The Bill of Rights and the State Transport Facilities Acts

The Queensland Full Court decision in *Cobb & Co. Ltd. and others v. Kropp*[1] is the most recent of the series of cases in the long battle between Queensland road transport operators and the Queensland Government over the validity of fees imposed for the carriage of goods and passengers within the State.

The main ground of attack which was directed against the *State Transport Facilities Acts* 1941-1959 (under which the fees had been levied) was that certain sections of this legislation conferring wide discretionary power on the Commissioner of Road Transport to determine the amount payable by those using the State's roads were contrary to a basic clause of the Bill of Rights (1688)[2] which provided that the "levying of money for or to the use of Crown, by pretence of prerogative, without grant of Parliament, for longer time or in other manner than the same is or shall be granted, is illegal". In particular, an attack was made on section 35 of the Acts. This section laid down the method of computing the amount of the fee. The amount of the fee could be (a) within the discretion of the Commissioner, (b) based on the gross revenue derived from the licensed service, (c) based on the number of vehicles used for carrying on the licensed service, (d) based on a passenger-mile or ton-mile basis or (e) based on the quantity of goods or number of passengers actually carried. Clearly this power concentrated wide discretionary fiscal power in the hands of the Commissioner which could well result in differential rates of fees being payable by individual operators.

However, the Full Court, relying in particular on the authority of *Powell v. Apollo Candle Company*,[3] was of the opinion that such a wide delegation of power to a subordinate authority did not infringe any constitutional prohibition and that in so far as there was statutory authority authorizing such delegation, the fees had not been imposed by the executive "without grant from Parliament" as provided for in the Bill of Rights. Gibbs J. said that "it was well settled that a Legislature such as that of Queensland can delegate its powers to subordinate agencies and no distinction has been drawn between powers of taxation and other powers".[4] But the Court also considered that even if there had been a conflict between the Bill of Rights and the State Transport Facilities Acts which authorized the fees, the latter Acts would prevail. The reason was, as Stable J. pointed out, that the Bill of Rights, which became a part of New South Wales law by virtue of s. 24 of the *Australian Courts Act* 1828 and continued as part of Queensland law when the northern colony was separated from New South

1. [1965] Qd. R. 285.
2. I Will. & Mar. sess 2, c. 2.
3. (1885) 10 App. Cas. 282.
4. [1965] Qd. R. at 297.

Wales,[5] could be amended or repealed as an ordinary statute.[6] The Bill of Rights is not an act applying by paramount force in Queensland and therefore it is not given superior force by s. 2 of the *Colonial Laws Validity Act,* nor is there any special manner and form provision in existence for its amendment under s. 5 of the *Colonial Laws Validity Act.*

The jurisprudential and constitutional significance of this second opinion of the Court is of great moment. During the last year celebrations have been conducted in England and elsewhere to commemorate the signing of Magna Carta in 1215. This basic charter of British liberties together with the Bill of Rights and other laws of a fundamental nature became part of the heritage of British law which was brought to Australia at the time of settlement according to the constitutional doctrine relating to settled colonies[7] and received statutory recognition in the *Australian Courts Act.* But this corpus of law has evidently no entrenched status as part of the legal system of the Australian States—it may be repealed by an ordinary statute of a State Parliament. The following passage taken from a recent commentary on Magna Carta may be quoted here.

> "In the light of seven and a half centuries of English history Magna Carta is no archaic curiosity. It is all very well to say that the sovereignty of Parliament is the key to our Constitution. No constitutional lawyer, be he Dicey or Jennings, can leave it at that. If, as Maitland said, Magna Carta embodies the rule of law, we can say—as Coke said, though not exactly as he meant it—"Magna Carta is such a fellow that he will have no sovereign."[8]

The point here is that "the rule of law", "fundamental law" or whatever other phrase is used to designate the basic presuppositions of our legal system are at present subject to the will of Parliament. It would not of course be realistic to suggest in the twentieth century that the basic liberties of the subject protected by Magna Carta, the Bill of Rights and other basic statutes should be free from legislative regulation, but surely what is needed in Australia to-day is some form of constitutional amendment which will make the so-called fundamental constitutional principles really fundamental in the legal sense, i.e. as providing guiding principles for the behaviour of the organs of government —legislature, executive and the judiciary.[9] Bills of Right are to

