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the money of account of Queensland and England was the same in 1895. It was undoubtedly similar at that date, and before and after that date, in the sense that the same nomenclature, pounds, shillings and pence, was used to describe its units of value " (1).

" Leaving aside the vital distinction between the two monetary systems in that they depend on different law-making powers, their Lordships think that the identity (or, as it were better said to avoid confusion, the similarity) of the two systems can be over-stressed. For, while it is true enough, as already stated, that the money of account, in the sense of the denomination of the units of account, was the same in New South Wales and in England, yet the money of payment, by which the obligation to pay so many units of the money of account could be discharged, was by no means immutable " (2).

Dixon J. says in the course of his judgment in the present case :— " By the registers the stockholders of each jurisdiction were identified and recorded. But it was seen that it might be convenient for individual stockholders to change from one jurisdiction to another and it was thought not to matter, because no one foresaw that during the currency of the stock Great Britain and Australia would leave the gold standard and the monetary systems would widely diverge " (3).

From that expression of opinion their Lordships do not differ but if that be the state of the parties' minds, it would equally seem to explain why they thought no one would have a cause of complaint if a uniform stock was issued to all the creditors irrespective of whether their debts had hitherto been payable in Australia or London. If, contrary to their Lordships' opinion, the parties could be taken to have contemplated the possibility of divergence, it might well be that the Bank who were a party to the scheme would have insisted on having uniform stock in order that their liability might not be for an uncertain amount. This is not, however, a permissible field of speculation.

Mr. *Menzies* placed some reliance on the facts that (*a*) interest on the stock which was for the time being on the English register had always been paid in English currency at the rate of $3\frac{1}{2}$ per cent per annum on the face value of the stock and (*b*) when in the year 1942 the Treasurer of the Commonwealth of Australia made an order under the *National Security* (*War-time Banking Control*) *Regulations* the Bank converted for balance-sheet purposes its

(1) (1951) A.C., at p. 217; (1950) 81 C.L.R., at p. 496.
(2) (1951) A.C., at p. 218; (1950) 81 C.L.R., at p. 496.
(3) (1951) 84 C.L.R., at p. 229.

indebtedness in respect of stock inscribed on the English register into Australian £s. at the current rate of exchange.

Their Lordships are unable to attach weight to these facts. They find themselves on this point in complete agreement with *Macrossan* C.J. who said :—

" In my view the conduct of the Bank in relation to neither of these matters is of any assistance in construing the Scheme of Arrangement. First, as to interest, Clause 4 of the Scheme provided that interest on the Stock should be payable half-yearly at the respective Offices of the Bank at which the stock was registered. The clause is silent as to the money of account applicable for the obvious reason that at the time when the Scheme of Arrangement was made there was only one money of account in all the places where the Bank had registers of stock and no one contemplated that in the future there might be more than one relevant money of account. Until 1926 the currencies of England and Australia were substantially of equal value. Therefore, for twenty-nine years at least there was no occasion for the Bank to direct its attention to the possible difference in its obligation to different classes of holders of stock in relation to this matter which might be caused by one or other construction of the contract. Its subsequent conduct after that lapse of time in paying interest on the basis that one of the several possible constructions of the contract was the correct one cannot, in my view, be called in aid to determine the true construction of a contract made in 1897. For the same reason, and *a fortiori*, the Bank's method of presentation in its accounts of its liability in respect of stock registered in London, applied for the first time in 1942, cannot affect the construction of the Scheme of Arrangement made in 1897, forty-five years earlier. It shows no more than an opinion held by the responsible officers of the Bank in 1942 on the matter of the construction of the Scheme of Arrangement ".

As their Lordships have already said the matter is purely one of construction and for the reasons already given their Lordships find themselves in agreement with the conclusion of *Latham* C.J.

