THE
SYDNEY LAW REVIEW

VOLUME 6, No. 1 JUNE, 1968

TRIAL BY JURY AND SECTION 80 OF THE AUSTRALIAN CONSTITUTION

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Although American precedent was influential in the drafting of the Australian Constitution there was one area where it had little, if any, impact.[1] Our founding fathers were singularly uninterested in the elaborate constitutional guarantees contained in the United States Constitution and its amendments. The history and experience of the Australian colonies during the nineteenth century, unlike that of the American colonies during the eighteenth century, did not teach the need for constitutional fetters on the exercise of governmental power.[2] As a result the Constitution is almost exclusively devoted to the establishment of the various branches of the Commonwealth Government and the allocation of legal responsibilities between them on the one hand and the States on the other. With only a few exceptions the Constitution is not concerned to control the exercise of the powers thus allocated. The exceptions are however interesting. There are four guarantees in the American style. Section 116 contains a guarantee of religious freedom.[3] Section 117 prohibits discrimination on the basis of State residence.[4] I have dealt with the history and meaning of these provisions in other places.[5] The power of the Commonwealth compulsorily to acquire property from any State or person is subject

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[1] See generally E. M. Hunt, *American Precedents in Australian Federation* (1930).

[2] "To establish personal liberty by constitutional restrictions upon the exercise of governmental power was not a guiding purpose in framing the Australian instrument, which in this respect departs widely from the American model." *R.* v. *Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 C.L.R. 556 at 580 *per* Dixon and Evatt, JJ. I have tried to develop this point in "Travelling Section 116 with a U.S. Road Map" (1963) 4 *Melb. U.L.R.* 41 at 43-56.

[3] "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."

[4] "A Subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State."

[5] See "Travelling Section 116 with a U.S. Road Map" (1963) 4 *Melb. U.L.R.* 41; "Discrimination on the Basis of State Residence in Australia and the United States" (1968) 6 *Melb. U.L.R.* 1.

to the requirement that it must do so on "just terms".[6] Finally there is s. 80 which is the subject of the present paper. It provides as follows:

> The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.

On its face this section seems to contain a significant guarantee of a right to trial by jury. It has not been so interpreted. As Barwick, C.J. pointed out in a recent case: "What might have been thought to be a great constitutional guarantee has been discovered to be a mere procedural provision".[7]

I

Section 80 forms part of Chapter 111 of the Constitution which deals with the judicial power of the Commonwealth. The influence of the equivalent provisions contained in Article 111 of the United States Constitution was strong and is clearly apparent.[8] Section 80 reflects the following clause contained in Article 111, s. 2:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by law have directed.

The Australian provision does not go on further to amplify the nature of this right as does the Sixth Amendment of the United States Constitution which specifies:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law. . . .

The main difference between the terms of s. 80 and those of Article 111, s. 2 is that while the latter attaches its guarantee to the trial of "all Crimes" the former only applies when the trial is "on indictment". The history of the change in terminology is interesting. It came about in two stages.

As originally drafted by the Judiciary Committee of the 1891 Convention the section applied to trials of "all indictable offences".[9] This Committee worked under the chairmanship of Andrew Inglis Clark who not only greatly admired the United States Constitution but also had a sound knowledge of its interpretation in the courts.[10] The Judicature Chapter of the 1891 Constitution was largely his work. It is almost certain that Clark knew of the difficulties experienced by the American courts in interpreting the words "all

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[6] Con. s. 51 (xxxiii).

[7] *Spratt* v. *Hermes* (1965) 114 C.L.R. 226 at 244.

[8] See E. M. Hunt, *op. cit.* at 185-200 *passim;* Z. Cowen, *Federal Jurisdiction in Australia* (1959) *passim.*

[9] *Proceedings and Debates of the National Australian Convention,* 1891, clxiv. As adopted by the Convention the clause, which was s. 11 of Chapter 111 of the draft Constitution Bill, read: "The trial of all indictable offences cognisable by any Court established under the authority of this Act shall be by jury, and every such trial shall be be held in the State where the offence has been committed, and when not committed within any State the trial shall be held at such place or places as the Parliament of the Commonwealth prescribes."

[10] J. Reynolds, "A. I. Clark's American Sympathies and his Influence on Australian Federation" (1958) 32 *A.L.J.* 62.

Crimes" in Article 111, s. 2. At first sight those words might seem to cover every criminal prosecution irrespective of the nature or gravity of the offence. There were many American decisions however which reached a different result by interpreting the words against the background of English and colonial experience. At the time the Constitution was adopted there were many offences which were punishable summarily. The courts refused to accept the view that the guarantee of trial by jury was intended to apply to these cases. A distinction was drawn between serious or grave offences on the one hand and petty or trivial offences on the other.[11] Only the former were held to be "crimes" within the meaning of Article 111, s. 2 or to be the subject of "criminal prosecutions" within the meaning of the 6th Amendment. It was, and is, a very difficult distinction to draw in any particular case.[12] With this American experience in mind Clark probably wanted to make it clear that the constitutional requirement of trial by jury only applied in serious cases and did not prevent the Commonwealth from providing for the summary punishment of certain offences. He thus adopted the distinction between "indictable offences" and offences punishable summarily. The Convention adopted the clause without debate.

The second stage in the history of this difference in terminology between Article 111, s. 2 and s. 80 took place during the third session of the Convention of 1897-98. Edmund Barton, the leader of Convention, moved to alter the words "The trial of all indictable offences" to "The trial on indictment of any offence". He argued that the use of the phrase "indictable offences" was unduly restrictive. In his opinion if an offence could either be prosecuted summarily or on indictment then it was an "indictable offence" by reason of the fact that an indictment *could* have been brought whether it was in fact brought or not. Barton wanted to reserve to the Commonwealth the right to choose the appropriate method of prosecution and only guarantee a trial by jury if the procedure of indictment was used. He used the example of contempt of court which is an indictable offence but which is usually punished summarily. In his view under the clause as it stood all contempts would have to be tried by jury because they were "indictable".[13] He pointed out that:

> The better way, however, is as we suggest that where there is a power of punishing a minor [offence] summarily, it may be so punished summarily. But where an indictment has been brought the trial must be by jury. The object was to preserve trial by jury where an indictment has been brought, but such cases of contempt should be punishable by the court in the ordinary way. . . . There will be numerous Commonwealth enactments which would prescribe, and properly prescribe, punishment, and summary punishment; and if we do not alter the clause in this

[11] See *Callan* v. *Wilson* (1888) 127 U.S. 540. The earlier State decisions are collected in the judgment of Harlan, J.

[12] See generally F. Frankfurter and T. Corcoran, "Petty Federal Offences and the Constitutional Guarantee of Trial by Jury" (1926) 39 *Harv. L.R.* 917; Annot. "Offences as to which a Jury Trial is a Constitutional Right" (1930) 75 L. ed. 177-221; *District of Columbia* v. *Clawans* (1937) 300 U.S. 617.

[13] It is interesting to note that in the United States the Supreme Court has held that neither Article 111, s. 2 nor the 6th Amendment operate to guarantee trial by jury in contempt cases. "These are sui generis—neither civil actions nor prosecutions for offences within the ordinary meaning of those terms. . . ." *Myers* v. *U.S.* (1924) 264 U.S. 95 at 103 *per* McReynolds, J. See also *Green* v. *U.S.* (1958) 356 U.S. 165; *In Re Debs* (1895) 158 U.S. 564; *Gompers* v. *U.S.* (1914) 233 U.S. 604. The Supreme Court has recently announced however that if a jury trial is not given the court cannot impose a more severe punishment than would be proper for a "petty" offence. See *U.S.* v. *Barnett* (1964) 376 U.S. 681 at 695, n. 12.

> way they will have to be tried by jury, which would be a cumbrous thing, and would hamper the administration of justice of minor cases entirely.[14]

The amendment was agreed to.

Before examining the interpretation that the High Court has given to the phrase "the trial on indictment" it will be convenient at this point to note several other features of the debate on s. 80 in the 1897-98 Convention. The section was attacked on two grounds. First it was said that it was an unnecessary restriction on the power of the Commonwealth. Patrick Glynn stated this view as follows:

> I do not see why we should put any limit on the Federal Parliament within its own jurisdiction such as is proposed by this clause. We are making trial by jury a fixture. We should give the Federal Parliament as much latitude in deciding whether trial by jury should be perpetuated as possible. We should not render its power less great than the power which is possessed by the states at present. . . . I ask on what grounds are we to follow the precedent of America in this matter? There is no reason why we should do so. It is simply copying, without the existence of the same necessity, of a clause in the American Constitution. On the ground that you should not fetter the omnipotence of Parliament, I hold that the words ought to be struck out.[15]

The second attack came from Isaac Isaacs. He pointed out that the provision constituted a rather futile safeguard because each time the Commonwealth Parliament "creates an offence, it may say it is not to be prosecuted by indictment, and immediately it does it is not within the protection of this clause".[16] In his opinion the Parliament could "if it chose, say that murder was not to be an indictable offence, and therefore the right to try a person accused or murder would not necessarily be by jury".[17]

These formidable arguments against the desirability of including s. 80 in the Constitution in its present form, or at all, went unanswered. Bernhard Wise was the only member to speak in favour of the clause and his remarks consisted of vague generalities about the virtue of trial by jury.[18] The supporters of the clause remained silent but it was carried nevertheless.

