

PORTER v. CHIN MAN YEE.

"Income Tax Assessment Act 1915," secs. 26, 27 (2), and (2A).

The question which the Court answered related expressly, and related only, to the mode of calculating "the deduction in respect of Commonwealth income tax to which the Kuhnel Company is entitled under "sub-sec. (4) and par. (c) of sub-sec. (5) of sec. 15" of the "War-time Profits Tax Assessment Act." The Court had no duty or right to go beyond the question asked.

As stated by the learned Chief Justice of South Australia in par. 21 of the case, the Commissioner, in calculating the deduction in respect of Commonwealth income tax under sec. 15 (5) (e), regarded the words "the aggregate of the amounts of tax that would "have been payable by each shareholder" as meaning (so far as the profits credited or paid to the trustees of the estate of the testator are concerned) the aggregate of the amounts that would have been payable by the beneficiaries in the estate. This view we thought to be wrong; and as to the two accounting periods 1916-1917 and 1917-1918, we said that the true method for determining this deduction from the profits was to find the amounts of income tax that would have been payable by each shareholder (Elder's Trustee Co. and four nominees were the shareholders). We added, "whether the shareholder is a trustee or not," for the obvious reason that under the "Income Tax Assessment Act 1915," before it was amended by the Act No. 18 of 1918, it was provided that—"Any person "who derives income as a trustee shall be assessed "and liable in respect of income tax as if he were "beneficially entitled to the income"—sec. 26 (1). We were not asked any question as to the deduction, from the income tax assessable to him, of so much of the tax as was due to the income distributed to beneficiaries, or deemed to be distributed—sec. 27 (2) (2A).

The scheme of the Income Tax Acts was drastically altered, however, by the Act No. 18 of 1918, which by its sec. 21 provided that a trustee shall not be liable to pay tax as trustee (ordinarily), and repealed sec. 27 of the Act of 1915. There is no need now (ordinarily) for any deduction from a trustee's tax.

I concur in the view of the Chief Justice of the Supreme Court that under our order on the case stated the method applicable to the accounting period 1917-1918 is to be the same as that which applies to the accounting period 1916-1917.

I am also of opinion that the rate of income tax to be applied, for these two accounting periods, in calculating the deduction from profits for the purpose of the war-time profits tax, so far as regards the shares held by Elder's Trustee Company, is the rate of tax applicable to companies. The result is anomalous, as Murray, C.J., points out; but it is in accordance with the Act. It is not at all surprising that there should be some confusion arising from these Acts.

The appeal must be allowed, the order of the Supreme Court set aside, and the case remitted to the Supreme Court for adjustment of the figures on the lines indicated. We have not the material for adjusting the figures.

RICH, J.—The meaning of the formal order in *Kuhnel's Case*, (1923) 33 C.L.R. 349, has been discussed on this appeal. For my part I intended the words "whether the shareholder is a trustee or not" to mean regardless of the fact that the shareholder is a trustee. That case was concerned with method only. The relevant facts necessary to raise the present questions were not before us; argument was not directed to them, and the formal judgment expressed no opinion on them. For the first time we are asked to express an opinion as to the rate of tax applicable in calculating the deduction in respect of the Company's share of income. In my opinion the flat rate is to be applied, and regard must be had to the provisions of sec. 27 of the "Income Tax Assessment Act 1915-1916."

Appeal allowed. Case remitted to the Supreme Court unless the parties can agree to the amount of the war-time profits tax.

[Solicitors—For the appellant, Gordon H. Castle, Crown Solicitor for the Commonwealth, by Fisher, Powers and Jeffries; for the respondent, Scammell and Skipper.]

FULL COURT — (Knox, C.J.,
Isaacs, Higgins, Gavan Duffy,
Rich and Starke, JJ.)
(Melbourne.)

March 16,
April 22.

PORTER, Appellant v. CHIN MAN YEE and Others, Respondents, THE COMMONWEALTH Intervenant.

High Court—Appellate jurisdiction—Supreme Court of Northern Territory — Appeal from to High Court—Jurisdiction to hear—The Constitution, secs. 73, 122 — "Northern Territory (Administration) Act" (No. 27 of 1910), sec. 13—Northern Territory Ordinance (No. 10 of 1922), sec. 21.

Under the "Northern Territory (Administration) Act" (No. 27 of 1910), section 13, the Governor-General of Australia is empowered to make Ordinances having the force of law in the Territory.

By an Ordinance made thereunder by the Governor-General, it is provided that the Full Court of the High Court of Australia may grant leave to appeal to the High Court from any judgment or order of the Supreme Court of the Northern Territory.—

Held, per Isaacs, Higgins, Rich and Starke, JJ. (Knox, C.J., and Gavan Duffy, J., dissenting), that the above provision of the Ordinance was valid, and an appeal from the Supreme Court of the Territory to the High Court was competent.

In re Judiciary Act and Navigation Act, 27 A.L.R. 193, distinguished.

