

~~E.D.L.E.6~~  
INSTITUTE OF ADVANCED  
LEGAL STUDIES,  
25, RUSSELL SQUARE,  
LONDON,

32, 1950

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31932  
No. 25 of 1949.

30 MAR 1951

In the Privy Council.

ON APPEAL FROM THE HIGH COURT OF  
AUSTRALIA.

UNIVERSITY OF LONDON  
W.C.1  
17 JUL 1953  
INSTITUTE OF ADVANCED  
LEGAL STUDIES

BETWEEN :

SIR JOHN LAVINGTON BONYTHON, ERIC  
GLENIE BONYTHON, CLIVE LANG-  
DON BONYTHON, JOHN BARTON  
BONYTHON, JOHN LANGDON BONY-  
THON, CHARLES WARREN BONY-  
THON, KATHERINE DOWNER  
NERCO, ADA LANGDON BONYTHON,  
WILLIAM JAMES ISBISTER AND  
ANNIE MARIE GELLERT (Plaintiffs)

*Appellants.*

AND

THE COMMONWEALTH OF AUSTRALIA  
(Defendant)

*Respondent.*

Case for the Respondent.

1. This is an appeal brought by special leave granted by His Majesty in Council by Order in Council dated the 29th April 1949 from an Order of the High Court of Australia (Latham C.J.) dated the 17th June 1948 whereby judgment was entered for the Respondent. RECORD.  
pp. 46, 47.  
p. 45.

2. The substantial question for decision in this appeal is whether in the events appearing hereinafter the Appellants are entitled to require payment by the Respondent in English currency, as distinct from Australian currency, of certain moneys, to wit Eighty thousand

RECORD. four hundred pounds (£80,400), in respect of which Commonwealth Consolidated Inscribed Stock was issued.

pp. 1-3. 3. The Appellants instituted an action in the original jurisdiction of the High Court of Australia on the 2nd January, 1946, claiming certain declarations and orders, and the action coming on to be heard before Latham C. J., the learned Chief Justice with the consent of the parties stated a case for the opinion of the Full Court pursuant to s. 18 of the Judiciary Act 1903-1947.

p. 10, l. 25-p. 18,  
l. 14.

p. 10, l. 25-p. 18,  
l. 14. 4. The facts relevant for the purposes of this Appeal, which are not in dispute, are set out in the case stated by the learned Chief Justice. They may be summarised as set out in Paragraphs 5 to 14 below.

p. 11, ll. 27-39.

5. By the provisions of a Queensland Act, known as the Government Loan Act, 1894 (Act 58 Victoria No. 32), the Governor-in-Council of the Colony of Queensland was authorised to raise by way of loan for the public service of the Colony sums of money not exceeding £2,000,000. In pursuance of this authority the Governor-in-Council on the 26th April 1895 raised by way of loan in London £1,250,000; and on the 3rd July 1895 raised by way of loan in Australia sums of £250,000 and £500,000. In respect of all these sums debentures were issued for varying amounts but otherwise in the following form :—

p. 11, l. 40-p. 12,  
l. 24.

p. 11, l. 40.  
p. 12, l. 24.

ONE THOUSAND POUNDS  
QUEENSLAND Identical S1. T1.

GOVERNMENT

DEBENTURE

No. 1

£1,000 Series S1.

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.

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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.

10 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.*

H. W. NORMAN,  
*Governor of Queensland.*

20 T. M. KING,  
*Under Secretary.*

HUGH M. NELSON,  
*Colonial Treasurer.*

Annexed to each Debenture were coupons in the following form :— p. 12, ll. 37-41.

QUEENSLAND GOVERNMENT DEBENTURE.

£,1000	SERIES S1.	£1,000
Half year's Dividend at the rate of THREE POUNDS TEN SHILLINGS per centum per annum, due 1st January 1945.		
£17 10s. 0d.		HMN.

