RECENT DEVELOPMENTS IN THE LAW OF EXTRADITION

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INTRODUCTORY

The subject of extradition has long been a source of intense fascination to academic lawyers, judges and journalists. Although the great rash of treatises which broke out about the turn of the century[1] has not since made a re-appearance, there has been a steady stream of articles and notes in the journals right up to the present day. On the relatively few occasions that the higher courts have had to consider problems of extradition law, the judges have applied themselves to the topic with an unusual degree of enthusiasm, ingenuity and on occasions (dare it be said?) prolixity. To the journalist and to his readers the fugitive criminal from the other side of the world very often presents a vision of romantic daring and courage and enlists the same sort of sympathy as is extended in many quarters to the fox in the hunt. It is easy in such circumstances for a balanced perspective of the subject to be endangered. At the outset it should be recognized that the fugitive criminal has always been a rarity compared with the volume of crime actually committed. Many practical considerations and human inclinations combine to induce the great majority of criminals to seek to escape the consequences of their wrongdoing by evasion of detection or protestations of innocence without leaving their place of domicile. Indeed the very fact of flight almost invariably causes suspicion to be focussed on the fugitive.

When the criminal does choose flight, however, certain significant patterns emerge. Flight commonly takes place to the nearest convenient point beyond the immediate jurisdiction of the pursuing authorities. In a federal country, most often the fugitive will choose to seek refuge in another constituent state or province rather than in another country. Applications between the States of Australia under the Service and Execution of Process Act 1901 (Cth) for the return of fugitives run into the hundreds annually, while an average of only two or three applications annually are exchanged between Australia and other countries. Statistics of representative European countries having

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[1] E.g. in England, Biron and Chalmers, *The Law and Practice of Extradition* (1903); Clarke, *A Treatise Upon the Law of Extradition* (4th ed. 1903); Piggott, *Extradition* (1910). In France the works of Billot, Bomboy and Gilbrin, Bernard, St. Aubin and several others all appeared in the course of two decades. In the present writer's opinion the best analytical work on extradition ever written, despite its tortured style, is Lammasch, *Auslieferungspflicht und Asylrecht* (1887).

one or more land borders with other countries show that an average of ninety per cent of all extradition applications relate to limitrophe countries, and that a high proportion of the remaining ten per cent relate to nearly contiguous countries. The criminal who flees to the uttermost ends of the earth is an exceptionally rare example of the species.

It is not to be assumed, however, that the extent of flight is influenced solely by distance. Immigration controls also play a significant role. Known or convicted criminals find it difficult to secure passports, and where in addition visas and health documents are required in advance of arrival, all but the most elaborately prepared fugitives are defeated. Immigration control posts at points of entry are also often forewarned by friendly foreign authorities of the arrival of 'undesirables'[2] and may take immediate action in the form of deportation rather than allow entry for the purpose of the lengthier processes of extradition.[3] Flight therefore will commonly take place to a country where the entry formalities are non-existent or minimal. Extradition traffic runs between the United Kingdom and the Republic of Ireland at the rate of approximatly 150 cases annually, compared with ten cases with all other countries. Very often such countries will also be contiguous, as for example the member States of the European Economic Community. But it is especially significant for present purposes to note that this is not always so, above all among member States of the Commonwealth of Nations. Travellers within the Commonwealth, while requiring a passport, do not (with very few exceptions) require visas and do not (again with very few exceptions) encounter currency exchange difficulties.

In the rare instances of extradition between foreign countries separated by considerable distance, the fugitive will most often be a national of the requested State, since return to one's home State is not attended with the same need of elaborate advance preparations or formalities. A citizen of State A while residing in State B as an immigrant or as a visitor commits a crime there and then returns home to State A. Here the difficulty arises that most extradition treaties expressly deny any obligation upon a requested State to extradite its own nationals.[4] In such cases the requested State itself prosecutes its

[2] The role of the International Criminal Police Organization (INTERPOL) is of growing significance and effectiveness in this connexion.

[3] The use of deportation generally as a disguised form of extradition is a subject deserving separate treatment and will not be discussed here. See *Reg. v. Brixton Prison (Governor); Ex parte Soblen* [1962] 3 All E.R. 641 (C.A.); O'Higgins, 'Disguised Extradition: Deportation or Extradition?' (1963) *Cambridge Law Journal* 10; Shearer, 'Extradition and Asylum in Australia,' *International Law in Australia* (O'Connell, ed.) 558, 564-567 (1965).

