[HIGH COURT OF AUSTRALIA.]

MAINKA . . . . . APPELLANT;
DEFENDANT,

AND

THE CUSTODIAN OF EXPROPRIATED PROPERTY . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE CENTRAL COURT OF NEW GUINEA.

H. C. OF A. 1924.

SYDNEY, *April* 30; *May* 1.

MELBOURNE, *June* 10.

Knox C.J., Isaacs, Gavan Duffy, Rich and Starke JJ.

Constitutional Law—High Court—Jurisdiction—Appeal from Central Court of New Guinea—Federal Court—Territory acquired by Commonwealth—The Constitution (63 & 64 Vict. *c.* 12), *secs.* 73, 122—*Treaty of Peace Act* 1919 (9 & 10 Geo. V. *c.* 33), *sec.* 1—*New Guinea Act* 1920 (*No.* 25 *of* 1920), *secs.* 4, 5, 14—*Treaty of Peace, arts.* 22, 119—*Mandate by Council of the League of Nations of* 17*th December* 1920, *art.* 2—*Judiciary Ordinance* 1921-1922 (*N.G.*) (*Ordinances under New Guinea Act* 1920, *No.* 3 *of* 1921—*No.* 22 *of* 1922), *secs.* 7, 24.

Company — Company established under German law in New Guinea — New capital —Payment to company—Payment to banker of company—Acquiescence of company —Rights of shareholder.

The High Court has jurisdiction to entertain an appeal from the Central Court of the Territory of New Guinea.

Prior to the War a commercial company with limited liability was formed in German New Guinea under German law, of which the appellant and N. were the only shareholders, and each of them had contributed the same proportion of the capital. In 1913 N. went to Germany and never returned to German New Guinea. In 1916 the capital of the company was increased by a certain sum of which each shareholder was to pay in one half, but, it being impossible for N. to be communicated with during the War, the company announced that the appellant took over the whole amount of the new capital

H. C. OF A. 1924.

MAINKA v. CUSTODIAN OF EXPROPRIATED PROPERTY.

and that the right of taking over one half of the new capital was reserved to N. until six months after the termination of the War provided that he had paid in his share with interest to the company.

Held, that a payment made within the time limited on behalf of N. to a firm in German New Guinea which was the banker of the company, such payment having been authorized by the only representative of the company then in German New Guinea and not having been disavowed by the company, was a payment in of N.'s share to the company so as to entitle him to an interest in the new capital equal to that of the appellant.

Decision of the Central Court of the Territory of New Guinea (*Drake Brockman* J.) affirmed.

APPEAL from the Central Court of the Territory of New Guinea.

Early in 1911 a company was duly formed in German New Guinea pursuant to German law called the Londip Pflanzung Gesellschaft mit beschränkter Haftung, of which the only shareholders were Karl Nauer and Karolina Charlotte Mainka, who contributed equally to the capital of the company which, until the increase hereafter mentioned, was 90,000 marks. Nauer went to Germany in 1913, and never returned. In 1916 the capital of the company was increased by 25,000 marks. In 1923 an action was brought in the Central Court of the Territory of New Guinea by the Custodian of Expropriated Property, as representing Nauer, against Mrs. Mainka and the company, by which the plaintiff claimed in substance a declaration that Nauer was entitled to one half of the new capital of the company. The action was heard by *Drake Brockman* J., who gave judgment for the plaintiff.

From that decision Mrs. Mainka now appealed to the High Court.

The other material facts are stated in the judgment of *Isaacs* J. hereunder.

Leverrier K.C. (with him *Teece* K.C. and *Harrington*), for the appellant. The High Court has jurisdiction to entertain an appeal from the Central Court of the Territory of New Guinea. Under sec. 73 of the Constitution the High Court has jurisdiction to entertain appeals from any Federal Court, that is, any Court established by the Parliament of the Commonwealth (see *R.* v. *Bernasconi* (1)).

(1) (1915) 19 C.L.R. 629.

[GAVAN DUFFY J. referred to *In re Judiciary and Navigation Acts* (1).]