Several specific questions in regard to the meaning of the phrase "the trial on indictment" in s. 80 must be examined. To begin with, is the Commonwealth Parliament at liberty to specify that any criminal offence it validly creates[19] can be prosecuted summarily? The question arose in *R.* v. *Archdall and Roskuge*.[20] There the accused had been prosecuted summarily before a magistrate for offences against s. 30K of the Commonwealth Crimes Act,

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[14] *National Australian Convention Debates*, 3rd Session, Melbourne (1898) at 1894-95.

[15] *Id.* at 350, 353. See also the remarks of Henry Bournes Higgins at 350-53 *passim*.

[16] *Id.* at 352. O'Connor interjected: "You may trust the Parliament not to increase the list of offences to be dealt with by summary jurisdiction." Isaacs retorted: "Then you may trust the Parliament not to wipe out the right to a jury?" *Ibid.*

[17] *Id.* at 1895. "The illustration is striking but a reference to another offence more within Commonwealth legislative jurisdiction than the crime of murder would have been sufficient." H. V. Evatt, "The Jury System in Australia" (1936) 10 *A.L.J.* (Supp.) 49 at 64.

[18] *Id.* at 350. Higgins said that in the mouth of anyone else Wise's remarks would have been "mere claptrap"! *Ibid.*

[19] It must be remembered that the Commonwealth has no general power in regard to criminal law. Such offences as it creates must be linked to some affirmative head of power. See *R.* v. *Bernesconi* (1915) 19 C.L.R. 629 at 634-35; *R.* v. *Kidman* (1915) 20 C.L.R. 425 at 433-34; *Burns* v. *Ransley* (1949) 79 C.L.R. 101; *R.* v. *Sharkey* (1949) 79 C.L.R. 121; *Communist Party Case* (1950) 83 C.L.R. 1. at 187.

[20] (1928) 41 C.L.R. 128.

1914-26. That section made it an offence to hinder the provision of a public service by the Commonwealth by boycott of property without reasonable excuse. The offence was punishable by imprisonment for up to a period of one year. Section 12(1) of the Act provided that all offences against the Act, other than those specifically stated to be indictable offences, could be prosecuted either on indictment or summarily. The offence in s. 30K was not expressed to be an indictable offence.

One of the points argued before the High Court was that the Commonwealth Parliament did not have complete freedom to determine the method of prosecution to be used in regard to the offences it created. Counsel argued as follows:

> To ascertain what are indictable offences within the meaning of s. 80 of the Constitution, regard must be had to the law as it stood when the Constitution Act was enacted, and such offences as were then regarded as indictable cannot be declared by Parliament to be other than indictable.[21]

The six members of the High Court rejected the argument as having no substance. In the joint judgment of Knox, C.J., Isaacs, Gavan Duffy and Powers, JJ. it is stated: "The suggestion that the Parliament, by reason of s. 80 of the Constitution, could not validly make the offence punishable summarily has no foundation and its rejection needs no exposition".[22] Starke, J. thought the argument "untenable".[23] For his part Higgins, J. was of opinion that all s. 80 meant was that "if there be an indictment, there must be a jury; but there is nothing to compel procedure by indictment".[24]

This decision would seem to establish the following propositions. First that the Commonwealth can, at its complete discretion, determine whether a trial will take place on indictment. Second, this discretion can either be exercised by the Parliament itself, by providing only one method of prosecution, or left to the discretion of an enforcement authority to choose between the alternatives it has provided.[25] To be sure, the facts of *Archdall and Roskuge* involved an offence for which there was a maximum punishment of imprisonment for one year. There is nothing in the judgments, however, which would suggest that a more severe punishment would alter the position. It is interesting to note that in general the Commonwealth has as a matter of practice limited the punishment for summary convictions to a period of imprisonment of one year or less.[26] This would seem to be a matter of policy and not of the limits of constitutional power. The result produced by *Archdall and Roskuge* is to confine s. 80 within very narrow limits. Just as Isaacs, J. had pointed out long before as a member of the Constitutional Convention of 1897-98, s. 80 was really not much of a guarantee at all.

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[21] *Id.* at 133.
[22] *Id.* at 136.
[23] *Id.* at 147.
[24] *Id.* at 139-40.
[25] Latham, C.J. has stated the effect of Archdall and Roskruge as follows: "The Commonwealth Parliament can, at its discretion, provide that offences shall be triable summarily or on indictment. It is only when the trial takes place on indictment (not when the offence is an offence which might have been prosecuted on indictment) that s. 80 applies."
[26] (1938) 59 C.L.R. 556, at 571. S. 12 of the Crimes Act, 1914-60 provides that a court of summary jurisdiction "may not impose a longer period of imprisonment than one year in respect of any one offence against this act". See also ss. 42-43 of the Acts Interpretation Act, 1901-64 which provide that, unless the contrary intention appears, an offence punishable by more than six months imprisonment shall be indictable and if less than six months then it is punishable summarily.

This conclusion was criticised in the joint dissenting judgment of Dixon and Evatt, JJ. in *R.* v. *Federal Court of Bankruptcy; Ex parte Lowenstein*[27] where their Honours pointed out:

> It is a queer intention to ascribe to a constitution; for it supposes that the concern of the framers of the provision was not to ensure that no one should be held guilty of a serious offence against the laws of the Commonwealth except by the verdict of a jury, but to prevent a procedural solecism, namely, the use of an indictment in cases where the legislature might think fit to authorize the court itself to pass upon the guilt or innocence of the prisoner. There is high authority for the proposition that "the Constitution is not to be mocked". A cynic might, perhaps, suggest the possibility that s. 80 was drafted in mockery; that its language was carefully chosen so that the guarantee it appeared on the surface to give should be in truth illusory. No court could countenance such a suggestion, and, if this explanation is rejected and an intention to produce some real operative effect is conceded to the section, then to say that its application can always be avoided by authorizing the substitution of some other form of charge for an indictment seems but to mock at the provision.[28]

With the greatest of respect to their Honours it might be said that one need not be a cynic but merely an historian to observe that the phrase "the trial on indictment" was inserted in s. 80 for the very purpose of producing the result they regarded as a "mockery".[29] Despite this isolated protest however it seems that *Archdall and Roskuge* states the settled interpretation of this aspect of s. 80.[30] As thus interpreted it is conceded on all hands that it is a simple matter for the Commonwealth to avoid the necessity of providing for trial by jury.[31]

II

If s. 80 compels a jury trial when there is a "trial on indictment" it becomes important to ascertain the nature of this procedure. Blackstone defined an indictment as follows: "An *indictment* is a written accusation of one or more persons of a crime or misdemeanor, preferred to, and presented upon oath by a grand jury".[32] At common law a grand jury consisted of 12 to 23 persons. Their function was to listen to the evidence of the prosecution and to decide whether it was of such a nature that the accused should be called upon to answer the charges set out in the bill of accusation.[33] If they decided he should stand trial then the accused was prosecuted by the Crown before a

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[27] (1938) 59 C.L.R. 556.

[28] *Id.* at 581-82.

[29] See *supra.*

[30] *R.* v. *Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 C.L.R. 556; *Sachter* v. *A.G. for the Commonwealth* (1954) 94 C.L.R. 86; *Re Bell* (1954) Q.S.R. 154, appeal to High Court dismissed (1954) 92 C.L.R. 665; *Spratt* v. *Hermes* (1965) 114 C.L.R. 226 at 244 *per* Barwick, C.J.

[31] "As s. 80 has been interpreted there is no difficulty in avoiding trial by jury where it does apply. . . ." *Queen* v. *Kirby; Ex parte Boilermaker's Society of Australia* (1956) 94 C.L.R. 254 at 290 *per* Dixon, C.J., McTiernan, Fullagar and Kitto, JJ. See also H. V. Evatt, "The Jury System in Australia" (1936) 10 *A.L.J.* (Supp.) 49 at 65; *Ffrost* v. *Stevenson* (1937) 58 C.L.R. 528 at 592.

[32] Sir W. Blackstone, 4 *Commentaries on the Laws of England* (1765) at 302.

[33] The grand jury would indicate their conclusion by writing either "not found" or "true bill" on the indictment. At an earlier stage the endorsement was either "billa vera" or "ignoramus". See H. J. Stephen, 4 *Commentaries on the Law of England* (1845) ch. xviii.

judge and petty jury of 12. The charges he had to answer were those set out in the grand jury's indictment. This was the strict common law meaning of "trial on indictment".

