SUITS AGAINST THE COMMONWEALTH ARISING IN THE TERRITORIES.

The cases heard by the High Court which raise problems with respect to the application of the Constitution to the territories are comparatively few in number, but they are difficult to reconcile and create many obscurities.

The most recent case is *Waters* v. *The Commonwealth.*[1] In that case Fullagar J. held that he had no jurisdiction to entertain a claim by a resident of the Northern Territory against (*inter alios*) the Commonwealth for a declaration and injunction and other relief in respect of an alleged wrongful imprisonment.

Fullagar J.'s conclusions are fairly summed up in the headnote to the case as follows:—

> " Chapter III of the Constitution does not extend to the territories which are governed under the power conferred on the Commonwealth Parliament by Section 122 of the Constitution. Accordingly, Section 75 of the Constitution does not confer on the High Court original jurisdiction in or in respect of those territories." *R.* v. *Bernasconi* (1915) 19 C.L.R. 629 discussed and applied.

His Honour expressed hesitation in reaching that conclusion in refusing jurisdiction. He in fact dealt with the merits of the case because of the possibility of appeal against his ruling on the jurisdictional point.

The increasing importance to Australia of the Northern Territory and the growth of Commonwealth activity there makes it important to examine that decision to see whether or not Fullagar J. was really bound to reach the conclusion he did.

There are two basic assumptions made by the Judge, both of which must some day be examined. One is that the Northern Territory is in no different position, with respect to the Constitution, from the other territories of Australia. The other is that the general proposition that the territories are governed under S. 122[2] of the Constitution and are not affected by Chapter III of the Constitution of its own force, prevented the acceptance of jurisdiction in *Waters' Case.*

1. (1951) 82 C.L.R. 188.
2. Section 122 of the Constitution reads:
" The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit."

It is proposed to examine only the second assumption here and to limit the discussion to the operative meaning of Sec. 75 (iii)[3] of the Constitution.[4] The argument that the High Court should accept jurisdiction rested on two main grounds. It was argued that jurisdiction existed under Sec. 75 (v)[5] and Sec. 75 (iii) of the Constitution. The argument under Sec. 75 (v), in the light of the existing authorities at least, raises the first proposition above for questioning and will not therefore be canvassed here. But the argument under Sec. 75 (iii) turned merely upon the admitted fact that the Commonwealth was a party to the proceedings. However tenuous the steps by which the Commonwealth was joined, Fullagar J. expressly held that it had been properly joined and was a party.[6]

In spite of so holding, he held that he had no jurisdiction to hear the case. His judgment on the point is brief.[7] He accepted a submission that Sec. 75 does not confer original jurisdiction with respect to the territories, which he treated as outside the federal organization created by the Constitution and as being governed only under the powers conferred on the Parliament of the Commonwealth by Sec. 122 of the Constitution. He referred to *R.* v. *Bernasconi*[8] and his view of that case virtually controlled his decision. He said[9]:—

> " In *R.* v. *Bernasconi* it was decided that S. 80 of the Constitution, which requires trial by jury of indictable offences against the laws of the Commonwealth, had no application to the local laws of a territory enacted under S. 122. This view might perhaps have been placed on the simple and narrow basis that a law made under S. 122 was a law of the Territory concerned and not a law of the Commonwealth within the meaning of S. 80. It seems, however, to have been placed on a much wider basis. Griffith C.J. said: ' In my judgment, Chapter III of the Constitution is limited in its application to the exercise of the judicial power of the Commonwealth in respect of those functions of government as to which it stands in place[10] of the States, and has no application to Territories '."

3. Section 75 (iii.) reads:
" In all matters . . . . . (iii) In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party . . . . . the High Court shall have original jurisdiction."

4. It is the view of the writer that the first assumption is wrong. The covering clauses of the Constitution place the N.T. in a special position as part of the Commonwealth—a position unaffected by subsequent events.

5. Section 75 (v) reads:
" In all matters . . . . . (v) In which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth . . . . . the High Court shall have original jurisdiction."

6. At p. 180.

7. At pp. 190-192.

8. (1915) 19 C.L.R. 629.