By the *Judiciary Ordinance* 1921-1922, made under the authority of the *New Guinea Act* 1920, sec. 14, the Central Court was established (clause 7) and an appeal was given to the High Court (clause 24). The authority of the Parliament to enact the *New Guinea Act* is contained in sec. 122 of the Constitution, which gives power to the Parliament to make laws for the government of "any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth." The Territory of New Guinea was "otherwise acquired" by the Commonwealth, namely, by the renunciation by Germany in favour of the Principal Allied and Associated Powers "of all her rights and titles over her Possessions in the Pacific" (Treaty of Peace, art. 119), the Mandate conferred by the Council of the League of Nations upon the Commonwealth for the government of German New Guinea, the acceptance by His Majesty the King of that Mandate on behalf of the Commonwealth pursuant to the *Treaty of Peace Act* 1919 (9 & 10 Geo. V. c. 33), sec. 1, and the acceptance of that Mandate by the Commonwealth by the *New Guinea Act* 1920. [On the merits of the appeal counsel referred to *Todd* v. *Reid* (2); *Sweeting* v. *Pearce* (3); *Pearson* v. *Scott* (4); *Pape* v. *Westacott* (5).]

E. M. Mitchell (with him *J. H. Moore*), for the respondent. The Central Court is properly described as a Court exercising Federal jurisdiction within the meaning of sec. 73 of the Constitution, for it exercises a jurisdiction derived from the Commonwealth (*Lorenzo* v. *Carey* (6); *Menges* v. *The King* (7); *Buchanan* v. *Commonwealth* (8); *Mitchell* v. *Barker* (9)). The intention of sec. 73 of the Constitution was to give the High Court jurisdiction to hear appeals from all Courts over which the Commonwealth Parliament has control.

Leverrier K.C., in reply.

Cur. adv. vult.

(1) (1921) 29 C.L.R. 257.
(2) (1821) 4 B. & Ald. 210.
(3) (1859) 7 C.B. (N.S.) 449.
(4) (1878) 9 Ch. D. 198.
(5) (1894) 1 Q.B. 272.
(6) (1921) 29 C.L.R. 243, at p. 252.
(7) (1919) 26 C.L.R. 369.
(8) (1913) 16 C.L.R. 315.
(9) (1918) 24 C.L.R. 365.

H. C. OF A. 1924.

MAINKA v. CUSTODIAN OF EXPROPRIATED PROPERTY.

June 10.

ISAACS J. delivered the following written judgment :—

This is an appeal from a judgment of *Drake Brockman* J. as a Justice of the mandated territory of New Guinea.

The first question that has arisen is as to the jurisdiction of this Court to entertain the appeal. The Court held, reserving reasons, that the jurisdiction exists. Ordinance No. 22 of 1922, by sec. 2, purports to give that jurisdiction in full, and if the Ordinance be validly made, the position is established. It purports to be made by the Governor-General under the *New Guinea Act* 1920, which is No. 25 of that year, and was passed on 30th September 1920 in anticipation of the Mandate to the Commonwealth for (*inter alia*) the former German New Guinea, and authorizing its acceptance by the Governor-General. Sec. 14 empowers the Governor-General to make Ordinances for the Territory when mandated (sec. 122 of the Constitution). The Mandate was made on 17th December 1920, and recites that His Majesty, for and on behalf of the Government of the Commonwealth of Australia, had agreed to accept it. Art. 2 is as follows: "The mandatory shall have full power of administration and legislation over the Territory subject to the present mandate as an integral portion of the Commonwealth of Australia, and may apply the laws of the Commonwealth of Australia to the Territory, subject to such local modifications as circumstances may require." The rest of the article is immaterial. Then the acceptance of the Mandate by His Majesty, is authorized by the Imperial Act 9 & 10 Geo. V. c. 33 (31st July 1919) called the *Treaty of Peace Act* 1919.

Thus, starting with the basis of Imperial statute, there is a connected chain of authority leading to sec. 2 of the Ordinance of 1922 conferring the necessary appellate jurisdiction. The words in art. 2 of the Mandate, "as an integral portion of the Commonwealth" are found, with the necessary substitution of the mandatory, in the other mandates of the same class, namely, those for Samoa to New Zealand, for German South-West Africa to the Union of South Africa, and for Nauru to the British Government. The words in the Australian Mandate appear to mean, not that the mandated territory is deemed to be physically part of the continent

of Australia, but as territory belonging to the King in right of the Commonwealth of Australia.

The appellate power of this Court under sec. 73 of the Constitution extends to "all judgments, decrees, orders, and sentences . . . of any *other* Federal Court," that is, other than itself. The Central Court from which this appeal comes is established by Judiciary Ordinance No. 3 of 1921, and under the law already stated is a Federal Court. The jurisdiction is thus completely established.

