No. 25 of 1949

In the Privy Council.

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA

Between SIR JOHN LAVINGTON BONYTHON, ERIC GLENIE BONYTHON, CLIVE LANGDON BONYTHON, JOHN BARTON BONYTHON, JOHN LANGDON BONYTHON, CHARLES WARREN BONYTHON, KATHERINE DOWNER VERCO, ADA LANGDON BONYTHON, WILLIAM JAMES ISBISTER and ANNIE MARIE GELLERT - *Appellants*

AND

THE COMMONWEALTH OF AUSTRALIA *Respondent.*

CASE FOR THE APPELLANTS.

RECORD

1. THIS is an appeal (by Special Leave granted on the 29th day of April, 1949) from the judgment and order of the High Court of Australia dated the 17th day of June, 1948, by which the Court dismissed with costs an action brought by the Appellants against the Respondent claiming as holders in varying proportions of Commonwealth Consolidated Inscribed Stock 3½ per cent. maturing on the 1st day of January, 1945, and as regards their respective interests, the following declarations and orders: p. 46. p. 45. pp. 3-4.

(*a*) That, in respect of each of several parcels of the said stock, the principal money became due and payable in English currency in London six months after the date of a due exercise of them of an option to require payment of the principal sums in London. pp. 7-8.

(*b*) That, if the principal monies of the said stock were in law properly payable in Australia, such monies became due and payable on the 1st day of January, 1945, and that the Appellants were in accordance with their several holdings entitled to be paid, in Australian currency, the equivalent of the principal monies in English currency.

(*c*) That the Appellants respectively were entitled to interest at 3½ per cent. per annum on the principal monies since the 1st day of January, 1945.

RECORD

The High Court of Australia held by a majority that the Appellants' only right was to be paid the principal sums named in the debentures (subsequently replaced by Commonwealth Inscribed Stock) in Australian currency, or the equivalent thereof at the current rate of exchange: *i.e.* (for example) that in respect of Inscribed Stock replacing a debenture expressed to be for £1,000 sterling the Appellants were entitled to be paid only £A1,000 or the equivalent thereof in English currency and not £1,000 sterling.

pp. 11-12. 2. The Government Loan Act, 1894, of the Colony of Queensland authorised the Governor in Council to raise by way of loan such several sums not exceeding two million pounds as might be required. In the exercise of the powers conferred by this Act an amount of one and a quarter million pounds was first raised in London. Then two or three months later two sums, one of a quarter of a million and the other of half a million pounds, were raised in Australia. These loans were all secured by debentures in the same form in denominations of £1,000 and £500. The particular debentures with which these proceedings are concerned formed part of the loan of £250,000 raised in Australia. That loan was wholly subscribed by the Australian Mutual Provident Society, a company incorporated and carrying on business in Australia, and the debentures securing that loan were issued to the lender in Queensland.

pp. 11-12. 3. In respect of all the loans under the said Act of 1894, whether in London or in Australia, the Governor in Council of the Colony of Queensland issued debentures for varying amounts but otherwise in the form following, that is to say:—

ONE THOUSAND POUNDS,

GOVERNMENT QUEENSLAND Identical SI.TI DEBENTURE.

No. 1. £1,000. *Series S.*1.

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

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

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

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

RECORD

WHEN THIS DEBENTURE is issued the place at which the Purchaser wishes the interest first falling due to be paid, shall be endorsed on the Debenture; any change in the place of payment of interest must be registered at the Treasury in BRISBANE or at the Offices of the Agents of the Government in SYDNEY, MELBOURNE or LONDON six months prior to the date on which such interest shall be payable, and the transfer at the same time endorsed on the Debenture.

DATED at Brisbane this 1st day of November, 1895.

E. DESHON,
Auditor General.
T. M. KING,
Under Secretary.

H. W. NORMAN,
Governor of Queensland.
HUGH M. NELSON,
Colonial Treasurer.

4. On each of the debentures issued to the Australian Mutual Provident Society as portion of the loan of £250,000 above referred to, the place at which the Purchaser wished the interest first falling due to be paid was endorsed as Sydney. No change in the place of payment of interest under the said debentures was registered. p. 12.