6. The sum of £250,000 referred to in Paragraph 5 above, includes p. 12, ll. 25-32.  
the sum of £80,400 in respect of which was subsequently issued  
30 Commonwealth Consolidated Inscribed Stock for £80,400 as hereinafter set out. The said sum of £250,000 was wholly subscribed by the Australian Mutual Provident Society (hereinafter called "the Society") being a company incorporated and carrying on business in Australia. Debentures were duly issued to the Society in respect thereof. The place for payment of interest endorsed on the said p. 12, ll. 32-35.  
Debentures was Sydney, and no change in such place of payment of interest was ever registered.

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p. 13, ll. 1-11.

7. By an agreement made on the 12th December 1927 between the Respondent and the several States of the Commonwealth of Australia, including Queensland, and by virtue of certain Acts of the Commonwealth Parliament, the public debt of Queensland including the liability under the said Debentures, was taken over by the Respondent.

p. 11, ll. 18-26.

8. In March 1932 the Society surrendered all its holding of the said Debentures and there was issued to the Society in Exchange therefor Commonwealth Inscribed Stock 3½ per cent. maturing the

p. 13, ll. 12-15.

1st January 1945. For some time after March 1932 the said stock was inscribed in the Stock Register kept at the Registry in Brisbane and 10 interest was paid there.

p. 10, l. 28-p. 11, l. 13.

9. Since prior to the 1st July 1944 the Appellants have been inscribed as the holders of various amounts of the said Commonwealth Inscribed Stock, to a total amount of £80,400. The stock in respect of which the Appellants are thus the registered holders is a part of the stock issued in March 1932 to the Society as set out in Paragraph 8 hereof. The said inscribed stock was issued subject to the condition that the same conferred upon the registered holders thereof for the time being rights which conformed in all particulars with the rights

p. 13, ll. 15-18.

conferred by the said Debentures. Upon or subsequently to the 20 Appellants becoming holders of the said stock the same was transferred to the Registry kept at Adelaide and thereafter interest was paid there.

p. 11, ll. 16-17.

10. The Appellants are and at all material times have been resident in Australia.

p. 13, ll. 19-21.

11. On the 15th December 1944 the Treasurer of the Commonwealth sent to each of the holders of the said stock a letter, suggesting that, instead of requiring repayment in cash of their holdings of the said stock on maturity on the 1st January 1945, the holders should

p. 13, l. 22-p. 14, l. 7.

convert such maturing securities into new securities. The said letters ended "Should it not be possible for you to convert your securities, 30

p. 14, ll. 1-3.

they will, of course, be redeemed on the due date, on presentation at the Commonwealth Bank." None of the Respondents replied to these letters, nor did they convert their said stock or any part of it.

p. 14, ll. 8-9.

p. 14, ll. 17-41.  
p. 15, ll. 20-29.

12. On the 22nd December 1944 the Appellant Annie Marie Gellert by two letters in substantially similar terms addressed to the Deputy Registrar of Inscribed Stock, Adelaide, requested on behalf of herself and the other Appellants that "in accordance with the conditions on which the said stock was issued, the amount of the stock set out

hereunder be paid on maturity in London in sterling ”. The total of the amounts set out in the said two letters, as corrected by a letter dated the 3rd January 1945, was £80,400 : that is, the total of the said inscribed stock referred to in Paragraph 9 hereof. RECORD.  
p. 15, ll. 4-13.

13. By letter dated the 30th December 1944, addressed to the said Annie Marie Gellert, the Deputy Registrar, after stating that the request for payment in London had been submitted to the Commonwealth Treasury, added : “ The conditions of the Loan provided that six months notice redemption in London would be necessary ”. By a further letter dated the 2nd January 1945, addressed to the said Annie Marie Gellert, the Deputy Registrar quoted the redemption provisions of the original Queensland Debentures, as set out in Paragraph 5 hereof, and concluded : “ As the holders of the stock did not give the notice required by the terms of the debentures they are now precluded from exercising an option for payment in London ”. p. 15, l. 33-p. 16, l. 7.  
p. 17, ll. 4-25.  
p. 17, ll. 20-23.