As to the decision itself, it is necessary to state clearly the relevant facts. For several years prior to the War, and while the Territory was entirely German, a company was formed called the Londip Pflanzung Gesellschaft mit beschränkter Haftung (Londip Planting Company with limited liability). The company was what we should call in English law a commercial partnership. It consisted of two shareholders, Karl Nauer and Karolina Charlotte Mainka. Such companies were regulated specially by German law. The respective shareholding interest of each member was proportionate to his money contribution to the capital of the company; which is a very important fact to bear in mind. In 1911 the capital of the company was 90,000 marks, of which eventually Nauer and Mainka contributed equal amounts. In 1913 Nauer went to Germany, and has since remained there. He was a captain in the German Army during the War. In October 1915 and February 1916, at what may be called statutory meetings of the company, resolutions were passed that the capital of the company should be increased by 25,000 marks, and of that each shareholder should "*pay in*" 12,500 marks. The expression "pay in" is of central importance. It is a technical term, because in the German law the word "*einzahlung*," meaning "payment in," is used for the purpose. The later resolution fixed 31st August 1916 for the date of payment. As Nauer was an alien enemy and in Germany, an obvious difficulty stood in the way of his complying with the condition. Mrs. Mainka paid in her quota by the required date, but Nauer's contribution remained unpaid. Whatever rights under German law the company had in respect of his failure are immaterial to consider, because the company did not take any step to enforce them. Under the German law a

H. C. OF A. 1924.

MAINKA v. CUSTODIAN OF EXPROPRIATED PROPERTY.

Isaacs J.

trade register was required to be kept in a public judicial office, and in this register resolutions and appointments of representatives and some other information regarding the company were required to be entered.

On 26th June 1917 German New Guinea, being in British military occupation and Brevet Lieutenant-Colonel Seaforth Mackenzie being the Judge of the Central Court at Rabaul, the company came before him and caused to be entered in the Trade Registry a memorandum of the resolution of February 1916 and a further memorandum stating the company's position with regard to the 25,000 marks additional capital resolved upon. The entry was in German, and the proper translation is as follows:—"Of the Capital.—Increase of 25,000 marks, Mrs. Caroline Charlotte Mainka takes over the whole amount as new original share. The right of the shareholder Karl Nauer to demand the taking over and to obtain a transfer of half of this sum, that is to say, 12,500 marks, is to be reserved to him until six months after the conclusion of peace between England and Germany, provided that he has paid in his share together with all interest whatever at 8 per cent." This was not an entry by or on behalf of Mrs. Mainka. It was clearly an entry by and on behalf of the company giving public information of its shareholders and their position in relation to the company, including as public an intimation to Carl Nauer as was possible in the circumstances. It may well be, and indeed it is most probable, that this intimation by the company was with the consent of Mrs. Mainka, having regard to the position of her compatriot. Nevertheless, it was a company announcement only in favour of Nauer, and is not objected to as unauthorized. In any case it is validated by British Imperial law. On 26th August 1919 a proclamation was issued at Rabaul by Lieutenant-Colonel Mackenzie as Acting Administrator, enacting and proclaiming as valid (*inter alia*): "(2) All judgments, decrees, orders, decisions, or other judicial acts of any person appointed to exercise judicial functions in respect of the laws of the Colony" (i.e., the Colony of German New Guinea). Sec. 6 of the Imperial *Indemnity Act* 1920 (10 & 11 Geo. V. c. 48) validates that proclamation.

Indeed, even the right of Mrs. Mainka to take up Nauer's half of the new capital has been challenged, but, in view of the entry