[4] Australia has extradition treaties with 40 countries. Extradition of nationals is absolutely excepted from 12 of these treaties, is discretionary in the case of 24 (discretion is virtually always exercised against extradition) and is mandatory in the case of only one country (the United States.) See the table of extradition treaties in O'Connell (ed.) *International Law in Australia,* 595 (1965).

national for the crime committed abroad.[5] In common law jurisdictions, where competence over crime committed extraterritorially is strictly limited, the criminal secures immunity.[6]

Against this briefly sketched background, Australia's perspective of extradition remains to be assessed. Australia is a relatively isolated island continent with no land borders with other countries. For reasons largely connected with human health and animal and plant diseases the entry formalities which it requires of visitors are unusually exacting. It is therefore not surprising that in the past ten years extradition cases between Australia and other Commonwealth countries have averaged only about two annually in each direction, and between Australia and foreign countries about one case every other year. Yet it would be wrong to deduce that the problems of international extradition are of little interest to Australia. Extradition cases, though infrequent, have very often important implications for political relations between States, and because of the derogation which extradition constitutes of the practice of political asylum they can have important internal political ramifications also for the requested party. The case of *Rancic*[7] in 1956, where Yugoslavia requested Australia for the extradition of an alleged fugitive, led to widespread fears among immigrants to Australia from Eastern European countries and to a consequent report by the Parliamentary Joint Committee on Foreign Affairs.[8] In the United Kingdom the recent cases of *Enahoro*[9] and *Armah*[10] serve to illustrate the circumstances in which extradition proceedings, for a number of reasons, can lead to strained diplomatic relations (in these cases with Nigeria and Ghana respectively).

Perhaps above all other considerations, the problems of extradition command serious attention in common law countries because it is a field where the liberty of the individual is at stake. Even where no allegations of political motives on the part of the requesting government are made, important questions of due process, the existence of sufficient evidence and of jurisdiction over the alleged offence arise.

[5] Very often with highly unsatisfactory results since evidence is presented at second hand from distant sources. One Angilletta, accused by the Victoria Police of a 'Mafia-style' murder in Melbourne, returned to Italy before being apprehended and could not, as an Italian citizen, be extradited to Australia. He was recently acquitted by an Italian court: *The Australian*, May 30, 1967. The rule has been criticized by the present writer: 'Non-extradition of Nationals' (1966), 2 *Adelaide Law Review* 273.

[6] An instance where knowledgeable criminals actually planned a crime abroad with the intention of acquiring immunity from prosecution under this rule by a speedy return to their own country, occurred in the case of the great mail train robbery in Belgium in 1887. Shearer, *op. cit.* 298.

[7] Central Police Court Sydney, April 6, 20, 1956 (unreported).

[8] *Report on Extradition*. Report of the Parliamentary Joint Committee on Foreign Affairs. Paragraph 10 of the Report recommended that all existing treaties with communist countries be denounced and that no further treaties be concluded with such countries. *Parliamentary Debates* (Cth) House of Representatives, vol. 31, 1745 (1956).

[9] [1963] 2 All E.R. 477.

[10] [1966] 3 All E.R. 177.

A topic which will not be pursued here (and which has not, it would seem, been pursued elsewhere) is the rôle that extradition might play in securing a greater acceptance of criminal standards of due process and the rule of law throughout the world.[11]

Extradition may be defined as the formal surrender by one nation to another of an individual accused or convicted of an offence outside its own territory and within the territorial jurisdiction of the other, which, being competent to try and punish him, demands the surrender.[12] Early in the nineteenth century it became settled law in England that no power to extradite existed in the absence of statutory warrant and the same view was taken by Australian courts.[13] The question often debated in the works of publicists whether an obligation to extradite exists in international law apart from treaty has not concerned our courts since the Extradition Acts do not apply in relation to any country unless an arrangement has been concluded with that country and the terms of the arrangement implemented by Order-in-Council. The operation of the Acts is expressly made subject to the restrictions and qualifications laid down in the applicable treaty.[14]