14. None of the Appellants completed forms which had been sent to them by the Deputy Registrar, requesting payment, nor did they present their said stock at the Commonwealth Bank for payment. Respondent has not paid to any of the Appellants any of the principal moneys due on maturity of the said stock. On and since the 1st January 1945 the Respondent has at all times been ready and willing to repay to the respective Appellants the said principal moneys 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. p. 17, ll. 26-28.  
p. 17, ll. 29-34.

15. The learned Chief Justice, on the basis of the facts summarised above, stated for the opinion of the Full Court of the High Court of Australia the following questions of law :— p. 17, l. 42-p. 18, l. 10.

30 “ (a) With respect to the Commonwealth Incribed Stock held by the Plaintiffs was the Defendant bound to pay the principal sums secured thereby in English currency in London six months after the date of the delivery of the letters referred to in paragraphs 10, 11 and 12 of this Case ? ” (*i.e.* the letters referred to in Paragraph 12 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 Plaintiffs respectively entitled to be paid in Australian currency the equivalent of the principal sums in English currency ?

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(d) Are the Plaintiffs respectively entitled to interest upon the amount of the said stock held by each of them at 3½ per cent. per annum since 1st January 1945 ? ”

16. On the hearing of the stated case the Appellants argued :—

(a) That upon the proper construction of the debentures payment must be made in sterling, meaning by “ sterling ” lawful English currency.

(b) That the place of payment was immaterial because, if payment were to be made in Australia, such payment must be made of an equivalent amount in Australian money to the sterling 10 amounts.

(c) That at the time of the issue of the debentures there was only one unit of currency known as the “ pound ” and that meant English currency.

(d) That the phrase “ pounds sterling ” had the same meaning in the year 1895 as it had in the year 1945.

(e) In the alternative to the above arguments, that the Appellants had an option which they had exercised to require payment in London, and in those circumstances, they were entitled to receive payment of the amount in question in English currency 20 without any deduction.

(f) That the requirement of six months’ notice should not be treated as a condition precedent to the Appellants’ right to require payment in London.

(g) That the Appellants were entitled to interest since the 1st January 1945 because the Respondent had made default in payment on that date.

17. The contentions of the Respondent were :—

(a) That upon the true construction of the debentures the Appellants were only entitled to payment of the face value of the 30 debentures in the currency prevailing in Queensland at the date of payment.

(b) That the debentures were issued pursuant to a Queensland Statute by the Government of Queensland and were in all respects governed by the law of Queensland.

(c) That the word “ sterling ”, in the circumstances, did not connote or indicate any distinction or intended distinction between

one currency and another, and the debentures should not therefore be construed as requiring payment in English currency.

(*d*) That the obligation pursuant to the debentures to repay was an obligation to repay in whatever was the lawful currency of Queensland at the date of repayment.

(*e*) Alternatively that the Appellants were not entitled to require payment in London because they had not given the necessary notice exercising the option conferred by the debentures.

10 (f) That the Appellants were not entitled to interest because there had been no default by the Respondent and, even if there had been such default the discretionary power to award interest should not be exercised in favour of the Appellants.

18. The stated case was heard by the High Court of Australia (Latham, C.J. Rich, Starke, Dixon and McTiernan J.J.) on the 23rd and 24th October 1947. Judgment was delivered on the 31st May 1948. pp. 18-43.

19. The High Court by a majority held that the Appellants' claim failed. Latham C.J. and Starke J. dissented, being of opinion that the Appellants' claim ought to succeed in substance, though Latham C.J. was of opinion that the Appellants were not entitled to interest since 20 the 1st January 1945. The reasons given by the various members of the Court are summarised hereafter.

20. The opinion of the Members of the Court as to the answers which should be given to the questions stated in the case, as set out in Paragraph 15 hereof, were as follows :—

Rich, Dixon and McTiernan JJ. answered questions (*a*), p. 28, ll. 18-23. (*c*) and (*d*) in the negative. p. 43, ll. 36, 37.

Dixon and McTiernan JJ. were of opinion that it was p. 43, ll. 41-44. unnecessary to answer question (*b*).