5. The following is a copy of the form of interest coupon annexed to the debentures for £1,000, the coupon annexed to the debentures for £500 being in the same form except as to the sums mentioned therein:— p. 12.

QUEENSLAND GOVERNMENT DEBENTURE.

£1,000. SERIES S.1. £1,000

Halfyear's dividend at the rate of Three Pounds Ten Shillings per cent. per annum, due 1st January, 1945.

£17 10s. 0d. H.M.N.

6. The liability upon the debentures issued to the Australian Mutual Provident Society passed, as on 1st July, 1929, from the State of Queensland to the Respondent pursuant to Part III of the Financial Agreement (see Commonwealth Statutes, Vol. 42, p. 175) and to Section 4 of the Financial Agreement (Commonwealth Liability) Act, 1932. p. 13.

7. In or about March, 1932, the said debentures were surrendered by the Australian Mutual Provident Society in exchange for Commonwealth Consolidated Inscribed Stock 3½ per cent. maturing on the 1st day of January, 1945. It is admitted by the Respondent that there was conferred upon the registered holders for the time being of the said stock rights which conformed in all particulars with the rights conferred by the said Queensland Government debentures surrendered in exchange therefor. p. 11.

8. THEREAFTER, but prior to the 1st July, 1944, the Appellants became and remained inscribed in a stock ledger kept at a Registry established by the Respondent at Adelaide as holders of portions of the Commonwealth Consolidated Inscribed Stock 3½ per cent. mentioned in paragraph 7 hereof, in the following amounts, that is to say:— p. 10.

RECORD

The Appellant, Sir John Lavington Bonython, in the sum of			£4,960
,,	,,	Eric Glenie Bonython, in the sum of ...	3,720
,,	,,	Clive Langdon Bonython, in the sum of	1,860
,,	,,	John Barton Bonython, in the sum of ...	1,860
,,	,,	John Langdon Bonython, in the sum of	620
,,	,,	Charles Warren Bonython, in the sum of	620
,,	,,	Katherine Downer Verco, in the sum of	620
,,	,,	Ada Langdon Bonython, in the sum of	2,000
The Appellants, Sir John Lavington and William James Isbister, in the sum of			12,140
,,	,,	William James Isbister and Annie Marie Gellert, in the sum of	52,000
			£80,000

p. 13. After the inscription of the Appellants in the said ledger, interest on the said amounts of the said stock was paid in Adelaide.

p. 11. 9. All the Appellants are and at all material times have been resident in Australia.

10. None of the Appellants gave notice on or before the 1st July, 1944, either to the Treasurer of Queensland or to the Respondent of the place at which they required the principal sums due under their said stock to be paid.

p. 14. On 22nd December, 1944, notices in writing on behalf of all the Appellants were given to the Deputy Registrar of Inscribed Stock at Adelaide requiring the amounts of their respective holdings of the said stock to be paid on maturity in London in sterling.

p. 17. 11. On the 2nd January, 1945, the Deputy Registrar of Inscribed Stock, having referred the above notices to the Commonwealth Treasury, advised the Appellants in writing that

> "as the holders of the stock did not give the notice required by the terms of the debenture they are now precluded from exercising an option for payment in London."

12. The Respondent has not paid to the Appellants or any of them the principal monies due on maturity of the said Inscribed Stock.

p. 17. On and from the 1st January, 1945, the Respondent was at all times ready and willing to repay the said principal monies in Australian currency equal to the amount inscribed, but no larger amount, at Adelaide or elsewhere in Australia as might be required by the holder.

13. The Appellants instituted the said action in the said High Court of Australia on the 2nd day of January, 1946, claiming the

p. 9. declarations referred to in paragraph 1 hereof. The Respondent in the Defence contended "*inter alia*" that if the Appellants ever became entitled to the option of having the principal sums represented by the said stock paid in London or paid in English currency, such option was conditional upon the Appellants giving notice to the Treasurer of Queensland or to the Treasurer to the Respondent on or before the 1st day of July, 1944, requiring such payment to be made, and that the Appellants and all of them failed to give the required notice on or

RECORD

before the 1st day of July, 1944. The Respondent further contended in the Defence that upon the true interpretation of the terms and conditions under which the said stock was inscribed and in the events set out in paragraphs 2, 3, 6, 7 and 8 hereof, the principal monies of the said stock became payable in Australia in Australian currency to the amount inscribed and not otherwise. p. 10.