APPEAL FROM THE SUPREME COURT OF NORTHERN TERRITORY.

On 13th August, 1925, in the Supreme Court of the Northern Territory, Roberts, J., heard a motion to make absolute an order *nisi*, whereby John Alfred Porter, of Darwin, newspaper editor, was called upon, at the instance of Chin Man Yee and other Chinese, to show cause why a writ of attachment should not issue against him for his contempt of Court in respect of the publication of certain newspaper articles. The articles were headed "Faked Birth Certificates" and "Alleged Faked Documents," and related to the alleged attempted entrance into Australia of Chinese by means of false birth certificates, and related further to a police raid of a shop at Darwin, when many letters were seized with a view to a charge of conspiracy being laid.

Before any proceedings had been commenced in any Court against the Chinese concerned, the order *nisi* mentioned was granted upon the application of the owners of the shops searched by the officers, and upon its return Roberts, J., made the order absolute, and directed Porter to pay a fine of £10, with £10 10s. costs, and to be detained until the payment was made.

Leave to appeal to the High Court against that order was granted on 29th October, 1925.

Menzies for the appellant.

Owen Dixon, K.C. (with him *Sanderson*), for the respondents.—There is a preliminary objection. There is no jurisdiction to hear an appeal from the Supreme Court of the Northern Territory. The "Northern Territory Administration Act" (No. 27 of 1910) was enacted under sec. 122 of the Constitution, and therefore is not affected by Chapter III. of the Constitution as to judicature. Chapter III. gives a right of appeal from all Federal Courts. The Supreme Court of the Northern Territory is not a Federal Court, because it is outside Chapter III. Hence, apart from some Statute passed by the Federal Parliament, no appeal would lie. Section 80 of the Constitution was held not to apply to the territories, the Commonwealth not in such case standing in the place of a State—*The King v. Bernasconi*, 21 A.L.R. 86 at p. 88; *Buchanan v. The Commonwealth*, 19 A.L.R. 251. Chapter III. exhaustively states the judicial jurisdiction which can be conferred on the High Court—*In re The Judiciary Act*, 27 A.L.R. 193 at p. 195; *British Imperial Oil Co. v. Commissioner of Taxation*, 31 A.L.R. 129 at p. 130. This is a "matter" within secs. 75 and 76 of the Constitution. It is not a matter of original jurisdiction, and there is no power to create appellate jurisdiction. Appellate jurisdiction arises under the Constitution only—*Mainka v. Custodian of Expropriated Property*, 31 A.L.R. 1. Further, the Judge has no life tenure and therefore is not a Court.

Menzies for the appellant.—Section 122 of the Constitution empowers Parliament to set up a Court with any tenure, and confers power to appeal to the High Court. This matter can be brought within sec. 73, even treating Chapter III. as an exclusive statement

of the appellate jurisdiction, for the Supreme Court of the Territory is either a Federal Court or a Court exercising Federal jurisdiction. The judicial power of the Commissioner is, by sec. 71 of the Constitution, vested in the High Court, and in such other Federal Courts as Parliament creates—*Mainka v. Custodian of Expropriated Property (supra)*—so that Federal Courts may be brought into existence, and sec. 122 empowers Parliament to make laws for the government of the territories and to set up a judiciary. Such a Court would be a Federal Court as originating with the Commonwealth Parliament. The restrictions in sec. 72 apply only to Courts created under sec. 71, and not to those created under sec. 122—*Mitchell v. Barker*, 24 A.L.R. 64. The Northern Territory forms part of the Commonwealth in the relevant sense—"Northern Territory Acceptance Act" (No. 10 of 1910), preamble; the Constitution, secs. 3 to 6. The Central Court of the mandated territory of New Guinea was held to be a Federal Court, the laws of the Commonwealth being applied—*Mainka v. Custodian of Expropriated Property (supra)*. And the position of the Northern Territory is the same. The ordinance relating to the Court in New Guinea and the appointment thereunder indicate that the Judge had no life tenure.

Sir Edward Mitchell, K.C. (with him *J. D. Moore*), for the Commonwealth intervening.—Section 122 should be treated as conferring a power to give an appeal to Courts created under it. The Territory Court is a Court exercising Federal jurisdiction within sec. 73, and is a Court invested with Federal jurisdiction within sec. 71. Section 122 should be construed in accordance with the principles illustrated in *Australian Steamships Limited v. Malcolm*, 21 A.L.R. 37 at p. 47; and *Harding v. Federal Commissioner of Taxation*, 23 A.L.R. 137. In America, as territories were acquired, fresh Courts were created, and a right of appeal given to the Supreme Court of the States—Quick and Garran on *The Constitution*, pp. 735, 971; *McAllister v. United States*, 141 U.S. 174; *American Constitution*, by Lord Bryce, p. 712. The framers of sec. 122 must be deemed to have known the position in the United States. [ISAACS, J., referred to *Downes v. Bidwell*, 182 U.S. 244 at p. 266.]