9. At p. 191.

10. This statement was, of course, the merest obiter, and is, when analysed, found to be almost devoid of meaning.

Fullagar J. thought that the other members of the court in *Bernasconi's Case* either expressed the same view or concurred in it and he went on to consider Dixon J.'s treatment of the cases in *A.N.A.* v. *The Commonwealth*[11]. He quoted with approval Dixon J.'s statement in that case:—

> " It thus appears that three of the six members of the Court who took part in the decision of *Porter* v. *The King*[12] treated S. 122 as insufficient to empower the Legislature to invest the High Court with original jurisdiction in respect of a Territory.[13] The whole court regarded the decision in *Bernasconi's Case* as showing *that Chapter III dealing with the Judicature, did not extend to the Territories* which are governed under the power conferred upon the Parliament by S. 122."

However many hesitations Fullagar J. may have had in treating *Bernasconi's Case* as applicable to the Northern Territory equally with other territories of the Commonwealth, and however much he hesitated in treating that case as binding him beyond the narrow ratio expressed above, the substance of his decision rested on the words underlined above. Those words connote a geographical limitation to the operation of the laws concerned. Let it be accepted for the purpose of argument that in so far as Chapter III includes laws which are capable of territorial limitation, those laws do not extend to the Territories. But Sec. 75 (iii) is not such a law. It deals with a specific legal person, the Commonwealth.

It operates to give the High Court jurisdiction wherever the Commonwealth is properly before it as a party. The words " Chapter III does not extend to the Territories " simply have no meaning when applied to this kind of provision.

It is not possible to distinguish a case where the Commonwealth is being sued for a fault committed in a State (by a person resident in that State) from a case where the Commonwealth is being sued for a fault committed outside the territory of the Commonwealth altogether, or from a case where the Commonwealth is being sued for a tort by a person resident in a territory, the tort being committed in the territory—except in one way.

That way is to say that " The Commonwealth " as used in Sec. 75 does not include the Commonwealth when it is acting as the Government of one of the Territories. There is some support for that view but it is submitted that it leads to absurdity; it is based upon faulty reasoning, and the weight of authority is against it. That view proceeds on the basis that when the Commonwealth governs under the powers

11. (1945) 71 C.L.R. at p. 84. 12. (1926) 37 C.L.R. 432.
13. It should be emphasized here that *Waters' Case* did not raise the question of the legislature's power to invest the High Court with original jurisdiction, but the question whether the Constitution had done so.

created under Sec. 122 it is not " The Commonwealth," as that term is used elsewhere in the Constitution—but is the Government of the territory concerned. Dicta tending to support that view may be discovered in *Buchanan* v. *The Commonwealth*[14], in *Bernasconi's Case,* in the Chief Justice's judgment in *Ffrost* v. *Stevenson*[15], in a remark made by the Chief Justice in *Johnston, Fear and Kingham* v. *The Commonwealth*[16] and in the judgments of the Chief Justice and Williams J. in *A.N.A.* v. *The Commonwealth* (supra).

But that view cannot happily be reconciled with the line of cases which establishes the power of Parliament to confer appellate jurisdiction on the High Court with respect to the territories[17], and it must be taken to have been rejected by the majority of the Court in the *A.N.A. Case.*

So far as the Commonwealth's power to confer appellate jurisdiction on the High Court is concerned, the effect of the line of cases noted[18], on the view under fire, may be illustrated by asking two questions:—

> First: if the Commonwealth Parliament legislating under Sec. 122 is acting as an independent plenary legislature making laws for the government of territories to be governed by a "Commonwealth " which is a different legal entity from the " Commonwealth " referred to in Chapter III of the Constitution, then by what right does it, acting in that minor capacity, purport to interfere with the jurisdiction of the High Court of Australia ?
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> And, second: if the " Parliament " and the " Commonwealth " in Chapters I and III of the Constitution are independent entities from the " Parliament " and Commonwealth acting under Sec. 122 and exercise their powers with respect to the " Federal system " only (except where otherwise expressly mentioned), then by what right does that Parliament or that Commonwealth interfere with the judicial systems of the territories which are said to be outside the Federal system ?

