[HIGH COURT OF AUSTRALIA.]

JOLLEY . . . . . APPELLANT;
DEFENDANT,

AND

MAINKA . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE CENTRAL COURT OF THE TERRITORY OF NEW GUINEA.

H. C. OF A. 1933.

SYDNEY, *April* 27; *Aug.* 31.

Rich, Starke, Dixon and Evatt JJ.

Currency—Debt—Territory of New Guinea—Contract—Mortgage—Payment of moneys secured—"In gold, or in currency equivalent thereto"—Interest due, £900—Nine hundred Australian pound notes paid by mortgagor—Satisfaction of debt—Legal tender—Treaty of Peace Act 1919 (9 & 10 *Geo. V.* c. 33)—*The Constitution* (63 & 64 *Vict. c.* 12), *secs.* 51 (VI.), (XXIX.), (XXXIX.), 122—*New Guinea Act* 1920-1926 (*No.* 25 *of* 1920—*No.* 15 *of* 1926), *secs.* 13, 14—*Commonwealth Bank Act* 1911-1931 (*No.* 18 *of* 1911—*No.* 6 *of* 1931,) *sec.* 60H (1) (*b*)*.

Constitutional Law (*Cth.*)—*Mandated Territory of New Guinea—Authority of Commonwealth Parliament.*

In pursuance of an agreement for the sale and purchase of land situate in the Mandated Territory of New Guinea, mortgages, executed in 1926 at Rabaul by the appellant in favour of the respondent, provided that all payments thereunder "shall be made in gold or in currency equivalent thereto at the market or exchange rate current at the time when every such payment is actually made." The principal sums secured by the mortgages were expressed in pounds. On 1st May 1931 the appellant paid to the credit of the respondent's account with a bank at Rabaul nine hundred Australian one pound notes in full payment of £900 interest falling due under the mortgages on 30th June 1931. At all material times the equivalent of £900 in gold in Rabaul was eleven hundred and seventy-two Australian pound notes.

* The *Commonwealth Bank Act* 1911-1931 provides, by sec. 60H (1), as follows:—"Australian notes may be issued in any of the following denominations, namely, five shillings, ten shillings, one pound, five pounds, ten pounds or any multiple of ten pounds, and shall . . . (*b*) be a legal tender throughout the Commonwealth [and throughout all territories under the control of the Commonwealth."

Held that the provisions of sec. 60H (1) (*b*) of the *Commonwealth Bank Act* 1911-1931 applied to the Territory of New Guinea and, therefore, the payment of nine hundred Australian one pound notes satisfied the debt of £900 due under the mortgages.

The nature and extent of the authority of the Commonwealth Parliament over the Mandated Territory of New Guinea discussed.

Decision of the Central Court of the Territory of New Guinea reversed.

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

The plaintiff, Karolina Charlotte Mainka, was the owner of two freehold blocks of land, Livuan and Londip Plantations, which latter included what was known as Londip Reserve, situate in the Kokopo District in the Territory of New Guinea. An agreement for the sale of these lands by the plaintiff to the defendant, Frederick Reidy Jolley, was made between the parties at Rabaul in the Territory of New Guinea on 26th November 1926. In pursuance of the agreement, mortgages over the properties sold were executed by the defendant in favour of the plaintiff for the purpose of securing the payment of the balance of purchase money together with interest thereon. The mortgages were a first mortgage and a second mortgage over Livuan for £6,000 and £9,600 at 6½ per cent per annum and 8 per cent per annum respectively, and a first mortgage and a second mortgage over Londip for £4,000 and £6,400 at 6½ per cent per annum and 8 per cent per annum respectively. Two of the mortgages contained a provision, similar in terms to a clause in the agreement, as follows: "It is hereby expressly agreed that all repayments of principal or payments of interest due and payable hereunder shall be made in gold or in currency equivalent thereto at the market or exchange rate current at the time when such payment is actually made." The other two mortgages were, at the hearing of the action referred to hereunder, rectified by Chief Judge *Wanliss*, so as to include a similar provision, his Honor finding that its omission arose from mutual mistake. No appeal was made from this finding.

On 30th June 1931, a sum of £900 became due, being six months' interest payable under the mortgages on a sum of £24,000, which was the total principal sum then due. Before this sum became due, however, the defendant by his attorney, on 1st May 1931,

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paid to the credit of the plaintiff's account with the Bank of New South Wales at Rabaul nine hundred Australian one pound notes " in full payment of interest falling due on 30th June next on the Londip and Livuan Plantation mortgages." At all material times the equivalent of £900 in gold in Rabaul was eleven hundred and seventy-two Australian pound notes, as, at all such times, the rate of exchange was £30 5s. per £100.

The plaintiff claimed that the payment made by the defendant was not made in gold or in currency equivalent thereto, as provided for in the agreement and the mortgages, but in depreciated Australian currency. She accepted in part payment the notes so paid to the credit of her account by the defendant and sued him in the Central Court of the Territory of New Guinea for the sum of £250, which she claimed was the balance owed to her by the defendant in respect of the six months' interest in question. In addition to various defences, the defendant demurred to the plaintiff's claim on the ground that as a matter of law the payment of £900 in nine hundred Australian pound notes was a compliance with the provision in the agreement and mortgages as to the mode of payment. Chief Judge *Wanliss* held that, although Australian notes were legal tender within the Territory of New Guinea, the agreement that payments should be made by the defendant to the plaintiff in gold or in currency equivalent thereto at the market or exchange rate current at the time of such payments was a perfectly legal agreement at the time it was made, and it had not been affected by subsequent legislation, and the defendant had not complied with the terms of the agreement. Judgment was given in favour of the plaintiff in the sum of £225, to which amount she had reduced her claim.

From that decision the defendant now, by leave, appealed to the High Court under the provisions of sec. 24 of the *Judiciary Ordinance* 1921-1931 (N.G.).

Further material facts appear in the judgments hereunder.

Flannery K.C. (with him *Sugerman*), for the appellant. The agreement between the parties was one which contemplated the sale of a property for a sum of money, and that that sum of money should, under the law as then existing in the Mandated Territory, be satisfied

in either of two currencies, that is, coin or Australian notes. It was not an agreement to pay bullion, but was an agreement to pay money. The appellant's obligation was fulfilled and discharged by payment in the alternative currency. The position of the Mandated Territory was considered in *Mainka* v. *Custodian of Expropriated Property* (1). The Mandated Territory of New Guinea became a territory under the control of the Commonwealth on 9th May 1921, that is, on the date of the commencement of the *New Guinea Act* 1920—which was assented to in 1920 in anticipation of the mandate—and upon the happening of that event the provisions of sec. 60H (1) (*b*) of the *Commonwealth Bank Act* 1911-1931, as inserted by the amending Act of 1920, applied to the Mandated Territory. The words of sec. 60H (1) (*b*) are apt and proper to include the Mandated Territory. By the provisions of that section, aided by sec. 13 of the *New Guinea Act* 1920, Australian notes are made legal tender within the Territory. In the circumstances it was not necessary that such provisions should be specifically extended to the Territory by ordinance. Australian coins are legal tender within the Territory by virtue of the provisions of sec. 7 of the *Coinage Act* 1909, which were specifically adopted by the *Laws Repeal and Adopting Ordinance* 1921-1927 (N.G.). In order to ascertain the real intention of the parties as to the mode of payment the Court should look at the transaction as a whole (*In re Société Intercommunale Belge d'Electricité*; *Feist* v. *Société Intercommunale Belge d'Electricité* (2)).

E. M. Mitchell K.C. (with him *R. K. Manning*), for the respondent. Sec. 60H (1) (*b*) of the *Commonwealth Bank Act* 1911-1931 did not, at material times, apply and never was applied to the Mandated Territory. The mandate was granted to the Commonwealth subsequently to the date on which assent was given to the *New Guinea Act* 1920; therefore, at that date the Commonwealth had no power to make any law applicable to the Mandated Territory. Similarly, at the date the *Commonwealth Bank Act* 1920 was passed the Commonwealth had no power to apply its provisions to the Territory. It

(1) (1924) 34 C.L.R. 297.
(2) (1933) 49 T.L.R. 8, 344; 175 L.T. Jo. 226.

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was not until 9th May 1921 that German laws ceased to apply to New Guinea. There is not sufficient intention expressed by sec. 60H (1) (*b*) of the *Commonwealth Bank Act* for it to apply to a place not, at the time the section was enacted, a territory, and not then "under the control of the Commonwealth." The provisions of sec. 60H (1) (*b*) are not expressed to extend to the Territory and have not been applied thereto by ordinance under sec. 13 of the *New Guinea Act* 1920. Consequently the provisions of sec. 60H (1) (*b*) have no application to the Territory. Until the expression "territory of the Commonwealth" or "territory under the authority of the Commonwealth" was defined by the *Acts Interpretation Act* 1930 as including any territory governed by the Commonwealth under a mandate, New Guinea was not a "territory under the control of the Commonwealth" within the meaning of sec. 60H (1) (*b*). The intention of the parties under the agreement was that payment should be made in gold coins, that is, in sovereigns, and that, if payment were made in any other currency, then the market value of the requisite number of sovereigns should be paid. In the absence of any express prohibition in the law, it should not be held that a contract stipulating that payments thereunder shall be made in a manner provided by the *Coinage Act* 1909 is illegal. The principle established in the United States of America is that an Act prescribing that the notes of that country shall be legal tender applies only when the contract is a contract for the payment of money generally and not a contract for payment of a particular form of money as in this case (*Trebilcock* v. *Wilson* (1); *Willoughby* on *The Constitutional Law of the United States*, 2nd ed. (1929), vol. II., p. 720). See also *Bronson* v. *Rodes* (2); *Gregory* v. *Morris* (3) and *Woodruff* v. *Mississippi* (4).). The moneys payable under the agreement and mortgages are something more than mere debts, they are debts to be discharged in a specific way.

Flannery K.C., in reply.

Cur. adv. vult.

(1) (1871) 79 U.S. 687; 20 Law Ed. 460.
(2) (1869) 74 U.S. 229; 19 Law. Ed. 141.
(3) (1878) 96 U.S. 619; 24 Law. Ed. 740.
(4) (1896) 162 U.S. 291; 40 Law. Ed. 973.

The following written judgments were delivered :—

RICH J. I am content to express my concurrence in the reasons so fully expressed by my brother *Dixon* and in the conclusion arrived at by him.

STARKE J. The respondent, Karolina Charlotte Mainka, was the owner of two freehold blocks of land, Livuan and Londip Plantations, which latter included what was known as Londip Reserve, in the Kokopo District in the Territory of New Guinea. In November 1926, an agreement for the sale of these lands was made between the respondent and the appellant, Frederick Reidy Jolley. The purchase price was £38,000, but of this amount the sum of £26,000 was to be secured by mortgages over the property sold, in manner following : a first mortgage and a second mortgage over Livuan for £6,000 and £9,600 at 6½ per cent per annum and 8 per cent per annum respectively, and a first mortgage and a second mortgage for £4,000 and £6,400 over Londip Plantation and Reserve at 6½ per cent per annum and 8 per cent per annum respectively. Interest was payable half-yearly. An aggregate sum of £2,000 secured by the first mortgages was payable upon demand by the respondent at any time after twelve calendar months from the date of the agreement. Clause 9 of the agreement was as follows : " All payments to be made to the vendor " (the respondent) " by the purchaser " (the appellant) " under this agreement or under any mortgage executed in pursuance thereof shall be made in gold or in currency equivalent thereto at the market or exchange rate current at the time every such payment is actually made."

Mortgages were executed in pursuance of this agreement, and it was expressly stipulated in each mortgage, as must now be assumed, " that all repayments of principal or payments of interest due and payable hereunder " (the mortgages), " shall be made in gold or in currency equivalent thereto at the market or exchange rate current at the time when every such payment is actually made." The aggregate sum of £2,000 secured by the first mortgages appears to have been paid, for on 30th June 1931 a sum of £900 fell due, being six months' interest payable under the mortgages on a sum of £24,000. Before it fell due, however, the appellant paid to the credit of the

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respondent at the Bank of New South Wales in Rabaul in the Territory of New Guinea nine hundred one pound Australian notes, in full payment of the interest falling due under the mortgages. At all times material, the equivalent of £900 in gold in Rabaul was eleven hundred and seventy-two Australian pound notes, the rate of exchange being £30 5s. per £100. The appellant claims that he satisfied the interest falling due under the mortgages by payment of nine hundred Australian pound notes, whereas the respondent insists that a contract providing specifically for payment in gold or in currency equivalent thereto is not discharged by the payment of such notes.