Mr. *Barwick* for the appellant invited their Lordships, if they came to this conclusion, not to allow the second defendants any costs in the High Court or before this Board, basing his contention on the argument that their Lordships had come to the conclusion that the cross-appeal ought to have failed in the High Court and the second respondents ought to be penalised for having given the notice of cross-appeal. The second respondents were made representative defendants and had been brought before the High Court

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by the appellants to defend a judgment in their favour. In these circumstances their Lordships are not disposed to accept Mr. *Barwick's* argument on costs.

Their Lordships will therefore humbly advise Her Majesty to set aside the order of the High Court except as regards costs and to vary the order of the Supreme Court of Queensland (*a*) by substituting the word "Australian" for the word "English" wherever such last-mentioned word occurs in the answers to questions 1, 4 and 6; (*b*) by deleting the answer to question 7 and substituting therefor the words "unnecessary to answer".

The costs of all parties of the appeal to this Board must be taxed and paid by the respondent liquidator out of the assets of the Bank.

Solicitors for the appellant, *Markby, Stewart & Wadesons*, agents for *Malleson, Stewart & Co.*

Solicitors for the respondents, *Parker, Garratt & Co.*, agents for *Arthur Robinson & Co.*

E. F. H.

[HIGH COURT OF AUSTRALIA.]

WONG MAN ON . . . . . PLAINTIFF;

AND

THE COMMONWEALTH AND OTHERS . DEFENDANTS.

Alien—Refugee—British subject—Person born of alien parents in enemy territory conquered and occupied in course of war by British forces—Mandated territory—Deportation from Australia—War-time Refugees Removal Act 1949 (*No.* 32 *of* 1949), s. 4.

A person born of alien parents in enemy territory conquered and occupied in course of war by British forces is not *ipso facto* a British subject, and, without more, is an alien within the meaning of s. 4 (1) (*a*) of the *War-time Refugees Removal Act* 1949.

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SYDNEY, *May* 5, 6.

MELBOURNE, *June* 6.

Fullagar J.

ACTION.

An action was brought in the High Court by Wong Man On against the Commonwealth of Australia, the Honourable Harold Edward Holt, he being the Minister of State administering the *War-time Refugees Removal Act* 1949, and Bertie Clyde Wall, an officer of the Department of Immigration, in which the plaintiff, by his statement of claim as amended, alleged that the defendants threatened and intended to cause him to be deported from Australia to New Guinea, and he claimed an injunction to restrain a threatened trespass to his person.

The intention was, in effect, admitted by the defendants, but they relied for justification on the *War-time Refugees Removal Act* 1949 and an order made thereunder by the Minister.

The action was heard before *Fullagar* J., in whose judgment hereunder the facts and relevant statutory provisions are sufficiently set forth.

C. A. Hardwick Q.C. (with him *M. R. Hardwick*), for the plaintiff, submitted: (1) that the plaintiff was a natural-born British subject; (ii) that his status as such came from the common law,

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and was not affected by statute before or since his birth; and (iii) that any person born within the protection of the Queen, by virtue of her protection as Sovereign of the British Empire, was a natural-born British subject.

The common law has not been affected at all by the mandate or anything done since. As soon as there was a surrender by the German Government in New Guinea to the representatives of the British Crown, all the people became subjects of, and owed obedience and allegiance to, the Crown of England. The whole place was subjugated. The occupation of New Guinea was complete and full.