At the trial of the said action in the High Court on the 15th day of October, 1947, Latham C.J., with the consent of the parties and pursuant to Section 18 of the Judiciary Act, 1903-1947, referred for the opinion and consideration of the Full Court of the said High Court the following questions of law: p. 10. pp. 17-18.

(*a*) With respect to the said stock held by the Appellants, was the Respondent bound to pay the principal sums secured thereby in English Currency in London six months after the date of the delivery of the notices in writing mentioned in paragraph 11 hereof?

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

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

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

14. The case stated by the learned Chief Justice for the opinion and consideration of the Full Court contained (as was agreed between the Appellants and Respondent) all the facts necessary to determine the action. Accordingly when the action came to trial before the Chief Justice on the 17th day of June, 1948, no evidence was taken and no argument was heard, judgment being entered so as to give effect to the opinions of the majority of the Full Court. p. 17.

15. The Answers, hereinafter referred to, to these questions and the reasons therefor were remitted to Latham C.J. who in conformity therewith on the 17th day of June, 1948, delivered the judgment and made the Order from which the Appellants now appeal. p. 44. pp. 18-43.

16. In substance, the Appellants complain of the answers given by the majority of the Full Court of the said High Court to the questions referred to them and, since upon any appeal from the judgment of Latham C.J. to the said Full Court, the Justices of the said Full Court would have adhered to the opinions previously expressed by them, no such appeal was taken.

17. The majority of the said Full Court (Rich, Dixon and McTiernan JJ.) answered questions (*a*), (*c*) and (*d*) set forth in paragraph 13 hereof in the negative. Dixon and McTiernan, J.J., were of opinion that it was unnecessary to answer question (*b*): Rich, J., was of opinion that the said principal sums were payable at the places mentioned in the debentures upon presentation of the inscribed stock. p. 44. p. 43.

Latham, C.J., and Starke, J., dissented. Latham, C.J., was of opinion that while the Appellants were not entitled to repayment of the said principal sums in English currency in London they were p. 26.

RECORD

p. 26. entitled to be paid in Australia on the 1st January, 1945, in Australian currency, the equivalent of the said principal sums in English currency.

p. 32. Starke, J., was of opinion that the Appellants were entitled to be paid the said principal sums on the 1st January, 1945, in English currency in London. Both Latham, C.J., and Starke, J., were of opinion that the Appellants were not entitled to interest as claimed, but Starke, J., was of opinion that they were entitled to damages for breach of contract by reason of the Respondent's failure to pay on the appointed

p. 32. day, viz., 1st January, 1945, and that such damages might be measured by the interest payable on the said stock. 10

18. In giving his reasons for answering the questions asked

p. 27. adversely to the Appellants, Rich, J., said that when the contract was made in 1895 between the Colony of Queensland and the original debenture holders there was then both in England and Australia a common unit of account and a common unit of payment. Between 1895 and 1945

> " changes occurred whereby the common unit of payment became disparate; in other words there came into existence two units of payment—an English pound and an Australian pound. In these circumstances little importance could be given to the 20 use of the words ' pound sterling ' in the original debentures. If the words ' pounds sterling ' had been used in a contract made after the time when Australian pounds were different from English pounds, it would be good ground for holding that the parties intended that the pounds sterling should be English pounds."

p. 27. His Honour held that the question to be considered was whether any and what implication as a matter of law could be made in the new situation as to the form and means of payment to the Appellants. Since the original contracts were made pursuant to the statutory law 30 of Queensland, the moneys repayable under the said debentures were secured on the Consolidated Revenue of Queensland, and were repayable in a currency which was the then currency of Queensland, as well as the currency of other parts of the Empire, His Honour thought it should be implied

> " that the proper law of these contracts was the law of Queensland and that the moneys repayable thereunder should be repaid in then currency of Queensland."

