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included in the *Reconstructed Companies Act* 1893 (No. 1356) of the Colony of Victoria as one of the schemes that Act was designed to facilitate by the vesting of assets, the statutory substitution of shareholders and the validation of the compromise. An indenture between the company and the trustees for the debenture holders was executed in London, but though the nature and some of the conditions of this deed and of the debentures themselves have an importance, there was afterwards a succession of trust deeds, and the not very dissimilar features of a substituted trust deed finally adopted have a more direct bearing upon the question and it will be enough to deal with them in their place.

In support of the view that the debentures are so associated with Victoria or Australia that the liability thereon should be taken to be based on the Australian money system, the appellant company points to the following matters in this transaction, apart from specific provisions of the trust deed. First, there is the fact that it is an attempt to adjust the value of Australian assets with the liabilities in an Australian balance sheet. Secondly, it is an Australian company reconstructed into another Australian company. Thirdly, the business is carried on in Australia. Fourthly, the transaction is confirmed by the Victorian Supreme Court and validated by the Victorian Parliament. The respondents on the other hand say that they are concerned only with the debentures; that predominantly these formed a London issue; that the issue was pursuant to a compromise with debenture holders in London which was negotiated there, that the trust instrument was framed and executed in London and it established an English trust. By a schedule to the trust deed elaborate provision was made for meetings of debenture holders. Among the powers of a general meeting was that of sanctioning a scheme of reconstruction, of sanctioning a compromise of the rights of debenture holders and of assenting to modifications of the trust deed and of authorizing the trustees to execute a deed supplemental to the trust deed embodying any such modification. It was very soon found necessary to invoke these powers. No doubt the contraction in values had gone on. Of the 900,000 shares 623,350 had been taken up but by 30th June 1895 only £247,132 of the amount called up had been paid. This together with the 5s. deemed to be paid up and with a sum of £36,088 paid up in advance of the due date of calls made brought the paid-up capital to £439,057. The uncalled capital was £3 10s. a share. But to secured creditors £821,000 was owing by that date. The assets over which this debt was secured were said largely to exceed in value the advances. Upon the debentures £2,468,700

was outstanding on 30th June 1895. A second scheme of arrangement was put forward in that year and adopted. The debenture holders met in London and appointed a committee which recommended it. Instead of the debentures, debenture stock was created of two classes, A debenture stock carrying four per cent per annum from 30th June 1895 and B debenture stock carrying three per cent per annum from that date. Each debenture holder was to take an equivalent amount of debenture stock but half (i.e. £1,234,350) in A stock and half in B stock. A greater amount of A debenture stock than was required for issue to the old debenture holders (£1,234,350) was created, viz. £1,500,000, with the purpose of using the balance in reducing securities given to banks and other creditors. As to the capital of the company the scheme gave shareholders an election to pay their shares up to £2 15s. and then obtain in lieu of such shares fully paid preference shares of £2 10s. Without going into details, it was the purpose of the rearrangement of share capital to write off 10s. a share on the issued capital of 623,350 shares and to write down the value of the assets to a corresponding extent, but while doing this to obtain from the shareholders enough further capital to write off the liability to the secured creditors. A new trust deed was executed to secure the debenture stock. It gave the A stock priority over the B stock. The interest on the B stock was made payable only if there were profits available for the purpose. The company was empowered to redeem the A stock at a £5 premium on notice and having done that to redeem in its turn the B stock. Further, the company was empowered to purchase stock on the market and cancel it. Otherwise both classes of stock were interminable unless the company made default.

The power to redeem stock was governed by clauses providing for drawings at the office of the company in London to determine the particular holdings of stock to be redeemed. The powers of stockholders in general meeting in London, including the power to sanction schemes of reconstruction, compromises and modifications of the trust deeds, were repeated but they were conferred on the A stockholders and were limited in some respects to the rights of A stockholders. The scheme of reconstruction had been approved in London by the debenture holders on 9th August 1895. On 26th September 1895 the Victorian Parliament passed an Act (No. 1397) confirming and sanctioning the scheme of arrangement and making it binding on the shareholders, debenture holders and creditors of the company. The trust deed was then settled and executed in London on 12th December 1895. In connection with this second scheme of reconstruction the same points as in the case of the first

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scheme are made respectively by the appellant and the respondents in support of the opposing views, that is, on the one side, the view that the transaction was closely associated with Australia and on the other, with England. Again I shall not deal with the specific provisions of the particular trust deed or with the conditions of the forms of debentures provided by the trust deed.

