[HIGH COURT OF AUSTRALIA.]

PORTER . . . . . APPELLANT;

AND

THE KING . . . . . RESPONDENT.

EX PARTE CHIN MAN YEE AND OTHERS . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF THE NORTHERN TERRITORY.

H. C. OF A. 1926.

MELBOURNE, *Mar.* 16, 17.

SYDNEY, *April* 22.

Knox C.J., Isaacs, Higgins, Gavan Duffy, Rich and Starke JJ.

Constitutional Law—High Court—Jurisdiction—Appeal from Supreme Court of Northern Territory—Federal Court—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 71, 72, 73, 122—*Northern Territory Acceptance Act* 1910-1919 (*No.* 20 *of* 1910—*No.* 24 *of* 1919)—*Northern Territory* (*Administration*) *Act* 1910 (*No.* 27 *of* 1910), *sec.* 13—*Supreme Court Ordinance* 1911-1922 (*N.T.*) (*No.* 9 *of* 1911—*No.* 10 *of* 1922), *secs.* 8, 21.

Contempt of Court—Supreme Court of Northern Territory—Jurisdiction—Publication of matter tending to interfere with administration of justice—No proceedings instituted to which matter could apply.

Held, by *Isaacs, Higgins, Rich* and *Starke* JJ. (*Knox* C.J. and *Gavan Duffy* J. dissenting), that in exercise of the power conferred by sec. 122 of the Constitution the Parliament of the Commonwealth may confer upon the High Court jurisdiction to entertain an appeal from a Court established by the Parliament in a territory, notwithstanding that the Court so established is not a Federal Court within the meaning of sec. 71 of the Constitution; and that jurisdiction to entertain an appeal from the Supreme Court of the Northern Territory is lawfully conferred upon the High Court by sec. 21 of the *Supreme Court Ordinance* 1911-1922 and sec. 13 of the *Northern Territory* (*Administration*) *Act* 1910, under the authority of which section that Ordinance was made.

In re Judiciary and Navigation Acts, (1921) 29 C.L.R. 257, distinguished.

R. v. *Bernasconi*, (1915) 19 C.L.R. 629, and *Mainka* v. *Custodian of Expropriated Property*, (1924) 34 C.L.R. 297, considered.

The appellant was fined for contempt by the Supreme Court of the Northern Territory in respect of matter published by him.

Held, by Isaacs, Higgins, Rich and *Starke* JJ., that the order should be set aside :

By *Isaacs* and *Higgins* JJ., on the ground that, there being no attack on any Court or its members, there could be no contempt of Court in respect of anything tending to obstruct the course of justice in the absence of any pending proceedings to which the published matter could apply.

By *Starke* J., on the ground that there was nothing in the published matter which was calculated to prejudice the course of justice.

Decision of the Supreme Court of the Northern Territory (*Roberts* J.) reversed.

APPEAL from the Supreme Court of the Northern Territory.

In a newspaper called the *Northern Territory Times and Gazette*, published at Darwin in the Northern Territory, of which John Alfred Porter was the editor, there appeared, on 4th August 1925, two articles. One, which was headed "Faked birth certificates," was (so far as is material) as follows :—"W. H. Barkly (Sydney Collector of Customs) stated that the department for years was aware that attempts were made to get Chinese into Sydney by means of false birth certificates. In some cases the attempts were frustrated by the vigilance of the Customs officials. The department had difficulty in obtaining proof that the birth certificates submitted were not genuine. Another method adopted by Chinese to get admission was to join the crew of a Chinese steamer and on arrival change places with another Chinaman wishing to return home." The other article, headed "Alleged faked documents," was (so far as is material) as follows :—"It is an unwarranted libel to say that Darwin Chinese Secret Society has anything to do with importing Chinese with faked passports, as has been reported in a section of the Southern press. The facts are that a Chinaman in Sydney working in conjunction with an ex-Customs officer is alleged to have been selling forged documents enabling Chinese immigrants to enter the Commonwealth. The Customs learned of the business in the following way :—A native-born Chinese named Ak Fong died at Darwin in 1920. His birth certificate was evidently sold and a Chinese immigrant entered Sydney on the strength of it. The

H. C. OF A. 1926.

PORTER v. THE KING; EX PARTE YEE.