In Australia this grand jury procedure was rarely used. Except for a brief period between 1823 and 1828 the procedure was not used at all in New South Wales.[34] In 1828 the Imperial Parliament enacted that ". . . until further provision be made as hereinafter directed for proceedings by Juries, all Crimes, Misdemeanors, and Offences . . . shall be prosecuted by Information, in the Name of His Majesty's Attorney General, or other Officer duly appointed for such Purpose by the Governor of New South Wales and *Van Diemen's Land* respectively . . ."[35] It should be remembered that at this time Victoria and Queensland were still parts of New South Wales. This provision contemplated the creation of a grand jury system at a future time when conditions in the colonies had altered; no doubt by the influx of large numbers of free settlers. The substitution of the Attorney General for the grand jury worked so satisfactorily however that this was not done. In 1885 Sir J. Martin, C.J. was able to say:

> In our mode of instituting criminal prosecutions I think we are infinitely in advance of the practice of the mother country. There can be no question that the power of determining whether there shall be a prosecution or not is in much safer hands when entrusted to a lawyer, of the eminence of which an Attorney-General appointed under our present system of government must always be, than in the hands of a jury, most—perhaps all—of whom are ignorant of the law, and who conduct their inquiries without a tithe of the deliberation which an Attorney-General must exercise when reading the depositions in order to determine whether he should prosecute or not.[36]

The Grand Jury procedure operated for a time in South Australia and in Western Australia. It was abolished in the former in 1852[37] and in the latter in 1883.[38] Victoria seems to be the only Australian State in which the possibility of summoning a grand jury still remains.[39] The power has been exercised only on very rare occasions.[40] It is true to say that the normal method of instituting prosecutions of indictable offences in Australia has been by an information signed by a Law Officer of the Crown or a specially appointed Crown Prosecutor. They exercise the same powers as were exercised by Grand Juries in England[41] prior to their abolition in 1933.[42] The written accusation is

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[34] The history of the matter is set out in *R.* v. *McKaye* (1885) 6 N.S.W.R. 123 at 127-30 *per* Sir J. Martin, C.J. See also *Byrne* v. *Armstrong* (1899) 25 V.L.R. 126 at 133 *per* Madden, C.J.

[35] 9 Geo. IV c. 83, s. v.

[36] *R.* v. *McKaye, op. cit.* at 130.

[37] Act No. 10, s. 1.

[38] Grand Jury Abolition Amendment Act, s. 4.

[39] Crimes Act, 1958 s. 354.

[40] See *In Re Davies and Millidge* (1893) 19 V.L.R. 346; (No. 2) 251; (No. 3) 269; *R.* v. *McInnes, Erskine and Caldwell* (1940) V.L.R. 416. There have been ". . . not more than half a dozen cases in the whole history of this State in which a grand jury has been called together. . . ." *Id.* at 420 *per* Lowe, J.

[41] "Under the law of New South Wales there is no grand jury, and the Attorney General discharges a duty analogous to or replacing that which, under the common law, performed by a jury. . . . When an accused person is committed for trial, it is for the Attorney General to consider whether the accused should be put on his trial and for what precise offence, and this he does by filing or refusing to file an indictment." *Commonwealth Life Assurance Society Ltd.* v. *Smith* (1938) 59 C.L.R. 527 at 543 *per* Rich, Dixon, Evatt and McTiernan, JJ. . . . See also *R.* v. *Cannan* (1918) V.L.R. 391; *R.* v. *Patterson* (1867) 4 W.W. & A'B. 43; *R.* v. *Walton* (1851) 2 Legge (N.S.W.) 706; *R.* v. *Martin* (1884) 10 V.L.R. 343.

[42] Administration of Justice (Miscellaneous Provisions Act, 1937 s. 1. See also Criminal

described as an indictment, or an information or a presentment in different states.[43] This same general system is used by the Commonwealth. Section 69 of the Judiciary Act, 1903-59 provides: "Indictable offences against the laws of the Commonwealth shall be prosecuted by indictment in the name of the Attorney General of the Commonwealth or of such other person as the Governor-General appoints in that behalf". The laws of the State where the prosecution takes place govern the procedure at the trial.[44]

In view of the history of the procedures used in the prosecution of indictable offences in Australia the validity of s. 69 of the Judiciary Act is clear. Despite the strict meaning of "trial on indictment" under the English common law[45] it is certain that in s. 80 of the Constitution this phrase does not contemplate the use of grand jury.[46] It is a "trial on indictment" if the prosecution is commenced by a written accusation signed by a Law Officer of the Crown or a Prosecutor appointed for that purpose.[47]

The next question which arises is whether the phrase "trial on indictment" is limited in its operation to such proceedings as these. It is not an easy question to answer. There is English authority for the view that the inquisition of a coroner's jury is equivalent to a common law indictment.[48] The inquisition of a coroner sitting without a jury would similarly have the same effect.[49] In these cases it is the coroner or the coroner's jury who decide whether the accused will stand trial and formulate the charges he will be called upon to answer. Another related procedure is the power of the Supreme Courts to give a private person leave to file an information which is then prosecuted in the name of the Attorney General.[50] In this procedure the responsibility for the formulation of the charge rests with the Court.

In *R.* v. *Federal Court of Bankruptcy; Ex parte Lowenstein*[51] Dixon and Evatt, JJ. endeavoured to find some common link between these procedures. They stated their conclusions as follows:

> What then is the essence of a "trial upon indictment" which sec. 80 insists shall be by a jury? For ourselves we should have thought that to find an answer it was necessary to look for the substantial elements common to

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Justice Act, 1948, s. 31(3).

[43] Victoria, Crimes Act, 1958 s. 353—Presentment; South Australia, Criminal Law Consolidation Act, 1935-57 s. 275—Information; Tasmania, Criminal Code Act, 1924 s. 310—Indictment; Queensland, Criminal Code, 1899 s. 560—Indictment. See *R.* v. *Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 C.L.R. 556 at 582-83; *R.* v. *Cannan* (1918) V.L.R. at 391.

[44] The trial usually takes place in a State court invested with federal jurisdiction. S. 68 (1) of the Judiciary Act, 1903-59 makes the law of that State relating to the "trial and conviction on indictment" applicable. The trial may also take place before the original jurisdiction of the High Court. The law of the State where the Court sits applies in the same way. See High Court Procedure Act, 1903-50 s. 15B. Such prosecutions are rare.

[45] In *R.* v. *Slater* (1881) 8 Q.B.D. 267 it was held that an indictment and an *ex officio* information by the Attorney General were completely different legal procedures. The latter could not be regarded as being covered by the word "indictment" as used in s. 7 of the Corrupt Practises Act, 1863. It is submitted that this decision is of no relevance to the interpretation of s. 80 of the Constitution.

[46] *Cf. R.* v. *Judd* (1904) 10 A.L.R. (C.N.) 73.

[47] Quick and Garran, *Annotated Constitution of the Australian Commonwealth* (1901) at 808; Quick and Groom, *The Judicial Power of the Commonwealth* (1904) at 196.

[48] *R.* v. *Ingham* (1864) 33 L.J.Q.B. 183. "The accusation by such a jury is equally an accusation as that of the grand jury." *Id.* at 189 *per* Blackburn, J.

[49] The finding of a coroner's inquest "is equivalent to the preferment and signing of a bill of indictment". Archbold, *Criminal Pleading, Evidence and Practice* (34 ed. 1959) at 118. See also *R.* v. *Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 C.L.R. 556 at 582 *per* Evatt and Dixon, JJ.

[50] See 9 Geo. IV c. 83, s. vi (1823); *R.* v. *McKaye* (1885) 6 N.S.W.R. 123.

[51] (1938) 59 C.L.R. 556.

> the recognized forms of procedure so called and going to make up the conception of prosecution upon indictment. We think that the first of them would be seen to be that some authority constituted under the law to represent the public interest for the purpose took the responsibility of the step which put the accused on his trial; the grand jury, the coroner's jury or the coroner, the law officer or the court. A second element, we think, would be found in the liability of the offender to a term of imprisonment or to some graver form of punishment. We should not have taken the view that sec. 80 was intended to impose no real restriction upon the legislative power to provide what kind of tribunal shall decide the guilt or innocence on a criminal charge.[52]

Their Honours went on to note the existence of "two further characteristics found in offences indictable at common law which may not be essential to the conception".[53] These characteristics were that such offences "fall within the jurisdiction of a superior court and they are pleas of the Crown".[54]

These observations were made in the course of a consideration of the validity of s. 217 (1) of the Bankruptcy Act, 1924-33 which provided that if the Bankruptcy Court "in any application for an order of discharge either voluntary or compulsory, has reason to believe that the bankrupt has been guilty of an offence against this Act punishable by imprisonment, it may—(a) charge him with the offence and try him summarily or (b) commit him for trial before any court of competent jurisdiction". The Bankruptcy Court had directed that Lowenstein be charged with an offence and directed a summary trial. Latham, C.J., Dixon and Evatt, JJ. considered whether s. 217 (1) was consistent with s. 80 of the Constitution. The point was not argued by counsel.[55]

Dixon and Evatt, JJ. were of opinion that s. 80 of the Constitution did not allow the summary proceedings which s. 217 (1) of the Act purported to authorize. Their Honours pointed out that s. 217 (1) covered serious offences which, apart from its own provisions, would have to be prosecuted on indictment. Furthermore the court itself is the authority which takes responsibility for the prosecution. Although the proceedings did not run in the King's name they did not run in any other "and the court which promotes them is an organ of government".[56] In these circumstances their Honours were prepared to hold that the summary prosecution which s. 217 (1) purported to authorize was in substance a trial on indictment.[57] They did not find it necessary to do so however because, contrary to the opinion of the majority of the Court, they held the section invalid on other grounds.

