LAW AND THE TERRITORY OF PAPUA AND NEW GUINEA

By The Honourable Mr Justice Smithers*

The Territory covers 183,500 square miles. It includes the whole of the Eastern half of New Guinea, the islands of New Britain, New Ireland and Manus and the two northernmost islands of the Solomons, namely Buka and Bougainville. In all some 1,000 lesser islands are included in the Territory, extending 1,200 miles from West to East and 600 miles from North to South.

The population consists of approximately two million persons, of whom about 25,000 are of non-indigenous race. The indigenous inhabitants of the Territory comprise a great diversity of physical types and an estimated 700 linguistic groups. Significant differences exist between local groups. Within such groups it is the village, a collection of hamlets or homes, that is the largest effective unit so far as native custom is concerned. Family loyalty is important but, beyond the basic family, wider groups derived from blood marriage or adoption are of great importance in social organization. Features materially affecting the social structure are:

(a) the prevalence of a subsistence economy with a limited range of differences in individual wealth;
(b) the recognition of bonds of kinship with obligations extending beyond the family group;
(c) a strong attachment of the people to their land;
(d) a fear of sorcery and magic;
(e) a disposition in the more primitive areas to indulge in 'pay back' killings and to treat the killing of a human being as a prestige factor favouring the killer;
(f) a garden economy in which the greater part of the work is performed by women, the men having much leisure.

For vast numbers of the inhabitants these features are as important as ever, but with the spread of education, the development of coffee, cocoa and copra cash crops, and work increasingly being undertaken by men in timber mills, wharves and factories, they are slowly giving way to notions more akin to those of the white man.

The terrain of nearly all the Territory renders communication between districts always extremely difficult and frequently impossible.

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At this date, there are thousands of people living in ignorance of the existence of any people or world outside the perimeter of their own narrow existence. It is sometimes said that there is a developing sense of national unity in the Territory, but, for myself, I have not yet experienced anything to make me think that there is any unity of ideas, ideals, or political development between for instance, a Tolai living in New Britain near Rabaul and a fuzzy haired Mekeo living in Papua 50 miles from Moresby. In the Legislative Council, there are the beginnings of unity but, even there, the difficulties of effective communication between many members are very marked.

The law of the indigene has rested on a foundation of local custom not easy to ascertain with certainty. It is sometimes constituted by what the headman, or a council of headmen, thinks and says ought to apply in the particular circumstances. Nevertheless, the notion of the settlement of disputes at the hands of some third person is one which is either natural to the indigene or has been learned by them from their Australian mentors. It is the most common thing to be told of a dispute between husband and wife, or between adverse claimants to the fruit of a coconut grove in connexion with which one party has 'courted' the other. This means that the parties have appeared before the luluai or headman or a meeting of the headmen of the village and that the allegations of each party have been stated. In many cases a decision, really by arbitration, has been arrived at, and that is the end of the dispute. Sometimes a dissatisfied party will take the dispute from one headman or luluai to another seeking a more favourable opinion. The average indigene in the Territory shows a strong disposition to accept the jurisdiction and judgment of a real court provided the general justice of the proceedings is apparent. My experience gives rise to the belief that if enough time is permitted to develop the notion of justice according to law the people of the Territory may yet live in a democracy of their own in which the rule of law will function. For present purposes however, it has to be noted that the current standard of life in the Territory is made possible only by an increasing annual expenditure by Australia of more than £20 million, and the allocation to the service of the Territory in medicine, education, agriculture, law, administration *et cetera,* of some 5,000 all hard working and many dedicated Australians.

By and large a situation has been reached in which there is peace and progress in New Guinea and a considerable measure of civilization and enlightenment has been achieved in many areas. This is in marked contrast to the situation not so long ago when tribal fighting was part of the normal routine life, when the people were ruled by sorcerers and secret societies, when a degenerate form of head hunting, even descending to the ambushing of women trudging to toil in

their gardens, was the prevailing sport and success in it the symbol of prowess and virility, and when the debasement of women was deplorable.

It is to the credit of Australia that a vision of self government, even though faint and at the far end of an avenue, is discernible. A stage has been reached when everything that is done or attempted in Papua and New Guinea proceeds under the shadow of the statue of liberty or rather of ultimate government of the people in the Territory by and for themselves.

But whatever is achieved and whatever the ultimate relationship between Australia and New Guinea may be, it is certain that it will be a good thing for Australia if New Guinea is governed in a democratic manner with emphasis on the maintenance and enforcement of those fundamental rules constituting 'the rule of law'. These are well stated in the Declaration of Delhi of 1959 of the International Commission of Jurists. For present purposes a few of the fundamental laws may be listed, as those providing for:

(a) the presumption of innocence;
(b) prompt trial after arrest;
(c) arrest only on reasonable suspicion of the commission of an act in breach of the law;
(d) prompt access to legal advice;
(e) availability of bail;
(f) exclusion of non-voluntary confessions;
(g) courts which work in public and give reasons for their decisions in public;
(h) courts which are in reality independent of the executive;
(i) exclusion of inhuman or excessive punishments;
(j) effective right of criticism of the executive.

Only by the enactment and effective enforcement of laws such as these can be achieved the conditions referred to in the statement made by the present Minister for Territories to the House of Representatives on 24 October 1961, when introducing to the House the report of Professor Derham on the system of law in the Territory. He said:

> Amongst the essential prerequisites of self-government for Papua and New Guinea is a system of justice. Such a system needs high standards in the bench, the accessibility of the Courts to the people, the confidence of the people in the courts and the habit of relying on the courts to protect the personal rights and property of the individual and to redress any wrong or injury suffered by the individual. Frankly, I would not like myself to be one of the ordinary citizens in any newly independent country if the system of justice were not soundly established and universally respected and if the authority and independence of the

courts were not beyond challenge and beyond influence from the Government.[1]

Of course there are tremendous difficulties in the way of the achievement of satisfactory self government. There is lack of sympathy between the different native communities and lack of an articulate public opinion or indeed anything in the nature of a broadly based worth-while public opinion. In addition the political instrument to be created will be controlled by persons lacking political and administrative experience who will for years be handicapped by the difficulties of linguistic communication between themselves.

Political independence will speed independence for political purposes of the supreme political instrument of the Territory whatever or whoever that may be. Control of that instrument will be the subject of competition between individuals and groups of individuals who by reason of inexperience may lack skill, confidence and restraint. The ordinary New Guinea inhabitant will be subject to the will of those in control of the political instrument. The political independence of his country may mean nothing to him in terms of personal liberty or political or economic freedom. In this connexion it is to be remembered that the bulk of electors will for some indefinite period have the greatest difficulty in appreciating both the policies of individual politicians and the real significance of political procedures. In addition, the country trying to govern itself will be unable to maintain itself economically. Against this background the prospect of maintaining the democratic processes, keeping the leader of the opposition out of gaol, and ensuring a semblance of the rights of free speech and fair trial and the other fundamental rights of ordinary people cannot be said to be obviously bright.