Sydney Customs wired Darwin and the fraud was discovered. Then Inspector Gabriel came here. He took all the local police and suddenly raided a local Chinese shop run by a relative of the Sydney man and seized many letters, some in English, some in Chinese. The English letters asked for certain birth certificates to be sent. One letter complained of delay as owing to inability to get particulars the immigrant had bought a certificate elsewhere for £200. The officials so far have been unable to get the Chinese letters translated. Then a telegram was sent to the Sydney man which said 'You better clear out to China quick.' It is not stated whether he cleared out or has been arrested. Inspector Gabriel can read Chinese a little, and there are indications of a wide-spread conspiracy with headquarters in Sydney and agents at various Australian ports. The documents used in some cases are described as crude forgeries. A man is coming from Sydney to interpret the Chinese letters, and Police Court proceedings will be commenced after his arrival. . . . It is now certain, however, that a wide-spread conspiracy exists with the object of introducing Chinese immigrants into Southern cities on borrowed birth certificates. The raid by the police and Customs officials on a certain Darwin Chinese store searched drawers, safes and cupboards from which were extracted incriminating documents, bundles of which were removed to the Customs strong-room. . . . The contents of seized letters will not be known until the arrival of the man from South for translation, when they will probably be read in the Police Court." At the time these two articles were published, no proceedings had been instituted in any Court in the Northern Territory in respect of the matters referred to in the articles.

On the application of Chin Man Yee, Che Pon (otherwise Che Kee Kan), Fong Ming, Fong Hong, Fong Yuan, Fong Quin, Men Joe and Fong Moon On, an order nisi was issued out of the Supreme Court of the Northern Territory calling upon Porter to show cause why a writ of attachment should not issue against him, or why the applicants should not have such further or other relief as to that Court might seem meet, for his contempt in respect of the two articles.

On the hearing of the order nisi, *Roberts* J. made an order that Porter should, for his contempt, pay a fine of £10, should pay to the applicants £10 10s. costs, and should be detained and, if necessary, imprisoned in the Darwin gaol until the fine and costs should be paid.

From that decision Porter now, by leave, appealed to the High Court.

The other material facts appear in the judgments hereunder.

Robert Menzies, for the appellant.

Owen Dixon K.C. (with him *Sanderson*), for the respondent applicants, took a preliminary objection:—This Court has no jurisdiction to entertain the appeal. Sec. 21 of the *Supreme Court Ordinance* 1911-1922, made under sec. 13 of the *Northern Territory (Administration) Act* 1910, is void. That Act was enacted under the power conferred by sec. 122 of the Constitution. Enactments made under sec. 122 are not governed or affected by the provisions of Chapter III. of the Constitution (*R.* v. *Bernasconi* (1); *Buchanan* v. *Commonwealth* (2)). That being so, no appeal lies to this Court under sec. 73 of the Constitution, for the Supreme Court of the Northern Territory is not a Federal Court, since the Judge has not a life tenure (sec. 8 of the *Supreme Court Ordinance* 1911-1922). Sec. 73 exhaustively states the appellate jurisdiction which is or may be conferred on the High Court (*In re Judiciary and Navigation Acts* (3); *British Imperial Oil Co.* v. *Federal Commissioner of Taxation* (4)), and no appellate jurisdiction which does not comply with sec. 73 can be conferred under sec. 122 of the Constitution.

Robert Menzies. Under sec. 122 of the Constitution the Parliament of the Commonwealth may set up in a territory any Court, give its Judges any tenure and provide that an appeal shall lie to it to the High Court, notwithstanding any of the provisions of secs. 71 and 73 of the Constitution. If that be not so, and if sec. 73 is an exclusive statement of the appellate power of the High Court, the

(1) (1915) 19 C.L.R. 629, at p. 635.
(2) (1913) 16 C.L.R. 315.
(3) (1921) 29 C.L.R. 257.
(4) (1925) 35 C.L.R. 422, at p. 437.