30 Rich J. was of opinion that the principal sums were payable at p. 28, ll. 19-23. the places mentioned in the debentures on presentation of the inscribed stock.

Latham C. J. dissenting, would have answered question (*a*) in p. 26, ll. 24-28. the negative; question (*b*) by the words "on 1st January 1945 in Australia"; question (*c*) in the affirmative; and question (*d*) in the negative.

Starke J. also dissenting, though for different reasons, p. 32, ll. 42-46. would have answered question (*a*) by the words "Yes, on

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1st January 1945 ”; question (c) in the negative; question (d) by the words “ No, but to damages for detention of the debt ”; the learned Judge did not consider that it was necessary to answer question (b).

Accordingly the questions were answered as follows :—

- (a) No.
- (b) Unnecessary to answer.
- (c) No.
- (d) No.

21. The reasons given by the learned Judges who formed the majority may be summarised as follows :— 10

*Rich J.* held :—

- p. 27, ll. 11-12. (a) That the question was a question of the construction of the particular contract.
- p. 27, ll. 12-22. (b) That in 1895 the pound sterling was a common unit of account and a common unit of payment in both Queensland and England and for that reason little importance could be attached to the use of the word “ sterling ” in the debentures.
- p. 27, ll. 23-28. (c) That the proper law of the contract constituted by the debentures was the law of Queensland.
- p. 27, ll. 42-45. (d) That the debentures (and consequently the inscribed stock) 20  
p. 28, ll. 3-4. were repayable in currency which was appropriate in conformity with Queensland law at the time of repayment.
- p. 28, ll. 6-15. (e) That the option conferred on holders of debentures entitling them to require payment in London was of a machinery character only and did not affect the substantial rights of the parties under the contract.
- p. 28, ll. 16-17. (f) That the Appellants were not entitled to interest.

*Dixon J.* (with whom McTiernan J. agreed) held :—

- p. 36, ll. 8-12. (a) That no significance attached to the use of the word “ sterling ” because there was in 1895 no distinction between the 30  
currency of Queensland and the currency of England.
- p. 36, l. 12—p. 37, l. 35. (b) That at the date on which payment was due there were different money systems in England and Australia and from the date of the change in the systems the word “ sterling ” lost its original denotation in that thereafter, as a matter of custom or



useage, it no longer applied to the money of Australia and New Zealand. RECORD.

(c) That the use of the word “ sterling ” did not give the Appellants the right to require payment in English currency. p. 37, ll. 31-35.

(d) That the right to exercise the option of requiring payment in London was not lost by the failure to give notice before the 1st July 1944; *but* that the option, or its exercise, did not affect the currency in which, or by reference to which, the debentures were to be repaid. p. 35, l. 3-p. 36, l. 7. p. 40, l. 18-p. 41, l. 8.

10 (e) That the currency in which the debentures were to be repayable must be determined as a matter of intention to be extracted from the transaction and referable to the time when the contract was made. p. 41, ll. 9-40.

(f) That the intention to be gathered from the debentures themselves, the nature of the transaction, and the fact that the debentures were issued by the Queensland Government under a Queensland Statute clearly was that repayment was to be made in currency which was legal tender in Queensland at the date of repayment. p. 41, l. 40-p. 43, l. 30.

20 (g) That the Respondent was not in default and interest was not therefore payable. p. 43, ll. 30-35.

22. Latham C. J. and Starke J. delivered separate dissenting judgments. Their views may be summarised as follows :—

*Latham C. J.* held :—

(a) That the use of the words “ pounds sterling ” was conclusive and that the Appellants were therefore entitled to be paid in English currency whether payment was due to be made in Australia or England. p. 23, ll. 23-47.

30 (b) That the meaning of sterling had not changed since 1895 when it meant the lawful currency of England as distinct from that of any British possession. p. 23, ll. 23-47.

(c) That the provision with respect to the giving of notice to require payment in London was a condition precedent to payment there and had not been complied with; that therefore, payment was due only in Australia; but that this did not affect the currency in which payment was to be made. p. 24, l. 1-p. 25, l. 38. p. 24, l. 21-p. 25, l. 24.