Essential conditions of success are that there be developed in these people a real respect for the law and that there be enacted certain constitutional provisions, perhaps even restrictive of complete political independence, which will express and ensure the enforcement of the laws listed under the heading 'the rule of law'. Unless these conditions are fulfilled the state of independence may well be a state of timorous and dangerous dictatorship.

The legal system of the Territory therefore assumes particular significance. It must demonstrate in a manner intelligible to the indigene the working of legal process and above all foster and develop a respect for the law.

It is one of the objectives of the Courts of the Territory to display

[1] *Commonwealth Parliamentary Debates* (1961) 33 New Series 2347. House of Representatives.

to the inhabitants the availability to them of independent courts and the working of a system on the basis of justice, careful of the contention of every party, patient in its approach, acting in public, and publishing its reasons. Much important work of this character is performed on circuit. There are 60 circuit towns in the Territory. The present Chief Justice has followed the policy of Sir Beaumont Phillips that as the indigenous people are unable to travel to see justice done, it is desirable that, so far as possible, justice shall be done where the people are. The result is that the judges travel far and widely and when persons are tried it is the general rule that at least the head men of the village and, frequently, other villagers are present at or in the vicinity of the court.

If you were the associate of a Supreme Court Judge for a circuit say to the highlands you would have much to do. It may be that the circuit would involve say five court towns. There would perhaps be cases of forgery and murder at Wau—of murder and rape at Menyamya—of murder at Kainantu and manslaughter and murder at Minj. You would arrange transport from Moresby to Lae by Douglas DC6 and from Lae to Wau in all probability by Cessna with just the load capacity to carry, with discomfort to some of the party, the Judge, yourself, the Crown Prosecutor and Counsel for the Defence, and their baggage. The exemplification by the Australian Government of the rule of law by the provision of competent counsel to appear for accused persons including every indigenous person accused of a serious crime is one of the least publicized but most important aspects of the government of the Territory.

Arriving at Wau counsel will take instructions and in due course the Court will sit. The Judge sits in the capacity of judge of law and facts. Trial by jury would be as yet impossible in the area where you are. Interpreters are provided by the Crown. Frequently, it is necessary to use one interpreter to translate from English to Pidgin and one to translate from Pidgin to the language of the prisoner.

The proceedings then follow the familiar pattern of a hearing but, at the end, the prisoner and the members of the public who are in attendance hear the reasons of the Judge for his decision. Sometimes when an acquittal has resulted from the rejection of a confession or from some technical cause there is difficulty in explaining that eventuality but in most cases the reasons for decisions are understood.

Having concluded the sittings at Wau you would arrange air transport, perhaps a DC_3, perhaps a Cessna or a Piaggio, to Menyamya, a fascinating journey over very sharp ridged mountains and deep gullies. Below are to be seen the growing network of roads and tiny native villages, many of them perched right on the tops of the mountain ridges. Their gardens, which are the fundamental food

producers of the Territory, nestle in all sorts of precarious positions on the sides of steep hills, and what is below looks too peaceful to provide the kind of story which is unfolded in the first case. For it appears that a man of the village of Komdoro died. Komdoro is one of a nest of villages some eight miles from the end of the nearest road and subjected to little European influence. There is little belief in natural death in that area and the people of Komdoro suspected that some person of the neighbouring village of Baira had brought about the death by sorcery. According to custom they laid out the body and forthwith invited the people of Baira to view it. If during the view blood came from the nose or some other part of the body then all would know that sorcery of some person of Baira had caused the death and fighting would ensue. If not there would be a feast. The people of Baira duly attended and viewed the body knowing that the deceased had been a leper who had been in and out of hospital for years and had 'defeated the white man's medicine'. They felt reasonably satisfied that no person in their village had worked sorcery. Unfortunately, this latest Komdoro death was one of a series and five of the Komdoro men had secretly agreed that the people of Baira were unduly working sorcery against them and that a reprisal was necessary. They decided that whether blood flowed from the body or not they would kill a man of Baira named Ne'i if he came to view the body. When the headman of Baira viewed the body he made a ceremonious touching of the body in the hope of acquiring merit in the eyes of the Komdoro men. It was alleged by witnesses from Komdoro but denied by the Baira witnesses that blood flowed from the nose of the deceased as the headman touched the body. At any rate, a Komdoro man fired an arrow wounding a Baira man. The Baira people fled but the five accused concentrated their 'fire' on Ne'i who was standing near the body and he was brought down and killed. At the two days trial many of the villagers of both villages attended from start to finish. The five men were convicted. The whole proceedings were translated into the language of Komdoro and the language of Baira. At the end the reasons of the Judge for convicting the men were stated in full, the accused stated their contentions concerning punishment and the Judge stated in full the matters which he would place before the Governor-General of Australia for consideration in the matter of commutation of the death sentence and determination of an appropriate period of imprisonment. The state of mind revealed by these events may cause a gasp, but at the death of Henry II his son

> Geoffrey, dutiful to the last, attended his father's corpse to the nunnery at Frontevault. There blood running from its mouth at the approach

> of Richard, that generous though violent spirit, in a fit of remorse, reproached himself as the murderer of his father.[2]

Such matters relate to the genuineness of the belief that sorcery was the cause of death and that unless something was done the shadow of further death by sorcery would hang over everybody of the village. Consideration must be given to a genuine belief that the killing of the man from the other village was justified and in fact a perfectly moral act. Sorcery is a hard thing to fight and ignorance is a great handicap in the battle. Weight must also be given to the view that killing arising out of suspected sorcery is not now permissible and that punishment is necessary to enforce precept in this respect.

As you accompany the Judge and hear the stories of other criminal acts you will be astonished at the multitude of circumstances arising largely out of native customs which induce crime. There may be the case of the elder brother who by custom becomes guardian of the girl to whom his immature younger brother is betrothed. By the same custom she lives in the house of the elder brother and alone with him until the younger brother is physically ready for marriage. It is part of the custom that sexual intercourse between the elder brother and the wife is forbidden and should it occur he will suffer great shame. Having fallen to temptation and being faced with exposure one elder brother killed the prospective wife. Again you may hear of the unfaithful wife who kills her illegitimate child. Native custom in her clan forbids sexual intercourse on her part while she is feeding a child. She fears she may lose her husband during this period. And there is no end to the social embarrassments arising out of deviation from the requirements of native custom which cause individuals fearing shame to commit crimes of violence in the hope that their deviations will be undiscovered. All of these must be unravelled, patiently dealt with, and the most constructive solutions must be sought.

