# FEDERAL AND TERRITORIAL COURTS

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The decision of the High Court in *Capital T.V. and Appliances Pty Ltd* v. *Falconer*[1] makes a further contribution to the step by step effort of the Court to develop a coherent doctrine with respect to the place of the Commonwealth Territories in the federal system. It goes some way towards answering the questions that arise with respect to the jurisdiction that may be exercised by territorial courts on the one hand, and on the other hand, the jurisdiction that may be exercised by federal courts, and State courts invested with federal jurisdiction, in respect of matters having a relationship with a Territory.

The matters decided were simply that the Supreme Court of the Australian Capital Territory is not a federal court, but is a territorial court established by virtue of the powers of the Parliament under section 122 of the Constitution, nor is it a court exercising federal jurisdiction. The Court did not find it necessary to decide whether the tenure of office of the judges of the Supreme Court met the requirements of section 72 of the Constitution with respect to federal courts. It held that, even assuming that those requirements were met, the Supreme Court was not a federal court. This conclusion was based on the intention of Parliament, as appearing from the words used to create the Court and the scope of the jurisdiction conferred on it. Further, it was held that the only courts "exercising federal jurisdiction", apart from federal courts, are State courts invested with federal jurisdiction.

Menzies J. and, as the writer understands his judgment, Gibbs J. also, were of the opinion that there was nothing in the jurisdiction of the Court that made it impossible for it to be a federal court, since a federal court can be given jurisdiction by an exercise of power under section 122, and Walsh J. proceeded on the assumption that this proposition (with which he seemed inclined to agree) was true. In their view, the Court was not a federal court simply because Parliament had *intended* to create it under section 122 of the Constitution and could validly do so. Gibbs J. seems to have considered that the whole of the jurisdiction of the Court was such that it could be conferred only by virtue of section 122. He may have considered that

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[1] [1971] A.L.R. 385; 45 A.L.J.R. 186.

a federal court must have *some* jurisdiction capable of falling within section 75 or section 76. The view of Menzies J. seems to produce the unprecedented result that the effect of an enactment of the Parliament may depend on which of two available powers the Parliament has intended to exercise.

On the other hand, McTiernan J. appears to have thought that the jurisdiction of the Court conferred under s. 122 precluded the possibility of its being a federal court. The position of Barwick C.J., Windeyer J. and Owen J. on this matter is not clear. Barwick C.J.[2] gave as the reason for his decision simply that *Spratt* v. *Hermes*[3] had decided that the Court of Petty Sessions of the Territory was not a federal court and that he could find no relevant ground for distinction between the Court of Petty Sessions and the Supreme Court. One would think that the contention advanced in the *Capital T.V.* case that the judges of the Supreme Court held office in accordance with the requirements of section 72 raised a point of distinction that required consideration of the question whether the jurisdiction of the Supreme Court was such that it could not be a federal court. The Chief Justice did further elaborate his views as to the nature of federal judicial power, and these views will be examined below.

It seems to be implicit in the decision that a court created by the Parliament is either a federal court or a territorial court; it cannot be both. However, some of the judgments give support to the proposition that, whilst the jurisdiction of a territorial court must be jurisdiction in relation to a Territory, it can include jurisdiction which overlaps with existing or potential jurisdiction, in relation to the Territories, of federal courts and of State courts exercising federal jurisdiction. The extent and significance of this overlap will be examined below.

The Chief Justice[4] restated his view (rejected by Menzies J., in *Spratt* v. *Hermes*),[5] that section 51 of the Constitution is not a source of power to make laws operating in the Territories. The other justices expressed no opinion on this question. However, the validity of the proposition may well be considered to have been implicit in the joint judgment of the Court in *Tau* v. *The Commonwealth and others*.[6]

All the judges seem to have understood section 11 of the Australian Capital Territory Supreme Court Act 1933-1966 (Cth) as conferring jurisdiction only "in relation to the Territory". They did not avert to

[2] [1971] A.L.R. 385, 388.
[3] (1965) 114 C.L.R. 226.
[4] [1971] A.L.R. 385, 389.
[5] 114 C.L.R. 226, 270.
[6] (1969) 119 C.L.R. 554.