Before many years had elapsed still a third scheme of arrangement was found necessary. That was in 1900. By then the paid-up capital consisted of a certain number of preference shares of £2 5s. each fully paid up and a certain number of ordinary shares partly paid up. Of these some were liable to forfeiture for non-payment of calls. A purpose of the plan was to reduce the paid-up share capital of the company by £393,321. This was to be done by forfeiting the shares liable to forfeiture, writing off the amount paid up on the ordinary shares and writing 10s. a share off the preference shares. The issue of A debenture stock stood at £1,481,050, composed of £1,234,350 representing half the debentures that had been replaced by the issue of A and B stock and £246,700 issued to secured creditors. The B stock stood at £1,234,350, representing the other half of the debentures that had been so replaced. Part of the third plan of arrangement was to write forty per cent off the amount of the B debenture stock or £493,740, but to increase the rate of interest to four per cent per annum. The reduction in the amount secured by the B debenture stock and the reduction in the paid-up capital would with the addition of a small sum enable the company to write down the value of its assets by £887,736. A report had shown that the book value exceeded the real value by that sum. Two reserves of £75,000 each were to be formed, a primary and a secondary reserve. The primary reserve was to be used to ensure the payment of interest to holders of the A stock, the secondary for the liquidation of debts of the company and for contingencies in its business. The primary reserve fund was to be invested in investments authorized by the laws of the United Kingdom or of certain of the Australian colonies. The A debenture stock to the amount of £246,700 held by secured creditors was to be obtained by the company from those holders and cancelled, and it was not to be re-issued.

The scheme was approved by a meeting of holders of A debenture stock in London on 15th January 1901 and at another meeting held on the same day of holders of B debenture stock. Each meeting sanctioned modifications of the trust deeds for carrying out the scheme. On 28th May 1901 the Supreme Court of Victoria made an order reducing the capital of the company in accordance

with the scheme. In pursuance of the authority of the two meetings of stockholders a supplemental trust deed between the company and the trustees dated 21st October 1901 was executed in London. The deed contained the modifications necessary to carry out the scheme and provided a new form of stock certificate for the B series of debenture stock. In relation to this transaction the parties use the same rival arguments. The appellant company cannot this time point to a Victorian statute or to an order of the Victorian Supreme Court confirming the scheme of arrangement. But the transaction does relate to the adjustment in an Australian company conducting an Australian business of items going into the liabilities side of its balance sheet. These items are adjusted with the true value of its assets, which substantially are Australian assets. On the other hand there are the same elements upon which the respondents may rely. The transaction, so far as it affects the debentures, is carried out in London by machinery there set up under the previous instruments and the purpose of the transaction is to modify the rights of holders of debenture stock whose securities represent money raised in London.

After this transaction there were no more reconstructions, schemes of arrangement or compromises. But three more supplemental trust deeds were found necessary and they were necessary for minor purposes not presently material. One of these, which arose out of an increase in the capital of the company, provided another edition of the form of debenture stock certificate.

In the form of debenture scheduled to the deed of 1893 the heading stated that the company was incorporated in Victoria. In the form of stock certificate scheduled to the deed of 1895 the statement was followed by one giving the nominal and issued capital of the company, doubtless because the capital structure had been altered. A similar statement of the nominal and issued capital appears in the forms of debenture scheduled to the deeds of 1901 and 1939. Of course each new form could apply only to stock certificates issued after the deed came into force. The capital of the company was necessarily expressed in pounds and the pounds could not but follow the Australian system of money when it diverged. But I cannot think that this is a matter of any significance. The statement formed no more than part of a description of the company. At first there was a common money system. In 1939 there was in the deed an avoidance of any alteration and change affecting the question. There is little but a purely verbal point in the fact that it is a money expression identifying itself with Australia. It leaves the substantial question where it was.

