[HIGH COURT OF AUSTRALIA.]

MERWIN PASTORAL COMPANY PROPRIETARY LIMITED . . . . Defendant, } Appellant;

AND

MOOLPA PASTORAL COMPANY PROPRIETARY LIMITED . . . . Plaintiff, } Respondent.

MOOLPA PASTORAL COMPANY PROPRIETARY LIMITED . . . . Plaintiff, } Appellant;

AND

McKINDLAY AND ANOTHER . . . . Defendants, Respondents.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *May* 31; *June* 1.

SYDNEY, *Aug.* 3.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Private International Law—Contract—Sale of land—Land in New South Wales—Contract made in Victoria—Personal obligation extinguished in New South Wales—Instalments of purchase money—Recovery—Proper law of contract—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 118—*Moratorium Act* 1930-1931 (*N.S.W.*) (*No.* 48 *of* 1930—*No.* 66 *of* 1931), *secs.* 11, 25.

The plaintiff, a company incorporated in Victoria, whose principal office was situated in Victoria, by an agreement in writing made in Victoria, agreed to sell a station property, together with chattels, in New South Wales to persons resident in New South Wales, as agents for a company to be formed. The

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proposed company was incorporated in Victoria. It adopted the contract, and was subsequently joined as defendant in an action in the Supreme Court of Victoria by the plaintiff company for instalments of purchase money and interest on the unpaid balance of purchase money. The plaintiff company and the defendant company were both registered in New South Wales for the purpose of carrying on business there. The contract of sale provided that it should be stamped, and it was in fact stamped in New South Wales. The purchase money was payable in Victoria.

Held that the proper law of the contract was the law of New South Wales: the *Moratorium Act* 1930-1931 (N.S.W.) consequently applied, and the personal obligation was extinguished by that Act.

Per Rich, Dixon and *Evatt* JJ.: Observations on the effect of sec. 118 of the Constitution in relation to the question whether, in an action in a State Court on a contract the proper law of which is that of another State of the Commonwealth, the Court can refuse to recognize a statute of that other State on grounds of public policy.

Per Rich and *Dixon* JJ.:—The proper law of a contract is governed by the intention of the parties, but, unless the parties otherwise intend, the *lex situs* should be considered the proper law of a contract for the sale of an immovable, and the preliminary presumption in favour of the *lex loci contractus* should be superseded by a presumption that the *lex situs* governs when the nature of the transaction appears.

Per Starke J.: Obligations of a contract with regard to immovables are not necessarily governed by the law of the place where the land is situated: what is the proper law of the contract depends on the intention of the parties, gathered from the whole circumstances of the case.

Decision of the Supreme Court of Victoria (*Macfarlan* J.) reversed.

APPEAL from the Supreme Court of Victoria.

The respondent, Moolpa Pastoral Co. Pty. Ltd., brought an action in the Supreme Court of Victoria against Merwin Pastoral Co. Pty. Ltd. and Neil Clark McKindlay and William Findlay McKindlay. The amended statement of claim was substantially as follows:— 1. The plaintiff is a company incorporated in the State of Victoria under the provisions of the Victorian *Companies Acts* and its registered office is situated in Melbourne in the said State. 2. By an agreement in writing made 1st April 1926 in Melbourne the plaintiff, therein called "the vendor," agreed to sell and the defendants, Neil Clark McKindlay and William Findlay McKindlay, therein called "the purchasers," as agents and trustees for a company to be formed, agreed to purchase the vendor's property known as

"Moolpa," consisting of 87,388 acres or thereabouts of freehold lands and certain Crown lands held under licence and lease, for a price equal to £2 5s. per acre for the freehold lands and upon the terms and conditions set out in the agreement. 3. Under the agreement the purchase price was payable as to £5,000 by a deposit in cash, a sum equal to twenty per cent of the total purchase money (inclusive of the sum of £5,000) in cash on delivery of possession and five instalments each equal to five per cent of the total purchase money at the expiration of two, three, four, five and six years, respectively, from the date of possession, and the balance at the expiration of ten years, and the purchasers were required to pay interest on the balance of purchase money remaining owing from time to time after possession at the rate of six per cent per annum half-yearly, and all such payments were required to be made to the credit of the vendor with the Bank of Australasia in Melbourne. 4. It was a term or condition of the agreement that, upon the formation of the company intended to be formed by the purchasers, the purchasers should procure the adoption and ratification of the agreement by the company. 5. Possession was given and taken under the agreement on or about 19th April 1926. 6. The defendant, Merwin Pastoral Co. Pty. Ltd., was incorporated in or about the month of June 1926 in Victoria under the provisions of the Victorian *Companies Acts*, one of the objects of the company set out in its memorandum of association being to adopt the agreement of 1st April 1926 and to become the purchaser thereunder. 7. After the incorporation of the defendant company, by an agreement made with the plaintiff, the defendant company agreed to adopt the agreement of 1st April 1926 and agreed that that agreement should be binding on the plaintiff and the defendant company in the same manner and take effect as if the defendant company had been a party thereto as purchaser. 8. On 19th April 1932 there was due and owing to the plaintiff under and pursuant to the terms of the agreement of 1st April 1926 the sum of £26,269 12s. 8d. for instalments of purchase money and interest on the balance of unpaid purchase money. The plaintiff claimed the sum of £26,269 12s. 8d. against all the defendants, or alternatively against the defendant

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company, or alternatively against Neil Clark McKindlay and William Findlay McKindlay.

By its defence the Merwin Pastoral Co. Pty. Ltd. admitted pars. 1 to 6 of the statement of claim, but did not admit any of the allegations in par. 7. The defence continued :—3. It admits that the sum of £26,269 12s. 8d. payable in accordance with the express terms of the agreement was on 19th April 1932 unpaid and save as aforesaid it does not admit any of the allegations contained in par. 8. 4. If it did enter into such agreement as alleged in par. 7 of the statement of claim it was the intention of the parties that the agreement should be governed by the law of the State of New South Wales and that law is the governing law of the agreement.—Particulars.—The intention is to be inferred from the terms of the agreement, from the fact that the agreement was made in New South Wales and was to be performed there, that the subject matter thereof was land in New South Wales, that the plaintiff and the defendant were registered under the law of New South Wales and that the writing containing the agreement of 1st April 1926 bore a duty stamp in accordance with the law of that State. 5. The defendant will rely upon secs. 16 and 25 of the *Moratorium Act* 1930 as amended by the *Moratorium (Amendment) Act* 1931 and the *Moratorium and Interest Reduction (Amendment) Act* 1931 of the State of New South Wales.