Reference was made, *inter alia*, to:—*Calvin's Case* (1); *In re Stepney Election Petition*; *Isaacson* v. *Durant* (2); *Sovfracht (V/O)* v. *Van Udens Scheepvaart en Agentuur Maatschappij (N.V. Gebr.)* (3); *Craw* v. *Ramsay* (4); *Campbell* v. *Hall* (5); *Jolley* v. *Mainka* (6); *Sottomayer* v. *De Barros* (7); *West Rand Central Gold Mining Co. Ltd.* v. *The King* (8); *R.* v. *Ketter* (9); The Mandate in *Laws of the Territory of New Guinea*, vol. 1, p. 3; the *Transactions of the Grotius Society*, vol. 23, pp. 86, 89, 91, 92; *Journal of the Society of Comparative Legislation*, vol. 14, pp. 314-326; *Holdsworth's History of English Law*, vol. 9, pp. 72-104; *Mervyn Jones* on *British Nationality, Law and Practice*, at pp. 121-157, 286, 287; *Halsbury's Laws of England*, 2nd ed., vol. 1, p. 464, par. 782; *Law Quarterly Review*, vol 18, pp. 495, 551; *Report* on the *Territory of New Guinea*, p. 15; *Clive Parry* on the *British Nationality*; *The Instrument of Surrender*, (1951) cl. 6; and *Oppenheim* on *International Law*, 5th ed. (1937), vol. 1, p. 202.

J. D. Holmes Q.C. (with him Dr. *F. Louat*), for the defendants, referred to, *inter alia*:—*American Insurance Co.* v. 356 *Bales of Cotton* (10); *Mainka* v. *Custodian of Expropriated Property* (11); *Dawson* v. *The Commonwealth* (12); *R.* v. *Ketter* (13); *Jolley* v. *Mainka* (14); *Ffrost* v. *Stevenson* (15); *Hall's Treatise* on *International Law*, 8th ed. (1924), pp. 553, 555; *Pitt Cobbett's Leading Cases*

(1) (1609) 7 Co. Rep. 1, at p. 2a [77 E.R. 377, at p. 379].
(2) (1886) 17 Q.B.D. 54.
(3) (1943) A.C. 203, at p. 220.
(4) (1670) Vaughan 274, at p. 281 [124 E.R. 1072, at p. 1075].
(5) (1774) 1 Cowp. 204, at pp. 207, 208 [98 E.R. 1045, at p. 1047].
(6) (1933) 49 C.L.R. 242, at pp. 248, 258, 278.
(7) (1879) 5 P.D. 94, at p. 96.
(8) (1905) 2 K.B. 391, at p. 405.
(9) (1940) 1 K.B. 787.
(10) (1828) 1 Pet. 511, at p. 542 [7 Law. Ed. 242, at p. 255].
(11) (1924) 34 C.L.R. 297, at p. 301.
(12) (1946) 73 C.L.R. 157.
(13) (1940) 1 K.B., at pp. 788, 790, 791.
(14) (1933) 49 C.L.R., at pp. 249, 256, 278.
(15) (1937) 58 C.L.R. 528, at pp. 547, 549, 553, 563, 566-568, 580, 612.

and Opinions on International Law, 4th ed. (1924), p. 362 ; *Law Quarterly Review* (1941), pp. 33, 34, 37 ; *Treaty of Versailles*, art. 119 ; *New Guinea Act* 1920-1935, preambles and recitals ; and *Papua and New Guinea Act* 1949-1950, recitals.

C. A. Hardwick Q.C., in reply, referred to *Ffrost* v. *Stevenson* (1) and the *Law Quarterly Review*, vol. 33, pp. 266, 270, 363, 364, 369.

Cur. adv. vult.

June 6.

The following written judgment was delivered by :—

FULLAGAR J. This is an action brought against the Commonwealth of Australia, the Honourable Harold Edward Holt (who is the Minister of State administering the *War-time Refugees Removal Act* 1949) and Bertie Clyde Wall (who is an officer of the Minister's Department). By his statement of claim as amended the plaintiff claims an injunction to restrain a threatened trespass to the person, alleging that the defendants threaten and intend to cause him to be deported from Australia to New Guinea. The defendants in effect admit the intention and the threat to cause the plaintiff to be deported, but rely for justification on the *War-time Refugees Removal Act* and an order made by the Minister thereunder.