H. C. OF A. 1926. PORTER v. THE KING; EX PARTE YEE.

High Court still has jurisdiction to entertain an appeal from the Supreme Court of the Northern Territory. Sec. 122 gives, among other powers, a power to create Courts in a territory and the power of the Commonwealth Parliament to create Courts resides in secs. 71 and 122. The words "the Commonwealth" in sec. 71 include any territory which may come into existence under sec. 122, and the creation of the High Court by sec. 71 is effective with regard to a territory as well as to the States. The test of whether a Court is a Federal Court within sec. 71 is not whether it is of a Federal instead of an intra-State character. It may be local in its character and may be created under sec. 122. Sec. 72 should be read as applying only to Courts created under sec. 71 and not to Courts created under sec. 122. But sec. 73, which purports to deal with the whole of the appellate jurisdiction of the High Court, including that in respect of territories, should be read as conferring appellate jurisdiction on the High Court in respect of Courts created under sec. 122 as well as those created under sec. 71. In *Mainka* v. *Custodian of Expropriated Property* (1) it was held that the Central Court of New Guinea was a Federal Court, and no distinction can be drawn between that case and this. The Court did not in that case indicate that the Mandate had the effect of making the Central Court a Federal Court, nor did the Mandate confer any different power from that conferred by sec. 122 of the Constitution.

Sir Edward Mitchell K.C. (with him *J. H. Moore*), for the Commonwealth. The Supreme Court of the Northern Territory is a "Court exercising Federal jurisdiction" as well as a "Federal Court" within the meaning of secs. 71 and 73 of the Constitution. According to the ordinary rules of construction the power to invest Courts with Federal jurisdiction is not confined to investing State Courts with that jurisdiction. Where in the Constitution State Courts are indicated, they are specifically so called. [Counsel referred to *McAllister* v. *United States* (2); *Australian Steamships Ltd.* v. *Malcolm* (3); *Harding* v. *Federal Commissioner of Taxation* (4).]

[ISAACS J. referred to *Downes* v. *Bidwell* (5).]

(1) (1924) 34 C.L.R. 297.
(2) (1891) 141 U.S. 174.
(3) (1914) 19 C.L.R. 298, at p. 328.
(4) (1917) 23 C.L.R. 119.
(5) (1901) 182 U.S. 244, at p. 266.

Under a power similar to that contained in sec. 122, in the United States it has been held that Congress can give a right of appeal to the Supreme Court from a Court of a territory. The jurisdiction of a Court created under sec. 122 is necessarily Federal; and there is no reason for excluding such a Court from secs. 71 and 73 of the Constitution.

Owen Dixon K.C., in reply.

PER CURIAM. We will hear the appeal on the merits.

Robert Menzies. No proceedings having been instituted to which the articles could apply, proceedings for contempt of Court were inapplicable. [Counsel was stopped.]

Owen Dixon K.C. Upon the evidence there may not have been sufficient material to justify the learned Judge in making the order fining the appellant. But he had jurisdiction to act notwithstanding that no proceedings had been instituted to which the articles could apply. The jurisdiction as to contempt is dependent on an interference with the King's justice, and there may be such an interference by preventing the issue of original process or by making it less possible for the prosecutor to proceed. It is not the interference with a particular proceeding before a Court, but the general tendency to make the administration of justice more difficult, that gives jurisdiction as to contempt. The criterion is the probability of a real and substantial interference with the administration of justice having taken place (see *Packer* v. *Peacock* (1); *R.* v. *Parke* (2); *R.* v. *Davies* (3)).

Cur. adv. vult.

April 22.

The following written judgments were delivered :—

KNOX C.J. AND GAVAN DUFFY J. In this case an appeal is sought from the Supreme Court of the Northern Territory and objection has been taken to our jurisdiction to hear an appeal from that Court. The would-be appellant puts his case in two ways. First, he says that the Supreme Court of the Northern Territory

(1) (1912) 13 C.L.R. 577. (2) (1903) 2 K.B. 432.
(3) (1906) 1 K.B. 32.

H. C. OF A. 1926.

PORTER v. THE KING; EX PARTE YEE.

Knox C.J. Gavan Duffy J.

is a Federal Court within the meaning of sec. 73 of the Constitution. It is enough to say that the words " any other Federal Court " in sec. 73 mean any one of the " other Federal Courts " mentioned in sec. 71 and having a Justice with the tenure prescribed by sec. 72 of the Constitution. The Supreme Court of the Northern Territory is not such a Court. In the next place, he says that sec. 122 of the Constitution enables the Parliament of the Commonwealth to make laws for the government of the Territory, that in pursuance of such power Parliament has authorized the Governor in Council to constitute an appeal to this Court, and that he has in fact done so by an ordinance known as the *Supreme Court Ordinance* 1911-1922. We proceed to examine the suggested power of the Parliament of the Commonwealth.