Latham, C.J., who was the other member of the Court who adverted to s. 80, did not agree that the proceedings authorized by s. 217 (1) constituted a "trial on indictment". He said:

> I have been unable to find any authority to the effect that any prosecution initiated or directed by a court or some public authority is, because it is so initiated or directed a trial on indictment.[58]

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[52] *Id.* at 583.
[53] *Ibid.*
[54] *Id.* at 584.
[55] "No argument based upon sec. 80 was addressed to the court in these proceedings." *Id.* at 571 *per* Latham, C.J.
[56] *Id.* at 584.
[57] *R.* v. *Archdall and Roskuge* (1928) 41 C.L.R. 128, *supra,* was distinguished on the ground that it was unnecessary in that case to consider what constituted a trial on indictment.
[58] *Id.* at 570.

His Honour expressed the view that the Commonwealth had complete freedom to determine whether any particular offence was to be prosecuted summarily or on indictment. The other members of the Court, Rich and Starke, JJ., joined the Chief Justice in holding that s. 217 (1) was valid. They did not however refer to s. 80 of the Constitution.

The question came before the High Court again in *Sachter* v. *Attorney General for the Commonwealth*.[59] In this case the judge of the Bankruptcy Court had directed the summary trial of several charges under s. 217. The Attorney General conducted the prosecution and obtained the judge's consent to certain alterations in the formulation of the charges. It was argued that "If the Attorney General, in effect, signs or directs or delivers or makes the charge, as here, that charge is in fact an indictment".[60] Dixon, C.J., who delivered the judgment of the Court, declined to discuss the argument. He pointed out that s. 217 had been held valid in *Lowenstein's Case* and indicated that the Court was not prepared to reconsider the question.

In view of *Lowenstein's Case* and *Sachter's Case* it must now be regarded as settled that the mere fact that the decision to prosecute is made by a judge, or the Attorney General, or some other public officer does not make the subsequent trial a "trial on indictment". The Commonwealth can authorize such persons to determine whether the accused will be tried summarily or on indictment. This was also implicit in *Archdall and Roskuge*.[61]

The question of what is meant by a "trial on indictment" however still remains. Some assistance may be obtained from the following passage from Dixon, J.'s judgment in *Munday* v. *Gill*:[62]

> There is . . . a great distinction in history, in substance and in present practice between summary proceedings and trial upon indictment. Proceedings upon indictment, presentment, or *ex officio* information are pleas of the Crown. A prosecution for an offence punishable summarily is a proceeding between subject and subject. The former are solemnly determined according to a procedure considered appropriate to the highest crimes by which the State may be affected and the gravest liabilities to which a subject may be exposed. The latter are disposed of in a manner adopted by the Legislature as expedient for the efficient enforcement of certain statutory regulations with respect to the maintenance of the quiet and good order of society.[63]

His Honour's remarks would support the view that the essence of a "trial on indictment" is a prosecution which is brought in the name of the Crown. It is submitted that this is the meaning of the phrase as used in s. 80 of the Constitution. Usually this procedure will be used for the prosecution of serious crimes which carry the possibility of severe punishment. In my submission, however, the severity of the punishment is not a necessary part of the conception of "trial on indictment" in s. 80. It seems to be concerned with form and not with substance. If a prosecution is brought in the name of the Crown it amounts to a trial on indictment irrespective of whether the possible punishment is severe or not. Similarly if a prosecution is not brought in the name of the Crown it will not constitute a trial on indictment even though the offence is subject to severe punishment. It is realized that this view is directly

[59] (1954) 94 C.L.R. 86.
[60] *Id.* at 87.
[61] *Cit. supra*, n. 20.
[62] (1930) 44 C.L.R. 39.
[63] *Id.* at 86.

opposed to that expressed by Dixon and Evatt, JJ. in their dissenting judgment in *Lowenstein's Case*. The later history of *Lowenstein's Case*, however, indicates that their Honours' interpretation has been rejected by the High Court.

I would conclude therefore that "trial on indictment" as used in s. 80 of the Constitution means:

1. Any prosecution which is commenced by a written accusation signed by a Law Officer of the Crown or a Crown Prosecutor appointed for that purpose; or
2. Any other prosecution which is brought in the name of the Crown irrespective of how or by whom it is instituted.

III

Section 80 only operates in regard to offences against "any law of the Commonwealth". This phrase clearly covers any criminal offence which the Commonwealth Parliament may create by an exercise of its legislative powers.[64] But does it cover a common law offence? This question assumes that there may be common law offences which exist as a matter of Commonwealth law independently of statute. It is submitted that this assumption is correct. As Latham, C.J. once pointed out the Commonwealth "was not born into a vacuum".[65] At its creation the common law relating to the rights and prerogatives of the Crown and its officers automatically attached to the Executive Government of the Commonwealth. Thus it is a crime to conspire to defraud the Commonwealth even in the absence of a statute.[66] Of course the existence of these common law offences is not of much practical significance in view of the detailed provisions of the Commonwealth Crimes Act, 1914-1960. It is submitted, however, that many of the crimes defined in that Act would still be crimes if that Act did not exist.[67]

Assuming then that there are certain crimes which exist as a matter of Commonwealth common law, is it proper to say that a prosecution in respect of any of them is for an offence against a "law of the Commonwealth" within the meaning of s. 80. Some assistance in answering this question may be derived from comparing the use of the phrase "any law of the Commonwealth" in s. 80 with the phrase "any laws made by the Parliament" in s. 76 (ii) which is also contained in Chapter III of the Constitution. This latter provision gives power to the Commonwealth Parliament to confer original jurisdiction on the High Court in respect of any matter "Arising under any laws made by the Parliament". In this context it is clear enough that the phrase is limited to an exercise of Commonwealth legislative power. The use of the different phrase "any law of the Commonwealth" only a few sections later would seem to suggest that it was intended to have a different and broader meaning. In *R.* v. *Kidman* Griffith, C.J. drew attention to this difference. He expressed his opinion that "it is impossible to contend success-

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[64] The Commonwealth has no general power with regard to criminal law. See *supra* n. 19.

[65] *Uther* v. *Federal Commissioner of Taxation* (1947) 74 C.L.R. 508 at 521.

[66] *R.* v. *Kidman* (1915) 20 C.L.R. 425 at 435-37 *per* Griffith, C.J. and at 444-46 *per* Isaacs, J. See also *R.* v. *Sharkey* (1949) 79 C.L.R. 121 at 163 *per* Webb, J. See generally Sir O. Dixon, "The Common Law as an Ultimate Constitutional Foundation" (1957) 31 *A.L.J.* 240.

[67] E.g., Treason (s. 24); Sedition (ss. 24 A-F); Inciting Mutiny (s. 25); False Pretences (ss. 29 A-C); Perjury (s. 35); Counterfeiting Coin (ss. 52-59); Forgery (ss. 63-68); Stealing (s. 71).

fully that they can be treated as synonymous".[68]

Outside Chapter 111 similar phrases like "the law of the Commonwealth" or "the laws of the Commonwealth" do not seem to be used with any constant meaning despite the contention by Knox, C.J. and Gavan Duffy, J. that the latter phrase in "every case probably means Acts of the Parliament of the Commonwealth".[69] Indeed the usual manner in which phrases are used seems to include the common law as well as statute law. For example, s. 120 of the Constitution provides that every State shall make provision for the imprisonment of persons accused or convicted of "offences against the laws of the Commonwealth". This section would seem to apply whether a person was convicted of a common law or a statutory offence. Similarly the provision in s. 44 (ii) that any person convicted "for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer" shall be incapable of being chosen, or of sitting, in either House of the Commonwealth Parliament would seem to embrace both common law and statutory offences.[70] On the other hand when s. 41 provides that no adult who is entitled to vote at a State lower house election shall "be prevented by any law of the Commonwealth" from voting in federal elections it is clear that this *can* only mean a Commonwealth statute.[71]

These considerations would lead me to the conclusion that "any law of the Commonwealth" in s. 80 of the Constitution includes common law and statutory offences. The change in terminology between s. 76 (ii) and s. 80 and the fact that the phrase is not generally used in a restrictive sense in other parts of the Constitution underpin this conclusion.[72] Furthermore there is no reason to ascribe to s. 80 the curious intention to provide for jury trial in cases of indictments for statutory offences but not common law offences.

There is still another problem with regard to the meaning of this phrase. The Commonwealth Parliament is given a plenary power to administer territories under its control by s. 122 of the Constitution. This broad power stands in contrast to the limited powers vested in the Commonwealth Parliament when it legislates as the central government of the federal system. In this latter sphere it may only exercise the specific powers vested in it by s. 51 and other relevant provisions of the Constitution. The question arises as to whether a law enacted by the Commonwealth Parliament under s. 122 is a "law of the Commonwealth" within the meaning of s. 80. *R.* v. *Bernasconi*[73] held that it was not.

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[68] (1915) 20 C.L.R. 425 at 439.

[69] *Commonwealth* v. *Colonial Combing Spinning and Weaving Co. Ltd.* (1922) 31 C.L.R. 421 at 431. Their Honours expressed the opinion that in s. 61 which provides that the executive power of the Commonwealth is vested in the Queen "and extends to the execution and maintenance of this Constitution and the laws of the Commonwealth" the phrase may not include prerogative powers. This is doubtful. The other three members of the Court rested their judgments on different grounds.