Section 4 (1) of the *War-time Refugees Removal Act* provides, so far as material, that the " Act shall apply to every person—(*a*) who entered Australia during the period of hostilities and is an alien ". The Act is also made to apply to certain other classes of persons, and certain classes of persons are expressly excluded from it, but it was mutually admitted that the plaintiff was not within any of the other classes included or within any of the classes expressly excluded. Section 4 (2) provides that the Minister may, by writing under his hand, certify that a person named in the certificate is a person of one of the classes specified in sub-s. (1), and any such certificate is to be prima-facie evidence of the fact so certified. Section 5 provides that the Minister may, at any time within twelve months of the commencement of the Act, make an order for the deportation of any person to whom the Act applies, and that that person shall be deported in accordance with the Act.

The Act commenced on 12th July 1949. On 6th May 1950 the Minister, by writing under his hand, certified that the plaintiff " is a person specified in paragraph (a) of subsection (1) of Section 4. of the War-time Refugees Removal Act 1949 ". On the same day

(1) (1937) 58 C.L.R., at pp. 548, 555, 556.

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he signed an order that the plaintiff be deported from Australia. The meaning of the Minister's certificate is that the plaintiff entered Australia during the period of hostilities and was, on the date on which the Minister signed the certificate, an alien. It was admitted that the plaintiff " entered Australia during the period of hostilities ", but it was denied that he was, on the date of the certificate or at any other material date, an alien within the meaning of the Act.

The Act contains no definition of the word " alien ". Throughout the argument before me it was assumed that the word means a a person who is not a British subject, and I think that the question in the present case is whether the plaintiff is or is not a British subject. Actually, however, the national status of persons in Australia was, at the date of the commencement of the *War-time Refugees Removal Act*, governed by the *Nationality and Citizenship Act* 1948 of the Commonwealth, which came into force by proclamation on 26th January 1949. The terms of this Act follow closely those of the *British Nationality Act* 1948 (Imp.) (11 & 12 Geo. 6, c. 56), which came into force on 1st January 1949. The *Nationality and Citizenship Act* 1948 defines the word " alien " as meaning " a person who is not a British subject, an Irish citizen or a protected person ". The plaintiff is not an Irish citizen or a protected person within the meaning of the Act, but he does claim to be a British subject. Section 7 of the Act provides that the status of a British subject is to depend upon Australian citizenship or citizenship of one of certain other countries. The position of persons who were British subjects immediately before the coming into operation of the Act is dealt with by ss. 25 and 26. Under the provisions of s. 25, if the plaintiff was a British subject immediately before the coming into operation of the Act, he became, on the coming into operation of the Act, an Australian citizen, since he fulfils two of the four alternative conditions specified. Every Australian citizen is a British subject. The question, therefore, is whether, immediately before the coming into operation of the *Nationality and Citizenship Act*, the plaintiff was a British subject. That question must be determined by reference to the *Nationality Act* 1920-1946 (Cth.), which was repealed by the *Nationality and Citizenship Act* and the *Statute Law Revision Act* 1950. Since the plaintiff claims to be a British subject by reason of the place of his birth, it is s. 6 (1) (*a*) of the *Nationality Act* that is material. That provides that " The following persons shall be deemed to be natural-born British subjects, namely :—(*a*) Any person born within His Majesty's dominions and

allegiance ". The wording is identical with that of s. 1 (1) (*a*) of the *British Nationality and Status of Aliens Act* 1914 (Imp.) (4 & 5 Geo. 5, c. 17), which governed the position in Australia before the passing of the Commonwealth Act of 1920, and which was repealed by the *British Nationality Act* 1948. The question which emerges for decision in this case is thus seen to be whether the plaintiff is a person who was " born within His Majesty's dominions and allegiance ".

