JUDICIAL SCRUTINY OF INTER-STATE EXTRADITION

1. SERVICE AND EXECUTION OF PROCESS ACT

The modern legislation governing extradition between the Australian states and territories is the Service and Execution of Process Act 1901-1974 (Cth). Prior to the formation of the Commonwealth of Australia extradition between the Australian colonies was governed by the Fugitive Offenders Act 1881 (Imp). Broadly speaking, the Service and Execution of Process Act was enacted to enforce both criminal and civil cases throughout the nation. The preamble describes it as an Act 'to provide for the Service and Execution throughout the Commonwealth of the Civil and Criminal Process and the Judgments of the Courts of the States and of other parts of the Commonwealth, and for other purposes connected therewith'. It is with the enforcement of the criminal law that this article is concerned. The Act was described by Madden CJ in *Evans v Sneddon*[1] as aiming to make the courts of all the states in effect the courts of one territory and had the intention to give each state jurisdiction to operate through all the states for the general advantage of the Commonwealth.

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1 (1902) 28 VLR 396 (FC) at 400.

The Service and Execution of Process Act 1901 was the successor to the Australasian Civil Process Act 1886 and the Australasian Judgments Act 1886. Some of its provisions were modelled on the provisions contained in these two Acts of the Federal Council of Australasia. Other provisions were modelled on the Common Law Procedure Act 1852 (UK) and the Indictable Offences Act 1848 (UK). Some of the pharseology in s 19(6) of the Act bears a close resemblance to s 19, Fugitive Offenders Act 1881 (Imp). Nevertheless, such has been the extent of the amendments effected to the Act in the three-quarters of a century of its existence, that no single section is now in pari materia with English legislation.

Since its inception in 1901 the Service and Execution of Process Act has been amended on sixteen occasions. The effect of these amendment Acts is that ss 6, 7, 10, 12, 13, 14, 17, 20, 23, 24, 25, 26, and the Second Schedule have survived in their original form whilst every other section has at some stage been amended. The principal changes effected have been the inclusion of territories on the same footing as states and the addition of new provisions, particularly Part IVA containing ss 26A-26R, relating to the enforcement of fines imposed by courts of summary jurisdiction. The other changes have been of a more formal nature, the majority of which have been made in response to anomalies which have occurred in practice over the years. Because many of the sections have been amended over the years some care needs to be exercised in referring to some of the earlier cases, which interpret the unamended provisions, as authorities in interpreting the amended sections.

The original Bill received careful attention in both the Senate and the House of Representatives. It was described during the second reading in the House of Representatives as 'one of the first practical fruits of Australian federation, inasmuch as it will largely assist in giving us a unified judicial system'.[2] It was accepted that the Act gave effect to the process known as backing of warrants. While the suggestion was made that it might have been simpler for criminal courts to have dispensed with the system of backing of warrants altogether, it was noted that at that time each state was largely in the position of a foreign country in regard to the others in the application of its laws. Their processes had no application beyond their territorial limits.[3]

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2 (1901) 3 Cth Parl Deb 4374 per Sir John Quick.

3 Ibid at 3440 per Mr E Barton, Minister for External Affairs.

The word 'extradition' is used in international law to describe the process whereby one state seeks the return of an alleged or convicted offender from another state. The word is not to be found in the Service and Execution of Process Act. Sometimes the courts use the word; more often they do not. It is, however, a convenient word to describe the process. One of the reasons it is not used is because it is but one of a number of matters covered by the Service and Execution of Process Act which governs both civil and criminal matters, while extradition is solely concerned with criminal law and procedure. For the same reason the word 'fugitive' is not used and the Act refers to the 'defendant' or the 'person apprehended'. Sometimes the courts use the word 'offender'[4] or 'alleged offender'.[5]

Of the 100 or more reported cases on the interpretation and meaning of the provisions of the Service and Execution of Process Act a substantial number relate to civil proceedings. Some of the provisions of the Act refer to both civil and criminal proceedings. For example, Part II of the Act (Service of Process) refers to both criminal and civil writs of summons, whereas Part IV (Enforcement of Civil Judgments) refers only to civil proceedings. Thus some of the civil cases are relevant in considering the position of criminal procedure whereas others are obviously of no relevance. There are a substantial number of matters in the Act which have no direct connection with inter-state extradition of criminal defendants.[6]

The introduction of the Act of 1901 did not apparently necessitate any amendment to the laws of the six states of Australia. Indeed, there has been no reported case of any of its provisions directly conflicting with state legislation. By 1901 state law had already had a period of adjustment to the Federal Council's Australasian Civil Process Act 1886 and Australasian Judgments Act 1886 and to the Imperial Fugitive Offenders Act 1881. In *Murphy*,[7] for example, it was held that s 63, Justices of the Peace Statute 1865 (Vic) empowered justices in Victoria to endorse a warrant for the apprehension of an offender whether such warrant had been issued in Victoria or elsewhere, in this case New South Wales. Such provision did not conflict with any of the provisions of the Act of 1901 when the latter Act came into effect. But in the course of time state law has made adjustments to the

4 Eg Rider v Champness [1971] VR 239 (Lush J).
5 Eg Ammann v Wegener (1972) 129 CLR 415 (HC).
6 Eg enforcement of judgments—see M C Pryles, *The Enforcement of Judgments under the Service and Execution of Process Act* (1972) 46 ALJ 286.
7 R v Call, ex p Murphy (1881) 7 VLR (L) 113 (FC).

existence of the Act. For example, Order 81B of the Rules of the Supreme Court of Western Australia makes express provision for proceedings under the Act of 1901.

2. CONSTITUTIONALITY

By s 51(xxiv) of the Australian Constitution power was given to the Commonwealth Parliament to legislate with respect of the service of state writs throughout the Commonwealth. The Service and Execution of Process Act was enacted under this provision and its constitutionality as a whole has not been effectively challenged. In *McGlew v New South Wales Malting Co Ltd*[8] it was held that this power was not limited to the mode of performance of the manual act of service but extended also the extraterritorial operation of the writ when served. An objecion that the Act was an invasion of state rights was held to be without foundation. The Act conferred federal jurisdiction upon state courts and was within the legislative power of the Commonwealth. In *Home Benefits* Murray CJ explained the position as follows—

> The constitutionality of this Act has never been questioned. Indeed, it is difficult to see how it could be, for its enactment is expressly authorized by the Constitution, and it is clearly for the peace, order and good government of the Commonwealth as a whole that the process of the state courts should be made to reach the persons against whom suits are brought and particularly the persons against whom charges of criminal offences are laid. It is true that the Commonwealth legislature has no power to alter or amend the laws of a state relating to the administration of justice, but it can aid or supplement those laws by making the process of the state courts binding and operative against all persons within the territorial boundaries of the Commonwealth.[9]

Subsequently in *Aston v Irvine*[10] it was contended that ss 18 and 19, Service and Execution of Process Act were contrary to the provisions of the Constitution in that the legislative power of the Commonwealth does not extend to conferring such authority upon magistrates, justices and officers appointed by a state. A unanimous bench of seven justices firmly rejected this argument. Magistrates having power to issue warrants of apprehension under the law of a state exercise that power

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8 (1918) 25 CLR 416 (HC).
9 R v Morgan, ex p Home Benefits (Pty) Ltd [1938] SASR 266 (FC) at 270-1.
10 (1955) 92 CLR 353 (HC).

under the authority of the law, which reposes it directly in them. The court said—

> They are not agents vicariously exercising an authority derived from the executive government of the state as a principal. To give them the power in question involves no interferences with the functions of the executive government of the state. . . . s 18 confers specific legal powers upon the magistrates, justices of the peace and officers authorized by state law to issue warrants of apprehension. The use of these involves an independent responsibility and does not involve the executive power of the Commonwealth. . . . the scheme of ss 18 and 19 seems to be to treat, the magistrate or the justice as exercising a preliminary discretion to grant, so to speak, process ministerially and then to submit for judicial review by a judge of the Supreme Court the whole question of the liability of the person apprehended to be returned to the state originating the proceeding.[11]

The most recent constitutional challenge occurred in *Ammann v Wegener*[12] where it was contended that the provisions of s 16 (2) were invalid on the ground that the provisions were not a law with respect to the service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the states within the meaning of s 51(xxiv) of the Constitution. Section 16(2) authorizes the issue of a warrant for the apprehension of a person who has failed to answer to a subpoena served under the authority of s 16(1) such as might have been issued had the unanswered subpoena been served in the state of its issue. It was held that a summons or subpoena issued by a magistrate for the purposes of securing the attendance of a witness at a preliminary examination under Part V of the Justices Act 1921-1969 (SA) of an information for an indictable offence is part of the criminal process of the state within s 51(xxiv) of the Constitution. It was further held by 6-1 (Barwick CJ dissenting) that the grant by s 16(2) of authority to a magistrate to issue a warrant for the apprehension of a person who failed to comply with a subpoena or summons to appear and give evidence at a preliminary examination of an information for an indictable offence, is a law with respect to the service and execution of the criminal process of a state within the meaning of s 51(xxiv). Menzies J said—