Punishment with explanation is a potent educational force. It is sometimes said that indigenous people do not object to gaol sentences. The experience of the judiciary of the Territory is to the contrary. It is true that imprisonment carries little stigma and relieves the prisoner from the rigours of sustaining life in the village. But loss of liberty means much to the average indigene and deprivation of female association is in most cases an important element of punishment. In cases of imprisonment for a substantial period the prisoner is removed from his own area and sent to a corrective institution at Boram (Wewak), Bomana (Moresby), Hagen, Madang, Lae or Kerevat (New Britain). These institutions are excellently run and combine discipline and humanity and instruction in cleanliness and useful

[2] Campbell, *Lives of the Chancellors* (2nd ed. 1846) i, 107.

skills, with most beneficial results to the prisoners and ultimately to their own communities when they rejoin them.

During the circuit you would sometimes hear evidence of the discussions between people contemplating an expedition to kill an alleged sorcerer or to pay back a previous killing. You would hear that Luluais, head men and others have counselled against action on the ground that it was against the law, and that various parties refused to join the expedition on that ground. In this way you learn that the government proscription of killing is widely known even in the remoter areas. In the areas subject to close Australian contact there is now remarkably little homicide and in the remote areas there is a recognition of the unlawfulness of killing and the probability of punishment.

In dealing with crime the law administered is the Queensland Criminal Code. None of the present Judges in the Territory are Queenslanders. Three of them come from the bar of Victoria and one from the bar of New South Wales. They find themselves grappling with notions of crime in which, as Griffith C.J. has said, it is not necessary to have recourse to the doctrine of *mens rea,* the sole test being that laid down by section 23 of the Code.[3] This section provides that subject to the express provisions of the code relating to negligent acts or omissions a person is not criminally responsible for an act which occurs independently of the exercise of his will or for an event which occurs by accident.

In homicide cases in the Territory the accused is frequently heard to plead that the death of the victim was an event which occurred by accident. In many cases the 'accident' occurs by reason of the fact that the victim had an enlarged spleen as a result of malaria. An enlarged spleen is peculiarly vulnerable to pressure. It may rupture as the result of an impact so slight that in the case of a person of ordinary health it would cause not the slightest harm.

Considerable light has been thrown on the scope of section 23 by the decision of the Court of Criminal Appeal of Tasmania and the High Court in *Vallance v. The Queen.*[4] From the judgment in that case it seemed proper to conclude that an event occurred by accident if it was not foreseen by the accused as a not unlikely consequence of his act and would not have been so foreseen by an ordinary reasonable person in his shoes. Prior to *Vallance's* case the present Chief Justice of the Territory had decided that an event which occurred by accident was one which the accused person did not foresee as a likely consequence of his act. After *Vallance's* case however the Court of Criminal Appeal in Queensland decided that if a person applies force to the

[3] *Widgee Shire Council v. Bonney* (1907) 4 C.L.R. 977, 981.
[4] (1962) 35 A.L.J.R. 182.

body of another and that other dies then there is no room for the defence of accident notwithstanding that the death was due to an unknown and unforeseeable physical weakness of the victim and that death was not foreseeable by the accused and would not have been foreseeable by a reasonable person in his shoes as a possible result of his act.[5] Of course once the defence of accident is negatived no recourse to *mens rea* is open under the Code and the accused may be guilty of manslaughter no matter how slight the blow or how astonished he or reasonable persons observing the incident may be at the result. The Chief Justice and Mr Justice Minogue of this Territory and I myself have been unable to accept the doctrine in *Martyr's* case. In *The Queen v. Talu* tried by me in February 1963 the accused delivered a blow to the victim which was not calculated to do the slightest harm and would have done no harm had it not been for the vulnerable nature of the victim's spleen. On the evidence I was unable to reject the view that in this instance death from such a blow was unforeseeable so far as the accused was concerned and would have been unforeseeable to an ordinary native of his area in his circumstances. I said:

> Subject to section 23 criminal responsibility attaches to a person who kills unlawfully, that is to a person who by some means or other directly or indirectly causes death. There is authority that responsibility attaches whatever the intent of the person concerned and, in the case of assault, even if that assault be not unlawful. With this primary position of law established, it should be surprising that with respect to a serious crime like manslaughter some criterion of criminal responsibility related in some way to blameworthiness should not appear. Section 23, if interpreted as section 13 (1) of the Tasmanian Criminal Code was by the High Court in *Vallance v. The Queen,* or by the Chief Justice of this Court in *The Queen v. Diru,* supplies this criterion. It is reasonable that criminal responsibility should be related to blameworthiness and it is fair that blameworthiness should be related to the foreseeability of possible consequences of one's actions. Such a view eliminates the element of injustice and indeed caprice of a law in which criminal responsibility would depend on causation alone.

The Code also raises perplexing issues in relation to the defence of provocation in respect of which various judges in Queensland and Western Australia have taken different views and in relation to which an opportunity for the High Court to give guidance seems to have been unduly delayed. Section 304 of the Code provides that where a person does the act which causes death in the heat of passion caused by sudden provocation and before there is time for his passion to cool, he is guilty of manslaughter only. By virtue of the provisions of the Code provocation is a complete defence to a charge of assault in certain circumstances. The Code says that the term provocation

[5] *Martyr v. The Queen* [1962] St. R. Qd. 398.

> used with reference to an offence of which an assault is an element means any wrongful act or insult of such a nature as to be likely when done to an ordinary person . . . to deprive him of the power of self control and to induce him to assault the person by whom the act or insult is done or offered.[6]

There are judgments of judges of various superior courts to support the differing views that 'provocation' in section 304, (a) has its ordinary dictionary meaning, (b) has the meaning stated in section 268, (c) ought to be treated as comprehending only the kind of event which would provide an accused person with a defence of provocation at common law.

The matter is of importance in this Territory and in the Northern Territory. Insults offered by native wives to husbands cause much homicide. Native wives are reputed to have a fine flow of insulting and provocative gutter type invective. A recent report from an officer of the Native Affairs Department in a Highlands area states:

> In this area women are at a premium—men outnumber women by about 33%. Before Administration contact women who showed a disposition to defy their husbands would have been brutally assaulted. With Administration protection, women have become increasingly arrogant. They are the cause of 80% of serious crime and over 60% of minor strife in the Kompiam area.

