[HIGH COURT OF AUSTRALIA.]

AUSTRALIAN STEAMSHIPS PROPRIETARY LIMITED . . . . . Appellant;
Defendant,

AND

MURPHY . . . . . Respondent.
Plaintiff,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. of A. 1934.

Melbourne, *June* 8.

Sydney, *Aug.* 3.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Shipping—Seaman—Incapacity due to accident—Landed at port other than home port—Certificate of recovery—Wages—Liability of shipowner—Agreement—Navigation Act 1912-1926 (*No.* 4 *of* 1913—*No.* 8 *of* 1926), *sec.* 132 (1)*.

An agreement made between a seaman and his employer provided that in the event of illness or accident to the seaman in the service of the ship incapacitating him from following his duty he should be entitled, "if landed and left at a port other than his home port, to receive wages until his recovery, certified" by his medical attendant or by a medical inspector of seamen "and until arrival at his home port, at the rate payable to him when he was landed and after his recovery (certified as aforesaid) to a free passage to his home port." This clause was similar to that contained in sec. 132 (1) (*b*) of the *Navigation Act* 1912-1926. The seaman whose home port was Melbourne met with an accident in the service of his ship while at Devonport, Tasmania, when his leg was badly

* Sec. 132 of the *Navigation Act* 1912-1926 provides: "(1) Where a seaman or apprentice belonging to a ship registered in Australia is left on shore at any place in Australia, in any manner authorized by law, by reason of illness or accident in the service of the ship incapacitating him from following his duty, he shall be entitled—(*a*) if landed at his home port, as specified in the agreement, to receive wages, at the rate fixed by his agreement, up to the expiration of one week after the date of his recovery, as certified by his medical attendant or by a medical inspector of seamen . . . (*b*) if landed at a port other than his home port, to receive, after his recovery, certified as provided in the last preceding paragraph, a free passage to his home port, with wages, at the rate fixed by his agreement, until arrival at that port."

fractured and he was incapacitated from following his duty. Because of the injury he was left at Devonport, where he remained for several months. The appellant company then gave him a free passage to Melbourne, where he was examined from time to time by a medical attendant, who, some months after the respondent's return, certified that his leg had then made all the improvement it was likely to make and that he had a useful limb, but that, in the medical attendant's opinion, he was permanently incapacitated for his work as an able seaman.

Held that the certificate was not a certificate of recovery within the meaning of the agreement, and that the seaman's right to wages continued.

Lawrence v. *Huddart Parker Ltd.*, (1930) 43 C.L.R. 440, applied.

Decision of the Supreme Court of Victoria (*Lowe* J.): *Murphy* v. *Australian Steamships Pty. Ltd.*, (1934) V.L.R. 150, affirmed.

CASE STATED.

In an action commenced by the respondent, James Murphy, in the Supreme Court of Victoria against Australian Steamships Pty. Ltd., the parties agreed upon the facts contained in the case stated, which were substantially as follows :—

1. The defendant is a company duly incorporated under the *Companies Act* 1928 or corresponding previous enactment.

2. By an agreement in writing (being the ship's articles) dated 6th July 1931 made between the plaintiff and the defendant, the plaintiff was employed as an able-bodied seaman on the defendant's steamship *Period* for a period not exceeding 13th January 1932 at a monthly wage which up to 31st July 1932 was £12 12s. and thereafter (if at all) at all material times £12 9s. 9d.

3. The contract of employment incorporated and/or was upon and subject to the terms contained in an agreement in writing dated 6th August 1925 made between the Federated Seamen's Union of Australasia for and on behalf of itself its officers and members, its branches, their officers and members, of the one part and the Commonwealth Steamship Owners Association (hereinafter called the Association) for and on behalf of itself and its members including the defendant.