The question depends upon the obligation of the contract, and the law governing the currency of the Territory. The obligation of the contract is governed by the law in force in the Territory of New Guinea: that is, the principles of the common law and equity in force in England in 1921 so far as the same are applicable (*Laws of the Territory of New Guinea*, vol. VIII., p. 360; *Laws Repeal and Adopting Ordinance* 1921-1927). On its proper construction the contract does not create an obligation to deliver bullion, or a certain weight of standard gold to be ascertained by a count of coin certified to contain a definite proportion of that weight, as suggested by the case of *Bronson* v. *Rodes* (1), but an obligation to pay a debt with interest thereon in gold or in a currency equivalent thereto (*In re Société Intercommunale Belge d'Electricité*; *Feist* v. *La Société Intercommunale Belge d'Electricité* (*The Gold Bond Case*) (2); *Coinage Act* 1909, sec. 7). It is quite immaterial whether the debt is for moneys due under the contract of sale or for moneys lent and secured by the mortgages and interest thereon. But, if the obligation between the parties is to pay a debt and interest thereon, then the stipulation that all payments of principal or interest shall be made in gold or in currency equivalent thereto necessarily determines the mode or method of payment. The effect of such a promise depends upon the laws governing currency in the Territory of New Guinea.

Under the *Treaty of Peace* (art. 119), signed at Versailles on 28th June 1919, Germany renounced in favour of the Allied and associated

(1) (1869) 74 U.S., at p. 250; 19 Law. Ed., at p. 146.

(2) (1933) 49 T.L.R. 344; 175 L.T. Jo. 226. [Since reversed, 50 T.L.R. 143 (H.L.).]

Powers her rights over her overseas possessions, including German New Guinea. Under the Covenant of the League of Nations (art. 22, Part I.) the Allied and associated Powers agreed that a mandate should be conferred upon His Britannic Majesty, to be exercised on his behalf by the Government of the Commonwealth of Australia, to administer New Guinea, and His Majesty, for and on behalf of the Government of the Commonwealth, agreed to accept the mandate, and undertook to exercise it on behalf of the League of Nations. Accordingly, on 17th December 1920, a mandate was conferred on His Majesty for and on behalf of the Commonwealth. The territory over which the mandate was conferred is described as the former German Colony of New Guinea, and the Commonwealth was granted full power of administration and legislation over the territory subject to the mandate, as an integral portion of the Commonwealth of Australia. The mandate is printed at large in *Laws of the Territory of New Guinea*, vol. I., Part I., p. 1. The Commonwealth, in anticipation of the mandate, passed an Act in September 1920 providing for its acceptance and for the government of the territory by the Commonwealth: It is the *New Guinea Act* 1920 (No. 25 of 1920). By sec. 5 of that Act, the Governor-General was authorized to accept the mandate when issued, and, by sec. 4, the territories and islands formerly constituting German New Guinea were declared to be a territory under the authority of the Commonwealth by the name of the Territory of New Guinea. Until the Parliament otherwise provided, the Governor-General was empowered to make ordinances having the force of law in the Territory (sec. 14). And sec. 13 enacted: "Except as provided in this or any Act, the Acts of the Parliament of the Commonwealth shall not be in force in the Territory unless expressed to extend thereto, or unless applied to the Territory by ordinance made by the Governor-General under this Act."

The constitutional validity of this Act has not been challenged in this appeal, and the decision of this Court in *Mainka* v. *Custodian of Expropriated Property* (1) supports it. (See also *Porter* v. *The King*; *Ex parte Yee* (2)). The constitutional power of the Commonwealth to accept the mandate must be referred, I think, to the *Treaty of Peace Act*, 9 & 10 Geo. V. c. 33, and the powers conferred

(1) (1924) 34 C.L.R. 297.

(2) (1926) 37 C.L.R. 432.

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by the Constitution, particularly those relating to the naval and military defence of the Commonwealth, external affairs, and the incidental power (sec. 51, pl. (VI.), (XXIX.), and (XXXIX.)). (Cf. *Willoughby* on *The Constitutional Law of the United States*, 2nd ed. (1929), vol. I., pp. 407-590). The Constitution, sec. 122, provides: "The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit."

A "territory placed by the Queen under the authority of and accepted by the Commonwealth" is in the nature of a mandated territory, and is dealt with on the footing that it is a territory acquired by the Commonwealth. Consequently I see no difficulty in construing the words "otherwise acquired by the Commonwealth" as sufficiently large to include a territory placed under the authority of the Commonwealth by mandate from the League of Nations. The Commonwealth thus acquires plenary control of the territory, subject to and during the subsistence of the mandate. But the Permanent Mandate Commissions refuse to recognize the sovereignty of the mandatory in this control (*R.* v. *Christian* (1); *Berriedale Keith, An Introduction to British Constitutional Law* (1931), pp. 204, 205, and *The Constitutional Law of the British Dominions* (1933), pp. 372, 373). The territory over which the mandate is conferred is doubtless a new form of acquisition, but that it is an acquisition, something gained or obtained by the Commonwealth, does not admit of doubt. It is thus a territory "otherwise acquired by the Commonwealth" within the meaning of sec. 122 of the Constitution.

Turning now to the legislation in force in New Guinea, it is interesting to note an ordinance (1922, No. 23), made under the *New Guinea Act*, which provides that all debts or moneys, due under a contract or otherwise, expressed in marks or fractions thereof, should be regarded as expressed in the same number of shillings or fractions thereof, and that payment of such debts might be made in notes of

(1) (1924) App. D. (S. Af.) 101.

the Commonwealth or in coins which are legal tender in the Commonwealth. But that provision has no application to this case.

The consolidated *Laws Repeal and Adopting Ordinance* 1921-1927, sec. 11, applied to the Territory, so far as they are applicable, the *Coinage Act* 1909 of the Commonwealth and the *Commonwealth Bank Act* 1920 of the Commonwealth, Div. 1 and Div. 5 of Part VIA. The *Coinage Act* 1909 established the standard weight and standard fineness of the gold, silver and bronze coins of the denomination mentioned in the Schedule to the Act, and provided (sec. 5) that a tender of money, if made in coins which are British or Australian coins of current weight, should be legal tender: in case of gold coins for any amount, in case of silver coins for payment of an amount not exceeding forty shillings, and in case of bronze coins for payment of an amount not exceeding one shilling. These provisions have no bearing upon this case. It is well however to note sec. 7 of the Act: "Every contract . . . and security for money, and every transaction, dealing, matter, and thing whatever relating to money, or involving the payment of or the liability to pay any money, which is made, executed, or entered into, done or had, shall be made, executed, entered into, done and had according to the coins which are current and are a legal tender in pursuance of this Act, and not otherwise, unless the same be made, executed, entered into, done or had according to the currency of some British possession or some foreign State."

The *Commonwealth Bank Act* 1920 (1920, No. 43) provided (Div. 4 of Part VIA.) for the issue of Australian notes in various denominations, and enacted that they should be a legal tender throughout the Commonwealth and throughout all territories under the control of the Commonwealth, except in respect of payments due by the Note Issue Department, and should bear the promise of the Treasurer to redeem the notes in gold coin (or, in case of a single five-shillings Australian note, in silver coin) on demand at the head office of the Commonwealth Bank. But this Division, it will be observed, is not the part of the *Commonwealth Bank Act* 1920 applied to the Territory of New Guinea by the consolidated *Laws Repeal and Adopting Ordinance* 1921-1927 already mentioned. And it is contended that

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the provision of the *Commonwealth Bank Act* 1920 making Australian notes legal tender throughout all territories under the control of the Commonwealth is not in force in the Territory of New Guinea, because it is not a territory within the meaning of that Act, and also because the *New Guinea Act* 1920 provides that the Acts of the Commonwealth shall not be in force in that Territory unless expressed to extend thereto. New Guinea, although accepted under mandate from the League of Nations, is nevertheless in my opinion a territory "otherwise acquired by the Commonwealth" within the meaning of sec. 122 of the Constitution, and necessarily therefore a territory "under the control of the Commonwealth" within the words of the *Commonwealth Bank Act* 1920. Indeed, the *New Guinea Act* 1920 expressly declares it a territory under the authority of the Commonwealth. It is true that New Guinea is not specifically named as a territory in the section of the *Commonwealth Bank Act* providing that Australian notes shall be a legal tender. But the *New Guinea Act* 1920 does not require that New Guinea shall be thus specifically named; and the *Commonwealth Bank Act* 1920 has used a phrase—"all territories under the control of the Commonwealth"—which renders enumeration of territories unnecessary and yet clearly includes them all. In my opinion that is an ample expression of intention that the provision of the *Commonwealth Bank Act* shall extend to New Guinea. As to transactions after the passing of the *Acts Interpretation Act* 1930 (No. 23) the matter is placed beyond doubt. Further, it appears to me of no importance whatever in the construction of the *Commonwealth Bank Act* 1920 that the *Australian Notes Act* 1910, sec. 6, now repealed, contained a somewhat similar section to sec. 60H of the *Commonwealth Bank Act*, or that the *New Guinea Act* of 1920 was passed before, but came into operation after, that Act. The *Commonwealth Bank Act* 1920 operates in respect of all territories which were at the time of its commencement, or thereafter came, under the control of the Commonwealth; and so, I should think, would the provision in the *Australian Notes Act* if it had remained in force.

It is desirable now to mention some amendments of the *Commonwealth Bank Act* 1920 before considering the effect of the legislation upon the contract in the present case. In 1929 an Act was passed

(1929, No. 31) enabling the Governor-General to prohibit by proclamation the export of gold, and also authorizing the Bank Board, when the Treasurer was satisfied that it was expedient so to do, to require any person to exchange with the bank for its equivalent in Australian notes of the nominal value thereof any gold coin or bullion held by such person. No proclamation prohibiting the export of gold has, so far as I know, been issued, but the other authority contained in the Act has, I understand, been invoked. In 1931 an Act (1931, No. 6) dealt with the gold reserve against the amount of Australian notes issue. In 1932, Act No. 16 of 1932 also dealt with the gold reserve and repealed the obligation to redeem Australian notes in gold coin at the Commonwealth Bank. Australia is therefore, and has been for some time, " off the gold standard." But the provision of the Act of 1920 remains, that Australian notes are a legal tender throughout the Commonwealth, and throughout all territories under the control of the Commonwealth. What is the effect of this provision on the contract between the parties ? On the part of the respondent it is insisted that the Australian law provides two descriptions of currency, metallic money (gold, silver and bronze) and paper money (Australian notes) ; both are authorized by law and both made legal tender in payments : consequently contracts whose obligations are payable in either are equally lawful and, if lawful, must be equally capable of enforcement (*Bronson* v. *Rodes* (1) ; *Trebilcock* v. *Wilson* (2) ; *Woodruff* v. *Mississippi* (3)). But, if the legislation on its true construction authorizes payment of obligations by another medium than that expressed in the particular contract, if it provides that debts may be discharged by payment either in metallic money or in paper money, then the argument for the respondent fails, for the parties cannot annul such a provision by agreement among themselves. The Act provides that Australian notes shall be a legal tender throughout the Commonwealth and its territories. The expression, legal tender, in itself connotes an offer to perform an obligation in manner allowed by law. And when the Legislature prescribes, in a law relating to currency, that Australian notes shall be a legal tender, then it necessarily prescribes

(1) (1869) 74 U.S. 229 ; 19 Law. Ed. 141.

(2) (1872) 79 U.S. 687 ; 20 Law Ed. 460.

(3) (1896) 162 U.S. 291 ; 40 Law. Ed. 973.

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that any obligation to pay money may be discharged by tender of such notes. The provisions of sec. 7 of the *Coinage Act* 1909 strongly support this view; it also has the support of authority (*Gold Bond Case* (1); *Com. Dig.*, vol. v., p. 146, B8; *Bac. Abr.*, vol. VII., p. 525; *Beynon Harris, Law of Tender* (1908), p. 62). Consequently the payment by the appellant of £900 in Australian notes discharged his obligations under the contracts above mentioned.

The appeal should be allowed and the cause remitted to the Central Court of the Territory of New Guinea.

DIXON J. This is an appeal from the Central Court of the Territory of New Guinea brought as in pursuance of sec. 24 of the *Judiciary Ordinance* 1921-1931 of that territory. The appeal is from a judgment of his Honor Chief Judge *Wanliss* in favour of the plaintiff in an action brought by a mortgagee against a mortgagor to recover the balance of moneys payable under four mortgages for interest in respect of a half-year. The amount of interest payments calculated at the rate of interest reserved by the mortgages was £900.

Australian notes are current as money in the Mandated Territory of New Guinea, and it may be taken that they are the form of currency in which sterling payments by or to banks would ordinarily be made.