[70] There would appear to be no reason why the phrase in Covering Clause 5 should not be similarly interpreted. It provides that "the laws of the Commonwealth" shall be in force on all British ships whose first port of clearance, or whose port of destination, is in the Commonwealth. There would also appear to be no reason why the phrase in s. 61 (see *supra* n. 69) does not include the prerogative powers of the Crown.

[71] It is difficult to see how a common law rule could be "a law of the Commonwealth" so as to render an inconsistent State law invalid under s. 109. But the possibility has been suggested. See *Huddard Parker Ltd.* v. *Cotter* (1942) 66 C. L. R. 624 at 653-54 *per* Rich and Williams, JJ.

[72] In *R.* v. *Kidman* (1915) 20 C.L.R. 425 Griffith, C.J. at 439, and Isaacs, J. at 446 were both prepared to hold that a prosecution for a common law offence against the Commonwealth was a prosecution for an offence against "the laws of the Commonwealth" within the meaning of certain statutory provisions. The conclusion is also supported by Quick and Garran, *Annotated Constitution of the Australian Commonwealth* (1901) at 809.

[73] (1915) 19 C.L.R. 629.

In that case Bernasconi was tried and convicted before the Central Court of the Territory of Papua for assault occasioning bodily harm. There was no jury. The Court was established, this procedure authorized, and the offence defined by Ordinances of the Legislative Council of Papua which predated the acquisition of the territory by the Commonwealth in 1905. The Papua Act of that year continued these laws in force. In the High Court it was argued that as these laws after 1905 derived their authority from the Commonwealth Parliament Bernasconi was entitled to a trial by jury under s. 80 of the Constitution. Sir William Irvine, Q.C., who was later Chief Justice of the Supreme Court of Victoria, argued:

> The language of that section is plain and unambiguous, and there is no reason for imposing any limitation upon the words "any law of the Commonwealth". A law made under sec. 122 of the Constitution is as much a law of the Commonwealth as one made under any other power conferred by the Constitution.

The question was thus squarely raised as to whether s. 80 applied to territorial laws whether directly enacted by the Commonwealth or by a local legislative body established under its authority.[74]

Griffith, C.J., with whose judgment Rich and Gavan Duffy, JJ. agreed; answered this question in the negative. He said:

> In my judgment, Chapter 111 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 execution of those functions which are aptly described as "laws of the Commonwealth".[75]

Isaacs, J. pointed out that s. 80 was a part of a group of interrelated provisions in Chapter 111 which dealt with the "judicial power of the Commonwealth proper".[76] In his opinion "the provision is clearly enacted as a limitation on the accompanying provisions, applying to the Commonwealth as a self-governing community. And that is its sole operation". His Honour went on to point out that jury trial in the territories "would be in the vast majority of instances an entirely inappropriate requirement".[77]

I have criticized this decision elsewhere.[78] Repetition or elaboration of that criticism here would serve no useful purpose. The recent decision of the High Court in *Spratt* v. *Hermes*[79] shows that *Bernasconi's Case* irretrievably establishes that s. 80 has no application to laws passed under s. 122.[80] It is pointless to do any more than to note my own opinion that a law enacted under s. 122 of the Constitution is a "law of the Commonwealth" within the meaning of that phrase in s. 80.[81] I would base my opinion on the use of

[74] There is a narrow point which may be noted here. Could it be said that laws which predate the acquisition of a territory by the Commonwealth and which are merely allowed to continue in force are not "laws of the Commonwealth"? Isaacs, J. *Id.* at 636-37, expressed his opinion that they were: *sed quaere.*

[75] *Id.* at 635.

[76] *Id.* at 637.

[77] *Id.* at 638. "It is fair comment that this is a sound policy reason for excluding the operation of jury trial in some of the territories—though it makes no sense at all in the Australian Capital Territory—but it is also fair comment to point out that such considerations should have been more appropriately addressed to those who were responsible for drafting the Constitution." Z. Cowen, *Federal Jurisdiction in Australia* (1959) at 128.

[78] C. L. Pannam, "Section 116 and the Federal Territories" (1961) 35 *A.L.J.* 209.

[79] (1965) 114 C.L.R. 226.

[80] The High Court also declined to reconsider *Bernasconi's Case* in *Speed* v. *R.* (1948) 22 A.L.R. 299.

[81] It is worth pointing out that in *Spratt* v. *Hermes*, *op. cit.*, Barwick, C.J. expressed

the phrase in other parts of the Constitution. The High Court has itself held that a territorial law is "a law of the Commonwealth" for the purpose of rendering an inconsistent state law invalid under s. 109.[82] It would seem that prisoners convicted of crimes against territorial laws come within s. 120.[83] There is no reason why the Executive power under s. 61 would not extend to territorial laws,[84] nor why a person convicted of an offence against a territorial law should not be disqualified as a member of Parliament under s. 44 (ii).[85]

There is also, as Evatt, J. has pointed out, internal evidence in s. 80 itself which suggests that it applies to territorial laws. It is provided that "every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes". In *Ffrost* v. *Stevenson*[86] Evatt, J. said:

> It would seem plain that the latter group of offences must include offences committed within the Commonwealth's own territories (properly so called). If so, sec. 80 must be regarded as being applicable to such territories in relation to offences against any "law of the Commonwealth".[87]

The Supreme Court of the United States has relied on similar reasoning to reach the conclusion that Article 111, s. 2, which contains the same venue provision, applies in at least some United States Territories. The argument that these words only covered offences committed on the high seas and in foreign lands was rejected.[88] All of this is merely what might have been. It is established beyond argument that s. 80 does not apply to laws enacted under s. 122.

The next question to be considered is whether s. 80 applies to prosecutions of the kind it describes in all courts or only in courts exercising the judicial power of the Commonwealth. The language of s. 80 is perfectly general. It does, however, form part of Chapter 111 which is concerned to identify the courts which may exercise the judicial power, specify its content, and to control the persons by whom and the manner in which it is exercised. The problem could arise in this way. Apart from Commonwealth legislation the

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his opinion that "the expression 'law of the Commonwealth' embraces every law made by the Parliament whatever the constitutional power under or by reference to which that law is made or supported": *Id.* at 247. His Honour was nevertheless not prepared to hold that s. 80 applied to laws made under s. 122. He was able to interpret s. 80 as only applying to laws made under s. 51. See also Windeyer, J. at 385-86 where he said: "I see 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."

[82] *Lamshed* v. *Lake* (1958) 99 C.L.R. 132. "But it does not follow that because for the purpose of s. 80 a territorial ordinance was not to be counted a law of the Commonwealth, a law made by the Parliament of the Commonwealth in the exercise of the legislative power conferred by s. 122 of the Constitution and by the implications carried with it is not a law of the Commonwealth within s. 109. In my opinion s. 109 is applicable to any valid enactment of the Parliament whether under s. 122 or any other power." *Id.* at 148 *per* Dixon, C.J. There is even authority for the view that the "just terms" requirement of s. 51 (xxiii) applies to the Commonwealth when it legislates under s. 122. See *Kean* v. *Commonwealth* (1963) F.L.R. 432 *per* Bridges, J.

[83] See *supra* at n. 69. This opinion is supported by the judgment of Dixon, C.J. (with whom Webb, Taylor and Kitto, JJ. agreed) in *Lamshed* v. *Lake, op. cit.* at 145.

[84] See *supra* at n. 69.

[85] See *supra* at n. 70.

[86] (1937) 58 C.L.R. 528.

[87] *Id.* at 592. "A broader interpretation of the provision might have resulted in a different conclusion for s. 80 itself shows that its application is not limited to the commission of offences in one or other of the States. . . . Where, outside a State, would offences against the laws of the Commonwealth ordinarily be committed except in the territories?" H. V. Evatt, "The Jury System in Australia" (1936) 10 *A.L.J.* (Supp.) 49 at 64.

[88] *Thompson* v. *Utah* (1898) 170 U.S. 343; *Callan* v. *Wilson* (1888) 127 U.S. 540.

State courts would have jurisdiction to try persons accused of crimes against Commonwealth laws. This jurisdiction would derive from Covering Clause 5 of the Constitution.[89] This is State and not federal jurisdiction.[90] If the prosecution was on indictment would s. 80 operate to compel trial by jury? The question is very difficult to answer.

It might be argued that s. 80 only applies in those Courts which are identified as repositories of the judicial power of the Commonwealth in s. 71. They are the High Court, "such other federal courts as the Parliament creates," and "such other courts as it invests with federal jurisdiction". An examination of Chapter 111 might suggest that none of its provisions was intended to interfere with the manner in which State courts exercised State jurisdiction.[91] This was certainly the view held by Quick and Garran[92] and it has also been expressed by Isaacs, J.[93] The interpretation given to Article 111, s. 2 of the United States Constitution would also support this view. It has been limited to the exercise of federal judicial power.[94]

Furthermore if this view is correct it would provide a convenient explanation of the actual decision in *Bernasconi's Case*. It could be said that s. 80 did not apply because the Central Court of the territory of Papua was not a federal court established under s. 71 but instead derived its authority from s. 122. Thus, even assuming that the law under which Bernasconi was prosecuted was a "law of the Commonwealth", s. 80 would still not have compelled a jury trial. It would also provide a convenient explanation for the undoubted power of a court-martial to sit without a jury. Such a court does not exercise the judicial power of the Commonwealth.[95]

On the other hand it can be pointed out that the framers of the Constitution must have realized that the High Court would be the only federal court in existence for some time. Almost all criminal prosecutions would take place in State courts. If those courts had jurisdiction to try offences against Commonwealth law as a matter of State jurisdiction free of s. 80, then s. 80 would only apply if the Commonwealth invested them with federal jurisdiction! The consequences of that view would be to enable the Commonwealth to determine whether or not s. 80 would have any operation at all. It is a loosely drafted provision to be sure but such a result seems strange indeed. Then again it might be pointed out that s. 80 is the one section in Chapter 111 that does not refer in terms to federal jurisdiction or judicial power.[96]

Furthermore it would be curious, to say the least, if s. 80 were interpreted so as to contradict itself. It provides that if an offence to which it

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[89] *Baxter* v. *Commissioner of Taxation* (N.S.W.) (1907) 4 C.L.R. 1087 at 1136 *per* Griffith, C.J.