4. The plaintiff's home port was Melbourne.

5. Clause 22 of the agreement provides as follows :—" If a seaman belonging to a ship for which articles are signed in Australia is landed and left at any port by reason of illness or accident in the

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service of the ship, incapacitating him from following his duty, he shall be entitled :—(*a*) If landed at the home port, to receive wages at the rate fixed by his agreement up to the expiration of one week after the date of his recovery, as certified by his medical attendant or by a medical inspector of seamen if the employer at his own expense requires an examination. Provided that in cases where his engagement expires within one month from the date he was left on shore, the time for which he shall be so entitled to be paid shall not exceed a period of one month, and in other cases it shall not exceed a period of three months from the date he was left on shore. (*b*) If landed and left at a port other than his home port, to receive wages until his recovery, certified as provided in the preceding sub-clause (*a*) and until arrival at his home port, at the rate payable to him when he was landed and after his recovery (certified as aforesaid) to a free passage to his home port. Provided that if after recovery the seaman rejoins his ship or takes other employment or is offered and refuses employment on some other vessel proceeding to his home port at a similar rate of pay to that received by him immediately prior to his being left on shore, and with the right of discharge from that vessel on arrival at his home port his right to continue to receive wages under this sub-clause shall then cease. (*c*) The illness, hurt, or injury which shall entitle a seaman to the benefits provided for in this clause shall :—(1) Be such as wholly to incapacitate him from performance of his duty. (2) Be or appear to be of such a nature that it is considered by the Master advisable in the interests of the seaman to leave him ashore. (3) So far as can be ascertained be an illness contracted on board of the ship or in the service of the ship or her owner, or a hurt or injury sustained in the service of the ship or her owner. Provided that if the illness is due to his own wilful act or default or to his misbehaviour, or is venereal disease, the seaman shall not be entitled to the benefits provided for in this clause. (*d*) The expense of providing the necessary medicines, surgical and medical advice, and attendance to a seaman belonging to a ship while suffering from the effects of sickness contracted or injury received in the service of the ship or of the owner or from any illness not being venereal disease or an illness due to his own wilful act or default, or to his own misbehaviour, and of the seaman's

conveyance to the home port after recovery, shall be paid by the employer without any deduction from wages on that account until he is cured or dies or is brought or taken back to the port where he is entitled to be discharged or such other port as is mutually agreed upon with the approval of the proper authority. This sub-clause is subject to the proviso to sub-clause (*b*) of this clause. (*e*) While being returned to the port above referred to under the provisions of this clause, the seaman, if he is not being maintained by or at the expense of the employer, shall be entitled to sustenance allowance recognized by this agreement."

6. The ship's articles were signed in Australia.

7. On or about 23rd November 1931 at Devonport in the State of Tasmania the plaintiff whilst in performance of his duties on the ship and in the service of such ship, sustained an accidental injury, severely fracturing his left leg. By reason of the said injury the plaintiff was then wholly incapacitated from the performance of his duty.

8. On 23rd November 1931 the plaintiff was landed at Devonport aforesaid by the Master of the said ship and remained as an in-patient at the Devon Hospital, Devonport, from that date until 2nd July 1932.

9. During the whole of this period the surgeon superintendent of the hospital was one Dr. Walpole, who, as such, regularly saw and prescribed for the plaintiff and was in charge of his treatment at the said hospital.

10. On 2nd July 1932 the plaintiff was discharged from the said hospital and Dr. Walpole signed a certificate in the following form (the name "Thomas" therein being a mistake for "James"):— "Thomas Murphy is being discharged to-day. There is still some disability in his ankle joint. I think there will be further improvement, but I doubt if he will ever be as good as he was before the accident."

11. On the said date the plaintiff was notified by the defendant company to return to Melbourne by the s.s. *Oonah* on which he received a free passage to his home port, Melbourne, where he landed on 3rd July 1932.

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12. On his return the plaintiff consulted his medical attendant, Dr. O'Sullivan of Melbourne, who on 5th July 1932 certified as follows:—"I have just examined Mr. James Murphy who is now convalescing from a bad fracture of both bones of the left leg just above the ankle joint. The accident happened seven and a half months ago. He has a good union of the fractures and should be able to get about without much inconvenience, but he is always likely to have restricted movement of his ankle joint and he is never likely to be very active again."

13. The defendant paid the plaintiff wages at the rate fixed by the agreement of £12 12s. per month for the period from 23rd November 1931 (the date of the said accident) to 31st July 1932.