The defence of the defendants Neil Clark McKindlay and William Findlay McKindlay, so far as is relevant to this report, corresponded with the defence of Merwin Pastoral Co. Pty. Ltd. above set out.

In addition to the provisions mentioned in the statement of claim, the contract of 1st April 1926 contained the following clauses :— " 8. The purchasers buy with notice and knowledge of and subject to a government embargo affecting the property sold under and in pursuance of the *Closer Settlement Acts* of New South Wales which has been duly notified and gazetted. . . . 9. The purchasers having paid the full amount of their purchase money and all interest thereon shall become entitled to and shall take a transfer of the property sold . . . Provided nevertheless that the purchasers shall have the right at any time and from time to time to sell off any part or parts of the said property and in the event of any sales

being effected the purchasers shall also have the right . . . to call for and obtain a transfer and title to any land so sold by them upon payment to the vendor" at a rate specified. "13. Any title deeds relating to the property sold are at present in Sydney and shall be inspected by the purchasers or their solicitors there." "17. The purchasers shall at their expense stamp this contract within thirty days after being requested in writing by the vendor so to do." The contract was executed in Victoria, and was adopted by the defendant company at a directors' meeting held in Melbourne. Pursuant to clause 17, the contract was stamped in New South Wales.

The action was heard by *Macfarlan* J., who held that there had been a novation under which the Merwin Pastoral Co. Pty. Ltd. was substituted for the individual defendants under the original contract, the individual defendants being discharged from their liability under the contract. On the main question, his Honor said that a contract made in Victoria with regard to immovables situated in another country or State was governed by the proper law of the contract, and, after setting out the matters material for the determination of what might be presumed to be the intention of the parties as to the governing law of the contract, held that the proper law, at all events so far as related to the obligation to pay the purchase money, was the law of Victoria, and therefore that the defence based upon the *Moratorium Acts* of New South Wales failed; and accordingly gave judgment against the defendant company, dismissing the action against the individual defendants.

From this decision the defendant company now appealed to the High Court. The plaintiff also appealed, but only lest the defendant company should contend that it had never become bound as a purchaser: this was not contended, and it was conceded that the plaintiff's appeal should be dismissed.

Further material facts appear in the judgments hereunder.

O'Bryan and *Fullagar*, for the defendant company. The question is: What is the proper law of these contracts? The proper law is the law of the place where the land is situate, as this is a case of immovables

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(*Noske* v. *McGinnis* (1); *Barcelo* v. *Electrolytic Zinc Co. of Australasia* (2)).

[DIXON J. referred to *In re Ralston*; *Perpetual Executors and Trustees Association* v. *Ralston* (3); *In re Hoyles*; *Row* v. *Jagg* (4).]

At first the *lex loci celebrationis* was accepted. Later cases stressed the law of the place of performance (see *Dicey's Conflict of Laws*, 5th ed. (1932), p. 628, r. 155; p. 663, r. 161; p. 665; p. 667, sub-r. 1; pp. 669, 671, sub-rr. 2 and 3; p. 683, r. 163).

[EVATT J. referred to *Salmond and Winfield, Law of Contracts*, (1927), p. 532, and *In re Paul & Gray Ltd.* (5).]

Dicey's Conflict of Laws, 5th ed. (1932), p. 953, appendix, note 20, deals with this question.

[STARKE J. referred to *Dicey's Conflict of Laws*, 4th ed. (1927), p. 906.]

Capacity to contract is governed by the *lex situs* (*Westlake's Private International Law*, 7th ed. (1925), p. 220, r. 165 (*a*)). *Dicey's Conflict of Laws*, 5th ed. (1932), p. 641, r. 158, says that capacity is governed by the proper law, which is usually the *lex situs*. This is an exception to *Lloyd* v. *Guibert* (6). As to mortgages, see *British South Africa Co.* v. *De Beers Consolidated Mines Ltd.* (7); *Aksionairnoye Obschestvo A. M. Luther* v. *James Sagor & Co.* (8); *Lecouturier* v. *Rey* (9). In mortgages, the Court regards the debt as of more importance than the security. The *Moratorium Act* (N.S.W.) does not state that a contract of sale of land is a mortgage within the meaning of sec. 25. (Compare sec. 11 (2) with sec. 25 (6).)

[MCTIERNAN J. referred to *Cood* v. *Cood* (10).]

[Counsel referred to *In re Ralston*; *Perpetual Executors and Trustees Association* v. *Ralston* (11); *In re Hoyles*; *Row* v. *Jagg* (4); *Jones* v. *Oceanic Steam Navigation Co.* (12).]

[MCTIERNAN J. referred to *Campbell* v. *Dent* (13).]

The contract refers in many respects to the law of New South Wales and shows that that is the law which the parties intended

(1) (1932) 47 C.L.R. 563.
(2) (1932) 48 C.L.R. 391.
(3) (1906) V.L.R. 689, at p. 694; 27 A.L.T. 46, at p. 47.
(4) (1911) 1 Ch. 179.
(5) (1932) 32 S.R. (N.S.W.) 386.
(6) (1865) L.R. 1 Q.B. 115, at p. 122.
(7) (1910) 2 Ch. 502.
(8) (1921) 3 K.B. 532.
(9) (1910) A.C. 262.
(10) (1863) 33 L.J. Ch. 273, at p. 278.
(11) (1906) V.L.R. 689; 27 A.L.T. 46.
(12) (1924) 2 K.B. 730.
(13) (1838) 2 Moo. P.C.C. 292; 12 E.R. 1016.

should apply. The contract cannot be governed by one law as to one matter and another law as to another matter.

[DIXON J. referred to *Jacobs* v. *Crédit Lyonnais* (1).]

