THE INTERPRETATION OF THE WORD "POUND."

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THE depreciation of the Australian exchange in the early days of the depression raised problems for politicians and economists, for traders and travellers, for debtors and tax-gatherers. Many of these problems involved questions of law, so the lawyer had his share too. The issue was mainly one of construction: when a document said "a pound," did it mean Australian currency or English currency? If Australia had retained rum, "holey" dollars and shinplasters as currency, the ordinary legal principles of foreign exchanges would have applied. Since, unfortunately, this has not happened, the point had to be decided practically *de novo*. The only precedents were of the seventeenth and eighteenth centuries, during the period when the Irish currency was depreciated 8½ per cent. owing to the issue of certain "mixt moneys" in Queen Elizabeth's reign.

These cases are analogous to the Australian ones, and from them we can derive several basic principles. The first case was *The Case de Mixt Moneys*.[1] The facts were these: Before the depreciation of the Irish currency, one Brett, of Drogheda, merchant, having become indebted to one Gilbert for goods purchased in London, promised to pay Gilbert £100 "a le tombe del Earle Strongbow in Christ-Church, Dublin, al certaine jour avener." Before the appointed day the currency was depreciated, and Brett tendered the sum in "mixt moneys." The tender was upheld by the Privy Council, the grounds being that the word "pound" applied equally to the English and Irish currency, even though the contract was an English one, and that, since the debt was due in Ireland, it should be paid in Irish currency. The principle of the case was well stated by Best C.J. in *Taylor* v. *Booth*,[2] "If a man draws a bill in Ireland upon England, and states that it is for sterling money, it must be taken to mean sterling in that part of the United Kingdom where it is payable: common sense will tell us this." *Noel* v. *Rochfort*[3] and *Kearney* v. *King*[4] support the same view.

These cases stress the fact that "sterling money" refers equally to the English and Irish currencies, and must be construed according to the place where the obligation is due. The particular economic concept involved is that of the distinction between the "money of account" and the currency that represents it. There is sharp conflict on the point between the Austrian school of economists and the Cambridge school. The former aver that, since money was originally nothing but a commodity that was generally acceptable, so to-day money can only be regarded as so much gold or silver coin, and that notes are not money, but only pass in place of it. The Cambridge school sees in money a unit of account for measuring debts. Just as length is measured in feet and inches, so debts and value must be

1. (1604) Davis's Rep. (Irel.) 18.
2. (1804) 1 C. & P. 286.
3. 4 Cl. & F. 158.
4. 2 B. & Ald. 301.

measured in money. Money, however, unlike a foot, does not measure any particular quantity, but is a unit measuring the ratio between a number of quantities of value. With any one of these quantities given we can determine all the other quantities through the agency of money. If we assume that one ounce of gold equals £3/17/10½, as the Australian Government did in the days of the gold standard, then all other prices follow according to their ratio with the value of gold. If an ounce of silver is estimated as being worth one-twentieth of an ounce of gold, then its value will be 3/10½. We may then say that at that particular moment a pound is worth either slightly more than a quarter of an ounce of gold, or else slightly more than five ounces of silver. If the Government enactment that says an ounce of gold shall be worth £3/17/10½ is repealed, the "pound" will still exist, and the notes representing it will retain their value, since there is always a close connection between the prices of any two given days owing to the continuity of obligations. We thus reach the conclusion that a pound can only be described as the unit in which debts and prices are measured.

When the early settlers came to Australia they brought their ideas of prices, their obligations, and, consequently, the pound with them. The English and Australian pound were at that time identical, for it is impossible to name any stage on the voyage out when the pound sterling underwent any change sufficient to make it the pound Australian. Since that time there has been no break in the continuity of the pound in either England or Australia. The prices of any given commodity in the two countries may have varied considerably, but the same thing occurs within the borders of Australia; for instance, the cost of living is 30 per cent. higher in Kalgoorlie than in Rockhampton, whereas wholesale prices in England are only 5 per cent. higher than in Australia, each being calculated in its own currency. It is in the value of the currencies that the difference between the two pounds lies. By currency we mean the things that represent a pound. In most countries to-day these are notes. When Australia established her own note issue a divergency was made possible between the exchange value of the English and Australian pounds. Prior to that each was represented by the sovereign; after it each was represented by gold and notes, and when the Treasury ceased to pay gold for notes the value of each note was determined approximately by the number issued. Australia has issued relatively 25 per cent. more notes than England, and so the English pound exchanges for 25/- Australian.

