HIGH COURT OF AUSTRALIA

Spratt

Vs.

Hermes

Barwick C.J.(1), Kitto(2), Taylor(3), Menzies(4), Windeyer(5) and Owen(6) JJ.

6 December 1965

CATCHWORDS

Constitutional Law (Cth) - Territories - Australian Capital Territory - "Seat of Government" - Source of legislative power - Courts of territories - Magistrate's court in Australian Capital Territory - Jurisdiction to hear charge of offence against statute applying indifferently to States and Territories - Whether magistrate must be appointed for life etc. - "The Commonwealth" - "Laws of the Commonwealth" - The Constitution (63 & 64 Vict. c. 12), covering cll. 3, 5, ss. 52 (i.) 71, 72, 73, 76, 111, 122, 125 - Seat of Government (Administration) Act 1910- 1959 (Cth), ss. 11, 12 - Seat of Government Acceptance Act 1909-1938 (Cth), s. 9 - Post and Telegraph Act 1901-1961 (Cth), ss. 107, 151 - Court of Petty Sessions Ordinance 1930-1961 (A.C.T.), ss. 5 (1), 7, 18.

High Court - Jurisdiction - Source of original jurisdiction as to territories - Case stated by Supreme Court of Australian Capital Territory - The Constitution (63 & 64 Vict. c. 12), ss. 76 (i.), (ii.), 122 - Acts Interpretation Act 1901- 1964 (Cth), s. 15A - Australian Capital Territory Supreme Court Act 1933-1960 (Cth), s. 3*.

HEARING

Melbourne, 1965, February 23-25;Sydney, 1965, December 6. 6:12:1965 CASE STATED under s. 13 of the Australian Capital Territory Supreme Court Act 1933-1960.

DECISION

December 6.The following written judgments were delivered: -

BARWICK C.J. On the hearing of a charge by a stipendiary magistrate in a raised an objection that the Court was without jurisdiction to try the charge because its trial involved an exercise of the judicial power of the Commonwealth within the meaning of Chap. III of the Constitution, and the Court of Petty Sessions was not constituted as required by that Chapter. The charge was that an offence had been committed in the Australian Capital Territory by sending by post a letter which had therein words of a grossly offensive character contrary to the provisions of s. 107 (c) of the Post and Telegraph Act 1901-1961 (Cth). (at p238)

2. The stipendiary magistrate who constituted the Court of Petty Sessions was appointed under s. 7 (1) of the Court of Petty Sessions Ordinance 1930-1961 of the Australian Capital Territory, and thus held office during the pleasure of the Governor-General: see s. 7 (2) of the Ordinance. The basis of

the defendant's objection was that the magistrate did not hold office during good behaviour. Cf. The Constitution, ss. 72 (ii.) and (iii.). (at p238)

3. Upon the magistrate overruling the objection, the defendant sought prohibition from the Supreme Court of the Australian Capital Territory to restrain the magistrate from hearing the charge. (at p238)

4. Section 13 of the Australian Capital Territory Supreme Court Act 1933-1960 (Cth) purports to give to the judge exercising the jurisdiction of that Court, power to state a case for the consideration of a Full Court of the High Court and to give to this Court authority to hear and determine the case stated. Upon the application for prohibition coming before a judge of the Supreme Court of the Australian Capital Territory, the Judge, pursuant to s. 13, stated a case to this Court in which answers to the following two questions are sought: "(i) Whether the provisions of s. 72 of the Commonwealth of Australia Constitution Act apply to the appointment of a stipendiary magistrate sitting as a Court of Petty Sessions in the Territory referred to in the Court of Petty Sessions Ordinance 1930-1961 of the Australian Capital Territory. (ii) Whether the said Clarence Lindsay Hermes having been appointed a stipendiary magistrate as stated in pars. 2 and 3 hereof and sitting as such pursuant to the Court of Petty Sessions Ordinance 1930-1961 of the Australian Capital Territory without having been appointed upon the terms specified in s. 72 pars. (ii.) and (iii.) of the Commonwealth of Australia Constitution Act has jurisdiction to hear and determine the information and summons aforesaid." (at p238)

5. Section 18 (1) of the Court of Petty Sessions Ordinance which was promulgated pursuant to s. 12 of the Seat of Government (Administration) Act 1910-1959 (Cth) provides for Courts of Petty Sessions in the Australian Capital Territory; the jurisdiction of such a court is exercisable by a stipendiary or special magistrate appointed under s. 7 (1) of the Ordinance, an appointment which, as I have said, is at the Governor-General's pleasure. (at p238)

6. Three questions arise: (i) Has this Court the jurisdiction to entertain the stated case? (ii) May the Commonwealth Parliament create courts to exercise jurisdiction in respect of occurrences in or concerning a territory of the Commonwealth without complying with the provisions of s. 72 of the Constitution? (iii) May such courts enforce in relation to occurrences within the limits of the territory in question a law made by the Parliament upon a subject matter falling within s. 51 of the Constitution intended to operate throughout the Commonwealth? (at p239)

7. The first question, being a matter of our own jurisdiction, ought to be examined at the outset. (at p239)

8. Section 13 of the Australian Capital Territory Supreme Court Act, to which I have already referred, does not limit the matters in which a case may be stated to the Court to matters falling within the scope of s. 76 of the Constitution. But in the generality of its expression it includes such matters; and if the Constitution so requires, it can be restricted in its operation to such matters by virtue of s. 15A of the Acts Interpretation Act 1901-1957 (Cth). The matter raised in the stated case involves the interpretation of the Constitution and falls within s. 76 (i.). Therefore the Supreme Court had power to state the present case and this Court has jurisdiction to entertain and to decide it. (at p239)

9. In thus dealing with the question of this Court's jurisdiction, I would not wish to be taken as prepared to decide that by an exercise of power under s. 122 of the Constitution, the Parliament may

not give original jurisdiction to this Court in matters which do not fall within s. 76. That question has not heretofore been decided by this Court. It has been held both by the Privy Council and by this Court that the Parliament may give a right of appeal to this Court from the decisions of courts having jurisdiction in respect of occurrences in the territories of the Commonwealth and may impose jurisdiction upon this Court to hear and determine such appeals: see, for example, Attorney-General of the Commonwealth of Australia v. The Queen (1957) AC 288, at p 320; (1957) 95 CLR 529, at p 545 ; Porter v. The King; Ex parte Yee [1926] HCA 9; (1926) 37 CLR 432 ; Chow Hung Ching v. The King [1948] HCA 37; (1948) 77 CLR 449 . Such appellate jurisdiction has been exercised by this Court on a number of reported occasions: see, for example, Menges v. The King [1919] HCA 37; (1919) 26 CLR 369 ; Mainka v. Custodian of Expropriated Property [1924] HCA 20; (1924) 34 CLR 297 ; Tuckiar v. The King [1934] HCA 49; (1934) 52 CLR 335 ; Sparre v. The King [1942] HCA 19; (1942) 66 CLR 149 . (at p239)

10. But members of this Court who have had occasion to express a view upon the question whether original jurisdiction in respect of occurrences in a territory may be imposed upon this Court have been equally divided in opinion: see Porter v. The King; Ex parte Yee [1926] HCA 9; (1926) 37 CLR 432 . (at p240)

11. In In re Judiciary and Navigation Acts [1921] HCA 20; (1921) 29 CLR 257 , a majority of the Court held that Chap. III of the Constitution exhaustively defined the original jurisdiction which may be given to this Court: (1921) 29 CLR, at p 265 . But this expression of opinion must be taken, in my opinion, in the context of that case to be limited to original jurisdiction given by laws made under legislative power derived from s. 51 of the Constitution. It has not so far been taken by the Court as a decision that Chap. III negates the possibility of original jurisdiction being given to this Court by a law made under some other legislative power of the Parliament, cf. view of Knox C.J. and Gavan Duffy J. in Porter v. The King; Ex parte Yee (1926) 37 CLR, at p 438 and the view of Dixon J. (as he then was) in Federal Capital Commission v. Laristan Building and Investment Co. Pty. Ltd. [1929] HCA 36; (1929) 42 CLR 582, at p 585 . (at p240)

12. I do not doubt the great inconvenience of increasing the original jurisdiction of this Court. Already it is extensive; and, as the Court is called upon to exercise it to any substantial extent, so the time available for the discharge of its appellate functions, which in general have more consequence, is seriously reduced. But, as at present advised, I cannot find any satisfactory fundamental distinction between the imposition upon the Court of appellate jurisdiction in respect of the decisions of courts created for the territories and the imposition upon it of original jurisdiction in connexion with occurrences in or concerning a territory. If the power to increase the original jurisdiction of this Court by laws made under the power conferred by s. 122 is to be denied, it must, in my opinion, be because of a limitation upon that section effected by some part of Chap. III construed in the Constitution as a whole. This conclusion might be said to follow from the difference in the language of s. 73 and that of s. 76. As at present advised I am not persuaded of it. However, it is unnecessary, in my opinion, to resolve that question in order to decide this case; accordingly, I abstain from doing so. (at p240)

13. In making these observations, I draw no distinction between the Australian Capital Territory and any other of the territories of the Commonwealth for I think that none can or should be drawn; in particular, I see no relevant consequence in the fact that the seat of government is to be found within the Australian Capital Territory or in the fact that the Parliament and the Executive Government there exercise poers which are federal in their nature. In my opinion, the power to make laws in respect to the Australian Capital Territory is derived from s. 122; in relation to the present matter I

do not think that anything is added to or subtracted from that power by s. 52 (i.). Thus I find no need to discuss the ambit of the legislative power given by s. 52. (at p241)

14. In refraining from expressing a concluded opinion as to whether the Parliament may, pursuant to s. 122, impose on this Court original jurisdiction in matters which do not fall within any of the descriptions in s. 76, I ought to say at once that, in my opinion, this Court already has original jurisdiction in respect of occurrences within a territory. In my opinion, s. 75 of the Constitution extends to give the Court original jurisdiction in all matters there described wherever the acts or omissions which form the basis of the approach to the Court have or should have occurred and whatever the nature of the cause of action which the moving party may seek to pursue. In my view, it is clear, for example, that this Court could entertain an action between a resident of Western Australia against a resident of Queensland for a wrongful act done by the one to the other in a territory of the Commonwealth; it can grant mandamus to an officer of the Commonwealth to perform a duty which is to be performed in a territory; and do so, though the Commonwealth officer is located in a territory. Equally, it may prohibit an act of an officer of the Commonwealth to be done, or in the course of being done, in a territory. The decision in Waters v. The Commonwealth [1951] HCA 9; (1951) 82 CLR 188 , which would appear to decide the contrary is, in my respectful opinion, insupportable and should be overruled. It was reached under the compulsion of a veiw of Chap. III and of the decision of this Court in R. v. Bernasconi [1915] HCA 13; (1915) 19 CLR 629 , to which I shall presently refer. That was a view which in effect imported into the language of s. 75 limitations which, in my opinion, are unwarranted and which are in truth inconsistent with the evident purpose of giving to this Court by the Constitution itself - and thus placing beyond the assail of the Parliament - such significant powers as those of which s. 75 speaks. (at p241)

15. The Court, in my opinion, for the reasons I have given, has power to entertain the stated case. (at p241)

16. I turn now to the second question. Section 122 gives to the Parliament legislative power of a different order to those given by s. 51. That power is not only plenary but is unlimited by reference to subject matter. It is a complete power to make laws for the peace, order and good government of the territory - an expression condensed in s. 122 to "for the government of the Territory". This is as large and universal a power of legislation as can be granted. It is non-federal in character in the sense that the total legislative power to make laws to operate in and for a territory is not shared in any wise with the States. (at p242)

17. But this does not mean that the power is not controlled in any respect by other parts of the Constitution or that none of the provisions to be found in chapters other than Chap. VI are applicable to the making of laws for the Territory or to its government. It must remain, in my opinion, a question of construction as the matter arises whether any particular provision has such an operation, the construction being resolved upon a consideration of the text and of the purpose of the Constitution as a whole. It has been decided for instance that, for reasons derived from the evident federal purpose of that provision, s. 55 properly construed does not apply to laws made by the Parliament for a territory under the legislative power given by s. 122: Buchanan v. The Commonwealth [1913] HCA 29; (1913) 16 CLR 315 : and that s. 80 neither applies of its own force to the trial in a territory of an offence there committed nor need its provisions be observed by the Parliament in making laws for such trial of such offences: R. v. Bernasconi [1915] HCA 13; (1915) 19 CLR 629 . I shall refer in a moment to the reasons advanced for this decision and express my own respectful view as to the basis upon which the decision in that case can be accepted. (at p242)