In our opinion, the reasoning of the majority judgment in *In re Judiciary and Navigation Acts* (1) establishes the proposition that the jurisdiction of this Court, whether original or appellate, is to be sought wholly within Chapter III. of the Constitution, that the Court exists only for the performance of the functions therein described, and that the Parliament of the Commonwealth, legislating for the peace, order and good government of the Commonwealth, can no more add to or alter the jurisdiction of the Court than it can add to or alter its own legislative powers. It is true that in this judgment sec. 122 of the Constitution was not discussed, and it is said that, even if the Commonwealth Parliament cannot add to the jurisdiction of the Court as an instrument functioning under Chapter III. of the Constitution, it can give it new powers and duties as part of the judiciary or judicial system of the Northern Territory. A consideration of the provisions of sec. 122 has confirmed us in the opinion that an appeal is not competent in this case. The section enables the Parliament of the Commonwealth to make laws for the government of any territory surrendered by any State to, and accepted by, the Commonwealth; but in legislating for such territories the Parliament of the Commonwealth must rely wholly upon the powers contained in the section, and cannot have recourse to legislative powers contained in Chapter I., Part V., of the Constitution, which have reference only to laws for the peace, order and good government

(1) (1921) 29 C.L.R. 257.

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

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

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

On the appeal being called on, there was no appearance on behalf of His Majesty, but the relators were represented by Mr. *Dixon* and Mr. *Sanderson*. An objection *in limine* was taken as to the constitutional competency of this Court to entertain appeals from the Courts of a territory, having regard to the decision in *In re*

H. C. OF A. 1926.

PORTER v. THE KING; EX PARTE YEE.

Isaacs J.

Judiciary and Navigation Acts (1) and to the terms of the *Northern Territory* (*Administration*) *Act* 1910, sec. 13. An adjournment took place to enable the Commonwealth to place its views before the Court on these questions. Ultimately Sir *Edward Mitchell* and Mr. *Moore* appeared for the Commonwealth to argue the question of the jurisdiction of this Court. Naturally that question must be determined before we are at liberty to say a word on any other point.

(1) *Jurisdiction of the High Court.*—It was contended for the relators that the *Judiciary and Navigation Acts Case* (1) is a decision that there is no power to confer any jurisdiction on this Court to hear an appeal from any Court that is not a Court within the meaning of Chapter III. of the Constitution. Then, proceeded the argument, a territorial Court created under sec. 122 is by *R.* v. *Bernasconi* (2) not within Chapter III., and so the appeal here is incompetent. It was sought to distinguish *R.* v. *Bernasconi*, but the effort failed. The Territorial Court, if a "Federal Court" within sec. 73 of the Constitution, would fall within sec. 72 and would, in view of the tenure, be invalidly constituted. Nor is it a Court "exercising Federal jurisdiction" within the meaning of sec. 73, because such a Court is in contradistinction to a "Federal Court." It means a State Court invested with Federal jurisdiction or assuming in fact to be so invested. Any attempt to justify appellate jurisdiction in this Court from a territorial Court on the self-executing provisions of the Constitution fails.

But sec. 122 is in the nature of a plenary authority in the Commonwealth Parliament. I have, in *R.* v. *Bernasconi* (2), stated my view of that section, and I incorporate what I there said, without textual repetition. It follows from what I there said, and, indeed, from what every member of the Court there said, unless qualified by the later decision referred to, that the Commonwealth Parliament may under sec. 122 confer at will appellate jurisdiction from a territorial Court. If my learned brethren who formed the majority unanimously thought the later case, though not expressly, but impliedly, concluded the matter as contended for the relators, I would implicitly accept that view. But, as two members of the majority are of that opinion and two others think this question is

(1) (1921) 29 C.L.R. 257.

(2) (1915) 19 C.L.R. 629.

left open, I am not merely at liberty but bound to act on my own opinion. I accordingly accept the later case as authoritatively determining that "the judicial power of the Commonwealth," within the meaning of Chapter III., and both original and appellate, cannot be increased by Parliament. But the judicial power of the Commonwealth is, as defined by *R.* v. *Bernasconi* (1), that of the Commonwealth proper, which means the area included within States. Beyond that the decision in the later case does not apply. It follows that, if there be appropriate parliamentary enactment, this Court is competent to entertain appeals from the territorial Courts.