The relationship between husbands and wives is bound up with the customs of the people concerning 'bride price'. Customs vary from area to area but normally an intending husband negotiates with his proposed wife's line and usually with 'financial' assistance from his relatives will pay to them money, pigs, Kina shells, beads, axes and the like. It may comprise some or all of these. The items represent real wealth to the natives, and if the wife for whom such wealth has been given fails to perform her wifely duties or leaves her husband, claims for return of bride price arise. Arguments as to the justification or otherwise of the wife's defection also arise because if she had just cause for leaving there may be no right to return of the bride price. Having regard to the fact that the price will have been distributed amongst many of the wife's line the intensity of the arguments and the complexity of the task of collecting the bride price in order to return it are not difficult to imagine. It is in this sphere that the indigene deserted by his wife and without influence with her line is in a difficult position. He is humiliated, impoverished, has lost his worker and his conjugal partner, and most importantly lacks effective access to a court. The Courts for Native Affairs and Native Matters lack adequate power to determine claims to or arising out of payment of bride price. The District Court and the Supreme Court seem too

[6] S. 268.

far away. Needless to say no principles dealing with the return of bride price or defining the rights and liabilities of parties have yet been worked out. However as the Administration moves closer and closer to the indigene the problem of providing adequate legal facilities with respect to this subject matter is one which must engage attention. At present the sense of frustration which tortures a deserted husband is responsible for much wife killing.

Save at Rabaul civil work is seldom encountered on circuit. The indigene does not yet appreciate adequately that the courts are there to dispense civil remedies as well as criminal sanctions.

Civil lists at Moresby and Rabaul provide litigation of familiar pattern mostly between non indigenous people but with an ever increasing number of indigenous parties.

Papua may be described as the southern half of East New Guinea plus all the eastern tip. It was acquired by Australia from Britain in September 1906 when by virtue of a Proclamation made pursuant to the Papua Act 1905 it became Australian Territory. It was administered under that Act until 1942 when the civil administration was suspended and an Australian military government was established for those parts of the Territory not occupied. With the surrender of the Japanese, civil administration was restored under the provisions of the Papua-New Guinea Provisional Administration Act 1945-1946. This set up a Supreme Court of Papua-New Guinea.

The Papua and New Guinea Act 1949, while maintaining the status of the Territory of Papua as a possession of the Crown and the status of New Guinea as a Trust Territory, provided for the Government of the Territory of Papua and the Territory of New Guinea in an administrative union with the title of the Territory of Papua and New Guinea. The Territory of New Guinea, comprising New Britain, New Ireland, Manus, Buka, Bougainville and many other islands and a great area of water first came under Australian control in 1920 when the League of Nations conferred upon Australia a Mandate for its Government. The Territory was administered under this Mandate until the Japanese invasion. With the surrender of the Japanese in 1945 the civil government was progressively restored. The Trusteeship Agreement for the Territory was approved by the General Assembly in December 1946.

The Papua and New Guinea Act 1949 provided also for the setting up of a Legislative Council for the Territory of Papua and New Guinea. This was established at Port Moresby on 26 November 1951. Subject to the assent of the Administrator, or in certain cases defined in the Act of the Governor-General, the Legislative Council has full legislative powers to make laws for the peace, order and good government of the Territory.

Ordinances do not operate until assented to. Every ordinance passed by the Council must be presented for assent to the Administrator who is to declare according to his discretion, but subject to the Act, that he assents thereto or that he withholds assent or that he reserves the ordinance for the Governor-General's pleasure. The Act specifies certain classes of ordinance which may not be assented to by the Administrator but must be reserved for the Governor-General's pleasure. Any ordinance assented to by the Administrator may be disallowed by the Governor-General within six months of such assent.

Section 58 of the Papua and New Guinea Act 1949-1960 provides that there shall be within the Territory a Supreme Court to be known as the Supreme Court of the Territory of Papua and New Guinea and that the Chief Justice and other Judges thereof shall have tenure of office subject to removal only on the grounds of proved misbehaviour or incapacity. The jurisdiction practice and procedure of the Supreme Court is to be provided by or under ordinance.

Section 64 says the High Court shall have jurisdiction subject to such conditions as are provided by ordinance to hear and determine appeals from all judgments *et cetera* of the Supreme Court.

The jurisdiction of the Supreme Court has been defined by ordinance. By virtue of the Judiciary Ordinance 1949 it was provided that the Supreme Court should have jurisdiction (including appellate jurisdiction) in relation to the Territory of Papua and New Guinea, the Territory of Papua or the Territory of New Guinea, as was theretofore exercisable in relation to the Territory of Papua and New Guinea, the Territory of Papua or the Territory of New Guinea by the Supreme Court of 'Papua-New Guinea'.

The reference to the Supreme Court of Papua-New Guinea is to the Court set up under the Papua and New Guinea Provisional Administration Act of 1945. This Act created a Supreme Court of the Territory of Papua and New Guinea to be known as the Supreme Court of the Territory of Papua-New Guinea. The Act suspended for the period of its operation the exercise of any jurisdiction of the Supreme Court of the Territory of Papua or of the Supreme Court of the Territory of New Guinea and conferred upon the new Court the same original jurisdiction both civil and criminal, the same appellate jurisdiction and the same power to apply and give effect to the law of any part of the Territory, as immediately prior to the Act the Supreme Court of the Territory of Papua and the Supreme Court of the Territory of New Guinea had respectively in relation to the Territory of Papua or the Territory of New Guinea.

To find that jurisdiction in relation to Papua we have to go back to the Courts and Laws Adopting Ordinance 1888 which created the Central Court of what was then British New Guinea, and declared it

a court of record. It conferred criminal jurisdiction over all crimes and offences against the law, provided that in cases punishable by death the carrying out of any capital sentence should not take place without the sanction of the Administrator who should have power to commute any such sentence. It conferred the like civil jurisdiction as the Supreme Court of Queensland exercised in that State, including, in respect of the subject matter of any cause, equitable jurisdiction, according to the laws then governing such matter or cause in Queensland.

The jurisdiction of the court with respect to the Territory of New Guinea is to be found in the Judiciary Ordinance 1921-1938. This Ordinance provided for the Supreme Court of New Guinea a criminal and civil jurisdiction in similar terms.

In addition to the Supreme Court there are two classes of inferior courts which have hitherto exercised jurisdiction in the two Territories. In the first class there are the Court of Petty Sessions exercising jurisdiction in Papua and the District Court exercising jurisdiction in New Guinea. In the second class there are the Court for Native Affairs exercising jurisdiction in New Guinea and the Court for Native Matters exercising jurisdiction in Papua.