(d) That the Appellants were not entitled to interest. p. 25, l. 46-p. 26, l. 23.

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*Starke J.* held :—

p. 30, ll. 6-12.

(a) That the words “ pounds sterling ” referred to the money of account common to both England and Australia and not to the money whereby debts are discharged or the money of payment.

p. 32, ll. 23-32.

(b) That the Appellants had effectively exercised their option to require payment in London because the debentures had been surrendered and converted into inscribed stock and notice prior to 1st July 1944 was therefore unnecessary.

p. 32, ll. 15-18.

(c) That the right of the Appellants to require payment in London necessarily involved payment in English currency of the 10 specified amounts without deduction on account of the exchange value of the pound in Australia.

p. 32, ll. 19-22.

(d) That, in the case of holders who elected to receive payment in Australia they were entitled only to payment in Australian currency of the face value of the stock.

p. 32, ll. 33-41.

(e) That the Appellants were not entitled to interest but were entitled to damages for non-payment of the moneys on the due date which damages might be measured by interest payable thereon.

p. 45.

p. 44.

p. 45.

23. The case was accordingly remitted to Latham C. J. with its opinion and answers as set out at the end of Paragraph 20 hereof. 20 Pursuant thereto the learned Chief Justice on the 17th June 1948 made an Order, against which the present Appeal is brought, dismissing the Appellants' action with costs and entering judgment for the Respondent.

pp. 46-47.

24. Special leave to appeal to His Majesty in Council was granted by Order in Council dated the 29th April 1949.

25. The Respondent respectfully submits that the majority of the High Court was right in holding that the debentures (and consequently the inscribed stock), wherever the same were repayable, were repayable only in or by reference to Australian money of the same amount as is expressed in pounds in the original debentures and in the inscribed 30 stock issued in lieu thereof. The Respondent also submits that the Appellants were not entitled to repayment of any of the moneys referred to in the said Commonwealth Consolidated Inscribed Stock in or by reference to any money other than Australian money. Further or alternatively the Respondent submits that, if and in so far as the place where repayment falls to be made is relevant, the place of repayment for the inscribed stock here in question was Australia, and not London,

since the Appellants failed to exercise the option by which alone they could have required repayment to be made in London.

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26. Accordingly the Respondent submits that this Appeal should be dismissed with costs for the following amongst other

#### REASONS

- (1) Because the Appellants were entitled to receive repayment of the inscribed stock only in Australia and in lawful Australian currency.
- 10 (2) Because the amount of such repayment to which the Appellants were entitled was the number of pounds specified in the inscribed stock being pounds in lawful Australian currency as distinct from pounds in English currency.
- (3) Because the money of account to which the debentures must be deemed to have referred was Australian money.
- (4) Because even if the Appellants were entitled to such repayment in London, or to repayment in some currency other than Australian currency, they were nevertheless not entitled to receive payment of any amount greater than the equivalent value of the amount in Australian currency which they were  
20 entitled to receive as set out in Reason (2) above.
- (5) Because the Appellants were not in the events which have happened entitled to require repayment in London of the inscribed stock or any part thereof.
- (6) Because the Appellants did not give due notice to require repayment in London.
- (7) Because the Appellants were not entitled to interest since no interest was payable after the 1st January 1945.
- (8) Because no interest or damages in lieu thereof are payable since there has been no default by the Respondent.
- 30 (9) Because in any event the discretionary power (if any) to award interest should not be exercised in favour of the Appellants.
- (10) Because the order appealed against is right and should be affirmed.

A. R. TAYLOR.

JOHN MEGAW.

R. ELSE-MITCHELL.

**In the Privy Council.**

**ON APPEAL FROM THE  
HIGH COURT OF AUSTRALIA.**

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BETWEEN

SIR JOHN LAVINGTON BONY-  
THON AND OTHERS (Plain-  
tiffs) - *Appellants.*

AND

THE COMMONWEALTH OF AUS-  
TRALIA (Defendant) *Respondent.*

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**Case for the Respondent.**

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