Owen Dixon, K.C., in reply.—Section 122 deals with the government of the Territory as a kind of dependency. The power to be exercised was not as a Federal Government. The functions of the High Court are stated fully in the Constitution for the purpose of the Federal system. Section 71, in declaring that the judicial power of the Commonwealth should be vested in the High Court, excludes from that Court any other judicial power—*In re the Judiciary Act (supra)*. The question of non-judicial powers being vested in the High Court was not then under consideration. The delegated power of the Governor-General to make ordinances is limited to ordinances having force in the Territory, and is not as extensive as the legislative powers conferred by sec. 122. It does not include the

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imposition of a duty upon the High Court outside the Territory. [*Menzies*.—The ground of the appeal is that there was no jurisdiction to punish for contempt, inasmuch as no proceedings had then been taken, no arrest made, and no charge laid.] Though no proceedings had been instituted, it may be that the publication would have the effect of preventing proceedings from being taken, and thus impeding justice. It is admitted that, apart from special considerations incident to such a community as the Territory, the order made cannot be supported.

Cur. adv. vult.

The following judgments were given:—

KNOX, C.J., and GAVAN DUFFY, J.—In this case an appeal is sought from the Supreme Court of the Northern Territory, and objection has been taken to our jurisdiction to hear an appeal from that Court. The would-be appellant puts his case in two ways. First, he says that the Supreme Court of the Northern Territory is a Federal Court within the meaning of sec. 73 of the Constitution. It is enough to say that the words "any other Federal Court" in sec. 73 mean any one of the "other Federal Courts" mentioned in sec. 71, and having a Justice with a tenure prescribed by sec. 72 of the Constitution. The Supreme Court of the Northern Territory is not such a Court. In the next place, he says that sec. 122 of the Constitution enables the Parliament of the Commonwealth to make laws for the government of the Territory, that in pursuance of such power Parliament has authorised the Governor in Council to constitute an appeal to this Court, and that he has in fact done so by an ordinance known as the Supreme Court Ordinance 1911-1922. We proceed to examine the suggested power of the Parliament of the Commonwealth.

In our opinion, the reasoning of the majority judgment in *In re the Judiciary Act* and *In re the Navigation Act*, 27 A.L.R. 193, establishes the proposition that the jurisdiction of this Court, whether original or appellate, is to be sought wholly within Part III. of the Constitution, that the Court exists only for the performance of the functions therein prescribed, and that the Parliament of the Commonwealth legislating for the peace, order and good government of the Commonwealth, can no more add to or alter the jurisdiction of the Court than it can add to or alter its own legislative powers. It is true that in this judgment sec. 122 of the Constitution was not discussed, and it is said that even if the Commonwealth Parliament cannot add to the jurisdiction of the Court as an instrument functioning under Chapter III. of the Constitution, it can give it new powers and duties as part of the judiciary or judicial system of the Northern Territory. A consideration of the provisions of sec. 122 has confirmed us in the opinion that an appeal is not competent in this case. The section enables the Parliament of the Commonwealth to make laws for the government of any territory surrendered by any State to, and accepted by, the Commonwealth; but in legislating for such territories the Parliament of the

Commonwealth must rely wholly upon the powers contained in the section, and cannot have recourse to legislative powers contained in Chap. I., Part V., of the Constitution, which have reference only to laws for the peace, order and good government of the Commonwealth.

We think that a power to make laws for the government of the Territory does not include a power to impose duties on persons or organisations not within the Territory and not in any way connected with it. Even if the section enables Parliament to permit litigants within its jurisdiction to submit their claims, whether in the first instance or by way of appeal, to Courts not within its jurisdiction, still it cannot impose on such Courts the duty of entertaining such litigation; least of all can it compel this Court to exercise such original or appellate jurisdiction. The status and duties of this Court are explicitly defined in Chapter 3 of the Constitution, and an attempt to alter that status or to add to those duties is not only an attempt to do that which is not authorised by sec. 122, but is an attempt to do that which is implicitly forbidden by the Constitution.

ISAACS, J.—This is an appeal from the Supreme Court of the Northern Territory by John Alfred Porter, in which His Majesty the King is the formal respondent, but Chin Man Yee, and several other Chinamen, are the actual contestants in opposition to the appeal.

On 6th August, 1925, His Honour Judge Roberts, sitting as the Supreme Court of the Northern Territory, fined the appellant £10, with £10 10s. costs, and to be imprisoned until the fine and costs were paid, for a contempt of the Darwin Police Court, in publishing in his newspaper, the *Northern Territory Times and Gazette*, on 4th August, 1925, two articles or paragraphs, entitled respectively "Faked Birth Certificates" and "Alleged Faked Documents." The application was made at the instance of the Chinamen referred to, the articles stating, *inter alia*, that Police Court proceedings were to be commenced in relation to the certificates and documents on the arrival of an official from Sydney.