> Its issue and execution is to make effective the civil or criminal process of a state to compel the attendance of witnesses required

11 Ibid at 364-5.
12 (1972) 129 CLR 415 (HC).

> to give evidence at civil or criminal proceedings instituted in the state. It is, I think, important that the issue of this warrant is but a step in enforcing obedience to the subpoena issued by that state authority and served under the authority of s 16(1) of the Commonwealth Act requiring attendance at civil or criminal proceedings. In this way its issue is but part of the execution of state process. The warrant, although issued under Commonwealth authority is still in aid of state process for obtaining the attendance of persons required as witnesses in state proceedings. It is not necessary that each act authorized by Commonwealth law should, in isolation, be itself the service of a document or the execution of a writ or warrant. The compound expression 'service and execution' of process comprehends more. Thus an authority to issue a warrant may, in appropriate circumstances, be given .... The issue of the warrant authorized by s 16(2) is an act which takes its character from the whole process of which it is but a part.[13]

Gibbs J said that although the warrant issued under s 16(2) is a warrant as might have been issued if the summons had been served in the state in which it was issued, its issue is authorized by Commonwealth law rather than by state law. He added—

> Assuming, however, that the warrant issued under s 16(2) may not in itself be described as the process of a state, it is issued to enable the process of a state, viz the summons, to be carried into effect. Although s 16(2) appears in a Part of the Act whose heading refers to 'Service', it provides, in my opinion, for the execution of the summons served under s 16(1). The Constitution does not narrowly limit the mode of execution allowed, but permits the Parliament to select the means by which process of one state is to be given efficacy in another, and to provide if necessary that further process be issued for this purpose. The decision in *Aston v Irvine,* supra, upholding the validity of s 18 of the Act, supports this view.[14]

The sole, dissenting view of Barwick CJ was that s 16(2) authorized a state officer to issue a warrant and the warrant which he would issue was not a process of the state; it was authorized by Commonwealth law and insofar as s 16(2) was sought to be supported as a law for the service of the process of a state, it would be invalid for it did no such thing. He regarded ss 18 and 16(2) as being radically different as the former gave validity to an existing process whilst the latter creates a new federal process.

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13 Ibid at 429-30.

14 Ibid at 438-9, with which Walsh and Stephen JJ agreed.

3. BACKING OF WARRANTS

The Indictable Offences Act 1848 (UK) introduced a system of services of warrants of arrest within the British Isles. At that time there were three jurisdictions: England and Wales, Scotland and Ireland. The procedure was for a magistrate in, say, England, to issue a warrant of arrest which the arresting officer took to a magistrate in, say, Scotland; the Scottish magistrate would indorse the warrant, usually on the reverse side. That is to say he would sign and authorize the arrest within the area of his jurisdiction. The arresting officer would then have authority to effect the arrest and take him before the court which had originally issued the warrant.

The system of backing of warrant was introduced into the Fugitive Offenders Act 1881 to groups of countries in close proximity to each other. Subsequently the procedure was incorporated into Part III, Extradition (Commonwealth Countries) Act 1966 (Cth) in relation to Australia, New Zealand, Fiji, the Gilbert and Ellice Islands and the British Solomon Islands. In 1968 the Part III procedure was made applicable to Australia and New Zealand only.

The term backing of warrants is not used in Part III of the 1966 Act. Nevertheless, the procedure is known generally in common law jurisdictions as backing of warrants. The Indictable Offences Act 1848 (UK) used the expression 'backing of warrants' in the headnotes of the relevant sections and this practice was continued in the Act of 1881 but not in the Act of 1966. The English extradition legislation governing the surrender of fugitives to and from Ireland is termed the Backing of Warrants (Republic of Ireland) Act 1965 (UK).

The system of backing of warrants is the foundation of the Service and Execution of Process Act 1901-1968 governing inter-state extradition within Australia. The expression is referred to in the marginal note to s 18 of the Act and it is the generally accepted term describing this method of summoning and arresting fugitives from justice.

Some of the problems which have arisen in respect of international backing of warrants are relevant to inter-state backing of warrants. Admittedly each enactment requires to be interpreted on its own merits. There are sufficient differences between, say, Part III, Extradition (Commonwealth Countries) Act 1966 (New Zealand-Australia extradition), Part III, Extradition Act 1965 (Ireland) (Anglo-Irish extradition), and Part II, Fugitive Offenders Act 1881 (Imp) to weaken, but not wholly diminish the significance of judicial interpre-

tation of one enactment upon another. For example, no provision is made in the Backing of Warrants (Republic of Ireland) Act 1965 (UK) for an inquiry to be made into whether there is a strong or probable presumption of guilt of the alleged offender. This has been held to mean that the magistrate backing the warrant neither was under obligation nor had power to make such inquiry.[15] Likewise there is no such requirement in s 24, Extradition (Commonwealth Countries) Act 1966; neither is there in s 18, Service and Execution of Process Act 1901 nor in s 13, Fugitive Offenders Act 1881. Therefore, a decision in one jurisdiction that there is an obligation on the magistrate to indorse the warrant on being satisfied as to its authenticity is persuasive in another jurisdiction. In *Keane*[16] it was held that under the Backing of Warrant (Republic of Ireland) Act 1965 (UK) the magistrate was under no duty to enquire into the merits of the charges. The Act related only to procedural matters and did not provide for any enquiry into the merits of the charges. This general proposition is persuasive authority as indicating the approach of the courts on the procedure to be followed in respect of inter-state extradition. On the other hand the decision in State *(Furlong) v Kelly*[17] relating to corresponding offences between Ireland and England may be of less persuasive authority. The Irish law of possession of stolen property is governed by the Larceny Act 1916; the English law is governed by the Theft Act 1868. The differences between the two provisions, though slight, was held not to 'correspond' as required by s 47 of the Irish Act. There are appreciable differences in the criminal laws between the six Australian states and the two territories for similar problems to arise. The Irish decision, if applied, would effectively undermine the whole procedure of backing of warrants. It is doubtful whether any Australian court would be prepared to refuse to return an alleged offender on this ground. The definition of theft may be different in Victoria from Queensland, but there is no provision in the Service and Execution of Process Act which requires the court to examine the substance of the law to determine whether it corresponds precisely with offences in the requested state. But if the offence in the warrant was unknown in the requested state as to be

15 Re Arkins [1966] 3 All ER 651 (DC).

16 Keane v Governor of Brixton Prison [1971] 1 All ER 1163 (HL).

17 [1971] IR 132 (SC); cf State (Duggan) v Tapley [1952] IR 62 (SC) where it was held that reciprocity is not a condition of a valid law of extradition and the operation of s 29, Petty Sessions (Ireland) Act 1851 (UK) was not dependent on the existence of similar legislation in Great Britain.

fundamentally different, the decision in *State (Furlong) v Kelly* might be regarded as not being wholly irrelevant despite the fact that it turns on the construction of a different statute.

The general principal is authoritatively determined in *Walker v Duncan*[17a] where it was held that the absence of an offence in the law of the extraditing state identical to or similar to the offence with which the accused was charged was not a matter which could form any part of the exercise of the discretion reserved to a magistrate by s 18(6) because that subsection limited the discretion. But Murphy J's strong, dissenting judgment on appeal suggests that this may not be the final word on the subject.

4. SUMMONS OF DEFENDANT

Criminal proceedings are commenced in one of two ways: either the defendant is summoned (ie commanded) to attend court, or he is arrested with or without a warrant and brought to court. The Service and Execution of Process Act makes provisions for both means of securing the attendance of the defendant who is outside the territorial jurisdiction of the state in which the trial is to take place but is within the geographical boundaries of Australia.

Section 4, Service and Execution of Process Act provides for the service of a writ of summons upon the defendant. A 'writ of summons' is defined in s 3 as meaning 'any writ or process . . . of which the object is to require the appearance of any person against whom relief is sought in suit', and 'suit' is defined in the same section as including a 'proceeding in which a person is charged with an offence'. The issue of a writ of summons under s 4(1) is restricted to a court of record, ie a Supreme Court or other court which is deemed to be such according to state law. It has been held that a summons issued by a justice of the peace under the Marriage Act 1890 (Vic) may come within the definition of a 'writ of summons' in s 3 but it cannot be issued out of a court and cannot be served in another state under s 4.[18] In *Fallshaw*,[19] however, Madden CJ explained that at common law a

17a (1975) 5 ALR 313 (Taylor CJ at CL); appeal dismissed 6 ALR 254 (HC).

18 Buckingham v Weathereys (1903) 29 VLR 381 (Holroyd J); cf Ex p Hore (1903) 3 SR (NSW) 462 (FC) (leaving a wife without means of support is not an offence punishable upon summary conviction within the meaning of s 15) and Healy v Healy [1945] SRQ 65 (Philp J) (for a contrary view); and see also Re Fowles [1936] VLR 96 (Lowe J) and R v Dodds, ex p Mitchell (1959) 3 FLR 462 (Kriewaldt J).