18. The reported cases establish that the Commonwealth using its legislative power derived from s. 122 can create courts with jurisdiction in respect of occurrences in or concerning a territory: see for example Porter v. The King; Ex parte Yee [1926] HCA 9; (1926) 37 CLR 432 ; Attorney-General of the Commonwealth of Australia v. The Queen (1957) AC 288; (1957) 95 CLR 529 . (at p242)

19. Unless s. 72 is of universal application to all courts created by the Commonwealth pursuant to any legislative power, these decisions determine the answer to the second question. However, s. 72, in my opinion, is not of such universal application. Upon its proper construction, in my opinion, it refers in the expression "the other courts created by the Parliament" to the other courts to which reference is made in s. 71, namely, such other federal courts as the Parliament creates, courts created by laws made in pursuance of the "federal" legislative powers contained in s. 51 of the Constitution. A court created by a law made by the legislative power given by s. 122 is not a "federal" court. Thus the section is not a limitation upon the power to create courts of judicature which is included within the complete power of legislation given by s. 122 for the government of the Territories. (at p243)

20. I come to the conclusion, therefore, directly from the language of the Constitution that the Commonwealth by laws made under the legislative powers given by s. 122 can create or authorize the creation of courts with jurisdiction in respect of occurrences in or concerning a territory without observing the requirements of s. 72 in the appointment of the judicial officers constituting such courts. (at p243)

21. But not all those who have considered this matter and would arrive at the same conclusion would do so for the reasons I have thus expressed. Some would support that result upon the fundamental view that Chap. III as a whole is inapplicable to or in respect of territories. The consequences of such a view are, in my opinion, so far-reaching and my respect for those who have entertained and do entertain it so great, that I feel bound to indicate the reasons for my inability to accept it. (at p243)

22. It is said that it is a logical conclusion from that opinion (and I agree that it is) that this Court may not entertain an action against the Commonwealth in respect of the wrongful detention in a territory of the Commonwealth of an Australian citizen by one of its officers. For so it was decided in Waters v. The Commonwealth [1951] HCA 9; (1951) 82 CLR 188 . The conclusion that this Court may not exercise the powers given it by s. 75 of the Constitution to prohibit a wrongful act or compel a lawful act whatever the source of the unlawfulness or of the duty by a Minister of the Crown done or to be done at the seat of government, which by the Constitution must be within a territory of the Commonwealth (s. 125), is, to my mind, so disturbing that one must immediately doubt the validity of the course of reasoning which appears to lead to it, and, however time honoured it may be, re-examine it. (at p243)

23. The reasons for judgment of the Court in R. v. Bernasconi [1915] HCA 13; (1915) 19 CLR 629 form the basis of the doctrine that Chap. III of the Constitution as a whole "has no application to the Territories"; "does not extend to the Territories". But such a conclusion does not necessarily follow, in my respectful opinion, from the decision itself in that case. (at p243)

24. It was there decided that, and I quote the headnote to the report of the case which, in my opinion, accurately reflects the Court's decision, "the power of the Commonwealth Parliament conferred by s. 122 of the Constitution to make laws for the government of a territory, whether that power is exercised directly or through a subordinate legislature, is not restricted by the provision in s. 80 of the Constitution that the trial on indictment of any offence against any law of the

Commonwealth shall be by jury" [1915] HCA 13; (1915) 19 CLR 629 . Whatever doubts there may be as to that decision, in my opinion, what it actually decided, as thus expressed, ought not now to be disturbed. For one thing, it is a decision of long standing upon the basis of which legislation has frequently been passed: and for another, the significance of what it precisely decides is now small having regard to R. v. Archdall and Roskruge; Ex parte Carrigan and Brown (1928) 41 CLR 128 and R. v. Federal Court of Bankruptcy; Ex parte Lowenstein [1938] HCA 10; (1938) 59 CLR 556 . What might have been thought to be a great constitutional guarantee has been discovered to be a mere procedural provision. (at p244)

25. In my opinion, the decision in R. v. Bernasconi [1915] HCA 13; (1915) 19 CLR 629 may be supported upon the ground that upon the proper construction of s. 80, read in the Constitution as a whole, the offences to which it refers are offences created by or under the authority of laws made by the Parliament pursuant to legislative powers derived from s. 51 of the Constitution, that is to say, to offences made under those laws of the Commonwealth, which in substance was what Isaacs J. held. This, the disclosed intention of the Constitution, might be derived from the unlikelihood that it could have been thought that juries would be found in such potential territories of the Commonwealth as might have been within contemplation at the foundation of the Commonwealth; and perhaps from the circumstance that the section appears to be in some sense related to ss. 71 and 72. (at p244)

26. But, whatever reason is found for so contruing it, in my respectful opinion, it is because of the construction of s. 80 itself, as distinct from any reasoning affecting Chap. III as a whole, that the decision in R. v. Bernasconi [1915] HCA 13; (1915) 19 CLR 629 should be supported. Indeed, Griffith C.J. (with whose views Gavan Duffy and Rich JJ. agreed) did initially reach the conclusion that the offences to which s. 80 related were such as were created as incidental to the execution of laws made under powers federally circumscribed (4). But he proceeded to treat such laws as exclusively entitled to the description "laws of the Commonwealth": and also to treat the whole of Chap. III as if none of it could apply to a non-federal power or situation. Isaacs J. did not accept the view that the law contrvened in that case, though deriving its force ultimately from s. 122, was not a law of the Commonwealth. But, he concluded that because s. 80 was found in Chap. III which dealt with "the whole judicial power of the Commonwealth proper", it was restricted in its operation to the exercise of that judicial power. (at p245)

27. In my most respectful opinion, these expressions went beyond the occasion, and were in their full extent unnecessary in order to support the conclusion that the offences to which s. 80 relates are only such as are created by the exercise of federal legislative powers. There does not seem to me to be any single theme running throughout Chap. III which requires it to be treated so much all of one piece that if any part of it relates only to federal matters, every part of it must likewise be restrained. Thus the mere presence of s. 80 in Chap. III does not, in my respectful opinion, require that it be inapplicable to territories and therefore to non-federal offences. (at p245)

28. Also, in my opinion, parts of Chap. III are clearly "applicable to the territories". It has been made clear that inter se questions can arise out of the exercise of powers exclusively vested in the Commonwealth as well as out of the exercise of a concurrent power: see Dennis Hotels Pty. Ltd. v. Victoria [1961] UKPCHCA 1; (1962) AC 25; (1961) 104 CLR 621 . The paramountcy of Commonwealth law accorded by s. 109 of the Constitution is not limited to paramountcy over laws made under those powers of the State with which the Commonwealth has concurrent power but every law of the Commonwealth whatever the constitutional power under which or by reference to which it is made or supported is paramount over every inconsistent State law. Further, laws made

for a territory may operate into a State: see Lamshed v. Lake [1958] HCA 14; (1958) 99 CLR 132 . Thus the possibility of inter se questions arising out of an exercise of the powers given by s. 122 is apparent. It could scarcely be said that because s. 74 is found in Chap. III it is limited to such questions arising out of the exercise of "federal" legislative powers. It could not be said that s. 74 was not "applicable to the territories". Lamshed v. Lake [1958] HCA 14; (1958) 99 CLR 132 shows that it cannot be said: see (1958) 99 CLR, at p 148 . (at p245)

29. I have already indicated my view as to the operation of s. 75. It must, in my opinion, apply no matter where the act upon which the proceedings before the court are founded has been or ought to be done and whether the cause of action derives from an exercise of legislative power given by s. 51 or by s. 122. Again, s. 78 is not limited to the making of laws to proceed against the Commonwealth in federal matters: nor must s. 56 of the Judiciary Act 1903-1960 be construed to exclude claims against the Commonwealth arising out of occurrences in a territory. (at p246)

30. Further, it seems to me, with the utmost respect, to be an error to compartmentalize the Constitution, merely because for drafting convenience it has been divided into chapters. No doubt on some occasions some assistance may be obtained from the place in the layout of the Constitution which a particular provision occupies when resolving ambiguities in language. But this does not call for disjoining a part of the Constitution from the rest. Cf. Dixon J. (as he then was) in Australian National Airways Pty. Ltd. v. The Commonwealth (1945) 71 CLR, at pp 84, 85 ; and Dixon C.J. in Lamshed v. Lake (1958) 99 CLR, at p 145 . (at p246)

31. Obviously some of the provisions found in Chap. I of the Constitution are "applicable to the territories", to borrow the elliptical phrase taken from the reasons for judgment in R. v. Bernasconi [1915] HCA 13; (1915) 19 CLR 629 : Sections 43, 44, 45, and 46 must apply to a member for whom provision is made pursuant to s. 122. Section 49 must, as Dixon C.J. pointed out in Lamshed v. Lake (1958) 99 CLR, at p 143 , apply when laws made pursuant to s. 122 are passing through the House. There would seem to be no reason why a double dissolution should not result from a disagreement of the House and the Senate upon a proposed law to be made under the powers derived from s. 122. (at p246)

32. Again, the duty to execute laws made for territories is surely no less under Chap. II than it is in respect of laws made under s. 51. Nor is there any reason to think that a Department of Territories may not be created under s. 64; and so it may be shown that much of Chap. II must be "applicable to the territories". (at p246)

33. It seems to me therefore, with the utmost respect, that whilst s. 122 does give a complete and, as opposed to those given by s. 51, a different power - there is no warrant for segregating that power from the rest of the Constitution or for taking any global view of any chapter of the Constitution and regarding it as wholly inapplicable to Chap. VI or to or in respect of the exercise of the power it gives. (at p246)

34. Besides saying that none of Chap. III was applicable to territories, it was also said by the majority in R. v. Bernasconi [1915] HCA 13; (1915) 19 CLR 629 that a law made under s. 122 was not a law of the Commonwealth. (at p246)

35. It may be granted that the word "Commonwealth" is used in the Constitution sometimes geographically, as in part of covering cl. 5 where it speaks of "every part of the Commonwealth", and sometimes as a reference to the political entity which the Constitution created, as in other parts

of that covering clause. It may also be granted that the powers which were given to the Commonwealth were of different orders, some federal, limited by subject matter, some complete and given expressly, and some no doubt derived by implication from the very creation or existence of the body politic. Consequently, the need to observe the nature of the powers sought to be exercised at any time by the Commonwealth is ever present. But, the Constitution brought into existence but one Commonwealth which was, in turn, destined to become the nation. The difference in the quality and extent of the powers given to it introduced no duality in the Commonwealth itself. The undoubted fact that the Commonwealth emerged from a federal compact or that that compact is reflected in the limitations placed upon some of the powers of the Commonwealth or that the new political entity derived from a union of the peoples of the former colonies does not deny the essential unity and singleness of the Commonwealth. (at p247)

36. Consequently, in my opinion, the expression "law of the Commonwealth" embraces every law made by the Parliament whatever the constitutional power under or by reference to which that law is made or supported: see per Dixon C.J. in Lamshed v. Lake (1958) 99 CLR, at p 148 . (at p247)

37. Although the territories may not be included in the federal system in the sense that the powers of the Commonwealth with respect to them are not federally circumscribed, they are, in my opinion, clearly included in the expression "The Commonwealth", e.g. throughout Chap. I of the Constitution. I see no occasion for contrasting a Commonwealth which contains or embraces only the constituent elements of a federation with a Commonwealth which includes all the areas over which it can by one power or another legislate. If the fundamental concept of a single Commonwealth is accepted, there would seem to be no need to entertain any distinction between territories which originally contained people who were members of a colony at the point of federation and other territories or to seek to find significance in the presence within a territory of the seat of government. (at p247)

38. No doubt some of the powers of the Commonwealth are appropriate to the rule of non self-governing possessions whilst others, though federally disposed, are truly those of a self-governing people. But this neither means that the Constitution is divisible into two parts without any mutual interaction nor that the power to govern dependent territories is in no respect controlled by any other part of the Constitution. (at p248)

39. I have not attempted to discuss in detail in these reasons the various reported cases in this Court in which the doctrine derived from R. v. Bernasconi [1915] HCA 13; (1915) 19 CLR 629 has been discussed, criticized, or applied. Realizing the significance of departure from views hitherto widely, though I am bound to say not universally, accepted, I have anxiously studied the judgments in which R. v. Bernasconi [1915] HCA 13; (1915) 19 CLR 629 or the doctrine derived from it have been mentioned. Having done so, I am constrained to observe that there would seem in reality to be no uniformity in the views expressed or in the manner of applying them. On the other hand, in my opinion, a departure from the doctrine would not result in any change in the actual result of any of the reported cases with the exception of Waters v. The Commonwealth [1951] HCA 9; (1951) 82 CLR 188 . (at p248)