On the appeal being called on, there was no appearance on behalf of His Majesty, but the relators were represented by Mr. Dixon and Mr. Sanderson. An objection *in limine* was taken as to the constitutional competency of this Court to entertain appeals from the Courts of a territory, having regard to the decision in the *Judiciary and Navigation Acts Case*, 27 A.L.R. 193, and to the terms of the "Northern Territory Administration Act 1910," sec. 13. An adjournment took place to enable the Commonwealth to place its views before the Court on these questions. Ultimately Sir Edward Mitchell and Mr. Moore appeared for the Commonwealth to argue the question of the jurisdiction of this Court. Naturally that question must be determined before we are at liberty to say a word on any other point.

1. *Jurisdiction of the High Court.*—It was contended for the relators that the *Judiciary and Navigation Acts Case* (*supra*) is a decision that there is no power to confer any jurisdiction on this Court to hear an appeal from any Court that is not a Court within the meaning of Part III. of the Constitution. Then, proceeded the argument, a territorial Court created under sec. 122 is, by *The King v. Bernasconi*, 21 A.L.R. 86, not within Part III., and so the appeal here is incompetent. It was sought to distinguish *Bernasconi's Case* (*supra*), but the effort failed. The territorial Court, if a "Federal Court" within sec. 73 of the Constitution, would fall within sec. 72, and would, in view of the tenure, be invalidly constituted. Nor is it a Court "exercising Federal jurisdiction" within the meaning of sec. 73, because such a Court is in contradistinction to a "Federal Court." It means a State Court invested with Federal jurisdiction, or assuming in fact to be so invested. Any attempt to justify appellate jurisdiction in this Court from a territorial Court on the self-executing provisions of the Constitution fails. But sec. 122 is in the nature of a plenary authority in the Commonwealth Parliament. I have in *Bernasconi's Case* (*supra*) stated my view of that section, and I incorporate what I there said, without textual repetition. It follows from what I there said, and indeed from what every member of the Court there said, unless qualified by the later decision referred to, that the Commonwealth Parliament may, under sec. 122, confer at will appellate jurisdiction from a territorial Court.

If my learned brethren who formed the majority unanimously thought the later case, though not expressly, but impliedly, concluded the matter, as contended for the relators, I would implicitly accept that view. But as two members of the majority are of that opinion and two others think this question is left open, I am not merely at liberty but bound to act on my own opinion. I accordingly accept the later case as authoritatively determining that "the judicial power of the Commonwealth," within the meaning of Part III., and both original and appellate, cannot be increased by Parliament. But the judicial power of the Commonwealth is, as defined by *Bernasconi's Case*, that of the Commonwealth proper, which means the area included within States. Beyond that, the decision in the later case does not apply. It follows that if there be appropriate Parliamentary enactment this Court is competent to entertain appeals from the territorial Courts. Whether there is such an enactment depends on the proper construction of sec. 13 of the "Northern Territory Administration Act 1910." Under that section substantially an ordinance has been made by the Governor-General which, in its amended form, purports, by sec. 21, to give ample power to entertain this appeal. But it is said that the section of the ordinance is not authorised by the quoted section of the Act. Section 13 of the Act is in these terms—"Until the Parliament makes other provisions for the government of the Territory the

"Governor-General may make ordinances having the force of law in the Territory." The argument is that the words "in the Territory" limit the operation of the ordinances to things, persons and events actually within the physical area of the Territory. It is not disputed, once the first point is settled, that the Parliament could authorise the Governor-General to make an ordinance conferring a right of appeal to the High Court.

The question, to my mind, is whether the words "having the force of law in the Territory" do not mean "having the force of law in the Territory, as opposed to its being law in force in the Commonwealth proper or in other territories." I think it does, and that those words are to indicate that the ordinance was not intended to transcend sec. 122 of the Constitution. At all events, it may mean that, and in a governmental instrument the words ought, in my opinion, not to be cut down to the narrowest possible limits unless intractable. I think the 21st section of the ordinance is the law in force "in the Territory" as to what right of appeal exists from the Supreme Court to this Court.

This construction is supported by other sections of the Act of 1910. I will take two of them. Section 7 says—"The Australian Industries Preservation Act 1906-1909 shall apply in the Territory," &c. Now, some of the sections of that Act, as 10, 11, 13, &c., refer to and authorise proceedings civil and criminal in the High Court. It is quite clear that "in the Territory" includes actions and criminal proceedings in this Court. Does the Act mean that this Court must sit for that purpose in the Northern Territory? If it does require this Court to sit there, then so does the legislation in hand, and we must simply move to the Northern Territory to hear *de novo* an application for leave to appeal, and then if that is granted to hear the appeal. If we were sitting there now I do not see what bar there would be to our jurisdiction to hear this appeal.