19 Fallshaw Brothers v Ryan (1902) 28 VLR 279 (Madden CJ).

court of record did not include a court of petty sessions. But a clerk of petty sessions is now required to keep a record and, therefore, a writ of summons so defined in s 3 included a summons by a court of petty sessions. The term 'court of record' seems to have two possible meanings. It may have a literal meaning as explained in *Fallshaw;* a court which keeps a record of its proceedings. Or it may mean a court which has power to fine or imprison for contempt or for any other offence.[20] In either event a court of petty sessions today comes within the expression as used in s 4(1).

Sections 14 and 15, Service and Execution of Process Act provide for the service of other kinds of process some of which are prima facie concerned with criminal procedure and securing the return of offenders from other states. The language which is used in Part II, Division I (ss 4-13) is more akin to that used in civil proceedings. Section 8, for example, is concerned with 'entering an appearance', a process which traditionally belongs to civil and not criminal procedure. Cases have occurred where proceedings have been instituted under the wrong section. In *Colbert*[21] it was held that a summons issued upon information made on oath for a criminal offence is not a writ of summons within the meaning of the definition of that expression in s 3(b). Such a summons issued in one state may pursuant to s 15(3), be served on a company registered in the state in which it was issued. It had been held in an earlier case[22] that an ordinary complaint and summons under the Maintenance Act was a writ of summons within ss 4-13 and did not fall within s 15, but in *Colbert* it was held that this was no authority for the view that an information and summons is outside s 15. It would seem that whilst the language used in the Act leaves a fair degree of doubt in the matter, s 15 is the section intended to be used for the institution of criminal proceedings where the alleged offender is in another state or territory. Section 15(1) refers to a summons 'issued on an information, complaint or application made on, or supported by oath, being a summons' requiring the attendance of the person named or giving notice of the hearing. This is the kind of language associated with the commencement of criminal proceedings.

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20 Ex p Power, re Devereux (1957) 57 SR (NSW) 253 (FC) per Brereton J at 260.

21 Colbert v Tocumwal Trading Co Pty Ltd [1964] VR 820 (FC).

22 Lindgran v Lindgran [1956] VLR 215 (Smith J).

23 R v Zempilas, ex p Cox [1970] WAR 197 (FC).

In *Cox*[23] a resident of South Australia was charged in the court of petty sessions in Western Australia with a breach of the Road Maintenance (Contribution) Act 1965 (WA). A complaint was made and service of the summons was effected pursuant to s 15(2), Service and Execution of Process Act. Upon its return the defendant appeared under protest and contended that the complaint, which was before the court, did not satisfy the section. The magistrate ruled that the complaint appeared regularly sworn by the justice and the court had jurisdiction, but later, after several witnesses had given evidence and the court had adjourned and resumed the hearing, he ruled that the complaint had not been properly sworn because parts of the printed form had been struck out, but not initialed. Upon being advised that the prosecution did not intend to call witnesses to establish the regularity of the complaint he ruled that the court's jurisdiction had not been established and that he was unable to hear the matter. It was held that the contention that once the magistrate had ruled in favour of jurisdiction he could not change his mind was unsound; if the magistrate should conclude on a reconsideration of the material on which the first ruling was given that jurisdiction was lacking, it was his duty to proceed no further.

Section 5(1), Service and Execution of Process Act requires that the summons be indorsed for service outside the jurisdiction with the words prescribed in the subsection. Section 6 renders the summons ineffective for service if it does not bear the indorsements required. Service has been held to be ineffective in a civil action where a writ of summons was not properly indorsed when served upon the defendant.[24] Section 6 does not appear to brook of any exceptions in respect of criminal proceedings. Additional indorsements may be necessary as required by the law of the state in which the summons was issued.[25] A warrant issued in one state does not become a warrant capable of being executed in another state until it has been indorsed.[26]

Normally a summons upon a person accused of a criminal offence will contain particulars of the time and date on which the accused person is required to attend. Section 8, Service and Execution of Process Act, which provides that a writ of summons should specify

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24 Atlas Company of Engineers v York (1903) 29 VLR 92 (Hodges J).

25 B v D [1903] QWN 18 (Real J).

26 R v Meldon, ex p McCrory [1938] QWN 6 (FC) (where a contention that the magistrate had not included the date of his indorsement thus invalidating the warrant was rejected on the ground that the court was satisfied that he did sign it on a particular date).

the period within which a defendant may enter an appearance, applies to civil cases and not to criminal cases.

Where a summons has been served out of the state under the Service and Execution of Process Act clear evidence must be given in Victoria that the identity of the defendant corresponds with the person served;[27] an affidavit of service sworn before a justice of the peace in Queensland is admissible as evidence without further proof.[28] In New South Wales it has been held that where personal service of a statement of claim has been effected out of jurisdiction, the affidavit of service should show how the deponent identified the person served as being the defendant in the suit and what took place at the time of effecting service.[29] In Victoria it has been held that a summons issued in one state may, pursuant to s 15(3) be served on a company registered in another state in the same way that it could be served on a company registered in the state in which it was issued, in this instance by post.[30]

Where a summons issued under the provisions of the Service and Execution of Process Act has been served and returned to the court where it was issued, the practice is for the server to swear an affidavit before a justice of the peace that he has served the summons. In *Fallshaw*[31] a question was raised whether proof was required that the person signing as a justice was a person authorized to administer an oath. It was held that an affidavit of service of a summons of a court of petty sessions upon a defendant resident in South Australia purporting to be made by 'one of His Majesty's justices of the peace in and for the State of South Australia' was prima facie evidence of service in Victorian law without any further proof that the person signing the same was a justice of the peace or was authorized to administer an oath.

In *Beams v Samuels*[32] a warrant of apprehension issued under s 26D, Service and Execution of Process Act was not signed personally by the justice but was merely stamped by a facsimile signature appended to it. It was held, perhaps surprisingly, that the affixing of a rubber stamp facsimile is substantial compliance with Form 1, (Fourth Schedule) within the requirement of s 26D. Section 26F(6)

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27 Cooper v Eisenberk [1913] VLR 262 (Hood J).
28 Healy v Healy [1945] SRQ 65 (Philp J).
29 Warringah Shire Council v Magnusson (1932) 49 WN (NSW) 187 (Long Innes J).
30 Colbert v Tocumwal Trading Co Pty Ltd [1964] VR 820 (FC).
31 Fallshaw Brothers v Ryan (1902) 28 VLR 279 (Madden CJ).
32 (1969) 14 FLR 201 (Neasey J).

(b) provides that the document shall, unless the contrary is proved, be deemed to be such a warrant and to have been duly issued. Whilst Form 1 permits either a clerk of the court or a justice to sign the warrant, the use of a rubber stamp is a doubtful practice.

Should an error occur in a summons to attend a criminal trial the question may arise as to whether a fresh summons may be issued or whether the summons can be amended. It would seem that the ordinary rules of criminal procedure would apply in such circumstances. There is no provision for such an eventuality under the Service and Execution of Process Act.

5. WARRANT OF APPREHENSION

By s 18(1), Service and Execution of Process Act a court may issue a warrant of apprehension for service in another state or other part of the Commonwealth. The subsection includes a warrant issued by a coroner and by an officer of the court. It applies to convicted or accused persons. A warrant addressed to members of the police force commanding them to take and convey a convicted person to a reformatory school and to deliver him to the superintendent of the school and keep him during a stated period, has been held in *Neville*[33] to be a warrant within the meaning of s 18. Section 18(1), as it stood before amended in 1953, authorized the endorsement of warrants 'for the apprehension or commitment' of any person who came within one or other of seven specified descriptions. The magistrate treated the omission of the words 'or commitment' in the 1953 amendment as indicating that the intention of the legislature was to confine the operation of the subsection to warrants of apprehension properly so called to the exclusion of a warrant of commitment on a conviction for a penalty. But it was held that the language must be interpreted as it stood and that the intention of the legislature was to extend the scope of the operation to Part II of the Act, not to reduce it.

Section 18(3) and (6), Service and Execution of Process Act uses the word 'return' or 'returned' in respect of a person apprehended. The word 'return' suggests that the fugitive will at some point of time, presumably at the time the offence was committed, have been physically present in the state or territory which is seeking his apprehension. There may, however, be occasional instances where the fugitive has committed an offence without having ever set foot in the state. Such

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[33] R v Pyvis, ex p Neville [1955] VLR 61 (Herring CJ).

an instance occurred in *O'Sullivan v Dejneko*[34] where the owner of a vehicle resident in the state committed an offence in another state although he had never driven the vehicle himself in the requesting state. Kitto J said, obiter, that the expression 'to be returned' must have a wider meaning than that of being taken back to a state from which he has come and must refer rather to his being taken back with the original warrant to the state from which the warrant had been brought.[35]

There is nothing in the Service and Execution of Process Act which gives power to a policeman or other person in authority to arrest a suspected offender from another state or territory without a warrant of apprehension. Section 19A makes provision for the issue of a provisional warrant. But until a warrant is issued in the state or territory seeking the return of the fugitive, there is no power under the Act for a policeman to arrest the fugitive.

