COPY

IN THE SUPREME COURT)
OF THE TERRITORY OF)
PAPUA AND NEW GUINEA)

1959 No. W.S.52

BETWEEN R.F. BUNTING Plaintiff

V.

AND D.M. CLELAND & ORS. Defendants

1959

Jun 26,29,30 and
Jul 1.

PT MORESBY.

REASONS FOR JUDGMENT

Mann C.J.

Mr. Mahoney's first main argument on behalf of the Plaintiff was that the Papua and New Guinea 1949-1957 is invalid in whole or at least to the extent to which it purports to set up a Legislative Council for the Territories of Papua and New Guinea.

It was contended that the invalidity arises:

(1) Because on the proper construction of the Trusteeship Agreement and the relevant parts of the United Nations Charter the powers thereby conferred are of such a specific and limited character that they do not authorize the establishment of a complete system of government such as is found in the Act.

(2) Because the power to set up any government services is subject to the requirement that the power should be exercised as if the Territory were an integral part of Australia and this involves limiting the exercise of the power to the Federal powers of the Commonwealth Parliament which are insufficient to support a system of government such as is to be found in the Act.

(3) Because the legislation implements a Treaty and is a matter with respect to External Affairs and the Parliament being strictly confined inthe exercise of this power to "a faithful pursuit of the purposes" has no power to legislate for any matters which are not expressed in the Trusteeship Agreement.

(4) Because the Commonwealth being bound to exercise a degree of control and administration in the Territory must itself carry out these obligations and is not authorized to hand over responsibility to Papua.

Mr. Mahoney was only concerned to attack those provisions of the Papua and New Guinea Act which established a Legislative Council and he was prepared to concede for the purposes of this case that those parts of the Act which provide for the appointment of an Administrator and Executive Council and Public Service and for the establishment of a Judicial System are valid and within the contemplation of the Trusteeship Agreement. If however the invalidity were to extend to those parts of the Act which constitute the present Court, the Court would have to decline jurisdiction on that ground, nor would any purpose be served by endeavouring to juggle with repealed clauses and go back to earlier legislation which might have been valid since this would be a New Guinea

case and the New Guinea Court could not sit in Port Moresby to determine it nor were any of the present Judges members of that Court.

As to the construction of the Trusteeship Agreement, I agree that regard must be had to the provisions of the Mandate but mainly for the purpose of applying by analogy some of the decisions of the High Court of Australia under the New Guinea Act 1920-1937. Some assistance may be derived from a comparison of the provisions of the two instruments particularly where a change in language is involved which may give some clue as to the meaning of the Trusteeship Agreement which according to its terms is to operate in substitution for the Mandate of the League of Nations. There is difficulty in treating the Trusteeship Agreement strictly as amounting to a novation and a substitution for the League of Nations Covenant owing to international changes which have taken place over the intervening years but this Court must accept as part of the municipal law the fact that the Trusteeship Agreement does amount to a substitution. Not much point therefore arises from detectable changes in language in the second Instrument but the fact of change should be noted.

At this point it may be worthwhile observing that the provisions of the Papua and New Guinea Act set out in Part IX are taken, not from the Trusteeship Agreement but from the express terms of the Mandate. The point emerges that upon the submission of Mr. Mason that the powers of this instrument should be construed very broadly, there is no difficulty in supporting as valid the retention in the Papua and New Guinea Act today of a prohibition against slave trade, but if Mr. Mahoney's very narrow and constricted method of construction were right, I think that it would follow as a consequence, that the repeal of the former provisions implied in the latter instrument a stipulation that the slave trade and other matters were not to be prohibited any longer, which is an intention which one would hesitate to impute to the framers of these instruments.

Coming to the express provisions of the Trusteeship Agreement, it should be noted that the Government of Australia is designated as the responsible party and is defined as the "Administering Authority" in Article 2. By "Government" I take it that the Agreement refers to the Commonwealth authorities established under the Constitution so that anything which the "Government" is required to perform may be performed on behalf of the Commonwealth by an appropriate Commonwealth instrumentality having constitutional capacity to do so. Under Articles 2 and 3 of the Trusteeship Agreement the Commonwealth is given sole power to "administer" the Territory of New Guinea. The meaning to be attributed to the word "administer" in the context of the Trusteeship Agreement provides the key to the extent of the powers conferred. The word was also used in a somewhat similar context in Article 2 of the Mandate the first part of which reads "The Mandatory shall have full power of administration and legislation over the Territory subject to the present Mandate as an integral portion of the Commonwealth of Australia and may apply the laws of the Commonwealth of Australia to the Territory subject to such local modifications as circumstances may require." The word is also used in the recitals to the Mandate where His Britannic Majesty is referred to as "exercising" the Mandate "to administer" New Guinea. In the Trusteeship Agreement the phrases used are:-

> "designated as the sole authority which will exercise the administration of the Territory" (Article 2);
>
> "The Administering Authority undertakes to administer the Territory in accordance with the provisions of the Charter and in such a manner as to achieve in the Territory the basic objectives of the international trusteeship system, which are set forth in Article 76 of the Charter" (Article 3);
>
> "The Administering Authority will be responsible for the peace, order, good government and defence of the Territory and for this purpose will have the same powers of legislation, administration and jurisdiction in and over the Territory as if it were an integral part of Australia, and will be entitled to apply to the Territory, subject to such modifications as it deems desirable,

such laws of the Commonwealth of Australia as it deems appropriate to the needs and conditions of the Territory. (Article 4).