Again, sec. 12 of the "Northern Territory Administration Act" says that—"For the enforcement of all laws in force in the Territory and the administration of justice in the Territory the several Courts of South Australia shall subject to any Ordinance made by the Governor-General (a) continue to have and exercise (1) what I may call their existing jurisdiction, or (2) such jurisdiction as is conferred on them by Ordinance made by the Governor-General. Clearly what the Parliament considered as "the administration of justice in the Territory" included an appeal heard in Adelaide. And equally clearly it considered the Governor-General had power by Ordinance to define the jurisdiction of the Supreme Court of South Australia to hear appeals in Adelaide. But when we turn to sec. 13, dealing with the power to make Ordinances, we find the words relied on—"Ordinances having the force of law in the Territory." If such an Ordinance made under sec. 12—which clearly is subject to all the provisions of sec. 13, and

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therefore to the words quoted—is not excluded by those words, how can the present Ordinance be excluded?

Reference was made to a passage in *Mainka v. Custodian of Expropriated Property*, 31 A.L.R. 1 at page 2, as supporting the view that the territorial Court is a "Federal Court" for the purposes of sec. 73 of the Constitution. Perhaps it was not sufficiently made clear that the New Guinea Court was there regarded as "a Federal Court" within sec. 73, not by reason of Commonwealth legislation simply, as in this case, but because of the effect of the Imperial Act, authorising the mandate as expressed, and therefore treating the territory as "an integral portion of the Commonwealth." The passage referred to must be read with that qualification, whatever be its accuracy or inaccuracy; it is no authority for treating as "a Federal Court," within Chapter III. of the Constitution, a tribunal erected under legislation authorised simply by sec. 122 of the Constitution. Still, both *Mainka's Case* (*supra*) and *Bernasconi's Case* (*supra*) determine very distinctly that the Parliament has power to give this Court appellate power in respect of Commonwealth territory outside the strict limits of the Commonwealth proper.

In my opinion, sec. 21 of the Ordinance is valid, and this appeal is competent.

2. *The Appeal*.—The next question is: How is the appeal to be determined? In my opinion it should be allowed, on the ground that, there being no proceedings pending, the summary process of attachment for contempt of Court is wholly inapplicable. I will assume, and proceed on the assumption, that the Supreme Court of the Northern Territory is in a position corresponding with that of the Supreme Court of a State, in having the general power of superintending the administration of the King's justice within the Territory. Nevertheless, there is no precedent for carrying the summary jurisdiction of the Court so far as it has been carried here, and I am not prepared to make one. There are many species of contempt. Where a Court is vilified or scandalised, or the members attacked in their public capacity, there is direct interference with the constitutional agent of the King in the administration of justice. Again, where a proceeding has been instituted, and so is in the hands of those entrusted with Royal administration of justice—anything calculated to obstruct or impede the course of justice, or to prejudice the parties concerned, may be summarily dealt with. That is an inherent power of the appropriate Court, a power of self-protection or a power incidental to the function of superintending the administration of justice. The fundamental conception of this authority may be read in the judgment in *Beaumont v. Barrett*, 1 Moo. P.C.C. at pp. 77-78. But where, as here, there is no attack on any Court or Judge, and no proceedings have even been begun, how does the Court—any Court—enter into the circumstances as a factor? I conceive the principle of in-

dividual liberty of speech and writing, limited only by the ordinary law, is in force in such a case, and that it would be an unprecedented and unwarranted stretch of curial authority, and an undue limitation of the right of free speech to fine or imprison for a mere conjectural impediment to a non-existing proceeding. The power would be too arbitrary.

On the other hand, I think it necessary to add that the appellant was, in my opinion, wise in taking the precaution he did. Before publishing the articles in question he ascertained from the local Clerk of Courts that no proceedings had been commenced. He evidently was aware how wrong it would otherwise have been to publish the articles. Had such proceedings been commenced, I should have regarded the articles as a very serious interference with the fair course of justice. Even amid the greater population of any Australian capital it would, in my opinion, be wholly indefensible to publish broadcast a printed statement with reference to defendants accused of crime, that "the fraud was discovered," that "there are indications of a widespread conspiracy," and that a raid on the defendants' premises and a search in safes and cupboards disclosed "incriminating documents." Still more must that be so in the smaller community at Darwin in relation to a question which is specially a burning question there, and where the Magistrate is in much closer contact with current public opinion than, for example, in a large and populous city, and where in the smaller community newspaper articles of the description referred to naturally have greater influence than in more distant and more populous localities. If proceedings had been initiated I should have thought the decision and the reasoning of Roberts, J., unassailable. He is in a much better position than any Judge in Sydney or Melbourne to measure the injurious consequences of such articles in Darwin. But, apart from that, I entirely agree with his reasoning, and for the advancement of impartial justice in such localities I feel bound to express my opinion.

I do not overlook the fact that, on behalf of his clients, the relators, Mr. Dixon told this Court that he did not think the articles were of the character meriting punishment for contempt. It was a most candid observation to make, and the candour of learned Counsel deserves recognition. But contempt of Court has two aspects, the private and the public aspect. From the private aspect, a party may yield his claim to protection. But from the public standpoint the Supreme Court of the Territory has its duty to perform *sua sponte* in maintaining inviolable the pure and uninfluenced administration of justice. No private interests, and no private yielding or admissions, can affect that aspect. It is a duty to the Crown and the public. And, regarding the matter from that standpoint, the concession made on behalf of the respondents are in my view irrelevant.