[Counsel referred to *Gibbs & Sons* v. *La Société Industrielle et Commerciale des Métaux* (2); *Ellis* v. *M'Henry* (3); *Phillips* v. *Eyre* (4); *Spiller* v. *Turner* (5); *Kaufman* v. *Gerson* (6).]

[STARKE J. referred to *Hamlyn & Co.* v. *Talisker Distillery* (7).]

Wilbur Ham K.C. (with him *Tait*), for the plaintiff. Two questions arise. First: Is the New South Wales Act directed to the discharge of a contract whose proper law is not that of New South Wales? Secondly, if the New South Wales Act does so apply, will the Victorian Courts give effect to it? The first question is concluded by *Barcelo* v. *Electrolytic Zinc Co. of Australasia* (8). Both questions come down to the ascertainment of the proper law of the contract. This contract was made in Victoria and the payments were to be made there; therefore, the law of Victoria is its proper law (*Dennys Lascelles Ltd.* v. *Borchard* (9); *Westlake's Private International Law*, 7th ed. (1925), p. 309, sec. 216; p. 229, sec. 176; *Dicey's Conflict of Laws*, 5th ed. (1932), p. 955). The only element that attracts the law of New South Wales is the fact that the land is there. The original contract was made in Victoria. There is no authority for the proposition that the Court can go behind the place where the contract was made and consider where the parties were resident. The place of payment of the money is an important factor. These two companies were resident in Victoria; the contract was made as between Melbourne solicitors and it is not until difficulties arise that it is suggested that the law of New South Wales is to be applied.

Fullagar, in reply. The proper law of this contract was to be ascertained as at the date when the contract was made, and no light can be derived from the contemplation of the *Moratorium Act*

(1) (1884) 12 Q.B.D. 589.
(2) (1890) 25 Q.B.D. 399.
(3) (1871) L.R. 6 C.P. 228, at p. 234.
(4) (1870) L.R. 6 Q.B. 1; 40 L.J. Q.B. 28.
(5) (1897) 1 Ch. 911.
(6) (1904) 1 K.B. 591.
(7) (1894) A.C. 202.
(8) (1932) 48 C.L.R. 391.
(9) (1933) V.L.R. 46.

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of New South Wales (*Ellis* v. *M'Henry* (1); *Peninsular and Oriental Steam Navigation Co.* v. *Shand* (2)). *Dicey's Conflict of Laws*, 5th ed., p. 955, does not afford an answer.

The position is correctly stated in *Westlake's Private International Law*, 7th ed. (1925), p. 302. The test there stated is the place with which the contract has the most real connection. Here it had the most real connection with New South Wales. The proper law of a contract for the sale of land is the law of the place where the land is situated, unless there are special reasons leading to a contrary conclusion. If it is found that a number of things important to the contract are to be done in a particular country, it should be inferred that the contract has most real connection with that country. Prima facie the *lex situs* is the proper law of immovables, but this presumption may be rebutted (*Campbell* v. *Dent* (3)). This contract must be stamped with the New South Wales stamp, and this gives it a very close connection with New South Wales (*Stamp Duties Act* 1920 (N.S.W.)).

[EVATT J. referred to *Dent* v. *Moore* (4).]

Wilbur Ham K.C., by leave, referred to *British South Africa Co.* v. *De Beers Consolidated Mines Ltd.* (5).

Cur. adv. vult.

Aug. 3.

The following written judgments were delivered:—

RICH AND DIXON JJ. The question for our decision is whether, notwithstanding the provisions of the *Moratorium Act* 1930-1931 of New South Wales, the liability of the purchaser for instalments of purchase money and interest payable under a contract for the sale of a pastoral property, together with the live stock thereon, situated in New South Wales remains enforceable in the Supreme Court of Victoria.

The combined operation of sec. 25 (6) and (7) and sec. 11 (1) and (2) of this statute is to annul any personal obligation arising

(1) (1871) L.R. 6 C.P. 228.
(2) (1865) 3 Moo. P.C.C. (N.S.) 272; 16 E.R. 103.
(3) (1838) 2 Moo. P.C.C. 292; 12 E.R. 1016.
(4) (1919) 26 C.L.R. 316.
(5) (1910) 2 Ch., at p. 515.

from a contract of sale of real property for the payment of purchase money or interest and to confine the vendor to his remedies against the land. The enactment contains no express language restricting its application to liabilities arising under the law of New South Wales. The Supreme Court of New South Wales appears, however, to have adopted a construction of the provision which excludes from its operation liabilities arising under the law of another State or country (see *In re Paul and Gray Ltd.* (1)). It is immaterial for the purpose of a proceeding in the Supreme Court of Victoria whether the legislation, when administered in New South Wales, should receive some wider application or should be restricted in this manner. It is a provision extinguishing obligations. When the jurisdiction of a Victorian Court is invoked for the enforcement of an obligation, the rules of common law governing the extra-territorial recognition of foreign rights determine the question whether the law of another State of the Commonwealth extinguishing such obligations operates in Victoria to absolve the obligor. According to those rules, it does not so operate unless the obligation arises under the law of that State, or, perhaps, under some other law which recognizes a discharge by that State. The principle is that for the discharge to be good, it must extinguish the obligation according to the law which gives rise to it. "As a general proposition, it is . . . true that the discharge of a debt or liability by the law of a country other than that in which the debt arises, does not relieve the debtor in any other country" (*Ellis* v. *M'Henry* (2)). A contractual liability or debt arises under the governing law of the contract, the proper law of the contract. Thus, the question in the present case is whether the law of New South Wales is the governing or proper law of the contract sued upon. When an agreement is made which, because of its nature or the circumstances attending it, may involve one or other of two or more countries or legal systems, the choice of the law with reference to which the parties contract, the law which is to govern the ascertainment of the rights and liabilities arising out of the contract, is considered a matter within the competence of the contracting parties. Accordingly the proper law of the contract is to be determined primarily

(1) (1932) 32 S.R. (N.S.W.), at pp. 396, 397.

(2) (1871) L.R. 6 C.P., *per Bovill* C.J., at p. 234.