To discharge his liability in respect of the sum of £900 for interest, the mortgagor placed to the credit of the mortgagee's current account at her bank that sum expressed in Australian notes. Thereupon the mortgagee, the respondent, claimed that under a provision, which either was or should have been incorporated in the mortgages, the mortgagor, the appellant, was obliged to pay £900 in gold, or, if he was unable or unwilling to do so, to pay in Australian notes or some other currency an amount equivalent in value to £900 in gold, that is to say, the amount in notes which would be given in the Mandated Territory by banks and others for nine hundred gold sovereigns. In fact, a premium of 25 per cent. was obtainable on sovereigns. The respondent accordingly accepted the credit to her account as part payment only and sued for the residue. The mortgages had been given to effectuate an agreement of sale

(1) (1933) 49 T.L.R. 344.

containing the provision upon which the respondent relied. Two of the mortgages failed to express this provision, but the learned Chief Judge held upon the facts that the failure to do so arose from mutual mistake and he rectified the instruments so as to include it. The appellant does not attack the order for rectification, but he contends that, in spite of the provision, the payment of £900 in Australian notes was a discharge of his liability under the mortgages in respect of the half year's interest.

The four mortgages are not identical in form, but they each acknowledge a loan of a money sum, expressed in pounds, and covenant to repay the principal sum and to pay interest thereon at a rate per centum per annum. The critical provision in two mortgages takes the form of a proviso. In the two mortgages that were rectified it is inserted as a separate or independent clause. But in all the mortgages the material words of the provision are the same. In the form of a proviso it is as follows: "Provided also and it is hereby expressly agreed that all repayments of principal or payments of interest due and payable hereunder shall be made in gold or in currency equivalent thereto at the market or exchange rate current at the time when every such payment is actually made." The learned Chief Judge took the view that gold sovereigns and Australian notes were both legal tender according to their face denomination and that there was nothing to render this stipulation ineffectual.

Upon the hearing of the appeal two alternative arguments were advanced on behalf of the respondent. The first is that Australian notes have never been made a legal tender in the Mandated Territory. The second is that, even if they be a legal tender, the provision in the mortgage is effectual according to its tenor.

The *New Guinea Act* 1920 was assented to on 30th September 1920. It was enacted in anticipation of the issue of the mandate, as appears from its preamble, and, by sec. 2, its commencement was to be on a date fixed by proclamation. The mandate of the Council of the League of Nations to "His Britannic Majesty for and on behalf of the Government of the Commonwealth of Australia" is dated 17th December 1920. The date fixed by proclamation for the commencement of the *New Guinea Act* 1920 was 9th May 1921.

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When the *New Guinea Act* 1920 was passed, the *Australian Notes Act* 1910-1914 was in force, by sec. 6 (1) (*b*) of which it was provided that Australian notes shall be a legal tender throughout the Commonwealth and throughout all territories under the control of the Commonwealth. The *Australian Notes Act* 1910-1914 was repealed by the *Commonwealth Bank Act* 1920, which was assented to on 30th November 1920 and commenced on 14th December 1920 pursuant to a proclamation. But sec. 60H (1) (*b*) of this statute re-enacted the provision contained in sec. 6 (1) (*b*) of the repealed statute, in the same terms, with the addition of an exception not presently material and now repealed.

The question is whether the general words "throughout all territories under the control of the Commonwealth," either alone or as a result of a definition enacted by the *Acts Interpretation Act*, suffice to make Australian notes a legal tender in New Guinea notwithstanding that New Guinea did not come under the control of the Commonwealth as a mandatory until after the commencement of the *Commonwealth Bank Act* 1920. It appears to have been considered that sec. 122 of the Constitution is the source of power for the enactment of the *New Guinea Act* 1920, the King's acceptance of the mandate on behalf of the Commonwealth presumably being treated as placing the Territory under the authority of the Commonwealth within the meaning of that section. (Cf. *Porter* v. *The King*; *Ex parte Yee* (1), explaining *Mainka's Case* (2); *Keith* on the *Sovereignty of the British Dominions* (1929) pp. 363, 364; *Tagaloa* v. *Inspector of Police* (3).) Thus the description "territory under the control of the Commonwealth" would not be inapplicable. But sec. 13 of the *New Guinea Act* 1920 enacts that, except as provided in that Act or any other Act, the Acts of the Parliament of the Commonwealth shall not be in force in the Territory unless expressed to extend thereto or unless applied to the Territory by ordinance made by the Governor-General under that Act. Are the words "expressed to extend thereto" satisfied by general words applying an enactment to territories by description without differentiation, and not to New Guinea *eo nomine*? The question

(1) (1926) 37 C.L.R., at p. 450, per *Starke* J.
(2) (1924) 34 C.L.R. 297.
(3) (1927) N.Z.L.R. 883.

is not an easy one. On the one hand, it may be said that the object of sec. 13 was to exclude the operation of statutes of the Parliament, which, although expressed to extend throughout the territorial jurisdiction of the Legislature and thus otherwise applicable to New Guinea, yet contained no expression of a particular intention to legislate for the Mandated Territory. In this view the provision would be explained not only by the fact that before New Guinea came into the possession of the Commonwealth an entirely different legal system had been established in the country, but also by the peculiar nature and origin, considered externally, of the Commonwealth's authority over the Territory. But, on the other hand, the precise meaning of the words " expressed to extend thereto " requires no more than some expression of an intention that the law shall have an application wide enough to include New Guinea. It then may fairly be urged that the general words of sec. 60H (1) (*b*) of the *Commonwealth Bank Act* 1920 should be interpreted in the light of the fact that it was passed by the Legislature while or shortly after the *New Guinea Act* 1920 was under its consideration, so that the Legislature must have been aware that the natural meaning of the expression would extend the operation of the provision to New Guinea: although it must be conceded that the argument loses some of its force when it appears that these general words are simply transcribed from the prior legislation contained in the *Australian Notes Act* 1910-1914 which the statute repealed. But, again, it is hard to believe that in 1920 to 1921, when government under the *New Guinea Act* was commenced, sec. 60H was not understood to apply to the Territory. A full power to make ordinances having the force of law within the Territory was created by sec. 14 of the *New Guinea Act* 1920, and by the exercise of this power the Commonwealth *Coinage Act* 1909 was adopted, with the result that British and Australian metallic currency became legal tender within the Mandated Territory. But the provision of the *Commonwealth Bank Act* 1920, making Australian notes a legal tender has not been adopted, although other parts of that statute have been made applicable (See *Laws Repeal and Adopting Ordinance* 1921-1927, sec. 11, and First Schedule.) On the whole, the considerations of most weight are in favour of the view that the words " expressed to extend

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thereto" should receive no more than their literal meaning and that sec. 60H of the *Commonwealth Bank Act* 1920 is made applicable to the mandated territory by force of its own terms.

This interpretation of sec. 13 of the *New Guinea Act* 1920 is arrived at independently of the *Acts Interpretation Act* 1930, by sec. 4 of which the following definition was inserted in sec. 17 of the *Acts Interpretation Act* 1901-1918: "(*p*) 'Territory of the Commonwealth' or 'Territory under the authority of the Commonwealth' includes any territory governed by the Commonwealth under a mandate." The enactment of this definition would not operate retrospectively to extend the meaning, and, therefore, the application, of sec. 60H, if previously it did not apply. It should be noticed, perhaps, that neither of the expressions defined occurs literally in sec. 60H which speaks of "territories under the control of the Commonwealth." But assuming the definition would cover such an expression, it is not applicable to statutes passed before the *Acts Interpretation Act* 1930 commenced. The *Acts Interpretation Act* 1901 was the second of the Commonwealth statutes, and it would have been absurd to include any express statement, such as is found in many provisions of the British *Interpretation Act* 1889, that any section should apply to an Act whether passed before or after that Act. When, without any such statement, sec. 4 of the Act of 1930 inserted the definition of the expressions relating to territories in sec. 17 of the Act of 1901, the result was a simple provision to the effect that in any Act either of those expressions includes a mandated territory. This provision speaks and operates from 1930. If it applied to then existing statutes, it might introduce important retrospective changes in the substantive laws of the Mandated Territory. Upon ordinary principles of interpretation such words ought not to be construed as doing more than prescribing the meaning of the terms if used in future Acts of Parliament. This view of the amendment is supported by the express reference to prior statutes in sec. 15A, inserted by sec. 3 of the Act of 1930. But, independently of the *Acts Interpretation Act* 1901-1932, sec. 60H of the *Commonwealth Bank Act* 1911-1932 extends to New Guinea.

Thus a money debt incurred in the Mandated Territory, which is there payable, may in point of law be discharged by a payment in

gold sovereigns, or in Australian notes of the same face denomination. Although secs. 7B, 7C, and 7D of the *Commonwealth Bank Act* 1911-1932 do not appear to be in force in the Mandated Territory, it is unlikely that in practice sovereigns are any longer obtainable there. But, so far as the law is concerned, a sovereign and a one pound Australian note are alike lawful money, either of which must be accepted by a creditor in satisfaction of a debt of £1. The re-appearance of double or multiple forms of legal tender available as a lawful discharge of debts up to any amount has revived difficulties with which English law has grown unfamiliar. But when these difficulties were common, as they were in former times, it was well settled that, given a debt, a tender in its discharge was good if made in any currency which at the time of tender was lawful money. When currency was established under the prerogative, it was said that the denomination or the value for which the coin is to pass current is in the breast of the King (*Blackstone's Commentaries*, vol. I., p. 278 : cf. *Hale's Pleas of the Crown*, vol. I., pp. 188-203). Therefore, "if at the time of making the condition, a purer or more weighty money were current, and before the day of payment coin of base alloy is established by proclamation, a tender of the sum in that coin is good" (*Fraser's* note to *Wade's Case* (1)). In the *Case of Mixed Money* (1605) [reported in Sir John Davies' Reports (English version of 1752, p. 48, reprinted in 2 State Trials 113) and cited, *Co. Litt.*, 207 a and b], an obligation given to pay in Dublin £100 sterling current and lawful money of England was answered by a tender in certain mixed money, which had in the meantime been coined and sent into Ireland to pay the Army and had been proclaimed to be the lawful and current money of the Kingdom of Ireland. The tender was held good and sufficient by a resolution of the Irish Judges upon the ground, among others, that, "although at the time of the contract and obligation made in the present case, pure money of gold and silver was current within this Kingdom, where the place of payment was assigned ; yet the mixed money, being established in this Kingdom before the day of payment, may well be tendered in discharge of the said obligation, and the obligee is bound to accept it" (2).

(1) (1601) 5 Co. Rep. 114a ; 77 E.R. 232, at p. 233.
(2) (1605) 2 State Trials, at p. 128.

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But, if the obligation undertaken was to pay or deliver foreign money or coins in use as money, not being lawful money of the Kingdom, no debt was created. An action for their recovery lay, but it was necessary to bring it in the detinet and not in the debet and detinet; that is, it was in the nature of detinue and not of debt proper. Further, it appears to have been considered that the obligation could not be discharged except according to its tenor. (See *Ward* v. *Kidswin* (*or Kedgwin*) (1)). There *Jones* J. illustrates the distinction by the case of foreign money being proclaimed to be lawful money of England as had been done with French crowns and, in the reign of Philip and Mary, with Spanish silver. *Jones* J. said (2): "But if French money be current by proclamation then" the action "lies clearly in the debet and detinet. And if a man is bound to pay 100 crowns French, he can well tender as much in English coin: *et sic e converso.*" (See further the cases in *Dyer's Reports* (3).) The statement of *Jones* J. means that an obligation the tenor of which requires payment of a sum of money in a particular form of legal tender constitutes a debt for which any other form of legal tender is a good and sufficient discharge. This proposition remains as true under the legislation of to-day as it was at common law in the Seventeenth Century. It was acted upon by the Court of Appeal in March last in *In re Société Intercommunale Belge d' Electricité*: *Feist* v. *La Société Intercommunale Belge d' Electricité* (so far reported only in the *Times Law Reports* (4) and referred to in the *Law Times* (5)), where *Romer* L.J. explicitly denied that effect could be given in law to an agreement to pay a sum of money in one only of the forms of legal tender to the exclusion of all others. In the United States after the civil war the consequences of the doctrine were avoided, if its existence or correctness were acknowledged, by the construction which was given to instruments containing stipulations for payment in gold dollars to the exclusion of the depreciated greenbacks. The interpretation adopted of such instruments was, briefly, that they called for the

(1) (1625) Latch 77, 84; 82 E.R. 283, 286; Palm. 407; 81 E.R. 1145.
(2) (1625) Latch, at p. 84; 82 E.R., at p. 286.
(3) (1552) 1 Dyer 81a-83a; 73 E.R. 174-180.
(4) (1933) 49 T.L.R. 344. [Since reversed, 50 T.L.R. 143 (H.L.).]
(5) (1933) 175 L.T. Jo. 226.

payment or delivery of an amount of gold calculated by reference to, and made in, gold dollars of the number specified in the stipulation. In other words, they amounted to contracts for the transfer of an amount of coined bullion ascertained by tale and not by weight. (See *Bronson* v. *Rodes* (1); *Hepburn* v. *Griswold* (2); *Trebilcock* v. *Wilson* (3); *Gregory* v. *Morris* (4); and *Woodruff* v. *Mississippi* (5).) But with all respect to those who adopted this construction, an obligation requiring payment of a money sum cannot be described as a contract for the acquisition of bullion, considered as a commodity, merely because it specifies the form of money to be paid. It cannot, according to its tenor, be fulfilled except by a payment, and by a payment of a sum certain made in lawful money. It constitutes a debt and an essential quality of money that is legal tender is its sufficiency to discharge a debt. Thus, in the case of *Société Intercommunale Belge d' Electricité* (6), where the promise was to make sterling payments for principal and interest in gold coin of the United Kingdom of a weight and fineness equal to the standard of weight or fineness existing at a specified date just before the bond was given, *Lawrence* L.J. said (7) that the obligation was a debt, and not an obligation to hand over a certain weight of gold differing only from a contract to deliver bullion in that the amount of gold was to be determined by count and not by weight.