In the course of argument the context was tested by treating "administration" as extending to no more than the executive functions of government, and by interchanging the words "administration" and "government" wherever they appeared. These processes gave impressions favourable to one side or the other but inevitably produced consequences which could hardly have been intended.

For example in Article 2 of the Mandate the word "administration" seems to mean less than "government" for otherwise the words "and legislation" would be redundant and yet if this phrase as a whole is intended to omit any power to exercise judicial functions in the Territory the objects of the Mandate could never be attained. If something less than "government" is meant by "administration" in Article 2 of the Mandate then the omission of the word "legislation" in the Trusteeship Agreement wherever power of administration is conferred (except in Article 4) might indicate an intention in the Trusteeship Agreement to exclude all powers of legislation but this is inconsistent with the express terms of Article 4.

The word "administer" appears therefore not to be used as a term of art. It appears to have been chosen as a word of wide and perhaps vague import as a matter of international practice to fit various systems of government which may be encountered. Indeed I think that the true meaning of the Mandate and of the Trusteeship Agreement can most clearly be ascertained if the word "administer" is taken as having no direct reference at all to any precise internal process of government, but as being used to cover all the various powers and duties which a Mandatory or Trustee may need to exercise in order to achieve the objects of the Mandate or Trust. Thus an executor, curator or trustee is commonly spoken of as "administering" the estate or property under his care, and the use of the word imports in general terms the control and direction as well as decision of all matters which arise in relation to the estate. Perhaps the nearest synonym in the context would be "take charge of" or "take control".

Applying such a meaning to the word, it becomes clear under Article 2 that the Commonwealth is to be the sole controlling authority in the Territory subject of course to express obligations arising elsewhere in the Trusteeship Agreement. In Article 4 the Commonwealth is responsible for "government" in the widest terms in the Territory and it is agreed that the Commonwealth is to have the same powers of legislation, administration and jurisdiction as if the Territory were an integral part of Australia. Even in Article 8 the references to "administrative and other services" appears to me to be no less satisfactory if it is simply construed as meaning "services pertaining to the administering authority and other services."

On the question of construction of these Articles I gained no impression at any point that narrowness of scope was intended but rather the general sense of the document which conveyed itself to me was that the Commonwealth was to be in sole charge of the Territory with the widest powers to govern. No narrower interpretation of the Trusteeship Agreement which has been submitted in argument would leave the Commonwealth with sufficient power and discretion to achieve in practice anything like the stated objectives of the Trusteeship Agreement which call for consistent care and control throughout the long period of development of the inhabitants of the Territory.

I think therefore that upon the proper construction of the Trusteeship Agreement the power which is intended to be conferred is in the widest terms and is intended to apply to all kinds of government activities needed to exercise sole control of the Territory and to govern the people not only at their present stage of development but through successive stages of development until a much more advanced state of society is reached. It is therefore not merely a power to

govern but also a power to create a new and much more highly advanced society and to exercise judgment and discretion as to the means to be employed in attaining all the objectives and ideals of the Trusteeship Agreement. I hold that the power is certainly no less than the power conferred under the former Mandate and that it includes the power to set up for the Territory constitutional government according to the views of the Commonwealth as to what instrumentalities of government are from time to time suitable to the growing needs of the inhabitants of the Territory.

Mr. Mahoney laid great emphasis on the provision in Article 4 that the powers should be exercised as if the Territory were an integral part of Australia, and sought to infer that this involves treating the Territory as if it were an Australian State so that only Federal powers could be exercised. So far as this is a matter of construction of the Trusteeship Agreement I cannot accept that view. This argument is based upon the false assumption that if New Guinea were made part of Australia, geographically or otherwise, it would happen to fall within some existing State boundaries. Treating New Guinea as part of Australia does not make it any particular part, nor does it mean that it would assume the particular physical, legal or climatic characteristics of any particular zone of Australia.

I think that the phrase is intended to extend rather than limit the scope of the powers, so as to overcome any difficulty that may be thought to arise from the extra-territorial operation of laws or any difficulties which might be thought to arise, especially in International law, over the application of Australian laws to people and places who might be regarded as foreign. Thus the scope which I would attach to the phrase is that the Commonwealth may exercise her powers just as if New Guinea were geographically part of Australia or alternatively just as if New Guinea were a part of whatever the legal concept of Australia as a whole might be. It avoids any "continental shelf" kind of argument. Read simply as a provision designed to remove doubts of this kind, the clause is innocent enough. I cannot read it as being intended to create any subtle constitutional difficulties to hamper the exercise of the powers conferred in the Agreement.

A good deal has been said by writers on International law and it appears from the observations of the Chief Justice in Ffrost v. Stevenson 58 C.L.R. 528 that in the original draft of the League of Nations Mandate the expression was as it now appears but that at the suggestion of a Japanese delegate it was altered to "as an integral part. This altered phrase was generally adopted but in the case of the Australian Trusteeship Agreement in relation to New Guinea the phrase was changed back again to "as if it were". This has caused some speculation but I think that the most likely explanation is that it was re-inserted into the Trusteeship Agreement in its original form in accordance with the decision of the High Court in Ffrost v. Stevenson to the effect that the Territory was not a place within His Majesty's Dominions and therefore was not part of Australia. This removes any suggested significance in the change and negatives the view that there is any inference to be drawn from the Trusteeship Agreement itself that the status of the Territory is to be affected merely by the substitution of the words "as if it were" for the word "as".