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Because of the number of documents which had come to govern the rights of debenture stockholders, and because some of the provisions arising out of the reconstructions were spent or because of the great improvement in the financial position of the company had lost their significance, it was decided in 1938 to produce a consolidated trust deed. Meetings of the holders of the two series of debenture stocks were held on 7th December 1938 in London pursuant to the powers already referred to expressed in the second deed. These meetings approved and sanctioned a draft supplemental trust deed that had been prepared and authorized the trustees to execute it. The supplemental deed which was dated 15th March 1939 was executed by the trustees in London and by the appellant company in Melbourne. The deed is complete with schedules containing forms of stock certificates for future use and containing provision for future meetings of stockholders. While for the purposes in hand it may be treated as the charter of the rights of the debenture holders, its character must not be disregarded. It is on its face a supplemental instrument gathering together and revising provisions growing out of the series of transactions I have described and deriving its force from the provision contained in the earliest of them and repeated in those that followed, that is to say, the provision empowering a meeting or meetings of stockholders to authorize modifications of the original contract.

At the time when this deed was drawn the departure of the Australian money system from the English money system was complete. The Australian pound was at a discount of twenty-five per cent. The difficulty that would probably arise if notice of redemption were given could hardly have escaped the appellant company, the defendant trustees, the meeting of debenture holders and the draftsman. Yet the question was avoided and no provision was altered that could affect the solution. It is apparent that the parties did not wish to deal with or prejudice the substance of the liability by a consolidation of machinery provisions. It should also be borne in mind that, unless contrary to the view which I should take without hesitation, it were held that the proper law of the obligation of the debentures was Victorian, the legislation of that colony could not in a forum outside Victoria be considered to overrule the provisions of the earlier trust deeds by paramount authority.

The deed contains a clause enabling the company with the consent of the trustees on giving six months' notice to redeem at a premium of five per cent the whole or any part of the A debenture stock and on redeeming the A stock to redeem the whole or any part of the

B stock. The company on the expiration of the notice becomes entitled and bound to redeem the stock. If the notice specifies a part only of the stock the particular stock to be redeemed is to be selected by a drawing on London or at some other place approved by the trustees before a solicitor of the Supreme Court of England.

The company with the approval of the trustees gave notice of redemption of the whole of the stock. The notice expired on 1st January 1948.

It is in this way that the question arose as to the money in which the amount due to stockholders residing in Australia or registered on the Melbourne register is to be calculated. It does not appear what amount of stock falls within this double description.

The trust deed forms a contract not with the debenture stockholders but with the trustees and the stock certificates are not expressed so as to create any liability directly to the stockholders. The obligation imposed upon the company by the trust deed is to pay the trustees. But the obligation may be satisfied by payment to the debenture stockholder. Two consequences of importance follow. In the first place it makes it difficult, if not impossible, to assign the obligation of the contract to different money systems according to the residence of the stockholder or the place where he is registered as a stockholder. As there is a single obligation and one creditor in respect of all the stock issued it surely must follow that the obligation is to be measured in one and the same money.

In the second place as the trustees reside and administer the trusts in England, the place of payment prima facie is England, subject to the company's electing to discharge its obligation by direct payments to the stockholders. The deed provides for a stock registry in London and another in Melbourne. Up to the time of the consolidated deed lists of all the stockholders were kept in each place, but since then each registry has been confined to the stockholders registered thereon. The payment of interest to stockholders has been made from the office in which the particular stock was registered and in the currency of that country.

This fact can afford no guidance in solving the question. The practice of paying interest from the office of the registry to the stockholders on the register doubtless arose before the divergence in the money systems and it continued afterwards. It was natural to go on using the money of the country concerned as the measure of the interest due. It is no ground for inferring an intention that the substance of the obligation to pay capital should vary with the place where the stock was registered. The close connection with England of the transaction expressed in or governed by the trust

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appears in a number of particulars. Trustees have been appointed who reside there. The debenture stockholders meet there. Moneys to be invested are to be placed in investments for the time being authorized by the law of England for trust moneys or in any other investments approved by the board of the company. The *Law of Property Act* 1925 of the United Kingdom is mentioned twice. A receiver appointed by the trustees is to have the powers given to a receiver by that Act and is not to be an agent of the trustees or stockholders but is to occupy the position of a receiver under the Act.