40. Though the abandonment of a doctrine of interpretation of the Constitution is something not lightly and but rarely to be done, I feel compelled after deep consideration, because of the logical consequences of doing so, to express the view that the Constitution ought not to be interpreted as if Chap. III as a whole were "inapplicable to territories". (at p248)

41. Having thus expressed myself, I return to say that, in my opinion, upon its true construction s. 72 does not apply to courts created by or pursuant to laws made under s. 122. (at p 248)

42. The second of the three questions I have posed as arising in the case should therefore be answered affirmatively. The Commonwealth may create territorial courts without complying with the requirements of s. 72. (at p248)

43. As to the third question, I have had the advantage of reading the reasons for judgment to be given by my brother Kitto. I entirely agree with the reasons he gives for deciding that a territorial court having the appropriate local jurisdiction may enforce in relation to acts occurring within the territory in question a law made by the Parliament upon a subject matter falling within s. 51 of the Constitution and intended to operate throughout the Commonwealth. I would not wish to add anything to his expression of those reasons. (at p248)

44. In my opinion, the questions submitted in the stated case should be answered : (i) No. (ii) Yes. (at p248)

KITTO J. The prosecutor stands charged with having committed within the Australian Capital Territory an offence against s. 107 (c) of the Post and Telegraph Act 1901-1961 (Cth). The Court in which the charge is pending is a court of petty sessions constituted under s. 18 (1) of the Court of Petty Sessions Ordinance 1930-1961 (A.C.T.), an Ordinance promulgated under s. 12 of the Seat of Government (Administration) Act 1910-1959 (Cth). By s. 18 (2) of that Ordinance it is provided that the jurisdiction of the Court may be exercised by a magistrate (other than a special magistrate) or by one or more special magistrates ; and s. 5 (1) defines "magistrate" to mean inter alia a stipendiary or special magistrate appointed under the Ordinance. Provision for the appointment of stipendiary magistrates is made by s. 7 (1), and by s. 7 (2) it is provided that a stipendiary magistrate appointed under s. 7 (1) shall be paid such remuneration, and shall hold office on such terms and conditions, as the Governor-General determines. Upon the charge coming on to be heard before the Court as constituted by a stipendiary magistrate appointed under s. 7 (1), the prosecutor objected to the jurisdiction on the ground that to adjudicate upon the charge would be to exercise a part of the judicial power of the Commonwealth to which Chap. III (ss. 71 to 80) of the Constitution refers, and that since the Court of Petty Sessions does not consist of Justices appointed upon the terms of s. 72 (ii.) and (iii.) as to non-removability and remuneration it is not a court in which, consistently with Chap. III, any of that judicial power of the Commonwealth may be vested. The objection was overruled by the magistrate and prohibition against his proceeding further with the charge is now being sought from the Supreme Court of the Territory. That Court, under s. 13 of the Australian Capital Territory Supreme Court Act 1933-1960 (Cth), has referred to this Court by stated case questions involved in the objection. (at p249)

2. To entertain the case stated is of course to exercise original jurisdiction. It is to exercise so much of the original jurisdiction to determine the application for prohibition as is involved in deciding the questions submitted by the Supreme Court. We must therefore decide whether s. 13, which in terms not only authorizes the stating of a case but empowers a Full Court of the High Court to hear and determine the case, is constitutionally valid. It happens that if I discuss that question at once a good deal of the ground which is relevant to the questions asked in the case stated will be covered. (at p249)

3. In its application to the present case, s. 13 is within the literal terms of the legislative authority conferred on the Parliament by s. 76 (ii.) of the Constitution ; for the relevant "matter", namely the

claim to have further proceedings in the Court of Petty Sessions prohibited, is one which involves the interpretation of the Constitution. If s. 76 (ii.) were to be given an application unrestricted by the context it may be that with the aid of s. 15A of the Acts Interpretation Act s. 13 could be upheld in so far as it applies to such a case. But it has been the doctrine of this Court for fifty years, consistently maintained notwithstanding criticism, that Chap. III is directed to a limited topic and accordingly has a limited application. The doctrine arises from a consideration of the framework of the Constitution and from many indications, to be found by working through the Constitution Act (63 and 64 Vict. c. 12) and the Constitution itself, that the first five Chapters of the Constitution belong to a special universe of discourse, namely that of the creation and the working of a federation of States, with all the safeguards, inducements, checks and balances that had to be negotiated and carefully expressed in order to secure the assent of the peoples of the several Colonies, with their divers interests, sentiments, prejudices, ambitions and apprehensions, to unite in the federation. When Chap. VI is reached, and it is found that s. 122 gives the Parliament a general power to make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed under the authority of the Commonwealth or otherwise acquired by it, a change to a fundamentally different topic is perceived. The change is from provisions for the self-government of the new federal polity to a provision for the government by that polity of any community which comes under its authority while not being "a part of the Commonwealth" : cf. Harrison Moore, The Commonwealth of Australia, 2nd ed. (1910) p. 589. (at p250)

4. The other sections of Chap. VI likewise deal with new topics, which may be described broadly as methods by which the composition of the federation may be altered. But it is not only the change of topic that is considered to be important in relation to s. 122. The width of the legislative power it confers is the crucial consideration. Whether or not one or two of the miscellaneous provisions in Chap. V apply to the territories - ss. 116 and 118 have been suggested, e.g. in Lamshed v. Lake [1958] HCA 14; (1958) 99 CLR 132, at pp 142, 143 , though further consideration has made me more doubtful than I was about them - it seems clear enough that the limitations which Chap. I puts upon legislative power in the working of the federal system, anxiously contrived as they are with the object of keeping the Parliament to the course intended for it, are thrown aside as irrelevant when the point is reached of enabling laws to be made for the government of territories which stand outside that system ; for s. 122 uses terms apt to authorize the Parliament to make what provision it will for every aspect and every organ of territory government. The exercise of the judicial power which is a function of government of a territory is within the unrestricted authority thus in terms conferred. The Court decided quite early, in Buchanan v. The Commonwealth [1913] HCA 29; (1913) 16 CLR 315 , that the Constitution, addressing itself here to something different from that to which its first five chapters have been devoted, makes on the new topic a provision which is appropriately free from all concern with problems of federalism. The concern here is not only with "a new consideration", as Isaacs J. called it in R. v. Bernasconi [1915] HCA 13; (1915) 19 CLR 629, at p 637 , but with "a disparate non-federal matter" as Viscount Simonds called it in Attorney-General of the Commonwealth of Australia v. The Queen (1957) AC 288, at p 320; [1957] HCA 12; (1957) 95 CLR 529, at p 545 . (at p251)

5. This has been considered the great fact to be borne in mind when one turns to Chap. III and asks how the territories stand in relation to the provisions there made. They are provisions that speak of "federal" courts and "federal" jurisdiction, and by so doing confirm the inference which the considerations already mentioned so strongly suggest. It would have been simple enough, as was recognized in the Boilermakers' Case [1956] HCA 10; (1956) 94 CLR 254, at p 290 , to follow the words of the relevant provisions, i.e. without attending to the scheme and the layout of the

Constitution; but, the allurement of simplicity notwithstanding, the conclusion that has been reached is that Chap. III does not intend to provide for or regulate the exercise of any judicial power save that which inheres in the federal polity as a function of government in respect of its own area, and that accordingly no provision of the Chapter is to be interpreted as intending to reduce the generality of the power conferred by s. 122 to make laws for inter alia the exercise of that judicial power which attaches to the Commonwealth, not in virtue of its character as the central polity of the federation and therefore in respect of the federated area, but in virtue of its responsibility for the entire (non-federal) government of a community made subject in all respects to its authority. (at p251)

6. The Court enunciated the doctrine in R. v. Bernasconi [1915] HCA 13; (1915) 19 CLR 629 , and has applied it in the interpretation and application of Chap. III ever since. R. v. Bernasconi [1915] HCA 13; (1915) 19 CLR 629 itself related to the provision in s. 80 that the trial on indictment of an offence against any law of the Commonwealth shall be by jury. A person was charged before a court in a territory with having committed in the territory an assault contrary to a provision of an ordinance which was in force in the territory by virtue of a law operating under s. 122. He was tried and convicted by a magistrate sitting without a jury, under the authority of a provision in an ordinance of the territory which applied to the case. The decision of the High Court was that the latter provision was valid and that s. 80 of the Constitution had no application to such an exercise of judicial power as the trial of the charge required. The reason was expressed a little differently in the judgments of Griffith C.J. (with whom Gavan Duffy and Rich JJ. concurred) on the one hand and of Isaacs J. on the other, but with no difference in fundamental idea. Griffith C.J. placed his emphasis on the expression in s. 80, "any law of the Commonwealth". He held that the reference was only to a law passed in the execution of those functions of government as to which the Commonwealth "stands in the place of the States" as contrasted with the territories. This he did on the basis of a general proposition that Chap. III is limited in its application to the exercise of the judicial power of the Commonwealth in respect of the functions thus referred to, and "has no application to the territories" (1915) 19 CLR, at p 635 - by which he obviously meant has no application to the exercise of the judicial power of the Commonwealth in respect of those functions of government as to which the Commonwealth exercises authority over the territories as subordinate polities. Isaacs J. held s. 80 to be inapplicable to the case on the general view that that section is "clearly enacted as a limitation on the accompanying provisions, applying to the Commonwealth as a self-governing community" (1915) 19 CLR, at p 637 . The view of the Court may be expressed by saying that a trial in a territory court of a charge of an offence in the territory against a law of the territory is as surely outside federal judicial power and within territory judicial power as a trial in a State of a charge of an offence in the State against a State law is outside federal judicial power and within State judicial power. No relevant distinction arises from the fact that the court is established and the offence created in the latter case by or under the laws of a self-governing State and in the former case by or under laws imposed upon the territory ab extra. (at p252)

7. The distinction is surely not artificial. It does involve interpreting the expression "the Commonwealth" in Chap. III in a narrower sense than that which it bears in some contexts, e.g. in covering cl. 5; but no one would contend that it is an expression of invariable meaning, and the task that must be faced in interpreting Chap. III is to select the meaning which is appropriate in that context. Such difficulty as there is in the task is to some extent due to the choice of the word "Commonwealth" as the title of the federal union instead of the more descriptive title, the United States of Australia. If the descriptive expression had been used in Chap. III, the prima facie meaning of it would have excluded the territories. No doubt even that expression would have come to be applied on occasions, by a process of extension, to the whole area under the central legislative

power, including the territories; but a use of it in the extended sense would have been ex facie inaccurate, and the adoption of the extended meaning in construing Chap. III could not have been justified in the absence of a positive indication that that was the meaning intended. (at p253)

8. The case of Waters v. The Commonwealth [1951] HCA 9; (1951) 82 CLR 188 occasions some difficulty, due, I venture to think, to a misconception of the Bernasconi doctrine by the learned Judge who decided it. The plaintiff, alleging that he was being unlawfully detained in the Northern Territory by officers of the Commonwealth, sued in the High Court for an appropriate declaration, for habeas corpus and for an injunction. He made the Commonwealth and the officers defendants to the action, and the "matter" was therefore within the descriptions in pars. (iii.) and (v.) of s. 75 of the Constitution. His Honour held that nevertheless the action was not within the jurisdiction of the Court, holding that according to Bernasconi's Case [1915] HCA 13; (1915) 19 CLR 629 , by which as a single Judge he was bound, Chap. III was not law in and for the territories. In my respectful opinion that is not what Bernasconi [1915] HCA 13; (1915) 19 CLR 629 decided. The statements appearing in the judgments that Chap. III "has no application to the territories", "does not extend to the territories", are, as I read them, elliptical and mean only that the Chapter has no application to the exercise of that judicial power which exists as a function of government of a territory. The doctrine of the case does not set any limit to the operation which s. 75 or s. 76 have according to their terms, for those sections confer jurisdiction (s. 75), or authorize the Parliament to confer jurisdiction (s. 76), as part of the judicial power of the Commonwealth referred to in s. 71. It may be mentioned that in Reg. v. Richards; Ex parte Fitzpatrick and Browne [1955] HCA 36; (1955) 92 CLR 157, at p 161 Dixon C.J. remarked, though only in an obiter dictum in the course of an oral judgment, that the application that had been made in that case to the Supreme Court of the Australian Capital Territory and referred by that Court to the High Court might have been made in the first instance to the High Court, because, as the argument had shown, the matter arose under the Constitution. No doubt his Honour had in mind s. 30 (a) of the Judiciary Act 1903-1946 (Cth). (at p254)