There was some discussion in argument as to the effect of a deeming clause which may be taken as importing a negative but I do not think that this is the correct approach. If for the purpose of some Act a dog is to be deemed a horse, which it clearly is not, the fact that it is not is not due to the deeming clause but to the physical character of the thing in question. On the other hand a clause that every passenger disembarking from a British ship shall be deemed to be a British subject makes no difference to anybody's actual nationality and merely relieves the responsible authority from making any enquiry on the subject by rendering the true fact irrelevant whichever way it may be. I think that the present phrase "as if" is in the same character and makes no difference to what was decided in Ffrost v. Stevenson. The earlier cases decided in the High Court as to the status of the Territory of New Guinea under the League of Nations Mandate are fully applicable to the Territory under the Trusteeship Agreement.

So far as the question of limiting the Commonwealth Parliament to the exercise of constitutional powers of a Federal nature depends upon the intention of the Trusteeship Agreement I think that there is to be found no support for this view at all. In the absence of some positive indication to the contrary I would expect that an International Convention would not be concerned with the internal constitutional processes available for the contracting powers to carry out the Treaty. The Commonwealth as an international entity has agreed to do certain things and it is its own problem to work out how those things may be done according to its Constitution. Moreover I do not see how the Commonwealth could by Treaty bind itself to act otherwise than in accordance with its Constitution which is binding on every branch of the Government, nor could any branch of the Government by contracting on its own behalf with some Foreign power acquire for itself powers which cannot be exercised by it under the provisions of the Constitution. The question of whether the Federal Parliament can exercise more than purely Federal powers in relation to the Territory is therefore a question to be determined according to Australian Commonwealth Constitutional law and since a number of difficulties in relation to this aspect of the matter arose during the course of argument I will endeavour to deal with this aspect separately at a later stage.

As part of his argument Mr. Mahoney relied on R. v. Burgess ex parte Henry 55 C.L.R.608, to establish that under the Treaty power the Commonwealth Parliament cannot legislate beyond the scope of the Treaty and sought to show that the Trusteeship Agreement in the present case was of narrow and restricted import corresponding with the precisely limited provisions of the Convention in R. v. Burgess. As a matter of construction I think that there is no parallel to be drawn between the two Conventions in question and it is clear from Burgess' case that the power with respect to external affairs if applicable in the present case is co-extensive with the requirements of the Treaty whatever they may be. Thus R. v. Burgess does not appear to me to be of any assistance to the Plaintiff.

It was also contended for the Plaintiff that the passing of the Papua and New Guinea Act 1949-1957 operated as an abdication of the Commonwealth's obligations under the Trusteeship Agreement and that having regard to those obligations the Commonwealth cannot have any implied power to take such a step.

The argument put forward on behalf of the Plaintiff as to abdication contains the seeds of its own destruction and Mr. Mahoney found some difficulty in deciding precisely to what extent he was relying upon an unauthorized delegation of power and to what extent the objection to delegation arose only so far as it might constitute in practice an abdication of the responsibilities imposed on the Commonwealth. That the objection cannot be based on mere delegation is plain, since modern constitutional practice is not in any way rejected and it can hardly be supposed that the Trusteeship Agreement contemplates or could properly or effectively require that the Executive branch of the government should be bound to discharge the three functions of government mentioned in Article 4; nor is it easy to see how the Commonwealth could afford the inhabitants of the Territory the growing responsibilities envisaged by the Agreement without delegation to and gradual development of proper instrumentalities. Moreover the argument is inconsistent with the submissions put forward to justify an interference by this Court into the deliberations of the Legislative Council, which argument emphasized the subordinate nature of the Legislature and the extensive control exercised by the Commonwealth over its legislative powers.

Such control is retained by the continued power of the Commonwealth Parliament to pass over-riding legislation, and is also exercised through provisions for the witholding of assent, and through the Administrator, who presides over the Legislative Council, and is bound under Section 15 to act according to any instructions which he may receive from the Governor-General, and through direct control over the votes of the official members of the Council who constitute a majority and the tabling of Ordinances in Parliament.

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I am of the opinion therefore that the establishment of the Legislative Council in the Territory in no way amounts to an abdication of the Commonwealth's responsibilities. I think that the Commonwealth is bound under the Trusteeship Agreement to retain control over any Government instrumentalities that operate on behalf of the Commonwealth in the Territory, and I think that this purpose is achieved in the Papua and New Guinea Act. At the same time the Legislative Council is designed to achieve its purpose by affording representation of the various points of view which are comprised in the population of the Territory, and the system as a whole lends itself to progressive development from time to time, as circumstances warrant it, of the processes of constitutional legislation. This pattern of control is consistent in the other branches of Government in the Territory since the Administrator is subject to control by the Governor-General, and the decisions of all Courts in the Territory are subject to final appeal to the High Court, the authority in which the Judicial power of the Commonwealth is vested.

I think that until the Territory has reached a stage at which the Trusteeship Agreement comes to an end it would be an abdication of a major part of the Commonwealth's responsibilities if the Commonwealth allowed itself to lose control of the legislative machinery of the Territory. It must not only retain this control but it must also retain the power by legislation to recall any delegation of government functions to any Territorial institutions.

I hold therefore that the Commonwealth is empowered to enact through its Parliament, a constitution for the Territory which includes a suitably controlled Legislative Council. I think that the manner of achieving the specified objects, the choice of instrumentalities suitable for the purpose from time to time, and generally the means of attaining those objects are necessarily left to the judgment and discretion of the Administering Authority according to circumstances which may exist from time to time, and according to the internal requirements of its own Constitution.