A Court of Petty Sessions derives its jurisdiction from the Justices Ordinance. It is presided over by one or more justices according to subject matter. It has jurisdiction to hear and determine prosecutions for any offence not declared to be treason, crime or misdemeanour or for the trial of which no other provision is made and it conducts the preliminary inquiry into indictable offences. With a Resident Magistrate presiding these Courts have a very wide jurisdiction in many kinds of civil claims up to £100.

The District Courts of New Guinea derive their existence and authority from an ordinance relating to New Guinea made on the advice of the Federal Executive Council of the Territory of New Guinea in 1924. These Courts are presided over by justices. A District Officer of the Department of Native Affairs is *ex officio* a justice and the Court may be constituted by a District Officer sitting alone or by two or more justices.

The criminal jurisdiction of this Court extends to the summary determination of all offences punishable on summary conviction which are not declared to be treason, crime, misdemeanor or indictable or for the trial of which no other provision is made. It has civil jurisdiction up to £100 in a wide selection of causes of action. It also conducts the preliminary inquiry in indictable offences.

The Courts for Native Affairs and for Native Matters have a unique character. They stem from the days when the administration of the law was concerned not so much with the maintenance of the

rule of law but the maintenance of law and order. These Courts were set up by Regulations made under ordinances of Papua and of New Guinea. It has been in these Courts particularly that a fusion between the exercise of administrative and judicial power has been most in evidence. This was probably an inevitable feature of one stage of development. The District Officer and often the Patrol Officer found himself in the role of policeman, Administrator and Magistrate. The policy of today is to abolish all features of this fusion and the Native Courts are likely to be abolished in the near future. They are an institution of interest in particular as evidencing the paternal period of law administration in the Territory.

The Native Regulations are drafted in homely phrases. The Courts come close to the native and touch him intimately. The jurisdiction remains paternal even if sometimes its exercise may be swift and didactic. The regulations require that with respect to any dispute 'the first thing the Magistrate shall do is to make himself thoroughly acquainted with all the particulars connected with the complaint'. The next thing is that

> he shall inform the person complained of of the nature of the complaint and of the time and place at which the complaint will be tried and he may do this himself or through a messenger.
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> Instead of arresting a complainant or defendant who neglects to attend at a trial the Court may hear the case of the party that does appear and decide the matter finally in the absence of the party who does not appear, but it is better to arrest the absenting party and compel him to be present at the trial than to hold it in his absence.
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> The proceedings at the trial shall be begun by one of the Magistrates addressing the defendant in words suited to the matter before the Court after this manner: "LOHIA says that five days ago you stole two bunches of bananas from his garden at Maivara. Do you admit or deny that you stole them?"
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> The defendant is not required to go into the witness box.
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> Magistrates should bear in mind that a defendant ought not to be called upon to show that he did not commit the offence with which he is charged unless and until evidence has been given on behalf of the complainant which evidence if it is not refuted by the defendant is sufficient to establish the charge or the complainant's claim.

The jurisdiction of these Courts extends to the punishment of 'Forbidden Acts', which constitute escaping from custody, assaults, spreading lying reports, tending to give rise to trouble or ill feeling amongst the people as a whole or individuals, threatening words, riotous conduct, non-maintenance of a wife or child, stealing, sorcery, participating in illegal cults, playing cards for money, non-attendance at school, non-performance of road work, failing to protect coconut trees and last but not least, adultery.

It is of interest to notice a change of policy in relation to prosecutions for adultery. The Regulations originally provided that a husband might lay a complaint for the offence against his own wife. The notion was no doubt that he should adopt this course as an alternative to action of a more drastic, if traditional, kind. As the Regulation now stands, a husband may lay a complaint only against the man concerned. It is apparently thought that the marital relationship has reached a stage at which it should not be disturbed by this kind of litigation between husband and wife.

Civil jurisdiction extends to claims between natives extending to any matter concerning the right to use land, the recovery of money and compensation for damage to property, but there is an express exclusion of jurisdiction to give relief arising out of payment or agreement to pay bride price.

These Courts have no jurisdiction save as between natives and over natives but with respect to natives this jurisdiction extends to all offences against the Native Administration Regulations and to nearly all classes of civil matters. They also have no power to summon a non-native to give evidence.

One pious but ineffective provision of the Regulations requires all District Officers and Patrol Officers to make themselves acquainted by all means within their power with the native customs of their District and to reduce such customs to writing and keep a copy of them in the District Office. The Native Regulations of New Guinea provide further that courts shall take judicial notice of all native customs and give effect to them save insofar as they are contrary to the principles of humanity or conflict with any law or ordinance in force in the Territory. It is difficult to see how a court can take judicial notice of customs unknown to it as a matter of general knowledge and usually only ascertainable after intensive investigation of evidence. No such general provision is in force in Papua but there are various provisions requiring the recognition and enforcement of native customs in relation to particular matters. Thus native property descends on intestacy 'to those persons who in accordance with native customs are entitled to it'.

The law concerning marriage by native custom in Papua differs from that in New Guinea. The Marriage Ordinance applicable in New Guinea does not apply to marriages both of the parties to which are natives, but the Native Regulations declare that every marriage between natives which is in accordance with the custom prevailing in the relevant tribe or group shall be a valid marriage. The Regulations go on to provide that a Court for Native Affairs shall grant a divorce of a marriage by native custom when satisfied that by native custom the complainant is entitled to a divorce.

The Marriage Ordinance applicable to Papua declares that every marriage celebrated by an authorized minister of religion, Registrar or justice shall be a legal and valid marriage but that 'no other marriage shall except as hereinafter provided be valid for any purpose'. The exceptions do not touch marriage by native custom.

The Native Regulations of Papua do not deal with the question of validity although they attach certain obligations to deserting husbands of wives, 'including any woman that by the custom of natives is regarded as or reputed to be the wife of a man'. There are no provisions in Papua dealing with the dissolution of such marriages. These distinctions have consequences in relation to the competence of a 'wife' to give evidence against her 'husband', the criminal liability for conspiracy between 'husband' and 'wife', and possibly in relation to bigamy.

The law applied by the courts of the Territory is provided by the common law, statutes and laws of England, Queensland statutes, Acts of the Commonwealth Parliament, ordinances of the Legislative Council and, to the extent mentioned above, native custom.

