by the plaintiffs' invention and of the proved commercial utility of the invention, it cannot be said that the defendants have established the invalidity of the plaintiffs' patent.

I agree therefore that the appeal should be dismissed.

RICH J. I agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors, for the appellants, *Snowden, Neave & Demaine.*

Solicitors, for the respondents, *F. B. Waters.*

B. L.

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BALLANTYNE v. AKTIEBOLAGET SEPARATOR.

COURT OF AUSTRALIA.]

THE KING

AGAINST

BERNASCONI.

ON APPEAL FROM THE CENTRAL COURT OF PAPUA.

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MELBOURNE, *March* 11, 12, 16.

Griffith C.J., Isaacs, Gavan Duffy and Rich JJ.

Constitutional Law—Powers of Commonwealth legislation as to territory acquired by Commonwealth—Indictable offence—Trial by jury—Appeal from Central Court of Papua—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 80, 122—*Papua Act* 1905 (*No.* 9 *of* 1905) *secs.* 5, 6, 43—*Criminal Code* (*Qd.*) (63 *Vict. No.* 9, *Sched.* 1), *secs.* 339, 604—*Ordinance No. XI. of* 1889 (*British New Guinea*), *sec.* 21—*Ordinance No. VII. of* 1902 (*British New Guinea*)—*Ordinance No. VII. of* 1907 (*Papua*)—*Ordinance No. VIII. of* 1909 (*Papua*), *sec.* 1.

The power of the Commonwealth Parliament conferred by sec. 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 sec. 80 of the Constitution that the trial on indictment of any offence against any law of the Commonwealth shall be by jury.

By sec. 21 of Ordinance No. XI. of 1889 of British New Guinea it was provided that trials of persons accused of crimes and offences cognizable in the Central Court should be by the Chief Magistrate sitting alone. Ordinance No. VII. of 1902 of British New Guinea provided that the Queensland

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Criminal Code should be the law of British New Guinea with respect to the several matters therein dealt with. By sec. 339 of that Code an assault occasioning bodily harm is an indictable offence, and by sec. 604 it is provided that on a trial for an indictable offence, if the accused pleads any plea other than a plea of guilty or a plea to the jurisdiction, he is to be deemed to have demanded, and is entitled to have, trial by a jury. By Ordinance No. VII. of 1907 of Papua it was provided that the trial of persons of European descent charged with a crime punishable by death should be held before a jury of four persons, but that "save as aforesaid the trials of all issues, both civil and criminal, shall as heretofore be held without a jury."

Held, that a person of European descent who was charged in Papua with an assault occasioning bodily harm, to which he pleaded not guilty, was properly tried without a jury.

Sec. 1 of Ordinance No. VIII. of 1909 of Papua, which provides that the Central Court must, on the application of counsel for the accused made before verdict, and may in its discretion, either before or after judgment, without such application, reserve any question of law which arises on the trial of an accused person for the consideration of the High Court, does not impose any restriction on the general right of appeal to the High Court given by sec. 43 of the *Papua Act* 1905.

CASE STATED and APPEAL.

At the Central Court of Papua, before His Honor J. H. P. Murray, Chief Judicial Officer, George Bernasconi was tried on a charge of assault causing bodily harm, and was found guilty and sentenced to twelve months' imprisonment with hard labour. At the request of the solicitor for the accused, his Honor stated a case reserving for the consideration of the High Court the following question (*inter alia*):—

(1) Whether the accused's deemed request for a jury was rightly refused.

During the argument of the case, on the application of counsel for the accused he was allowed to treat it as an appeal from the conviction on the grounds that the verdict was against evidence, and that evidence was wrongly admitted.

The material facts are stated in the judgments hereunder.

Sir William Irvine K.C. (with him *Cussen*), for the accused. The accused was entitled to a jury under sec. 80 of the Constitution. That section applies to all offences against any law of the Commonwealth. The words "any law of the Common-

wealth" include laws made either directly by the Commonwealth Parliament itself or indirectly by an authority to which the Parliament has delegated the power of making laws. The Parliament can delegate only such powers as it has itself, and if sec. 80 applies to all laws which the Parliament makes, it also applies to all laws made by a delegated authority. The fact that a law made by the Parliament is applicable to only a particular part of the Commonwealth does not make that law any the less a law of the Commonwealth. Sec. 339 of the Queensland *Criminal Code of* 1899, which creates the offence with which the accused was charged, derives its efficacy from the *Papua Act* 1905, and is therefore a law of the Commonwealth.