[90] See Z. Cowen, *Federal Jurisdiction in Australia* (1959) 151-53.

[91] That is putting on one side the appellate jurisdiction of the High Court under s. 73 (ii) of the Constitution.

[92] "It would seem that this provision (i.e., s. 80) is only intended to apply to trials in federal courts, and courts exercising federal jurisdiction; not to extend to courts of the States in those cases where they may have concurrent jurisdiction to try offences against the laws of the Commonwealth." Quick and Garran, *Annotated Constitution of the Australian Commonwealth* (1901) at 808.

[93] *New South Wales* v. *Commonwealth* (1915) 20 C.L.R. 54 at 90-94.

[94] *Eilenbecker* v. *District Court of Plymouth County* (1890) 134 U.S. 31. Jury trial in State courts is not even compelled under the due process clause of the 14th Amendment. See *Hurtado* v. *California* (1883) 110 U.S. 516; *Hallinger* v. *Davis* (1892) 146 U.S. 314; *Brown* v. *New Jersey* (1899) 175 U.S. 172; *Maxwell* v. *Dow* (1900) 176 U.S. 581.

[95] *R.* v. *Bevan* (1942) 66 C.L.R. 452; *R.* v. *Cox* (1945) 71 C.L.R. 1.

[96] In this connection it is interesting to note that the equivalent provision to s. 80 in the 1891 draft Constitution was specifically limited to only apply in "any Court established under the authority of this Act". See *supra* n. 9. This specific limitation was left out of s. 80.

applies is not committed within a State then "the trial shall be held at such place or places as the Parliament prescribes". If the Parliament could prescribe a place in a territory, for example, where the courts are established under s. 122, and if it is assumed that s. 80 would not apply to such courts, then the very guarantee it contains could be negated by an exercise of a power it authorizes.

The argument that this view would involve the proposition that s. 80 would apply to a court-martial can be met by pointing out that such proceedings may not be "trials" within the meaning of the section and that in any event the proceedings do not take place on "indictment". Finally, as far as the United States decisions are concerned it can be said that Article 111, s. 2 of the United States Constitution is drafted very differently. There the context makes it clear that the "Trial of all Crimes" refers to trials conducted in courts established under Article 111, s. 1.

On balance I would be inclined to lean in favour of the second set of arguments.[97] It seems to me to make more sense to say that s. 80 operates in all courts whether they be federal, State or territorial. As a practical matter, however, it probably makes little difference which view is accepted, at least as far as the State courts are concerned. Under s. 68 (2) (c) of the Judiciary Act, 1903-59 the State courts of appropriate jurisdiction are vested with federal jurisdiction "with respect to persons who are charged with offences against the laws of the Commonwealth committed within the State, or who may lawfully be tried within the State for offences committed elsewhere".[98] There is a similar investment of jurisdiction in regard to the offences contained in the Crime Act, 1914-60.[99] It is certainly clear that s. 80 applies to these State courts when they are exercising federal jurisdiction.

There are some situations, however, where the question could become crucial. One is if a prosecution took place in a territorial court in respect of an offence against a Commonwealth law which drew its validity from a source other than s. 122.[100] *Bernasconi* does not conclude the point. It was concerned with an offence which was created by a law which derived its validity under s. 122. This is a very different situation. Here the offence is created by "law of the Commonwealth" within the meaning of s. 80. In my submission s. 80 would compel a jury trial in such a case if the procedure of indictment was used.

IV

Section 80 requires trial by "jury". What does that mean? The traditional elements can be simply stated. A criminal jury consists of twelve men. They listen to the evidence in the presence and under the superintendence of a judge who has the responsibility of instructing them on the law and of summing

[97] This opinion would seem to be supported by the remarks of Evatt, J. in *Ffrost* v. *Stevenson* (1937) 58 C.L.R. 528 at 592.

[98] See also s. 39 which provides that the State courts shall be "vested with federal jurisdiction, in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred" except insofar as ss. 38 and 38A had not made the High Court's jurisdiction exclusive. Under s. 30(c) the High Court has non exclusive original jurisdiction "in all matters arising under the Constitution and involving its interpretation". As to the relationship between s. 39 and s. 68 see Z. Cowen, *Federal Jurisdiction in Australia* (1959) at 181-87.

[99] S. 85E.

[100] Such a situation could easily arise under the venue provisions discussed later in this paper. See *infra* Part V.

up and explaining the evidence. Their verdict must be unanimous. If it is a verdict of *acquittal* it is absolute and there can be no appeal.[101] But does the guarantee of a "jury" trial in s. 80 mean that these traditional elements cannot be changed in the prosecutions to which it applies? The question is of some importance because the Commonwealth has adopted the practice of directing that the laws relating to trial on indictment of the State where the trial takes place will apply to Commonwealth prosecutions.[102] Even if the trial takes place in the original jurisdiction of the High Court, which is rare, the law of State where the trial is held relating to juries is made applicable.[103] Problems are created by the fact that some States have changed, or may in the future change, their laws relating to trial by jury.

The absolute nature of a jury's verdict was considered by the High Court in *R.* v. *Snow*.[104] There Snow had been tried on indictment in the Supreme Court of South Australia for attempting to trade with the enemy contrary to the Trading With the Enemy Act, 1914 on dates both before and after the passing of that Act. The trial judge held as a matter of law that the Act did not have a retroactive effect, and as far as the charges relating to the period after the Act came into force he thought that there was insufficient evidence. He directed the jury to find a verdict of not guilty which they did. The Crown applied to the High Court for special leave to appeal on the ground that the trial judge had made several legal mistakes.

The Court was evenly divided on the question as to whether there was power to review a verdict of acquittal. Griffith, C.J. was of opinion that a verdict of not guilty afforded "absolute protection".[105] He interpreted s. 80 to involve "an adoption of the institution of 'trial by jury' with all that was connoted by that phrase in constitutional law and in the common law of England".[106] Gavan Duffy and Rich, JJ. shared this view. In their opinion:

> . . in saying that the trial of offences shall be by jury, Parliament has said that the persons tried shall have all the benefits incidental to a trial by jury, and one of them is that a verdict of "not guilty" shall be final and conclusive on the issue the jury are sworn to try, the issue of "guilty or not guilty".[107]

The other members of the Court—Isaacs, Higgins, and Powers, JJ.—did not dispute this proposition if the verdict of acquittal proceeded from any independent consideration of the case by the jury. The whole Court thus agreed that there could be no appeal from a verdict of acquittal given in such circumstances. But in this case there had been no independent consideration of the question of guilt or innocence by the jury. They were merely told to acquit and they did. As the judge's direction was allegedly based upon legal error their Honours took the view that in such a case the High Court had a discretionary power to hear an appeal by the Crown. Powers, J. however was not prepared to exercise the power on the facts of this case and so the appeal failed. It is interesting to note, however, that one of his reasons for declining to exercise the power was that "heretofore in all British

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[101] There is a convenient statement of the traditional learning about trial by jury in ch. 12 of Sir Mathew Hale's, *History of the Common Law of England* (1713).
[102] Judiciary Act, 1903-59 s. 68; Crimes Act, 1914-60 s. 85E (5).
[103] High Court Procedure Act, 1903-50 s. 15B.
[104] (1915) 20 C.L.R. 315.
[105] *Id.* at 323.
[106] *Ibid.*
[107] *Id.* at 365.

communities, except Canada, a verdict of not guilty by a jury in a criminal trial has in every case been accepted as conclusive".[108]

Higgins, J. expressed his opinion as follows:

> The facts had to be ascertained by a jury (under sec. 80 of the Constitution), and the law had to be stated to the jury by the Court; and under (what is assumed to be) a mistake of the Court as to the law, the jury have not yet applied their mind to the facts—these facts were entirely shut from their consideration.[109]

Isaacs, J. took the view that the verdict contemplated by s. 80 is "one which the jury are to be allowed to arrive at under the guidance and with the assistance of the Judge, but still freely and independently on their own view of the evidence, and not at his dictation".[110] In his opinion the Court could not "retry the accused or usurp the office of the jury, or review all verdicts of acquittal at discretion" but "that no perfunctory verdict . . . of conviction or acquittal, deprives the Court of a power to annul a judgment founded upon a total misapprehension of the law".[111]

Although the precise question does not seem to have come before the High Court subsequently it appears that the view of Griffith, C.J., Gavan Duffy and Rich, JJ. has been accepted.[112] I will not venture to comment on the justification for this conclusion as a general matter of the extent of the appellate jurisdiction of the High Court under s. 73 of the Constitution. As far as s. 80 is concerned, however, I find the reasoning of Isaacs and Higgins, JJ. persuasive. It is difficult to see how there was any trial by "jury" in *Snow's Case* when all the jury did was to comply with a direction to acquit. If that direction was based on a legal error by the trial judge it would not seem to be inconsistent with a right to trial by a jury to allow the Crown to appeal his ruling to a higher court. As pointed out above, however, it is clearly established by *Snow's Case* that if the jury have given any independent consideration to the case whatever, then s. 80 operates to prevent any appeal from a verdict of acquittal.