But a further question is raised by the provision contained in the mortgages given to the respondent by the appellant in the present appeal. That provision does not stipulate absolutely for payment in gold currency. It stipulates for the performance of alternative duties by the mortgagor, the appellant. It calls upon him, either to pay in gold the sum which is specified, in the case of principal, and, in the case of interest, which is ascertainable by calculation, or to pay in other currency another sum based on the first sum and ascertained by reference to an external standard or event, viz., market or exchange rate. But these alternatives are prescribed

(1) (1869) 74 U.S. 229; 19 Law. Ed. 141.
(2) (1869) 75 U.S. 603; 19 Law. Ed. 513.
(3) (1872) 79 U.S. 687; 20 Law. Ed. 460.
(4) (1878) 96 U.S. 619; 24 Law. Ed. 740.
(5) (1896) 162 U.S. 291; 40 Law. Ed. 973.
(6) (1933) 49 T.L.R. 344; 175 L.T. Jo. 226.
(7) (1933) 175 L.T. Jo., at p. 226.

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as the methods of discharging a main obligation to pay money sums. The question arises whether, notwithstanding that the provision is expressed to govern modes of payment, it should not be considered as a modification or qualification of the tenor of the main covenants, so that no obligation is undertaken to repay the specified sum of principal and none to pay the ascertainable sums for interest. The tenor of the obligation in the case of principal and of the obligation in the case of interest is but to do one or other of two things, either to pay an amount of gold sovereigns, or to pay some other amount ascertained by reference to the market value of the currency tendered, which, perhaps, when applied to the existing state of the law is equivalent to saying Australian notes. Upon this interpretation of the obligation, independently of the form of currency tendered, there would be no ascertainable sum susceptible of payment, no debt. In the case of the *Société Intercommunale Belge d' Electricité* (1) *Lawrence* L.J. addressed himself to the question whether the bond in that case secured a principal sum of £100, or an amount to be ascertained by adding to that nominal amount a further sum in sterling equivalent to any decrease in the gold value of the same nominal amount as compared with the gold value of the same nominal amount at the earlier date specified in the bond, and he concluded that the principal sum secured was £100 sterling and that the words did not measure the amount of the liability but merely indicated the mode of payment. This is something different from enquiring whether two alternative sums are provided, differing according to the medium of discharge, and it does not follow that his Lordship was of opinion that, in such a contract, payment of the lower of the two amounts in any legal tender would not suffice. In any case, it is clear upon the construction of the provision itself that the choice between the alternative modes of performance lies with the mortgagor, the appellant (*Reed* v. *Kilburn Co-operative Society* (2)), and that the first alternative is the payment of gold coins which at the time of payment are current as legal tender in respect of debts expressed in sterling. It may be remarked that, although, no doubt, the parties anticipated, and with every likelihood of correctness, that no gold coins would be legal tender in New

(1) (1933) 175 L.T. Jo., at p. 226. (2) (1875) L.R. 10 Q.B. 264.

Guinea except sovereigns of the weight and fineness established under the then existing law, yet, strictly speaking, the contract does not adopt this standard but simply prescribes whatever gold currency for the time being may be legal tender for sterling debts. The second alternative must be understood as contemplating a payment in some other form of currency which is lawful money or legal tender in New Guinea (see sec. 7 of the *Coinage Act* 1909). It follows from these considerations that what the tenor of the provision requires is payment in one form of currency of an amount which at a future date would discharge a sterling debt of a determined or determinable amount, or else payment in another form of currency of an amount equal to the commodity value of the first. The amount of that sterling debt appears from what in form is an express covenant to pay sums of money. It may be conceded that the instruments should each be construed as a whole and that the express covenant, divorced from whatever qualification upon its effect is contained in the provision relating to currency, should not be treated as conclusively establishing a debt in the sums determined by or under it. But, from its very nature, this provision cannot operate except upon the hypothesis that a sum certain in sterling is first ascertained as a debt which must be met in sterling currency. Only when such a debt becomes payable could its intended operation commence. That intended operation is to defeat the legal equality in the discharge of obligations which is given to all forms of legal tender of the same denomination. It is, therefore, ineffectual to require a payment of more than £900 in respect of the half-yearly interest under the mortgages.

For these reasons the appeal should be allowed with costs and so much of the order of the Central Court should be discharged as directs that judgment be entered for the plaintiff for £225 and costs to be taxed and enters such a judgment accordingly. In lieu thereof judgment upon the money claims in the action should be entered for the defendant. The cause should be remitted to the Central Court to enter the judgment in the appropriate form and to make such order as may appear to it to be just in respect of the costs of the action. As the action included a claim for rectification which succeeded, the learned Chief Judge who tried it is in a better position to dispose of the question of costs than is this Court.

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EVATT J. This is an appeal from Chief Judge *Wanliss* of the Mandated Territory of New Guinea. The only question on which the parties remain in dispute is whether, by delivery of nine hundred Australian pound notes, the appellant duly discharged the obligation sought to be enforced in these proceedings.

In her statement of claim, the respondent, who was plaintiff in the Court below, expressed the appellant's obligation as one for interest due (1) under an agreement whereby the defendant agreed to pay to the plaintiff the moneys including interest therein mentioned and (2) under a covenant contained in a memorandum of mortgage to secure the payment of the sum of £9,600 with interest at the rate of eight pounds per centum per annum and (3) under covenants of a similar form and character.

It appears that the original agreement between the parties, made on November 26th, 1926, was for the purchase of lands in the Mandated Territory of New Guinea, where the agreement was executed, and both parties resided. The mortgages back to the vendor were made in pursuance of the original agreement, and these mortgages also were executed within the Territory. At all material times the Commonwealth of Australia alone administered the internal government of the Territory, and, through various instrumentalities, exercised legislative, executive, and judicial power.

It would seem clear (1) that the relevant obligation which was assumed by the appellant, was to pay 900 " pounds " or " £ " to the respondent, (2) that the obligation was intended to create and did create a debt, and (3) that the unit of " money-of-account " in which the debt was expressed was the " pound " or " £ " unit known and recognized as such throughout the Commonwealth of Australia.

But the same agreement which created such obligation also provided that " all payments . . . shall be made in gold or in currency equivalent thereto at the market or exchange rate current " when the payment was to be made.

Admittedly, as from May 9th, 1921, the Commonwealth *Coinage Act* 1909 had the force of law within the Mandated Territory. This was by virtue of the *Laws Repeal and Adopting Ordinance*, No. 1 of 1921, now embodied in the *Laws Repeal and Adopting Ordinance* 1921-1927, both ordinances being duly made by the Governor-General

under sec. 14 of the *New Guinea Act* 1920. By sec. 7 of the *Coinage Act*, thus introduced, every contract, payment, transaction or dealing relating to money or involving the payment of or liability to pay money "shall be made . . . according to the coins which are current and are a legal tender in pursuance of this Act, and not otherwise, unless the same be made . . . according to the currency of some British possession or some foreign State."

I mention this preliminary aspect of the matter because it reinforces the inference that the "gold" referred to in the stipulation as to payment means such British or Australian gold coins of standard weight, as are, by sec. 5 (1) of the *Coinage Act*, made a good legal tender for the payment of money up to any amount. The alternative view is that the stipulation only refers to "gold" as a commodity and so contemplates a payment in bullion.

But the overriding intention of the parties was to create a precise money obligation and secure its payment by the mortgagor. The use in the gold provision of the phrase "all payments to be made" also tends to exclude the theory that it was intended to discharge the obligation, in the one event, by the delivery of bullion quantified only by reference to market price or value, in the other, to pay "currency equivalent thereto." I agree with Chief Judge *Wanliss's* statement that

> "I may add here that the meaning of the word 'gold' in the agreement is 'gold coin' within the meaning of the Commonwealth *Coinage Act*, and incidentally comes directly within the terms of sec. 7 of that Act."

In the circumstances of the present case, acceptance of the view I have rejected as to the meaning of the word "gold" in the payment stipulation, would not alter the legal position. For if the view rejected be correct, it is the appellant (the mortgagor) who has the option of discharging his obligation either in bullion at its market price (upon this alternative view) or in currency equivalent to the required quantity of such bullion. As the obligation to be discharged is 900 Australian "pounds" or "£," if bullion was being offered, the quantity required was what could be procured on the market for 900 Australian "pounds," and the "currency equivalent" of such bullion was obviously the currency sufficient to discharge a debt of 900 Australian "pounds." Therefore, if the delivery of 900 Australian notes was, in law, a full and valid discharge within

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the Mandated Territory of a debt of 900 Australian "pounds," the appellant (mortgagor) duly discharged his obligation.

So also, upon three assumptions which I will state, the respondent duly discharged his obligation if, as I hold, "gold" in the clause means "gold coins," for the option was to tender 900 gold sovereigns or their "currency equivalent."

The assumptions are three in number:—

I. The first assumption, already mentioned, is that the appellant was at liberty to discharge his obligation in a sufficient quantity of currency and was not bound to tender gold coins themselves. This is the view favoured by Messrs. *Post* and *Willard* (*Harvard Law Review*, vol. 46, p. 1241, n. 61), in a valuable article on *The Power of Congress to Nullify Gold Clauses*.

In the present case, the respondent does not contend that the option lay with her to reject paper currency altogether. Her case is that additional Australian notes should have been tendered sufficient to make up, as at the time of payment, the depreciated value of Australian notes in relation to gold coins. In substance the respondent's claim is that she is entitled to receive the value in notes of gold coins, and that the 900 Australian notes were not equal in value to 900 gold sovereigns.

A claim by the present mortgagee for an "option" in the sense that, by expressing a preference for gold coins, she might refuse a tender of an agreed equivalent of Australian notes, would also extend so as to cover a refusal to accept gold coins, and an insistence on equivalent currency, to be named by the mortgagee. But no such claim was advanced, and I am clearly of opinion that the first assumption, that the appellant was not bound to tender gold coins, is correct.

II. That at the time of payment, 900 Australian pound notes were lawful currency of the Territory and good legal tender for a debt of 900 Australian "pounds." This assumption depends upon a number of circumstances, and the question will require very close examination.

III. That, at the time and place of payment, the tender of 900 Australian pound notes was an "equivalent" of a tender of 900 British or Australian gold sovereigns.

It is convenient to deal at once with the third question.

III. By the *Commonwealth Bank Act*, No. 43 of 1920, the Commonwealth Parliament inserted Part VIA. in the principal Act. By sec. 60H (1), contained in Div. 4 of that Part, authority was given to issue "Australian notes" in specified denominations including that of one "pound." By sec. 60H (1) (*b*), they were, upon issue, to "be a legal tender throughout the Commonwealth and throughout all territories under the control of the Commonwealth except in respect of payments due by the Note Issue Department."

The *Commonwealth Bank Act* 1920 was assented to on November 30th, 1920, and, by sec. 3, it repealed the *Australian Notes Act* 1910-1914.

By the *Australian Notes Act* 1910-1914 it was provided in sec. 6 (1) (*b*) (as in the *Commonwealth Bank Act* 1920) that the notes should be a legal tender "throughout all the territories under the control of the Commonwealth."

If the second assumption is correct, the third question has to be considered upon the footing that a similar dispute has arisen entirely within the Commonwealth of Australia. A borrows money from B and promises to repay "£X" "in gold or in Australian notes equivalent thereto." Is the tender of X Australian "pound" notes a valid discharge of the contract?