Until the enactment of the Extradition (Foreign States) Act 1966[15] (Cth) Australia had no power itself to implement extradition treaties. The legislation in force in Australia relating to extradition with foreign countries until then was the Extradition Act 1870-1935[16] (Imp.) supplemented by the minor machinery provisions of the Extradition Acts 1903-1950[17] (Cth). Extradition treaties negotiated by Great Britain either applied to Australia as one of the Crown's dominions or applied by virtue of a provision which enabled the self-governing Dominions to adhere. The last extradition treaty to which Australia adhered in this fashion was the treaty with Luxembourg of 1939. Australia has not sought to become a party to the extradition treaties concluded by the United Kingdom since World War II, nor indeed has any provision been made in those treaties to enable it to do so. On no occasion has any foreign country denied Australia's succession (albeit behind the veil of 'Dominion status') to British extradition treaties extended to Australia when a colony; so far as Australian

[11] Such a study has been attempted of the analogous role of Status of Forces Agreements: Ellert, *NATO Fair Trial Safeguards: Precursor to an International Bill of Procedural Rights (1963)*.

[12] *Terlinden v. Ames* (1902) 184 U.S. 270, 289. On the subject generally a wealth of information is to be found collected in: *Harvard Research in International Law: Extradition*, 29 *American Journal of International Law*, Spec. Supp. (1935).

[13] *Reg. v. King* [1860] 1 S.C.R. (Q.) 1; *Brown v. Lizars* (1905) 2 C.L.R. 837.

[14] 33 & 34 Vict. c. 52, s. 5 (1870); Extradition (Foreign States) Act 1966 (Cth) s. 10.

[15] Act No 76 of 1966.

[16] 33 & 34 Vict. c. 52; 36 & 37 Vict. c. 60; 58 & 59 Vict. c. 33; 6 Edw. 7 c. 15; 22 & 23 Geo. 5 c. 39; 25 & 26 Geo. 5 c. 25.

[17] Act No 12 of 1903 as amended by Acts Nos 35 of 1933, 45 of 1934 and 80 of 1950.

municipal law is concerned, the continuity of these treaties (with forty countries in all) is preserved by the stipulation of the new Act that it applies in relation to all foreign States to which the Imperial Acts applied, unless otherwise declared by regulation.[18]

Australia's first interest in extradition was not, however, with foreign countries either in point of time[19] or as a matter of practical priority. Extradition first presented itself as a problem concerning the escape of criminals from one of the Australian colonies to another. Legislative steps were soon taken in each separate colony to provide for the apprehension and return of offenders escaping from the other colonies.[20] The provisions of these Acts were simple and fairly uniform. Where a warrant issued by a judge or justice of the peace in another colony was authenticated by credible evidence before a justice, he might endorse the warrant which would then authorize the person bringing the warrant and all other persons to apprehend the fugitive and bring him before a justice. Where apprehended and brought before a justice, the fugitive might then be ordered into the custody of a person authorized by the requesting colony for return to that colony. This system of rendition was known as 'backing the warrant', a procedure adopted earlier in 1804 in the United Kingdom by the Act 44 Geo. 3 c. 92. 'to render more easy the apprehending and bringing to trial offenders escaping from one part of the United Kingdom to the other, and also from one country to another.'[21]

This simple and effective system did not long survive the rise of the doctrine of colonial extraterritorial legislative incompetence.[22] The first warning shot directed specifically at colonial fugitive criminal legislation was the disallowance in 1862 of a Canadian Act as being in excess of power.[23] Thereafter two courts struck down colonial legislation as infringing the doctrine of exterritorial incompetence, the Supreme Court of Victoria in *Ray v. MacMackin*,[24] and the Supreme Court of New Zealand in *In re Gleich*.[25] The result of these cases was that the problem of fugitive criminals had to be solved in Australia within the framework of existing Imperial legislation. The only

[18] Act No. 76 of 1966, s. 9.

[19] Castieau, 'The Statutory Basis of Extradition in Australia' (1935) *Proceedings of the Australian and New Zealand Society of International Law* 122, 129, can find no instance of any extradition proceedings between Australia and a foreign country before the passing of the Extradition Act 1870 (Imp.).

[20] The N.S.W. Act of 11838, 2 Vict., No 11; the Van Diemen's Land Act of 1838, 2 Vict. No 16 and the South Australian Act of 1839, 3 Vict. No 5.