In South Australia,[113] Tasmania,[114] and Western Australia[115] there are statutory provisions which restrict the requirement of unanimous jury verdict to capital cases. It is provided that in other cases a verdict of ten will suffice after the jury has considered the evidence for varying periods of time.[116] The question arises as to whether these provisions can be applied to Commonwealth criminal prosecutions which came within s. 80. The requirement of a unanimous verdict was a basic feature of the common law relating to trial by jury. Sir Matthew Hale pointed out in his "short Account of the Method and Manner of that Trial":

> When the whole Twelve Men are agreed, then, and not till then, is their Verdict to be received; and therefore the Majority of Assentors does not conclude the Minority, as is done in some Countries where Trials by Jury

[108] *Id.* at 355-56.
[109] *Id.* at 355-56.
[110] *Id.* at 328-29.
[111] *Id.* at 352-53.
[112] See *Commonwealth* v. *Brisbane Milling Co. Ltd.* (1916) 21 C.L.R. 559; *Fieman* v. *Balas* (1930) 47 C.L.R. 107; *R.* v. *Wilkes* (1948) 77 C.L.R. 511 at 555; *Jenkyns* v. *Public Curator* (Q.) (1952) 90 C.L.R. 113.
[113] Juries Act, 1927 s. 57.
[114] Juries Act, 1899 s. 48.
[115] Juries Act, 1957 s. 41.
[116] Tasmania—2 hours; South Australia—4 hours; Western Australia—3 hours.

> are admitted: But if any One of the Twelve dissent, it is no Verdict nor ought to be received.[117]

There is no Australian authority on the point.[118] It has however been considered in the United States. The Supreme Court has held that a unanimous verdict is an essential feature of trial by jury. In *American Publishing Co.* v. *Fisher*,[119] which involved the guarantee of "the right to trial by jury" in civil cases contained in the Seventh Amendment,[120] Brewer, J., who delivered the Court's opinion, said:

> Now unanimity was one of the peculiar and essential features of trial by jury at the common law. No authorities are needed to sustain this proposition. Whatever may be true as to legislation which changes mere details of a jury trial, it is clear that a statute which destroys this substantial and essential feature thereof is one abridging this right.[121]

This judgment applies *a fortiori* to Article 111, s. 2 and the Sixth Amendment. The point is regarded as settled in the United States.[122]

The proposition that a unanimous verdict is required by s. 80 depends on the view that it guarantees a trial conducted in accordance with the fundamental common law requirements of trial by jury. It is submitted that this is the proper interpretation of s. 80. This interpretation was accepted so far as the generally absolute nature of a verdict of acquittal is concerned by all of the members of the High Court in *Snow's Case*. The contrary view would reduce s. 80 to complete impotence. Even in those cases where it applied it would be possible completely to change all of the traditional common law elements of trial by jury. In my opinion therefore a majority verdict taken in accordance with the Tasmanian, South Australian and Western Australian legislation referred to above is not consistent with the requirements of s. 80. Similar reasoning leads to the conclusion that an attempt to provide for a jury of less than twelve persons would also violate the requirements of s. 80.[123] As was pointed out in Chitty's *Criminal Law*: "The petit jury, when sworn, must consist of precisely twelve, and is never to be either more or less. . . ."[124] There are decisions of the Supreme Court of the United States which support this conclusion.[125]

There is, however, a distinction which must be drawn between the fundamental requirements of trial by jury as it is known to the common law and what Brewer, J. described in the passage set out above as "mere details". Take for example the question of peremptory challenges at the time of

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[117] *History of the Common Law of England* (1713) at 261. See also Sir M. Hale, 2 *History of the Pleas of the Crown* at 161.

[118] Evatt, J. expressed the view that a unanimous verdict was required in "The Jury System in Australia", *op. cit. supra* n. 17 at 64.

[119] (1897) 166 U.S. 464.

[120] "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

[121] *Op. cit.* at 468. See also *Springville* v. *Thomas* (1897) 166 U.S. 707 where Fuller, C.J. stated: "In our opinion the Seventh Amendment secured unanimity in finding a verdict as an essential feature of trial by jury in common law cases, and the act of Congress could not impart the power to change the constitutional rule." *Id.* at 708-9.

[122] *Andres* v. *U.S.* (1948) 333 U.S. 740 at 748; W. Willoughby, 2 *Constitutional Law* (2 ed. 1929) at 1141.

[123] Isaac Isaacs expressed a contrary view in the Convention Debates. He said that s. 80 "could be got over in various ways—by saying that the jury should be composed of two persons, or of only one". *Convention Debates* 1897-1898, Melb., 3rd Sess. at 1895.

[124] J. Chitty, 1 *Criminal Law* (1836) at 505.

[125] *Thompson* v. *Utah* (1898) 170 U.S. 343; *Rassmussen* v. *U.S.* (1905) 197 U.S. 516 at 529 *per* Harlan, J.

empanelling the jury. At common law the accused was allowed thirty-five peremptory challenges but this number has been reduced by Statute in England and in Australia.[126] It would not seem that any particular number of peremptory challenges or indeed the right of peremptory challenge itself is fundamental to trial by jury.[127] What is essential is that the jury should be impartial. The accused should thus be entitled to see the jurors as they are selected and be able to challenge them for cause.[128]

A question that is relevant to this subject was involved in *Allan* v. *The King*[129] but it was not mentioned by counsel or the Court. That was an appeal from an order made by Starke, J. sitting in the original jurisdiction of the High Court that a trial on indictment take place before a special jury of twelve. The trial was to take place in Victoria. By virtue of s. 15B of the Judiciary Act the Victorian Juries Act which authorized the use of special juries in certain cases applied. The accused appealed on the ground that there were no grounds for ordering the trial to take place before a special jury. The appeal was denied. No argument based on s. 80 was put to the Court.

It is submitted that s. 80 does not prevent the use of special juries in appropriate cases. There was statutory provision for such juries in most of the Australian Colonies at the end of the nineteenth century.[130] The only limitation was that they could not be used in cases of felony or treason.[131] In recent times most States have abolished special juries. The old arrogant assumption that degrees of wealth determined degrees of intelligence has gone. Nevertheless it would be curious to interpret s. 80 as preventing the use of special juries in cases where they were allowed when the Constitution was drafted. It is of interest to note that the Supreme Court of the United States has upheld the validity of so called "blue ribbon" juries.[132]

Huddart Parker & Co. City Ltd. v. *Moorehead*[133] shows that, whatever is meant by trial by "jury", s. 80 does not have any application to the means by which evidence is obtained for use in such trial. There the Comptroller-General of Customs required the appellant company and its manager to give written answers to certain questions which he put to them. Both refused and were fined £5 in a Court of Petty Sessions. The procedure was authorized by s. 15B of the Australian Industries Preservation Act, 1906 in cases where the Comptroller-General had reason to believe that an offence had been committed against the Act.

In the High Court it was argued that the procedure authorized by s. 15B violated s. 80 of the Constitution because it compelled a person to give self incriminatory evidence which could be used in a trial on indictment before

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[126] See Sir W. Blackstone, 4 *Commentaries on the Laws of England* (1765) at 353-55; Chitty, 1 *Criminal Law* (1836) at 534-37.

[127] *Stilson* v. *U.S.* (1919) 250 U.S. 583.

[128] *Lewis* v. *U.S.* (1892) 146 U.S. 370. See also *Pointer* v. *U.S.* (1894) 151 U.S. 396. The details of common law right to challenge for cause "propter honoris, propter respectum, propter defectum, propter affectum, and propter delictum" are set out in Chitty, 1 *Criminal Law* (1836) at 540-44.

[129] (1942) A.L.R. 295.

[130] Tas., Jury Act, 1899 s. 40; N.S.W., Jury Act, 1901 s. 28; S.A., Jury Act, 1862, s. 39; Vic., Juries Act, 1890 s. 39; Q., Jury Act, 1867-1884 s. 26.

[131] Special juries were known to the common law and this limitation reflects the common law rule. Chitty points out "it frequently happens, in important cases of misdemeanour, that one of the parties is desirous of having the issue determined by a special jury. This can never be done in cases of felony or treason, but only upon the trial of less serious offences." 1 *Criminal Law* (1836) at 522.

[132] *Fay* v. *New York* (1947) 332 U.S. 261; *Moore* v. *New York* (1948) 333 U.S. 565; *Hoyt* v. *Florida* (1961) 368 U.S. 57.