The respondent denies that it is, and for support points to certain decisions of the United States Supreme Court. The leading case is *Bronson* v. *Rodes* (1) decided in the year 1869. There it was held that a promise to pay "dollars payable in gold and silver coin, lawful money of the United States" was not discharged by a tender of United States greenbacks, which were at a depressed value in the market. The decision is thus commented on by Messrs. *Post* and *Willard*:—

> "The Court of Appeals of New York held that the tender was a good one, since the obligation fell within the *Legal Tender Act*. This was reversed by the Supreme Court, principally on the ground that an obligation to pay in gold coin was not a 'debt,' as that word was used in the *Legal Tender Act*. In holding that Rodes' tender was ineffective to discharge the obligation, the Court necessarily held that the gold clause was valid and enforceable" (*Harvard Law Review*, vol. 46, p. 1228).

(1) (1869) 74 U.S. 229; 19 Law. Ed. 141.

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And also :—

"The important point which it decided was that there was nothing in the existing statutes which, either as a matter of statutory construction or of public policy, required the Court to treat gold dollars and paper dollars as equivalents. The Court recognized that this was the central issue, for it said that there were 'two kinds of money, essentially different in their nature, but equally lawful.' Since 1868, a policy of recognizing the actual or potential difference between gold and currency, and consequently of respecting the intent of gold clauses, has been firmly embedded in the Federal statutes" (pp. 1229, 1230).

"The Court reviewed," they add, "at some length, the currency statutes since 1792, and concluded that gold dollars and paper dollars were not actual equivalents, 'nor was there anything in the currency Acts purporting to make them such.' See 7 Wall., at 251-52 (1). Particular emphasis was laid on the fact that pars. 1 and 5 of the Act of February 25, 1862, required that duties on imports and interest on the public debt be paid in coin" (p. 1230, n. 17).

The last observations as to payment of debts and interest may avail to distinguish the English decisions now to be mentioned, but the learned commentators state that

"recently the English Courts, in *In re Société Intercommunale Belge d'Electricité*; *Feist* v. *The Company* (2), reached a conclusion exactly contrary to that reached in *Bronson* v. *Rodes* (3). They have held that a gold clause in a sterling bond is ineffective, and that the bond can be discharged by payment of the nominal amount of pounds in depreciated currency" (p. 1231).

In the Court of Appeal (4) *Lawrence* L.J. said :

"A contract that a debt shall be discharged by payment of gold coins (being one form of legal tender) cannot abrogate the enactment by the Legislature that the debt may be discharged by payment in bank-notes (being another form of legal tender)."

This decision of the Court of Appeal is, in my opinion, applicable to this part of the case, and we should follow it. In the present case the obligation is to pay 900 Australian "pounds," and it is satisfied by the payment of 900 Australian notes. This is by the direct force of statutory law which enables a debtor to discharge his debt in the manner prescribed. It cannot be disputed that the intention of the parties, to require the discharge of the debt by one form of legal tender as opposed to another, is defeated. That this must be so, follows from the legislative command.

(1) (1869) 74 U.S., at pp. 251, 252 ; 19 Law Ed., at p. 147.
(2) (1933) 49 T.L.R. 344 ; 175 L.T. Jo. 226. [Since reversed, 50 T.L.R. 143 (H.L.)]
(3) (1869) 74 U.S. 229 ; 19 Law. Ed. 141.
(4) (1933) 175 L.T. Jo., at p. 226.

An interesting illustration of an analogous effect of legal tender statutes upon contracts is provided by the recital to the Imperial Act of 1764 (4 Geo. III. c. 34), passed to prevent paper bills of credit issued in the then American colonies "from being declared to be a legal tender in payments of money." The recital states:

> "Whereas great quantities of paper bills of credit have been created and issued in His Majesty's Colonies or Plantations in America, by virtue of Acts, orders, resolutions, or votes of assembly, making and declaring such bills of credit to be legal tender in payments of money: And whereas such bills of credit have greatly depreciated in their value by means whereof debts have been discharged with a much less value than was contracted for."

The general principle is clearly stated by Mr. *Keynes* as follows:—

> "Furthermore it is a peculiar characteristic of money contracts that it is the State or community not only which enforces delivery, but also which decides what it is that must be delivered as a lawful or customary discharge of a contract which has been concluded in terms of the money-of-account. The State, therefore, comes in first of all as the authority of law which enforces the payment of the thing which corresponds to the name or description in the contract. But it comes in doubly when, in addition, *it claims the right to determine and declare what thing corresponds to the name, and to vary its declaration from time to time*—when, that is to say, it claims the right to re-edit the dictionary. This right is claimed by all modern States and has been so claimed for some four thousand years at least. It is when this stage in the evolution of money has been reached that Knapp's Chartalism—the doctrine that money is peculiarly a creation of the State—is fully realized" (*Money*, vol. I., p. 4).

II. It is therefore necessary to return to the second assumption required in order to found the appellant's case, that the Commonwealth law as to Australian notes being legal tender was in force in the Mandated Territory.

The argument for the respondent is that the *Laws Repeal and Adopting Ordinance* introduced into the mandated territory the *Coinage Act* 1909, but only Divs. 1 and 5 of Part VIA. of the *Commonwealth Bank Act*, and that the fair inference is that Div. 4 was not introduced. But whilst the *New Guinea Act* provides, in sec. 14, that the Governor-General may make ordinances having the force of law in the Territory, it also provides, in sec. 13, that

> "except as provided in this or any Act, the Acts of the Parliament of the Commonwealth shall not be in force in the Territory unless expressed to extend thereto, or unless applied to the Territory by ordinance made by the Governor-General under this Act."

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It appears from the terms of sec. 13 that, notwithstanding the clear failure to apply by ordinance the statutory provision making Australian notes a legal tender, the provision may have to be regarded as in force by virtue of the *Commonwealth Bank Act* itself. The *Commonwealth Bank Act* 1920 actually commenced on December 14th, 1920, the mandate in respect of New Guinea issued from the Council of the League of Nations at Geneva on December 17th, 1920, and the *New Guinea Act* came into force on May 9th, 1921, on which day civil government replaced the period of seven years' government under military occupation by the King's Australian Forces.

That part of the case, therefore, raises two questions, (*a*) whether sec. 13 of the *New Guinea Act* is satisfied by the terms of the *Commonwealth Bank Act*; (*b*) is the Mandated Territory accurately described as one of the "territories under the control of the Commonwealth" within the meaning of sec. 60H (1) (*b*)?

Before dealing with question (*b*), whether the Mandated Territory is, within the meaning of the *Commonwealth Bank Act*, one of the "territories under the control of the Commonwealth," it may be noted that in sec. 4 of the *New Guinea Act* itself, there is to be found a statement purporting to declare the area in question to be a territory under the authority of the Commonwealth, by the name of the Territory of New Guinea. But this provision does not, of itself, provide an answer to question (*b*). If sec. 4 is to be regarded as an attempt to declare the mandated area a territory within the meaning of sec. 122 of the Constitution, it is obviously futile, for sec. 122 is itself defining and, of course, controlling.

The question whether the mandated area of New Guinea can be regarded as one of the "territories under the control of the Commonwealth" involves consideration of the very special position the area occupies in relation to our constitutional system.

The Treaty of Versailles came into force on January 10th, 1920. By arts. 118 and 119 of the Treaty, Germany renounced in favour of the principal Allied and associated Powers all her rights over her overseas possessions, and also undertook to recognize and to accept the measures taken by the principal Allied and associated Powers, in agreement where necessary with third Powers, in order

to carry the consequences of her renunciation into effect. (Cf. Report of M. *Hymans*, adopted by the Council of the League of Nations on August 5th, 1920—League of Nations 20/48/161, Annex. 4).

As part of the Treaty of Versailles, art. 22 of the Covenant of the League of Nations made provision for the future fate of

> "those colonies and territories which as a consequence of the late war have ceased to be under sovereignty of the States which formerly governed them and which are inhabited by people not yet able to stand by themselves under the strenuous conditions of the modern world."

The principle laid down by art. 22 was that "the well-being and development of such peoples form a sacred trust of civilization."

The article then proceeded to embody "securities for the performance of this trust." It declared that the best method of giving practical effect to the principle was that "the tutelage of such peoples should be entrusted to" advanced nations, and that such tutelage "should be exercised by them as mandatories on behalf of the League." The character of the mandate must, it was stated, differ according to certain circumstances, and three classes were described. These have come to be known as A, B and C mandates, and it is with the C class alone that the Commonwealth of Australia is concerned.

This class of mandate affects "territories such as South-West Africa and certain of the South Pacific Islands," which, subject to certain safeguards, "can be best administered under the laws of the mandatory as integral portions of its territory."

Provision was made in art. 22 for (1) an annual report to be rendered by the mandatory to the Council in reference to the territory "committed to its charge"; (2) a definition by the League or the Council of the degree of "authority, control or administration" to be exercised by the mandatory and (3) the future constitution of a permanent Commission to examine the reports and to "advise the Council on all matters relating to the observance of the mandates."

On July 31st, 1919, the Parliament of the United Kingdom passed the *Treaty of Peace Act* 1919, which authorized His Majesty to

> "make . . . such Orders in Council, and do such things as appear to him to be necessary for carrying out the said Treaty, and for giving effect to any of the provisions of the said Treaty."

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There is not to be found in the Treaty any provision appointing any mandatory, and no Order in Council was ever issued by His Majesty under the 1919 Act concerning the control of New Guinea by the Commonwealth authorities.

The various signatures of those representing His Majesty throughout the various constitutional units of the British Empire were affixed to the Treaty on June 28th, 1919, but, before that date, on May 7th, 1919, at a meeting of the Supreme War Council, decisions had been reached and made public as to who were to hold mandates in respect of Germany's overseas possessions in Africa and the Pacific. The decisions were modified to some extent in August 1919. (Memorandum of Secretary-General of Council—L/N 20/48/161, Annex. 3).

It was not until June 30th, 1920, that the Secretary-General of the League of Nations suggested definite action by the Council under art. 22 of the Covenant. He pointed out that since the coming into force of the Treaty of Versailles on January 10th, 1920, the title to "the territories which are to be placed under mandate" had been invested in the principal Allied and associated Powers and that it was their "right and duty" to select "the mandatory Powers who shall exercise authority on behalf of the League" (Memorandum 3).

On August 5th, 1920, the Council adopted the report of the Belgian representative, M. *Hymans*, which stated, *inter alia* (at p. 8):—

> "It is not enough, however, that the mandatory Powers should be appointed; it is important that they should also possess a *legal title*—a mere matter of form perhaps, but one which should be settled, and the consideration of which will help towards a clear understanding of the conception of mandates.
>
> It must not be forgotten that, although the mandatory Power is appointed by the principal Powers, it will govern *as a mandatory* and *in the name of the League of Nations.*
>
> It logically follows that the legal title held by the mandatory Power must be a double one: one conferred by the principal Powers and the other conferred by the League of Nations. The procedure should, in fact, be the following:
>
> 1. The principal Allied and associated Powers confer a mandate on one of their number or on a third Power.
> 2. The principal Powers officially notify the Council of the League of Nations that a certain Power has been appointed mandatory for such a certain defined territory.
> 3. The Council of the League of Nations takes official cognizance of the appointment of the mandatory Power and informs the latter that

> it (the Council) considers it as invested with the mandate, and at the same time notifies it of the terms of the mandate, after ascertaining whether they are in accordance with the provisions of the Covenant."

On September 30th, 1920, the statute of the Commonwealth Parliament called the *New Guinea Act* 1920 was assented to. The Act provided for the acceptance of the mandate to be issued to the Commonwealth and for the government of the Territory. It was to commence on a date to be fixed by proclamation (sec. 2). There was recited, *inter alia*, (1) an agreement by the principal Allied and associated Powers that a mandate for the described ex-German territories should be conferred on the Commonwealth of Australia and (2) a statement that, under the Covenant of the League of Nations, a mandate was to be issued to the Commonwealth of Australia " with full power to administer the same, subject to the terms of the mandate, as an integral part of the territory of the Commonwealth."

On December 1st, 1920, the proposed Constitution of the Permanent Mandates Commission was approved by the Council of the League. On December 6th, 1920, the Council reported to the Assembly, *inter alia* :—

> " With regard to the responsibility of the League for securing the observance of the terms of the mandates, the Council interprets its duties in this connection in the widest manner. Nevertheless the League will obviously have to display extreme prudence, so that the exercise of its rights of control should not in any way increase the difficulties of the task undertaken by the mandatory Powers." (pp. 12-13, L/N 20/48/161).

On December 17th, 1920, the Council duly issued the mandate for German New Guinea and all the German possessions in the Pacific Ocean lying south of the Equator other than German Samoa and Nauru. This recited (1) the renunciation of all her rights by Germany in art. 119 of the Treaty of Versailles ; (2) an agreement by the principal Allied and associated Powers that a mandate should be conferred upon " His Britannic Majesty, to be exercised on his behalf by the Government of the Commonwealth of Australia " ; (3) an agreement to accept by the same authority and (4) the provision in art. 22 for the definition of the terms of the mandate.