9. In Waters v. The Commonwealth [1951] HCA 9; (1951) 82 CLR 188 it was unnecessary for Fullagar J. to decide whether a law operating in a territory by force of s. 122 could validly have conferred on the High Court original jurisdiction for such a case as that which he had before him. But the question had been considered long before, in the case of Porter v. The King; Ex parte Yee [1926] HCA 9; (1926) 37 CLR 432 . Opinions were much divided in that case, with the odd result that while four of the six Justices decided that appellate jurisdiction in respect of a territory might be given to the High Court by a law operating under s. 122 there was an equal division of opinion as to whether original jurisdiction in respect of a territory might likewise be given, though no one suggested any difference in principle between them. The important point to notice is that the distinction upon which the Bernasconi doctrine rests, the distinction between provisions of the Constitution that relate only to the federal system and provisions that relate to non-federal matters, met with no word of criticism from any of the Justices. True it is that Knox C.J. and Gavan Duffy J. (the latter himself a party to Bernasconi which, however, was not cited in the joint judgment) treated the case of In re Judiciary and Navigation Acts [1921] HCA 20; (1921) 29 CLR 257 , in which they had been of the majority, as establishing that the jurisdiction of the High Court, whether original or appellate, is to be sought solely in Chap. III; and if a majority of the Court had agreed with them it would have been impossible thereafter to maintain the Bernasconi interpretation of the Chapter. But three Justices (including two who had been of the majority in In re Judiciary and Navigation Acts [1921] HCA 20; (1921) 29 CLR 257) considered that that case related only to the original and appellate jurisdiction of the High Court in matters within federal judicial power; and, in express conformity with Bernasconi [1915] HCA 13; (1915) 19 CLR 629 , they held that s. 122 contained a

power of legislation which, being untrammelled by anything in Chap. III, extended to giving the High Court both original and appellate jurisdiction in territory matters falling outside the federal judicial power of the Commonwealth. The remaining Justice, Higgins J., had dissented in In re Judiciary and Navigation Acts [1921] HCA 20[1921] HCA 20; ; (1921) 29 CLR 257 . He did not say, and could hardly be expected to say, which two members of the majority in the case were correctly interpreting their joint judgment. But his Honour, accepting that judgment as having the effect attributed to it by Knox C.J. and Gavan Duffy J., declined to apply its principle to appellate jurisdiction. He mentioned Bernasconi's Case [1915] HCA 13; (1915) 19 CLR 629 without criticism. Thus, of the five Justices to whose reasoning an opinion as to the soundness of the Bernasconi doctrine was relevant, a majority accepted and applied it. Of these, the new-comer to the doctrine was Starke J., from whose judgment I quote a few sentences for the sake of their clear affirmation. (at p255)

10. "The Parliament has, by force of s. 122 of the Constitution, full and plenary power over the territories . . . 'The governments of the territories are not, however, organized 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 [1850] USSC 26[1850] USSC 26; ; (1850) 9 Howard 235 (13 Law Ed 119) ; R. v. Bernasconi [1915] HCA 13; (1915) 19 CLR 629). 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 (1857) 20 Howard 176, at p 182 (15 Law Ed 891, at p 893)). And there is nothing on the face of s. 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. (at p255)

11. "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 Judiciary and Navigation Acts [1921] HCA 20; (1921) 29 CLR 257). I am unable to accept this view. In the case cited the Court was dealing with the judicial power defined in Chap. 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 s. 21 of the Ordinance 1911-1922 establishing the Supreme Court for the Northern Territory of Australia" (1926) 37 CLR, at pp 448, 449 . (at p255)

12. Thus Bernasconi's Case [1915] HCA 13; (1915) 19 CLR 629 was left in possession of the field; and every member of the Court who has touched upon the subject since (with the possible though not certain exception of Evatt J. in Ffrost v. Stevenson [1937] HCA 41; (1937) 58 CLR 528, at p 592) has accepted the proposition, even if he has not given it his approval, that Chap. III does not limit in any way the authority of the Parliament under s. 122 to make laws with respect to the exercise of judicial power which are laws for the government of a territory: see, for example, Reg. v. Kirby; Ex parte Boilermakers' Society of Australia [1956] HCA 10; (1956) 94 CLR 254, at pp 289, 290, aff (1957) AC 288; (1957) 95 CLR 529. ; Lamshed v. Lake [1958] HCA 14; (1958) 99 CLR 132, at p 142 , and other cases cited herein. In particular, ever since Porter v. The King; Ex parte Yee [1926] HCA 9; (1926) 37 CLR 432 there has been a continuous acceptance of the validity of laws conferring on the High Court appellate jurisdiction in respect of territories, notwithstanding any disregard they may evince of Chap. III: e.g. in Wall v. The King [1927] HCA 4; (1927) 39 CLR 245, at p 250 ; Jolley v. Mainka [1933] HCA 43; (1933) 49 CLR 242 ; Tuckiar v. The King [1934] HCA 49; (1934) 52 CLR 335, at p 338 ; Chow Hung Ching v. The King (1948) 77 CLR 449, at pp

459, 470, 475 . As regards original jurisdiction in territory matters there has been some measure of uncertainty, traceable to the illogical attitude which Higgins J. felt himself obliged to take up in Porter v. The King [1926] HCA 9; (1926) 37 CLR 432 . He assumed (or conceded, it is not clear which) that the case of In re Judiciary and Navigation Acts [1921] HCA 20; (1921) 29 CLR 257 bound him to deny validity to a law giving the High Court original jurisdiction outside Chap. III, but he insisted nevertheless upon maintaining the validity of a similar law as to appellate jurisdiction, while not expressly agreeing or disagreeing with the Bernasconi doctrine. It was this, apparently, that led Dixon J. to question his jurisdiction in Federal Capital Commission v. Laristan Building and Investment Co. Pty. Ltd. [1929] HCA 36; (1929) 42 CLR 582 , though he concluded that he was warranted in assuming jurisdiction none the less. The doubt seems to have continued in his Honour's mind in Douran v. Whisker [1946] HCA 9; ; (1946) 72 CLR 595, at p 606 and Chow Hung Ching v. The King [1948] HCA 37; (1948) 77 CLR 449, at p 475 (note the expression "on any view"), and may account for the obiter dictum in Reg. v. Richards; Ex parte Fitzpatrick and Browne [1955] HCA 36; (1955) 92 CLR 157, at p 161 to which I have already referred. What his Honour said in Australian National Airways Pty. Ltd. v. The Commonwealth [1945] HCA 41[1945] HCA 41; ; (1945) 71 CLR 29, at p 84 as to the difficulty of reconciling the cases on the subject (i.e. on the subject of the relation of s. 122 to the rest of the Constitution) cannot be gainsaid, but as Fullagar J. found in Waters v. The Commonwealth [1951] HCA 9; (1951) 82 CLR 188, at pp 191, 192 the difficulty is not in applying the Bernasconi doctrine but in reconciling with that doctrine everything that was said in Mainka v. Custodian of Expropriated Property [1924] HCA 20[1924] HCA 20; ; (1924) 34 CLR 297 , and with everything that was said in Porter v. The King [1926] HCA 9; (1926) 37 CLR 432 . But at least in Lamshed v. Lake [1958] HCA 14; (1958) 99 CLR 132, at p 142 Dixon C.J. accepted the position, on the authority of Bernasconi [1915] HCA 13; (1915) 19 CLR 629 , that Chap. III may be treated as imposing no limit upon the power to make laws under s. 122. Accordingly, whatever might have been said at an earlier time it seems to me that the difficulties of reconciliation have by now become of only academic importance. Mainka v. Custodian of Expropriated Property [1924] HCA 20; (1924) 34 CLR 297 I have not discussed, because in so far as the judgment in that case was out of line with Bernasconi [1915] HCA 13; (1915) 19 CLR 629 the discrepancy ceased to matter, I think, after Porter v. The King [1926] HCA 9[1926] HCA 9; ; (1926) 37 CLR 432 . And as regards Porter v. The King [1926] HCA 9; (1926) 37 CLR 432 itself, the difficulty of choosing between the divergent views there expressed has become, as I see it, simply a question whether Bernasconi [1915] HCA 13; (1915) 19 CLR 629 stands or not; and it has stood so long and been acted upon by the Parliament so often that I cannot doubt we will best perform our proper service by accepting it as established law. Indeed, in view of its history in this Court and in the Privy Council, a departure from it is a course which in my opinion the Court should not contemplate. On that footing, and being unable myself to see, or to find in any judgment a suggestion that anyone else has seen, a logical ground for distinguishing in principle between appellate and original jurisdiction as regards the power of the Parliament to give this Court jurisdiction outside Chap. III by means of a law operating under s. 122, I am of opinion that we ought to hold as a corollary of Bernasconi's Case [1915] HCA 13; (1915) 19 CLR 629 , and in line with the decision in Porter v. The King [1926] HCA 9[1926] HCA 9; ; (1926) 37 CLR 432 and all the cases that have followed it, that the power of Parliament under s. 122, being unrestricted by anything expressed or implied in Chap. III, extends to conferring on the High Court original as well as appellate jurisdiction in any matter, provided that in doing so it is a law for the government of a territory. (at p257)

13. We have been strongly urged to admit an exception in the case of the Australian Capital Territory on either or both of two grounds: (i) that the source of legislative power for the

government of the Capital Territory is not s. 122, or at least is not exclusively s. 122, and that that is sufficient to prevent the reasoning of Bernasconi's Case [1915] HCA 13; (1915) 19 CLR 629 from applying in relation to that Territory; and (ii) that Chap. III applies to the whole of the federal polity and that the Australian Capital Territory is within that polity, either because the polity is co-terminous with the continent of Australia or because the Territory, by reason of its special relation to the seat of government, is integral to the federal system. (at p257)

14. The first ground is based upon what I believe, with all respect to those who have thought differently, to be the misconception that the source, or at least a source, of legislative power for the government of the Capital Territory is s. 52 (i.) of the Constitution, so that conclusions which depend upon the exclusiveness of s. 122 as a source of that power do not apply. By s. 52 (i.) the Parliament is given exclusive power to legislate for the peace, order and good government of the Commonwealth with respect to the seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes. The power under the first limb of s. 52 (i.) extends only, I think, to the making of laws on the subject of the seat of government as a specific and separate topic of legislation to be distinguished from more general topics which may affect a place in which the seat of government is or is to be - just as the second limb extends only, I should suppose, to laws on the specific subject of places fulfilling the given description. It is the seat of government as such, and places acquired, etc., as such, which I understand to be referred to in s. 52 (i.). Examples of the kind of legislation authorized by the first limb are to be found in the Seat of Government Act 1908-1955 (Cth) and s. 4 of the Seat of Government Acceptance Act 1909-1955 (Cth). In view of the clear distinction drawn in s. 125 of the Constitution, it would be difficult to maintain that the Constitution identifies the seat of government with the territory in which the Parliament has determined that the seat of government shall be. In my opinion the whole power to legislate for the government of that territory is found in s. 122, which in terms applies to "any" territory. The inferences to be drawn from that section must, I think, be the same for the Capital Territory as for any other territory. (at p258)

15. The second of the grounds referred to should, I think, be dismissed as requiring a complete rejection of the reasoning in Bernasconi's Case [1915] HCA 13; (1915) 19 CLR 629, for it depends upon treating "the Commonwealth" in Chap. III as referring to a larger area than that of the federated States. It is true that the Constitution Act (covering cl. 6) treats the Northern Territory as included (in 1900) in South Australia, and that what is now the Australian Capital Territory was then a part of New South Wales; so that the area of the federation to which the doctrine of Bernasconi's Case [1915] HCA 13; (1915) 19 CLR 629 refers covered, at the beginning, the whole continent. But it is the federation as it exists from time to time as the self-governing community that is to be contrasted with the territories which from time to time exist as communities subject to government by the federation: see per Isaacs J. in Buchanan v. The Commonwealth [1913] HCA 29; (1913) 16 CLR 315, at p 335 . The federation came into existence as a union of the people of six Colonies, but as a union inherently, by its own constitution, susceptible of alteration as regards the States composing it: see ss. 121-124 and covering cl. 6. It is for this reason that I should think unmaintainable for relevant purposes the distinction, which Griffith C.J. mentioned as a possibility in Mitchell v. Barker [1918] HCA 13; (1918) 24 CLR 365, at p 367 , between territories which have and those which have not formed part of the Commonwealth. As for the suggestion that the Capital Territory is so essentially a part of the federal system that it is included in the concept of "the Commonwealth" in Chap. III, perhaps it is sufficient to say that so to hold would be to deny the Bernasconi doctrine completely; for it is of the essence of the doctrine that Chap. III treats of the Commonwealth in the sense of a polity which consists of the federated communities and is therefore confined geographically to the regions comprising the States. (at p259)

16. For these reasons I am of opinion that s. 13 of the Australian Capital Territory Supreme Court Act is valid and that therefore this Court has jurisdiction to hear and determine the case stated. Subject to one question, the same reasons lead to a conclusion adverse to the prosecutor on the case stated itself. (at p259)