the significance of the inclusion in that section (without express limitation of the Territory) of such jurisdiction as is from time to time vested in the Supreme Court by other Acts, although Walsh J. did make a reference to some aspects of that jurisdiction. There are a number of Acts, other than the Supreme Court Act itself, that vest, or purport to vest, jurisdiction in the Supreme Court and some of these Acts appear on their face to give jurisdiction not related to the Territory. For example, section 85E of the Crimes Act 1914-1966 (Cth) confers jurisdiction on the several courts of the Territories with respect to offences against that Act (which include indictable offences) and that jurisdiction is stated to be conferred without regard to the limits of the jurisdiction of the courts concerned having effect by reference to the places at which offences are committed. Sub-section (4.) provides that the trial on indictment of an offence against the Act, not being an offence committed within a State, may be held in any State or Territory. This seems to imply that an offence committed within a State could not be tried in the Supreme Court of the Australian Capital Territory. Such a limitation is required by section 80 of the Constitution, with the possible exception of any offences that may be capable of being committed within a State under the Act in its application as a law for the government of the Territory. But the offences that can be committed under the Act include extra-territorial offences, that is to say offences committed beyond the Commonwealth and the Territories (section 3A) and it seems certain that some, if not all, of these offences cannot be regarded as having any relationship with the Territory: yet the Act purports to confer jurisdiction on the Supreme Court of the Territory to try them. A similar position exists under the Crimes (Aircraft) Act 1963 (Cth) and the Statutory Declarations Act 1959-1966 (Cth).

It appears to the writer that, if the Court had averted to these provisions, it would have had to consider whether they purported to confer on the Court jurisdiction capable of exercise only as federal jurisdiction, and whether the result was that the Court was a federal court. As the High Court held that the Australian Capital Territory Supreme Court is not a federal court, the question now arises whether the jurisdiction purported to be conferred on it by these sections can be exercised at all and, if so, in what circumstances.

Civil jurisdiction is also conferred on the Court by Acts other than the Supreme Court Act itself. The Matrimonial Causes Act 1959-1966 (Cth) confers jurisdiction on the Court in matrimonial causes, subject to the same jurisdictional limits as are applicable to the State Supreme Courts, but with the additional limitation that at least one of the parties must have been ordinarily resident in the Territory at the date

of the institution of the proceedings or have been resident in the Territory for a period of not less than six months immediately preceding that date (section 23). Decrees of the Court, like those of the State Courts, are to have effect throughout the Commonwealth and all the Territories (section 94). Walsh J. alone referred to jurisdiction under the Matrimonial Causes Act.[7] He did not do so in discussing whether the Court is a federal court but only in dealing with the question whether it is a "court exercising federal jurisdiction". He pointed out that the jurisdiction is expressed to be "conferred" and is not expressed to be an investing of federal jurisdiction, and went on to say that in his opinion it was not federal jurisdiction. He seems to have regarded it as valid jurisdiction in relation to the Territory, but did not elaborate his reasons. It would seem that the Court should have considered whether the jurisdiction conferred by the Matrimonial Causes Act is sufficiently related to the Territory as to be capable of being conferred in reliance solely on section 122 or whether, on the other hand, it extends to matters appropriate only to federal jurisdiction and was therefore relevant to the question whether Parliament had intended to create the Court as a federal court or to convert it into a federal court.

The Supreme Court Act also permits jurisdiction to be conferred on the Court by Ordinance, but all Ordinances must relate to the peace, order and good government of the Territory. An example of the vesting of jurisdiction in the Court by Ordinance is to be found in the Supreme Court Ordinance 1952 (A.C.T.), which is expressed to invest the Court with jurisdiction in all matters in which a writ of mandamus or of prohibition or an injunction is sought against an officer of the Commonwealth in respect of the exercise by the officer of a power, duty or function in relation to, and under a law in force in, the Territory. In view of the disapproval in *Spratt* v. *Hermes*[8] of the decision of Fullagar J., in *Waters* v. *Commonwealth*[9] it is clear that this jurisdiction is within the jurisdiction of the High Court under section 75. The jurisdiction conferred by the Ordinance was exercised by Morgan J. in *The Queen* v. *Registrar of Companies for the A.C.T.*[10] His Honour held that the jurisdiction was validly conferred on the Court as a federal court: a view which, of course, is not now tenable. As will be seen, the view of the writer is that the jurisdiction is validly conferred on the Court as a territorial court even though it is also a jurisdiction that is capable of exercise by a federal court.

[7] [1971] A.L.R. 385, 406.
[8] 114 C.L.R. 226.
[9] (1951) 82 C.L.R. 188.
[10] (1960) 1 F.L.R. 109.

