KEAN v. THE COMMONWEALTH[1]

Constitutional law—Acquisition power in the Territories—Northern Territory (Acceptance) Act 1910 *(Cth)—Acquisition of Territories—Scope of the power under section* 122*—Compensation on 'just terms'.*

The plaintiff, prior to the enactment of the Northern Territory (Acceptance) Act 1910 (Cth), had been granted an estate in fee simple by the State of South Australia.

The Legislative Council of the Northern Territory by the Minerals (Acquisition) Ordinance 1953-1954 (N.T.) purported to acquire all minerals in the Territory for the Crown. Compensation was to be paid in accordance with agreement between the parties concerned or by action against the Commonwealth if an agreement on compensation could not be reached. This right to claim compensation from the Commonwealth was subject to two conditions. First, a written claim for compensation was to be filed and secondly, the action for determination had to be commenced within one month from service by the Administrator of a notice that agreement could not be reached.

The plaintiff in this case owned lands which were affected by the Ordinance. However, agreement could not be reached on the compensation payable. The plaintiff therefore brought action against the Commonwealth claiming declarations that the Ordinance was invalid and so did not vest the minerals in the Commonwealth or, alternatively, compensation under the Ordinance with interest.

Bridge J. refused to grant the relief sought by the plaintiff, dismissing her suit with costs. It was argued for the plaintiff that the Ordinance was invalid as it was repugnant to the Northern Territory (Surrender) Act 1907 (S.A.) and the Northern Territory (Acceptance) Act 1910 (Cth). This argument sought to gain acceptance of the view that these two Acts formed a bilateral agreement between South Australia and the

[1] Judgment 29 March 1963, not yet reported; Supreme Court of the Northern Territory; Bridge J.

Commonwealth which could be altered only by mutual agreement of the parties. Thus, section 10 of the Northern Territory (Acceptance) Act 1910 (Cth), preserving 'all estates and interests, held by any person . . . at the time of acceptance', would safeguard the plaintiff's property from acquisition by Ordinance.

Bridge J. rejected this argument, holding that on acceptance by the Commonwealth the Northern Territory came within 'the exclusive jurisdiction of the Commonwealth' in accordance with section 111 of the Constitution. Thus after acceptance the surrendering State had no further power over estates existing at acceptance, the Commonwealth having full plenary power under section 122 of the Constitution to make laws for the government of the Territory. Section 4U of the Northern Territory (Administration) Act 1910-1959 (Cth) purported to vest this plenary power in a Legislative Council. His Honour also held that section 10 of the Northern Territory (Acceptance) Act 1910 was in no way part of any agreement with South Australia.

Accordingly, it was held that the power to make Ordinances was not limited by the Northern Territory (Acceptance) Act 1910.

The plaintiff also argued that even if her property could be acquired by the Commonwealth, it could be so acquired only on 'just terms' in accordance with section 51 (xxxi) of the Constitution.

The Commonwealth, on the other hand, argued that section 122 of the Constitution was plenary in terms and not qualified by section 51 (xxxi).

Bridge J. held that the terms of acquisition were in fact just. His Honour pointed out that 'just terms' did not require such items as interest to be included in compensation payable by the Commonwealth.[2]

The time limit imposed on the making of a claim against the Commonwealth was held to be reasonable even taking into account the communications difficulties in the Northern Territory.

Apart from the question of time the requirement for agreement or, in default of agreement, judicial determination did not violate the 'just terms' requirement.[3]

It was not strictly necessary to decide the question whether section 51 (xxxi) limited section 122, in view of the fact that the terms of acquisition were 'just'. However, Bridge J. made it clear that he did not accept the argument put forward by the Commonwealth on this issue.

The High Court decisions, *The King v. Bernasconi*,[4] *Buchanan v. Commonwealth*,[5] and *Porter v. The King*; *Ex parte Yee*[6] were distinguished.