17. The question that remains is raised by reference to the fact that s. 107 (c) of the Post and Telegraph Act is a law enacted in general terms, with the evident intention of applying indifferently to the States and to the territories, except in so far, of course, as other legislation may exclude its application in particular places. The prosecutor contends that any court which adjudicates upon a matter arising under such a general law exercises a part of the judicial power of the Commonwealth to which Chap. III applies. In my opinion the answer is that jurisdiction to try a person on a charge of having committed in a territory an offence against such a law necessarily falls within that judicial power which is a function of government in respect of the territory and not within federal judicial power. This is not due simply, or directly, to the fact, though it is a fact, that the law under which the charge is laid operates in the territory by force of s. 122 as a law for the government of the territory, whereas it operates in the Commonwealth proper by force of s. 51 (v.) as a law for the peace, order and good government of the Commonwealth. It is due to the fact that what is charged is conduct in the territory which the operation of a law in force there makes an offence; for an offence in the territory against a law of the territory is in its nature triable in exercise of that judicial power which appertains to the government of the territory and not, unless there be some federal factor in the case, to the judicial power which appertains to the government of the federation of States. (at p260)

18. For the foregoing reasons I am of opinion that the questions in the case stated should be answered: (1) No. (2) Yes. (at p260)

TAYLOR J. The questions which we are called upon to consider in this matter arise upon the facts set out in a case stated pursuant to the provisions of s. 13 of the Australian Capital Territory Supreme Court Act 1933-1960. This provision is in the following form: "The Judge, whether in Court or in Chambers, may state any case or reserve any question for the consideration of a Full Court of the High Court, or may direct any case or question to be argued before a Full Court of the High Court, and a Full Court of the High Court shall thereupon have power to hear and determine the case or question". This general provision, it may be said, purports to extend the original jurisdiction of this Court beyond the ambit of the matters specified in ss. 75 and 76 of the Constitution and during the course of argument doubts were expressed concerning its validity according to its tenor but it is convenient to postpone consideration of the particular problems which the provision raises until after a discussion of the substantive question in the case. (at p260)

2. Briefly, this question is whether in the appointment of a magistrate pursuant to the Court of Petty Sessions Ordinance 1930-1961, promulgated under the Seat of Government Acceptance Act 1909 and the Seat of Government (Administration) Act 1910, the requirements of s. 72 (ii.) and (iii.) of the Constitution must be observed. This, of course, involves consideration of the question whether the Court of Petty Sessions having jurisdiction in the Australian Capital Territory is, within the meaning of that expression as used in s. 71 of the Constitution, a "federal court" and whether the jurisdiction which it is authorized to exercise is part of the judicial power of the Commonwealth. Unless, however, the submissions which depend upon what was said to be the special position occupied by the Australian Capital Territory are accepted it is, I think, inevitable that the question must be resolved against the prosecutor for there is the clearest authority establishing that the Parliament of the Commonwealth may under s. 122 of the Constitution establish or authorize the

establishment of courts in the territories of the Commonwealth independently of and unrestricted by the provisions of Chap. III of the Constitution (R. v. Bernasconi (1915) 19 CLR 629 ; Porter v. The King; Ex parte Yee [1926] HCA 9; (1926) 37 CLR 432 : Reg. v. Kirby; Ex parte Boilermakers' Society of Australia [1956] HCA 10; (1956) 94 CLR 254, at p 290 : and Attorney-General of the Commonwealth of Australia v. The Queen (1957) AC 288, at p 320; (1957) 95 CLR 529, at p 545). Such courts are not "federal courts" (Porter's Case (1926) 37 CLR, at pp 443, 450 and Reg. v. Kirby (1956) 94 CLR 254, at p 290) and they do not exercise the judicial power of the Commonwealth. (at p261)

3. But it was contended by the prosecutor that the Australian Capital Territory is not a territory of the Commonwealth in the sense in which that expression is used in the cases referred and that it is, itself, an integral part of the Commonwealth. Accordingly, it is said, it is to be distinguished from territories which may be said to be appendant to the Commonwealth and in this connexion our attention was drawn to the observations of Dixon J. (as he then was) in Federal Capital Commission v. Laristan Building and Investment Co. Pty. Ltd. [1929] HCA 36; (1929) 42 CLR 582, at pp 583-585 . In that case the plaintiff sued in this Court to recover from the defendant the amount of certain charges imposed by regulations made pursuant to s. 12 of the Seat of Government (Administration) Act and questions arose as to the validity and effectiveness of s. 8 of the Seat of Government Acceptance Act 1909 which provided that "until the Parliament otherwise provides, the High Court and the Justices thereof shall have, within the Territory, the jurisdiction which . . . belonged to the Supreme Court" of New South Wales "and the Justices thereof". After referring to the differences of opinion which have occurred in this Court concerning the somewhat vexed question whether s. 122 of the Constitution authorizes Parliament to extend the original jurisdiction of the High Court beyond the scope of the matters specified in ss. 75 and 76, Dixon J. observed: "There is no decision, however, which denies the application of Chap. III to the seat of government. Section 122 is dealing, at least primarily, with Territories which do not form part of the Federal system. It is not necessary to discuss the relation between ss. 111, 122 and 125. This case arises in the seat of government, and s. 52 provides that the 'Parliament shall, subject to this Constitution, have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to (i.) the seat of government of the Commonwealth'. The seat of government is an integral part of the Federal System, and I see no reason for denying the application of s. 76 to laws made pursuant to s. 52 (i.)" (1929) 42 CLR, at p 585 . Consistently with this view his Honour thought that he was entitled to assume jurisdiction because the matter before him was one which "arose under a law made by Parliament" and that s. 8 of the Seat of Government Acceptance Act 1909 should be regarded as operative "to the full extent authorized by s. 76" (1929) 42 CLR, at p 586 . (at p262)

4. These observations are at the heart of the prosecutor's submission for upon them is founded the proposition, first, that the source of legislative authority for laws operating in the Australian Capital Territory is s. 52 (i.), and not s. 122, of the Constitution and, secondly, that under that head of power Parliament has no authority to disregard any restrictions or conditions expressed in Chap. III. In my opinion, the prosecutor's primary submission should be rejected for, with the greatest respect, I do not think that s. 52 (i.) is the source of legislative authority for the provisions under which the magistrate was appointed. In the first place the Australian Capital Territory and the seat of government are not synonymous terms. Section 125 of the Constitution provides that: "The seat of Government of the Commonwealth shall be determined by the Parliament, and shall be within territory which shall have been granted to or acquired by the Commonwealth, and shall be vested in and belong to the Commonwealth, and shall be in the State of New South Wales, and be distant not less than one hundred miles from Sydney". The section proceeds: "Such territory shall contain an

area of not less than one hundred square miles, and such portion thereof as shall consist of Crown lands shall be granted to the Commonwealth without any payment therefor". By the Seat of Government Act 1908 it was provided that the seat of government of the Commonwealth should be in the district of Yass-Canberra in the State of New South Wales and that the territory to be granted to or acquired by the Commonwealth for the seat of government should contain an area not less than nine hundred square miles. The Seat of Government Acceptance Act 1909 ratified an agreement made during that year for the surrender by the State of New South Wales of nine hundred square miles of territory in the district specified. Section 4 of the Act provided that the seat of government should be in the surrendered territory. It is immaterial for present purposes to refer to later enactments by which these earlier Acts were amended and it is sufficient to point out that beyond the establishment of the seat of government in the Australian Capital Territory it has not been thought necessary to attempt to define its precise geographical limits. (at p262)

5. In the second place I do not understand s. 52 (i.) as a provision intended to invest the Parliament of the Commonwealth with legislative authority to make laws for the general government of such territory as is found to comprise the seat of government, or, for that matter, of "all places acquired by the Commonwealth for public purposes". On the contrary it presents itself to me as a very special power to make laws "for the peace, order, and good government of the Commonwealth" with respect to specified subject matters, i.e. the seat of government of the Commonwealth and "all places acquired by the Commonwealth for public purposes". It is not a power to make general laws irrespective of their subject matter having an operation within the seat of government and such other places but a power to make laws having as the subject matter the seat of government or such other places. As such it authorizes legislation to establish the seat of government and such other laws as can fairly be said to be with respect to that subject matter. The contrary conclusion would mean that whenever the Commonwealth acquired a parcel of land for public purposes it would thereby acquire an exclusive legislative power to make general laws for the government of such places (cf. R. v. Bamford (1901) 1 SR (NSW) 337), but a comparison of the legislative form of s. 51 with that of s. 52 strongly militates against such a conclusion. It may be of some interest to note the fundamental distinction between the terms of s. 52 (i.) and those of cl. 17 of s. 8 of Article I of the Constitution of the United States which empowers Congress "To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten miles square) as may, by Cession of Particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings". But whether or not the source of legislative authority for the legislation now in question be s. 52 (i.) or s. 122 the result of this case must, I think, be the same for, in my view, the courts of the territories constituted under s. 122, or in the case of the Australian Capital Territory, whether constituted under s. 122 or s. 52 (i.), do not exercise the judicial power of the Commonwealth but, in effect, what may be described as the judicial power accorded to the respective territories for which as organs of government they are constituted. The legislative power under which this is done is, in the language of the Judicial Committee, "a disparate non-federal matter" (Attorney-General of the Commonwealth of Australia v. The Queen (1957) AC 288, at p 320; (1957) 95 CLR 529, at p 545) and this is so whether it is done under s. 122 or s. 52 (i.). (at p263)

6. However, for the reasons which I have expressed I have come to the conclusion that s. 122 is the constitutional provision under which the Parliament is authorized to make laws for the Government of any territory including the Australian Capital Territory. The Australian Capital Territory is clearly within the description in s. 122 - "any territory surrendered by any State to and accepted by the

Commonwealth" - and the section quite plainly invests the Parliament of the Commonwealth with general authority to make laws for the Government of the territories and this it has done to a greater or lesser degree. It may establish or authorize the establishment of legislative bodies, or bodies having executive power and courts having authority within the territories and such courts may be invested with a general jurisdiction as to subjectmatter. Upon authority they are not federal courts and they do not exercise the judicial power of the Commonwealth though they are established under laws made by the Commonwealth Parliament. These propositions are established in relation to the territories generally and, in my view, they apply with equal force to the Australian Capital Territory. Accordingly, I take the view that the Court of Petty Sessions at Canberra is not a federal court and that the specific questions raised by the case stated should be answered : (1) No. (2) Yes. (at p264)

7. I wish only to add that the views which I have expressed do not mean, as was held in Waters v. The Commonwealth [1951] HCA 9; (1951) 82 CLR 188 , that as to matters of the character specified in s. 75 of the Constitution which arise in any one of the territories the jurisdiction of the High Court is excluded and I do not understand this conclusion to follow from the observations of Dixon J. in the Laristan Case (1929) 42 CLR 582 . In my view the original jurisdiction conferred upon the High Court by s. 75 (iii.) and (v.) - the provisions which were the subject of consideration in Water's Case [1951] HCA 9; (1951) 82 CLR 188 - is not subject to any restriction or limitation such as was suggested in that case. I am of the opinion that those provisions invest this Court with original jurisdiction in respect of matters of the character specified wherever the right which is sought to be enforced in any such matter arose. (at p264)

8. One matter remains to be mentioned. That is the form of provision under which the instant case was stated. According to its tenor it purports to invest this Court with jurisdiction to hear and determine a case stated in any matter in which the Supreme Court has jurisdiction. But, inter alia, the Supreme Court has, by virtue of s. 11 of the Australian Capital Territory Supreme Court Act, the same jurisdiction in relation to the Territory as was formerly exercised by the Supreme Court of New South Wales. Section 13, therefore, it seems, purports to extend the original jurisdiction of this Court beyond the range of matters of the description specified in ss. 75 and 76 of the Constitution and the question arises whether such an extension may be accomplished by legislation enacted under s. 122. There has been considerable discussion in this Court on this question but in my opinion the balance of authority denies the proposition that it may be and I think we should accept this view. But, however this may be, the particular matter in respect of which the case was stated was a "matter arising under the Constitution or involving its interpretation" and I think that with the aid of s. 15A of the Acts Interpretation Act 1901-1964 sufficient of s. 13 of the Australian Capital Territory Supreme Court Act can be salvaged to authorize this Court to deal with the case. (at p265)