[21] The system of 'backwarrants' was in fact older than this, having for example existed in Ireland before the Act of Union: *per* Day J. in *Rex v. Mr Justice Johnson* (1805) 29 Howell's State Trials 81, 188, cited by O'Higgins, 'Irish Extradition Law and Practice' *British Y.B. International Law* 274, 276 (1958).

[22] Quick and Garran, *Annotated Constitution of the Australian Commonwealth* (1901), 617, 620.

[23] Todd, *Parliamentary Government in the Colonies* (2nd ed. 1894), 177.

[24] (1875) 1 V.L.R. (L.) 274.

[25] (1879) O.B. & F. (S.C.) 39.

existing Imperial Act at that time applying to the Australian colonies was the Fugitive Offenders Act 1843.[26] Its most serious limitation was that it applied only to the return of offenders accused or convicted of felonies. A further limitation on its convenience, so far as its application between the Australian colonies was concerned, was that it required the showing of a *prima facie* case of guilt before return could be ordered. Until 1875 this Act had been used in Australia only in respect of offenders from the United Kingdom or from other British possessions; rendition between the Australian colonies had continued on the basis of the system of backed warrants established by the pre-1843 colonial legislation and by complementary legislation passed after 1843.[27] After 1875, however, the more convenient procedure was unavailable and representations were made in London for the passing of suitable Imperial legislation applicable to the Australian colonies *inter se*. The result was the Fugitive Offenders Act 1881[28] (Imp.) which applied generally, as did the Act of 1843, throughout the British dominions, but which in Part II provided a simpler system of backed warrants without production of evidence of guilt which could be applied by Order-in-Council between groups of neighbouring possessions.[29]

The establishment of the Commonwealth of Australia in 1901 opened the way for legislation to be passed by the federal Parliament dealing with fugitive criminals among the States. The problem of extraterritoriality was solved by the express grant of power in the federal Constitution to make laws for the 'service and execution throughout the Commonwealth [of Australia] of civil and criminal process and the judgments of the Courts of the States.'[30] In exercise of this power the Service and Execution of Process Act 1901[31] was passed which dealt, *inter alia*, with the return of fugitive criminals from one part of Australia to another. This Act did not make any substantial alteration to the principles and procedures laid down in Part II of the Fugitive Offenders Act 1881 (Imp.); in fact much of the phraseology of that Act was imported without change. Part II of

[26] 6 & 7 Vict. c. 34.

[27] In addition to the colonial Acts previously cited, see the N.S.W. Acts of 1850, 14 Vict. No 7, the S.A. Act of 1851, 15 Vict. No 8, the W.A. Act of 1851, 14 Vict. No 18 and the Tas. Act of 1852, 15 Vict. No 6. A further S.A. Act, the Intercolonial Apprehension of Offenders Act 1864, 28 Vict. No. 16 was argued at be inconsistent with the Imperial Act of 1843 and void for repugnancy but the submission was rejected, it would seem, on the basis of section 7 of the *Colonial Laws Validity Act* 1865 (Imp.): *Re William King* (1867) 1 S.A.L.R. 86.

[28] 44 & 45 Vict. c. 69.

[29] By Order-in-Council dated 23 August 1883 the provisions of Part II of the Act were applied to the Australian colonies.

[30] Constitution of the Commonwealth of Australia, 63 & 64 Vict. c. 12, s. 51 (xxiv) (1900).

[31] 1901-1963, reprinted with amendments in *Commonwealth Acts, 1963,* Part II, 359.

the Fugitive Offenders Act continued to apply, not as between the States of Australia, but as between Australia as a whole[32] and Fiji, the Gilbert and Ellice Islands, Nauru, New Guinea,[33] New Zealand, Norfolk Island,[33] Papua,[33] British Solomon Islands and Western Samoa.

With this background, it is convenient now to turn to the developments in the Australian law relating to foreign and Commonwealth extradition made by the two new Acts of 1966.

THE EXTRADITION (FOREIGN STATES) ACT 1966 (CTH)

This Act repealed the Extradition Acts 1903 and 1933 (Cth) and any laws relating to extradition in force in Australia's Territories and it excluded the operation of the Extradition Act 1870 (Imp.). The new Act therefore provides the sole basis for extradition between Australia and foreign States.