It was also contended that even assuming that the Commonwealth had power to set up a controlled legislature such as was done under the Mandate by the New Guinea Act 1920-1932, the passage of the Papua and New Guinea Act 1949-1957 involves abdication by the Commonwealth in handing over legislative powers in respect of the Territory of New Guinea to the Territory of Papua. More accurately it should be put that the consolidation of the legislative functions of these two Territories leaves the control of legislation applicable to New Guinea in hands other than those of either the inhabitants of New Guinea or the Commonwealth itself. I think that this argument amounts to a fallacy for it being the direct responsibility of the Commonwealth to retain legislative control it cannot be an objection that control is in the hands of somebody other than the inhabitants of New Guinea. When the time comes for the conclusion of the Trusteeship it might be wrong for the Commonwealth to hand over irrevocable legislative powers in respect of New Guinea to persons who are not the inhabitants of New Guinea, without some further authorisation, which if it is to come from the inhabitants themselves, can only be given when they have reached a stage of development in which they can be fairly expected in their own interests to be bound by any choice which they may make; but this is not the present position, and for the reasons previously indicated I think that control of legislative functions in relation to the two Territories is effectively retained by the Commonwealth and has not been handed over either to Papua or to any combination of Papua and New Guinea.

Mr. Mason relies on the express provisions of Article 5 as authorising the administrative union or federation of the two Territories. Mr. Mahoney however contended upon his narrower construction of the word "administrative" that on no view can this express provision justify a legislative union. I think it is wrong to read the words "customs, fiscal or administrative" in this Article as offering strict alternatives mutually exclusive of each other, for there is inevitably some degree of overlapping whatever meaning is attributed to the individual words.

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Also to give practical effect to such a clause the word "or" would have to be read as importing the word "and" because it would appear most unlikely in this context that the administering authority should be strictly limited to a choice of any one of the three. I think that the words "customs, fiscal or administrative" are most naturally to be read as being placed in ascending order of degree, so that each succeeding word incorporates the scope of the word or words preceding it. A fiscal union or federation would therefore include a customs union or federation, and an administrative union would include both, but it is left entirely to the discretion of the Administering Authority to what extent all or any of the matters falling within these group-headings should be brought within a union or federation and on what terms.

Consistently with the meaning that I have given to the word "administer" in the Trusteeship Agreement, I think that the word "administrative" used in Clause 5 should be taken as meaning simply that the Commonwealth may "administer" any of its dependent Territories together with New Guinea, if it regards this as beneficial to New Guinea, in the same way as an executor or curator might if so empowered "administer" two estates together to the advantage of each estate, in the exercise of his various legal powers. Thus the Commonwealth controlling one Territory may by the same acts control both. Article 5 only applies while both Territories are dependent.

It is clear that the express agreement contained in Article 5 was put into the Trusteeship Agreement in the light of the experience which the Commonwealth had already gained during wartime in the joint administration of the two Territories. It is true that this wartime administration was of an executive character, but this was established by legislative authority under the Defence power, and affords no indication of the type of government that would be employed in peacetime. By reason of its wartime experience, however, the Commonwealth is in a very good position to determine what benefits flow to the inhabitants of New Guinea from a merger of government and I see no justification on the score of convenience for reading the terms of the express power, so as to exclude a controlled joint legislature if the Commonwealth should think that better training and development of the inhabitants of New Guinea can be attained and a more efficient dispatch of business achieved in the light of the deliberations of official and non-official members representing various parts of and various interests in these two Territories, the problems and objectives of each of which are so similar.

There is another aspect of Article 4 which was not canvassed in argument, and that is that the Commonwealth has express power to apply to the Territory, laws of the Commonwealth. This may mean any of its internal Federal laws, or may include any law, such as a law providing a system of government for other Territories. I can see no objection to such a law being extended to operate also in New Guinea and for the laws of New Guinea to be passed by any controlled Legislative Council, if the Commonwealth thought that in the circumstances this would be appropriate, which of course I do not suggest is the case. It has been common practice for Commonwealth laws and the laws of the State of Queensland and of various Territories to be applied or adopted in relation to the Territory of New Guinea and for powers and discretions to be conferred by this means, and subject to the views which the Parliament may form as to the suitability of the legislation in question, I can see no objection on the score of validity to such a practice.

If I am wrong as to the construction of the Trusteeship Agreement and if on its true construction it only extends to administrative acts in the sense of acts appropriate to be performed by the Executive Branch of the Commonwealth Government it still does not necessarily follow that the present Act is invalid since it may be supported on either of two grounds.

The first is that Parliament has power under the Constitution to legislate in respect of matters vested in the Government (Section 51)xxxix. The fact that the exercise of Executive powers is covered by Commonwealth Legislation does not invalidate them. On the assumption that the Act can only deal with executive matters in a union of Territories, the validity of the provisions dealing with the Legislative Council might be supported on the ground that the Legislative Council as a subordinate body exercising powers delegated by legislation is part of the Administrative Government of the Territory, or more remotely, part of the Executive Government of

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the Commonwealth, operating in the Territory. That it is within the competence of the Commonwealth Parliament to delegate Statutory powers to executive bodies and even for incidental purposes to judicial bodies has long been recognized and this recognition is again apparent in Attorney-General v. The Queen ex parte Boilermakers' Society 94 C.L.R.290; 95 C.L.R.529. On this view the powers of the Legislative Council would have to be read down to whatever could be done by the Executive or the Legislature of the Commonwealth in performance of the Treaty.