9. I accordingly agree that the questions raised by the case stated should be answered : (i) No. (ii) Yes. (at p265)

MENZIES J. The decisions of this Court in regard to the jurisdiction of territorial courts, its own jurisdiction to hear appeals from such courts, and its original jurisdiction to hear and determine matters arising in a territory have unfortunately not resulted in a coherent body of doctrine. Nevertheless, as departure from past decisions would unsettle the judgments of other courts made in the exercise of jurisdictions which this Court has to date recognized, I consider we must now proceed on the footing that those earlier decisions of this Court stand. To this I would, however, make one exception - Waters v. The Commonwealth (1951) 82 CLR 188 , where the successful objection to jurisdiction was stated by Fullagar J. to be: "It was submitted that s. 75 of the Constitution did not confer original jurisdiction on this Court in or with respect to 'Territories' which

are not part of the federal organization created by the Constitution though they are subject to the law-making powers conferred upon the Parliament of the Commonwealth by s. 122" (1951) 82 CLR, at p 190 . The actual decision in that case was an extension of anything decided previously and, to my mind, it placed an unjustifiable limitation upon the constitutional jurisdiction of this Court by restricting the jurisdiction conferred by s. 75 of the Constitution to exclude cases when the matters therein set out arise in a territory. If the Australian Capital Territory is a territory to which the decision in Waters v. The Commonwealth (1951) 82 CLR 188 would extend, the result would be that this Court, when sitting at its own principal seat - see Judiciary Act, s. 10 - would not have jurisdiction under the Constitution itself to hear matters such as a claim against the Commonwealth arising in the Australian Capital Territory, proceedings against a consul for something done in the Australian Capital Territory, or an application for mandamus, prohibition or injunction against a Commonwealth officer refusing to exercise his authority or acting in excess of his authority in the Australian Capital Territory. But even if Waters v. The Commonwealth (1951) 82 CLR 188 were in some fashion to be limited to territories other than the Australian Capital Territory, I do not regard the decision in R. v. Bernasconi [1915] HCA 13; (1915) 19 CLR 629 - which was that Chap. III of the Constitution did not apply to a court constituted under s. 122 - as requiring the acceptance of a far-reaching limitation upon the jurisdiction conferred upon this Court by s. 75. In my judgment, the original jurisdiction which is conferred upon this Court by s. 75 relates to the matters therein described regardless of where they arise. (at p266)

2. My acceptance of the earlier decisions of this Court does not, however, involve an acceptance of all the reasons given for them nor do I consider myself bound to carry the authority of any particular decision, such as R. v. Bernasconi [1915] HCA 13; (1915) 19 CLR 629 , beyond what it decides. (at p266)

3. My review of the earlier decisions of this Court had led me to conclude that it has been decided : -(i) That the Parliament may, by a law made under s. 122 of the Constitution, establish in its territories - other than the Australian Capital Territory - courts which are not federal courts in the constitutional sense, with judges appointed and holding tenure otherwise than as provided by s. 72 of the Constitution, exercising jurisdiction outside that which Parliament may confer under s. 77 of the Constitution and not subject to s. 80 of the Constitution : R. v. Bernasconi (1915) 19 CLR 629 and Porter v. The King ; Ex parte Yee [1926] HCA 9; (1926) 37 CLR 432 .(ii) That the High Court may hear appeals from the non-federal courts referred to in (i) : Porter v. The King ; Ex parte Yee [1926] HCA 9; (1926) 37 CLR 432 ; olley v. Mainka [1933] HCA 43; (1933) 49 CLR 242 and Reg. v. Kirby ; Ex parte Boilermakers' Society of Australia (1956) 94 CLR 254 ; (1957) AC 288 ;(1957) 95 CLR 529 .(iii) That the Parliament may confer upon the High Court original jurisdiction of a general character in respect of matters arising in the Australian Capital Territory : ederal Capital Commission v. Laristan Building and Investment Co. Pty. Ltd. [1929] HCA 36; (1929) 42 CLR 582 .(iv) That the High Court has jurisdiction to hear appeals from the Supreme Court of the Australian Capital Territory. (at p267)

4. It has not, I think, been decided : -(i) That the Parliament may confer upon the High Court original jurisdiction in a territory other than the Australian Capital Territory beyond that which can be conferred under s. 76.(ii) That the Parliament can establish a court which is not a federal court for the purposes of ss. 71, 72 and 77 of the Constitution to have jurisdiction in the Australian Capital Territory.(iii) That the Parliament can confer upon a court constituted to have jurisdiction in the Australian Capital Territory an original jurisdiction extending beyond that which can be conferred upon a federal court by laws made under s. 77 of the Constitution - there is no doubt this power has been assumed without question. (at p267)

5. The case now before us calls, I think, for decisions with regard to two matters : - (i) Whether s. 13 of the Australian Capital Territory Supreme Court Act 1933-1959, giving the High Court original jurisdiction in a matter arising in the Australian Capital Territory, is valid ; and (ii) Whether s. 12 of the Seat of Government (Administration) Act 1910-1947 does validly authorize the making of ordinances having the force of law in the Australian Capital Territory, and in particular whether the Court of Petty Sessions Ordinance (No. 2) 1930 made thereunder does validly establish a Court of Petty Sessions to exercise jurisdiction in the Australian Capital Territory and does authorize the appointment thereto of magistrates to hold office during pleasure and at a remuneration not fixed by the Parliament. (at p267)

6. These questions arise in the following circumstances. The respondent, Clarence Lindsay Hermes, being a magistrate appointed to the Court of Petty Sessions of the Australian Capital Territory, upon the hearing of an information for a breach by the prosecutor Spratt of s. 107 (c) of the Post and Telegraph Act 1901-1961, overruled an objection that was taken to his jurisdiction. Thereupon Spratt applied to the Supreme Court of the Australian Capital Territory for a writ of prohibition against both the magistrate and the informant Matthews on the ground that the magistrate had no jurisdiction to hear the information. The judge of the Supreme Court of the Australian Capital Territory before whom this application came thereupon exercised the power conferred by s. 13 of the Australian Capital Territory Supreme Court Act and stated the following questions for consideration by this Court : - "(i) Whether the provisions of s. 72 of the Commonwealth of Australia Constitution Act apply to the appointment of a stipendiary magistrate sitting as a Court of Petty Sessions in the Territory referred to in the Court of Petty Sessions Ordinance 1930-1961 of the Australian Capital Territory. (ii) Whether the said Clarence Lindsay Hermes having been appointed a stipendiary magistrate as stated in pars. 2 and 3 hereof and sitting as such pursuant to the Court of Petty Sessions Ordinance 1930-1961 of the Australian Capital Territory without having been appointed upon the terms specified in s. 72 pars. (ii.) and (iii.) of the Commonwealth of Australia Constitution Act has jurisdiction to hear and determine the information and summons aforesaid." (at p268)

7. In the first place, I think that s. 13 of the Australian Capital Territory Supreme Court Act is valid as a law under s. 76 (ii.) of the Constitution whether Parliament's power to legislate for the Australian Capital Territory arises under s. 52 or s. 122 of the Constitution. Furthermore, I am disposed to think that, by a law under s. 122 of the Constitution, the Parliament could confer upon the High Court jurisdiction beyond that which could be conferred under s. 76 of the Constitution. Section 13 of the Act confers jurisdiction upon this Court to hear and determine any matter referred thereunder as an exercise of original jurisdiction. The Seat of Government Acceptance Act 1909, s. 8, conferred upon the High Court the same jurisdiction in the Australian Capital Territory as had belonged to the Supreme Court of New South Wales. This provision continued in force until 1927 when the Judiciary Act 1927 declared that, in relation to the Australian Capital Territory, the High Court should have the original jurisdiction exercised by the Supreme Court of New South Wales before 1911, together with such original jurisdiction, civil and criminal, as may from time to time be conferred by ordinances. This provision remained in force until 1933. From 1909 until 1933 the High Court exercised jurisdiction in the Australian Capital Territory in accordance with the terms of the provisions to which I have referred. It seems that it was not until Federal Capital Commission v. Laristan Building and Investment Co. Pty. Ltd. [1929] HCA 36; (1929) 42 CLR 582 that attention was paid to the basis of the legislative grant of jurisdiction to the High Court in matters arising in the Australian Capital Territory. In that case Dixon J. (as he then was), after consideration of that question, decided that he was warranted in assuming jurisdiction. That the High Court can be given original jurisdiction with respect to any matters arising in the Australian Capital Territory is,

therefore, something which has been firmly established over a long period. Accordingly, now it should be accepted that there is no constitutional objection to s. 13 of the Australian Capital Territory Supreme Court Act. (at p269)

8. The validity of the Court of Petty Sessions Ordinance (No. 2) has not heretofore been questioned in court but it has been established that such a law may, under s. 122 of the Constitution, be made for a territory of the Commonwealth. It is necessary, therefore, to consider whether the Australian Capital Territory is one of the territories in respect of which s. 122 confers legislative power. Prima facie it is, for the Australian Capital Territory was surrendered by the State of New South Wales and accepted by the Commonwealth in the manner provided by s. 111 of the Constitution : see Seat of Government Surrender Act, 1909 (N.S.W.) and Seat of Government Acceptance Act 1909 (Cth). There are, however, in some cases statements that would indicate that s. 122 relates only to territories which do not form part of what has been referred to as "the Federal System": R. v. Bernasconi [1915] HCA 13; (1915) 19 CLR 629, at pp 635, 637 ; Buchanan v. The Commonwealth [1913] HCA 29; (1913) 16 CLR 315, at pp 330, 335 ; and Porter v. The King; Ex parte Yee [1926] HCA 9; (1926) 37 CLR 432, at pp 448, 449 . It appears to me that the Australian Capital Territory cannot be regarded as outside "the Federal System", notwithstanding that the territory is not within the legislative competence of any State legislature. As was said in Federal Capital Commission v. Laristan Building and Investment Co. Pty. Ltd. [1929] HCA 36; (1929) 42 CLR 582 : "The seat of government is an integral part of the Federal System . . . " (1929) 42 CLR, at p 585 . If, therefore, s. 122 were to be regarded as merely authorizing the making of laws for territories outside "the Federal System", it would not authorize the making of laws applicable to the Australian Capital Territory. I am not able, however, to accept the suggested limitation upon s. 122. The notion that there are territories which do not form part of "the Federal System" has been put forward to explain why it is that constitutional limitations such as those which are to be found in s. 55 and Chap. III of the Constitution do not apply to laws made under s. 122 and also how the High Court can, by a law made under s. 122, be given jurisdiction to hear appeals from non-federal courts consistently with the principles eventually adopted in the Boilermakers' Case (1956) 94 CLR 254; (1957) AC 288; (1957) 95 CLR 529 . For my part, I am prepared to accept as binding decisions such as Bernasconi [1915] HCA 13; (1915) 19 CLR 629 , Buchanan [1913] HCA 29; (1913) 16 CLR 315 and Yee [1926] HCA 9; (1926) 37 CLR 432 without accepting the particular rationalization that has been offered for them, viz. that territories of the Commonwealth are outside "the Federal System". To me, it seems inescapable that territories of the Commonwealth are parts of the Commonwealth of Australia and I find myself unable to grasp how what is part of the Commonwealth is not part of "the Federal System": see the Commonwealth of Australia Constitution Act, s. 5, which refers not only to every State but to "every part of the Commonwealth". If there be room for doubt as to this in so far as territories outside Australia are concerned, I think the terms of s. 122 itself preclude doubt in the case of territories within Australia. That section contemplates that an area which is part of a State and so within "the Federal System" will be accepted by the Commonwealth and may be represented in either House of the Parliament. I do not understand how the surrender and acceptance authorized by s. 111 of the Constitution can take the area affected outside "the Federal System". To my mind, the notion that an area which is geographically within Australia and is part of the Commonwealth of Australia is outside "the Federal System" should be given no further countenance. Surely, if the phrase "the Federal System" is to be used to define some legal concept, it can but mean the system of government established by the Constitution itself: if it be understood to mean the system of dual government by the Commonwealth and a State so that an area not so subject is outside the system, then, of course, the seat of government of the Commonwealth for which the Constitution expressly provides is nevertheless outside "the Federal System" - a

conclusion that would suggest to me a misuse of language. It seems to me that s. 122, which subjects territories to the legislative power of the Parliament and makes provision for the representation of those territories in Parliament, itself cannot be regarded as dealing with non-federal matters. Particularly is this so when laws made under that section are laws of the Commonwealth which may operate throughout the Commonwealth, States and territories alike - The Commonwealth of Australia Constitution Act, s. 5 - and are laws to be executed and maintained by the Governor-General pursuant to s. 61 - Lamshed v. Lake [1958] HCA 14; (1958) 99 CLR 132 . There, the view adopted by Williams J. that a law made under s. 122 is a non-federal local law was rejected by the majority of the Court. Moreover, it has to be remembered that s. 122 is not the only source of power to make laws for the government of the territories. A law of the Commonwealth made under s. 51 may operate within the territories simply because they are parts of the Commonwealth. It cannot, therefore, be said that the territories are governed by "territorial laws" as distinct from laws of the Commonwealth. (at p271)