In the *Capital T.V.* case, there was a difference of approach between Barwick C.J. on the one hand and the approach of Menzies, Walsh and Gibbs JJ. on the other. Under both approaches regard was had to the jurisdiction of the Court in determining whether there was an intention to create a federal court. However, Barwick C.J. looked to the legislative power supporting the legislation *in relation to which jurisdiction is exercised* as determining the character of the judicial power, federal judicial power being, in his view, "that which is called into exercise by or in connexion with legislation enacted pursuant to ss. 51 and 52".[11] He went on[12] to refer to "the *limitation*[13] of section 71 to the judicial power for the exercise of which laws made pursuant to section 51 and section 52 may call". As, in his view, all laws in force in the Territory by virtue of the exercise of the powers of the Commonwealth Parliament (including Commonwealth laws of general Commonwealth application) rest on section 122, and not on section 51 or section 52, it might be thought to follow that jurisdiction in respect of the application of such a law as in force in a Territory cannot be exercised within the federal judicial power, and this appears to be equivalent to saying that it cannot be "federal jurisdiction". Menzies J., Walsh J. and Gibbs J., however, looked to the legislative power by virtue of which *the jurisdiction was conferred* as the determining factor. Of course, in order to find the source of the legislative power to confer the jurisdiction, it was necessary to look at the nature of the jurisdiction conferred. In the view of these Justices, the jurisdiction conferred was jurisdiction "in relation to" the Territory. Such jurisdiction is capable of being conferred by virtue of section 122 on a court created under that section, and in their view Parliament showed an intention to do this. Jurisdiction can be conferred on a court of a Territory by virtue of section 122 in respect of a matter arising under any law of the Commonwealth, so long as it is jurisdiction in relation to the Territory, and this does not depend on "the matter" not being within the federal judicial power. This leaves the way open for the one matter to be capable of being dealt with either in federal jurisdiction or in territorial jurisdiction. The practical significance of this difference of approach will be discussed below.

Although, as has been said, the judgment of Barwick C.J. seems open to the interpretation that a particular matter (at any rate if it is a matter arising under Commonwealth legislation) must be either a matter of federal jurisdiction or a matter of territorial jurisdiction, and

[11] [1971] A.L.R. 385, 388.

[12] *Id.*, 389.

[13] Emphasis added.

cannot be both, his judgment in *Spratt* v. *Hermes*[14] suggests (for reasons mentioned below) that he did not intend this inference. It seems likely that, in speaking of the *limitation* of section 71 to the judicial power for the exercise of which laws made pursuant to section 51 and section 52 may call, he meant to describe the limits of the matters that cannot be dealt with under the territorial judicial power, but not to say that there are no *other* matters that can be dealt with under the federal judicial power, or to say that these other matters cannot be dealt with also by territorial courts. Certainly the description of the federal judicial power that he gave is not exhaustive. For example, it would not cover jurisdiction in a suit between residents of different States in a matter arising under a State law.

It is submitted that it is now well established that there can be concurrent federal jurisdiction in one court and territorial jurisdiction in another court in respect of a matter falling within section 75 or section 76. It is further submitted that the trend of opinion in the High Court is that this applies to matters arising under laws made by the Parliament by virtue of section 122 (including subordinate legislation). In *The Queen* v. *Richards; Ex parte Fitzpatrick and Browne*[15] Dixon C.J., delivering the judgment of the Court, expressed the opinion that the application for a writ of *habeas corpus* that was made to the Supreme Court of the Australian Capital Territory could have been made to the High Court in the first instance, because the matter arose under the Constitution. No doubt was expressed as to the jurisdiction of the Supreme Court, which was probably founded on the fact that the applicants were under detention in the Territory.

In *Spratt* v. *Hermes*,[16] all the Justices, including the Chief Justice, appear to have accepted the notion of concurrent jurisdiction of federal and territorial courts, at least as regards matters falling within section 75. This follows from their disapproval of *Waters* v. *The Commonwealth*[17] as there seems no reason to doubt that they would have upheld legislation giving to the Supreme Court of the Northern Territory jurisdiction in the matter that was (in their view validly) before Fullagar J. in that case. The Chief Justice,[18] in emphatically rejecting the decision in *Waters'* case, affirmed that the federal jurisdiction of the High Court under Constitution section 75 extends to matters that have a relationship with a Territory, such as an action between residents of different States for a wrongful act done by one of them in a Territory, or an

[14] 114 C.L.R. 226.
[15] (1955) 92 C.L.R. 157.
[16] 114 C.L.R. 226.
[17] 82 C.L.R. 188.
[18] 114 C.L.R. 226, 241.

action for a mandamus to an officer of the Commonwealth to perform a duty which is to be performed in a Territory, and made it clear[19] that the source of the duty required by such a mandamus to be performed was immaterial for this purpose. Menzies and Windeyer JJ., in the view of the writer, clearly accepted the concept of concurrent jurisdiction, and regarded it as applicable to matters falling within section 76, including section 76(ii.). Menzies J. said[20] that section 13 of the Australian Capital Territory Supreme Court Act (which gives the High Court jurisdiction to hear and determine a case stated or question reserved by a judge of the Supreme Court) "is valid as a law under s. 76(ii.) of the Constitution". This dictum implies that matters arising under laws enacted for a Territory by, or under authority of, the Parliament are matters arising under a law made by the Parliament for the purposes of section 76(ii.) of the Constitution. However, the other Justices, for reasons that are not obvious, preferred to rest the validity of section 13 of the Act on Constitution section 76(i.) and did not rely on section 76(ii.).[21]

Windeyer J. said[22] that it was, in his view, proper to regard sections 73, 75 *and* 76 as stating the jurisdiction of the High Court as the highest Australian Court having authority to declare and enforce the whole law of Australia, wherever it is binding, whether in States, Territories, or upon ships at sea, and whatever in a particular case is the source of the obligation it imposes, and added that he saw no ground for refusing the name "a law of the Commonwealth" to any law validly made by or under the authority of the Commonwealth Parliament, wherever that law operates. The context gives strong reason for believing that the reference to the expression "a law of the Commonwealth" was intended to be a reference to the expression "laws made by the Parliament" in section 76(ii.), especially as His Honour added[23] an express statement that the provisions of sections 75 and 76 apply to proceedings arising in the Territories.