referred to, need not be determined. Within the period mentioned, that is, before the expiration of six months after the conclusion of peace, and, to be quite precise, on 11th June 1920, a Mr. Constantini, acting for Nauer, paid in to the credit of an account with Hernsheim & Co., at Rabaul, the sum of 16,575 shillings, representing the 12,500 marks additional capital with 8 per cent interest to date. The only point of contest is whether that was a compliance with the proviso in the entry. The only reason advanced for denying that it was a compliance is, not that it was out of time or that the amount was insufficient, but that it was not a payment to the company direct or to Mrs. Mainka. We may put aside the latter reason, because clearly a payment to Mrs. Mainka herself or to anyone for her individually would not have been a " payment in " to the company or a compliance with the registration notice. Was it then a " payment in " to the company ? The company had not, so far as appears, anything in the nature of a registered office. It had a business manager, Mr. Rudolf Wolff, of Paparatava, and the business manager was by law a sufficient representative of the company. But, by a registration notice of 5th March 1914, it was notified that Joseph Mainka (who in fact is the husband of Mrs. Mainka) in Londip had been appointed business manager and that both managers " can represent the firm only jointly." But with that notification was another on the same date, stating that by a deed of 9th February 1914, power was taken to appoint one or several business managers, and that " the right of representation is to be regulated from case to case." It was argued on behalf of the appellant that the payment in to Hernsheim & Co. was bad for two reasons : first, because payment to that firm, a mere creditor of the company, enabling it to set off the amount against a debt owing to it by the company, was not " compliance with the proviso " ; and next, because it was not authorized by Wolff and Mainka jointly as the company's representatives. The first is met by the facts that there was no *place* suggested as the home of the company, that Hernsheim & Co. were (*inter alia*) bankers, and at all events were bankers of the company, and the payment in was apparently made merely in the course of paying in the sum to the credit of the company's banking account. But, however that might be, the

H. C. OF A. 1924.

MAINKA v. CUSTODIAN OF EXPROPRIATED PROPERTY.

Isaacs J.

company was represented by Wolff and by him alone in New Guinea. Mr. Mainka, the other business manager, in April 1920 left for Sydney, and remained there. His absence covered the period from April 1920 in which Nauer had the right, according to the company's notification, to pay in the money, and the company cannot take advantage of the absence of its own representative to cut down Nauer's rights. In *The Apollo* (1) Lord *Halsbury* L.C. quoted with approval *Jervis* C.J. in *Giles* v. *Taff Vale Railway Co.* (2), as saying: "I am of opinion that it is the duty of the company, carrying on a business, to leave upon the spot some one with authority to deal on behalf of the company with all cases arising in the course of their traffic as the exigency of the case may demand." That is a general principle, and, unless there were shown to be some distinct legal provision to the contrary, that principle is applicable here. If, as must be assumed, the company in fact permitted Mainka to be away from the business and permitted Wolff to continue alone to conduct its affairs and represent it in fact, then the company could not be heard in this instance to say it was not properly represented. But not only so, there are two letters of great importance in this connection which were put in evidence, one on behalf of the respondent, dated 5th January 1922, and the other on behalf of the appellant, dated 19th March 1922. In the first, Mr. Mainka, as manager of the company, wrote to Hernsheim, objected to money as "illegally paid in"—note, it was admitted to have been "paid in" in fact—on the single ground that, besides the permission of Wolff, that of Mr. Mainka was necessary. In the second, which was on the face of it the record of a conversation between Mr. Mainka and Mr. Spangenberg, the representative of Hernsheim & Co., on the subject of the former's letter, this passage occurs:—"5. I know there was a publication that you and Mr. Wolff would represent the Londip Company only jointly, but had left April 1920 for Sydney and there was no other representative for you here. As it would have been illegal to leave without appointing an attorney or representative during your absence I naturally took it for granted that during your stay in Sydney Mr. Wolff was the sole representative and manager of the Londip G. m. b. H. and that he

(1) (1891) A.C. 499, at p. 507.

(2) (1853) 2 E. & B. 822, at p. 829.

alone could act and bind that company. As far as I remember you did say something to that effect to Mr. Wolff in Rabaul in my presence." That very fairly puts the position. The company has never disavowed the payment in by paying its debts, whatever they may be, to Hernsheim or otherwise. Apparently it has fully adopted the benefit of the payment.

On the whole, therefore, the payment to Hernsheim should be treated as a " payment in " within the meaning of the proviso to the registration notice.

RICH J. I concur in the judgment of my brother *Isaacs*.

STARKE J. I agree that the appeal should be dismissed for the reasons stated by my brother *Isaacs*.

[KNOX C.J. and GAVAN DUFFY J. did not deliver judgments.]

The respondent offering and undertaking to pay to appellant the 12,500 *shillings paid in to the company in respect of the* 12,500 *shares mentioned in the judgment appealed from, with interest thereon at* 8 *per cent per annum from the time of such payment in, this undertaking to be inserted in such judgment. Appeal dismissed with costs.*

Solcitiors for the appellant, *Perkins, Stevenson & Co.*

Solicitor for the respondent, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

B. L.