14. From time to time thereafter the plaintiff was examined by Dr. O'Sullivan, who on 9th August 1932 certified as follows:—"To certify that Mr. James Murphy is not yet fit to resume his usual occupation. In my opinion his injured leg is likely to permanently incapacitate him to some extent and he will probably not be able to again undertake his old work," and, on 25th October 1932, as follows:—"To certify that I have again examined Mr. James Murphy. His leg has now made all the improvements it is likely to make and he has now a useful limb but in my opinion he is permanently incapacitated for his work as an A.B.," and, on 31st August 1933, as follows: "To certify that I have examined Mr. James Murphy again and he is still unfit for work as an A.B. or for any work requiring the normal exertion called for in occupations requiring prolonged standing or walking."

15. The plaintiff has not resumed his employment or worked at any other occupation.

16. The defendant has refused to pay the plaintiff any wages from and after 31st July 1932.

17. No certificate in relation to the plaintiff has been given other than those mentioned in pars. 10, 12 and 14 of this case nor has the defendant at its own expense or at all required an examination by a medical inspector of seamen.

18. The plaintiff claims that he is entitled to be paid wages from 31st July 1932 at the rate of £12 9s. 9d. per month or other the proper rate fixed under the agreement from time to time until his

recovery from the injury referred to as certified by his medical attendant or by a medical inspector of seamen if the defendant at its own expense requires such an examination.

19. Alternatively, the plaintiff claims such wages under sec. 132 (1) (*b*) of the *Navigation Act* 1912-1926.

20. The defendant denies the right of the plaintiff to any wages as claimed and further alleges that the plaintiff was certified by his medical attendant on 2nd July 1932 or alternatively on 5th July 1932 or in the further alternative on 25th October 1932 as having recovered from the injury.

21. As an alternative defence and whilst denying any liability the defendant has paid £50 into Court with its defence and alleges that that sum is enough to satisfy the plaintiff's claim.

22. The question for the Court is:

Whether, on the facts stated, the defendant is liable to pay the plaintiff under the agreement or the *Navigation Act* 1912-1926 any and what sum for wages from and after 31st July 1932 for any and what period.

23. (*a*) If the answer to the question is that the defendant is liable to pay the plaintiff some such sum—

(1) If the said sum is more than £50 judgment is to be entered for the plaintiff for a declaration accordingly, except that the rate of £12 12s. therein mentioned is to be changed to £12 9s. 9d. (or so much thereof as is applicable), and for the amount found to be due at the date of the writ, with costs to be taxed, including the costs of pleadings, discovery and this case.

(2) If the said amount is not more than £50 judgment is to be entered for the plaintiff for such declaration as is applicable and for the amount found due, with such order as to costs as the Court may in its discretion think fit.

(*b*) If the said question is answered in the negative judgment is to be entered for the defendant with costs to be taxed, including costs of pleadings, discovery and this case.

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The action was heard by *Lowe* J. who decided in favour of the plaintiff.

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

Fullagar K.C. (with him *Tait*), for the appellant. The agreement deals with the same matters as sec. 132 of the *Navigation Act* 1912-1926. Sec. 127 of that Act also affects its construction and confers certain benefits on the seaman. The *Seamen's Compensation Act* 1911 provides compensation in case of injury. The certificate given by the respondent's medical attendant was in effect a certificate that the respondent had " recovered " from his injuries. The word " recovery " in the agreement means fitness to resume work in some employment, and freedom from the necessity of medical attention, and does not necessarily mean complete restoration to former conditions. The man may have " recovered " although he may not be able to pursue his former vocation. Where a clause is open to different constructions, the more reasonable should prevail (*Bruhn* v. *Australian Steamships Pty. Ltd.* (1); *Australasian Temperance and General Mutual Life Assurance Society Ltd.* v. *Howe* (2); *Arrow Shipping Co.* v. *Tyne Improvement Commissioners* (*The " Crystal "*) (3)). Alternatively, having arrived at his home port with or without a certificate, the right to wages ceased (*Lawrence* v. *Huddart Parker Ltd.* (4)).