5. See *The Constitution Acts* (Qld.), 1867-1961, s. 33.
6. [1965] Qd. R. at 292.
7. See Lumb, *The Constitutions of the Australian States* (2nd ed., 1965), pp. 6-7.
8. Cam, *Magna Carta—Event or Document* (Selden Society Lecture, 1965), p. 26.
9. The legal problems associated with the question of entrenchment of a statute are discussed in *The Constitutions of the Australian States,* Ch. 5, pp. 95 et seq.

be found in the constitutional instruments of most of the American States. Perhaps the time is ripe for the Australian States to adopt similar legislation. This would bring about an increase in the protection of the liberties of the subject while at the same time recognising the need for these liberties to be regulated in the light of needs of society. Is it too late to suggest that, so far as Queensland is concerned, the Bill of Rights which was introduced into the Queensland Parliament some years ago but not proceeded with, could be re-drafted (or an entirely new Bill drafted) taking into account the guiding principles derived from both an analysis of the requirements of the common good and the rights of the citizen?

Legislative power over the Territories—nature of the "Commonwealth"

In *Spratt v. Hermes*[1] the question to be determined by the High Court was whether magistrates exercising jurisdiction in the Australian Capital Territory were required by the Commonwealth Constitution to be appointed for life. In so far as the appointment of magistrates was "during pleasure" a decision that the provisions of s. 72 of the Constitution—which embody life tenure for federal judges—applied to them would have meant that they were not exercising a valid jurisdiction. The members of the Court were agreed that under s. 122 of the Constitution the Federal Parliament had a plenary power of legislating for a Territory, that under this power jurisdiction could be conferred on courts in a Territory to hear offences against the laws of the Commonwealth, but that the requirements of s. 72 of the Constitution were not applicable to appointments to such courts.

It is not proposed in this note to examine all the aspects of the case (which included a detailed analysis of previous authority and the nature of federal jurisdiction) but to focus attention on a question which was taken up by a number of the judges. The question may be briefly formulated in this way: to what extent is the exercise of power over the territorial areas designated as Territories of the Commonwealth (i.e. the non-self-governing areas) an exercise of legislative power over the *Commonwealth?*

Barwick C.J. pointed out that sometimes the word "Commonwealth" is used to refer to the juristic entity created by the Commonwealth Constitution and sometimes to a territorial area over which the powers of that juristic entity might be exercised. He emphasized, however, that one could not distinguish a Commonwealth which consisted only of the self-governing areas—the

1. (1966) 39 A.L.J.R. 369.

States—from a Commonwealth which composed the whole area over which the power of legislation existed, although some of the powers conferred on the Commonwealth related only to the exercise of authority over the area of the federated States. The consequence of this was that there was no essential distinction between Territories which originally contained people who were members of a colony at the time of federation (e.g. Northern Territory and Australian Capital Territory) and other Territories.[2]

On the other hand, Kitto J. considered that a definite distinction existed between the first five chapters of the Constitution which applied to a special "universe of discourse", the federated States, and the power over the Territories which fell within Chapter VI of the Constitution. "The change is from provisions for the self-government of the new federal polity to a provision for the government by that polity of any community which comes under its authority while not being 'part of the Commonwealth'."[3] In other words there was a distinction between the federation of States as it existed from time to time and the wider area which included the non-self-governing Territories.[4]

Menzies J. was of the opinion that the Territories of the Commonwealth were part of the Commonwealth and were within the federal system. "To me, it seems inescapable that Territories are parts of the Commonwealth of Australia and I find myself unable to grasp how what is part of the Commonwealth is not part of the "federal system": see the Commonwealth of Australia Constitution Act s. 5, which refers not only to every State but to every part of the Commonwealth. If there be room for doubt as to this in so far as Territories outside Australia are concerned, I think that the terms of s. 122 itself preclude doubt in the case of Territories within Australia. That section contemplates that an area which is part of a State and so within "the federal system" will be accepted by the Commonwealth . . . I do not understand how the surrender and acceptance authorized by s. 111 of the Constitution can take the area affected outside "the federal system". To my mind, the notion that an area which is geographically within Australia and is part of the Commonwealth of Australia is outside "the federal system" should be given no further countenance."[5] It may be noted that Menzies J. is not willing to adopt the "fluctuating" criterion of Kitto J. viz. that when a part of a State is surrendered to the Commonwealth it is no longer "part of the Commonwealth" or within the federal system. On the other hand Menzies J. does not go so far as Barwick C. J.

2. *Ibid*, pp. 373-4.
3. *Ibid*, p. 375, citing Moore, *The Commonwealth of Australia* (2nd ed.) 1910, p. 589.
4. *Ibid*, p. 375.
5. *Ibid*, p. 383.

and seems to restrict his opinion to territories which geographically form part of the Australian continent (i.e. the A.C.T. and the Northern Territory).