9. It appears that the only basis for regarding s. 122 as inapplicable to the Australian Capital Territory is by treating the power conferred upon the Parliament by that section as limited to territories outside "the Federal System" and then finding - as I would - that the Australian Capital Territory is within that system. For the reason I have given, however, I do not accept the limitation which it has been sought to impose upon s. 122 and my conclusion is that the section does confer upon the Parliament power to authorize the making of a law such as the Court of Petty Sessions Ordinance (No. 2) so that the attack upon its validity fails. (at p271)

10. Furthermore, I have not found it necessary to deal with the somewhat vexed question of the extent of the legislative power conferred by s. 52 of the Constitution. If that power extends to the whole of the Australian Capital Territory, that circumstance does not, in my opinion, exclude that territory from the operation of s. 122. I would merely point out that if there can be no seat of government of the Commonwealth unless and until some portion of the Australian Capital Territory has been specified as such by the Parliament, then there is at present no seat of government of the Commonwealth. Section 125 of the Constitution is quite inconsistent with the idea that the seat of government can be determined otherwise than by the Parliament and it seems that the only relevant legislation is the Seat of Government Act 1908, ss. 2 and 3, and the Seat of Government Acceptance Act 1909, ss. 4 and 5. However this may be, I do not think that any limitation on s. 122, so far as the whole of the Australian Capital Territory is concerned, can be derived from the grant of legislative power made by s. 52 (i.). (at p271)

11. For the reasons which I have given, I would answer the questions asked in the case stated as follows: - (i) No. (ii) Yes. (at p271)

WINDEYER J. The question in this case is whether a magistrate exercising jurisdiction in the Australian Capital Territory must be appointed to his office for life. It is perhaps unnecessary to observe that to say that this is not so involves no denial of the importance of his office or of its judicial character. The rule that judges hold their offices during good behaviour and not at pleasure is not of general application. It is not part of the common law. It describes an exceptional tenure, one which judicial officers of subordinate courts, for the most part, do not enjoy: see the remarks of Lord Goddard C.J. in Terrell v. Secretary of State for the Colonies (1953) 2 QB 482, at pp 495, 496 . It is therefore not surprising, nor is it contrary to tradition or principle, that the Court of Petty Sessions Ordinance 1930-1961 of the Australian Capital Territory provides for the appointment by the Governor-General of stipendiary magistrates who "shall be paid such remuneration, and shall hold office on such terms and conditions as the Governor-General determines". But it is said this is

in conflict with ss. 71 and 72 of the Constitution. (at p272)

2. It is well to remember that, as Dixon C.J. once said: "We should avoid pedantic and narrow constructions in dealing with an instrument of government and I do not see why we should be fearful about making implications" (1945) 71 CLR, at p 85, repeated (1958) 99 CLR, at p 144 . It is important to remember too that the enactment of the Constitution had two great political results. One was that the Australian Colonies were united in a federal system. The other was that by this a new nation was created. This dual consequence in political theory was seen and expressed at the time of Federation, particularly in passages in the writings of Sir Robert Garran, then Mr. Garran. The Australian Colonies, each a former dependency of Britain, were joined to form a new dependency in the British Empire, the Commonwealth of Australia. This was in law the result of the Constitution. Later events have consolidated it as a political reality. The new dependency became in time an independent Dominion, and then a nation in its own right. Australia now has dependent overseas territories of her own. (at p272)

3. Holmes J. once said in the Supreme Court of the United States: "When we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago": Missouri v. Holland (1920) 252 US, at p 433 (64 Law Ed, at p 648) . I quote this because I feel that we should not in this case reach a decision by reference only to particular sentences to be found in earlier judgments of this Court, some of them given many years ago in conditions different from those of today upon questions different from the present question. The Constitution is, this Court has said, "intended to endure and apply to changing conditions" (1960) 106 CLR, at p 197 . (at p272)

4. Section 122 confers upon the Parliament a full and sufficient power to legislate for all the territories, those within the Continent of Australia and those overseas alike. This plenary power of the Parliament as the legislature of the Australian nation is not diminished, rather is it aided, by other provisions of the Constitution: see Lamshed v. Lake [1958] HCA 14; (1958) 99 CLR 132 . The national Parliament has complete sovereignty over the Australian Capital Territory no less than over the dependent territories. The source of its power is in my opinion s. 122. That does not mean that the Capital Territory has not a special position in the polity of Australia. It has, for within it lies the seat of government, the seat, that is, of the central government of the federated States, which is the government too of the Australian nation and its dependencies. I do not regard s. 52 as curtailing the power given by s. 122. The power of the Parliament to make laws for the peace, order and good government of the Commonwealth with respect to the seat of government is not the same thing as a power to make laws for the government of the Capital Territory. The phrase "seat of government" has for centuries been used to describe a capital city. It is used in this sense in the British North America Act, 1867 s. 16, by which Ottawa is made the seat of government of Canada. Section 52 (i.) giving the Commonwealth Parliament exclusive power to make laws with respect to the seat of government is derived from the Constitution of the United States (Art. I, s. 8 (17)). A provision that, if Story be correct, owes its origin to insults offered by mutinous soldiery to the Congress at Philadelphia, came, somewhat oddly, into the Constitution of Australia. It is perhaps an unnecessary provision there. However that be, it can have little bearing upon the present question, because the seat of government and the Australian Capital Territory are not co-extensive in fact; nor could they be regarded as co-extensive in law, because s. 125, by what reads as an inartistic interpolation, states

that the seat of government shall be within territory to be granted or acquired by the Commonwealth. To ignore the word "within" here would involve a dismissal of language, a disregard of well-known historical events and a defiance of the geographical fact that the Capital Territory covers a very much greater area than does the city of Canberra. (at p273)

5. The power of the Parliament to make laws for the government of any territory unquestionably enables it to create, or authorize the Crown to create, courts for that territory. The question is whether ss. 71 and 72 of the Constitution apply to such courts. Section 71, so far as relevant, provides that "the judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction . . .". Then follow in s. 72 provisions as to the appointment, tenure (during good behaviour) and fixed remuneration for "the Justices of the High Court and of the other courts created by the Parliament". In my opinion the words "the other courts created by the Parliament" refer, as a matter of construction, to courts created pursuant to the power given by the immediately preceding section (s. 71), that is to "such other federal courts as the Parliament creates". The dualism inherent in the concept of federal jurisdiction existing alongside State jurisdictions, which we derive from the Constitution of the United States, has for us become further complicated by the provisions, peculiar to our Constitution, by which State courts may be invested with federal jurisdiction. The result is a notoriously technical and difficult branch of Australian constitutional law. However, for the purpose of deciding the present question I do not think it necessary that I enter far into its complexities. If the Court of Petty Sessions of the Australian Capital Territory is a federal court within the meaning of s. 71, a magistrate appointed to it must be appointed pursuant to s. 72, that is during good behaviour. But if that Court is not a federal court, then it seems to me s. 72 has no application and there is no limitation upon the power of the Parliament to provide for, or authorize the Crown to provide for, the magistrate holding his office on some different terms and tenure. The answer is, I think, that s. 71 is concerned with the Commonwealth considered in its federal aspect, and with courts created or invested with federal jurisdiction in that sense, and is not applicable to courts created for territories. The very words of the section lead to that conclusion, and it is in accordance with what has been said by this Court on several occasions. I do not myself find any difficulty in regarding the Australian Capital Territory as being outside the federal system; for the Parliament's power with respect to it is plenary, whereas a limitation and division of sovereign legislative authority is of the essence of federalism. It is worth noticing here that in the United States the distinction between "constitutional" courts, exercising the judicial power of the United States, and "legislative" courts outside Article III of the Constitution was enunciated by Marshall C.J. in 1828: American Insurance Co. v. Canter [1828] USSC 2; (1828) 1 Pet 511 (7 Law Ed 242) . But the Supreme Court has not, over the years, adhered consistently to one view as to the status of the courts of the District of Columbia: see e.g. Ex parte Bakelite Corporation [1929] USSC 90; (1929) 279 US 438 cf (73 Law Ed 789) ; O'Donoghue v. United States [1933] USSC 116[1933] USSC 116; ; (1933) 289 US 516 (77 Law Ed 1356) ; and because of marked differences between Art. III of the American Constitution and Chap. III in our Constitution, I have not found the reasoning of American cases directly helpful to a decision in this case. (at p275)

6. The form of the proceedings before us makes it necessary to consider the further question of the nature and extent of the jurisdiction of this Court in relation to the territories. The question arises primarily because of the sweeping generalization in the judgment of Griffith C.J. in R. v. Bernasconi [1915] HCA 13; (1915) 19 CLR 629, at p 635 , that the power conferred by s. 122 is not restricted by Chap. III of the Constitution, that that Chapter has no application to territories. The actual decision in Bernasconi's Case was that s. 80 of the Constitution did not apply in cases arising under

what Griffith C.J. there called "the local laws of a territory, whether enacted by the Commonwealth Parliament or by a subordinate legislature set up by it" (1915) 19 CLR, at p 634 . Recognition of the decision does not necessarily involve acceptance of the statement that Chap. III as a whole has no application to the territories. The offence with which Bernasconi was charged was, it is true, an indictable offence under the Queensland Criminal Code, which had been adopted by local ordinance as the law of New Guinea. But the trial, held as it was in accordance with the procedure laid down by the ordinance, was not a "trial on indictment" within the meaning of s. 80 as it has been since then interpreted. It may be thought unwise now to unsettle in any way the reasoning of the judgments in Bernasconi's Case, and in Buchanan's Case [1913] HCA 29[1913] HCA 29; ; (1913) 16 CLR 315 , which preceded it. Those cases have stood for over half a century, notwithstanding some judicial expressions of misgiving in recent times. Nevertheless and although, because of the eminence of those who gave the judgments and of their close knowledge of the genesis of phrases of the Constitution, it may seem boldly unbecoming to say so, I do not think that the conclusion that Chap. III, as a whole, can be put on one side as inapplicable to matters arising in the territories is warranted by its actual language. Some of its provisions seem to me to have a wide and general application. In particular it is, in my view, proper to regard ss. 73, 75 and 76 as describing not only the position of this Court in its capacity as the "Federal Supreme Court" exercising the judicial power of the Commonwealth in the federal system, but as also stating its jurisdiction as the highest Australian court having authority to declare and enforce the law, that is the whole law of Australia, wherever it is binding, whether in States, territories, or upon ships at sea, and whatever in a particular case is the source of the obligation it imposes. (at p276)

7. The phrase "laws made by the Parliament" seems to be less extensive in denotation than "laws of the Commonwealth": see R. v. Kidman [1915] HCA 58; (1915) 20 CLR 425, at p 438 . But, however that may be, I see no ground for refusing the name "a law of the Commonwealth" to any law validly made by or under the authority of the Commonwealth Parliament wherever that law operates. (at p276)

8. I have not overlooked the passage in the judgment of the Privy Council in the Boilermakers' Case (1957) AC 288, at p 320; [1957] HCA 12; (1957) 95 CLR 529, at p 545 , where Viscount Simonds spoke of Chap. III as "exhaustively describing the federal judicature and its functions in reference only to the federal system of which the territories do not form part", and said: "There appears to be no reason why the Parliament, having plenary power under s. 122, should not invest the High Court or any other court with appellate jurisdiction from the courts of the territories". If this means that in the exercise of its plenary power to legislate for the territories the Parliament can enlarge the jurisdiction of this Court in any way it chooses, regardless of the provisions of ss. 73, 75 and 76 of the Constitution, then it seems to me, with respect, that this statement probably goes too far. But in terms his Lordship was referring only to appellate jurisdiction; and in Porter v. The King; Ex parte Yee [1926] HCA 9[1926] HCA 9; ; (1926) 37 CLR 432 , it had been decided by this Court that the Parliament could confer upon the Court jurisdiction to entertain appeals from territorial courts. This was a majority decision (Isaacs, Higgins, Rich and Starke JJ.). Knox C.J. and Gavan Duffy J. in a joint judgment dissented, as they considered that "the status and duties of this Court are explicitly defined in Chap. III 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 authorized by s. 122, but is an attempt to do that which is implicitly forbidden by the Constitution" (1926) 37 CLR, at p 439 . That view did not prevail. The decision of the majority was that by virtue of s. 122 the Parliament could give to this Court an appellate jurisdiction beyond that explicitly conferred by s. 73. But, because Higgins J. expressly limited his judgment to the matter of appellate jurisdiction, there was no majority for the view that this Court can be given any original jurisdiction beyond that conferred by s. 75 or authorized by s.