Mandates in similar terms also issued to South Africa and New Zealand in respect of the former German possessions in South-West Africa and Samoa.

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Whilst Australia, South Africa and New Zealand has each administered the three mandated territories committed to their respective charge as though they were "integral portions of its territory," subject to the important safeguards which are defined in the instruments of the mandate, conflicting lines of reasoning as to the true legal basis of such administration have been adopted by the Courts of the three Dominions.

In South Africa the question came to an issue in connection with a charge of treason preferred against a native chief alleged to have taken part in an armed rebellion against the mandatory in the Mandated Territory. There has been some divergence of opinion as to what was the precise *ratio decidendi* of the judgment of the Supreme Court of South Africa. The actual decision was that the charge was properly laid and the objection to the indictment should be overruled. But a close perusal of the judgments suggests the principle that the Union of South Africa possessed, by virtue of its character of mandatory, sufficient internal sovereignty—*majestas* operating internally—to forbid and punish any attempt to overthrow its authority by force. Although full external sovereignty in relation to the territory was considered as not vested in the Union, such a concession was unnecessary for the actual decision.

There has been no attempt in South Africa or Australia to base the administration of the mandated territories upon the *Foreign Jurisdiction Act* 1890, and no Imperial Order in Council thereunder was issued in respect of South-West Africa or New Guinea. In New Zealand, however, the administration of Samoa has been regarded as dependent upon an Imperial Order in Council under the *Foreign Jurisdiction Act*. It was made on March 11th, 1920, eight months prior to the issue of the mandate from the Council of the League (December 17th, 1920).

The matter came up for debate before the Supreme Court of New Zealand in *Tagaloa* v. *Inspector of Police* (1). In the *Urtas Springs Case*, which was decided by the Judicial Committee of the Privy Council on February 16th, 1926 (*Jerusalem-Jaffa District Governor* v. *Suleiman Murra* (2)), it was held that an appeal lay to the Privy Council from the Supreme Court of Palestine by virtue

(1) (1927) N.Z.L.R. 883. (2) (1926) A.C. 321.

of the *Foreign Jurisdiction Act*. In the case of Palestine the mandate had issued to His Britannic Majesty direct and it was accepted upon the advice and responsibility of British Ministers alone. But the decision was regarded by the Supreme Court of New Zealand as sufficiently analogous to justify, by reference solely to the *Foreign Jurisdiction Act*, the affirmation of the validity of the *Samoa Act* 1921, by which the Parliament of New Zealand purported to create and endow with legislative, executive and judicial power over the Mandated Territory of Western Samoa, certain specified organs of Government.

A grave difficulty as to the applicability of the *Foreign Jurisdiction Act* lay in the fact that the Imperial Order in Council, on its fair construction, purported to surrender all power in respect of Western Samoa to the Parliament or Government of New Zealand. This is, one should imagine, a stretching of the Imperial Act even beyond its very wide limits of elasticity. The Act proceeds, of course, upon the fact that the place where the jurisdiction is exercised is outside His Majesty's Dominions, and, although it always receives a liberal interpretation, it hardly seems to contemplate the permanent delegation of the foreign jurisdiction of His Majesty's Privy Council to the Parliament of a self-governing Dominion, and that Parliament's further delegating the jurisdiction to a local authority, viz., "the Administrator, acting with the advice and consent of the Legislative Council of Western Samoa" (*Samoa Act* 1921, sec. 46).

As one authority has stated, with reference to Berar :—

> "The intention of the *Foreign Jurisdiction Act* 1890 was to give statutory authority to existing practice, including presumably the extra-territorial legislation of the Governor-General of India in (executive) Council. But it is a constitutional commonplace to say that when an Act of Parliament trenches upon ground formerly occupied by the prerogative, the prerogative is thenceforward strictly limited by the letter of the statute. The Act does not confer or recognize any power of legislation in the Governor-General: all that it does in terms is to confer legislative authority, including the power to create Courts, *on the Privy Council, and the Privy Council only*. The Indian (Foreign Jurisdiction) Order in Council of 1902 delegates that authority to the Governor-General: but there is no authority for any such delegation in the Act. Perhaps, if the point had been raised in 1902, the Order might have been invalidated; but it is much too late to question its validity now" (*Vesey Fitzgerald, Law Quarterly Review* (1926), vol. 42, p. 517).

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The above difficulty was not considered in *Tagaloa's Case* (1). The main point taken against the validity of the *Samoa Act* was that, by it, the Parliament of New Zealand was attempting to clothe itself with an extra-territorial jurisdiction. This, it seemed to the majority, was a fatal objection to the validity of the *Samoa Act* in the absence of some charter from the Imperial Parliament authorizing the exercise by New Zealand of such a jurisdiction. This charter was found, mediately, in the Order in Council mentioned. *Sim* A.C.J., for the majority, stated the position thus (2) :—

> " His first main contention was that the *Samoa Act* 1921 itself was *ultra vires* of the Legislature of New Zealand. The *Constitution Act*, he argued, gave the Legislature power only to legislate for the peace, order, and good government of New Zealand, and the Legislature, therefore, could not legislate for territory outside the boundaries of the Dominion. That is true, no doubt, as a general rule, and the case of *R.* v. *Lander* (3) illustrates the application of this rule. There the Court of Appeal held the *Crimes Act* 1908 to be *ultra vires* in so far as it purported to make bigamy punishable as a crime in New Zealand when the offence was committed outside New Zealand. If, therefore, the power to legislate for Samoa depended on the *Constitution Act* the appellant would be right in his contention. But it does not depend on that Act, and the power is derived from other sources."

Ostler J., however, was impressed with the additional " status " which had come to be regarded as belonging to New Zealand by virtue of its possessing something of international personality and statehood. He said (4) :—

> " The progress of the Dominion along the path of nationhood has been rapid in recent years. The older conception of subordination to a central legislative authority has been superseded by the conception of a partnership of independent nations bound together by ties of loyalty to the same King, ties of kinship, ties of common interest, common beliefs, common faith in the future. If this was not clear before, it was made abundantly clear by the proceedings of the Imperial Conference of 1926. In my opinion the time has come for recognition of this fact by the Courts. It is not necessary to hold that our *Constitution Act* has fallen into desuetude, though a strong argument could be put forward to that effect founded on the maxim *Cessante ratione legis, cessat ipsa lex.* ' The tooth of time will cut away ancient precedent, and gradually deprive it of all authority and validity. The law becomes animated by a different spirit and assumes a different course, and the older decisions become obsolete and inoperative ' (per Sir *J. Salmond* in the *Law Quarterly Review* (1900), vol. 16, p. 383). But whether the *Constitution Act* has thus become obsolete or not, so far as the mandate is concerned, in my opinion, it

(1) (1927) N.Z.L.R. 883.
(2) (1927) N.Z.L.R., at p. 893.
(3) (1919) N.Z.L.R. 305.
(4) (1927) N.Z.L.R., at pp. 900, 901.

is a matter entirely outside the scope of the *Constitution Act*. The Dominion had a representative at the negotiation of the Treaty of Peace, who signed the Treaty on behalf of New Zealand, which thus agreed as a separate nation to the Covenant of the League of Nations and became a member of the League."

Unfortunately the opinion of *Ostler* J. was not fully elaborated. It has been criticized upon the ground that the New Zealand Parliament could not lawfully trespass beyond the limits of capacity prescribed by its own existing Constitution notwithstanding the additional capacities with which it might otherwise have been regarded as endowed, by its constitutional development within, and its international development without, the Empire.

It was said, in the criticism :—

"A statute may in practice, although not in theory, fall into desuetude through its being so old that it is never adverted to. It may, for example, legislate for a matter which does not arise in present times. English law, however, does not favour desuetude as a means of repeal. It recognizes only actual repeal. In this respect, it differs from Continental legislation. In any case, age cannot affect such a comparatively recent enactment as the *Constitution Act*. The only argument could be that conditions have so changed that there is no subject matter to which the Act could be referable, that is, that New Zealand has become such a different species of community that the Act could not have reference to it. In support of this argument may be quoted the status of New Zealand in the League of Nations, but very little else. The Imperial Conference could not legislate. It was only a conference. It is difficult to see by what authority one could go further. There is a risk, if one does not test every link of the chain, of falling into the dangerous and often subtle argument of appeal to sentiment. There seems to be no legal authority for saying that the *Constitution Act* is in any way repealed, nor, therefore, has the Constitution of the Dominion of New Zealand altered at all" (*Law Quarterly Review* (1928), vol. 44, p. 422).

This comment is powerful, for, from the point of view of municipal and constitutional law, it is clear that the power of the New Zealand Parliament must be exerted within its Constitution. And the real question was whether, in relation to the new circumstances and events, Parliament's existing powers under the New Zealand Constitution were sufficient to authorize administrative control over Samoa.

In Australia, the legal authority of the Commonwealth Parliament and Government over the Mandated Territory of New Guinea has long been regarded as indisputable, despite the fact that the Commonwealth Parliament, unlike those of South Africa or New Zealand, has been invested with legislative powers only in relation to a specified

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number of topics. The question came before this Court in *Mainka* v. *Custodian of Expropriated Property* (1). There it was argued that sec. 122 of the Commonwealth Constitution gave the Commonwealth Parliament the necessary legal authority. That section reads:—

> "The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit."

But, unfortunately for this argument, the Mandated Territory was never "placed by the King under the authority of and accepted by the Commonwealth." The documents, in the case of the Commonwealth, negative any such action on the part of His Majesty or of the Commonwealth. The sources to which alone the exercise of Commonwealth control must be referred are recited both in the *New Guinea Act* 1920 and in the mandate itself. They consist of (1) Germany's renunciation of all her rights in favour of the principal and associated Powers, (2) the agreement of the principal Allied and associated Powers that the Commonwealth of Australia should be the mandatory, (3) the issue under art. 22 of the mandate for the control of the territory, and (4) the acceptance of such mandate by the Commonwealth. These sources completely exclude any "placing by the King" of New Guinea under Commonwealth authority. And there are no other sources.

Nor is it possible to regard the mandated area as ever having been "acquired" by the Commonwealth. The area is not, in law or in fact, so "acquired." No legal title has been vested in the Commonwealth. Legislative and administrative jurisdiction, and their exercise, are quite consistent with absence of dominion or title. The mandated territory is not part of, but outside, His Majesty's Dominions. Very strong, if not conclusive, evidence of that fact is furnished by two Imperial Orders in Council—No. 648 of 1923 and No. 1030 of 1928. The first was made under sec. 737 of the *Merchant Shipping Act* 1894, the second under sec. 30 of the *Fugitive Offenders Act* 1881. Each not only recites, but is expressly based upon the position that, in law and in fact, the Mandated Territory of New

(1) (1924) 34 C.L.R. 297.

Guinea is a place " outside " or " out of " His Majesty's Dominions.

Further, sec. 122 not only looks to the " acquisition " of territory, but to the possibility of the representation of every such territory in the Commonwealth Parliament itself. The process envisaged is one of a gradual approach of the acquired territory towards inclusion within the existing organization of the Commonwealth. In the Mandated Territory, the process envisaged by art. 22 is exactly the reverse. It is to be controlled as if it were, contrary to the fact, an integral portion of the Commonwealth ; but its development is to be not towards, but away from, absorption by the Commonwealth. " It is never," as *Corbett* says, " to be incorporated in the territory of the mandatory " unless, of course, by further international action (*British Year Book of International Law* (1924), at p. 135).

It is improbable that sec. 122 would ever have been regarded as relevant but for the fact that the word " territory " is used in that section and in the mandate alike. This is, of course, merely a coincidence, due to the fact that art. 22 itself speaks of " territories," and describes the C class of mandates in a clause commencing : " There are *territories* such as South-West Africa and certain of the South Pacific Islands."

In *Mainka's Case* (1), *Isaacs* J. said " 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." It may be mentioned that the bearing of the *Treaty of Peace Act* 1919, an Imperial Act, was not fully debated in *Mainka's Case*. The Act authorized measures for the carrying out by His Majesty of the terms of the Treaty of Versailles, but, in the Treaty, there was no assignment of any mandate. It certainly may be stated (1) that the 1919 Act did not, of itself, authorize the exercise of legislative authority by a Dominion in respect of a territory committed to its care by a mandate issued and defined by the Council of the League of Nations ; (2) that no action was taken under the 1919 Act in relation to New Guinea, and (3) that the legal foundation of the Commonwealth authority in New Guinea cannot be discovered in the 1919 Act.