With respect to Papua it was provided by Ordinance No. 6 of 1889 (The Courts and Laws Adopting Ordinance (Amended) of 1889):

(i) that certain Statutes of Queensland in force there on 17/9/1888 should be adopted as Ordinances of Papua (then British New Guinea) so far as the same should be applicable to the circumstances of the Possession and not repugnant to any Ordinance in force in the Possession then or thereafter made, and also,

(ii) that the Statutes and Laws of England which were in force in the Colony of Queensland on 17/9/1888 be adopted so far as the same should be applicable and not repugnant to any Ordinance or other law then in force or made thereafter, and

(iii) that the principles and rules of Common Law and Equity that for the time being shall be in force and prevail in England shall so far as the same shall be applicable to the circumstances of the Possession be likewise the principles and rules of Common Law and Equity that shall be in force and prevail in British New Guinea.

In 1921 by the Laws Repeal and Adopting Ordinance 1921 similar provisions were made for the Territory of New Guinea, save that the principles of common law and equity which were in force on 9 May 1921 were adopted instead of those in force for the time being. By various ordinances of later date, ordinances of Papua mainly concerned with commercial subjects such as companies, partnership and insolvency were adopted in New Guinea.

The ordinances of both Territories spring now from the same source of power, namely the Commonwealth of Australia. So far as

relates to the Territory of New Guinea that Territory is regarded as a territory 'acquired' by the Commonwealth within the meaning of section 122 of the Commonwealth Constitution, and it is governed by the Commonwealth under the provisions of that section.[7]

From time to time problems arise from the provisions for the adoption of the principles of common law and equity. One such reached the High Court—*Booth v. Booth*.[8] In 1934 Mr Charles Booth, who said he had been incautious in permitting valuable assets to be acquired in or transferred into his wife's name, claimed as against his wife a declaration that he was the beneficial owner of the assets in question. It was decided for various reasons that the husband failed to prove a proprietary interest in the assets. If, therefore, Mrs Booth had a legal capacity, independent of her husband, such as arises under the Married Women's Property Act, the husband's claim failed entirely.

Mr Booth contended that under the law of New Guinea she did not have such a capacity. He pointed out that the Laws Repeal and Adopting Ordinance 1921-1923 applied certain statutes of Queensland to the Territory, but not the Married Women's Property Act. By section 14 the Ordinance adopted, as laws of the Territory, the Acts statutes and laws of England that are in force in Queensland and are applicable to New Guinea. But this section did not refer to English statutes in force in Queensland only in the sense that the parliament of that State had enacted legislation based upon or transcribed from them. The English Married Women's Property Act was not then in force in Queensland except in that sense. He further urged that although section 16 provided that the principles and rules of common law and equity that were in force on 9 May 1921 should be in force in the Territory so far as applicable and so far as not repugnant to any Act or ordinance of the Territory the English Married Women's Property Act formed no part of the principles and rules of common law and equity. It was pointed out however that the English Act had actually displaced principles and rules of common law, and that those that were displaced could not be said to be in force in May 1921.

The Court said that if the suggested interpretation were placed upon the Laws Repeal and Adopting Ordinance there would be, on the subject of married women's property, a legal vacuum. There would be no law at all on the subject. The German law was excluded, the common law would not be introduced because it was no longer in force in England, and the legislation is omitted from the statutes specifically applied. In this circumstance it might be right to regard the status of a married woman in New Guinea as equivalent to that

[7] See *Fishwick v. Cleland* (1961) 106 C.L.R. 186; *Australian National Airways Pty Ltd and Others v. The Commonwealth and Others* (1945) 71 C.L.R. 29.
[8] (1935) 53 C.L.R. 1.

of a *femme sole* and so subject to no restrictions on her contractual or proprietary capacity.

The High Court thought, however, that it was impossible to suppose that the Ordinance really meant to leave outside the scope of the law the whole topic of married women's property. A very wide meaning therefore should be given to section 16 in spite of the difficulties which its language presents, and probably the principles and rules of common law and equity must be taken subject to and together with statutory modifications in their application made in England before 9 May 1921. In any event, it could not be said that New Guinea receives from the common law the doctrine of the unity of personality of husband and wife. Starke J. said:

> Gradually the rules of common law with regard to the acquisition and enjoyment of property by a wife were altered, by the *Married Women's Property Acts*. . . . The development of the rules of English law relating to the proprietary rights of husband and wife has been continuous, and the rules of common law, the doctrines of equity, and statutes, have all played a part in this development. The provisions of the *Married Women's Property Acts* in force in England on 9th May 1921 may therefore be regarded as part of "the principles and rules of common law and equity" referred to in sec. 16 of the *Ordinance*.[9]

The reverse side of this problem had been considered in Ireland in 1928. Article 73 of the Constitution of 1922 provided that, subject to that Constitution and to the extent to which they were not inconsistent therewith, the laws in force in the Irish Free State at the inception of the Constitution should continue and be of full force and effect until repealed or amended by the Oireachtas. A literal construction would have interpreted the reference as including only statutes, since 'laws' not 'law' were referred to and repeals and amendments are primarily referable to statutes. However it was held to the contrary, Johnston J. declaring:

> I cannot believe that this great constitutional change brought with it a juristic vacuum in any department of national activity. On the contrary the Constitution is based upon the assumption of the existence in the Free State of a fully developed body of law regulating rights and duties in its territory.[10]

In Papua as late as 1962 a plaintiff was heard to contend that contributory negligence was not an answer to a claim in negligence because the Law Reform (Contributory Negligence) Act of 1945 of England had abolished such a defence. It was urged that only such common law as was in force in England at the date of the cause of

[9] *Ibid.* 32.
[10] *Performing Rights Society v. Bray U.D.C.* (1928) I.R. 511.

action was relevant. The plaintiff contended alternatively that at worst the Act of 1945 applied in Papua in all respects so that contributory negligence entitled the defendant merely to a reduction of damages. As it happened the findings of facts rendered a decision upon this point unnecessary for this case, but the Chief Justice expressed the view that the Act was not applicable in Papua and that contributory negligence was a defence there. His Honour was impressed by the distinction between the language of the adopting ordinance relating to Papua and that of the adopting ordinance relating to the Trust Territory. He noted that the joint judgment in *Booth v. Booth* does not express a definite conclusion with reference to the application to the Trust Territory under the relevant ordinance of English statutes which were passed prior to 9 May 1921 and modify the common law. From a practical point of view the issue has been resolved so far as contributory negligence is concerned by the enactment of an ordinance in the terms of the Law Reform (Contributory Negligence) Act of 1945 applicable to torts committed in Papua and the Trust Territory since 1 January 1963.