76 to be conferred. (at p277)

9. The distinction between appellate and original jurisdiction may seem slender if it be based on nothing more than the differences in language between s. 73 and ss. 75 and 76; for in each case the language of the grant of jurisdiction in the cases mentioned may seem to carry a negative implication. But there is a difference in language, slight though it is, and it has been thought sufficient to permit a distinction similar to that which has been held to exist in the United States and there described as a "workable anomaly". It can be regarded as founded upon national needs as well as on mere comparisons of language. The special position and function of this Court under the Constitution require that it should be able to declare the law for all courts that are within the governance of Australia. However the existence of the Court's appellate and supervisory jurisdiction in relation to territorial courts is to be justified and explained, it stands now as a long and firmly established principle of Australian constitutional law, not to be disturbed. But considerations that apply to appellate jurisdiction do not apply to the original jurisdiction of this Court. I do not think that the interests of a supposedly logical consistency compel us to say that the Parliament can give the Court original jurisdiction in matters other than those specified in s. 76. If we had to decide that question here, I would be inclined to the view that that list is exhaustive. But the question does not, I think, have to be decided in this case. (at p277)

10. As I do not feel able to accept the broad proposition in Bernasconi's Case [1915] HCA 13; (1915) 19 CLR 629 that Chap. III does not apply to the territories, it is unnecessary for me to consider in any detail the reasoning in Waters v. The Commonwealth [1951] HCA 9; (1951) 82 CLR 188 . If I be wrong in not accepting that proposition, then the decision in Waters' Case may be inescapable. This, however, merely reinforces for me the conclusion that the power to make laws for the territories under s. 122 is not independent of and uncontrolled by other provisions of the Constitution. In his judgment in Lamshed v. Lake [1958] HCA 14; (1958) 99 CLR 132 Dixon C.J., repeating the passage in his judgment in Australian National Airways Pty. Ltd. v. The Commonwealth (1945) 71 CLR, at p 85 , to which I have already referred, said: "For my part, I have always found it hard to see why s. 122 should be disjoined from the rest of the Constitution and I do not think that Buchanan's Case and Bernasconi's Case really meant such a disjunction" (1958) 99 CLR, at p 145 . I respectfully and whole-heartedly agree. The Constitution must be read as a whole, an instrument of government for a nation and its people, the Commonwealth of Australia. (at p278)

11. Of other matters incidentally discussed in the argument I would say only that, in my view, when the Parliament makes a law intended to be of general application throughout the whole of the Commonwealth and its territories it does so in the exercise of all powers it thereunto enabling. If the law be within power under s. 51 it will, by the combined effect of that section and of s. 122, be law in and for the States and the territories alike. If it be invalid as beyond s. 51 then, in the absence of a clear indication that it should nevertheless apply in the territories, it will I consider fail altogether of effect. Whether a particular Act is intended to extend to the territories, or to a particular territory, as well as to the States then becomes a question of construction to be resolved either by its express provisions or by its intendment as revealed by its scope and nature. (at p278)

12. I sum up my conclusions as follows:
The source of power to make laws for the Australian Capital Territory is s. 122 of the Constitution. This is a plenary power; but, in some cases and for some purposes, s. 52 (i.) may be an additional source of power.

Courts created for a territory pursuant to s. 122 are not federal

courts. It is therefore not necessary that judges or magistrates appointed to them should have the tenure prescribed by s. 72. (at p278)

13. The Parliament can by legislation pursuant to s. 122 confer upon the High Court an appellate jurisdiction from territorial courts. (at p278)

14. But the provisions of ss. 75 and 76 define, probably exhaustively, the original jurisdiction of the High Court. Those provisions apply to proceedings arising in the territories. (at p278)

15. It follows, therefore, that in my opinion this Court has jurisdiction to entertain the case stated and that the questions asked should be answered (1) No; (2) Yes. (at p278)

Owen J. This is a case stated under s. 13 of the Australian Capital Territory Supreme Court Act. The question raised by it is whether the provisions of s. 72 of the Constitution apply to the appointment of a stipendiary magistrate to exercise jurisdiction in the Australian Capital Territory under the Court of Petty Sessions Ordinance 1930-1961. (at p278)

2. Before dealing with that question a preliminary matter requires consideration. Section 11 (a) of the Australian Capital Territory Supreme Court Act gives the Supreme Court of the Territory constituted under that Act the same original jurisdiction, both civil and criminal, in relation to the Territory as the Supreme Court of New South Wales had in relation to that State immediately before 1st January 1911. Its jurisdiction therefore extends to a wide variety of matters. Section 13 provides that a judge of the Supreme Court of the Territory may state any case or reserve any question for the consideration of the Full Court of the High Court or may direct any case or question to be argued before that Court which shall thereupon have power to hear and determine the case or question. In determining such a case or question this Court would be exercising an original and not an appellate jurisdiction and this raises the question whether the constitutional powers of the Parliament to make laws for the government of the Capital Territory empower it to extend the original jurisdiction of the High Court so as to enable it to hear and determine matters arising in the Territory in addition to those matters which are enumerated in ss. 75 and 76 of the Constitution. (at p279)

3. It has been held that under the power given by s. 122 of the Constitution to make laws for the government of a Territory the Parliament may confer upon this Court appellate jurisdiction to hear appeals from a court established in that Territory notwithstanding the fact that the court so established is not a federal court or a court exercising federal jurisdiction within the meaning of Chap. III of the Constitution: Porter v. The King; Ex parte Yee [1926] HCA 9; (1926) 37 CLR 432 ; Chow Hung Ching v. The King [1948] HCA 37; (1948) 77 CLR 449 . See also the Boilermakers' Case [1956] HCA 10; (1956) 94 CLR 254, at p 290; (1957) AC 288, at p 320; (1957) 95 CLR 529, at p. 545. . But, as Dixon J. (as he then was) pointed out in Federal Capital Commission v. Laristan Building and Investment Co. Pty. Ltd. (1929) 42 CLR 582, at p 585 , three of the six members of the Court in Porter's Case [1926] HCA 9; (1926) 37 CLR 432 considered that ss. 75 and 76 limited the power of the Parliament to confer upon the High Court original jurisdiction in respect of matters arising in a territory. The justification for drawing such a distinction between the power under s. 122 to confer upon the High Court jurisdiction to hear appeals from territorial courts and the power under that section to confer upon the Court original jurisdiction over matters arising in a territory may, I think, be found in the passage in the judgment of Higgins J. in Porter's Case (1926) 37 CLR, at p 447 , which was quoted by Dixon J. in the Laristan Case (1929) 42 CLR, at p 584 . (at p279)

4. In Waters v. The Commonwealth [1951] HCA 9; (1951) 82 CLR 188 Fullagar J. took the view that s. 75 of the Constitution did not of its own force confer original jurisdiction upon the High Court in or with respect to Territories, basing his opinion upon R. v. Bernasconi [1915] HCA 13[1915] HCA 13; ; (1915) 19 CLR 629 . He expressed no opinion, however, upon the question whether under s. 122 original jurisdiction might be conferred and, if so, whether the power to do so is limited to the matters to which ss. 75 and 76 refer. Whether his Honour's conclusion as to the operation of s. 75 was correct is not in point in the present case since the Parliament has, by s. 13 of the Australian Capital Territory Supreme Court Act, purported to invest this Court with original jurisdiction in respect of matters arising in the Capital Territory whether or not they are matters of the kind mentioned in ss. 75 and 76. Having regard to what was said in the majority judgment in Re Judiciary and Navigation Acts [1921] HCA 20; (1921) 29 CLR 257 and notwithstanding the broad statements made by Griffith C.J. in Bernasconi's Case (1915) 19 CLR, at p 635 that Chap. III of the Constitution has no application to territories and that "the power conferred by s. 122 is not restricted by the provisions of Chap. III" (4), I am disposed to think that the Parliament in the exercise of its powers under s. 122 cannot extend the original jurisdiction of the High Court so as to enable it to deal with matters other than those enumerated in ss. 75 and 76. I am of opinion, however, that it can empower the Court to exercise original jurisdiction with respect to territories provided that that jurisdiction is limited to the matters of which those sections speak. One such matter is to be found in s. 76 (i.) - "any matter arising under this Constitution or involving its interpretation" - and it is plain that the matter raised in the present proceedings is of this description since the questions posed by the stated case involve the interpretation of the Constitution. If s. 13 of the Australian Capital Territory Supreme Court Act is wider in its terms than is warranted by the constitutional power to make laws for the government of the Territory, it can and should, I think, be read down by the aid of s. 15A of the Acts Interpretation Act so that it may operate to the extent authorized by ss. 75 and 76. (at p280)

5. What I have said proceeds upon the assumption that s. 122 provides the source of the power of the Parliament to legislate generally for the government of the Capital Territory as it does for the other territories of the Commonwealth. If that view is correct, there is no doubt that the legislative powers conferred by that section enable the Parliament to establish in the Capital Territory territorial courts which are not federal courts within the meaning of s. 71 of the Constitution and are not therefore amongst "the other Courts" to which s. 72 refers. For the prosecutor, however, it has been submitted that while this is so as to territories other than the Australian Capital Territory, the power to make laws for the government of the Capital Territory is a more limited one. That Territory differs in kind from the other territories of the Commonwealth in that it is not a mere dependency of the Commonwealth but is the area within which the seat of government of the Commonwealth is to be found and is, for that reason, an integral part of the federal system. The power to legislate for the government of that territory is, it is contended, to be found in s. 52 (i.) of the Constitution which gives the Parliament, subject to the Constitution, the exclusive power "to make laws for the peace, order, and good government of the Commonwealth with respect to the seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes". Whatever may have been decided as to the width of the power, under s. 122, to make laws for the government of territories other than the Capital Territory, there is no sound ground, so the argument runs, for saying that the provisions of Chap. III have no application to the law-making powers conferred by s. 52 (i.). In support of these submissions reliance is placed upon the judgment of Dixon J. (as he then was) in the Laristan Case [1929] HCA 36; (1929) 42 CLR 582 in which his Honour, after saying "Section 122 is dealing, at least primarily, with Territories which do not form part of the Federal system" (1929) 42 CLR, at p 585 , appears to have taken the view that the source of power to

legislate for the Capital Territory is s. 52 (i.) and that for that reason the decisions that Chap. III did not extend to territories governed under s. 122 had no application in the case of the Capital Territory. And in Australian National Airways Pty. Ltd. v. The Commonwealth [1945] HCA 41[1945] HCA 41[1945] HCA 41; ; ; (1945) 71 CLR 29 , his Honour said, "It is then said that s. 122 is the only other relevant legislative power in relation to Territories, apart from the seat of government, which is, of course, governed by s. 52 (i.)" (1945) 71 CLR at p 83 . If his Honour's view was that the words "the seat of government" in s. 52 (i.) are synonymous with the territory within which the Constitution, by s. 125, required the seat of government to be established and that s. 52 (i.) therefore provides the source of the power of the Parliament to legislate generally for the government of that territory, I cannot, with all respect, agree. The territories mentioned in s. 122 include any territory surrendered by any State to the Commonwealth and accepted by the Commonwealth and the Capital Territory is plainly such a territory. It was surrendered by the Parliament of New South Wales pursuant to the powers conferred upon it by s. 111 of the Constitution and its surrender was accepted by the Commonwealth. A power to make laws "for the peace, order, and good government of the Commonwealth with respect to" certain matters including "the seat of government of the Commonwealth" does not, I think, include a power to make laws for the general government of the territory within which the seat of government is established. That power is to be found in s. 122. (at p282)

6. In these circumstances the authorities make it plain that the provisions of s. 72 had no application to the appointment of the respondent magistrate. (at p282)

7. I would answer the questions as follows: (1) No; (2) Yes. (at p282)

ORDER

The questions asked in the stated case answered as follows:(i) Whether the provisions of s. 72 of the Commonwealth of Australia Constitution Act apply to the appointment of a stipendiary magistrate sitting as a Court of Petty Sessions in the Territory referred to in the Court of Petty Sessions Ordinance 1930-1961 of the Australian Capital Territory.

Answer: No.

(ii) Whether the said Clarence Lindsay Hermes having been appointed a stipendiary magistrate as stated in pars. 2 and 3 hereof and sitting as such pursuant to the Court of Petty Sessions Ordinance 1930-1961 of the Australian Capital Territory without having been appointed upon the terms specified in s. 72 pars. (ii.) and (iii.) of the Commonwealth of Australia Constitution Act has jurisdiction to hear and determine the information and Summons aforesaid.

Answer: Yes.

Costs of the stated case to be paid by the prosecutor.

Case remitted to the Supreme Court of the Australian Capital Territory.

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