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by the intention of the parties. But more often than not the parties have not adverted to the matter, and no intention is expressed in the contract, and no actual intention appears by implication or as a matter of necessary intendment. A supposed, presumed or constructive intention is then sought for in the nature and subject matter of the contract, its incidents, the situation of the parties, such other matters as must have been within their contemplation, and the circumstances of the transaction. Such an inquiry must be guided, if not governed, by presumptions. "Certain presumptions or rules in this respect have been laid down by juridical writers of different countries and accepted by the Courts, based upon common sense, upon business convenience, and upon the comity of nations; but these are only presumptions or prima facie rules that are capable of being displaced, wherever the clear intention of the parties can be gathered from the document itself and from the nature of the transaction" (*Jacobs* v. *Crédit Lyonnais* (1)). So far as these rules apply to the present case they were expressed in the course of the judgment delivered by *Willes* J. for the Exchequer Chamber in *Lloyd* v. *Guibert* (2) in the following passage, which has been repeatedly quoted: "It is . . . generally agreed that the law of the place where the contract is made, is prima facie that which the parties intended, or ought to be presumed to have adopted as the footing upon which they dealt, and that such law ought therefore to prevail in the absence of circumstances indicating a different intention, as for instance, that the contract is to be entirely performed elsewhere, or that the subject matter is immovable property situate in another country, and so forth; which latter, though sometimes treated as distinct rules, appear more properly to be classed as exceptions to the more general one, by reason of the circumstances indicating an intention to be bound by a law different from that of the place where the contract is made; which intention is inferred from the subject matter and from the surrounding circumstances, so far as they are relevant to construe and determine the character of the contract."

(1) (1884) 12 Q.B.D., *per Bowen* L.J., at p. 600.

(2) (1865) L.R. 1 Q.B., at pp. 122, 123.

In the present case the subject matter of the transaction was the sale of a sheep station in New South Wales and of sheep and other stock connected therewith. The vendor was a proprietary company incorporated in Victoria and having its registered office in Melbourne. The contract was made in 1926. The purchasers, who resided in New South Wales, bought the sheep station as "agents and trustees" for a company to be formed, and were evidently members of a syndicate. In the event, the intended company was incorporated in Victoria and had its registered office in Melbourne. Both companies were, of necessity, registered in New South Wales as companies incorporated elsewhere but carrying on business in that State. The newly formed company adopted the contract of purchase at a directors' meeting held in Melbourne. The purchase price of the sheep was payable cash on delivery, and the contract stated that the sheep were being mustered in the presence of the purchaser's representative who would check the count. The purchase money for the land was payable, as to twenty per cent, in cash upon delivery of possession, as to twenty-five per cent, in five equal periodical instalments, and, as to the balance, at the end of ten years. All payments under the contract were to be made to the credit of the vendor at a bank in Melbourne free of exchange. A clause put the purchasers upon notice as to an embargo gazetted in respect of the property under the New South Wales Closer Settlement legislation. Another clause stated that the title deeds were "at present" in Sydney and should be inspected by the purchasers or their solicitors there. The parties in fact employed Melbourne solicitors. The contract was made in Victoria. It was executed by the vendor in Melbourne, and by the purchasers apparently at Echuca, a border town. Strictly speaking, the obligation which has been enforced against the purchaser company arises, not out of the contract itself, but out of the novation which took place when the company adopted the contract. These appear to be all the circumstances affecting the ascertainment of the proper law of the obligation. Upon them no inference can be drawn that the parties possessed any actual common intention as to what law should govern the transaction. Except as to some matters affecting, or possibly affecting, title and as to the conveyancing practice in

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completing a contract of sale, the law in operation in the two States was, in all relevant particulars, the same. Many of the considerations which operate when the choice lies between independent countries differing in law, language and business usages do not exist in the case of transactions between Australians, who in considering their affairs have, apart from income tax, little need to regard State boundaries. When the contract was made no one foresaw the legislation upon which the purchaser now relies. But the contract was for the sale of immovables and movables situated in New South Wales. Predominantly it was a sale of immovables. In such a transaction the main purpose is the transfer of title and the delivery of possession in exchange for money. The place where the money is payable may have a greater significance where the currency of one place differs from that of another, but, as between places enjoying the same currency, the place of payment can be chosen by the parties only on grounds of banking and financial convenience. On the other hand, performance of the vendor's obligations is necessarily governed by the *lex situs*, which determines what is his title to the immovable and how he may convey it. The substantial objects of a contract for the sale of land are, therefore, to be achieved in the country where it is situated and according to the law of that country. We think that, unless the parties otherwise intend, the *lex situs* should be considered the proper law of a contract for the sale of an immovable. The preliminary presumption in favour of the *lex loci contractus celebrati* should be superseded by a presumption that the *lex situs* governs when the nature of the transaction appears. What little authority exists, supports these principles. In the passage cited from *Lloyd* v. *Guibert* (1) the fact that the subject matter is an immovable situate in another country is given as an example of what will or may show that the *lex loci celebrationis* is not intended as the proper law. In *Bank of Africa Ltd.* v. *Cohen* (2), the capacity to contract in relation to an immovable was held to be governed by the *lex situs*. In *British South Africa Co.* v. *De Beers Consolidated Mines Ltd.* (3), *Kennedy* L.J. said:—"If it is apparent that the contract affects immovables situated out of the jurisdiction,

(1) (1865) L.R. 1 Q.B. 115. (2) (1909) 2 Ch. 129.
(3) (1910) 2 Ch., at p. 523.

the *lex loci rei sitae*, in general at least, must be taken as the proper law of the contract. In the case of a contract with regard to an immovable, 'its proper law is, in general but not necessarily, the law of the country where the immovable is situate:' see *Dicey, Conflict of Laws*, 2nd ed., p. 510." The grounds for the statement quoted from *Dicey* are given and discussed in appendix 20 to the *Conflict of Laws*, 5th ed. (1932), pp. 953 *et seq.* For these reasons the law of New South Wales as the *lex situs* should be considered as the proper law of the contract.

It was suggested that, even so, sec. 25 (6) and (7) of the *Moratorium Act* 1930-1931 should not be given effect to because the provision contravened notions of morality or the fundamental policy of the law, or, in the words of *Macfarlan* J., because " its application would at the stage and in the circumstances in which it was invoked work manifest injustice to or, in effect, a fraud on one of the parties." This suggestion is not supported by any authority and goes much further than any decision of the Courts has gone hitherto in refusing recognition of the law of another country. Further, it appears to be contrary to sec. 118 of the Constitution (cf. sec. 18 of the *State Laws and Records Recognition Act* 1901).