Kitto J. also joined in disapproving *Waters* v. *The Commonwealth*[24] in terms implying that there can be concurrent federal and territorial jurisdiction in the one matter. He does, however, seem to have taken the view that section 76(ii.) does not extend to laws creating offences

[19] *Id.*, 243.

[20] *Id.*, 268.

[21] The reference to s. 76(ii.) in the judgment of Kitto J. (at 249-250) seems to be an error.

[22] 114 C.L.R. 226, 275-276.

[23] *Id.*, 278.

[24] 82 C.L.R. 188.

in the Territories when he said[25] that "jurisdiction to try a person on a charge of having committed in a territory an offence against such a law necessarily falls within that judicial power which is a function of government in respect of the territory and not within federal judicial power". However, he seems to have qualified his statement, though rather cryptically, in a further passage in which he said that "an offence in the Territory against a law of the Territory is in its nature triable in exercise of that judicial power which appertains to the government of the Territory and not, *unless there be some federal factor in the case*,[26] to the judicial power which appertains to the government of the federation of States".

In the *Capital T.V.* case, Menzies J. quite explicitly repeated his view that the one matter can be the subject of federal or territorial jurisdiction. He rejected the proposition that jurisdiction with respect to the matters enumerated in sections 75 and 76 must always be characterized as federal jurisdiction in the constitutional sense, and pointed to *Spratt* v. *Hermes* as a case in which jurisdiction with respect to a matter mentioned in section 76 was treated as territorial jurisdiction.[27] He also referred to the fact that the Supreme Court of the Territory "had jurisdiction to decide matters which, in other courts, would be matters of federal jurisdiction". Moreover, he asserted emphatically that the "laws made by the Parliament" referred to in section 76 include laws made in pursuance of section 122.[27a]

In *Anderson* v. *Eric Anderson Radio and T.V. Pty Ltd*[28] it was argued that an action to enforce a right under an Ordinance of the Australian Capital Territory was a matter arising under a law made by the Parliament for the purposes of section 76, but the High Court did not find it necessary to decide the question. No member of the Court, however, indicated disagreement with the proposition, although Taylor J. said that it "may be open to question".

Menzies J.[29] and Gibbs J.,[30] in the *Capital T.V.* case, said that a federal court can have additional judicial power in respect of matters not included in sections 75 and 76 conferred on it by a law made under section 122. These dicta suggest that there may be some matters arising in relation to the Territories that do not fall within section 75 or section 76 and are therefore not capable of being matters of federal

[25] 114 C.L.R. 226, 259.
[26] Emphasis added.
[27] [1971] A.L.R. 385, 394.
[27a] *Id.*, 392.
[28] (1965) 114 C.L.R. 20.
[29] [1971] A.L.R. 385, 392.
[30] *Id.*, 407.

jurisdiction. It seems that such matters would be very rare, because most, if not all, of the law in force in the Territories derives its authority, directly or indirectly, from laws made by the Parliament, as was pointed out by Dixon J. (as he then was), in relation to the Australian Capital Territory, in *Federal Capital Commission* v. *Laristan Building and Investment Co. Pty Ltd.*[31]

It is submitted that the proposition that "laws made by the Parliament" in section 76 includes laws made under section 122 is consistent with the clear tendency of the Court not to extend the doctrine of *The King* v. *Bernasconi*[32] but on the contrary to emphasize that the powers given by section 122 are powers of the national Parliament and that laws made under it can have effect throughout Australia. It is a proposition of considerable practical significance. Its effect is that original jurisdiction can be conferred on the High Court, as federal jurisdiction, in matters arising under laws made directly or indirectly by the Parliament as applying (whether exclusively or not) to a Territory, and similarly that original and appellate federal jurisdiction in such matters can be given to other federal courts or State courts invested with federal jurisdiction. At the same time the vexed question whether original jurisdiction can be conferred on the High Court by a law under section 122 becomes largely academic, because, as already mentioned, the law of the Territories has a basis in Commonwealth statutes.