The main reason for the passing of the Act was stated by the Federal Attorney-General (Mr B. M. Snedden, Q.C., M.P.):

> It is now clearly inappropriate for Britain to negotiate further extradition treaties on behalf of Australia. Australia, as a sovereign nation, can negotiate its own treaties. What is now needed is comprehensive legislation to give effect to new extradition treaties that are entered into by Australia. This is the principal reason for this Bill.[34]

This purpose is carried out in section 10 of the Act which empowers the Federal Government to apply the Act by regulation to any country with which an extradition treaty has been concluded.

Prior to the passing of the new Act, extradition relations between Australia and foreign countries were regulated by British treaties extended to Australia by Order-in-Council under the Imperial Act of 1870. The operation of these treaties continues unimpaired as a result of the saving provision of the new Act (section 9) but it is provided that the Act may cease to apply to any such country by regulation.

The countries to which the old Act applied (and to which the new Act thus continues to apply, subject to any future regulation) are. Albania, Argentina, Belgium, Bolivia, Chile, Colombia, Cuba, Czechoslovakia, Denmark, Ecuador, El Salvador, Finland, France, Greece, Guatemala, Haiti, Hungary, Iceland, Iraq, Italy, Liberia, Luxembourg, Mexico, Monaco, Netherlands, Nicaragua, Norway, Panama,

[32] *McArthur v. Williams* (1936) 55 C.L.R. 324; *Godwin v. Walker* [1938] N.Z.L.R. 712.

[33] These territories were brought within the operation of the Service and Execution of Process Act, by Act No 48 of 1953, s. 4. The Act had previously been extended to New Guinea by regulation. In 1955 the Act was extended by regulation to the Territory of Cocos (Keeling) Islands, and in 1958 to Christmas Island.

[34] Commonwealth of Australia, *Parliamentary Debates,* House of Representatives, 14 October 1966, 1819.

Paraguay, Peru, Poland, Portugal, Rumania, San Marino, Spain, Switzerland, Thailand, U.S.A., Uruguay and Yugoslavia.

No new extradition treaties have yet been concluded by Australia, but negotiations with several countries were reported to be in progress at the time of the introduction of the Bill in the House of Representatives.[35] It can therefore be expected that some of the more blatant gaps in Australia's extradition treaties will soon be closed, notably with Austria, Brazil, West Germany, Israel, Japan, Philippines, South Africa and Sweden.

Although treaty implementation remains the principal object and achievement of the new Act, several other features of the Act are worthy of attention.

POLITICAL OFFENCES

One of the major concerns of governments both in the framing of municipal extradition legislation and in the conclusion of extradition treaties, has been to minimize the possible danger presented by the concept of extradition to the principle or practice of asylum for political refugees. Extreme difficulty is encountered, however, in any attempted definition of a 'political offence'; definitions susceptible of judicial application tend to be either too wide or too narrow.

A wide definition of 'political offence' might, for example, give immunity to an anarchist who indiscriminately spreads havoc and destruction,[36] or to a person who joins in a political disturbance in the course of which he murders another but for purely private and not political reasons.[37] These considerations led British courts to introduce the notion that a political offence was one committed pursuant to or in the course of a violent struggle for power between contending forces.[38] An anarchist would not satisfy this requirement since he was the enemy of all governments and not any one government in particular; the privately motivated killer would not be protected because his act was not committed in furtherance of the struggle. Reservations have also been entertained respecting assassination of Heads of State and members of their immediate families and genocide.[39]

Too narrow a definition, on the other hand, might exclude from protection as a political offender the escapee from a totalitarian State where all contending political forces were effectively suppressed, so

[35] *Ibid.*, 1820.
[36] *Re Meunier* [1894] 2 Q.B. 415.
[37] *Re Castioni* [1891] 1 Q.B. 149.
[38] *Re Castioni, supra; Schtraks v. Government of Israel* [1962] 3 All E.R. 529 (H.L.).
[39] The so-called '*attentat* clause' appears in a number of treaties between civil law States and in the European Convention on Extradition, 1957, Article 3.3. The *Genocide Convention,* 1948, 78 U.N.T.S. 277 Art. 7 obliges Australia not to qualify genocide as a political offence for the purposes of extradition, but Australia has done nothing to give effect to this provision in municipal law.

that the hijacking of an airliner, the overpowering of the master of a vessel or the assault of a border guard could not be said to be committed in the 'furtherance of a struggle for power'.[40] Difficulties too have been felt in the cases of offenders who have admittedly committed quite apolitical crimes but who, if returned, will stand in real danger of receiving a prejudiced trial or a disproportionate sentence on account of their race, nationality, religion or known political beliefs.