The appeal of the Merwin Pastoral Co. Pty. Ltd. should be allowed and judgment entered for the defendant company. The appeal of the Moolpa Pastoral Co. Pty. Ltd. should be dismissed. It was instituted only lest the Merwin Pastoral Co. Pty. Ltd. should contend that it had never become bound as a purchaser, a contingency which did not arise.

STARKE J. The Moolpa Pastoral Co. Pty. Ltd., on 1st April 1926, sold to Neil Clark McKindlay and William Findlay McKindlay a station property in New South Wales containing nearly 100,000 acres, together with some 28,000 sheep and horses, cattle, station brands, earmarks, plant and chattels. The great part of the station property was freehold land, but some of it was held under lease or license from the Crown. The amount of the purchase money was agreed upon, and stated in the contract, and a stipulation is contained therein that all payments should be made to the credit of the vendor with its banker in Melbourne, in the State of Victoria.

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Subject to certain payments, the contract provided that possession of the property and delivery of the stock and chattels should be given and taken on 19th April 1926. Provision was also made that the purchasers should at their own expense stamp the contract. The purchasers agreed to buy " as agents and trustees for a company to be formed," and the contract stipulated that the company should be formed on or before 20th May 1926, and that one of its objects should be the acquisition of the Moolpa property and the ratification and adoption of the agreement.

A company called the Merwin Pastoral Co. Pty. Ltd. was formed before the date mentioned, and, on 28th May, was duly incorporated. A novation then took place, and, by agreement between the Moolpa Pastoral Co. Pty. Ltd., the McKindlays, and the Merwin Pastoral Co. Pty. Ltd., the original agreement was discharged, and the Merwin Pastoral Co. Pty. Ltd. was substituted for the McKindlays, and undertook their liability under the contract, and was accepted in their place by the Moolpa Pastoral Co. Pty. Ltd. It is unnecessary to detail the steps and the evidence which established the novation, for the fact was not seriously contested before this Court.

Both companies were incorporated under the provisions of the *Companies Acts* of the State of Victoria, and both were registered in New South Wales under the provisions of the *Companies (Amendment) Act* 1906 of New South Wales. The McKindlays were domiciled and resident in New South Wales. The central management and control of both companies were exercised from Victoria, though their principal business was connected with the station property situate in New South Wales. The agreement of 1st April was made in Victoria : at all events, it was executed by the company in Victoria, and by the McKindlays at Echuca, a town on the River Murray, in Victoria, just over the boundary line between New South Wales and Victoria. The novation took place, I think, in Victoria, though it is to be inferred from acts and documents done and executed both in Victoria and in New South Wales. The Merwin Pastoral Co. Pty. Ltd. made default in payment of instalments of purchase money due in April of 1931 and 1932, and interest thereon, and about June of 1932 the Moolpa Pastoral Co. Pty. Ltd. issued

a writ of summons out of the Supreme Court of Victoria to recover the amounts.

The question for decision is whether the law of New South Wales or the law of Victoria is the proper law of the contract by which the parties intended, or may fairly be presumed to have intended, their obligations to be governed. It is critical to the decision of the case, because the *Moratorium Act* 1930-1931 of New South Wales—assented to on 11th December 1931, and in force at the time of action brought, though repealed in December 1932 by the Act No. 57 of 1932, sec. 3—provided that all covenants, agreements or stipulations by a mortgagor for payment or repayment of any mortgage moneys secured by a mortgage of real property should, except for the purpose of enabling a mortgagee to exercise all or any of his rights against the mortgaged land, be void and of no effect whatever. And, by sec. 11, the provisions of the Act extend and apply *mutatis mutandis* to an agreement for sale and purchase of land, and an agreement for sale and purchase of land shall be deemed to be a mortgage of such land to secure payment of the unpaid purchase money and interest thereon and fulfilment of the conditions set forth in the agreement. The State of Victoria has not enacted any such law. If the law of New South Wales governs the obligations of the contract between the parties, then the Moolpa Pastoral Co. Pty. Ltd. cannot recover in this action, but it can do so if the Victorian law is the governing law.

"The rights of the parties to a contract are to be judged of by that law by which they intended" to bind, "or rather by which they may justly be presumed to have bound themselves" (*Lloyd* v. *Guibert* (1); *Hamlyn & Co.* v. *Talisker Distillery* (2)). "The whole of the contract must be looked at and the rights under it must be regulated by the intention of the parties as appearing from the contract" (*Hamlyn & Co.* v. *Talisker Distillery* (3)). "In the absence of any other clear expression of their intention, it is necessary and legitimate to take into account the circumstances attendant upon the making of the contract and the course of performing its stipulations contemplated by the parties" (*Hamlyn & Co.* v.

(1) (1865) L.R. 1 Q.B., at p. 123. (2) (1894) A.C. 202.
(3) (1894) A.C., at p. 208.

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Talisker Distillery (1)). "To this intention, in the absence of express declaration on their part, we must be guided by applying to the language of the contract itself sound ideas of business convenience and sense, and by justly appraising the inferences to be drawn from the nature of the transaction, and the place and circumstances of its machinery and of its contemplated performance" (*British South Africa Co.* v. *De Beers Consolidated Mines Ltd.* (2); *Jacobs* v. *Crédit Lyonnais* (3)). The rule that the intention of the parties is the governing element in the choice of law has been criticized by *Westlake, Private International Law*, 3rd ed. (1890), pp. 254-258; *Baty, Polarized Law* (1914), pp. 44-47. It is, however, the accepted view of the English Courts (*Dicey, Conflict of Laws*, 1st ed. (1896), note 12, pp. 762-768; 4th ed. (1927), note 22, pp. 911-919). But the intention of the parties will be judged on substantial considerations, such as the place of the making of the contract, the place of its fulfilment, and the place with which the transaction has the most real and substantial connection.