Sholl, for the respondent. The burden is on the appellant to show a certificate clearly within the agreement. The respondent retains a right to wages until a certificate of recovery is given, even after arrival at his home port. No adequate certificate of recovery has yet been given. " Recovery " means restoration of the capacity previously existing or sufficient to enable the man to do the work he was formerly doing. The words in sec. 132 of the *Navigation Act* support this view. In the absence of a certificate of recovery, the agreement is to pay wages until death or commutation. It is not sufficient that medical aid has ceased or that the respondent

(1) (1922) 31 C.L.R. 136, at p. 143.
(2) (1922) 31 C.L.R. 290.
(3) (1894) A.C. 508, at p. 516.
(4) (1930) 43 C.L.R. 440.

can do some work (*Lawrence* v. *Huddart Parker Ltd.* (1)). Under sec. 132 (1) (*b*) of the *Navigation Act* the right to wages extended until both conditions were satisfied, namely, the certificate of recovery and arrival at the home port (*Bruhn* v. *Australian Steamships Pty. Ltd.* (2) ; *Australian Steamships Pty. Ltd.* v. *Abbott* (3)).

Fullagar K.C., in reply.

Cur. adv. vult.

Aug. 3.

The following written judgments were delivered :—

RICH, DIXON, EVATT AND MCTIERNAN JJ. The respondent was engaged by the appellant company as a seaman upon a ship in the coasting trade. His home port was Melbourne. While his ship was at Devonport, in Tasmania, he met with an accident by which both bones of his left leg were badly fractured just above the ankle joint. He met with the accident in the service of the ship and, of course, was incapacitated from following his duty. Because of the injury he was left at Devonport, where he remained in hospital for almost eight months. The appellant company then gave him a free passage to Melbourne. There he was examined from time to time by a medical attendant, who, three or four months after the date of the respondent's return, certified that his leg had then made all the improvement it was likely to make and that he had a useful limb, but that, in the medical attendant's opinion, he was permanently incapacitated for his work as a seaman.

The ship's articles incorporated, as part of the terms of the engagement, a provision contained in a general agreement between the shipowners and the Seamen's Union. The provision, which originated in an industrial award, is founded upon sec. 132 of the *Navigation Act* 1912-1926. The provision deals with the case of a seaman who is left at any port by reason of illness or accident in the service of the ship incapacitating him from following his duty ; it gives him rights which go beyond those conferred by the section. If he is landed at his home port he is entitled to wages until a week

(1) (1930) 43 C.L.R. 440. (2) (1922) 31 C.L.R. 136.
(3) (1927) 39 C.L.R. 148.

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after " his recovery, as certified by his medical attendant or by a medical inspector of seamen " ; but the maximum period for which wages are payable is three months from the date he was left on shore. If he is landed and left at a port other than his home port, he is entitled to wages " until his recovery," so " certified . . . and until arrival at his home port, . . . and after his recovery (certified as aforesaid) to a free passage to his home port." This right is qualified by a proviso which does not apply to the circumstances of the present case. The question which these circumstances raise is whether the time during which wages continued to be payable to the respondent ended at or before the giving of the medical certificate relied upon. In the Supreme Court, *Lowe* J. held that wages ran on after that medical certificate. In his opinion the document did not amount to a certificate of recovery, and, upon the construction of the clause, unless a certificate of recovery was given, there was no termination of wages.

On behalf of the appellant company it was denied that without a certificate of recovery its liability for wages must continue, but it was asserted that upon a proper understanding of the meaning of the word " recovery " in the clause, the facts stated in the medical certificate amounted to " recovery " on the part of the respondent. In support of the first position reliance was placed upon the incongruity produced by conceding to a seaman who returns to his home port, after being left at another port, a right to wages for the full period until his certified recovery, although, if he had been left at his home port, wages would end, at latest, at the expiration of three months. It was suggested that upon his return to his home port before his recovery, a seaman who, on account of accident or illness, had been left at another port was remitted to the position of a seaman landed at his home port ; that he ceased to answer the description " landed and left at a port other than his home port " and took on the character of one " landed at the home port," so that his right to wages was subject to the limit of a three months' maximum. The language of the provision does not seem capable of such a construction. The words which govern all the paragraphs of the clause are " if a seaman . . . is landed and left at any port." They form part of the statement of a condition, which, if

complied with, entitles the seaman to the benefits which the ensuing paragraphs describe. The first of those paragraphs deals with landing at the home port; the second, with landing at some other port. Each states the rights which result from those respective events, and they are framed as if intended to be mutually exclusive. The return of a seaman to a home port is something quite different from his being landed and left, by reason of illness or accident, a process dealt with by sec. 129 of the *Navigation Act* 1912-1926.