With these difficulties in mind, many of which have arisen since the Second World War, the formula adopted by the Imperial Extradition Act in 1870 was, viewed in retrospect, not an unhappy solution. No definition of political offence was essayed, thus leaving to the courts a wide canvas upon which to work in given cases and succeeding political conditions. More importantly, however, the provisions of the Act provided a two-pronged approach to the problem; in the first instance an executive discretion to reject an extradition application *in limine* on the ground that the offence was political in character was given to the Secretary of State, and in the second instance, *i.e.* where the Secretary of State failed to act, a judicial discretion to refuse surrender was given to the magistrate on committal or to the court in *habeas corpus* proceedings:

> 3. (1) A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or if he prove to the satisfaction of the police magistrate or the court before whom he is brought on *habeas corpus*, or the Secretary of State, that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character.
> 7. If the Secretary of State is of opinion that the offence is one of a political character, he may, if he thinks fit, refuse to send any such order [for the apprehension of the fugitive] and may also at any time order a fugitive criminal accused or convicted of such offence to be discharged from custody.

The importance of the executive discretion in Australian extradition practice was underlined in a statement by the Prime Minister in 1956:

> [Australia] will exercise its discretion under the Extradition Acts and will not grant extradition unless it is thoroughly satisfied that such a move is not being sought for political purposes . . . The Australian Government has to be convinced before agreeing to extradition that the application from Eastern European countries is *bona fide* and not a pretext to obtain custody of an individual for other purposes.[41]

The provisions of the new Act retain the two-pronged executive-judicial approach to the determination of political offences, but unlike those of the old Act they are of unequal content. The scope of execu-

[40] *Ex parte Kolczynski* [1955] 1 Q.B. 540, *Re Kavic* (1952) 19 *International Law Reports* 371; *Hungarian Deserter (Austria) Case* (1959) 28 *International Law Reports* 343.

[41] Press Release, P.M., 21/1956.

tive inquiry indicated by the new Act is more extensive than that of the judicial. The general restriction on surrender is contained in section 13 (1):—

> A person is not liable to be surrendered to a foreign state if the offence to which the requisition relates is, or is by reason of the circumstances in which it is alleged to have been committed or was committed, an offence of a political character.

Together with this section should be read one of the provisions of the definition section, section 4 (4):—

> For the purposes of this Act, an offence against the law of a foreign state may be regarded as being an offence of a political character notwithstanding that there are not competing political parties in that State.

The effect of these two sections is to restate the 1870 formula in language which more felicitously expresses the current judicial interpretation of that formula.

The provisions of the new Act addressed to the executive, by contrast, represent a significant departure from the old Act:—

> 14. The Attorney-General shall not give a notice under sub-section (1) of the next succeeding section, or issue a warrant under sub-section (2) of section 18 of this Act, in relation to which section 10 of this Act applies, if the Attorney-General has substantial grounds for believing that—
>
> (a) the requisition for the surrender of the fugitive, although purporting to have been made in respect of an offence for which, but for this section, he would be liable to be surrendered to that State, was made for the purpose of prosecuting or punishing him on account of his race, religion, nationality or political opinions; or
>
> (b) if the fugitive is surrendered to that State, he may be prejudiced at his trial, or punished, detained or restricted in his personal liberty, by reason of his race, religion, nationality or political opinions.

These provisions are modelled on Article 3.2 of the European Convention on Extradition.[42] It is unnecessary to analyze at length the many possible situations to which they could be applied; it seems clear that they give a virtually unlimited scope for the executive to act as it may see fit on the information it may have from whatever source. The only striking feature of the provisions is that they are addressed primarily to the executive and not to the judiciary as well. In this respect the Extradition (Commonwealth Countries) Act stands on the same footing except that under that Act a court does have some greater powers in as much as it is empowered to consider, *inter alia*, whether the accusation was made 'in good faith or in the interests of justice'.[43] It is true that the fugitive stands in no less favourable position before the courts in this respect than he did under the old Act. It is

42 359 *United Nations Treaty Series* 273.