This, according to Rich, J.,

pp. 27-28. > " entitled the State of Queensland, when the Australian pound 40 came into existence, to pay the debenture holders in Australian pounds, and as the rights of the holders of the inscribed stock are agreed to be the same as or similar to the rights of the original debenture holders, the Commonwealth (Respondent) . . . is entitled to repay the holders of the inscribed stock in Australian currency."

p. 28. As to the construction of the clause in the debentures conferring on the holder an option as to the place of payment of the principal sum, His Honour said:—

"The clause relating to this option could never have been intended to affect the rights of the debenture holders to receive payment of their principal sums whether in English or Australian currency, and must be regarded as machinery for the convenience only of the borrower, and as not affecting the rights of the lenders to receive repayment of these sums in accordance with their substantial rights under their contract." RECORD

In view of his answers to the main questions Rich, J., did not give reasons for denying that the Appellants were entitled to interest after the maturity date of the debentures.

19. Dixon, J. (with whom McTiernan, J., concurred), also expressed in detail his reasons for answering the questions adversely to the Appellants. Upon the construction of the clause in the debenture conferring an option as to the place of repayment His Honour held that unless notice of the place where the holder intends to present his debenture is given before the specified date, he cannot insist on payment at that place on the due date. p. 35.

"In other words before he can insist on payment anywhere he must give notice of the place and it must be a reasonable notice, the length being fixed, if payment is to be made on the due date, at six months. Full effect is thus given to the words 'payable either in Brisbane, Sydney, Melbourne or London at the option of the holder' and the ensuing words as to notice on or before the 1st July, 1944, are treated as a qualification of the words 'on the 1st day of January, 1945.'"

His Honour then stated that:

"It is difficult to find any significance in the use of the word 'sterling.' The debentures were issued when the same money of account and legal tender prevailed in Australia and in Great Britain and no other state of affairs was in contemplation. Although no doubt the use of the word 'sterling' to denote the British money of this system when distinguishing it from foreign money had long obtained, within the system itself the word added nothing to the meaning or effect of a monetary expression to which it was attached . . . To employ the word 'sterling' or to fail to employ it in expressing a sum of money had no significance. It was a fuller and more formal description of the only money in use in Australia and in Great Britain whether as money of account or as currency. But in all domestic transactions it was an otiose addition to the expression of a sum of money . . . Since the divergence of the two monetary systems and the establishment of a high premium on exchange on London it has become the custom to use the word 'sterling' to distinguish the £E from the £A. But that more recent usage appears to have no bearing upon the meaning or application of the monetary expression employed in the debentures." p. 36.

His Honour then held that by 1945 the monetary systems of the United Kingdom and of Australia were separate systems, adding: p. 37.

"Naturally when the divergence took place the word 'sterling' followed the money of the United Kingdom, not

RECORD

because Australia left the gold standard earlier but because the world was accustomed to use it of British money, the money of a great financial nation. Nevertheless the sense, the denotation, of the word 'sterling' underwent some change because it no longer applied to the money of Australia and New Zealand, except according to an extended and secondary meaning. The accident that the word 'sterling' was used in the debentures—for in truth it is little more than an accident—is no warrant for the conclusion that when a difference developed between the money of account of Great Britain and that of Australia, the debentures applied only to the former."

His Honour then elaborated his reasons for holding that before 1945 there were

> "two independent monetary systems established by the Governments of two different countries adopting or continuing the same nomenclature for expressing different measures of value in the term of one another. This must mean that they provide separate moneys of account."

pp. 39-40. His Honour then adverted to the distinction between the money of account in which an obligation is measured and the money of payment in which the obligation is to be discharged and also to the presumption that when the parties contract to pay a sum of money expressed in a form capable of describing the money of account of the place of payment they are referring to that money not only as the money of payment but as the money of account: Auckland Corporation v. Alliance Assurance Co. (1937) A.C. 587 and 606. This presumption, in His Honour's view, could have no application where the contract conferred upon the payee an option of calling for payment in any one of several places save in the exceptional case where the option was not merely an option as to the place of payment but an option between different measures of liability.

p. 40.

p. 41. Where, as in the present case, no single place of payment is fixed by the contract the money of account of the obligation must, so Dixon, J., held be determined as a matter of interpretation of the contract, after first ascertaining the proper law of the contract. In the present case the proper law of the contract must be that of Queensland or of England. But since both laws have a common method of interpreting contracts the choice between them is immaterial.