Another suggestion was that, in spite of the conjunction "and," the paragraph should not be read as requiring for the termination of wages the occurrence of both events, both certified recovery and arrival at the home port, but as intending to end the shipowner's liability for wages upon the seaman's arrival at the home port, whether a certificate of recovery had or had not been given. The language of the provision is against any such construction. It is true that it confers upon the seaman a right to a free passage only "after his recovery (certified as aforesaid)." But this affords no ground for implying that if he returns before recovery, whether at his own expense, or at the expense of the shipowner, his right to wages goes. The provision most distinctly says that he is entitled to wages until certified recovery and until arrival at his home port. Upon this language, it is clear that both events must occur before wages cease to be payable. In *Lawrence* v. *Huddart Parker Ltd.* (1), this Court said of the same provision: "Subject to the proviso, this clause confers, in terms, upon the seaman a right to wages until both of two events have taken place, namely, until his certified recovery and until arrival at his home port." The case was one in which the seaman was said to have recovered before returning to his home port, but the statement applies also when recovery is not certified until after his return. It contains an accurate description of the effect of the double condition. It follows that, unless the medical certificate relied upon amounts to a certificate of recovery, the appellant's liability for wages had not ceased. What does the word "recovery" mean? Many injuries and some illnesses necessarily leave permanent consequences. The accidental loss of a limb, of eyesight or hearing, is within the provision. If

(1) (1930) 43 C.L.R., at p. 448.

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"recovery" means rehabilitation of bodily condition, or of the former capacity to work, or to earn a livelihood, the liability to pay wages will in many cases continue until the seaman's death. The provision is not directed to compensation for accident. It is not intended to supersede, in cases of permanent incapacity, the *Seamen's Compensation Act* 1911. The word "recovery" appears rather to describe the attainment of a condition of health. If the illness or accidental injury is one which will leave a permanent bodily disability, defect, impairment or infirmity, the seaman has "recovered" within the meaning of the provision when he has obtained his health and reached what will continue to be his normal condition. The word "recovery" is neither scientific nor exact and it is not possible without substituting a new agreement for that which the parties in fact made to define with precision what bodily states or conditions would satisfy its meaning. Perhaps all that can be said is that the more immediate and remediable effects of his accident or illness must have gone, leaving him in such a state that, in common speech, he would be described as now well, or no longer ill. The question whether such a standard has been reached is left to the determination of the medical attendant and of a medical inspector of seamen. A certificate of recovery apparently is conclusive. It need not use the expression "recovery"; although to avoid doubts and disputes it is, perhaps, desirable that certificates should do so. It is enough if a condition is certified to, which actually does amount to "recovery" within the meaning of the clause.

Not the least difficult question in the present case is whether the certificate relied upon does describe that condition. It states that the respondent's leg has made all the improvement it is likely to make and that it is now a useful limb. The concluding statement, that the seaman is permanently incapacitated, is quite consistent with a condition amounting to "recovery." But, as *Lowe* J. remarked, the purpose of the certificate is to avoid an examination of evidence upon which opinions might differ; the certificate should be clear and unambiguous and leave open the one conclusion only. The certificate must be of the man's recovery. To confine it to the injured limb, as this document is confined, leaves open the man's general condition. Further, the statement that the leg has improved

as much as it is likely to do is little more than a prophecy that not much improvement can now be expected. It is negative rather than positive. It leaves one in doubt whether the medical attendant really directed his attention to the question set by the clause.

On the whole, it does not appear to be sufficiently clear and specific to conclude the respondent's rights.

For these reasons the appeal should be dismissed with costs.

STARKE J. The facts are set forth in the case stated by the parties. Under clause 22 (*b*) of the agreement sued on in this case, a seaman, belonging to a ship for which articles are signed in Australia, landed and left at any port by reason of illness or accident in the service of the ship, incapacitating him from following his duty, is entitled, if landed and left at a port other than his home port, to receive wages until his recovery, certified by his medical attendant or by a medical inspector of seamen, and until arrival at his home port, at the rate payable to him when he was landed, and after his recovery (certified as aforesaid) to a free passage to his home port; subject to a proviso which it is unnecessary here to set forth.