The contract of sale in the present case "did not create any more than a personal right, as distinct from a real right, a right which the Courts" either of Victoria or of New South Wales "would enforce *in personam*" (*British South Africa Co.* v. *De Beers Consolidated Mines Ltd.* (4)). The main purpose, however, of the contract is the disposition of real and personal property actually in New South Wales. We derive no assistance from the fact that the contract is in English, because the language of all the States is English. Again, the systems of law in force in the States of New South Wales and Victoria offer little, if any, guidance, for the foundation of the legal systems of all the States of Australia is the English common law; substantially the differences in the laws of the different States arise from legislation and not from any fundamental difference in the respective systems. Delivery of the property under the present contract, and the title to it, must be given in, or made according to the law of, New South Wales. The reasonable conclusion in these circumstances is that parties to such a contract generally would intend their contract for the sale of property and of stock connected

(1) (1894) A.C., at p. 212.
(2) (1910) 2 Ch., at p. 523.
(3) (1884) 12 Q.B.D. 589.
(4) (1910) 2 Ch., at p. 513.

therewith to be governed by the law of the place where the land is situated.

It is clear enough law that the making and execution of the contract in Victoria is no decisive test of its proper law (*Hamlyn & Co.* v. *Talisker Distillery* (1)). Indeed, in Australia, the place of the making or the execution of the contract is often but a matter of convenience, as, for instance, the execution of the contract of sale in the present case by the McKindlays in Echuca on the Victorian side of the River Murray. Again, the fact that the two companies involved in this case were incorporated in, and are managed and controlled from, Victoria, affords no decisive test, for both are also registered under the laws of New South Wales and carry on their main operations there. Further, the stipulation of the contract that all payments under it shall be made in Victoria rather suggests that, but for that clause, the parties contemplated payment in New South Wales ; but in any case the place of payment is rather a matter of convenience for the Moolpa Pastoral Co. Pty. Ltd. than a decisive test of the proper law of the contract.

There are, I am aware, authorities which assert that obligations of a contract with regard to immovables are governed by the law of the place where the land is situated ; but that is not necessarily so ; it depends upon the intention of the parties, gathered from the whole circumstances of the case (*British South Africa Co.* v. *De Beers Consolidated Mines Ltd.* (2) ; *In re Smith* ; *Lawrence* v. *Kitson* (3) ; *Dicey, Conflict of Laws*, 4th ed. (1927), p. 640, pp. 906-910). In the present case, the law of New South Wales is the law which has the most real and substantial connection with the transaction between the parties, and the law, in my opinion, by which they must justly be presumed to have bound themselves.

The result is that the appeal must be allowed, and judgment entered for the defendant company as well as the individual defendants.

EVATT J. By an agreement made on April 1st, 1926, the respondent, Moolpa Pastoral Co. Pty. Ltd., agreed to sell to Neil Clark McKindlay and William Findlay McKindlay the respondent's New South Wales

(1) (1894) A.C. 202. (2) (1910) 2 Ch. 502. (3) (1916) 2 Ch. 206.

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station property known as "Moolpa." The property comprised (1) 87,388 acres of freehold lands, (2) 1,044 acres of New South Wales Crown land held under occupation lease, (3) 1,377 acres of New South Wales Crown land held under preferential occupation licence, (4) 7,900 acres of New South Wales Crown land held under improvement lease, (5) about 28,000 sheep, and (6) the plant and chattels on the station property.

In the transaction, as appears upon the face of the contract, the purchasers were acting as "agents and trustees for a company to be formed." The appellant company, the Merwin Pastoral Co. Pty. Ltd., was duly incorporated, about June 1926, in the State of Victoria under the provisions of the *Companies Acts* of that State. One of the objects of the company, as appearing from its memorandum of association, was to adopt the agreement of April 1st, 1926, and to become purchaser of the New South Wales properties therein described.

In view of the course taken in reference to the second appeal in this matter, it must be taken that, as *Macfarlan* J. found, there was, in or about June 1926, by novation, a further agreement between the individual purchasers and the appellant and respondent companies by which the appellant was substituted for the individual purchasers in the agreement of April 1st, 1926. It is agreed that the second appeal shall be dismissed.

The respondent company is suing the appellant company for instalments of purchase money, and interest thereon, and the only defence raised is that the proper law, both of the original contract of purchase and of the novation, is that of New South Wales. If so, it is conceded that the action must fail because by the New South Wales *Moratorium Act*, No. 48 of 1930, as amended by Acts No. 43 of 1931 and No. 66 of 1931, the purchaser's instalment and interest obligations must, for the purposes of the present action, be regarded as "void and of no effect for any purpose whatsoever" (sec. 25 (6), (7)). Is this concession rightly made?

In *Barcelo* v. *Electrolytic Zinc Co. of Australasia* (1), I had occasion to consider the effect upon a contract of *ex post facto* legislation passed by the legislature of the country by reference to the law of

(1) (1932) 48 C.L.R., at p. 436.

which the parties had (in that case by express stipulation) contracted. I thought that the opinion of *Isaacs* J. in *Delaney* v. *Great Western Milling Co.* (1) should be followed, and added :—

> "It may be conceded that the parties did not anticipate that, during the currency of their agreement, there would be passed, in Victoria, legislation which would have the effect of discharging the plaintiff company's obligation to pay the agreed rate of interest upon payment of a lower rate; but they clearly agreed to accept the Victorian legal system with all faults (if any) as well as with all virtues (if any). And their agreement must control. The observations of *Isaacs* J. in *Delaney's Case* (1), which I have quoted, were applied by him to the incorporation of *ex post facto* legislation passed in the country the law of which was the 'proper law' of the contract. On this part of the case, I have felt most difficulty by reason of the temporary or 'emergency' character of the Victorian legislation. But I have come to the conclusion that a Victorian Court cannot, on that account, exclude it from consideration in enforcing the agreement, but it is bound to treat it as part of the relevant body of law and as securing the discharge *pro tanto* of the obligations originally created."

I am of opinion that the concession by the respondent was rightly made, so that the only question which need be discussed is, what, according to the rules of that branch of the municipal law of Victoria called private international law, is the proper or governing law of the contracts described ?