> "The interpretation of the transaction must be worked out from its character, from the elements which are contained within it. The nature and circumstances of the transaction must supply the grounds from which the so-called 'intention' must be deduced as a reasoned consequence. It may be called an implication."

pp. 41-42. His Honour then referred to Dahl v. Nelson, 6 A.C. 38, per Lord Watson at p. 59, and continued:

> "In the present case the transaction giving rise to the obligation was connected in every way with Queensland except for the reference to London, Sydney and Melbourne in the option of place of payment. The borrower issuing the deben-

ture was the Government of Queensland. The loan was raised under a statute of the Queensland Legislature. The statute secured it on the public revenues of the Colony. The statute even fixed the currency of the loan and made it repayable on 1st January, 1945. The debentures were issued in Queensland. The loan was raised in Queensland. The lender who 'purchased' the debentures from the Government was a body carrying on business in Queensland, as well as elsewhere in Australia. In these circumstances the transaction was bound up with Queensland. The tenor of the debentures and the localisation of the particular transaction therefore suggest that pounds sterling formed the money of account of the obligation in virtue of its being the money used in Queensland rather than in virtue of its being the money used in the United Kingdom . . . Apart from the use of the word 'sterling' and the reference to London and possibly Sydney and Melbourne as alternative places of payment . . . there appears to be only one other consideration tending against the view that the money of account is that of Queensland or Australia. That consideration is that under the authority of the same Loan Act debentures identical in form were issued in England, presumably in respect of moneys lent in England. We have no details of this transaction and we do not know what has been the history or fate of those debentures and whether they have been paid off in English sterling or not."

RECORD

Finally Dixon, J., propounded the question: p. 43.

"Which of the two moneys of account would the parties have presumably adopted as fair and reasonable men, if, having the possibility of a separation of the two money systems in view, they had expressly provided for its occurring . . .? On the limited hypothesis stated, the answer that a Queensland purchaser of debentures from the Government of Queensland must be assumed to make is that he would abide by the monetary system of the country where his business was and his investments were to be made. The answer of the Queensland Government would of course have been that its financial dealings in Australia must be governed by Australian money. From the foregoing reasoning it follows that the debentures are redeemable in Australian money of the same amount as is expressed in pounds in the debentures. Upon this footing no question as to interest since 1st January, 1945, can arise since the Commonwealth (Respondent) has not been in default."

20. Latham, C.J., and Starke, J., delivered separate dissenting judgments. Latham, C.J., relied chiefly upon the fact that the debentures contained an obligation to pay 'the sum of One thousand pounds sterling."

"There was a single promise to pay which could be discharged by performance in any one of several places. But the promise was the same wherever it might be performed." p. 20.

His Honour held that by 1945 what is legal tender for the discharge of monetary obligations in Australia was determined by p. 21.

RECORD

Australian and not by English law and that, although the same word " pound " was used in each country there are in fact and in law separate currencies or moneys of account.

p. 21. But " the terms of the debentures were not altered by any subsequent legislation. The obligation, in 1945 as in 1895, was an obligation to pay £1,000 sterling."

p. 22. The learned Chief Justice then stated that what the parties meant by a promise to pay £1,000 sterling must be determined by interpretation according to the proper law of the contract. He held that the law of Queensland was the proper law of the contract even with respect to the debentures which were issued in London.

p. 23. " But even if English law were held to be the governing law in the present case, it would not affect the rights and duties of the parties, because there is no difference between the English law and the law of Queensland with respect to the interpretation of contracts."

p. 23. The following passage contains the crux of the judgment of the learned Chief Justice:

" What then was the meaning according to Queensland law in 1895 of a promise to pay ' sterling '? At that time what was ' sterling ' in a contract governed by the law of Queensland then meant sterling as determined by English law. " Sterling " in relation to currency means, according to the Standard Dictionary, ' having a standard of value or fineness established by the British Government; said of British money of account.' See definition of ' sterling ' in Webster's Dictionary—' Lawful money of England or later of Great Britain or of those British Possessions having no separate coinage '—*i.e.*, sterling means lawful English currency as distinct from a Dominion or Colonial currency which is established independently of English Law. This was held to be the meaning of ' sterling ' in De Bueger v. J. Ballantyne & Co. (1938) A.C. at p. 461, this meaning being said to have obtained from the 17th and 18th centuries.

p. 23. " The meaning of ' sterling ' has not changed since 1895. The money now current in Queensland as ' pounds ' is not ' pounds sterling.' It is a different money both in respect of the law which makes it money (which is now Australian law) and in respect of its exchange value. Accordingly, in my opinion, the substance of the obligation under each of the £1,000 debentures is, according to the law of Queensland, to pay £1,000 in English currency. That is what is owed. Payment of what is owed may be made in legal tender in the place of payment. If payment is made in Australia, the money of payment may be Australian, and in that case the equivalent in Australian currency of £1,000 sterling must be paid."

With regard to the option as to place of payment Latham, C.J., placed a different construction upon the debenture from that adopted by Dixon, J. The Chief Justice held that the option, if not exercised on or before the 1st July, 1944, lapsed altogether.

RECORD

"The result, in my opinion, is that there is no provision in the contract which, in the case of the Plaintiffs (Appellants), effectively specified a place of payment which must therefore be determined upon the general rules of the relevant law." p. 24.

His Honour then held that the holders in order to obtain payment, must present their debentures to the Government of Queensland (now to the Government of the Commonwealth (Respondent)) where that Government is—namely in Australia. p. 25.

"Thus if the rights of the debenture holders as to prescribing a particular place of payment are regarded as having been transferred to the Plaintiffs (Appellants) in this action, those rights, owing to the delay in the giving of the notice, do not entitle the Plaintiffs (Appellants) to require payment elsewhere than in Australia."

If on the other hand the Appellants were to be treated as the owners of Commonwealth Inscribed Stock, His Honour held that they could claim payment only in Australia. p. 25.

"Accordingly, whether the Plaintiffs (Appellants) are treated as being holders of the debentures or as being owners of inscribed stock, they can, in my opinion, claim payment of principal only in Australia. But this circumstance does not alter the substance of the obligation to pay sterling. 'Sterling' is an express term which it is impossible to ignore and the use of which excludes the *prima facie* rule that the obligation is an obligation to pay in pounds in legal tender in the place of payment—De Bueger v. Ballantyne and Co. (1938) A.C. at 461." p. 25.

In accordance with his construction of the option of place of payment, the Chief Justice rejected the claim for interest. For the Appellants did not present or offer to present the debentures for payment in Australia. pp. 25-26.

"They insisted on payment in London. The Commonwealth (Respondent) was entitled to refuse to pay in London, and was in my opinion right on this point. The Commonwealth (Respondent) therefore was not in default and interest under Lord Tenterden's Act is given only by way of damages for default."

21. Starke J., held that the money of account of both England and Australia is and has always been the same. p. 29.

"The monetary systems of England and Australia doubtless rest upon independent constitutional powers. But the money of account is and always has been the same—Adelaide Electric Supply Co., Ltd., v. Prudential Assurance Co., Ltd. (1934), A.C. 122. Debts and prices are expressed in terms of pounds, shillings and pence. The pound was and is the unit of account in both England and Australia. A pound in Australia is, as in England, a pound whatever its value in exchange. The Baarn No. 1 (1933), pp. 251 and 265. 'It is a mistake to define the unit of account in terms of the metallic standard; for the unit of account is that which persists even

RECORD

when the standard changes' (Hawtry Currency and Credit, p. 183) . . ."

p. 30. "The question is what is the proper construction of a contract to pay a certain number of pounds sterling at the option of the holder of stock in Brisbane, Sydney, Melbourne or London? The words should, I think, be referred to the money of account which was common to England and Australia and not to money whereby the obligation was to be discharged. It is an obligation to pay a sum of money expressed in a money or unit of account common to England and Australia. How then is that obligation to be discharged?"