[ISAACS J. Ought not sec. 80 to be read as a qualification upon Chapter III. of the Constitution just as sec. 55 is to be read as a limitation upon sec. 51 (II.)?]

It is submitted that sec. 80 should not be so read. The language of that section is plain and unambiguous, and there is no reason for imposing any limitation upon the words "any law of the Commonwealth." A law made under sec. 122 of the Constitution is as much a law of the Commonwealth as one made under any other power conferred by the Constitution. The words "laws of the Commonwealth" are used in sec. 61 of the Constitution, which provides that the executive power of the Commonwealth extends to the execution and maintenance of the "laws of the Commonwealth." That cannot be limited to laws made directly by the Parliament. In the United States Constitution there is a provision similar to sec. 80 which is placed in that part dealing with the judicial power. There is also a similar provision to sec. 122. Yet the provision as to trial by jury has been held in the United States to apply to territories: *Callan* v. *Wilson* (1); *Thompson* v. *Utah* (2); *Dorr* v. *United States* (3); *Rassmussen* v. *United States* (4). The words "trial on indictment" in sec. 80 mean trial by formal charge before a superior Court and not of a summary nature. The trial in this case was in that sense a trial on indictment.

A general right of appeal to this Court is given by sec. 43 of

(1) 127 U.S., 540.
(2) 170 U.S., 343, at p. 346.
(3) 195 U.S., 138.
(4) 197 U.S., 516, at p. 526.

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the *Papua Act* 1905, and no limitation has been placed upon that right by Ordinance No. VIII. of 1909 of Papua.

Starke and *Morley*, for the Crown, were not called upon.

[During the argument reference was also made to *British Settlements Act* 1887 (50 & 51 Vict. c. 54), secs. 2, 3, 4; Royal Proclamation of 4th September 1888; Letters Patent of 8th June 1888; Ordinance No. XI. of 1889 of British New Guinea, sec. 21; Ordinance No. VII. of 1902; Queensland *Criminal Code of* 1899, sec. 604; *Papua Act* 1905, secs. 6, 8, 9, 36; Ordinance No. VII. of 1907 of Papua; *Buchanan* v. *The Commonwealth* (1); *Powell* v. *Apollo Candle Co. Ltd.* (2); *American Insurance Co.* v. *Canter* (3).]

Cur. adv. vult.

March 16.

The following judgments were read:—

GRIFFITH C.J. This matter came before the Court on a case stated by the Central Court of the Territory of Papua upon a conviction for an assault occasioning bodily harm. The accused was tried before the Central Court without a jury in accordance with the provisions of Ordinances of that territory.

The first question raised by the case is whether he was entitled to be tried by a jury. The objection is founded upon sec. 80 of the Constitution, which provides that the trial on indictment of any offence against any law of the Commonwealth shall be by jury. The question, therefore, is whether the offence of which the accused was convicted was an offence against a law of the Commonwealth within the meaning of that provision.

What is now the Territory of Papua became a British Possession by the name of British New Guinea on 4th September 1888. By Letters Patent dated 8th June of the same year a legislature was established for the Possession by the name of the Legislative Council. By an Ordinance of the Legislative Council passed on 9th January 1889 (No. XI. of 1889), it was provided (sec. 21)

(1) 16 C.L.R., 315.
(2) 10 App. Cas., 282, at p. 288.
(3) 1 Pet., 511.

that trials of persons accused of crimes and offences cognizable in the Central Court should be by the Chief Magistrate sitting alone.

By an Ordinance, No. VII. of 1902, intituled "An Ordinance to establish a Code of Criminal Law," it was enacted that on and from 1st July 1903 the Queensland *Criminal Code* should be adopted and be the law of British New Guinea with respect to the several matters therein dealt with.