However, for the reason given, I agree that the appeal should be allowed.

HIGGINS, J.—On the 20th August, 1925, an order was made by the Supreme Court of the Northern Territory (Roberts, J.). The order directed the appellant, the editor of a newspaper, to pay, for contempt of Court, a fine of £10, with costs, and that he be detained, and if necessary imprisoned, until the said fine and costs be paid. When the appeal came on for hearing (in pursuance of leave granted by this Court to appeal), Counsel for the relators, at whose instance the order was made, took the objection that this Court has no jurisdiction to entertain the appeal. The argument is that, although this High Court has, under sec. 73 of the Constitution, jurisdiction to hear and determine appeals from all judgments, decrees, orders and sentences of any other Federal Court or Court exercising Federal jurisdiction or of the Supreme Court of any State, or of any other Court of any State, from which at the establishment of the Commonwealth an appeal lies to the Queen in Council, this Supreme Court is not a Federal Court or a Court exercising Federal jurisdiction, or a Supreme Court of any State. It is only the Supreme Court of a territory. It is not a Federal Court within the meaning of sec. 71, for, according to sec. 72 and *Waterside Workers v. Alexander*, 24 A.L.R. 341, to constitute a Federal Court the Judge must have a life tenure, and the Judge of this Court has not a life tenure. Nor has Federal jurisdiction been invested in the Court under sec. 77. The decision in *Alexander's Case* that sec. 72 involves a life tenure as a condition of the office is not impugned; and it is clear, therefore, that, as a result of *Alexander's Case*, sec. 73 does not confer on this High Court jurisdiction to hear and determine an appeal from this Supreme Court.

But this does not necessarily end the matter. Section 73 may not give the jurisdiction to hear the appeal, but some other section of the Constitution may. Section 73 does not say that the jurisdiction of the High Court on appeal shall be confined to appeals from the Courts mentioned in sec. 73. It does not even say that "the jurisdiction of the High Court shall be to hear appeals from the Courts" mentioned. The form of expression used is—"The High Court shall have jurisdiction," &c., just as if it were—"The High Court shall have a marshal." This would not forbid other officers appointed under some other power. Now, under sec. 122, "the Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth;" and, according to the recitals of the "Northern Territory Acceptance Act 1910," this territory is such a surrendered and accepted territory. This power to make laws for the government of the territory is, so far as appears, unlimited, and it is difficult to see what right we have to limit it by construction. Under the "Northern Territory (Administration) Act 1910," sec. 13, the Governor-General may make ordinances having the force of law in the Territory; and under an Ordinance gazetted 30th May, 1911, sec. 21, the Full Court of the High Court of Australia, constituted by at least

two Judges, may grant leave to appeal to the High Court of Australia, from any conviction, sentence, judgment, decree or order of the Supreme Court of the Northern Territory, including any order or direction made by the Judge of the Territory, whether in Chambers or in Court—see Ordinance No. 10 of 1922. Why should we refuse to give effect to the Act and Ordinance? Section 122 is of the same authority as sec. 73.

The decision in *In re the Judiciary and Navigation Acts*, 27 A.L.R. 193, does not compel us to put a narrow construction on sec. 122. In that case an Act had purported to give the High Court jurisdiction to hear and determine any question referred to it by the Governor-General as to the validity of any Act of the Federal Parliament; and the Act was held to be invalid as to that provision. It was held that, under the Constitution, no original jurisdiction could be given to the High Court other than that mentioned in secs. 75 and 76 of the Constitution; but there has been no such decision as to the appellate jurisdiction conferred by sec. 73. Section 76 had enacted that—"The Parliament may make laws conferring original jurisdiction on the High Court" in certain matters; and it might fairly be argued that, on the usual principles of construction, Parliament could not confer other jurisdiction, *expressio unius exclusio alterius*. But there is no such expression as to the powers of Parliament to give appellate jurisdiction. I am, of course, bound by the decision as to original jurisdiction; but it does not apply to this case. See also *R. v. Bernasconi*, 21 A.L.R. 86; *Mainka v. Custodian of Expropriated Property*, 31 A.L.R. 1.

Some point has been made as to the words "having the force of law in the Territory," in sec. 13 of the "Northern Territory (Administration) Act 1910." I take the words as meaning merely that the Governor-General's Ordinances were to have the force of law in the Territory only, as Parliament reserved to itself the right to make Federal laws for the rest of Australia. State laws would be made by the Legislatures of the appropriate States.

In my opinion this Court is competent to entertain the appeal.

As for the appeal itself, I am clearly of opinion that the order for fine and (in the meantime) imprisonment was not justified.