A problem of construction of a law-adopting ordinance arose in connexion with the contention that a citizen of the Mandated Territory was entitled to trial by jury upon a criminal charge of stealing as a servant. In answer to this contention it was said that the Criminal Procedure Ordinance of Papua which abolished trial by jury in Papua had been adopted with respect to the Mandated Territory of New Guinea by the Laws Repeal and Adopting Ordinance 1921. The relevant passage of that Ordinance was one adopting those portions of certain named ordinances, of which the Criminal Procedure Ordinance was one, that were in force in the Territory of Papua at the commencement of the 1921 Ordinance of New Guinea. It was pointed out that section 21 of the Papua Ordinance of 1889 which had abolished jury trial in Papua had itself been the subject of legislative treatment in Papua by the Jury Ordinance of 1907, which provided that the trial of a person of European descent charged with a crime punishable with death should be before a jury of four persons and that save as aforesaid the trials of all issues both civil and criminal should 'as heretofore' be held without a jury.

The question was whether section 21 of the Papua Ordinance of 1889 could be said to be in force in Papua when the Ordinance of 1921 of New Guinea spoke. It was held by the majority of the Court, Rich, Starke and Dixon JJ., that it was in force. Dixon J. said:

> It is evident that the [1907 Ordinance] does make an alteration in the law. It does so in respect of capital offences. Does it altogether replace clause 21 of the *Criminal Procedure Ordinance* 1889 so that it ceased to be "in force"? . . . On the whole I have come to the conclusion that

> it does not effect a complete repeal by implication of clause 21 . . . . It operates rather to amend it, and, subject to the alteration or amendment to confirm it in other respects. I think, therefore, that clause 21 was in force in Papua at the relevant date.[11]

Previously, in 1915, one Bernasconi had alleged that he was entitled to trial by jury in Papua in respect of a charge of an indictable offence. He was faced of course with the provisions of the Jury Ordinance of 1907. As to this he contended it was contrary to the provisions of section 80 of the Commonwealth Constitution. That section provides that:

> Trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be in the State where the offence was committed. . . .

The King v. Bernasconi[12] made occasion for examination of the constitutional position of the Territory of Papua as a territory governed by Australia.

Griffith C.J. pointed out that the offence was indictable and therefore by virtue of Chapter LXII of the Queensland Criminal Code which was adopted in Papua by Ordinance No. VII of 1902 the accused was entitled to a jury. This position obtained after Papua was placed under the authority of and accepted by the Commonwealth and when the Commonwealth Parliament enacted the Papua Act 1905 continuing the laws then in force in the Territory. Only the Ordinance of 1907 stood in the way of the appellant Bernasconi. He contended that section 80 of the Constitution invalidated the provisions of the Jury Ordinance. On this question Griffith C.J. said:

> 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 Commonwealth, 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 treated 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.

[11] *Sutherland v. The King* (1934) 52 C.L.R. 356, 361.
[12] (1915) 19 C.L.R. 629.

> 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 so 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.
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> 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*. . . . 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.[13]

It was but a short step from this to the expression of the view that the courts of the territories established by section 122 are not Federal Courts. It was a corollary of this that judges need not be appointed for life. Nevertheless it was held that there was power in the Commonwealth to endow the High Court with appellate jurisdiction from the decisions of the courts of the territories. In *Porter v. The King; Ex parte Yee*[14] the appellant sought relief from a decision of the Supreme Court of the Northern Territory of Australia from a fine for contempt of that Court. It was contended for the respondent that the appellate jurisdiction of the High Court was defined once and for all by Chapter III of the Commonwealth Constitution and could not be enlarged by the Commonwealth Parliament. If so then it had no appellate jurisdiction in the instant case because the Territory Court was neither a Federal Court nor a Court exercising Federal jurisdiction.[15]

It was accepted by all the judges that the Territory Supreme Court was not a Federal Court nor was it a Court exercising Federal jurisdiction. Knox C.J. and Gavan Duffy J. were of opinion that the Commonwealth Parliament had no power to endow the High Court with appellate jurisdiction from it, and certainly could not compel that Court to exercise any such jurisdiction. The other four members of the bench, Isaacs, Higgins, Rich and Starke JJ., held to the contrary. Starke J. said:

> Parliament has, by force of sec. 122 of the Constitution, full and plenary power over the territories. . . . "The governments of the territories are

[13] *Ibid.* 634.
[14] (1926) 37 C.L.R. 432.
[15] See s. 73 of the Commonwealth Constitution.

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;*[16] *R. v. Bernasconi.*[17]) 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.*[18]) 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 the judicial organs of the Commonwealth itself.[19]

Isaacs J. said:

But sec. 122 is in the nature of a plenary authority in the Commonwealth Parliament. . . . "The judicial power of the Commonwealth" within the meaning of Chapter III. [of the Constitution] and, both original and appellate, cannot be increased by Parliament. But the judicial power of the Commonwealth is, as defined in *R. v. Bernasconi,*[20] that of the Commonwealth proper, which means the area included within the States. . . . It follows that, if there is appropriate parliamentary enactment, this Court is competent to entertain appeals from the territorial Courts.[21]

This view was approved by the Privy Council in *Attorney-General of the Commonwealth of Australia v. The Queen*[22] where it was said that the legislative power in respect of the territories is a disparate non-Federal matter. It is interesting to note that the enactment actually endowing the High Court with appellate jurisdiction from the Supreme Court of the Northern Territory was the Supreme Court Ordinance 1911-1912 made pursuant to a power to make ordinances having 'the force of law in the Territory'. As to this, Isaacs J. said:

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. . . . I think the 21st section of the Ordinance [granting the right of appeal] is the law in force "in the Territory" as to what right of appeal exists from the Supreme Court to this Court.[23]

These decisions seem to accord with the substance of what was done in 1900. When the people of the Australian States had to consider the question of governing territories which their creature the Common-

[16] (1849) 9 Howard 635.
[17] (1915) 19 C.L.R. 629.
[18] (1857) 20 Howard 176, 182.
[19] (1926) 37 C.L.R. 432, 448.
[20] (1915) 19 C.L.R. 629.
[21] (1926) 37 C.L.R. 432, 440.
[22] [1957] A.C. 288, 320.
[23] (1926) 37 C.L.R. 432, 441.

wealth might acquire, they did not know how such territories would be acquired, whether by purchase peaceful cession or conquest. They did not know whether the territories would be friendly or hostile, nor what the exigencies of their government might be. It was natural that the Commonwealth should be chosen as the body to make the laws for such territories and it would have seemed unwise to p. -ny restrictions on the kind of laws which might be made.

Thus the question whether there should be trial by j. y in a territory would depend upon the requirements of the territory as assessed by the Commonwealth. Whether it was desirable to set up courts with judges having life tenure also was to be left to the judgment of the Commonwealth.