And yet the cases do establish, virtually beyond the possibility of challenge, that the appellate jurisdiction in respect of territorial cases may be conferred on the High Court by Parliament.

So far as direct authority is concerned, the position is confused. Dicta in support of the view have been referred to, but it is submitted that the majority judgments in the *A.N.A. Case* tip the scales against it. In that case Dixon J. (with whom Rich J. expressly agreed and with whom Starke J. must be taken to have implicitly agreed), in answer to an argument based on the view that the Commonwealth Parliament in

14. (1913) 16 C.L.R. 315.
15. (1937) 58 C.L.R. 528.
16. (1943) 67 C.L.R. 314 at p. 328.
17. See, e.g., *Mainka* v. *The Custodian of Expropriated Property* (1924) 34 C.L.R. 297; *Porter* v. *The King* (1926) 37 C.L.R. 432; *Wall* v. *The King* (1927) 39 C.L.R. 245.
18. See note 17 above.

legislating for territories under Sec. 122 was acting in a completely independent and plenary character, said[19]:—

> " I should see no difficulty myself in treating Sec. 122 as aided by Sec. 51 (xxxix) and interpreting the Constitution as a whole as meaning that the Commonwealth Parliament could make laws concerning the territory including communications and all other matters arising from the connection between the Commonwealth and the territory or dependency. However, it is said that such cases as *Buchanan* v. *The Commonwealth*[20], *The King* v. *Bernasconi*[21], and *Porter* v. *The King*[22], make it necessary to treat Sec. 122 as an independent power complete in itself and outside the general system of government. I admit that it is difficult to reconcile the Australian cases on the subject, but I think that the decision in *Porter's Case* tends in the contrary direction, and that so does some of the reasoning in *Mainka* v. *Custodian of Expropriated Property*[23], and also that of some of the judgments in *Ffrost* v. *Stevenson*[24], where antecedent steps of the reasoning in *Mainka's Case* were criticized."

It is perhaps significant to note in this context that the Supreme Court of the United States has had no difficulty in holding that the Congressional power to legislate for the territories (analagous to Sec. 122 in the Australian Constitution though implied in that of the United States) is subject to appropriate general prohibitions contained in their Constitution. That Court does not seem to have been diverted by ideas of an unqualified plenary and independent head of power.[25]

In any case the view that the Commonwealth acts in a separate character where the territories are concerned leads to practical absurdity.

Such a view would mean, in effect, that not merely the personality of a new State was created by the Commonwealth of Australia Constitution Act with respect to the federal system, but that the personality of a new State was created separately by Sec. 122 in respect of each territory governed by the Commonwealth or which might thereafter be so governed. Thus the Commonwealth would have at least nine distinct legal personalities, each called by the same name and each in fact being the same institutions and persons " on the ground."

The conclusion must be that " The Commonwealth " acting under powers created under Sec. 122 of the Constitution and " The Commonwealth " referred to in Sec. 75 (iii) are one and the same. But if that is so then, as has already been shown, Sec. 75 (iii) confers jurisdiction on the High Court to hear any action against the Commonwealth which satisfies the ordinary jurisdictional requirements. *Waters* had satisfied those requirements.

19. (1945) 71 C.L.R. at p. 84.
20. supra, n. 14.
21. supra, n. 8.
22. supra, n. 12.
23. supra, n. 17.
24. (1937) 58 C.L.R. 528.
25. See, e.g., Willis on *Constitutional Law*, 1936, at pp. 261-63, and generally Chapter VIII.

It would be unwise to rely on decisions made *sub silentio*, but it is important to note that in at least two reported cases the High Court has entertained cases against the Commonwealth arising in the territories without its jurisdiction being questioned by bench or bar. In *Strachan* v. *The Commonwealth*[26] the Court did not question its jurisdiction to hear a case against an officer of the Commonwealth in the territories, and in *Carey* v. *the Commonwealth*,[27] Higgins J. did not question the High Court's original jurisdiction to hear a claim by the Administrator of the Northern Territory for wrongful dismissal.

It is respectfully submitted that *Waters' Case* should have been permitted to proceed.

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26. (1906) 4 C.L.R. 455. 27. (1921) 30 C.L.R. 132.

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