The offence with which the accused was charged is an indictable offence described in sec. 339 of the Code. Chapter LXII. of the Code, which is headed "Trial: Adjournment: Pleas: Practice," deals with indictable offences, and enacts that on a trial for an indictable offence if the accused person pleads any plea other than a plea of guilty or a plea to the jurisdiction he is to be deemed to have demanded trial by a jury. It did not, however, occur to anyone that this provision introduced the system of trial by jury into the Possession, or that the express provisions of sec. 21 of the Ordinance of 1889 were repealed or superseded.

By an Ordinance, No. VII of 1907, passed after the transfer of the Possession to the Commonwealth, to which I will directly refer, it was enacted that the trial of persons of European descent charged with a crime punishable with death should be held before a jury of four persons, but that "save as aforesaid the trials of all issues, both civil and criminal, shall as heretofore be held without a jury."

In 1905 the Possession was placed by the King under the authority of and accepted by the Commonwealth. The *Papua Act*, No. 9 of 1905, was passed in order to give effect to this acceptance. The effect of the transfer was that the laws in force in the Possession, including those which had been lawfully made by the Legislative Council of British New Guinea, continued in force until repealed or altered, except so far as they might be inconsistent with any paramount law. The *Papua Act* provided by sec. 6, perhaps *ex abundanti cautelâ*, that subject to the Act the laws in force in the Possession should continue in force in the Territory until other provisions should be made. In my opinion this enactment operated only as a declaration of the law. By the

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Act a new Constitution was conferred on the Territory, resembling in most respects that established by the Letters Patent of 1888.

It was contended, however, that the effect of sec. 6 was that the laws of the Territory no longer derived their validity from having been in force at the time of the transfer, but must now be regarded as laws enacted for the first time by the *Papua Act*, and that if these laws properly construed do not provide for the trial by jury of offences tried on indictment they are *pro tanto* invalid as being in contravention of the provisions of sec. 80 of the Constitution, and that sec. 6 of the *Papua Act*, as well as the Ordinance of 1907, is to the same extent invalid.

An interesting question was also raised and discussed with regard to the Ordinance of 1907 as to whether a law passed by the legislature of a territory under the authority of a law passed by the Parliament of the Commonwealth can properly be regarded as a law of the Commmonwealth in any sense. But there is a larger and more important question to be answered before these questions can become material, namely, whether sec. 80 has any application to the local laws of a territory, whether enacted by the Commonwealth Parliament or by a subordinate legislature set up by it.

Sec. 122 provides as follows:—"The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit."

The main object of the Constitution was, as stated in the preamble to the *Constitution Act*, to unite the Australian Colonies in one indissoluble Federal Commonwealth under the Crown of the United Kingdom and under the Constitution thereby established. Each of these Colonies had for many years exercised independent plenary powers of Government, and the establishment of the Commonwealth involved the surrender or transfer of many of those powers to the new central authority and the establishment of a new Judiciary. The general power to deal with criminal law was not transferred to the Common-

wealth, but the imposition of penalties, either personal or pecuniary, by way of sanction, was a matter plainly incidental to the exercise of the enumerated legislative powers of the Commonwealth. At that time the laws of all the States provided for the trial by jury of persons tried on indictment, and it was thought desirable to lay down the rule that the trial of persons charged with new indictable offences created by the Commonwealth Parliament should be tried in the same way. Such a provision naturally found place in Chapter III. of the Constitution dealing with the Judicature, of which sec. 80 forms part.

In my judgment, Chapter III. is limited in its application to the exercise of the judicial power of the Commonwealth in respect of those functions of government as to which it stands in the place of the States, and has no application to territories. Sec. 80, therefore, relates only to offences created by the Parliament by Statutes passed in the execution of those functions, which are aptly described as "laws of the Commonwealth." The same term is used in that sense in sec. 5 of the *Constitution Act* itself, and in secs. 41, 61 and 109 of the Constitution. In the last mentioned section it is used in contradistinction to the law of a State. I do not think that in this respect the law of a territory can be put on any different footing from that of a law of a State.

The power conferred by sec. 122, although conferred by the same instrument, stands on a different footing. No question has been raised as to the power of the Parliament to create a subordinate legislature in a territory, as it has done by the *Papua Act*. It is indubitable that it is not bound to do so, but may legislate directly, as it has done in the case of the Northern Territory. In my opinion, the power conferred by sec. 122 is not restricted by the provisions of Chapter III. of the Constitution, whether the power is exercised directly or through a subordinate legislature.