If the "laws made by the Parliament" referred to in section 76(ii.) do not include laws made under section 122, difficult problems could arise in practice as regards the exercise of federal jurisdiction by State courts, as it seems evident that jurisdiction cannot be conferred on State courts under section 122 itself. Many laws of the Commonwealth are framed so as to apply indifferently over the whole of the Commonwealth and the Territories, and it may be difficult to determine exactly what part of the operation of such a law is attributable to section 122. In such a case would section 76(ii.) apply only to such matters arising under the law as did not arise under it as based on section 122 and how could these matters be identified? For example, section 208 of the Income Tax Assessment Act 1936-1970 (Cth) provides that income tax shall be a debt due to the King and payable to the Commissioner in the manner and at the place prescribed, and section 209 provides that any tax unpaid may be sued for and recovered in any court of

[31] (1929) 42 C.L.R. 582, 585. Compare the argument advanced in *Anderson* v. *Eric Anderson Radio and T.V. Pty Ltd* (114 C.L.R. 20) and referred to by Kitto J. at 114 C.L.R. 29.

[32] (1915) 19 C.L.R. 629.

competent jurisdiction by the Commissioner or a Deputy Commissioner suing in his official name. Let us suppose that a person is assessed to income tax on income derived partly in the A.C.T. and partly in the States. Do sections 208 and 209, in their application to the tax so assessed, depend on section 51 or on section 122, or partly on both? Does it make any difference to this question if the taxpayer is resident in the A.C.T. and, if so, at what time is residence material? If the answer is that both powers are involved, would section 76(ii.) apply to an action to recover the tax?

Another example of the difficulty of determining to what extent a law is dependent on section 122 is the provision made by the National Service Act 1951-1966 (Cth) for exempting persons from liability to render service under that Act, and empowering various courts to determine the entitlement of persons to exemption. An order of any such court would purport to exempt the person concerned, wherever resident, from liability to service in a Territory as well as in the States or overseas. In what circumstances would an application for exemption be a matter arising under a law made under section 122?[33]

Even if the Chief Justice did not intend to reject the application of section 76(ii.) to matters arising under laws made by virtue of section 122, converse difficulties would arise, under his approach, in delimiting the possible jurisdiction of *territorial* courts as, in his view, matters arising under laws made by virtue of section 51 are necessarily matters of federal jurisdiction, and for this purpose it would seem necessary to distinguish the operation of the one provision under section 51 from its operation under section 122. On the other view of territorial jurisdiction, the fact that a matter arose partly, or even wholly, under a law made under section 51 would not be decisive against the jurisdiction of a territorial court. Laws made by the Parliament under section 51 in respect of matters related to the States are binding on the courts of the Territories (covering clause 5 of the Constitution Act), and it

[33] In the two examples given, federal jurisdiction would be attracted by s. 75(iii.), without reliance on s. 76(ii.). As regards s. 209 of the Income Tax Assessment Act, the legislature has adopted an approach to the jurisdiction of territorial courts that seems more in line with the views of Menzies, Walsh and Gibbs JJ. than with those of the Chief Justice. S. 83 of the Judiciary Act 1903-1969 (Cth) provides that suits to recover taxes accruing under any revenue law of the Commonwealth may be brought in the State or Territory where the liability for the tax occurs *or in the State or Territory where the debtor resides.* In the case of the National Service Act, jurisdiction to deal with exemption applications is conferred by s. 29B on courts of summary jurisdiction of the States and Territories in general terms. However s. 29C provides for review of the decision of a court of summary jurisdiction by a court of the State or Territory in which the person affected resides.

seems possible for a matter to arise wholly or partly under such a law in such circumstances that it could properly be the subject of the exercise of jurisdiction in relation to a Territory. An action in a territorial court for the recovery of income tax owing by a resident of the Territory on income derived in a State while he was a resident of the State might be such a matter. To justify the jurisdiction of the territorial court in such a case by arguing that the law making the tax recoverable in the Territory is itself a law under section 122 under which the matter arises would seem to be to beg the question of the jurisdiction of the territorial court.

Assuming that the approach of Menzies, Walsh and Gibbs JJ. to the jurisdiction of territorial courts prevails, there remains for detailed consideration by the High Court the extent of the jurisdiction that can properly be regarded as jurisdiction "in relation to" a Territory. *Spratt* v. *Hermes*[34] concerned an offence against a general law of the Commonwealth committed in the Territory, and there the jurisdiction was clearly related to the Territory. In the *Capital T.V.* case the matter was an offence committed in the Territory against an Ordinance of the Territory and the jurisdiction was therefore even more clearly related to the Territory. Obviously, however, much more difficult cases can arise.