It is this divergence that raises a problem when obligations are due in pounds under a contract to be performed partly in England, partly in Australia. It is for the courts to determine whether the obligation is to be discharged in English or Australian currency. The leading case is *Adelaide Electric Supply Co. Ltd.* v. *Prudential Assurance Co. Ltd.*[5] The facts were that the Adelaide Electric Co. was a

5. [1934] A.C. 122.

company incorporated under the English Companies Acts 1869-1909, having its registered office in London, and a branch office in Adelaide, where it carried on its business. It was thus an English company. The Prudential was an English company, holding 5 per cent. and 6½ per cent. preference shares in the Adelaide Electric Co. In 1921, by special resolutions, the whole conduct and control of the Adelaide Electric Company's business, except formalities required by statute to be observed in England, were transferred to Australia, and it was provided that all dividends should be declared and paid in and from Australia. The object of this resolution was to avoid British Income Tax. On and since March 1, 1931, the Adelaide Electric Company paid dividends by delivering warrants payable at the Bank of Adelaide. The respondents thus suffered a reduction in dividends equal to the exchange rate, and claimed a declaration that they were entitled to be paid in sterling for the full nominal amount. It will be seen that the question involved is one of construction, namely, whether the word "pound" in the contract could apply to both English and Australian pounds, i.e., whether the two pounds were one and the same. If that was so, then the only question was to determine in what currency the obligation was to be discharged. This point is covered by the principle in Dicey's *Conflict of Laws*, 5th ed., p. 671: "In the cases of countervailing considerations the following presumptions as to the proper law of a contract have effect: . . . . second presumption. When the contract is made in one country, and is to be performed either wholly or in part in another, then the proper law of the contract, especially as to the mode of performance, may be presumed to be the law of the country where performance is to take place (*lex loci solutionis*)." That statement was quoted with approval and applied by the Privy Council in *Benaim and Co.* v. *L. S. Debono*.[6] The principle that obligations are to be discharged in the currency of the place where they are due has the support of the early cases cited above.

The opinion of Lords Warrington of Clyffe, Tomlin, and Russell of Killowen was that the money of account in England and Australia was the same. Their views are best expressed by Lord Warrington of Clyffe when he says in his judgment: "After consideration of the history of English and Australian money, I have come to the conclusion that, merely as a money of account, the pound symbolized by the £ is one and the same in both countries, and that the difference in the currencies merely concerns the means whereby an obligation to pay so many of such units is to be discharged." As a consequence of the identities of the moneys of account, the obligation is legally discharged in the currency of the country where it is due, since, as Lord Eldon said in *Cash* v. *Kennion*[7]: "The debtor is bound to have the money ready at the appointed time and place of payment. It is natural and reasonable that the money he should be bound to have ready should be the legal money of that place." And in this case there is no objection powerful enough to rebut that presumption.

6. [1924] A.C. 514, 520.
7. (1805) 11 Ves. 314.

Lords Atkin and Wright were not prepared to accept the identity of the moneys of account in as full a sense as the other three Law Lords. Lord Atkin preferred to think that "the recipient of an obligation expressed in pounds may be indifferent as to the currency denoted by the 'pound' in which the obligation is discharged, and is prepared to accept the currency which is legal tender in the country where the performance is made. It is in that sense that the 'pound' can be said to be the 'same' in the two countries. I think myself that this was the position for years while both England and Australia were on the gold standard. Of course, notwithstanding that the pound was the same, the contract might expressly or impliedly state the place for performance. In such a case the pound denoted currency expressed in the currency of that place. The question of construction would then not be which pound was intended, but in what place the obligation to pay a common pound was to be enforced. I think, however, that where values in one currency or another show a substantial difference, there is every reason for concluding that the recipient is not indifferent as to the currency in which the obligation is performed, and that the pounds then become different, so that there will be an English and an Australian pound." Lord Wright was of the opinion "that not only in a business sense, but in a legal sense the currencies of England and Australia are, and were at all times, different currencies, notwithstanding the identity of the unit of account," and that "the question is whether the proper law of the contract or the law of the place of the declaration and payment of dividends, which is Australia, is to govern the meaning of the word 'pound.'"

King Line v. *Westralian Farmers Ltd.*[8] seems to conflict with this viewpoint. In that case, under a charter-party, a cargo was loaded in Australia. Clause 34 provided that 5 per cent. of the freight should be paid as commission at the loading port, while Clause 35 provided that all sums due in Australia should be paid in Australian currency. Lord Macmillan in his judgment said that "the currencies of both countries alike consists of pounds, shillings and pence," and that the 5 per cent. of the amount of the freight (which was payable in sterling) would be legally discharged in Australian currency. The result would seem to imply an absolute equivalence between the English and Australian moneys of account, thus conflicting with the milder principle of Lords Atkin and Wright in the *Adelaide Electric Company* case. I would submit, however, that *King Line* v. *Westralian Farmers* can be distinguished as a special case of construction coming within their Lordships' principle. The placing of the two relevant clauses together in the charter-party strongly suggests that the result reached in the case was within the direct contemplation of the parties, and to give them any other effect would be to nullify that intention. Lord Macmillan in his judgment gives some authority to this view when he says: "The term 'sum' seems to me in this context

8. (1932) 48 T.L.R. 548.

to connote naturally so many pounds, shillings and pence without any reference to rates of exchange."