It would seem that if a person was arrested and a warrant for his apprehension was issued in the state with jurisdiction to try the case and the warrant is endorsed and then served on the fugitive, the warrant is, nevertheless, properly executed. In *Horwitz*[36] it was contended that the fugitive had been wrongly arrested in the first place on July 18 and could not be arrested again on August 10 whilst in custody under the wrongful arrest. It was held that the question of whether the fugitive from Victoria was rightly or wrongly arrested in the first instance did not arise in considering the question whether the magistrate had jurisdiction to make the warrant of return, which he did.

By s 19A(1), Service and Execution of Process Act a magistrate, justice of the peace or officer of the court (not defined but an expression used also in s 18(1)) may issue a provisional warrant for the apprehension of a fugitive. Before issuing such warrant he must be satisfied that the provisions of s 18(1) exist. He may issue the provisional warrant if the original warrant is not produced or, if produced, he requires further information before endorsing it. Whilst the wording of the subsection is not wholly clear it does seem to suggest that there should be an original warrant in existence even if the magistrate in the requested state or territory has not seen it. The subsection does not

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34 (1964) 110 CLR 498 (HC).

35 Ibid at 502; but at 511 the majority of the court refrained from expressing any opinion on the point as it was not in contention.

36 R v Horwitz (1904) 6 WALR 184 (FC).

seem to contemplate a warrant being issued independently of any warrant being issued in the state or territory which has jurisdiction to try the offence. The subsection seems to have a narrow scope. Its wording is different from that in s 14(1), Extradition (Commonwealth Countries) Act 1966 which permits the issue of a warrant of apprehension without any warrant having been issued in the Commonwealth country having jurisdiction to try the offence.

Section 18(3)(b) and (6)(e), Service and Execution of Process Act gives a magistrate or justice of the peace discretion to release a person apprehended on a warrant issued in another state or territory. It is obviously implied that bail shall be granted in accordance with the general principles of law. The principal difference of a procedural nature is that the magistrate can release the fugitive on bail to appear in the state in which he is required to answer the charge.[37]

6. JURISDICTION

The concept underlying s 18, Service and Execution of Process is that a state or territory may obtain the return of a fugitive for a crime alleged to have been committed within the jurisdiction of the requesting state or territory. Section 18(1)(a) of the Act of 1901 contained the phrase 'offence to have been committed within such State' but the present subsection as amended in 1958, contains no such limitation. It simply refers to the backing of a warrant for execution which has been issued by a state or territory for the apprehension of a fugitive 'under the law of another State'.

Various questions relating to jurisdiction are posed by s 18. May the court of the requested state examine the warrant to ascertain whether the requesting state has jurisdiction to try the case? Is such a test to be that of the law of the requested or the requesting state? At what stage can a fugitive challenge the jurisdiction of the requesting state to try and determine the alleged offence? May the question of jurisdiction be determined as a preliminary issue before the warrant for apprehension is executed? Further subsidiary questions arise—for example, which court determines whether a fugitive will be returned where the offence is committed partly within and partly without the requesting state's territory?

The Service and Execution of Process Act is primarily an Act concerned with procedure. But such is its scope that it has also had the effect of widening the jurisdiction of state courts not only in matters

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37 See O'Donnell v Heslop [1910] VLR 162 (FC).

of procedure but in matters of law also. The question arose in *Delaney v Great Western Milling Co Ltd*[38] where the High Court held by 3-2 that a contract made in Victoria was subject to the jurisdiction of the courts of New South Wales. The dissenting view was that the Service and Execution of Process Act did not affect the substantive law to be applied by the court in deciding a case under the jurisdiction conferred by it. But the majority held that the effect of the Act was to make the contract subject to the jurisdiction of the court in New South Wales. The defendant was resident within the Commonwealth of Australia and was, therefore, subject to the jurisdiction of the Supreme Court of New South Wales by being served with process under the Act.

The relationship of state law to the Service and Execution of Process Act was again considered by the High Court in *Luke v Mayoh*[39] where the Rules of the Supreme Court of South Australia provided that no writ of summons for service out of the jurisdiction could be issued without leave of the court, whilst s 4 of the Act of 1901 contained no such restriction. It was held that on an application to a judge of the Supreme Court for leave to issue a writ for service in another state, he should not restrict the issue of such a writ to cases in which it could have been effectively served under the law of South Australia, and the court should grant the leave without considering whether the cause of action was within the cases in s 11 of the Act of 1901. The decision refers to the civil jurisdiction of a state court and not to criminal matters. Nevertheless, because the Act treats both civil and criminal process under the same sections for certain purposes, the case is not without relevance in criminal procedure. Questions of jurisdiction and the application of the decision in *Luke v Mayoh* have laregly arisen in civil cases.[40] But it arises in criminal matters also.

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38 (1916) 22 CLR 150 (HC).

39 (1921) 29 CLR 435 (HC).

40 Norddentscher Lloyd Ltd v Ockerby & Co Ltd (1918) 20 WAR 39 (FC) (no jurisdiction on company registered in NSW prior to war carrying on business in WA); Johnston v Johnston (1921) 17 Tas LR 20 (FC) (order for maintenance made in Tas applies to defendant in NSW); Ex p Gove (1921) 21 SR (NSW) 548 (jurisdiction over resident of another state if debt contracted within jurisdiction); Mutch v Dalley [1923] QSR 138 (FC) (no jurisdiction in civil action on promissory note where defendant at no time in Qd); McColl v Peacock [1924] VLR 102 (Cussen J) (no leave to issue a summons is necessary at all); Clarke & Co Pty Ltd v Kerin [1926] VLR 559 (McArthur J) (the issue of a writ and its service under the Act of 1901 are good although it may subsequently appear that the court had no jurisdiction to hear the action); Lawrie v Chick [1929] SASR 47 (FC) (defend-

In *Hodgson v Ryan*[41] it was held that the area of criminal jurisdiction exercisable by the children's court (WA) did not extend to a person who had never been domiciled or resident in Western Australia.

In *Home Benefits*[42] it was held that there is jurisdiction in a court of summary jurisdiction of South Australia to hear a complaint laid against a New South Wales company for encouraging a person, by means of a circular delivered at its instigation in South Australia, to despatch in exchange for goods portions of packages delivered about goods which had been, were being, and were intended to be sold and distributed in South Australia. Murray CJ said that no distinction

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ant outside SA subject to jurisdiction of court); Ex p Walker (1931) 31 SR (NSW) 494 (FC) (no increased jurisdiction under s 13); City & Suburban Parcel Delivery (Boyce) Ltd v Gourlay Bros Ltd [1932] QSR 213 (Henchman J) (Act of 1901 does not extend coercive authority to company registered and incorporated in NSW with no office or place of business in Qd); Braemar Woollen Mills Co-op Ltd v Poinsettia Hosiery Mills Pty Ltd (1934) 51 WN (NSW) 6 (Street J) (no jurisdiction to entertain action against company registered and carrying on business wholly outside NSW); Colquhoun v Bell [1935] SASR 346 (FC) (no jurisdiction to hear affiliation proceedings where putative father is at all times resident and domiciled in Qd); Commissioner of Road Transport v Green Star Trading Co Pty Ltd. (1936) 36 SR (NSW) 320 (FC) (summons may be issued out of Supreme Court of NSW against a company registered and conducting its own business only in Vic); Friedman v Kemp Nurseries Ltd [1954] VLR 336 (O'Bryan J) (s 13 is merely negative in character and any limitation on service must be found in provisions of s 11); Tallerman & Co Pty Ltd v Nathan's Merchandise (Vic) Pty Ltd (1957) 98 CLR 93 (HC) (practice has grown up entering conditional appearance, objecting to jurisdiction and then applying by summons to have writ set aside—may well be that Luke v Mayoh will some day have to be reconsidered); Gilchrist v Dean (1959) 2 FLR 175 (Sholl J) (third party notice issued in Vic may be validly served in Qd and service cannot be set aside even in Vic court would later, under s 11, refuse defendant leave to proceed in the event of the third part not appearing); W A Dewhurst & Co Pty Ltd v Cawrse [1960] VR 278 (Dean J) (defendant in SA successfully moved to stay proceedings in Vic without entering an appearance on ground that Vic court had no jurisdiction); State of Victoria v Hansen [1960] VR 582 (Adam J) (question of jurisdiction determined without defendant entering an appearance); Earthworks & Quarries Ltd v F T Easement & Sons Pty Ltd [1966] VR 24 (Dean J) (plaintiff has right to choose place of trial where issue is within s 11 (1) (c) and choice should not be interfered with except on some definite and clear ground of inconvenience or otherwise); Wilson Electric Transformer Co Pty Ltd v Electricity Commission (NSW) (1967) 12 FLR 314 (Adam J) (jurisdiction of court to set aside writ where a conditional appearance has been entered or no appearance has been entered is well established); Hodge v Club Motor Insurance Agency Pty Ltd (1974) 2 ALR 421 (FC, SA) (victim of traffic accident in SA is able to invoke Act and serve writ on insurers in Qd).

41 (1962) 4 FLR 390 (D'Arcy J).