[133] (1908) 8 C.L.R. 330.

a jury. The right to a jury trial was said to carry with it the ordinary common law protections of an accused person, one of which was that he could not be compelled to incriminate himself. The High Court unanimously rejected this argument. Griffith, C.J., with whose judgment Barton, J. agreed, pointed out that the doctrine of self incrimination "is rather one of evidence than one relating to trial by jury".[134] Isaacs, J. said that in his opinion the essence of trial by jury is "that a jury, and not a judicial officer, shall pronounce upon the guilt or innocence of the accused".[135] But the doctrine of self incrimination is "a mere evidentiary rule, applicable to all criminal offences, indictable or otherwise, and open like all rules of evidence to Parliamentary regulation".[136] O'Connor, J. said:

> . . . it is no part of the system of trial by jury, and the authority of the Parliament of the Commonwealth to create and punish offences as incidental to the exercise of the powers conferred by the Constitution would certainly extend to the modification of any principle of British criminal law, no matter how fundamental, so long as the modification is not forbidden expressly or implicitly by the Constitution.[137]

This decision underlines the limited scope of s. 80. All it guarantees is a right to trial by jury. It has nothing to say about any other aspect of a trial on indictment. In the United States the position is very different. There the Fifth Amendment compels the use of the indictment procedure in "capital, or otherwise infamous crimes". It also prevents a person from being "compelled in any criminal case to be a witness against himself" and protects him against double jeopardy. The Sixth Amendment gives an accused person the right to be confronted by witnesses who testify against him, to have "compulsory process for obtaining witnesses in his favour", and to have "the assistance of counsel for his defence". Thus in the United States the right to trial by jury is only one of a series of interrelated provisions which apply to criminal trials. In Australia, on the other hand, the right stands alone. This makes it all the more curious why jury trial was alone singled out for special treatment by s. 80.

Finally it should perhaps be pointed out that one of the most fundamental elements involved in the conception of trial by jury is that the trial takes place under the general supervision of a judge. Sir Matthew Hale put the matter thus:

> Another Excellency of this Trial is this; That the Judge is always present at the Time of the Evidence given in it: Herein he is able in Matters of Law emerging upon the Evidence to give them a great Light and Assistance by his weighing the Evidence before them, and observing where the Question and Knot of the Business lies, and by showing them his Opinion even in matters of Fact, which is a great Advantage and Light to Lay-Men: And thus, as the Jury assists the Judge in determining the matter of Fact, so the Judge assists the Jury in determining Points of Law. . . .[138]

If the circumstances of a trial were such that the judge was not qualified to, or did not, perform these functions it would not seem to constitute a trial by jury within the meaning of s. 80 of the Constitution.[139]

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[134] *Id.* at 358. His Honour also pointed out that the doctrine was introduced into English law at a far later date than trial by jury and that it had frequently been excluded by statute.

[135] *Id.* at 386.

[136] *Ibid.*

[137] *Id.* at 375.

[138] Sir M. Hale, *History of the Common Law* (1713) at 259-60.

[139] *Capital Traction Co.* v. *Hof* (1899) 174 U.S. 1 (Jury trial before Justice of Peace held invalid).

The venue provision contained in s. 80 is as follows:

> . . . every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.

This is not a general venue requirement for the prosecution of offences against Commonwealth laws. It only applies to "such" trials as are described in the first part of the section. That is to say trials on indictment. It does not apply to other forms of prosecution.

There are obvious difficulties in regard to the determination of where some offences are "committed". Section 70 of the Judiciary Act, 1903-59 deals with one of these difficulties. It provides that if an offence "is begun" in one State or part of the Commonwealth and "completed" in another then the "offender may be dealt with tried and punished in either State or part in the same manner as if the offence had been actually and wholly committed therein". Certain questions may be raised as to the validity of this provision in many of its possible applications. If it is interpreted to mean that the offence with which an accused person is charged has not yet been committed at the time it is "begun", and is only committed when it is "completed", then it would seem to violate s. 80. It is not enough that at the beginning stage the crime of attempt had been committed unless that is the offence with which the accused is charged. If he is charged with the substantive crime then it is submitted that the trial must take place where it is committed, not where it is begun. Of course this reasoning would not apply to continuing offences which may be actually committed in many jurisdictions thus giving the Commonwealth a choice as to the place of trial.[140]

Different problems are raised by venue provisions such as those contained in Crimes (Aircraft) Act, 1963. There it is provided that in respect of offences against that Act committed on board an aircraft whilst in flight "it shall be presumed, unless the evidence shows the contrary, that (the offence) did not take place in a State or Territory other than the State or Territory in which the trial is held".[141] However at any time "before the jury has returned its verdict" the defendant can object to the jurisdiction of the Court and if the Judge is satisfied that the offence was committed elsewhere then the proceedings are to be discontinued and the trial conducted in the proper place. This provision assumes that if the offence was in fact committed in another State to that in which the Court sits, the failure of the accused to take the jurisdictional objection validates the trial. Such an assumption involves the proposition that the venue provisions, and if them the rest, of s. 80 can be waived by an accused person. In other words, that s. 80 is a guarantee personal to an accused person and not a limitation on the authority of the Commonwealth to prosecute except in accordance with its terms.

There is little assistance to be derived from s. 80 on this question. Its language is completely general, just as general indeed as is the equivalent language of Article 111, s. 2 of the United States Constitution. The Supreme Court has held that under that provision an accused person can waive his right to a jury trial of twelve for some lesser number, or even to a jury trial at all.[142] In my opinion there is no reason why s. 80 should be given an

[140] See *U.S.* v. *Johnson* (1944) 323 U.S. 273; *U.S.* v. *Cores* (1958) 356 U.S. 405.
[141] S. 23 (1).
[142] *Patton* v. *U.S.* (1930) 281 U.S. 276; *Adams* v. *U.S.* (1942) 317 U.S. 269; *Singer* v. *U.S.* (1965) 380 U.S. 24

absolute interpretation. Its policies can be effectuated just as well by treating it as a personal guarantee that an accused person can waive at his election. It is submitted therefore that a venue provision like that contained in the Crimes (Aircraft) Act, 1963 is a valid exercise of Commonwealth power.

When a crime is not committed within a State then the trial is to be held at a place to be prescribed by the Parliament. There would seem to be no reason why this prescription could not be made after the offence was committed nor why the prescription should not be limited to the particular prosecution.[143] In fact the Commonwealth has regularly prescribed that offences against particular Acts "not being an offence committed within a State, may be held in any State or Territory".[144] The only difficulty involved here arises if the trial court in the place prescribed is not a court created under Chapter 111 of the Constitution or else is not vested with federal jurisdiction for the purposes of the trial. If the guarantee of trial by jury in s. 80 only applies in courts which are exercising the judicial power of the Commonwealth then it would not apply if some other court is prescribed. I have dealt with the point earlier in this paper.[145] In my opinion a trial by jury is required by s. 80 whether or not the court prescribed exercises the judicial power of the Commonwealth.

VI

The conclusions which have been stated in the course of the foregoing analysis of s. 80 may be summarized as follows:

1. The Parliament has complete discretion to determine whether a prosecution for any offence against a law of the Commonwealth shall be on indictment or by summary trial. It can exercise this power directly or provide that the final decision shall be left to the appropriate enforcement authority.
2. The phrase "trial on indictment" in s. 80 means:
   (a) Any prosecution which is commenced by a written accusation signed by a law officer of the Crown or a Crown Prosecutor; or,
   (b) Any other prosecution which is brought in the name of the Crown irrespective of how or by whom it is instituted.
3. The phrase "any law of Commonwealth" included common law as well as statutory offences. The decisions of the High Court establish that it does not include laws which derive their validity from s. 122 of the Constitution. This conclusion is questionable; but the point is well settled.
4. S. 80 applies to the type of prosecutions it specifies irrespective of the source of the court's jurisdiction. Its operation is not confined to the courts specified in s. 71. It applies in territorial courts.
5. The trial by jury guaranteed by s. 80 is a trial in accordance with the fundamental common law rules relating to such trials. These include the requirements that there be a jury of twelve, that there can be no appeal from at least a considered verdict of not guilty.
6. The provisions of s. 80 can be waived by an accused person both as to trial by jury and venue.

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[143] See *U.S.* v. *Dawson* (1853) 15 How. 467; *Jones* v. *U.S.* (1890) 137 U.S. 202 (Guano Island); *Cook* v. *U.S.* (1891) 137 U.S. 157.

[144] Crimes Act, 1914-1960 s. 85 E (4). See also Defence (Special Undertakings) Act, 1963 s. 11 (4); Atomic Energy Act, 1953-58 s. 61 (3); Geneva Conventions Act, 1957 s. 10 (2); Crimes (Overseas) Act, 1964 s. 7 (4).

[145] See text *supra* at nn. 91-100.

As it is drafted s. 80 is an ineffective guarantee. It is difficult to understand why it was ever included in the Constitution. It was certainly not because its weaknesses were not pointed out during the Convention Debates. The restrictions it contains impose no serious limitation on the Commonwealth at all. Together with the guarantee of religious freedom in s. 116[146] it represents the high water mark of uncritical and seemingly senseless copying of inappropriate American precedent. All it means in substance is that there shall be trial by jury when the Commonwealth intends that there shall be trial by jury.

[146] See C. L. Pannam, "Travelling Section 116 with a U.S. Road Map" (1963) 4 *Melb. U.L.R.* 41 at 43, 56.