The plaintiff was born on 15th January 1916 at what is now Madang in the Territory of New Guinea. His parents were Chinese. Before 1914 Madang was known as Friedrichwilhelmshafen, and the Territory (then generally known as German New Guinea) was part of the German Empire. The centre of administration for German New Guinea and a number of other German possessions in the Western Pacific was at Rabaul on the island of New Britain (Neu Pommern). On 6th August 1914, two days after Great Britain had declared war on Germany, the Secretary of State for the Dominions despatched a telegram to the Governor-General of Australia, part of which read as follows:—" If your Ministers desire and feel themselves able to seize German wireless stations at New Guinea . . . we should feel that this was a great and urgent Imperial service. You will realize, however, that any territory now occupied must at conclusion of war be at the disposal of Imperial Government for purposes of an ultimate settlement ". In September, 1914, an Australian naval and military force proceeded to New Britain, and, after some opposition, occupied Rabaul. On 12th September, Colonel Holmes, the officer commanding the forces, issued a proclamation on behalf of His Majesty which recited that the island of New Britain had been occupied by the forces under his command, and that the authority of the German Government had ceased to exist therein. The proclamation then declared that " From and after the date of these presents the Island of New Britain and its dependencies are held by me in military occupation in the name of His Majesty the King ". Certain orders and instructions followed as to the conditions which were to prevail during the occupation. On 17th September the German Governor formally surrendered to Colonel Holmes, and Terms of Capitulation were signed. This instrument recited that the Governor had no authority to surrender any portion of the German possessions under his administration, but, in view of the occupation by an overwhelming force, was prepared to give an assurance that all military resistance to such occupation should cease forthwith. It is necessary to mention only two of the twelve terms of

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the capitulation. Clause 8 declared that the administration of the colony during the military occupation would be conducted by the British Military Commander, and cl. 9 provided that " during the said military occupation the local laws and customs shall remain in force so far as is consistent with the military situation ". On 22nd September the mainland of German New Guinea was occupied without opposition.

From September 1914 until 19th May 1921, which was the date of commencement of the *New Guinea Act* 1920 (Cth.) the German possessions in the Western Pacific continued under what was known as the British Military Administration. Ordinances on various subjects were from time to time promulgated by the Officer Commanding the Forces. These had no statutory or other formal authority at the time of their making, but were validated by s. 6 of the *Indemnity Act* 1920 (Imp.) (10 & 11 Geo. 5 c. 48). The plaintiff, having been born in German New Guinea during the period of British Military occupation and administration, says that he is a person who was " born within His Majesty's dominions and allegiance ".

It is plain, in my opinion, that no such contention can be maintained. There is a well-settled distinction between annexation or cession or subjugation on the one hand and mere military conquest and occupation on the other hand. It is not necessary, for present purposes, to examine the correct use of the terms " cession ", " annexation " and " subjugation ". It is enough to say that each is used to describe a formal and permanent acquisition, or a means of formal and permanent acquisition, of territory by one belligerent power from another. Such a permanent acquisition may, and often does, affect the nationality of all or some of the inhabitants of the territory acquired, though it does not necessarily do so, and a variety of questions may arise. For instance, if in this case there had been in 1914 a permanent acquisition by His Majesty of German New Guinea, the question whether the plaintiff's parents became British subjects would or might have depended partly on whether they were German nationals before the acquisition. But, while permanent acquisition by cession or otherwise may affect nationality, mere military conquest and occupation of particular enemy territory in the course of a war never does. On such occupation no change takes place in the nationality of any of the inhabitants, and persons born during the occupation do not *ipso facto* become nationals of the occupying country. The reason, of course, is that military conquest and occupation without more does not involve a change of sovereignty :

territory conquered and occupied by British forces during the course of a war does not automatically become part of the King's dominions. *Mervyn Jones* (*British Nationality Law and Practice*, p. 40) says :— " According to the established rule of international law conquest in itself does not transfer sovereignty over occupied territory. It is necessary that military occupation should be followed by annexation before sovereignty can pass ". So *Oppenheim* on *International Law*, 5th ed. (1937), vol. 1, p. 449, says :—" Conquered enemy territory, although actually in possession and under the sway of the conqueror, remains legally under the sovereignty of the enemy until through annexation it comes under the sovereignty of the conqueror ". The learned author has just previously pointed out that the word " conquest " is sometimes used in a misleading sense in this connection.