42 R v Morgan, ex p Home Benefits (Pty) Ltd [1938] SASR 266 (FC).

could be drawn between civil cases and criminal charges in this respect and the provisions of the federal Act which authorizes effective service within Australia should not be restricted to cases in which a summons could have been effectively served under state law.[43] Once the offence is localized as having taken place in the state whether the offence is indictable or punishable upon summary conviction, service of the summons is authorized upon compliance with s 15 of the Act of 1901.[44] Napier J said—

> It was unnecessary for the State Parliament to do more than to provide for the issue of the warrant or summons, as the case might be, and to provide for its service or execution in South Australia, leaving the law of the Commonwealth to implement the local law, by enabling the process to be served or executed in other states. This is, no doubt, an extension of the jurisdiction of the state courts, in the sense that it enables them to reach offenders who could not otherwise be brought before the court, but this does not mean that the state court is able to hear or determine any case which is not within its jurisdiction when the defendant is found within the state. The fact that he has been brought into the state under compulsion, by the law of the Commonwealth, does not deprive the state court of jurisdiction.[45]

The problem of jurisdiction over persons resident outside the state was again before the court in *Iskra*[46] where the owner of a vehicle, resident in Victoria, was alleged to have committed an offence under the Road Maintenance (Contribution) Act 1958 (NSW). The case is primarily concerned with the extra-territorial operation of New South Wales statutes but also concerns the Service and Execution of Process Act. Sugerman J said—

> The jurisdiction of a state court, considered solely from the point of view of its jurisdiction over persons who are outside the territorial limits of the state, is dependent upon the existence of statutory authority for the service of its process outside those limits. Part II of the Service and Execution of Process Act, within the limits of its operation, provides such authority. Where it operates, jurisdiction in the relevant sense is found in the state court, being, indeed, conferred by such operation. The pre-existence in the state court of extra-territorial jurisdiction in the abstract is not necessary; indeed there is no such concept.[47]

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43 Ibid at 271.

44 Ibid at 275-6.

45 Ibid at 279.

46 Ex p Iskra (1963) 63 SR (NSW) 538 (FC), where Ex p Gove, see note 40, is discussed and criticised.

47 Ibid at 545.

A similar but slightly different problem arose in *O'Sullivan v Dejneko*:[48] a resident of South Australia who had never been in New South Wales was convicted of an offence under the Road Maintenance (Contribution) Act 1958 (NSW). He was fined and, in default of payment it was ordered that he be imprisoned. The Supreme Court of South Australia refused to order the return of the owner upon the ground that it would be unjust or oppressive to do so because the provisions of the Road Maintenance (Contribution) Act in their application to the owner of the vehicle were not within the legislative competence of the legislature of New South Wales. The owner did not himself drive the vehicle in New South Wales but having the legal right to forbid and prevent the journeys, he gave his son such a general licence to use the vehicle that in every practical sense he sanctioned the journeys as if he had given specific consent to each journey. The High Court held that there was no doubt that the use of a motor vehicle upon a public street in New South Wales is a matter with which the legislature of that state may validly deal. The purpose of the Act was to impose upon owners of vehicles using the streets an obligation to contribute towards their upkeep. The obligation could not be imposed against the vehicle. It could only be imposed upon someone who can contribute and the obvious person to select was the owner of the vehicle. It was the presence of the vehicle in New South Wales and the use of it upon the streets that attracted the constitutional authority of the state and enabled its legislature to impose the obligation of contributing to the upkeep of its streets upon owners of vehicles, no matter where they are domiciled, resident or carry on business. In short, the Act was not beyond the power of the state from which the warrant issued.

Where an offence is committed in State A against the law of State A, and State B claims jurisdiction, the fugitive cannot be returned to State B by State C. Neither State B nor State C has any jurisdiction in the matter. In *Falkiner*[49] a warrant was issued in New South Wales and was endorsed by a magistrate in Tasmania for an alleged offence of being an accessory after the fact to robbery committed in Victoria. It was held by the Tasmanian court that the warrant had been issued without jurisdiction by the New South Wales court and could not be endorsed.

A detailed examination of the law governing extraterritorial jurisdiction of a criminal court is beyond the scope of this article which

48 (1964) 110 CLR 498 (HC).
49 R v Falkiner (1914) 10 Tas LR 63 (FC).

is primarily concerned with procedure. The general rule is associated with *Mcleod v Attorney-General for New South Wales*[50] where the Privy Council held that all crime is local and the jurisdiction over the particular crime belongs to the country where the crime is committed. The question of procedure is whether the requested state can determine the matter according to its own law or according to the law of the requesting court. The judgment in *Falkiner* suggests that the court was assuming the criminal law to be the same in both states on the subject of extraterritoriality[51] and that it could determine the issue according to the law of both states. In this case a warrant of arrest was issued in New South Wales and endorsed by a magistrate in Tasmania and the defendant was arrested. The warrant charged him with being an accessory after the fact in Victoria. It was held that a New South Wales magistrate could not issue a warrant for the arrest of a person for a crime committed in Victoria. Section 18, Service and Execution of Process Act 1901-1912 gave no power to the Tasmanian magistrate to endorse such a warrant.

Questions of jurisdiction in respect of the enforcement of maintenance orders occurred regularly in the earlier years of the life of the Act. The Family Law Act 1975 currently governs the law and procedure to be followed and no separate consideration is given to the subject in this article.

7. GROUNDS FOR REFUSING SURRENDER

Section 18(6), Service and Execution of Process Act gives discretion to the magistrate in certain circumstances to order the fugitive's discharge, delay his return or 'make such other order as he thinks just'. Clearly the words give the magistrate in the requested state or territory a wide discretion where

> (a) the charge is of a trivial nature;
> (b) the application for the return of the person has not been made in good faith in the interests of justice; or
> (c) for any reason, it would be unjust or oppressive to return the person either at all or until the expiration of certain period . . .

The words of the subsection bear a close resemblance to ss 10 and 19, Fugitive Offenders Act 1881 (Imp) but omit reference to 'distance', 'facilities of communication' and 'too severe a punishment' which were

50 [1891] AC 455 (PC) at 458 per Lord Halsbury LC.
51 See eg F A Trindade, *The Australian States and the Doctrine of Extra-Territorial Legislative Incompetence* (1971) 45 ALJ 233.

essential factors for consideration in the Imperial Act. Nevertheless, there is a strong presumption that circumstances which would be regarded by a court exercising jurisdiction under, say, s 16, Extradition (Commonwealth Countries) Act 1966-1973 (the successor to s 10 of the Act of 1881) as being of a 'trivial nature', 'not made in good faith' or 'unjust or oppressive' would be the same in respect of inter-state extradition. It is conceivable, but unlikely, that what might be held to be 'unjust or oppressive' under one Act would not be in the other. The small number of reported cases which have been brought for determination before the courts suggest that the proper canon of construction is to regard the subsection as self-contained and to determine each case on its merits. There are too many other differences between the legislation governing international extradition and interstate extradition to make the cases determined under each applicable. Inter-state extradition covers all criminal offences; international extradition covers only serious offences. Thus the range of cases which may fall under s 18(6) of the inter-state Act is much greater than under s 16, Extradition (Commonwealth Countries) Act 1966-1973.

In *Algerston*[52] the origin of the words 'unjust or oppressive' was noted. No attempt was made to decide whether the Service and Execution of Process Act placed greater or fewer difficulties in the way of the prosecution than the Fugitive Offenders Act. Lowe J said it was unnecessary to discuss the matter, but Fullagar J did discuss same of the decisions made under the Act of 1881 and thought it was open to an applicant under each of the enactments to show that no case can be made against him.

Of the three factors listed in s 18(6)—'trivial nature', 'not made in good faith', and 'unjust or oppressive'—some of the cases have involved consideration of each of the factors and the finding has not necessarily been made on one factor in isolation from the other two. However, for convenience, each of the three factors is considered separately from the other.

(i) *Trivial nature of charge*

Section 18(6) (a), Service and Execution of Process Act lists the trivial nature of the charge as the first ground for refusing to surrender the fugitive. This appears to be the only limitation in the Act restricting the return of a fugitive on what might be described as minor offences.

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52 Re Algerston [1947] VR 23 (FC).

(ii) *Application not made in good faith*

The second ground listed in s 18(6)(b), Service and Execution of Process for refusing surrender of a fugitive is that the application of the person apprehended has not been in good faith in the interests of justice. In *Andrew*[53] the prosecutrix alleged that the fugitive had committed bigamy in New South Wales in 1876 by going through a form of marriage with her. Shortly after the alleged offence the fugitive obtained a divorce from his wife and offered to marry the prosecutrix legally, an offer which he repeated on a number of occasions. She always refused but the parties lived together until 1898. In 1901 she threatened to prosecute the fugitive unless he paid her a certain sum of money. No payment was made and the prosecution was instituted. The court in New South Wales requested the return of the fugitive from South Australia but this was refused on the ground that having regard to the lapse of time and other circumstances, the prosecution was not instituted in the interest of justice. Boucaut J said that by English law lapse of time does not expunge a felony, but judges deprecate prosecutions after such a long lapse of time as a quarter of a century. The subsection was inserted to enable a judge to act on the principle that after the expiration of a certain time and in certain circumstances it would be 'cruel and improper to extradite an alleged offender'.[54] In *Mulfahey v Fullarton*[55] the fugitive contended that the person who had procured the issue of the information charging him with conspiracy had endeavoured by threats of criminal proceedings to extort money from the fugitive and the other persons charged with conspiracy in satisfaction of a civil claim. The Victorian court held that even if these allegations were proved the fugitive should be returned to Tasmania as the information was sworn by a member of the Tasmanian police force and not by a private person and before the issue of the information the matter had been fully investigated by the Crown Solicitor of Tasmania. The court was not prepared to investigate the allegation but the judgment seems to suggest that it might perhaps have been prepared to do so if it had been a private prosecution or if the principal complainant was a private person and there had been no investigation beyond that conducted by a police force or by a Crown Law Department.