The second ground upon which the validity of the Legislative Council may be sustained notwithstanding any apparent restriction in the Trusteeship Agreement represents the high-water mark of Mr. Mason's argument in which he contended that so far as our municipal law is concerned once it is accepted that Section 122 of the Commonwealth Constitution is the power under which the Commonwealth Parliament may legislate with respect to New Guinea it follows that any legislation of the Commonwealth Parliament dealing with New Guinea is constitutionally valid and free from any restriction. The difficulty about this argument so far as this Court is concerned is that it does not appear to me to be possible at the present time to accept without qualification the proposition that Section 122 is the sole source of power. I will deal further with this point at a later stage.

The foregoing conclusions based upon the construction of the Trusteeship Agreement are supported by decisions of the High Court as they stand at the present time. The High Court has considered the position of New Guinea under the League of Nations Mandate in Mainka v. Custodian of Expropriated Property 34 C.L.R.297; Jolley v. Mainka 49 C.L.R.242 and Ffrost v. Stevenson 58 C.L.R.528. I think that these cases are equally applicable to New Guinea under the Trusteeship Agreement.

The substantial weight of the judgments in these cases appears to me to establish that the Commonwealth Parliament "is omnipotent in New Guinea" and has constitutional power to legislate in respect of New Guinea, although all the Justices did not agree that Section 122 of the Constitution was applicable, and Evatt J. expressed very strongly, and later adhered to, the view that the legislation was to be justified under the External Affairs power conferred by Section 51xxix and not under Section 122.

The views expressed by Evatt J. in Jolley v. Mainka (at page 278) appeared to me to proceed upon the assumption of fact that the Commonwealth first became interested in New Guinea as a result of her own military operations and that thereafter a Mandate being conferred directly upon the Commonwealth as an internationally recognized entity there was no stage at which His Majesty placed the Territory "under the control" of the Commonwealth and no stage at which the Commonwealth "otherwise acquired" any relevant interest in the Territory. This assumption of fact appears to be derived from the first recital to the New Guinea Act 1920 which appears to have been inserted for the reason disclosed in the last recital to support the independent operation of Section 4 of the Act in case the Mandate had not been issued when the Act came into effect.

In the light of the remarks of the learned Chief Justice of the High Court in Ffrost v. Stevenson 58 C.L.R. at page 549, I set out some additional information which was gleaned from Government Gazettes and proclamations from the old Government Printing Office at Rabaul which have recently come into the possession of the Territory Museum, since some of these facts do not appear to have been placed before the High Court in the cases above referred to, and might have made some difference to the views expressed by Evatt J.

On the 12th September 1914 at Rabaul, a proclamation was made by Colonel William Holmes, Brigadier Commanding His Majesty's Naval and Military Expeditionary Force, on the occasion of the occupation by the forces under his command of "the former German Territory of The Island of New Britain and its Dependencies" and declaring that they were held by him in military occupation in the name of His Majesty the King. On the same day a proclamation in Pidgin-English was addressed to the native inhabitants of the late German possessions in the Pacific which after giving certain guarantees to the native population declared (in effect) that the King had taken the place formerly occupied by the Kaiser, ("No more 'um Kaiser God Save 'um King"). The fact that by "British" was not intended

"Australian" is further indicated by the folbwing extract from the same proclamation:-

> "You look him new feller flag, you savvy him? He belonga British (English); he more better than other feller;"

The word "British" occurs in only two places in this proclamation and in each case it is followed by the qualifying word "English" in brackets. On the 17th September 1914 at Herbertshohe near Rabaul, New Britain, the terms of capitulation of German New Guinea were drawn up and signed by Colonel Holmes and Herr Haber, "Acting Governor of the German possessions known as Deutsch Neu Guinea" and an addendum to these terms was signed on the 27th April 1915 at Rabaul.

It appears from these transactions that although Colonel Holmes was in fact a Commander of the Australian Expeditionary Forces in the area, he hoisted the Union Jack and purported to act and set up a military administration on behalf of His Majesty King George V and not specifically on behalf of the Commonwealth as such. This Administration was described as the "British Administration" of the Colony or former colony of German New Guinea. On the 26th September 1914 the Australian Naval Board notified the Vice-Admiral commanding His Majesty's Australian Fleet that the Government had appointed Colonel Holmes as Administrator. Martial law was proclaimed throughout the Colony on the 23rd July 1915 by Lieutenant-Colonel Toll as "Acting Administrator under British Military Occupation". On the 7th August 1915 Sir Ronald Ferguson, Governor-General of the Commonwealth by Commission appointed Colonel Pethebridge to administer all the affairs of the German possessions in the Pacific enumerated in the Commission and the military affairs of the Island of Nauru. On the 9th September 1915 Colonel Pethebridge as "Administrator under British Military Occupation of the Colony of German New Guinea" issued a proclamation abolishing martial law throughout the Colony.

These incidents suggest an admixture of British and Commonwealth interests. (cf. the terms of the two proclamations published on pp.33 and 35 of Volume 1 of the Annotated Laws of New Guinea 1921-1945).