Mr. *Hardwick*, for the plaintiff, cited *Calvin's Case* (1), where it is said " Whosoever is born within the King's power or protection is no alien ". The plaintiff, he said, was born within the King's power and protection. *Calvin's Case* (2) has been said to consist mainly of *obiter dicta*, and many of these have been much discussed. The passage cited was not intended with reference to any such case as the present. Mr. *Hardwick* also relied on the well-known case of *Campbell* v. *Hall* (3), when Lord *Mansfield* said :—" A country conquered by the British arms becomes a dominion of the King in right of his Crown . . . . The conquered inhabitants, once received under the King's protection, become subjects, and are to be universally considered in that light, not as enemies or aliens ". This passage should, I think, be read in the light of the fact that the island of Grenada had, after conquest, been ceded by treaty to Great Britain, and everything material in the case took place after the cession. The only other authority on which Mr. *Hardwick* relied and to which I think I need refer is *Craw* v. *Ramsay* (4), where the learned Chief Justice is reported by his son as saying :—" If the King of England enter with his Army hostilly the territories of another prince, and any be born within the places possessed by the King's Army, and consequently within his protection, such person is a subject born to the King of England, if from parents subjects, and not hostile. . . . Those under the King's power, as King of England, in another prince his dominions, are under his laws ". This passage is of very dubious import. It occurs in the course of an enumeration by Sir *John Vaughan* of

(1) (1609) 7 Co. Rep. 1, at p. 25a [77 E.R. 377, at p. 407].
(2) (1609) 7 Co. Rep. 1 [77 E.R. 377].
(3) (1774) 1 Cowp. 204, at p. 208 [98 E.R. 1045, at p. 1047].
(4) (1670) Vaughan 274, at pp. 281, 282 [124 E.R. 1072, at p. 1075].

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"four ways in which men born out of England may inherit in England". It seems to have had no real bearing on the problem then in hand. The case of *West Rand Central Gold Mining Co. Ltd.* v. *The King* (1) and the *Sovfracht (V/O)* v. *Van Udens Scheepvaart en Agentuur Maatschappij (N. V. Gebr.)* (2) appear to me to deal with questions remote from any that arise in the present case.

The view that enemy territory occupied by His Majesty's forces in time of war does not, by the fact of occupation, come within His Majesty's sovereignty or become part of his dominions, seems to be quite beyond doubt. One or two additional authorities may be cited. In *American Insurance Co.* v. 356 *Bales of Cotton* (3) (to which Mr. *Holmes* referred me) *Marshall* C.J. said:—"The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed". It could certainly not be suggested that in September 1914 Germany was entirely subdued! And, when the treaty of peace was made, German New Guinea was not, as we shall see, ceded to Great Britain. The legal problems which may arise out of belligerent occupation are many and various, but in 1941 we find *McNair* (*Law Quarterly Review*, vol. 57, at pp. 37, 39) regarding the following two propositions as commanding general agreement among British textwriters:—"(a) That birth in British territory under enemy occupation confers British nationality *iure soli*, unless the father is an alien enemy", and "(b) That birth in non-British territory, whether enemy, allied or neutral, under British occupation, would not confer British nationality *iure soli*". A suggested theory of "temporary sovereignty" seems long since to have been rejected. Writing in 1917 *Oppenheim* (*Law Quarterly Review*, vol. 33, at p. 363 (n.)) reproached himself for having failed to point out "that the obedience owed to the occupant is imposed upon the inhabitants by his martial law only, and neither by international nor by their own municipal law". A little later (at p. 364) he says:—"As regards the *kind of authority* an occupant possesses, Hall and others correctly describe it as mere military authority. . . . There is not an atom of sovereignty in the authority of the occupant, since it is now generally recognized that the sovereignty

(1) (1905) 2 K.B. 391.
(2) (1943) A.C. 203.
(3) (1828) 1 Pet. at p. 542 [7 Law. Ed. at p. 255].