Finally reference may be made to the comment of Windeyer J. on this point. Referring to the Australian Capital Territory Windeyer J. stated that he did not "find any difficulty in regarding the Australian Capital Territory as outside the federal system in the sense that the Parliament's power with respect to it is plenary, whereas a limitation and division of sovereign legislative authority is of the essence of federalism".[6] He therefore seems to be favourably inclined to what we may call the "divisible" or "dualist" doctrine of the Commonwealth.

It can be said therefore that while the members of the Court are agreed that s. 72 has no application to territorial courts, they show differences in the routes by which they arrive at their conclusion. Basically the "non-divisible" approach of Barwick C. J. and Menzies J. is functional in orientation. They accept the notion of one Commonwealth but recognize that a number of the provisions of the Commonwealth Constitution affect only the federated States. The "divisible" doctrine espoused by Kitto J. and supported by Windeyer J. is based on a recognition of a "divisible" Commonwealth, the federated States being strictly part of the Commonwealth and falling within the federal system, the Territories falling outside the federal system and in this sense not being part of the Commonwealth.

It would seem, however, that the differences in the two approaches may not have significant practical effects in so far as interpretation of the Constitution is concerned except in one or two special areas. To take an example, suppose that in the future a question arises as to the application of s. 116 to the Territories. On either approach a conclusion would be reached that that section does or does not apply to the exercise of legislative or administrative power in the Territories: the approaches do not compel *opposite* conclusions. Perhaps the one area in which the approaches may lead to different conclusions is in the area of boundary alteration or territorial changes. It may be that in this respect a holding that the Territories of the Commonwealth are not strictly part of the Commonwealth would influence interpretation of sections 121, 122, 123 and 124 of the Constitution and the operation of the *Colonial Boundaries Act* of 1895 in relation thereto.[7] It may be that in this respect the distinction referred to in the judgment of Menzies J. may become important namely, that while the Territories within the Continent of Australia are part of the Com-

6. *Ibid*, p. 385.
7. See Lumb, *Territorial Changes in the States and Territories of the Commonwealth*. (1963), 37 A.L.J. p. 172.

monwealth, the Territories outside may possibly fall within a different category. The practical significance of this distinction may emerge in the years to come, when the Territory of Papua and New Guinea attains self-governing or independent status or its boundaries undergo some transformation, or the constitutional status or territorial area of one or other of the Territories in the Indian or Pacific Oceans is modified.

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The inter-State trade and commerce power

Some might argue that the recent *Airlines Case*,[1] decided by the High Court of Australia, is not a landmark in constitutional law, but that it merely affirms well established attitudes about s. 51 (i) of fthe Constitution. With the passage of the Commonwealth *Trade Practices Act* 1965, however, the *Airlines Case* should not be allowed to pass completely unnoticed by this journal.

S. 51 (i) of the Constitution empowers the Commonwealth Parliament to make laws with respect to trade and commerce among the States. The words "trade and commerce among the States" seem to describe the movement of a person or thing from one State to another, movement which is carried out so that some purpose may be achieved in the latter State.[2] In other words, the phenomenon described by s. 51 (i) is a form of movement. This is a very narrow conception. But it is a well known doctrine that a legislative power with respect to a subject matter extends, as well, to matters which are incidental to that subject matter. "A legislative power . . . . with respect to any subject matter contains within itself authority over whatever is incidental to the subject matter of the power and enables the legislature to include within laws made in pursuance of the power provisions which can only be justified as ancillary or incidental."[3] The identification of those matters which are incidental to trade and commerce among the States and therefore within Commonwealth power is the central problem of s. 51 (i).

The phrase "among the States" is proving to be an important limitation upon the doctrine of incidental power insofar as it applies to s. 51 (i) of the Constitution. The doctrine cannot be applied to s. 51 (i) so as to render meaningless the phrase "among

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1. *Airlines of N.S.W. Pty. Ltd. v. N.S.W.* (1965) 38 A.L.J.R. 388.
2. For argument in favour of this proposition, see an article by the writer 'S. 92 of the Commonwealth Constitution', (1964) 4 U.Q.L.J. 369. For discussion concerning the relationship between s. 51 (i) and s. 92 of the Constitution, see 28 C.L.R. at p. 549, 71 C.L.R. at p. 82, 88 C.L.R. at p. 386, and 93 C.L.R. at p. 77.
3. Dixon C.J., *Wragg v. N.S.W.* (1953) 88 C.L.R. 353, 386.