The resources available in the Territory do not enable me to pursue this inquiry further but it does seem to me to be a possible view that New Guinea was taken in the name of His Majesty by British Imperial Forces and that the officers who set up the Administration of the former German Territory did so as British Officers in the name of the King and that at a later stage the United Kingdom, in recognition of the long history of Australian interest in New Guinea going back to times before the German annexation and in view of the fact that the United Kingdom has over a similar period of time expressed its disinterest in New Guinea as a whole, allowed the Commonwealth in its own right to take charge of the Administration of the former German Colonies with the result that the Mandate when it was issued was granted to the King on behalf of the Commonwealth. It seems to me therefore that it is possible that in fact there was a stage at which Great Britain as an Imperial power was purporting to exercise sovereign rights which were handed over to the Commonwealth prior to the granting of the Mandate and that if this is so the requirements of Section 122 of the Constitution would then have been satisfied. Upon this view the subsequent acceptance by the Commonwealth of the lower status of Mandatory in respect of the same Territory would not necessarily cause Section 122 to cease to operate since the control and authority originally derived from the King would have continued subject to the new conditions imposed under the Mandate and the Trusteeship Agreement.

It appears to me however that whether the dissenting views of Mr. Justice Evatt, the views expressed by Mr. Justice Starke in Jolly v. Mainka, the views expressed by the Chief Justice in Ffrost v. Stevenson or any of the individual views expressed in the High Court since Mainka v. Custodian of Expropriated Property should ultimately be held to be correct, it still follows that there is no lack of power in the Commonwealth Parliament to enact any legislation coming within the scope of the Mandate or under the Trusteeship Agreement and that such power is sufficient to meet the argument raised in this Court in the present case. If Section 122 applies there is no problem. The real difficulty which became apparent in the course of argument is that so long as there remains an open question as to whether the true

source of Constitutional power for the Commonwealth Parliament to legislate in respect of New Guinea is to be found in Section 122 or Section 51 xxix or in some other provision of the Constitution there are consequential questions involving the validity of the legislation which may call for reconsideration of principles laid down in a number of cases previously decided in the High Court. These difficulties are adverted to in Ffrost v. Stevenson 58 C.L.R.528 by Latham C.J. (at page 556), Dixon J.(at page 566) and by Evatt J. (at pp.590-593).

Unless and until the question is solved by some further decision of the High Court, I think that the only view that this Court can take is that should it appear that the true source of constitutional power to legislate for New Guinea arises not under Section 122 but under Section 51 xxix or some other provision of the Constitution these cases would still have been decided the same way. This view requires a conclusion that if any part of Section 51 is applicable the Commonwealth Parliament is not limited to its Federal powers and is not required to observe in relation to New Guinea those portions of the Constitution which are designed to apply within the Federal system. For example the fact that the exercise of power under Section 51 is "subject to the Constitution". (Amalgamated Society of Engineers v. Adelaide Steamship Co. 28 C.L.R.129 at p.144) does not necessarily import any change in the reasons for the exclusion of territory matters from Part III of the Constitution (Porter v. R. Ex parte Yee 37 C.L.R. 432,441; R. v. Bernasconi 19 C.L.R.629,635.)

In Ffrost v. Stevenson it is made clear that New Guinea is no part of the British Dominions, no part of Australia and therefore no part of the Federal structure coming within the Australian Constitution. The Commonwealth Parliament, although it would have power to legislate under Section 51 xxix for the peace order and good government of the Commonwealth with respect to Commonwealth affairs in New Guinea, including the adoption of the Trusteeship Agreement, would not by virtue of that provision of the Constitution alone, have power to legislate for the peace order and good government of the inhabitants of New Guinea with respect to their own affairs.

The power to do this is contained in the Trusteeship Agreement, which is recognized as a part of our municipal law when the Trusteeship Agreement is adopted by Statute.

This, on the foregoing assumptions, is the only source of power, and it is conferred not upon the Commonwealth Parliament but upon the Commonwealth itself. The question of how the Commonwealth may exercise that power (apart from exercise by the Executive Government) becomes a question of the capacity of Parliament to act as the legislator on behalf of the Commonwealth to carry out the requirements of the Treaty. It is generally a less exacting task to establish capacity to enter into a class of transaction than to establish power or authority to enter into a particular one. Legislation of the kind in question is incidental to the exercise of the treaty-making power which is vested in the Government under Section 61, and capacity to legislate in respect of it is to be found in Section 51 xxix (R. v. Burgess ex parte Henry) and Section 51 xxxix. Resort to s.51 xxix does not merely extend beyond the Commonwealth domestic powers of government which the Commonwealth happens to possess under the Federal system. (R. v. Burgess).

It seems to me that there is authority for a somewhat analagous view in relation to the appellate jurisdiction of the High Court to hear appeals from Courts of the Territory, which according to the views discussed by Evatt J. in Ffrost v. Stevenson is not to be limited solely and exclusively to Section 73 of the Constitution (see pp.590,593). If this reasoning is sound the High Court could hear an appeal from a Territory Court according to Territory law notwithstanding that a similar appeal would not lie under Commonwealth Law from a Federal Court.

Upon the present state of authority therefore I conclude that there is no lack of capacity on the part of the Commonwealth Parliament in exercising on behalf of the Commonwealth the power conferred on the Commonwealth to pass legislation such as is found in the Papua and New Guinea Act 1949-1957 for the government of New Guinea.