Whether there is such an enactment depends on the proper construction of sec. 13 of the *Northern Territory (Administration) Act* 1910. Under that section, substantially, an ordinance has been made by the Governor-General which, in its amended form, purports, by sec. 21, to give ample power to entertain this appeal. But it is said that the section of the Ordinance is not authorized by the quoted section of the Act. Sec. 13 of the Act is in these terms: "Until the Parliament makes other provision for the government of the Territory, the Governor-General may make ordinances having *the force of law in the Territory.*" The argument is that the words "in the Territory" limit the operation of the Ordinance to things, persons and events actually within the physical area of the Territory. It is not disputed—once the first point is settled—that the Parliament could authorize the Governor-General to make an ordinance conferring a right of appeal to the High Court. The question, to my mind, is whether the words "having the force of law in the Territory" do not mean "having the force of law in the Territory as opposed to its being law in force in the Commonwealth proper or in other territories." I think it does, and that those words are to indicate that the Ordinance was not intended to transcend sec. 122 of the Constitution. At all events, it may mean that, and in a governmental instrument the words ought, in my opinion, not to be cut down to the narrowest possible limits unless intractable. I think the 21st section of the Ordinance is the law

(1) (1915) 19 C.L.R. 629.

H. C. OF A. 1926.

PORTER v. THE KING; EX PARTE YEE.

Isaacs J.

in force " in the Territory " as to what right of appeal exists from the Supreme Court to this Court.

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

Again, sec. 12 of the *Northern Territory (Administration) Act* says that " For the enforcement of all laws in force in the Territory *and the administration of justice in the Territory* the several Courts of the State of South Australia shall, subject to any ordinance made by the Governor-General, (*a*) continue to have and exercise " (1) what I may call their existing jurisdiction, or (2) such jurisdiction as is conferred on them by ordinance made by the Governor-General. Clearly what the Parliament considered as " the administration of justice in the Territory " included an appeal heard in Adelaide. And equally clearly it considered that the Governor-General had power by ordinance to define the jurisdiction of the Supreme Court of South Australia to hear appeals in Adelaide. But when we turn to sec. 13, dealing with the power to make ordinances, we find the words relied on " ordinances having the force of law in the Territory." If such an ordinance made under sec. 12—which clearly is subject to all the provisions of sec. 13, and therefore to the words quoted—is not excluded by those words, how can the present ordinance be excluded? Reference was made to a passage in *Mainka's Case* (1) as supporting the view that the Territorial Court is a " Federal Court " for the purpose of sec. 73 of the Constitution. Perhaps it was not sufficiently made clear that the New Guinea Court was

(1) (1924) 34 C.L.R., at p. 301.

there regarded as " a Federal Court " within sec. 73, not by reason of Commonwealth legislation simply—as in this case—but because of the effect of the Imperial Act, authorizing the Mandate as expressed and therefore treating the Territory as " an integral portion of the Commonwealth." The passage referred to must be read with that qualification whatever be its accuracy or inaccuracy; it is no authority for treating as " a Federal Court " within Chapter III. of the Constitution a tribunal erected under legislation authorized simply by sec. 122 of the Constitution. Still, both *Mainka's Case* (1) and *Bernasconi's Case* (2) determine very distinctly that the Parliament has power to give this Court appellate power in respect of Commonwealth Territory outside the strict limits of the Commonwealth proper.

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

(2) *The Appeal.*—The next question is: How is the appeal to be determined? In my opinion it should be allowed, on the ground that, there being no proceedings pending, the summary process of attachment for contempt of Court is wholly inapplicable. I will assume—and proceed on the assumption—that the Supreme Court of the Northern Territory is in a position corresponding with that of the Supreme Court of a State, in having the general power of superintending the administration of the King's justice within the Territory. Nevertheless, there is no precedent for carrying the summary jurisdiction of the Court so far as it has been carried here, and I am not prepared to make one. There are many species of contempt. Where a Court is vilified or scandalized, or the members attacked in their public capacity, there is direct interference with the constitutional agent of the King in the administration of justice. Again, where a proceeding has been instituted, and so is in the hands of those entrusted with royal administration of justice, anything calculated to obstruct or impede the course of justice or to prejudice the parties concerned may be summarily dealt with. That is an inherent power of the appropriate Court, a power of self-protection or a power incidental to the function of superintending the administration of justice. The fundamental conception of

(1) (1924) 34 C.L.R. 297. (2) (1915) 19 C.L.R. 629.

H. C. OF A. 1926.

PORTER v. THE KING; EX PARTE YEE.