In *Lawrence* v. *Huddart Parker Ltd.* (1), this Court said: "Subject to the proviso, this clause confers, in terms, upon the seaman a right to wages until both of two events have taken place, namely, until his certified recovery and until arrival at his home port." But the learned counsel for the appellant insisted that the liability of the shipowner ended in any case upon the arrival of the seaman at his home port. Several reasons were advanced in support of this contention. One, a necessary implication, it was said, from the provision that after his recovery the seaman is entitled to a free passage to his home port. Another, that on being landed at his home port, the provisions of sub-clause (*a*) of clause 22 relating to a seaman landed at his home port applied to him. And, finally, that the right to receive wages depended, upon the proper construction of sub-clause (*b*), on alternative events. It is very likely, I think, that sub-clause (*b*) does not express what the parties intended, and should be re-drawn, so that liability under the sub-clause terminates

(1) (1930) 43 C.L.R., at p. 448.

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upon arrival of the seaman at his home port, or within some definite period thereafter; it was never intended, I should think, that a seaman should be entitled—should his recovery not be earlier certified—to receive wages for the rest of his life, though he had come or was brought to his home port. But I see no escape from the construction of the sub-clause (*b*) given to it by this Court in *Lawrence's Case* (1); it is the grammatical and ordinary sense of the words, and must be adhered to unless some repugnancy or inconsistency is established, which is by no means the case here. The seaman is therefore to receive wages until his recovery is certified.

What is the recovery that must be certified? In its ordinary signification, the word indicates a restoration to health after a wound or sickness. In my opinion, it has nothing to do with the restoration of a seaman or other person to his former or any industrial capacity or efficiency. Otherwise, a seaman who lost a limb owing to an accident, or whose former condition of rude health was never completely regained owing to sickness, would seldom recover. Yet we know that people, in the ordinary use of language, "recover" from their wounds or from sickness, sometimes with the loss of a limb, and at other times with greatly diminished strength. The question for the medical attendant or inspector is really one of fact, namely, whether he can or cannot certify that the seaman has "recovered" in this ordinary and usual sense of the word; he has not to consider whether his industrial capacity or efficiency has or has not been restored; all that concerns him is whether the seaman has reached that condition of health that medical men and others would ordinarily describe as recovery from his injury or sickness. The more plainly that fact is stated in the certificate the better, but I agree with the argument put to us that a certificate is sufficient if it states a condition of health that amounts to recovery, though the word recovery is not used. It was stated during the argument that medical inspectors were advised that certificates of recovery should not be given unless the seaman has been restored to his former industrial capacity; such advice, if it were given, is, I think, erroneous, and should not be followed. *Lowe* J. was of opinion that no one of the certificates relied upon

(1) (1930) 43 C.L.R. 440.

in this case, nor any combination of them, constituted the certificate of recovery required by the agreement. It would be idle for me to repeat the reasons of the learned Judge for that conclusion, in which I entirely agree.

The appeal should be dismissed.

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Appeal dismissed.

Solicitors for the appellant, *Green, Dobson & Middleton.*

Solicitors for the respondent, *Maddock, Jamieson & Lonie.*

H. D. W.

[HIGH COURT OF AUSTRALIA.]

THE WANGANUI-RANGITIKEI ELECTRIC POWER BOARD . . . . . PLAINTIFF, } APPELLANT;

AND

THE AUSTRALIAN MUTUAL PROVIDENT SOCIETY . . . . . DEFENDANT, } RESPONDENT.

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SYDNEY, *Nov.* 28-30, 1933.

MELBOURNE, *Mar.* 26, 1934.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Private International Law—Proper law of contract—Loan—Lender, New South Wales corporation—Borrower, New Zealand local authority—Statutory provisions as to raising loan and repayment thereof—Debentures—Interest payable in New South Wales—Local Bodies' Loans Act 1913 (*N.Z.*) (*No.* 30 *of* 1913)—*Electric-power Boards Act* 1918 (*N.Z.*) (*No.* 5 *of* 1918)—*Finance Acts*, 1921, 1922, 1927 (*N.Z.*) (*No.* 5 *of* 1921, *No.* 51 *of* 1922, *No.* 5 *of* 1927).

Gavan Duffy C.J., Starke, Dixon, Evatt and McTiernan JJ.