Having regard to the care the people took to restrict the subjects upon which they permitted the Commonwealth to make laws concerning themselves as citizens of the States, it would have seemed surprising that they should have conceded to the Commonwealth the power to make laws affecting the States upon every subject whatsoever, provided that such laws were incidental to the exercise of the power of governing the territory. Yet it would seem that the High Court has held that under section 122 the Commonwealth can make a law on any subject and make it effective in a State provided that such a law is incidental to the exercise of the power to govern a territory pursuant to section 122.

The emergence of this view could be seen in what was said by Sir Owen Dixon in the *Airways Case*.[24] He spoke of the necessity for interpreting the Constitution in a manner neither pedantic nor narrow. He referred to the absurdity of contemplating a central government with control over a territory, and yet without power to make laws wherever its jurisdiction might run, for the establishment, maintenance and control of communications with the territory concerned. He said:

> The form or language of s. 122 may not be particularly felicitous but, when it is read with the entire document, the conclusion that the legislative power is extensive enough to cover such a matter seems inevitable. 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*[25] and *Bernasconi's Case*[26] really meant such a disjunction.[27]

It was in the case of *Lamshed v. Lake*[28] that this doctrine was applied in a way which surprised many. The Road and Railway

[24] *Australian National Airways Pty Ltd and Others v. The Commonwealth and Others* (1945) 71 C.L.R. 29.
[25] (1913) 16 C.L.R. 315.
[26] (1915) 19 C.L.R. 629.
[27] (1945) 71 C.L.R. 29, 85.
[28] (1957) 99 C.L.R. 132.

Transport Act of South Australia 1930-1939 provided that it was an offence for an unlicensed person to operate any vehicle on certain roads for the carriage of passengers or goods for hire. The roads in question included the only practicable routes from South Australia to Alice Springs. Lake had driven his vehicle along one of the specified roads without a licence. He was prosecuted in South Australia. In his defence he relied upon section 10 of the Northern Territory (Administration) Act 1910-1955 which provided that trade commerce and intercourse between the Northern Territory and the States whether by internal carriage or ocean navigation shall be absolutely free. The State answered, not unnaturally, that that was a law relating to the Northern Territory and it did not operate in South Australia. The High Court decided that the Act did extend to South Australia and that to the extent that the Act of that State was inconsistent with the Northern Territory (Administration) Act it was inoperative.

This was the decision of the majority, made up of Dixon C.J., Webb, Kitto and Taylor JJ. McTiernan and Williams JJ. dissented. The issue between the majority and the minority seems to be expressed in the words of Williams J., where he said that the Northern Territory Act is not a law of the Commonwealth it is a law of the Northern Territory.[29] The Chief Justice said:

> To my mind s. 122 is a power given to the national Parliament of Australia as such to make laws "for", that is to say "with respect to", the government of the Territory. The words "the government of any territory" of course describes the subject matter of the power. But once the law is shown to be relevant to that subject matter it operates as a binding law of the Commonwealth wherever territorially the authority of the Commonwealth runs.[30]

His Honour then examined the nature of the practical requirements of the Territory as a place dependent upon communication between itself and its neighbouring States and decided that the Act was fairly incidental to the power to legislate for the government of the territory. McTiernan J. said[31] that it was right to describe the law as a law of the Commonwealth because it is a law made for the government of a part of the Commonwealth. But it was not a law within the Federal order of the Commonwealth, nor was it a law for the regulation of matters within the jurisdiction of the States. Williams J. said:

> The Parliament, when legislating under s. 122, is legislating only for the government of a territory. It is not legislating for the government of the Commonwealth. A law made under s. 122 is not a law of the Commonwealth. It is a law of a territory. No question of inconsistency between a law of a territory and a law of a State can therefore arise under

[29] *Ibid.* 151-152. [30] *Ibid.* 141. [31] *Ibid.* 149.

> s. 109 of the Constitution since that section relates to inconsistency between a law of a State and a law of the Commonwealth. . . .
>
> There is . . . no federal head of power under which the Parliament is authorised to legislate with respect to trade and commerce throughout the Commonwealth. . . . [Nor] with respect to intra-State trade and commerce or trade and commerce between a State and a territory. I can find nothing in the Constitution to indicate that the latter hiatus may be filled by legislation under s. 122. The section does not authorise the Parliament to pass laws for the government of the States.[32]

The view of the majority was stated in terms which do not reflect on the soundness of the decisions of *Buchanan* and *Bernasconi* and there is every reason to take the High Court as maintaining the doctrine that laws setting up Courts for the territories under section 122 do not attract the conditions attaching to the creation of Federal Courts under Chapter III of the Constitution. Nevertheless the majority view strains the doctrine that section 122 is a disparate non-Federal matter.

The implications seem to be wide and to point in three directions. One way they point to the further invasion of State spheres by the Commonwealth. Another way they point to a strengthening of the Commonwealth in positive attempts to assist a territory. Finally they point towards the application of restrictions to the otherwise unfettered power of the Commonwealth to make what laws it pleases in governing a territory. Section 116 of the Constitution is in point. That section says:

> The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

From time to time in this Territory the various religious organizations themselves have restricted by agreement their several competing operations. Danger of confusing the indigenes by variations of doctrines are obvious. In this land strange cults and 'religions' abound. The wisdom of denying to the Commonwealth which is responsible for all aspects of government in the Territory the power to legislate about matters the subject of section 116 may well be questioned. It was natural enough for the States to protect themselves against the Commonwealth in this respect. The States holding the residual power did not choose to fetter themselves similarly.

How far and in relation to what subjects the doctrine of *Lamshed v. Lake*[33] may be used in relation to legislation for the government of the Territory of Papua and New Guinea may be difficult to say.

If, having regard to what was achieved by a local Ordinance in

[32] *Ibid.* 151-152. [33] (1957) 99 C.L.R. 132.

Porter v. The King; Ex parte Yee[34] one were tempted to contemplate the effect of an ordinance of the legislature of the Territory that trade commerce and intercourse between the Territory and the States of the Commonwealth should be absolutely free, it would be well to remember that despite the fact that the grant of legislative power to the legislature of the Territory is in wide terms, it is a grant to a subordinate legislative body not intended to have authority in the Commonwealth of Australia.

On the other hand *Lamshed v. Lake*[35] may sustain laws made by the Commonwealth Parliament for the assistance of the Territory in matters of trade having important operation in the Commonwealth generally or in particular States, and which it could not make under any other power.

[34] (1926) 37 C.L.R. 432.
[35] (1957) 99 C.L.R. 132.