The House of Lords, in the *Adelaide Electric Company* case expressly overruled the earlier case of *Broken Hill Proprietary* v. *Latham*.[9] In that case debentures issued by the B.H.P. were made payable as to principal and interest in any of the Australian capital cities or in London. This was an appeal case, and Romer and Lawrence L.JJ. (Lord Hanworth M.R. dissenting), reversing the judgment of Maugham J., held that the London debenture-holders were only entitled to Australian currency. The judgments of Lord Hanworth M.R. and Maugham J. were quoted with approval in the *Adelaide Electric Company* case, and both these judgments favour the milder principle of Lords Atkin and Wright. Maugham J. said that "it is *prima facie* a contract to pay money according to the currency of the country where payment has to be made. . . . I must hold that the contract cannot be treated as referring to an Australian measure of value or medium of exchange." Lord Hanworth M.R. said that Dicey's presumptions as to the place of performance "apply to the present debenture. If so, when the debenture is presented for payment in London, it ought to be paid in English currency." Neither Lord Hanworth M.R. nor Maugham J. place much emphasis on the identity of the moneys of account, but, together with the other two Judges, treat the case as one of construction as to the currency in which the obligation is to be discharged.

As a result of this discussion, we see that a general identity between the English and Australian "pound" as a unit of account has been established, but that this has not established an absolute rule that where an obligation of a pound is mentioned this means that it must necessarily be discharged in the currency of the country where it is due.

We come now to the last case of the series: *Payne* v. *Federal Commissioner for Taxation*.[10] The facts were that Payne (hereinafter called the taxpayer), who was resident and domiciled in Australia, during the year ended June 30, 1931, received interest amounting to £5,671 from British Government Stock. He used the money in England, and did not cause any part of it to be transferred or remitted to Australia. In his return of income the taxpayer included the sum of £5,671 received by him in sterling. The Commissioner, however, assessed him in the sum of £6,768, being the amount £5,671 in London would have produced if transmitted to Australia. It was held by Gavan Duffy C.J., Evatt and McTiernan JJ. (Rich, Starke and Dixon JJ. dissenting) that the taxpayer was rightly assessed. The three dissenting Judges were of the opinion that they were bound by the strict rule in the *Adelaide Electric Company* case, i.e., that the English and Australian moneys of account are absolutely identical, and that the Income Tax Assessment Acts 1922-31 requirement that income should be stated in pounds, shillings and pence was,

9. [1933] Ch. 373.
10. 51 C.L.R. 197.

therefore complied with by the taxpayer. The majority, in a joint judgment, refused to regard the strict rule as the ratio *decidendi* of the *Adelaide Electric Company* case, and declared that "We have not to ascertain the meaning of an obligation defined in terms of 'pounds,' but to determine the correct way of expressing in the income tax return a particular income receipt according to a unit of value which is common to the whole return." In other words, they decided that the identity of the moneys of account did not preclude them from interpreting the Act to mean Australian currency when such an interpretation was required by the terms of the Act itself. Their decision was recently upheld on appeal to the Privy Council.[11] Lord Russell of Killowen, in delivering the judgment, said there could be no manner of doubt that the Australian Acts in referring to pounds, shillings and pence were referring to Australian currency, and that assessable income, in whatever currency it was received, must be expressed in terms of Australian currency.

Thus the result of the cases is that, where the word "pound" is mentioned, no immediate conclusion as to whether it means English or Australian currency can be reached. If it appears that one construction or another is intended, that construction will hold. If, however, neither construction is expressed or inferred then the word "pound" refers to the currency of the place where the obligation is to be discharged.

11. The *Argus*, June 24, 1936. To be reported in 55 C.L.R.

[See also on this question two recent decisions of the New Zealand Court of Appeal, viz.: *C. F. Martin de Bueger* v. *J. Ballantyne & Co. Ltd.* and *Alliance Assurance Co. Ltd.* v. *Auckland City Council and Auckland Transport Board*, both reported in *The Australasian Insurance and Banking Record*, July 21, 1936, at p. 222. Ed.]