Isaacs J.

this authority may be read in the judgment in *Beaumont* v. *Barrett* (1). But where, as here, there is no attack on any Court or Judge and no proceedings have even been begun, how does the Court—any Court—enter into the circumstances as a factor? I conceive the principle of individual liberty of speech and writing, limited only by the ordinary law, is in force in such a case, and that it would be an unprecedented and unwarranted stretch of curial authority, and an undue limitation of the right of free speech, to fine or imprison for a mere conjectural impediment to a non-existing proceeding. The power would be too arbitrary. On the other hand, I think it necessary to add, the appellant was, in my opinion, wise in taking the precaution he did. Before publishing the articles in question he ascertained from the local Clerk of Courts that no proceedings had been commenced. He evidently was aware how wrong it would otherwise have been to publish the articles. Had such proceedings been commenced I should have regarded the articles as a very serious interference with the fair course of justice. Even amid the greater population of any Australian capital it would, in my opinion, be wholly indefensible to publish broadcast a printed statement with reference to defendants accused of crime that "the fraud was discovered," that "there are indications of a widespread conspiracy" and that a raid on the defendants' premises and a search in safes and cupboards disclosed "incriminating documents." Still more must that be so in the smaller community at Darwin in relation to a question which is specially a burning question there, and where the Magistrate is in much closer contact with current public opinion than, for example, in a large and populous city, and where in the smaller community newspaper articles of the description referred to naturally have greater influence than in more distant and more populous localities. If proceedings had been initiated, I should have thought the decision and the reasoning of *Roberts* J. unassailable. He is in a much better position than any Judge in Sydney or Melbourne to measure the injurious consequences of such articles in Darwin. But, apart from that, I entirely agree with his reasoning, and for the advancement of impartial justice in such localities I feel bound to express my opinion.

(1) (1836) 1 Moo. P.C.C. 59, at pp. 77-78

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

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

HIGGINS J. On 20th August 1925 an order was made by the Supreme Court of the Northern Territory (*Roberts* J.). The order directed the appellant, the editor of a newspaper, to pay for contempt of Court a fine of £10, with costs, and that he be detained and if necessary imprisoned until the said fine and costs be paid. When the appeal came on for hearing (in pursuance of leave granted by this Court to appeal), counsel for the relators at whose instance the order was made took the objection that this Court has no jurisdiction to entertain the appeal. The argument is that although this High Court has, under sec. 73 of the Constitution, jurisdiction to hear and determine appeals from all judgments, decrees, orders and sentences of any other Federal Court or Court exercising Federal jurisdiction or of the Supreme Court of any State or of any other Court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council, this Supreme Court is not a Federal Court or a Court exercising Federal jurisdiction or a Supreme Court of any *State*. It is only the Supreme Court of a *Territory*. It is not a Federal Court within the meaning of sec. 71, for, according to sec. 72 and *Waterside Workers' Federation of*

H. C. OF A. 1926.

PORTER v. THE KING; EX PARTE YEE.

Higgins J.

Australia v. *J. W. Alexander Ltd.* (1), to constitute a Federal Court the Judge must have a life tenure, and the Judge of this Court has not a life tenure. Nor has Federal jurisdiction been invested in the Court under sec. 77. The decision in *Alexander's Case* that sec. 72 involves a life tenure as a condition of the office is not impugned; and it is clear therefore that as a result of *Alexander's Case* sec. 73 does not confer on this High Court jurisdiction to hear and determine an appeal from this Supreme Court.

But this does not necessarily end the matter. Sec. 73 may not give the jurisdiction to hear the appeal, but some other section of the Constitution may. Sec. 73 does not say that the jurisdiction of the High Court on appeal shall be confined to appeals from the Courts mentioned in sec. 73. It does not even say that "the jurisdiction of the High Court shall be to hear appeals from the Courts" mentioned. The form of expression used is "the High Court shall have jurisdiction" &c., just as if it were "the High Court shall have a marshall"; this would not forbid other officers appointed under some other power. Now, under sec. 122, "the Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth"; and according to the recitals of the *Northern Territory Acceptance Act* 1910, this Territory is such a surrendered and accepted territory. This power to make laws for the government of the Territory is, so far as appears, unlimited; and it is difficult to see what right we have to limit it by construction. Under the *Northern Territory (Administration) Act* 1910 (sec. 13) the Governor-General may make ordinances having the force of law in the Territory; and under an ordinance gazetted 30th May 1911 (sec. 21), the Full Court of the High Court of Australia, constituted by at least two Judges, may grant leave to appeal to the High Court of Australia from any conviction, sentence, judgment, decree or order of the Supreme Court of the Northern Territory, including any order or direction made by the Judge of the Territory whether in Chambers or in Court (see Ordinance No. 10 of 1922). Why should we refuse to give effect to the Act and Ordinance? Sec. 122 is of the same authority as sec. 73.