There was no contempt of Court, no attack on any Court or its members, nor was there anything tending to obstruct the course of justice in any pending case; and it is of the essence of the latter kind of offence that Court proceedings be pending when the comments are published—7 Halsbury's *Laws of England*, 286; and see *Reg. v. O'Dougherty*, 5 Cox. C.C. 348. There are certain special exceptions, as to a probable new trial, or as to a magisterial inquiry having ended and the trial not having been completed, but they confirm the general principle.

I cannot take the view that the charges levelled by the article against these men were trifling; but, what-

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ever other remedy they might have—criminal or civil, by indictment or action for libel—the summary procedure for contempt is not applicable under the authorities as they stand. I am not at all sure that under modern developments of journalism the principle is satisfactory.

RICH, J.—I agree that the appeal should be allowed. I do not think that the decision of this Court in *In re the Judiciary and Navigation Acts*, 27 A.L.R. 193, prevents my taking this course. I regard that decision as limited to the judicial power of the Commonwealth consisting of the States. In other words, the Commonwealth proper. It had no reference to the Commonwealth in relation to territories, and therefore the legislative power of the Commonwealth Parliament under sec. 122 of the Constitution is a separate question from anything dealt with in that case. The only question as to the jurisdiction of this Court in the present case depends upon the construction of the Commonwealth Act. The difficulty arises through the use of the expression "in the Territory"—"Northern Territory (Administration) Act 1910," sec. 13. I consider, on the whole, that those words merely signify that the Ordinances to be made by the Governor-General are to have operation with respect to the Territory, and that outside the Territory other laws are to prevail. They do not mean, as was suggested, that appeals are only to be heard in the Territory, but that in the Territory the rights of appeal, if any, are to be such as are ordained by the Governor-General. On that interpretation the objection for want of jurisdiction must be over-ruled.

STARKE, J.—The Parliament has, by force of sec. 122 of the Constitution, full and plenary power over the territories. It is unnecessary, for the purposes of the present case, to consider whether certain constitutional limitations—as, for instance, that contained in sec. 116—extend to legislation in respect of the territories. "The Governments of the Territories are not "however, organised under the Constitution, nor subject to its complex distribution of the powers of "government, but they are creations exclusively of "the Parliament, and subject to its supervision and control—*Cf. Benner v. Porter*, 9 How. 235; *R. v. Bernasconi*, 21 A.L.R. 86. Consequently it is within the competence of Parliament to create Courts for the territories, and to define their jurisdiction, or "to "delegate the authority requisite for that purpose" to the governments of the territories—*Cf. Leitensdorfer v. Webb*, 20 How. 176. And there is nothing on the face of sec. 122 which precludes the Parliament from subjecting the judicial organs of the Territory to supervision by way of appeal to and review by judicial organs of the Commonwealth itself.

It is said, however, that the Constitution delimits the whole of the judicial power which may be exercised by this Court pursuant to the Constitution—*In re The Judiciary and Navigation Acts*, 27 A.L.R. 193. I

am unable to accept this view. In the case cited, the Court was dealing with the judicial power defined in Chapter III. of the Constitution. But in the present case we are dealing with a jurisdiction or authority given to this Court in pursuance of the power which enables the Parliament to make laws for the government of the territories. Therefore, in my opinion, the Parliament might have directly conferred upon this Court the jurisdiction defined in sec. 21 of the Ordinance 1911-22 establishing the Supreme Court for the Northern Territory of Australia. It did not do so directly, but by the "Northern Territory (Administration) Act 1910" (No. 27 of 1910), sec. 13, the Governor-General was empowered, until the Parliament made other provisions, to make Ordinances "having the "force of law in the Territory," and under this authority was made the Ordinance 1911-22, sec. 21, enabling this Court to grant leave to appeal to itself from any order of the Supreme Court of the Northern Territory.

The question is whether the power contained in sec. 13 is wide enough to authorise the provisions of the Ordinance (sec. 21) enabling an appeal to be brought to this Court with its leave. If the words had empowered the Governor-General to make Ordinances or laws in and for the Territory, or for "the peace, order "and good government of the Territory," the validity of the Ordinance in question here could not have been denied. It would have been safer if the Administration Act had been so framed, but the intent of sec. 13 is fairly plain, namely, that the law-making authority in the Territory shall be the Governor-General until the Parliament makes other provisions for the government of the Territory, and the words actually used authorise, in my opinion, the making of Ordinances in the Territory which shall have the force of law. But that delegates to the Governor-General the power to make laws for the Territory which the Parliament might itself exert under the provisions of the Constitution. Consequently the appeal to this Court is competent.