(1) (1924) 34 C.L.R., at p. 300.

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Reference has been made to the decisions of the highest Courts in New Zealand, South Africa and Australia as to the legal basis of the control exercised by those three Dominions over the mandated territories committed to their respective charges. In New Zealand the only basis relied on was the *Foreign Jurisdiction Act* 1890, an Order in Council thereunder giving power to the Parliament of New Zealand, and exercise of such powers by further delegation to an Administrator and Legislative Council. This elaborate chain of authority seems to possess one, perhaps two, weak links. It was thought that the general constitutional power of the New Zealand Parliament was insufficient for the purpose because authority had to be exerted extra-territorially. The point as to extra-territoriality was not adverted to in the South Africa case, *R.* v. *Christian* (1), nor in *Mainka's Case* (2). In the former it was held that the Government of South-West Africa possesses "*majestas* operating internally" sufficient to found a charge of high treason. In the latter it was held that an appeal could be brought to the High Court from a local Court in the Mandated Territory. In the former, reliance was placed upon the terms of the mandate, and the position of South Africa as a member of the League of Nations, *de Villiers* J.A. stating (3) that

> "for the purpose of the mandate a mandatory is considered to be on a footing of equality with all other members of the League and is not itself subject in any respect to any other member. The mandate is a trust which is delegated to one of the members of the League to be exercised by such member personally in the spirit of the Treaty, with more especial reference to the well-being of the indigenous populations, and under the safeguards provided by the Treaty and the terms of the mandate,"

and concluding therefrom that "the Union Government as mandatory of South-West Africa is not in any respect subject to the Imperial Parliament." In Australia, this general question was not discussed, but, apparently, the (Imperial) *Treaty of Peace Act* 1919 was considered to have a bearing upon the question.

In the case of the Commonwealth of Australia and the mandated area of New Guinea, I have come to the conclusion that the legal position is as follows:—

(1) The King's Executive Government of the Commonwealth was possessed of sufficient authority (*a*) to become a party to the Treaty

(1) (1924) App. D. (S. Af.) 101.
(2) (1924) 34 C.L.R. 297.
(3) (1924) App. D. (S. Af.), at pp. 119, 120.

of Versailles and to the Covenant of the League of Nations, and (*b*) as a member of the League, to accept the position of mandatory with all its incidental rights and obligations.

(2) The Commonwealth Parliament having full power to legislate with respect to "external affairs"—sec. 51 (XXIX.)—was thereby vested with authority to pass the *New Guinea Act* 1920, as a law for the fulfilment of the duties imposed upon, and the exercise of the rights of administration committed to, the Commonwealth as mandatory power.

(3) Although the *New Guinea Act* and ordinances made thereunder necessarily operate outside the area of the Commonwealth or any of its territories properly so-called, such extra-territorial operation does not invalidate the *New Guinea Act*, which is a valid law for the peace, order and good government of the Commonwealth with respect to external affairs.

If this reasoning is correct in relation to the Commonwealth Parliament, it would seem to be applicable to the case of New Zealand. In the former case the Parliament has authority over the peace, order and good government "of the Commonwealth with respect to . . . external affairs" (sec. 51 (XXIX.)); in the latter case, over the peace, order and good government of New Zealand without restriction of subject matter. It has been noticed that, in the decision in *Christian's Case* (1), the supposed extra-territorial limitation placed upon a Dominion's competence was not mentioned. There, too, the same reasoning could be applied. Each of the three propositions stated I shall endeavour to substantiate.

1. *Executive Power of the Commonwealth.*

We here pass into the realm of the King's prerogative or common law powers. It is well established, of course, that capacity to enter into agreements with foreign Powers pertains to the King's prerogative. Such capacity may lawfully be exercised by the King in relation to and acting upon his Executive within any of his self-governing Dominions. It is the adaptability of the common law (of which the prerogative of the Crown forms a part) to new circumstances and conditions which allowed the royal prerogative to be

(1) (1924) App. D. (S. Af.) 101.

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exercised so as to (*a*) enable the King to enter into binding arrangements with foreign Powers, in his capacity as head of, and with respect solely to, any one or more of the self-governing Dominions, and (*b*) authorize the King in right of and as representing such Dominion to accept a mandate. As part of the common law, the royal prerogative has what *Parke* B. described as " the incalculable advantage of being capable of application to new combinations of circumstances perpetually occurring."

It is now indisputable that a self-governing Dominion's special constitutional relationship with Great Britain does not preclude it from having and exercising direct relations with foreign Powers. The two questions are necessarily related. If the Dominions were, by the relevant rules of the municipal law of the British Empire, prevented from being subject to any duties or entitled to any rights in international law, the first question would never arise. On the other hand, a refusal by foreign States to recognize any separate personality in a Dominion would leave them quite outside the family of nations, however willing Great Britain herself might be to their being accorded international status.

Neither of these two possibilities has happened. Owing partly to the Dominions' enormous loss of life and wealth during the Great War, but also to the insistence and persistence of three statesmen—*Hughes*, *Smuts* and *Borden*—they were accorded recognition at the Peace Conference of 1919, and their representatives became signatories to the Treaty of Versailles, each self-governing Dominion becoming an original member of the new family of nations constituted by the Covenant, and taking appropriate local action in ratification of the Treaty. I do not propose to revive the controversy as to the precise meaning to be ascribed to the method of signing adopted in 1919, where, according to Sir *Robert Borden*, the Dominions enjoyed the " doubtful advantage of a double signature " (quoted by Professor *Noel Baker*, p. 73). It is fully and convincingly discussed, both historically and critically, by Professor *Baker* in his work on the *Juridical Status of the British Dominions in International Law* (1929). The subsequent active participation of the Dominions in the work of the League as co-equal members thereof shows the general soundness of *Baker's* critical analysis. The capacity of the

Dominions for separate international personality has been illustrated by their activity in international deliberations. History has resolved whatever doubt arose because of the form of the original signatures to the Treaty of Versailles. In particular, a close perusal of the proceedings of the Permanent Mandates Commission proves to demonstration that the League, including Great Britain, regards Australia, South Africa and New Zealand as directly responsible to it for their proper administration. As *Noel Baker* says :—

"The direct and separate responsibility of the Dominion mandatory Powers towards the League is exemplified in every phase of the working of the mandates system. The Dominions, naturally, control their mandated areas without any interference or control by the British Government ; they make their annual reports on their administration direct to the League without previous consultation with the British Colonial Office ; they appoint their own Dominion delegates to explain, defend, and amplify their reports before the Permanent Mandates Commission ; their Assembly delegations defend their actions as mandatories when the Assembly discusses their Reports " (p. 107).

This international position of the Dominions has only gradually been recognized by international jurists. *Pearce Higgins* says :—

"That the self-governing Dominions have acquired something of an international personality by reason of their membership of the League of Nations seems clear, but how much is not so evident. They are treated as independent in their relations to the business of the League, but for other purposes they would appear only to have made good a claim to be consulted on important matters affecting the whole of the British Empire, while each Dominion is consulted as regards matters of special import to itself. Representatives from the Dominions were not specially summoned to the Washington Conference in 1921-2 by the United States, but the British Delegation contained representatives of several of them. Even should one or more of them be represented by diplomatic agents appointed by the King to foreign Powers this would not necessarily indicate complete independence, for many of the German States retained the right of representation under the Imperial Constitution of 1871. The inclusion of representatives of the Dominions amongst the delegates of the British Empire at an international conference enables each of the Dominions to give advice regarding its own peculiar questions, and the authority of each of such delegates is limited to the Dominion he represents, whereas the delegates appointed for Great Britain have plenary powers to act for the whole of the Empire. Foreign Powers dealing with such a delegation realize that if one Dominion fails to sign a treaty, it would not operate so far as that Dominion was concerned, but the Treaty, when ratified by the King, would be effective as regards the rest of the Empire " (*Hall's International Law*, 8th ed. (1924), p. 35).

So, too, Professor *Keith* (*Wheaton's Elements of International Law*, 6th ed. (1929), vol. I., pp. 130, 131) says :—

"Thus in the League of Nations the Dominions have an international personality, and for League purposes cannot be denied the character of States.

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> In their actions the governments proceed without control by the United Kingdom, and, if they consult with the British Government, it is merely as equals; notoriously they have on several occasions of no small importance taken an attitude contrary to the British view, and Canada in special has struggled energetically for the reduction of her obligations under article 10 of the Covenant of the League, and has succeeded in securing an interpretation which, if not binding, is yet sufficiently authoritative for all purposes. Further, the election of Canada to be a member of the Council of the League in 1927 has emphasized the independent position of the Dominions."

Indeed, as appears from *Noel Baker's* further discussion, (cf. pp. 127, 128), with respect to all matters affecting the execution of the Covenant of the League of Nations, the internal "capacity" or "status" or "personality" of the Dominion members of the League is clearly established, and now is seldom disputed even by those who have minimized, partly because they have deprecated, the position of the Dominions as nations of the world.

It was suggested by Professor *H. A. Smith* (*British Year Book of International Law* (1930), at pp. 251-257) and by Professor *Keith* (*Wheaton's Elements of International Law*, 6th ed. (1929), p. xvi.), that the equality of status asserted in the 1926 declaration as to the status of the Dominions was difficult, perhaps impossible, to reconcile with the dissimilarity of international functions actually performed by Great Britain and the self-governing Dominions, which dissimilarity is also sufficiently described in the Balfour Report. In 1928 *Keith* regarded the 1926 Report as "sentimental rather than substantial" (*Responsible Government in the Dominions* (1928), p. xviii.).

However that may be, the Imperial Conferences of 1929 and 1930 and the passing of the *Statute of Westminster* seem to have justified the general thesis of *Noel Baker* as against that of his quondam critics. But the latter would not dissent from the proposition that the international capacity of the Commonwealth of Australia to enter into membership of the League and to accept and perform the New Guinea mandate cannot be denied. However further the powers of the great Dominions may be extended, or be capable of extending, it is unnecessary to discuss.

2. *Legislative Power over "External Affairs."*

It may be pointed out that in *In re Regulation and Control of Radio*

Communication in Canada (1), Viscount *Dunedin*, for the Privy Council, said :—

"Canada as a Dominion is one of the signatories to the convention. In a question with foreign powers the persons who might infringe some of the stipulations in the convention would not be the Dominion of Canada as a whole but would be individual persons residing in Canada. These persons must so to speak be kept in order by legislation and the only legislation that can deal with them all at once is Dominion legislation. This idea of Canada as a Dominion being bound by a convention equivalent to a treaty with foreign powers was quite unthought of in 1867. It is the outcome of the gradual development of the position of Canada *vis-à-vis* to the mother country Great Britain, which is found in these later days expressed in the *Statute of Westminster*. It is not, therefore, to be expected that such a matter should be dealt with in explicit words in either sec. 91 or sec. 92. The only class of treaty which would bind Canada was thought of as a treaty by Great Britain, and that was provided for by sec. 132. Being, therefore, not mentioned explicitly in either sec. 91 or sec. 92, such legislation falls within the general words at the opening of sec. 91, which assign to the Government of the Dominion the power to make laws 'for the peace order and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.' "

The reasoning of the Privy Council in the *Radio Case* (2) has been subjected to certain criticism in Canada. It has been said by a learned commentator :—

"And we so add another peculiar twist to our Constitution. Sec. 92 of it assigns to the Provinces exclusive jurisdiction over certain subjects. Nowhere is there given to the Dominion Government authority to trench upon provincial jurisdiction. Nobody imagined that the Dominion Government had any such authority. But the Judicial Committee has held that by agreeing with a foreign State that the Dominion Parliament will trench, the trenching can be done. It is right to add that complicity in that respect cannot be charged against either the Dominion Government or the lawyers engaged in the case. Neither in the factum of the Government in the Supreme Court, nor in its case in the Privy Council, nor, as I am informed, in the oral pleadings was the twist presented on behalf of Canada. No Canadian lawyer could have thought of it " (*J. S. Ewart, Canadian Bar Review* (1932), pp. 301-302).

The power of the Commonwealth Parliament to pass the *New Guinea Act* for the government of the Mandated Territory is not complicated by the element which led to the dispute between the Dominion and Provincial Legislatures in the *Radio Case* (2). There the legislation of the Dominion Parliament was attacked as trenching

(1) (1932) A.C. 304, at p. 312. (2) (1932) A.C. 304.

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upon the exclusive area of provincial authority, so that a contest between Dominion and Province had to be resolved. In the case of the Mandated Territory of New Guinea no contest of Commonwealth and State *inter se* does or can arise.

Ewart's criticism can therefore have no application at all to the case of New Guinea, because neither the *New Guinea Act* nor the ordinances thereunder made operate outside New Guinea itself, and the States are in no way concerned or affected.