His Honour explained these decisions on the ground that the particular matters under limitation from which powers under section 122

[2] *Commonwealth v. Huon Transport Pty Ltd* (1945) 70 C.L.R. 293, 315, 325-326.
[3] *Australian Apple & Pear Marketing Board v. Tonking* (1942) 66 C.L.R. 77, 106-7.
[4] (1915) 19 C.L.R. 629.
[5] (1913) 16 C.L.R. 315.
[6] (1926) 37 C.L.R. 432.

were held to be free related only to the division of powers between the Commonwealth and the States. Limitations associated necessarily with 'the federal system of which the Territories do not form part' do not in any way affect the legislative power under section 122 as 'the legislative power in respect of the Territories is a disparate and non-federal matter'.[7]

The distinction between 'federal' and 'non-federal' limitations which Bridge J. drew is certainly applicable to *Buchanan v. The Commonwealth.*[8] In that case the limitation on federal taxation imposed by section 51 (ii) was held to have no application to the Territories. Section 51 (ii) and section 55 are both matters concerning the State-Commonwealth power relationship. This is pointed out by Barton A.C.J.

> I return to the strong connection between sec. 51 (ii) and sec. 55. Both of them are in a form devised for the protection of State interests, a purpose having no place, nor any analogy, in sec. 122. They are checks on a Parliament primarily intended to exercise great legislative powers with a due regard to those interests. True, it is this very Parliament which has to execute the powers of sec. 122. But, in exercising them, it is scarcely probable that it was intended to be bound by checks devised for other purposes and to protect other interests.[9]

The King v. Bernasconi,[10] however, causes some difficulty. It is hard to see how the provisions in section 80 giving a right to trial by jury in all cases where an offence is created by any law of the Commonwealth can be distinguished in kind from the right to 'just terms' on acquisition of property under section 51 (xxxi). Both of these rights are in the nature of civil rights and are included as such in Amendments 5 and 6 of the United States Constitution. These rights are not, therefore, something peculiarly bound up in the State-federal relationship.

Fullagar J. in *Waters v. The Commonwealth*[11] suggested that the correct view of *Bernasconi's* case was that section 80 did not apply to laws under section 122 as such laws were laws of the Territories concerned and not laws of the Commonwealth. However, his Honour also pointed out that the final decision of such matters should be left to a Full Court and not to a single judge of the High Court.[12]

The question raised by *The King v. Bernasconi*[13] would seem to have been answered by *Lamshed v. Lake.*[14] In that case it was held that a

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[7] *Attorney-General for the Commonwealth of Australia v. The Queen* [1957] A.C. 288, 320.

[8] (1913) 16 C.L.R. 315.

[9] *Ibid.* 329-330.

[10] (1915) 19 C.L.R. 629.

[11] (1951) 82 C.L.R. 188, 191.

[12] *Ibid.* 192.

[13] (1915) 19 C.L.R. 629.

[14] (1957-1958) 99 C.L.R. 132.

law made under section 122 is a 'law of the Commonwealth' at least for the purposes of section 109 of the Constitution. The Chief Justice in *Lamshed v. Lake* was careful to distinguish *Bernasconi's* case but did not expressly approve of it. He said:

> . . . since Chapter III has been considered to be concerned with judicature in relation to that division of powers [between a central and local State legislature] it may be treated as inapplicable so that laws made mediately or immediately under section 122 are primarily not within the operation of the Chapter.[15]

In *Lamshed v. Lake*, Dixon C.J. stated that there were a number of powers in section 51 that had no relation to the Territories. However, the mere fact that a power was conferred by section 51 did not itself mean that it was only of Commonwealth-State concern and irrelevant to the Territories. Some of the powers expressly mentioned as applicable to the Northern Territory were the naval and military defence of the Commonwealth, the postal power, power in respect to fisheries in Australian waters beyond territorial limits, banking including State banking extending beyond the limits of the State concerned, naturalisation, aliens and the incidental power.

Other powers mentioned by Dixon C.J. in *Lamshed v. Lake* as being applicable to laws made under section 122 were section 118, section 116, section 120, section 52 (i) and section 49.

Thus in the instant case Bridge J. approached the problem of the application of section 51 (xxxi) to the Northern Territory along the lines set out by Dixon C.J. in *Lamshed v. Lake.*

T. J. HIGGINS

[15] *Ibid.* 142.