There is, in this case, no express selection of New South Wales or Victoria as the conventional law of the contract. If a choice of Victorian law had been expressed by the parties, "there is," as *Salmond and Winfield* point out, "commonly no reason why . . . they should not be taken at their word" (*Hamlyn & Co.* v. *Talisker Distillery* (2); *Kwik Hoo Tong Handel Maatschappij* v. *James Finlay & Co.* (3); *Salmond and Winfield, Law of Contracts* (1927), p. 541, quoted in *Barcelo* v. *Electrolytic Zinc Co. of Australasia* (4)).

In very exceptional cases the attempt of the parties to select a law to govern their contract may be rendered futile by reason of a competent legislative authority itself making an agreement for the parties and prohibiting persons under its control from making any inconsistent agreement (*The Torni* (5)). But the general principle stated by *Salmond and Winfield* remains clear. As the New York Court of Appeals has recently said :—

> "Contracts made by mature men who are not wards of the Court should, in the absence of potent objection, be enforced. Pretexts to evade them should

(1) (1916) 22 C.L.R. 150.
(2) (1894) A.C. 202.
(3) (1927) 33 Com. Cas. 55.
(4) (1932) 48 C.L.R., at p. 433.
(5) (1932) P. 78.

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not be sought. Few arguments can exist based on reason or justice or common morality which can be invoked for the interference with the compulsory performance of agreements which have been freely made. Courts should endeavour to keep the law at a grade at least as high as the standards of ordinary ethics. Unless individuals run foul of constitutions, statutes, decisions or the rules of public morality, why should they not be allowed to contract as they please? Our Government is not so paternalistic as to prevent them. Unless their stipulations have a tendency to entangle national or State affairs, their contracts in advance to submit to the process of foreign tribunals partake of their strictly private business" (*Gilbert* v. *Burnstine* (1)).

As we are not assisted by any express stipulation as to the governing law of the contract, we are thrown back upon more general considerations. Dr. *Baty*, in his discussion of the proposed tests for ascertaining the system of law which is to determine the obligation of a contract and its discharge, is very critical of the decision in *Hamlyn & Co.* v. *Talisker Distillery* (2), saying:—

> "But when we turn to the substance of the contract, as distinguished from its form, no such general agreement is to be found. Savigny elaborated a well-known set of rules for ascertaining a proper law. The House of Lords have in desperation given up the attempt to indicate any rules at all, and have said in effect that the proper law to apply to a contract is whatever the parties like" (*Polarized Law* (1914), pp. 44, 45).

It is true that the decision in question lays down that as a general rule it is "perfectly competent" to contracting parties "to indicate . . . which system of law they intend to be applied to the construction of the contract and to the determination of the rights arising out of it" (*Hamlyn & Co.* v. *Talisker Distillery* (3)). Dr. *Baty* adds: "Unfortunately, it is not such a simple matter. The old difficulty of finding a secure foothold of law from which to appreciate the intention of the parties, independent of that intention, cannot be kept out" (*Polarized Law*, p. 45). No doubt it cannot. Lord *Herschell's* judgment (4) does not suggest that it can, but merely indicates that, if an intention can be ascertained, it will usually be given effect to. In these circumstances it is hard to concede much force to Dr. *Baty's* reference to "the insecure morass of leaving it to the parties to say" (*Polarized Law*, p. 49). It was the overwhelming danger of the insecurity caused by the parties'

(1) (1931) 255 N.Y. 348, per *O'Brien* J. at pp. 354, 355.
(2) (1894) A.C. 202.
(3) (1894) A.C., per Lord *Herschell* L.C., at p. 208.
(4) (1894) A.C., at p. 208.

saying nothing, which was fully appreciated in *Hamlyn & Co.* v. *Talisker Distillery* (1).

Such insecurity is illustrated by the present case. Upon the precise point in issue the parties have been silent. Which system of law shall prevail? The *lex loci solutionis*, the *lex loci contractus* or the *lex loci rei sitae*?

Baty approves of the rule now stated in *Westlake's Private International Law*, 7th ed. (1925) (*Bentwich*), p. 302, as follows:—

> "In these circumstances it may be said that the law by which to determine the intrinsic validity and effects of a contract will be selected in England on substantial considerations, the preference being given to the country with which the transaction has the most real connection, and not to the law of the place of contract as such."

Baty says that this is "an excellent rule" (*Polarized Law*, p. 47) and, referring to *Hansen* v. *Dixon* (2), says that a contract is properly governed by "the law of the country which had most to do with the transaction" (*Polarized Law*, p. 48). *Salmond and Winfield, Law of Contracts* (1927), accept the same position (p. 532). The result is no different if it be still affirmed that the search is for "the intention" of contracting parties, for the only guide to intention is "by applying to the language of the contract itself sound ideas of business convenience and sense, and by justly appraising the inferences to be drawn from the nature of the transaction, and the place and circumstances of its machinery and of its contemplated performance" (per *Kennedy* L.J. in *British South Africa Co.* v. *De Beers Consolidated Mines Ltd.* (3)).

In the case of a contract affecting immovables situated outside the country where the contract is made, it was said by *Kennedy* L.J. that there is a general presumption in favour of the *lex* being that *loci rei sitae* (*British South Africa Co.* v. *De Beers Consolidated Mines Ltd.* (3)). In the present case, it is not necessary to express a preference either for acting upon such a presumption or for applying the more elastic rule favoured by the other authorities I have mentioned; either view, in my opinion, should lead to the conclusion that the governing law of the contracts is that of New South Wales.

(1) (1894) A.C. 202. (2) (1906) 23 T.L.R. 56.
(3) (1910) 2 Ch., at p. 523.

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The outstanding facts may now be summarized :—

(1) The vendor, although a Victorian company, was also carrying on business in New South Wales and there registered.

(2) The original purchasers were residents of New South Wales.

(3) The company formed by them, although a Victorian company, was also registered in New South Wales for the purpose of conducting its business there.

(4) The original contract, and the contract which replaced it, were made in Victoria. But, although the purchaser crossed the River Murray to execute the original contract at Echuca, this would appear to be an accidental feature of the transaction and not to possess any special significance. And there is every reason for supposing that the second contract was to be governed by the same law as the first.