p. 30-31. His Honour discussed the decisions in Broken Hill Proprietary Co., Ltd., v. Latham (1933), 1 CH. 373; Adelaide Electric Supply Co., Ltd., v. Prudential Assurance Co., Ltd. (1934), A.C. 122; Auckland Corporation v. Alliance Assurance Co. (1937), A.C. 587; Payne v. Deputy Federal Commissioner of Taxation (1936), A.C. 487; and De Bueger v. Ballantyne & Co. (1938), A.C. 452.

p. 31. Starke, J., also said:—

"The fact that the obligation is expressed in pounds sterling and not in pounds makes no difference in principle for the money of account whether expressed in pounds or in pounds sterling is the same both in England and Australia."

p. 32. His Honour then held that an obligation to pay "pounds" or "pounds sterling" could be discharged by whatever is legal tender at the place of payment for the required number of pounds. He further held that the Appellants had not lost their right to require payment in London and having done so the Respondent was bound to pay whatever in London was legal tender for the amount of debentures.

p. 32. His Honour held that the Appellants were not entitled to interest as such but thought that they might claim damages for breach of contract in not paying money to them on the appointed day, namely 1st January, 1945.

22. It is submitted on behalf of the Appellants that the opinions summarized herein of Rich, Dixon and McTiernan, JJ., were wrong, and that the judgment of Latham, C.J., which gave effect to those opinions should be set aside for the following among other

REASONS.

1. BECAUSE upon a proper construction of the debentures they imposed an obligation on the borrower to pay a sum of money expressed in English currency, and in whatever currency payment is in fact made the extent of such obligation cannot be varied.

2. BECAUSE the Respondent's obligation in the circumstances being in all respects similar to the obligation imposed on the borrowers by the terms of the debentures, the Respondent was liable

either (*a*) to pay to the Appellants in London the sums specified in the inscribed stock in English currency;

or (*b*) (if the Appellants' option to require payment in London had lapsed) to pay the Appellants in Australia on the 1st January, 1945, or alternatively thereafter on demand, the equivalent of the said specified sums in Australian currency at the then current rate of exchange.

10 3. BECAUSE Latham, C.J., was right in holding that effect had to be given to the use of the word " sterling " in the debentures, and that " lawful English currency " was consequently the money of account by which the Respondent's obligation had to be measured.

4. BECAUSE the construction placed by Dixon, J., upon the option term was correct, and the Appellants having nominated London as the place of payment, the Respondent was bound to have the money available in London at the latest on the 22nd June, 1945 (*i.e.*, six months after notice was 20 given requiring payment in London).

5. BECAUSE if (as the Appellants submit in the alternative) Starke, J., was right in holding that the money of account in England and Australia is and always has been the same, then the Appellants, having duly required payment to be made in London, are entitled to be paid in London in currency which is there legal tender for the face value of the stock held by them.

6. BECAUSE Rich, J., was wrong in holding that little importance could be given to the word " sterling " in the 30 debenture, and Dixon, J., and consequently McTiernan, J., who concurred with Dixon, J., were wrong in holding that the word " sterling " in the debentures was without significance and in effect inserted by accident.

7. BECAUSE Dixon, J., and therefore McTiernan, J., were wrong in holding that there was necessarily implied in the terms upon which the debentures were issued, a term that if the currencies of England and Australia should divide the parties would adopt the currency of the Commonwealth of Australia as the money of account.

40 8. BECAUSE as from the 1st January, 1945, or alternatively from the 22nd June, 1945, at latest, the Respondent, having refused to make any payment in London, and having refused to pay in Australia more than the face value of the

stock in Australian currency, was in default and should be ordered to pay interest at 3.5 per centum until payment or judgment, or alternatively should be ordered to pay damages measured by reference to such interest.

9. BECAUSE the conclusions of the majority of the High Court are inconsistent with the decisions of the House of Lords and of the Privy Council and are wrong.

FREDERICK GRANT.
JAMES STIRLING.

32, 1949

~~No. 25 of 1949~~

In the Privy Council.

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA.

BETWEEN

SIR JOHN LAVINGTON BONYTHON and OTHERS

AND

COMMONWEALTH OF AUSTRALIA.

APPELLANTS' CASE.

TORR & CO.,
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