The first question raised by the case, which is whether the request for a jury alleged to have been implied by the plea of "not guilty" was rightly refused, must therefore be answered in the affirmative.

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The other questions raised by the case are not questions of law at all.

The *Papua Act* gives (sec. 43) a general right of appeal from the Central Court of Papua to the High Court with such exceptions and subject to such regulations as are prescribed by Ordinance. Ordinance No. VIII. of 1909, under which the case was stated, merely provides for the reservation of questions of law arising at the trial, but does not (except in one immaterial particular) restrict the general right of appeal.

Sir *William Irvine* asked to be allowed to treat the case as a general appeal from the conviction, although no formal notice of appeal had been given otherwise than by asking for the reservation of the case; and under the special circumstances, no objection being offered by the Crown, and this being the first appeal from Papua, and there not being any rules in existence regulating such appeals, we allowed his request.

On the merits of the case it is sufficient to say that, giving the fullest weight to all the evidence offered for the defence, other than the sworn denial of the accused himself, there remained a body of evidence which, unless wholly untrue (as to which the Presiding Judicial Officer was a better judge than we are), showed that, although the evidence of some of the witnesses was exaggerated, and indeed grossly exaggerated, there was a residue which established that the accused had committed an aggravated assault for which the sentence of twelve months' imprisonment (which might be imposed under the Code for a common assault) cannot be regarded as excessive.

The appeal must therefore be dismissed.

ISAACS J. The first point argued for Bernasconi was that sec. 80 of the Constitution is a limitation applying to every part of it, and therefore a limitation on the provisions of sec. 122. It was said that as a law made under the authority of sec. 122, such as the *Papua Act* 1905, enacting the future operation of laws theretofore existing under other authority, is a law of the Commonwealth, because made by the Commonwealth Parliament, the words of sec 80 would necessarily be satisfied by such a law.

But although in my opinion the law alleged to have been

contravened is a law of the Commonwealth, because its present force subsists by virtue of the declared will of the Commonwealth Parliament, yet if both sec. 80 and sec. 122 be construed, not by themselves alone, but in relation to the rest of the instrument as well as to each other, the contention rested on sec. 80 cannot be sustained.

That section is one of the *fasciculus* of sections collected in one Chapter and united and inter-related as members of a distinct group under the title of "The Judicature." The "judicial power of the Commonwealth"—that is, the whole judicial power of the Commonwealth proper—is there dealt with. By force of the various sections of Chapter III. other than sec. 80 and aided by sub-sec. XXXIX. of sec. 51, Parliament might have enacted, or might have enabled Courts to provide by rules, that all offences whatever should be tried by a Judge or Judges without a jury. Sec. 80 places a limitation on that power. Neither Parliament nor Courts may permit such a trial. If a given offence is not made triable on indictment at all, then sec. 80 does not apply. If the offence is so tried, then there must be a jury. But the provision is clearly enacted as a limitation on the accompanying provisions, applying to the Commonwealth as a self-governing community. And that is its sole operation.

When the Constitution, however, reaches a new consideration, namely, the government of territories, not as constituent parts of the self-governing body, not "fused with it" as I expressed it in *Buchanan's Case* (1), but rather as parts annexed to the Commonwealth and subordinate to it, then sec. 122 provides the appropriate grant of power.

It is plain that that section does not consist merely of additional legislative power over territories beyond the powers already conferred upon Parliament in relation to the Commonwealth itself, for its language is unrestricted and covers many of the subjects already specified in sec. 51. It is an unqualified grant complete in itself, and implies that a "territory" is not yet in a condition to enter into the full participation of Commonwealth constitutional rights and powers. It is in a state of dependency or tutelage, and the special regulations proper for its

(1) 16 C.L.R., 315, at p. 335.

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government until, if ever, it shall be admitted as a member of the family of States, are left to the discretion of the Commonwealth Parliament. If, for instance, any of the recently conquered territories were attached to Australia by act of the King and acceptance by the Commonwealth, the population there, whether German or Polynesian, would come within sec. 122, and not within sec. 80. Parliament's sense of justice and fair dealing is sufficient to protect them, without fencing them round with what would be in the vast majority of instances an entirely inappropriate requirement of the British jury system.