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53 Re Andrew [1902] SALR 106 (Boucaut J).
54 Ibid at 108-9.
55 [1920] VLR 126 (Schutt J).

(iii) *Unjust or oppressive*

The factor which may be taken into account in deciding whether to accede to a request for surrender by s 18(6)(c) if for any reason, it would be unjust or oppressive to return the person either at all or until the expiration of a certain period. In *Rustichelli*[56] the fugitive was apprehended in Queensland under a warrant issued by a magistrate in South Australia under the provisions of s 11, Intercolonial Debts Act 1887 (SA) on a charge of unlawfully quitting that state with intent to defraud a creditor of £20. It was held that this 'drastic provision' which had no counterpart in the law of Queensland made it unjust and oppressive to order the fugitive's return. The complaint was making an improper use of the criminal statute as a lever to recover money and the application had not been made in good faith in the interests of justice. Likewise in *Conway,*[57] where a warrant of apprehension was issued in New South Wales for the arrest of a fugitive charged with an offence under the Liquor Act of not paying on demand a reasonable sum for meals and accommodation supplied on licensed premises, the Queensland court held that the fugitive should be discharged as this was not a criminal offence in Queensland and was an attempt to enforce the payment of a civil debt incurred in New South Wales by use of criminal process in that state.

In *George*[58] it was established that where a person for whose apprehension a warrant has been issued charging him with an offence in another state has been arrested in Victoria under the provisions of s 18 and it is made clear to a justice that if he were put upon his trial for such an offence, he should, on the undisputed facts, be acquitted, the justice should discharge such person. The wide discretion which s 18 confers on a justice ought to be exercised in such circumstances. A full discussion on the scope of the subsection took place in *O'Donnell v Heslop.*[59] Madden CJ said that there was difficulty in laying down a definite general rule which would apply to all cases that might arise. It was a general principle of law that the issue should be determined where the prosecution was instituted, but there might be cases where the charge against the defendant was wholly misconceived. Circumstances might clearly establish the innocence of

56 R v Boyce, ex p Rustichelli [1904] SRQ 181 (Chubb J).
57 Re Conway, ex p Conway [1946] QWN 31 (Douglas J).
58 Re George [1909] VLR 15 (A'Beckett J).
59 [1910] VLR 162 (FC).

the defendant and that therefore there would be no real use in returning him. He concluded—

> But it ought always to be remembered that the court in which the litigation exists is the court to try the issue, and that nobody outside such court should take upon himself to try the real issue, but at the same time it must be remembered that the magistrate has to see that the person charged is not sent back to be tried on an alleged issue which does not really exist.[60]

Hodges J referred to a contention that the words 'unjust or oppressive' must be facts going to the question of guilt or innocence but he did not think that there should be such a limitation. He said—

> While ordinarily neither a magistrate nor a judge would enter on the question of the guilt or innocence of the defendant, there may be cases of an exceptional character in which the defendant is able so to satisfy the magistrate or judge by proving almost to a demonstration that it was not possible for him to have committed the offence charged, and where the prosecutor can bring forward nothing in answer to that demonstration.[61]

In such a case the magistrate would be entitled to discharge the fugitive but such a case would be exceptional. Cussen J said that it was quite clear that it was never intended that a defendant should be entitled to call upon the justice or judge to exercise his discretion in the defendant's favour upon proof of facts which would amount to an ordinary defence to the charge at the trial, if the justice or judge is satisfied that the prosecution is bona fide challenging those facts.[62]

In *Triggs*[63] a husband was arrested in Victoria under a warrant issued on the application of his wife in New South Wales for disobedience of the maintenance order. There was evidence to show that the wife was committing a matrimonial offence in having deserted her husband and it was held that it would be unjust to send him back to Sydney.

Further consideration was given to the question of 'unjust and oppressive' in *Algerston*[64] where it was held that it is unjust and oppressive to order the return of a person to another state pursuant to s 18 where the whole of the evidence against him is before the justice determining whether to order the return and is such that no

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60 Ibid at 171.
61 Ibid at 174.
62 Ibid at 176.
63 Re Triggs [1927] VLR 187 (McArthur J).
64 Re Algerston [1947] VR 23 (FC).

magistrate could on it properly find a case fit to be sent for trial. Declining to define the words 'unjust or oppressive' on the ground that it would be presumptuous as it would be unwise to try to foresee all the combinations of circumstances which would fall within the category, Lowe J concluded—

> Finally, I think that the justice should only refuse to return the person named in a clear case. Where it is reasonably arguable that there is a case for committal it is not unjust or oppressive to return the defendant.[65]

Martin J said that in so deciding whether an order for return would be unjust or oppressive a judge would be bound to consider whether any useful purpose could be served by making the order for return, and Fullagar J (dissenting on the question of the quantum of the prosecution evidence) said that it would generally be useless for an applicant to maintain that he has a good defence to the charge, but where it is abundantly clear that the charge is without foundation in the sense that there is no evidence whatever which could possibly be left to a jury, the applicant should be discharged. The majority view was that whilst there was grave suspicion of corruption and dishonesty the facts were so flimsy that no jury would convict. *Algerston* was expressly followed in *Mandel*[66] where it was held that issues of fact should not be investigated nor should doubtful questions of law be determined. *Mandel* in turn was followed in *McNamara*[67] where it was held that the application, in which the burden of proof is upon the applicant, in order to succeed must be brought by the applicant within the four corners of s 18(6), and that process does not involve any trying of the merits of the issues in Queensland which ultimately, if the matter gets so far, will be tried by a jury in Victoria. The cases were reviewed again in *Klumper*[68] where it was repeated that it is not sufficient that there should be merely doubtful or debatable or reasonably arguable questions of law involved; these, like disputed questions of fact, are matters for decision at the trial in the state to which return is sought.

In *Aston v Irvine*[69] informations were sworn in South Australia against certain persons in Victoria for conspiracy to cheat and defraud, by use of an electric battery upon a racecourse in a race held in South Australia, contrary to the rules of racing, such persons as should invest

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65 Ibid at 30.
66 Re Mandel [1958] VR 494 (O'Bryan J).
67 Re McNamara (1964) 7 FLR 83 (Stable J).
68 Ex p Klumper (1967) 10 FLR 167 (Sugerman JA).
69 (1955) 92 CLR 353 (HC).

money on other horses in the race. It was alleged that the combination involved deception for the purpose of securing a declaration that the horse had won the race, so that the bets and prize-money would follow, when according to the rules of racing there would be no title to such a declaration. Warrants were issued in South Australia and indorsed pursuant to s 18(1) by a magistrate in Victoria, for the apprehension of the men, who were subsequently apprehended in Victoria. It was held that the warrant should issue. It did not appear upon the suggested facts that the charge was misconceived. The court accepted that it would be unjust or oppressive to return the accused to South Australia if the facts as they are alleged to appear make it clear that there was no indictable conspiracy. It was not enough that the information as laid was open to criticism.

In *O'Sullivan v Dejneko*[70] it was argued that it would be unjust and oppressive to return the owner of a vehicle for an offence in connection with the payment of road maintenance contribution who had never been in the requesting state and thus had no jurisdiction, but the argument was rejected. It seems to be implicit from the judgment that if the requesting state had not had jurisdiction over the fugitive, the court of the requested state would have been justified in finding that his return would be unjust and oppressive.

In *Rider v Champness*[71] it was held that where a person is apprehended and brought before a magistrate under a warrant issued in another state and endorsed pursuant to s 18(1) of the Act, the magistrate is entitled, if the warrant and endorsement are, on the face of them and on the proof provided for in s 18(1), in order, to make an extradition order by s 18(3) although nothing more than the warrant and endorsement is placed before him. It rests with the person so brought before a magistrate to ask for particulars of the charge against him or to raise matters on which an extradition order should be refused. If the person so brought before a magistrate does not ask for particulars of the charge, it is not unjust or oppressive to make an extradition order under s 18(3) although he has been given no information about the charge except what appears in the warrant.