The real question is whether the legislative power exercised by the Commonwealth Parliament in the *New Guinea Act* is one truly in respect of "external affairs" under sec. 51 (xxix.) of the Constitution? The answer is: Yes. The legislation pertains to external affairs and in no way to matters occurring within the Commonwealth. It is legislation directed solely towards performing Australia's obligations to the other members of the League of Nations. Powers of administration and government are assumed solely towards that end, and over matters and things without the area of the Commonwealth and its territories.

In the year 1906, *Barton* J. pointed out that

> "it is not necessary to decide now whether the external affairs power of the Commonwealth Parliament under sec. 51 of the Constitution would cover legislation applying to such circumstances . . . It is probable that that power includes power to legislate as to the observance of treaties between Great Britain and foreign nations" (*McKelvey* v. *Meagher* (1)).

Referring to the "external affairs" power in the year 1899, *Lefroy* said:

> "It will look . . . as though the Imperial Parliament intended . . . to divest itself of its authority over the external affairs of Australia and commit them to the Commonwealth Parliament; and the Imperial Parliament has never yet repealed an Act conferring constitutional powers on a colony" (*Law Quarterly Review* (1899), vol. 15, p. 291).

"The power to legislate upon external affairs," *Jethro Brown* wrote in 1900,

> "is a new departure of doubtful significance. The Bill appears to aim at providing a general power which will apply to . . . future emergencies" (*Law Quarterly Review* (1900), vol. 16, p. 26).

"The power to legislate upon 'external affairs,'" commented *Harrison Moore* in the same year,

> "is a somewhat dark one, especially as the principal 'external' matters over which control is desired are enumerated, e.g. immigration of aliens,

(1) (1906) 4 C.L.R. 265, at p. 286.

naturalization, the influx of criminals, &c." (*Law Quarterly Review* (1900), vol. 16, p. 39).

In *Roche* v. *Kronheimer* (1), this Court held that the *Treaty of Peace Act* 1919, which empowered the Governor-General to carry out and give effect to the economic clauses of the Treaty, was a valid exercise of the powers of the Parliament of the Commonwealth. In the course of his judgment *Higgins* J. said (2) :—

"It is difficult to say what limits (if any) can be placed on the power to legislate as to external affairs. There are none expressed. No doubt, complications may arise should the Commonwealth Parliament exercise the power in such a way as to produce a conflict between the relations of the Commonwealth with foreign Governments and the relations of the British Government with foreign Governments. It may be that the British Parliament preferred to take such a risk rather than curtail the self-governing powers of the Commonwealth; trusting, with a well-founded confidence, in the desire of the Australian people to act in co-operation with the British people in regard to foreign Governments."

In *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (3) I had occasion to discuss *Roche* v. *Kronheimer* (1) as follows :

"Having regard to the peculiar prerogative rights of the Crown in respect to the declaration of war and the making of peace, the special relationship of the Executive Government of the Commonwealth to the Treaty of Peace itself, the difficulty of the subject of 'external affairs' being dealt with by an authority other than the Executive, the plenary nature of the defence power in time of war, including the time of terminating the war, the complexity of the arrangements required for the purpose of carrying out the economic provisions of the Treaty, and the necessity of a continuous exercise of authority to change the terms of such arrangements from time to time, the *Treaty of Peace Act* was also a law with respect to naval and military defence and with respect to external affairs."

It is interesting to observe that, in Australia, sec. 51 (XXIX.) of the Constitution—the external affairs power—has been regarded as having a scope and purpose at least as far-reaching as that of sec. 132 of the *British North America Act*. Thus, on the 3rd January 1908, the Secretary of State for the Colonies, in a despatch to the Governor-General of the Commonwealth, stated :—

"His Majesty's Government are pledged to the view that, so far as the relations of Australia with foreign nations are concerned, the Government of the Commonwealth alone can speak, and that for everything affecting external communities the Government of the Commonwealth alone are responsible to

(1) (1921) 29 C.L.R. 329. (2) (1921) 29 C.L.R., at pp. 338, 339.
(3) (1931) 46 C.L.R. 73, at p. 122.

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the Crown. It follows from this that adherence to no treaty or convention with a foreign Power, whatever its subject matter, can be notified for which the Commonwealth has not made itself responsible; in other words, which is not made on behalf of the Commonwealth" (*Commonwealth Papers*, C11845).

The same communication proceeded :—

"In the absence of any authoritative interpretation of the provisions of sec. 51 (XXIX.) of the Constitution, it is not for His Majesty's Government to say whether they confer on the Commonwealth Parliament the powers expressly conferred on the Canadian Parliament by the *British North America Act*. In matters in which your Ministers do not consider it necessary or desirable to consult the State Governments as being of Federal concern, the Canadian rule must be applied to Australia."

The official Commonwealth communication, dated February 6th, 1909, stated, *inter alia* :

"I may add for the information of the Secretary of State that the law advisers of the Government have expressed the view that under sec. 51 (XXIX.) of the Constitution, the Commonwealth Parliament has power to make such legislative provision as is necessary to secure the fulfilment of treaty obligations, and that accordingly the powers of the Commonwealth Parliament are substantially identical with those of Canada" (*Ibid.*).

3. *Extra-territorial Operation of Legislation.*

With reference to this question, it has recently been pointed out by Lord *Macmillan* in the important case of *Croft* v. *Dunphy* (1) that the Dominion of Canada has jurisdiction, quite apart from the *Statute of Westminster*, to make its laws operate outside Canada, as far as such operation is necessarily involved in the power to make laws over any given subject matter. He said (2) :—

"But while the Imperial Parliament may be conceded to possess such powers of legislation under international law and usage, the respondent contends that the Parliament of Canada has no such powers. It is not contested that under the *British North America Act* the Dominion Legislature has full powers to enact customs laws for Canada, but it is maintained that it is debarred from introducing into such legislation any provisions designed to operate beyond its shores or at any rate beyond a marine league from the coast. In their Lordships' opinion the Parliament of Canada is not under any such disability. Once it is found that a particular topic of legislation is among those upon which the Dominion Parliament may competently legislate as being for the peace, order and good government of Canada, or as being one of the specific subjects enumerated in sec. 91 of the *British North America Act*, their Lordships see no reason to restrict the permitted scope of such legislation by any other consideration than is applicable to the legislation of a fully sovereign State."

(1) (1933) A.C. 156. (2) (1933) A.C., at p. 163.

I have elaborated an analysis of this question in my recent judgment in the case of *Trustees Executors and Agency Co.* v. *Federal Commissioner of Taxation* (1).

As it is abundantly clear that the *New Guinea Act* is a law with respect to "external affairs," and in like case a "fully sovereign State," to use Lord *Macmillan's* phrase, would obviously be regarded as entitled to enact it, the Commonwealth Parliament is entitled to do so.

In Lord *Macmillan's* judgment (2), it was suggested, as a possibility only, that, if a Dominion enactment were shown to be "contrary to the principles of international law," that fact might destroy its validity. In the present case, so far from the *New Guinea Act* constituting a breach of such principles, it embodies a direct execution of the principles and pledges which, by international law, are binding upon the King's Executive Government of the Commonwealth.

I therefore conclude that the principle of *Croft* v. *Dunphy* (3) applies, and the fact of the extra-territorial operation of the Commonwealth's laws and ordinances in relation to New Guinea does not affect their validity.

The conclusions to be drawn from this examination of the relation between the Commonwealth and the mandated area are as follows :—

(1) That the lawful source of the Commonwealth's government of the Mandated Territory of New Guinea is not to be found in sec. 122 of the Constitution.

(2) That the Commonwealth's *de facto* government of the Territory has its lawful source in (*a*) legislation under sec. 51 (xxix.) of the Commonwealth Constitution following upon (*b*) the Commonwealth's international right and duty to administer New Guinea according to the terms of the mandate.

(3) That such area is not one of the territories referred to in sec. 122.

(4) But it is, none the less, a territory lawfully "under the control of the Commonwealth."

I am therefore of opinion that there is no reason for saying that the Mandated Territory is not one of the "territories under the control

(1) *Ante*, p. 220. (2) (1933) A.C., at p. 164.
(3) (1933) A.C. 156.

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of the Commonwealth " within the meaning of sec. 60H (1) (*b*) of the *Commonwealth Bank Act* 1920.

It is true, upon this view, the Act applied to the area on December 14th, 1920, three days before the mandate issued from Geneva. But the Act previously in force, the *Australian Notes Act* 1910-1914, had made Australian notes a legal tender " throughout all territories under the control of the Commonwealth " (sec. 6 (1) (*b*)). From 1914 until the issue of the mandate, that is, during the period of military occupation and administration of ex-German New Guinea, the Commonwealth authorities were always in *de facto* control. And in particular reference to the currency of Australian notes it appears :—

(1) On April 14th, 1916, Colonel Pethebridge, the then Administrator, issued a proclamation establishing a branch of the Commonwealth Bank of Australia, and prohibiting, as from May 1916, any other bank from carrying on business within German New Guinea.

(2) On March 11th, 1916, the Administrator issued the *Currency and Coinage Proclamation* 1916, which provided:—(*a*) That German notes and coinage should not be imported, but that existing German silver coinage might be used until peace was declared. (*b*) That German notes or other paper money should from June 30th, 1916, not be used. (*c*) That such notes might before June 30th be surrendered to the Treasury in exchange for " bank notes of the Commonwealth of Australia " at a specified rate of exchange.

(3) On May 8th a further *Currency and Coinage Proclamation* was issued, which provided, *inter alia*, that all debts due to and by persons, firms and companies should be paid " either in silver marks . . . or in notes of the Commonwealth of Australia or English or Australian coinage " at rates of exchange in the proclamation specified.

These proclamations were included amongst those validated and kept in force by sec. 6 of the *Imperial Indemnity Act* 1920 (10 & 11 Geo. V. c. 48, sec. 6, referred to in *Mainka* v. *Custodian of Expropriated Property* (1)), and Australian notes were in fact treated as good legal tender until the military occupation was replaced by civil government under the *New Guinea Act*.

(1) (1924) 34 C.L.R., at p. 302.

In these circumstances it is difficult to resist the inference that the omission to make Commonwealth notes legal tender by express ordinance under the *New Guinea Act* was because such provision was considered as already in full operation within the mandated area. And my opinion is that, upon the commencement of civil administration under the mandate, at the latest, the area came to answer the description contained in sec. 60H (1) (*b*) of the *Commonwealth Bank Act* 1920.

The only remaining point is whether, by sec. 13 of the *New Guinea Act*, the *Commonwealth Bank Act* is an Act prevented from extending to the Mandated Territory.

I regard the provisions of sec. 13 as very important. It is a clear recognition of the Commonwealth's special international duties in relation to the Territory and its inhabitants. In the circumstances of the present case it is unnecessary to determine whether the words of sec. 13 would be satisfied by Acts passed by the Commonwealth Parliament after the coming into force of the *New Guinea Act* and merely containing a general description to which the mandated area, and the Territories proper, might all answer. For the *Commonwealth Bank Act* was passed, and commenced, prior to the coming into force of the *New Guinea Act*. When the mandate issued, or, at all events, on May 9th, 1921, when civil government was established under its terms and those of the *New Guinea Act* itself, the territory came within the scope and intendment of sec. 60H (1) (*b*) of the *Commonwealth Bank Act*. Here, I think, the position as to sec. 13 is reasonably clear. Sec. 13 is dealing with all Acts of Parliament, past as well as future. The general rule is that none of them are to be in force in the Territory. But, so far as concerns Acts to come into force within the Commonwealth at some future time, they may be "expressed to extend thereto," or "applied by ordinance." So far as concerns Acts already in force within the Commonwealth itself, they can hardly be "expressed to extend thereto" but they may be "applied by ordinance." But the whole of sec. 13 is preceded by the words "Except as provided in . . . any Act." It seems to me that such an exception from the general rule and the special requirement is contained in the *Commonwealth Bank Act*, which, of its own force, operated within every place answering or

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coming to answer the description of a "territory under the control of the Commonwealth."

I am therefore of opinion that all three assumptions mentioned earlier are correct, and that, by delivery of the 900 Australian notes, the appellant fully discharged his obligation to pay 900 Australian "£" to the respondent.

Accordingly the appeal should be allowed.

Appeal allowed with costs. Discharge so much of the order of the Central Court as directs that judgment be entered for the plaintiff for £225 and costs and as enters such a judgment accordingly. In lieu thereof direct the entry of judgment for the defendant upon the money claims in the action. Remit the cause to the Central Court to enter the judgment required by this order in the appropriate form and to make such order in respect of the costs of the action as to it may appear just.

Solicitors for the appellant, *McMaster, Holland & Co.*

Solicitors for the respondent, *Dalrymple & Blain.*

J. B.