This point therefore fails, and the first question reserved by the special case should be answered in the affirmative.

The second and third questions, reserved, were not really argued upon the special case, as the Ordinance No. VIII. of 1909 under which the case is stated expressly restricts the reservations to questions of law. This is in accordance with the ordinary meaning of "case stated." (See *Merchant Service Guild* v. *Newcastle and Hunter River Steamship Co.* [*No.* 1] (1).)

But a general right of appeal was claimed by sec. 43 of the *Papua Act* 1905. That section gives a *primâ facie* unqualified right of appeal both on law and facts from the Central Court of the Territory. Unless, therefore, some Ordinance prescribes exceptions which include a given case, a right of appeal remains. And unless some Ordinance prescribes a regulation to which a permissible appeal must conform, the right exists *simpliciter*, and this Court must hear it, provided the fundamental principles of justice are observed in connection with it. Regulations are not exceptions.

The second part of sec. 43 permits "regulations" as to "case stated" and the Ordinance VIII. of 1909 is affirmative and permissive in form, and there are no negative words making that form of appeal exclusive. No regulation, it seems, has been made with respect to other forms of appeal, and so the right exists subject only to the requirements of natural justice. Whether that is intentional or not I do not know, but inconvenience may easily arise from the want of definite provision.

The Crown did not in this case suggest any likelihood of

(1) 16 C.L.R., 591, at pp. 621-623.

injustice arising from hearing the appeal at once on the materials, and so the Court entertained the appeal *instanter*. That is not to be taken as indicating that every such appeal would be so dealt with.

The two points relied on on this basis were: (1) that certain hearsay evidence was admitted as to complaints by natives of ill-treatment, and (2) that on the whole body of evidence the proper conclusion of fact to be drawn by a Court was that the accused was not guilty of the charge made against him.

As to the first point, it clearly appears that the evidence now objected to, not only was not objected to at the trial but could not have been successfully objected to. It was legitimately elicited in cross-examination by the Crown to qualify or test a statement made in direct examination of the witness for the defence.

The second point utterly fails. The evidence as it appears in cold type, strongly supports the finding of the Chief Judicial Officer. But the testimony as it reaches us lacks the life tints that, with especial importance in a region like New Guinea and in relation to surroundings of an intensely local significance, must inevitably affect the value of the mere words themselves that are uttered.

The considerations to which I adverted in *Dearman* v. *Dearman* (1), and which I need not here repeat, are extremely necessary to bear in mind in the present case.

Of course, as Lord *Wynford* said for the Privy Council in *Canepa* v. *Larios* (2), in this connection "a case may be so unsatisfactory as to require further explanation; so improbable as to be manifestly unworthy of credit; or may exhibit circumstances which should convince any impartial or judicious mind of its truth. In such cases the Court of Appeal should not be concluded by the judgment of the Court below."

In the present case, however, those features do not appear—far from it; and I feel no hesitation in adhering to the learned Judge's decision.

I should add, it was faintly suggested that the sentence should be revised in favour of the appellant. But the punishment

(1) 7 C.L.R., 549, at pp. 561-562. (2) 2 Knapp, 276, at p. 283.

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awarded was by no means too severe for such deliberate and cold-blooded cruelty as is found to have been perpetrated by the prisoner. It is apparently at times a matter of extreme risk for an island laborer to attempt to protect himself by seeking the intervention of the law. A passage in the evidence of the accused himself as it stands illustrates this. Speaking of a man named Tirari he says: "He got a month for desertion—the desertion being that he took a canoe and went to Abau to lay a complaint against me." In those circumstances to lessen the penalty awarded on the spot by the Chief Judical Officer might easily detract from the influence of the law in protecting the islanders.

On all grounds the appeal should be dismissed.

The judgment of GAVAN DUFFY and RICH JJ. was read by

RICH J. We concur in the judgment of the Court, and we adopt the views expressed by the Chief Justice with respect to the construction of secs. 80 and 122 of the Constitution.

Question 1 *answered in the affirmative.*
Appeal dismissed.

Solicitor, for the Crown, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

Solicitors, for the accused, *Pavey, Wilson & Cohen.*

B. L.