Mainka's Case, 31 A.L.R. 1, was relied upon during the argument to support the proposition that the Supreme Court of the Northern Territory was a Federal Court for the purposes of sec. 73 of the Constitution. There are some incautious expressions in the judgment in that case (at page 2) which support the contention, but in truth the government of the territory of New Guinea under the mandate from the League of Nations was not organised under the Constitution, nor subject to its complex system. It was organised under the "New Guinea Act" (No. 25 of 1920), coupled with the Treaty of Peace, the mandate, and the Imperial Act 9 and 10 Geo. V., c. 33. The appeal from the Central Court of that territory to the High Court is based upon the authority contained in these Acts, and not upon the provisions of sec. 73 of the Constitution. The Central Court of New Guinea is not, any more than is the Supreme Court of the Northern Territory, a Federal Court within the mean-

ing of Chapter III. of the Constitution, but each is a Court created by the Parliament in exercise of powers contained under sec. 122 of the Constitution or some other Imperial authority.

On the substance of the case I can be short. There was nothing in the article published by the appellant calculated to prejudice the course of justice, even if the Supreme Court had jurisdiction to deal with the matter before any legal proceedings were instituted.

The appeal should be allowed.

[Solicitors—For the appellant, Blake and Riggall; for the respondents, McCay and Thwaites for R. J. D. Mallam; for the Commonwealth, Gordon H. Castles, Federal Crown Solicitor.]
S. K. H.

Supreme Court.

IN CHAMBERS—(Before
Weigall, A.J.)

March 26.

THE ASSOCIATED EQUIPMENT CO. LTD. and Another v. TURNER.

Jury—Practice—Trial by jury — Application by defendant for—Summons for final judgment—Adjournment of summons by consent—Application by defendant for jury on return of summons—Question of time—Extension of time—Rules of the Supreme Court 1916—Order II., rule 1; Order XIV., rules 1, 8; Order XXX., rules 4, 5; Order XXXVI., rule 6; Order LXIV., rule 7.

The plaintiffs sued the defendant by specially indorsed writ, indorsed for trial by a Judge without a jury. Defendant appeared on the 1st March. Plaintiffs, on the 4th March, took out a summons (returnable on the 9th March) for final judgment under Order XIV. This summons, adjourned by consent, was heard on the 15th and the 26th March, when leave to defend was granted, and the defendant asked for directions, including a direction for trial by jury.

Held, that since the summons was returnable on the 9th March, the defendant had (in the circumstances) applied for a jury within ten days after appearance, in accordance with Order XXVI., rule 6, and that even if he were out of time, the time should be extended till the summons should be finally dealt with.

Semble, a defendant who has been served with a summons for final judgment under Order XIV., should not apply for trial by a jury pending the hearing of such summons.

SUMMONS.

By a specially indorsed writ, the Associated Equipment Company Limited and George Mann sued the defendant, A. Turner for money due under a written agreement and for the price of goods sold and delivered. The writ was indorsed for trial without a jury. Defendant entered an appearance on the 1st March, 1926. The next step in the action was that the plaintiffs, on the 4th March, took out a summons for final judgment under Order XIV., r. 1. The

summons was returnable on the 9th March. On that day the hearing of the summons was, by consent, adjourned till the 15th March, when leave to defend was given, and plaintiffs' application for final judgment was refused. Defendant then applied for directions, and asked for an order directing trial before a Judge and a jury of six. This application was adjourned without prejudice to defendant's right to a jury, the further hearing of the application to be treated as being made on the 15th March. The application now came on for hearing on the 26th March.

Fazio for the defendant.—The defendant has a right to a trial by jury. This application must be deemed to be made as on the hearing of the Order XIV. summons on the return day thereof, viz., the 9th March. It is therefore made within the ten days allowed by Order XXXVI., rule 6. The summons for final judgment having failed, and leave to defend having been granted, it became the Judge's duty to give directions—Order XIV., rule 8—and the summons in effect became a summons for directions. On that summons, in its fresh aspect, the defendant can object to the mode of trial sought by the plaintiff—Order II., rule 1—and may ask for a jury. If the defendant is regarded as out of time, the time should be extended—Order LXIV., rule 7. It would be absurd for the defendant to apply by summons for a trial by jury, for he has been served with a summons, the avowed object of which is to obtain an order that there should be no trial at all. He referred to *Onyons v. Horsburgh*, (1921) V.L.R. 31.

Lewis for the plaintiff.—The defendant is out of time. The rule is definite—the application must be made within ten days after appearance. Further time cannot and should not be granted. The affidavits show that the case is not one where a jury should be granted.

WEIGALL, A.J.—In this case the plaintiffs, having issued a writ in which they state that they do not desire a jury, but want a trial by a Judge without a jury, the defendant entered an appearance on the 1st March. On the 4th March the plaintiffs took out a summons under Order XIV., asking for final judgment and that the defendant be not allowed to defend. This summons was returnable on the 9th March. Had that summons been dealt with on the 9th March, and had the defendant obtained leave to defend, he would have been entitled, under Order XXXVI., r. 6, to say—"I ask that there shall be a trial before a Judge with a jury," and he would then have been applying within the ten days after appearance. In fact, he did not actually apply on the 9th March, for, by consent of the parties, the summons was adjourned till the 15th March. On that day the Judge determined that leave to defend should be given to the defendant. Thereupon it became the duty of the Judge, under Order XIV., r. 8, to give all such directions as might