(1) (1918) 25 C.L.R. 434.

The decision in *In re Judiciary and Navigation Acts* (1) does not compel us to put a narrow construction on sec. 122. In the case, an Act had purported to give the High Court jurisdiction to hear and determine any question referred to it by the Governor-General as to the validity of any Act of the Federal Parliament; and the Act was held to be invalid as to that provision. It was held that under the Constitution no *original* jurisdiction could be given to the High Court other than that mentioned in secs. 75 and 76 of the Constitution; but there has been no such decision as to the appellate jurisdiction conferred by sec. 73. Sec. 76 had enacted that "the Parliament may make laws conferring original jurisdiction on the High Court" in certain matters; and it might fairly be argued that, on the usual principles of construction, Parliament could not confer other jurisdiction: *Expressio unius exclusio alterius.* But there is no such expression as to the powers of Parliament to give appellate jurisdiction. I am, of course, bound by the decision as to original jurisdiction; but it does not apply to this case. (See also *R.* v. *Bernasconi* (2); *Mainka* v. *Custodian of Expropriated Property* (3).)

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

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

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

There was no contempt of Court—no attack on any Court or its members, nor was there anything tending to obstruct the course of justice in any pending case; and it is of the essence of the latter kind of offence that Court proceedings be pending when the comments are published (*Halsbury's Laws of England*, vol. VII., p. 286; and see *R.* v. *O'Dogherty* (4)). There are certain special exceptions, as to a probable new trial, or as to a magisterial inquiry having ended,

(1) (1921) 29 C.L.R. 257.
(2) (1915) 19 C.L.R. 629.
(3) (1924) 34 C.L.R. 297.
(4) (1848) 5 Cox C.C. 348.

H. C. OF A. 1926.

PORTER v. THE KING; EX PARTE YEE.

Higgins J.

and the trial not having been completed; but they confirm the general principle.

I cannot take the view that the charges levelled by the article against these men were trifling; but whatever other remedy they might have—criminal or civil, by indictment or action for libel—the summary procedure for contempt is not applicable, under the authorities as they stand. I am not at all sure that under modern developments of journalism the principle is satisfactory.

RICH J. I agree that the appeal should be allowed. I do not think that the decision of this Court in *In re Judiciary and Navigation Acts* (1) prevents my taking this course. I regard that decision as limited to the judicial power of the Commonwealth consisting of the States, in other words, the Commonwealth proper. It had no reference to the Commonwealth in relation to territories, and therefore the legislative power of the Commonwealth Parliament under sec. 122 of the Constitution is a separate question from anything dealt with in that case. The only question as to the jurisdiction of this Court in the present case depends upon the construction of the Commonwealth Act. The difficulty arises through the use of the expression "in the Territory"—*Northern Territory (Administration) Act* 1910, sec. 13. I consider, on the whole, that those words merely signify that the ordinances to be made by the Governor-General are to have operation with respect to the Territory and that outside the Territory other laws are to prevail. They do not mean, as was suggested, that appeals are only to be heard in the Territory, but that in the Territory the rights of appeal, if any, are to be such as are ordained by the Governor-General. On that interpretation the objection for want of jurisdiction must be overruled.

STARKE J. The Parliament has, by force of sec. 122 of the Constitution, full and plenary power over the territories. It is unnecessary, for the purposes of the present case, to consider whether certain constitutional limitations—as, for instance, that contained in sec. 116—extend to legislation in respect of the

(1) (1921) 29 C.L.R. 257.

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* (1); *R.* v. *Bernasconi* (2)). 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* (3)). And there is nothing on the face of sec. 122 which precludes the Parliament from subjecting the judicial organs of the territory to supervision by way of appeal to and review by judicial organs of the Commonwealth itself.