If we compare the position of State courts, there seems to be no limit to the jurisdiction (not being federal jurisdiction) that the State Parliament can confer on those courts, under its power to make laws for the peace, order and good government of the State, in matters arising under laws that are binding on these courts (though there can, of course, be questions of the validity of the State law giving rise to an exercise of jurisdiction where the law has an extra-territorial operation). There can be no question of a State Parliament giving to the orders of its courts a legal operation outside the boundaries of the State, and jurisdiction to decide matters under laws that are binding on the courts of the State by orders having effect in the State will necessarily be valid. As the Privy Council said in *Ashbury* v. *Ellis*[35] in relation to New Zealand legislation, "[f]or trying the validity of the New Zealand laws it is sufficient to say that the peace, order and good government of New Zealand are promoted by the enforcement of the decrees of their own courts in New Zealand". In practice, the jurisdiction of a State court in most matters depends upon effective service of its process, either within or outside the State, but the State can

[34] 114 C.L.R. 226.

[35] [1893] A.C. 339, 344-345.

dispense with such service, even where the defendant is not within the State: compare *Ashbury* v. *Ellis*[36] and *Ex parte Iskra.*[37]

The consideration of the permissible jurisdiction of territorial courts is complicated by the fact that it is within the power of the Commonwealth Parliament to give the order of a territorial court an effect in the States if provision to do so can properly be characterized as a law for the government of the Territory (*Lamshed* v. *Lake*).[38] It is necessary to consider how the question of jurisdiction "in relation to" a Territory is to be approached having regard to this consideration.

If the order of the court is to have effect only in the Territory, it would seem that the jurisdiction would necessarily be jurisdiction in relation to the Territory. For example, if, under a Matrimonial Causes Act, decrees of a territorial court were given effect only in the Territory, there seems no reason why jurisdiction of the court should not be based on any criterion Parliament might choose, for example, residence of the petitioner in the Territory for one week or even simply lawful service of the petition, whether in or out of the Territory. If, however, the law purported to give the order of the court effect throughout the Commonwealth, different considerations seem to apply. It is suggested that the extended effect of the order must be taken into account in determining whether the jurisdiction can properly be said to be exercised in relation to the Territory.

A distinction may be drawn between (a) an order (such as a money judgment) which operates primarily in the Territory but is made enforceable, or purports to be made enforceable, in the States by the Service and Execution of Process Act 1901-1963 (Cth) or similar legislation and (b) an order (such as a sequestration order in bankruptcy) made under legislation which gives the order a legal effect in the States as an integral part of the effect of the order.

The service and execution of process power (section 51 (xxiv.)) does not apply to the judgments of the courts of the Territories, and the operation of the Service and Execution of Process Act in respect of those judgments must depend on section 122, aided by section 51 (xxxix.). It may be suggested that section 122 does not authorize legislation for the execution of a judgment of a territorial court in a State unless the matter in which the judgment was given had some substantial connexion with the Territory. The result might be that, if jurisdiction were given to a territorial court in a matter not having a

[36] *Ibid.*
[37] (1963) 63 S.R. (N.S.W.) 538.
[38] (1958) 99 C.L.R. 132.

substantial connexion with the Territory, the jurisdiction would be validly exercised so as to result in an order enforceable in the Territory, but the Service and Execution of Process Act could not validly operate to make the judgment enforceable in a State.

The matter just discussed may be illustrated by reference to the decision of Gibbs J., in his former office as a Judge of the Supreme Court of the Australian Capital Territory, in *Cope Allman* v. *Celermajer and Anor.*[39] In that case His Honour had to consider whether he had jurisdiction in an action for an injunction restraining the defendants from breaking a covenant in a deed. The facts of the case had only a very slight connexion with the Territory, and His Honour did not treat this connexion as material. The facts and the parties were closely related to New South Wales and the injunction, to be effective, would have needed to be enforceable in New South Wales. The writ was served in New South Wales under a rule of the Court which provided that it was not necessary to obtain leave to serve a writ of summons outside the Territory but within the Commonwealth. Gibbs J., without discussing the constitutional question, held that he had jurisdiction, basing his decision simply on the provision of the Supreme Court Act giving the Court "in relation to the Territory, the same original jurisdiction, both civil and criminal, as the Supreme Court of New South Wales had in relation to that State immediately before the first day of January, One thousand nine hundred and eleven". His Honour took the view that the Supreme Court of New South Wales, at that date, had jurisdiction to entertain an action of the kind concerned simply by virtue of valid service of the writ of summons on the defendant. The fact that the writ in the case before him had been served out of the jurisdiction was not material. His Honour referred to the suggestion that there might be some problems in executing any judgment of the court but said that he was unable to see that any real problems would arise in that connexion. It is submitted that, whilst jurisdiction could validly be conferred in that case to make an order that would be enforceable in the Territory, it is difficult to see how the order could validly be made enforceable in the States, as the enforcement would not have served any purpose substantially related to the government of the Territory. If the order could be made so enforceable, it would seem to follow that any personal action in a matter arising in a State, though having no connexion at all, whether as to subject-matter or parties, with the Australian Capital Territory, could be brought in the Supreme Court of that Territory, the writ served in the State, and the judgment

[39] (1968) 11 F.L.R. 488.

enforced in the State. A law permitting this could hardly be characterised as a law for the government of the Territory.