The most recent case in which s 18 has been considered is *Walker v Duncan*.[71a] A Queensland magistrate issued a warrant for the arrest of an alleged offender on a charge of making a demand with threats under s 415, Queensland Criminal Code. The offender sought a review

70 (1964) 110 CLR 498 (HC).
71 [1971] VR 239 (Lush J).
71a See note 17a.

of the magistrate's order of return on the grounds that (i) there was no comparable offence in New South Wales, (ii) the application for his return was not made in good faith, and (iii) because prejudice of the white community of Queensland against him personally and against the Aboriginal race, of which he was a member, would militate against him receiving a fair trial in that state. Confirming the magistrate's order Taylor CJ in CL said that it was irrelevant that the offence for which the offender was charged in Queensland was not an offence in New South Wales. There was not any question under s 18 of reciprocal action between the states. Moreover there was no evidence to show that personal and racial prejudice of the white community would prevent the offender from having a fair trial. Taylor CJ in CL relied to some extent on *Ammann v Wegener*[71b] where Mason J observed that there was much to be said for the view that court's powers of review does not extend to reviewing the validity of the warrant.

(iv) *Autrefois acquit and autrefois convict*

Where a fugitive alleges that he has previously been acquitted or convicted of the offence for which he has been apprehended under a warrant endorsed under the Service and Execution of Process Act it would seem that a magistrate has discretion to consider such plea under the provisions of s 18(6). In *Ball*[72] the fugitive had been charged under s 196, Crimes Act 1900 (NSW) with having set fire to a dwelling house knowing a person to be then in such dwelling, and had been acquitted. He came to Western Australia where he was arrested on a warrant from New South Wales charging him under s 198, Crimes Act of setting fire to a dwelling house with intent to defraud. The Supreme Court of Western Australia held that the two offences were quite different. But the tenor of the judgment suggests that if it had been found that the two offences were the same it had power to refuse to surrender him. It is arguable, however, that this is a question of law which should be determined by the New South Wales court and not by the Western Australian court.

8. WITNESSES

(i) *Summons to witness*

Section 15, Fugitive Offenders Act 1881 (Imp) made provision for the enforcement of the attendance in proceedings for an offence in

71b (1972) 129 CLR 415, see note 12 (HC).
72 Ball v Murphy (1908) 10 WALR 89 (FC).

one colony of a witness in another colony. No such provision was included in Part III (Extradition to and from New Zealand) of the Extradition (Commonwealth Countries) Act 1966.[73] Section 16, Service and Execution of Process Act is therefore the successor in practice for the summoning of a witness in one state to give evidence before the court of another state.

By s 16(1) of the Act of 1901 any criminal court may issue a summons or subpoena to a witness in another state or territory to give evidence. The summons may be issued by the court requiring such a witness provided it 'is necessary in the interests of justice'. By s 16(2) the witness is to be tendered a reasonable sum for his expenses. At least if his presence is to be enforced he must have been tendered reasonable expenses. When an application is made for liberty to serve a *subpoena duces tecum* in any other state under s 16 some information should be supplied to the judge as to the social and financial position of the person whose attendance is required, so that he may be guided in fixing terms to be imposed on the service of the subpoena and in considering what would be a reasonable sum to tender for expenses.[74] A one-way first class railway ticket as distinct from a return ticket has been held not to constitute reasonable expenses.[75] The High Court discussed the meaning of the word 'court' for the purposes of s 16 in *Ammann v Wegener*.[76] In this case a witness was served with a summons in New South Wales to appear at the Adelaide magistrates' court to give evidence at a preliminary inquiry. It was contended that such an inquiry was a ministerial and not a judicial function and the presiding magistrate did not constitute a court. Admitting that there was a considerable body of authority in support of the view that a preliminary inquiry was not a judicial inquiry, Gibbs J, obiter, said that it did not necessarily follow that because a magistrate is not exercising judicial functions he cannot be said to sit as a court, but for the purpose of the case it was not necessary to decide whether the words 'the courts of the States' in s 51(xxiv) of the Constitution refers only to tribunals exercising judicial powers as the word 'process' is not governed by the words 'of the courts'. Subse-

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73 Although it would seem that Australia could by the law of New Zealand summons a witness from that country as s 15 of the Act of 1881 should continue to apply there; New Zealand cannot now by the law of Australia enforce the attendance of a witness from Australia.

74 Kingston v Reid & Co Ltd [1903] QWN 11 (Real J).

75 Re A H Prentice Ltd [1930] QWN 11 (Douglas J).

76 (1972) 129 CLR 415 (HC).

quently the witness sought an order from the court in New South Wales that it would be unjust or oppressive for her to go to Adelaide to give evidence in a trial where a medical practitioner was charged with unlawful use of an instrument with intent to proceure her miscarriage. Mason J said—

> . . . it is not enough for the applicant to show here that the charge involves one or more debatable questions of law; it must appear clearly that the charge is without legal foundation, that it is 'misconceived'.[77]

It was for the courts of South Australia to determine whether or not the charge was with legal foundation. On the evidence he concluded that she had not shown that the charge was without legal foundation or misconceived. The witness also contended that though she had been granted a formal pardon by the Governor of South Australia, she might yet be liable to prosecution for conspiracy under the law of New South Wales, but this argument carried little weight, as did her suggestion that she would be embarrassed in giving evidence against a doctor who had acted at her request. There was evidence that the Crown of South Australia was willing to provide a first class return air travel ticket from Sydney to Adelaide, provide accommodation and meals in Adelaide and pay other reasonable expenses. By failing to to appear a witness who has been duly served with a subpoena commanding his attendance renders himself liable to be apprehended under a warrant of apprehension.[77a]

(ii) *Commission*

There are two methods of obtaining evidence from a witness who is outside the jurisdiction of a state or territory but is within Australia. The court requiring his evidence may either issue a commission or issue a summons or subpoena requiring him to give evidence in person before the court. The power to issue a commission is to be found in state or territory law.[78] The principles upon which a commission is issued are to be found in state or territory law. The principles upon which a commission will issue to take the evidence of a witness abroad belong to the rules of criminal procedure and evidence and are outside

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77 (1973) 47 ALJR 65 (Mason J) at 67.

77a Re John Sanderson & Co (NSW) Pty Ltd (1975) 7 ALR 390 (Kaye J).

78 Eg s 4, Witnesses Examination Act 1900 (NSW); s 4, Evidence Act 1958 (Vic).

the scope of this article.[79] The principal problem here is its relation to the right of a court to subpoena a witness from another state or territory under s 16, Service and Execution of Process Act.

The general rule has been expressed in Victoria as being that a commission will not be granted to examine a witness whose attendance at the trial can be enforced under the provisions of the Service and Execution of Process Act.[80] In Queensland it has been ruled that judges should be informed by affidavit of the substance of evidence expected to be given by the person whose attendance is required in order that he may be able to decide whether the testimony of such person is necessary in the interests of justice.[81] In Victoria it has been ruled that where a witness is permanently resident in another state (Western Australia in this instance) and his attendance would be very inconvenient for business reasons, the Victoria court will, where the evidence sought does not involve personal credibility, and runs largely on the production of documents, grant a commission to take the evidence, notwithstanding that the witness's attendance might be

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79 The general principles are to be found in Williams v Mutual Life Association of Australasia (1904) 4 SR (NSW) 677 (FC) (where on an application for a commission to examine a witness abroad, the judge is satisfied that the evidence is material, that the witness is out of the jurisdiction and cannot be compelled to attend at the trial, he is bound to direct the commission to issue unless the other side satisfy him that the witness will be present); Willis v Trequair (1906) 3 CLR (HC) (in considering whether a commission should or should not issue, the court should not speculate as to whether one party or the other is likely to succeed at the trial, and should attend to the nature of the case); Re Matthews [1919] VLR 733 (Hood J) (the circumstances of each case must be considered); La Baloise Compagnie d'Assurances Contre l'Incendie v Western Australian Insurance Co Ltd [1939] VLR 363 (FC) (where material witnesses give evidence abroad on commission and it appears that the credibility of such witnesses is of great importance the court in its discretion may order that their depositions, or certain parts thereof, shall not be admitted in evidence at the trial if the opposite party gives notice requiring the attendance of the witnesses for examination and cross-examination); Bandiera v Adamedes [1963] SASR 103 (Travers J) (assumption that evidence taken in accordance with the law of Italy); Bangkok Bank Ltd v Swatow Lace Co Ltd [1963] NSWR 488 (Wallace J) (it is generally undesirable where questions of identity and credibility are main issues that evidence of a material witness should be taken abroad on commission); Hardie Rubber Co Pty Ltd v General Tire & Rubber Co (1972) 46 ALJR 326 (Gibbs J) (if it appeared that the procedure abroad would not permit the evidence given by a witness to be properly tested and that this would cause injustice to the applicant for an order a commission the court would not be bound to confirm the order).

80 National Mutual Life Association of Australasia Ltd v Australian Widows' Fund Life Assurance Society Ltd [1910] VLR 411 (Hood J).