At the same time it should be observed that because the obligations of the Commonwealth under the Trusteeship Agreement are continuing obligations it is essential that the Commonwealth should retain in its own instrumentalities power to repeal or modify any such legislation from time to time as the needs of the Territory may require and to exercise appropriate control over all the institutions of government established under the Act with power to exercise any governmental authority in New Guinea. There is nothing in the Act or in the Commonwealth Constitution which would prevent the future exercise of any such powers and I find that the Act therefore complies with all these requirements of the Trusteeship Agreement.

The second main argument advanced on behalf of the Plaintiff was to the effect that in view of the express requirement of Section 36 of the Papua and New Guinea Act that the Legislative Council shall consist of twenty-nine members, it cannot validly function or at any rate pass legislation when the membership of the Council stands at less than twenty-nine.

I cannot attach weight to the suggestion which emerged during argument that the effect of vacancies in the Legislative Council, especially amongst the elected members would be to disenfranchise the entire Territory or a substantial part of it. This consideration would not affect the construction of the Act unless it should be inferred by reason of such a consideration that the legislature must have intended that the Council should not be capable of operating at all when any vacancy occurred. In the absence of any express clause invalidating the Council in such an event, the Court would need some positive indication that that was the intention of the legislature before any such implied clause could be read into the Act.

The reasoning for this argument is based on the notion of democratic representation in Parliament, no doubt in consequence of the proposals to introduce tax legislation into the Territory and upon the footing that there should be no tax without representation. If this view could be supported as a rule of law the Tax legislation might be invalidated as a consequence but unless it is put forward as a rule of law, I think that it has little or no weight as a consideration to be taken into account when construing the terms of an Act which contains no express term invalidating the proceedings of the Legislative Council in the events which have occurred. The weight of considerations such as this must be assessed with due regard for the type of Legislative Council which has been set up in the Territory. As I have pointed out it is not a democratic nor in any real sense a representational forum. It is and in the existing circumstances is required to be a Council of strictly limited, and controlled powers, and the purpose of providing for members of widely differing classes is to afford the Government controlling the Council the greatest practicable variety of points of view and to take a step towards the development of what may ultimately become a democratic forum in the true sense.

Were it the intention of Parliament to prohibit any proceedings in the Council if a vacancy disturbed the pattern of representation provided for in Section 36 one would expect that the quorum provisions set out in Section 41 would be far more specific and would at least require the presence of some members of each class at every meeting.

One must also remember that there is no power to compel an elected member to take his seat or compel anybody to submit himself as a candidate and accept nomination or appointment to the Council. Moreover the death, resignation or disqualification of even a single member, and even for that matter of a single official member, would on the same argument, prevent the Council from working, and would place the existence or non-existence of the Council from time to time quite beyond the control of the Government. There is no intermediate course; either invalidity is to be implied or it is not; and I think that on the score of reasonableness and practicability the better choice with reference to this argument is that Parliament did not intend in these circumstances to invalidate the proceedings of the Council.

Section 19(4) of the New Guinea Act 1920-1932 recognized that where there is a small Legislative Council such as existed under that Act there was a need to broaden the views which might be expressed in the Council by making provision for the Administrator to invite non-members to make their opinions available to the members. This desirable breadth of views is obtained in the present Act in a different way, by combining the Legislative Councils of the two Territories into one larger body representing a wider field of interests.

Having made provision designed to increase the effectiveness and value of debates within the Council, I think that it by no means follows that the availability of every member is to be regarded as an essential condition of the validity of every piece of legislation.

Section 47A of the Papua and New Guinea Act which was introduced in 1957 gives recent statutory recognition to the possibility of invalidity arising in relation to Territory legislation where unqualified members take part in the proceedings of the Council. This express provision dealing only with persons who are present at the Council tends to negative rather than support any legislative recognition of the possibility of invalidity arising through the absence of a member occurring as a result of a vacancy.

Were it intended that a vacancy should invalidate any proceedings before the Council it would be extraordinarily difficult for the Council to transact any business unless every member were present in person so that the Council could be assured that at the time of passage of each Bill, every member was still living and had not resigned or become disqualified.

The only support that I can see for the Plaintiff's interpretation is based on the direct statement in Section 36 that there "shall be 29 members". The unqualified right of resignation conferred by Section 38 clearly contemplates that vacancies may occur from this cause as well as from death disqualification and removal from office, and the remedy provided for such occurrences in the Act is the filling of the vacancy under Section 38(3). In view of this and of the other provisions to which I have referred I do not see sufficient justification for implying into the affirmative words of Section 36 the negative corollary that should the number of members be less than twenty-nine the Council must not exercise its functions. I think that there is an indication tending to negative such an implication to be derived from the operation of Section 38A in the event of the Council reaching a determination that a member is not qualified to sit, or that for any other reason there is a vacancy. It cannot be intended that the determination of the Council would itself be invalid because of the vacancy. That the function to be exercised under Section 38A is to be regarded as of the same character as the legislative functions of the Council is indicated by the wording of Section 41 providing for a quorum.

The third main argument advanced by the Plaintiff was that the Tax Ordinance of the Territory is invalid because it conflicts with the present provisions of the Income Tax legislation of the Commonwealth which covers the whole field of Income Taxation legislation and applies to the Territory although it is conceded that the Commonwealth Act contains certain exemptions in favour of Territory residents with respect to income earned in the Territory. It was pointed out in argument that in some circumstances liability for income tax might be substantially increased if both pieces of legislation were in operation.