Where legislation purports to give an order of a territorial court an effect in the States as an integral part of the effect of the order, it may likewise be suggested that the order could not validly be given that effect in the States unless the matter had a substantial connexion with the Territory. Where such a connexion was lacking, the effect of the order in the Territory might not be severable, and the exercise of jurisdiction might be wholly invalid. Whether the effect of the order was severable would depend on the usual tests of severability, including the workability of the order as an order limited to the Territory. For example, provision in a Matrimonial Causes Act giving a territorial court jurisdiction based simply on service of the petition might well be wholly invalid if it provided that the decrees were to have effect throughout the Commonwealth. Another example would be a bankruptcy law giving a territorial court jurisdiction to make a sequestration order on the basis of residence of a single creditor in the Territory. Such a law might be valid if the order was to have effect only in the Territory. But the position might be different if the order was to have the effect of vesting in the trustee, and subjecting to discharge under the Act, all the property and debts of the bankrupt anywhere in Australia.

The difficulty in regard to the bankruptcy jurisdiction of the Supreme Court of the Northern Territory was adverted to in that Court in *Re Ballard; Ex parte Wright.*[40] In that case Kriewaldt J. held that the Supreme Court of the Northern Territory was validly invested with bankruptcy jurisdiction under section 18 of the Bankruptcy Act 1924-1954 (Cth), notwithstanding that it was not so constituted as to be capable of being a federal court. The section in question purported to include the Supreme Court among the courts "invested with federal jurisdiction in bankruptcy throughout the Commonwealth". His Honour reached his conclusion on the basis that *The King* v. *Bernasconi*[41] had decided that Chapter III of the Constitution has no application to the Territories and hence section 72 could not be used to impugn the jurisdiction of the Supreme Court of the Northern Territory to make a sequestration order. However, it is significant that His Honour expressly left open the question whether a sequestration order made by the court would have any operation outside the Northern Territory, or whether the Bankruptcy Act, so far as it purported to give the order operation throughout the Commonwealth, would need to be "read down" in order to make it a valid law for the Territory. Of course His Honour might

[40] (1955) 1 F.L.R. 473.
[41] 19 C.L.R. 629.

have expressed a view on this matter if *Lamshed* v. *Lake*[42] had preceded his decision. The report does not state what connexion the facts of the case had with the Territory.

In the Bankruptcy Act 1966-1970 (Cth), the legislature has adopted a different approach from that in the earlier Bankruptcy Act. It is expressly provided that an order of the Supreme Court of the Northern Territory made in the exercise of jurisdiction under the Act has force and effect throughout Australia, but it is also provided that that court is not to exercise its power unless the facts of the matter meet certain specific tests as to their connexion with the Territory. The scheme is no doubt designed to have the effect that the orders of the court, even as affecting property and debts in the States, are a *bona fide* exercise of jurisdiction in relation to the Territory. As already mentioned, a similar approach is adopted in the Matrimonial Causes Act 1959-1966 (Cth).

There is another possible view of the effect of orders of territorial courts in the States. It may be argued that it is open to the Parliament to give territorial jurisdiction to a territorial court on any basis the Parliament chooses, and then, as a separate exercise, to give some particular effect to the orders in the States by a law made under one of the heads of power in section 51, if such a head is available (including, perhaps, placitum (xxxix.) in its application in relation to section 122). Thus, on this argument, a Commonwealth law giving some operation in the States to a bankruptcy order made by a court of a Territory would itself be a law under section 51 with respect to bankruptcy. Likewise a law giving effect in the States to a territorial decree of dissolution of marriage might be a law with respect to marriage or matrimonial causes just as would a law giving similar effect to the decree of a New Zealand court. Against this argument it may be urged that the nature of the jurisdiction exercised by a court must be ascertained by examining not merely the effect which the order of the court is itself expressed to have but also the effect that is given to it by the legislature. This approach to the nature of a judicial order seems to be implicit in the following passage from the judgment of Kitto J. in *The Queen* v. *Davison*:[43]

> These considerations lead me to conclude that, while it may well not be correct to say of a power to bring into operation with respect to a debtor statutory provisions such as are contained in the Bankruptcy Act 1924-1950 (Cth.) that it is necessarily judicial in character simply because it has that result, yet it is

[42] 99 C.L.R. 132.
[43] (1954) 90 C.L.R. 353, 384.

> certainly true that the grant to a court of a power to produce that result by the particular process of receiving a debtor's petition for the sequestration of his estate, hearing the petition in conformity with the settled principles governing judicial proceedings, and granting the prayer of the petition by making a sequestration order, is a grant of judicial power within the meaning of s. 71 of the Constitution.