When the foregoing considerations are taken into account with the whole history of the debenture debt the inference seems inevitable that the obligation secured by the trust deed is essentially English. The greater part of the debenture stock was up to the time of redemption held in England and was upon the London register. It originated in a security by which money was raised in London. The modifications of the creditors' rights were effected in London. The stockholders looked to English trustees and an English deed to protect and secure their rights as creditors.

In answer to these considerations it was urged that the schemes of arrangement involved adjustments which postulated a single money system for the liabilities, including debenture stock, and for the items on the assets side of the account. The adjustment, it was contended, was inconsistent with the notion that the debenture liability depended on one money system, and the share capital on another, while in terms of the latter the valuation of assets was reduced. Further, the schemes meant that the London creditors were required to come into the enterprise and allow the funds to remain in it with a view to retrieve them, interest being payable only out of available profits. A maintenance of the proportion between assets and liabilities re-established by the scheme was contemplated by all parties, so it was argued, and that was incompatible with reliance on divergent money systems.

The short answer to most of this argument appears to me to lie in the fact that at the time of the three schemes of arrangement the divergence had not taken place and none was in the least likely. Indeed it is perhaps not too much to say that such a possibility was foreign to the conceptions then current. The adjustment was made between liabilities and asset values expressed in one money of account because only one obtained in England and Australia. But I cannot see that it would have made any real difference if the liability upon the debenture stock had been expressed in some other money as, for example, dollars. Conversion into

Australian pounds would have been necessary and perhaps some provision against the contingency of the exchange moving unfavourably, but that is all. The contention that the London stockholders committed their funds to the enterprise seems to mean little. All they did was to submit to a modification of their full rights. The fact that the company is Australian and that its business is in Australia is of course a consideration and a not unimportant one. I attach less importance to the recourse made to the legislature and to the Supreme Court of Victoria. That arose only out of the circumstance that the company was incorporated under Victorian law.

But the question is what deductions should be made from the whole of the foregoing circumstances. The point to be considered is whether the contractual intention upon which the transaction must be taken to have been based was to rely on England or upon Australia as the country providing and controlling the money system governing the issue of debenture stock. The dominant elements appear to me to be, (*a*) the English setting of the transaction embodied in the trust deeds; (*b*) the English source of the money originally raised; (*c*) the English superintendence and control of the transaction, that is to say, the trusts were established in England, the trustees were English, the meetings were in London, the debt was enforceable in and from England and prima facie was payable there; (*d*) the fact that the only creditors were the trustees in England to whom the debenture stockholders might look for the effectuation of their rights; (*e*) so far as a choice between the systems of law of the two countries might be a guide the recourse was to English law clearly enough and it was the law relied upon. It is a reasonably plain deduction that the parties to the contract embodied in the trust deed and the stock certificates treated the legal and financial system of England as the foundation of the transaction. It was the country with which they instinctively contrived to connect the contract most closely. The natural inference to draw as to the contractual intention is that it was upon the money system of England because it was the system of that country that they based the expression of the liability secured by the debenture stock. Where an intention is to be implied, it is a familiar test to ask what the parties would have said at the time if they had been asked what was their intention as to the particular term proposed. Suppose the company and a meeting of debenture stockholders had been asked in 1893 or 1895 or 1901 the question whether the security was expressed in pounds because the pound was the money of England or because it was the money of Australia.

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The question of course would have appeared a strange one, but perhaps in 1901 they might have been satisfied with the explanation that the new Commonwealth had a legislative power over currency which it might exercise. Or suppose they had been asked the hypothetical question, namely, whether if Australia and England came to have different money systems the debenture stock were to be taken as referring to English or to Australian money.

I find it hard to imagine that they would have failed to agree in saying to either of these questions: "Of course the contract is an English one referring to the English money system." But to imagine the parties dealing with the very question at the time of the contract is only a device to test the conclusion. The intention to be implied must be arrived at by working out the consequences which appear to flow from the features which the transaction exhibits and the circumstances which surround it.

So looking at it I think that the proper conclusion is that reached by *Fullagar* J., with whose judgment I agree.

I think the appeal should be dismissed with costs.

McTIERNAN J. The appeal should be dismissed.

I agree with the reasons of my brother *Dixon*.

Appeal dismissed with costs.

Solicitors for the appellant: *Blake & Riggall.*

Solicitors for the respondent: *Aitken, Walker & Strachan.*

E. F. H.