81 Diamond Brother v W M Collins & Sons Ltd [1911] QWN 46 (DC).

compelled under s 16 of the Act of 1901.[82] In New South Wales it has been held that each application to allow a commission must depend upon its own facts.[83]

9. ENFORCEMENT OF FINES

Part IVA of the Act (ss 26A-26R) makes provisions for the enforcement of the payment of a fine by a person within Australia but not within the state or territory of the court imposing the fine. It relates only to fines imposed by courts of summary jurisdiction. By s 26D a warrant of apprehension may be issued in respect of a person who has not paid the fine. Part IVA was considered in *Beams v Samuels* where Neasey J said—

> The general object and purpose of Part IVA is clearly enough, I should think, to enable the courts of the various states and territories to which the Act applies to act in aid of one another in the enforcement of penalties imposed by way of fines by courts of summary jurisdiction, without the trouble, expense and inconvenience of returning an offender to the state or territory where the fine was imposed. Part IVA makes careful provision for the offender to be given an opportunity to pay the fine either in whole or, if the court before which he is brought thinks fit, by instalments. The matters of which the court is required to be satisfied before it acts are set out in s 26F. It must be satisfied of the identity of the person before the court with the person upon whom the fine was imposed, and it must be unsatisfied that the liability of the person to pay the fine has been fully discharged. It is provided, however, by s 26F(2), that for the purposes of that section the court may presume that the person before the court is the person on whom the fine was imposed if the person before the court does not adduce evidence that he is not. It is also provided by s 26F(6), that in proceedings under this section a warrant for apprehension is evidence of the facts stated in the warrant, and a document purporting to be a warrant of apprehension shall, unless the contrary is proved, be deemed to be such a warrant and to have been duly issued. These facilitatory provisions are apparently designed to prevent technical defences being raised successfully in order to defeat the substantive purposes of Part IVA.[84]

In this case the person arrested had been convicted in South Australia of a breach of a by-law of the City of Adelaide and being required to

82 Burnside v Melbourne Fire Office Ltd (No 2) [1918] VLR 639 (Hood J), distinguishing National Mutual, note 80, where it was a question of personal credibility.

83 Rickard v Sutherland (1907) 24 WN (NSW) 153 (Simpson CJ in Eq).

84 (1969) 14 FLR 201 (Neasey J) at 204.

state his full name and address had refused to comply with the requirement. He pleaded guilty and was fined $20 and in default 14 days imprisonment. He did not pay the fine and was subsequently apprehended in Tasmania. Prior to 1963 he would have been subject to return to South Australia, but under Part IVA he was sentenced by the magistrate in Hobart to 14 days' imprisonment under s 26F. It was contended that the magistrate did not consider his powers in remitting the fine under s 26F(4)(b). It was held that assuming the magistrate had discretion to remit the fine, there was no evidence as to whether he took that power into consideration; but there were no circumstances which might conceivably call for the exercise of such a discretion; the defendant made no suggestion of impecuniosity, he did not apply for time to pay, and at all times stated his intention not to pay the fine. It was no part of the magistrate's jurisdiction to consider any suggestion that the by-law was an unjust law.

10. WRIT OF ATTACHMENT

Section 19C, Service and Execution of Process Act makes provision for a writ of attachment for the arrest of a person for a contempt of court or disobedience of an order of the court to be executed in another state or part of the Commonwealth. The writ requires the leave of a judge of a court of record in the state or territory in which it is to be effected. In *Lewis v Lewis*,[85] the first reported case of its kind to arise under the Act of 1901, it was held that the discretion given under s 19C (originally s 19) is judicial and should be exercised on definite principles. It would not be exercised to authorise the execution in Queensland of a writ of attachment issued by the Supreme Court of New South Wales which, although nominally issued for contempt, was in substance a writ of execution for non-payment of money. Griffith CJ said—

> It is not important to remember also that extradition is, according to the practice of civilized nations, conducted on terms of reciprocity, and it is not usual to allow the extradition from any country which would not have been an offence if it had been done in the country from which extradition is asked. The laws of Queensland do not allow attachment for debt, and it would be an anomalous thing if a person living in Queensland, and protected by the laws of Queensland from imprisonment for debt, were to be handed over for imprisonment in New South Wales, when, at the time of the writ being issued, he was living in Queensland.[86]

[85] [1902] QSR 115 (FC).
[86] Ibid at 119.

This passage was sharply criticised by Taylor CJ at CL in *Walker v Duncan*[87] who said that it was not proper for him to take into account that the offence for which the offender was to be charged in Queensland was not an offence under the New South Wales law.

11. JUDICIAL REVIEW

(i) *Order for review*

The exercise of discretion under s 18(3) and (6) is subject to an order for review before a judge of the Supreme Court.

Section 19(4) of the Act of 1901 (now s 18(6)) conferred discretion on both a judge and a justice of the peace to discharge an offender. When the subsection was amended in 1953 the discretion was vested in a justice of the peace only. In *George*[88] the concurrent power of the judge and the justice had been interpreted as contemplating what practically amounted to an appeal to a judge from the justice. The point is no longer of any consequence because s 19 now provides for a person dissatisfied with an order made under s 18(3) or (6) to apply to a judge of a Supreme Court to review the order. By s 19(3) the review of the order is by way of rehearing.

(ii) *Prerogative writs*

The prerogative writs lie to correct jurisdictional errors committed under the Service and Execution of Process Act. Mandamus may be sought to compel a magistrate to endorse a warrant where he mistakenly believed that he had no jurisdiction to endorse a warrant of commitment.[89]

(iii) *Habeas corpus*

The traditional remedy for a person who alleges that he has been wrongly detained is to apply for a writ of habeas corpus. The Service and Execution of Process Act does not, of course, attempt to oust or circumscribe the right to apply for the writ. But it is an essential element for an applicant who alleges that he has been unlawfully

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87 (1975) 5 ALR 313 (Taylor CJ at CL); affirmed 6 ALR 254 (HC).

88 Re George [1909] VLR 15 (A'Beckett J); this was the conclusion reach in O'Donnell v Heslop [1910] VLR 162 (FC) at 172 per Madden CJ, but at 175 Cussen J thought the judge's jurisdiction was original rather than appellate and this was the view taken in Gardner v Parker (1925) 28 WAR 22 (FC); however the majority decision in O'Donnell v Heslop was followed in Re Hatherley [1940] SRQ 20 (FC) and in Re Mandel [1958] VR 494 (O'Bryan J).

89 R v Pyvis, ex p Neville [1955] VLR 61 (Herring CJ).

detained under the provisions of the Act of 1901 that he should be in detention. Moreover he should be detained because of a wrongful exercise of the power under the Act. The writ is not available if the person has been committed to prison in accordance with law. In *McCrory*[90] an applicant who alleged that he had been wrongly arrested under the provisions of the Act of 1901 was taken from Queensland to New South Wales. Henchman J said—

> Personally I cannot see how we can be in a position to say that the judgment appealed from was wrong unless we are in a position to set it right, and we are not in that position on the changed facts. The duty of the court on habeas corpus is simply to put an end, if it can lawfully do so, to the detention by the respondent of the person alleged to be unlawfully detained in custody, where as the facts show that the man is not now lawfully detained in custody. . . . [91]

Habeas corpus proceedings have been used as an alternative method for securing the attendance of a person in court proceedings. In *Glasson v Scott*[92] the plaintiff by summons in the Supreme Court of New South Wales endorsed under s 5 of the Act of 1901 for service in Queensland sought a writ of habeas corpus for service in Queensland for the production of her three illegitimate children. The defendant appeared under protest and argued that the court had no jurisdiction but it was held, inter alia, that a writ of habeas corpus issued in New South Wales extends to and is operative in Queensland by virtue of s 24, Australian Courts Act 1828 (Imp).

12. COSTS

No provision is made in the Service and Execution of Process for the award of costs. It would appear that the ordinary rules governing the award of costs to the prosecution or to the defendant apply. In *Rider v Champness*[93] the judge refused to make any order for costs upon the general basis that this was a criminal matter of a kind in which, in Victoria, payment of costs was not normally ordered. There is a perceptible trend towards the payment of costs in criminal cases

90 R v Meldon, ex p McCrory [1938] QWN 6 (FC).

91 Ibid.

92 [1973] 1 NSWLR 689 (Larkins J), following Ex p Anderson (1861) 121 ER 525; the subject is examined in Ex p Mwenya [1960] 1 QB 241 (CA) and in Re Keenan [1972] 1 QB 533 (CA).

93 [1971] VR 239 (Lush J).

where the defendant is acquitted and it is possible that *Rider v Champness* will cease to reflect the general rule of earlier days.

13. CONCLUSION

If the administrative effectiveness and criminal justice of the Service and Execution of Process Act is to be measured by judicial criticism then it must be deemed to be satisfactory. Compared to the hazards and pitfalls surrounding international extradition, inter-state extradition must be rated simple. A state seeking the return of a criminal fugitive from another part of Australia has no outmoded treaty to contend with. The role of the executive is considerably less than in international extradition. There is little joy for the criminal offender who seeks to call in aid the technicalities of procedure. The courts have demonstrated their willingness to look at cases only where there has been a *substantial* breach of procedure which prejudices the rights of the ordinary citizen. As with many statutes it is easy to say that the drafting is poor. A clearer distinction could be made between criminal and civil cases. The Act works reasonably well because underlying it there is mutual confidence between the courts of the states and the Commonwealth in the administration of criminal justice. No state court thinks it administers a higher standard of criminal justice than its neighbour. Or to put it a different way—no state court believes that its neighbour administers a lower standard of criminal justice than itself.

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