It remains a matter for speculation how the High Court would approach the problem of the minimum necessary connexion of matters with a Territory that would justify the conferring of territorial jurisdiction to determine them by orders having effect throughout the Commonwealth. There are already in force a number of Acts that could result in that question coming before the Court. Some of these Acts, while conferring jurisdiction on the courts of the Territories as well as on State courts, do not attempt to specify the circumstances in which the jurisdiction may be exercised, and may have to be "read down" in some way.

*Conclusions*

The following submissions, which are considered to be consistent with the authorities and to be equally applicable in relation to the external Territories as to the mainland Territories, are made:

1. A court created, directly or indirectly, by the Parliament must be either a federal court created under section 71 or a territorial court created under section 122.

2. Jurisdiction can be conferred on a federal court both under section 77 (federal jurisdiction) and under section 122 (territorial jurisdiction). However, jurisdiction can be conferred on a territorial court only under section 122, and must be jurisdiction "in relation to" the Territory.

3. Jurisdiction in the one matter may be federal jurisdiction, if conferred on a federal court or invested in a State court, or territorial jurisdiction, if conferred on a territorial court.

4. If the constitution of a court complies with the requirements of section 72, the question whether it is a federal court or a territorial court must be determined according to the intention of Parliament, as disclosed by the Act creating the court and the jurisdiction conferred on it. The question must be approached on the basis that there is no jurisdiction that can be conferred on a territorial court that cannot also be conferred on a federal court, but the reverse is not true. If Parliament has declared the court to be a federal court, it will be such a court, with the possible exception of a case where the only jurisdiction of the

court is jurisdiction that can be conferred only by virtue of section 122 (and it may be doubted whether any such jurisdiction exists, having regard to 7 below). If Parliament has not declared the court to be a federal court, the position is as follows:

(a) If all the jurisdiction is capable of being conferred under section 122, the court would probably be held to be a territorial court.

(b) If part of the jurisdiction is capable of being conferred under section 122 but another part is not, it could be held that the court is a federal court. However, it is possible (especially if the name of the court and its general jurisdiction relate it to a Territory, or if the federal jurisdiction was added by an amending Act after the creation of the court) that it would be held that Parliament had disclosed a dominant intention to create a territorial court and that the attempt to confer federal jurisdiction should be severed, as invalid.

5. If the constitution of the court does not meet the requirements of section 72, the court is a territorial court if it has any jurisdiction capable of being conferred under section 122, that is to say jurisdiction "in relation to" a Territory. Any attempt to confer other jurisdiction on it is invalid.

6. A territorial court may be given functions in relation to a Territory that are not judicial in the strict sense. A federal court cannot be given such functions.

7. The jurisdiction that may be conferred on a federal court, or invested in a State court, under section 77 includes jurisdiction in matters arising under laws made by the Parliament under section 122, including matters arising under subordinate legislation, such as Ordinances.

8. Although jurisdiction may be conferred on a federal court (including the High Court) under section 122 in relation to a Territory, in view of 7 above this is probably not significant except as regards appellate jurisdiction of the High Court.

9. For the purpose of determining whether jurisdiction is "in relation to" a Territory, so as to be validly conferred on a territorial court, the following considerations apply:

(a) If the orders of the court are to have effect only in the Territory, the jurisdiction will almost certainly be valid.

(b) If the orders are given a legal operation in the States, then it is necessary to determine whether the provision giving that operation to the orders can be characterized as a law for the government of the Territory, and for this purpose the criterion on

which the jurisdiction is exercisable, as well as the effect of the orders, must be examined. If the provision cannot be so characterized, then the conferring of the jurisdiction will be invalid unless the operation of the orders outside the Territory can be "severed". It is not yet possible to say what criteria of jurisdiction will be acceptable to the High Court, or how the Court would approach an attempt by the Parliament to confer jurisdiction "in relation to the Territory", without itself defining the scope of the expression, or whether the Court would "read down" in some way a law purporting to confer jurisdiction in general terms on a territorial court in matters arising under a Commonwealth Act of general application.

10. If the Commonwealth were prepared to give section 72 conditions to the judges of a superior court of a Territory, it would avoid many problems of jurisdiction by creating the court as a federal court. The problems referred to include those that arise from Acts of general application, such as the Matrimonial Causes Act and the Bankruptcy Act. However it may be considered that the first part of conclusion 2, and conclusion 7, are not yet sufficiently supported by authority to make this course safe. It seems unlikely that the Commonwealth would be prepared to adopt a similar course as regards inferior courts.

11. The original jurisdiction that may be conferred on the High Court under section 76(ii.) includes jurisdiction in matters arising under laws made by the Parliament under section 122, including matters arising under subordinate legislation under such laws. This makes the question whether original jurisdiction can be conferred on the High Court under section 122 largely academic. Probably, however, such jurisdiction may be conferred.