It is said, however, that the Constitution delimits the whole of the judicial power which may be exercised by this Court pursuant to the Constitution (*In re Judiciary and Navigation Acts* (4)). I am unable to accept this view. In the case cited the Court was dealing with the judicial power defined in Chapter III. of the Constitution. But in the present case we are dealing with a jurisdiction or authority given to this Court in pursuance of the power which enables the Parliament to make laws for the government of the territories. Therefore, in my opinion, the Parliament might have directly conferred upon this Court the jurisdiction defined in sec. 21 of the Ordinance 1911-1922 establishing the Supreme Court for the Northern Territory of Australia. It did not do so directly; but by the *Northern Territory* (*Administration*) *Act* 1910 (No. 27 of 1910), sec. 13, the Governor-General was empowered, until the Parliament made other provisions, to make ordinances "having the force of law in the Territory," and under this authority was made the Ordinance 1911-1922 (sec. 21) enabling this Court to grant leave to appeal to itself from any order of the Supreme Court of the Northern Territory. The question is whether the power contained in sec. 13 is wide enough to authorize the provisions of the Ordinance (sec. 21) enabling an appeal to be brought to this Court with its leave. If the words had empowered the Governor-General to make

(1) (1849) 9 Howard 235.
(2) (1915) 19 C.L.R. 629.
(3) (1857) 20 Howard 176, at p. 182.
(4) (1921 29 C.L.R. 257.

H. C. OF A. 1926.

PORTER v. THE KING; EX PARTE YEE.

Starke J.

ordinances or laws in and for the Territory, or for "the peace, order and good government of the Territory," the validity of the Ordinance in question here could not have been denied. It would have been safer if the Administration Act had been so framed; but the intent of sec. 13 is fairly plain, namely, that the law-making authority in the Territory shall be the Governor-General until the Parliament makes other provisions for the government of the Territory, and the words actually used authorize, in my opinion, the making of ordinances in the Territory which shall have the force of law. But that delegates to the Governor-General the power to make laws for the Territory which the Parliament might itself exert under the provisions of the Constitution. Consequently, the appeal to this Court is competent.

Mainka's Case (1) was relied upon during the argument, to support the proposition that the Supreme Court of the Northern Territory was a Federal Court for the purposes of sec. 73 of the Constitution. There are some incautious expressions in the judgment in that case (2) which support the contention, but in truth the government of the Territory of New Guinea under the Mandate from the League of Nations was not organized under the Constitution, nor subject to its complex system. It was organized under the *New Guinea Act* (No. 25 of 1920) coupled with the Treaty of Peace, the Mandate, and the Imperial Act 9 & 10 Geo. V. c. 33. The appeal from the Central Court of that territory to the High Court is based upon the authority contained in these Acts, and not upon the provisions of sec. 73 of the Constitution. The Central Court of New Guinea is not, any more than is the Supreme Court of the Northern Territory, a Federal Court within the meaning of Chapter III. of the Constitution, but each is a Court created by the Parliament in exercise of powers contained under sec. 122 of the Constitution, or some other Imperial authority.

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

The appeal should be allowed.

(1) (1924) 34 C.L.R. 297.

(2) (1924) 34 C.L.R., at p. 301.

Appeal allowed. Order appealed from discharged. Respondents other than the King to pay costs in Supreme Court and of this appeal.

H. C. OF A. 1926.

PORTER v. THE KING; EX PARTE YEE.

Solicitors for the appellant, *Blake & Riggall.*

Solicitors for the respondents, *Gordon H. Castle,* Crown Solicitor for the Commonwealth; *R. I. D. Malam,* Darwin, by *McCay & Thwaites.*

B. L.

[HIGH COURT OF AUSTRALIA.]

JUMNA KHAN . . . . . APPELLANT;
PLAINTIFF,

AND

THE BANKERS AND TRADERS INSURANCE COMPANY LIMITED . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Fire Insurance—Policy—Untrue answer to question in proposal—Condition for avoidance—Illiterate proposer—Answers filled in by agent of insurer—Agent for proposer or insurer—Warranty.

H. C. OF A. 1925.

SYDNEY, *Nov.* 27.

KNOX C.J., ISAACS, HIGGINS, RICH AND STARKE JJ.

The appellant, who was illiterate, went to the local office of the respondent, an insurance company, to insure his house and furniture against fire, and there, at the request of the agent of the respondent, signed a proposal form, the agent saying that he would fix everything up. The agent, without asking the appellant any questions, filled in the form, and inserted in it an untrue answer to one of the questions. In the policy which was issued upon the proposal it was provided that the insurance should at all times and in all circumstances be subject to the particulars in the proposal (which should in all cases be deemed to be inserted or furnished by the insured), and to the