I agree with the submission of Mr. Mason that it is not possible at the present stage to say that such a conflict does exist or will ever in fact exist. Certainly it appears probable that the two provisions will overlap unless either or both be amended before the Territory legislation comes into force, particularly in view of the Territorial provision that the Ordinance is to operate as from 1st July 1959. It is however common knowledge that many substantial amendments to the Territory Bill which has not yet been passed are at the present

time under consideration, and neither the Court nor the Legislative Council can know at the present time in what precise form the Bill will be passed assuming that it is going to be passed. Nor for that matter can it be known at the present time in what precise form the Commonwealth Act will be at the date when the Territory Legislation purports to become law. These things must be known precisely before any test of inconsistency can be applied and I think that this part of the claim is clearly premature.

The whole question of the power of the Legislative Council to pass laws with respect to taxation depends not only upon the applicability of Section 122 of the Constitution, but also upon whether, assuming that the Statute, 1 W.& M. - S.2,C.2, is in force in the Territory,(see Commonwealth v. Colonial Combing & Spinning & Weaving Co. 31 C.L.R.421, 433-4), it is possible for a subordinate legislature such as the Territorial Legislative Council to impose tax without an express grant from Parliament specifying the time and manner of imposition, and the question of whether the Commonwealth Taxation legislation can validly apply to the Territory so as to impose a tax upon persons who are under no allegiance to Australia depends in turn upon the question raised in this case as to the applicability of Commonwealth Federal powers to the Territory. At the present time when there is no legislation purporting to apply to the Territory under which tax is levied upon persons who are not Australian taxpayers the whole question is hypothetical.

Even if it could be established at the present time that the Territory tax legislation would be invalid when passed and that it was intended that it should be passed, I do not think that there would be any grounds for granting an injunction either to prevent its passage or to prevent it from receiving assent. It is not suggested in the present proceedings that any irreparable harm will be occasioned by the passage of an invalid Bill, and there is no reason why the matter should not wait until the Bill is passed, so that it will be possible to ascertain its precise terms and apply the proper tests for invalidity.

Submissions were made on both sides as to whether in any event the Court should interfere with the proceedings of the Legislative Council by way of injunction or declaration whilst the Legislative Council is considering the Bill. The Court was asked to express its views on all these questions argued so that all points could be tested and established on appeal.

We were referred to Trethowan v. Peden 41 S.R.183 (44 C.L.R.394) 47 C.L.R.97). McDonald v. Cain 1953 V.L.R.411-418 and Taylor v. Attorney-General 1917 Q.S.R.208, and it was contended on the part of the Plaintiff that the weight of existing authority is in favour of the view that even in the case of a parliamentary body the Courts will in appropriate cases restrain by injunction the submission of an Act for assent. In view of the fact that this Legislative Council is not invested with sovereign power and should be regarded as a subordinate legislative body, and is a single chamber presided over by the Administrator who in most cases is empowered to give immediate assent to a Bill, we were invited to reach the conclusion that the Court should not hesitate to interfere by granting an injunction while the Council is in session as the only practicable means of achieving the same result as was achieved in Trethowan's case.

In the case of a subordinate and controlled legislature of this character there are very important considerations of legislative policy involved on the one hand in allowing a developing legislative body to have the advantages of a status comparable with that of a parliament as soon as possible and on the other hand ensuring that whilst the legislative body is in fact subject to control the Court should be free to exercise effective supervision and restraint over its proceedings to prevent it from exceeding its lawful powers, the scope of which are not easily ascertained. The views of the legislature on this question of policy have not been clearly revealed in the Papua and New Guinea Act and I think it desirable that until the question does specifically come up for determination by the Court it should be left to the legislature to express its intention should it so desire.

Moreover in Hughes & Vale v. Gair 90 C.L.R.203 the Chief Justice of the High Court expresses considerable doubt as to the decision in Trethowan's case in relation to Houses of Parliament and I think it desirable that this Court should not attempt to decide these questions prematurely. The only view on the subject which I express at the present time is that if it is to be inferred from the Papua and New Guinea Act that the Legislative Council is intended to be a body operating subject to control by the Court as to its internal proceedings, the remedy of prohibition or other appropriate prerogative writ as an alternative to injunctions and declarations in the appropriate cases would be available.

For the reasons given I reach the following conclusions:-

(1) The Papua and New Guinea Act 1949-1957 is within the powers conferred on the Commonwealth by the Trusteeship Agreement of the United Nations and is a valid exercise by the Commonwealth Parliament of its powers. Having regard to circumstances existing in relation to the Territory of New Guinea up to the present time, the said Act is not invalid by reason of the fact that it sets up a Legislative Council for the Territories of Papua and New Guinea.

(2) The fact that the number of members of the Legislative Council is reduced below 29 by reason of resignations does not operate to invalidate proceedings before the Legislative Council or prevent the Council from exercising any of its powers.

(3) The Plaintiff's objection to the Territorial Income Tax Bill on the ground that it conflicts with Commonwealth Legislation upon the same subject matter is premature and this question cannot be determined unless and until it is passed as an ordinance and purports to become law.

In my opinion the action should be dismissed with costs to be taxed.

NOTE: At the conclusion of the hearing Counsel for the Plaintiff was given liberty to file a Statement of Claim and to amend the Indorsement of Claim on the Writ to include the relief asked for in the course of argument including declarations as to validity and injunctions. The application for an interlocutory injunction was by consent brought on for hearing and treated as the trial of the action and in view of the urgency and importance of the matters involved the hearing proceeded without waiting for the Defendants to deliver a defence and upon the understanding that they should not be required to do so.