(5) Not only was the subject matter of the contract real and personal property entirely situate in New South Wales; the agreement contemplated that the purchasers and the company to be formed by them could and would sell parts of the property, upon full payment to the vendors in respect of any such part (clause 9).

(6) Payments under the agreement were to be made to the credit of the vendor's bank in Melbourne, Victoria, free of exchange (clause 6). This throws little light upon the transaction. It was designed partly for convenience and partly to avoid the vendor's paying exchange. In Australia, where there is one system of currency, less weight and importance is to be attributed to mere provisions as to place of payment than in cases where there are differing systems.

(7) Clause 13 provided that the title deeds relating to the property sold were in Sydney, and should there be inspected by the purchasers.

(8) Clause 17 provided that the purchasers should at their own expense "stamp this contract." Ultimately this was done and the sum of £1,476 15s. paid by the purchasers to the New South Wales Commissioner of Stamp Duties. To this

clause and its fulfilment importance attaches. It suggests that, in the event of the contract not being performed, resort would probably be had to the Courts of New South Wales. Before such Courts, the contract would not have been enforced, or even treated as of any legal efficacy at all, in the event of failure to comply with the revenue requirement (*Stamp Duties Act* 1920 (N.S.W.), sec. 29; *Dent* v. *Moore* (1)). It is well known that it is this sanction, as much as the possibility of direct pecuniary penalties, which secures the revenue of the State against loss.

Looking at all the circumstances of the case, it was New South Wales with which the transaction was most intimately concerned, and, to some extent at least, that was recognized by the three parties interested. The instalments were to be payable over a long term of years, though accelerations in payment might, and apparently did, result from the purchasing company's sales by process of subdivision. The case might not be so strong in favour of a reference to New South Wales law if the contract contemplated early completion. But, as conveyance was postponed to the distant future, the vendor was retaining its interest in the New South Wales property.

I therefore think that the governing law of the contract was that of New South Wales. But *Macfarlan* J. was also, I gather, prepared to decide against the present appellant upon the separate ground that the *ex post facto* New South Wales legislation was very unmeritorious and its application would probably "work manifest injustice to or, in effect, a fraud on one of the parties."

It is true that, very occasionally, upon grounds of public policy, English Courts have refused to accord recognition to some part of the law of a foreign country, which might otherwise be treated as governing or underlying a transaction. It is, in my view, not permissible for a Victorian Court to adopt such an attitude here. All that the Legislature of New South Wales did, was, in a period of unexampled economic crisis, to revise, alter, suspend or discharge certain contractual obligations over which it could exert its constitutional power. The Legislature of Victoria too enacted a law which differed in degree only from that of New South Wales. And,

(1) (1919) 26 C.L.R., at p. 324.

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further, the Commonwealth Constitution expressly requires that "full faith and credit shall be given, throughout the Commonwealth, to the laws . . . of every State" (sec. 118). In the United States the constitutional provision from which our sec. 118 is taken has been regarded as prohibiting a refusal by the Courts of one State "to give effect to a substantive defence under the applicable law of another State" (*Bradford Electric Light Co.* v. *Clapper* (1)).

The appeal should be allowed, and judgment entered for the appellant company. It is agreed that the second appeal should be dismissed.

McTIERNAN J. In my opinion, the appeal of the Merwin Pastoral Co. Pty. Ltd. should be allowed, and the appeal of the Moolpa Pastoral Co. Pty. Ltd. should be dismissed. The question for decision is whether the presumed intention of the parties to the contract in question was that it should be governed by the law of Victoria or the law of New South Wales. The principle upon which this question may be resolved is stated in *Lloyd* v. *Guibert* (2), in these terms: "It is, however, generally agreed that the law of the place where the contract is made, is prima facie that which the parties intended, or ought to be presumed to have adopted as the footing upon which they dealt, and that such law ought therefore to prevail in the absence of circumstances indicating a different intention, as for instance, that the contract is to be entirely performed elsewhere, or that the subject matter is immovable property situate in another country, and so forth; which latter, though sometimes treated as distinct rules, appear more properly to be classed as exceptions to the more general one, by reason of the circumstances indicating an intention to be bound by a law different from that of the place where the contract is made; which intention is inferred from the subject matter and from the surrounding circumstances, so far as they are relevant to construe and determine the character of the contract."

In the present case the contract was made in Victoria; and it is provided by the contract that the moneys due under it should be paid in Victoria. But the principal part of the subject matter of

(1) (1932) 286 U.S. 145, at p. 160. (2) (1865) L.R. 1 Q.B. 115, at pp. 122, 123.

the contract is immovable property in New South Wales, consisting of freehold lands and lands held under special tenures created by the *Crown Lands Acts* of that State. In my opinion, the intention of the parties, which is to be inferred from the subject matter of the contract, the provisions of the contract and the surrounding circumstances which need not again be set out in detail, is that the contract should be governed, not by the law of Victoria where the contract was made, but by the law of New South Wales. It follows that the obligation arising under the contract to pay the instalments of purchase money sued for was discharged by the provisions of the *Moratorium Acts* of New South Wales (*Ellis* v. *M'Henry* (1)).

The proper law of the contract being that of New South Wales, there is no sound reason for declining to hold that the provisions of these Acts are of such a character that they should not be held by a Court in Victoria to apply to the contract.

Appeal of the Merwin Pastoral Co. Pty. Ltd. allowed. Judgment of the Supreme Court in favour of plaintiff respondent set aside. In lieu thereof order that judgment be entered for the defendant appellant with costs. Respondent to pay the costs of the appeal. This appeal and the appeal of the Moolpa Pastoral Co. Pty. Ltd. to be treated as consolidated for the purpose of taxation.

Appeal of the Moolpa Pastoral Co. Pty. Ltd. dismissed with costs. This appeal and the appeal of the Merwin Pastoral Co. Pty. Ltd. to be treated as consolidated for the purpose of taxation.

Solicitors for the Merwin Pastoral Co. Pty. Ltd., *Gillott, Moir & Ahern.*

Solicitors for the Moolpa Pastoral Co. Pty. Ltd., *Blake & Riggall.*

H. D. W.

(1) (1871) L.R. 6 C.P. 228.