43 It will be noted that this provision, (section 16 of the Extradition (Commonwealth Countries) Act,) was added as an afterthought in the Committee stages: *Parliamentary Debates*, *ibid.*, 2049-50.

also true that in many cases the kind of evidence upon which the Attorney-General might be moved to act under section 14 would not be admissible in court proceedings. Yet it still seems strange that the fugitive was not given the added protection of appealing to a court on these same grounds (otherwise than by any of the limited possibilities of review on *habeas corpus*), especially since it might be thought diplomatically less embarrassing for a requested government were a court and not the government itself to make adverse findings as to the motives of the requesting government or the standard of justice administered in that government's courts.

CHARACTERIZATION OF THE OFFENCE

It is not every criminal offence which justifies the expenditure of time and money in the process of extradition between foreign countries. In the first place it is up to the parties to each treaty to specify the crimes for which they will reciprocally bind themselves to extradite. This may be done by the 'enumerative method', *i.e.* by listing extradition crimes by name, or by the 'no-list method', *i.e.* by designating as extraditable any crime which by the law of both parties is punishable by a certain minimum standard of severity. In the second place, in the case of those countries (like Australia) where treaties are not self-implementing, an extradition offence must also be defined by statute.

An extradition crime is defined in the Act as an offence against the law of a foreign State which, if it took place in the part of Australia where the fugitive was found, would constitute an offence against the law in force in that part of Australia.[44] It is provided in addition that such an offence against the law in force in that part of Australia must be one of the offences described in the First Schedule to the Act or be one of those offences qualified by some reference to a special interest, state of mind or circumstances of aggravation (section 4 (1).) The list comprising the First Schedule contains 33 paragraphs which variously describe offences, some in a limitative way (*e.g.* '5. A malicious act with intent to injure passengers on a railway') and some in a broadly indicative way (*e.g.* '27. An offence against the law relating to companies'). The explanation for the inclusion of certain specific offences is the necessity to keep faith with some existing treaty obligations which specify these offences.

OTHER NOTEWORTHY FEATURES

1. The principle of specialty is contained in section 13 (2). This principle is designed to protect extradited persons from being prose

[44] By assigning the question of characterization to the law of the State or Territory where the fugitive is found, the draftsmen of the Act have followed the provisions of the Act of 1870 and of the Harvard Draft Convention on Extradition. *Cf. Factor v. Laubenheimer* (1933) 290 U.S. 276.

cuted for crimes other than the crime or crimes for which extradition was granted. A court may not grant extradition unless the law of the requesting State, or the terms of the treaty between Australia and that State, provide that the fugitive will be given an opportunity to return to Australia before he is charged with crimes other than those provable upon the facts given in the requisition. The actual wording of this provision is important. As in the case of characterization of extradition offences generally, it is not necessary that there be an identity in name between the offence charged and the offence for which extradition is requested. The essence of the matter is that no offence may be charged arising otherwise than from the facts upon which the requisition was grounded. It would thus not offend the principle of specialty that France secured the return of a criminal from Australia on a charge of murder and then after his return decided to arraign him on a charge of manslaughter only, provided that the killing was the same.

2. A further limitation akin to specialty is contained in section 13 (2) (b) which provides that a person is not liable to be surrendered by Australia unless provision is made by the law of the requesting State or by a treaty in force between the Commonwealth and that State, that a person surrendered shall not, unless he has been returned or has had an opportunity of returning to Australia, be detained for the purpose of being surrendered to a third State. No extradition treaty to which Australia is a party contains a clear provision to this effect although a number of national extradition statutes do.[45] There will therefore be much anxious scanning of foreign statutes by counsel engaged in extradition cases under the new Act. It would appear that extradition by Australia to Italy might be challenged on the ground that neither the applicable treaty[46] nor the Italian Penal and Criminal Procedure Codes[47] clearly prohibit re-extradition to third States. The municipal law of the United States of America similarly does not prohibit re-extradition,[48] but it may be a nice question of interpretation whether the treaty provisions in force between Australia and that country satisfy the requirement of section 13 (2) (b). Article 7 of the treaty[49] provides:

> A person can in no case be kept in custody or be brought to trial in the territories of the High Contracting Party to whom the surrender has been made for any other crime or offence, or on account of any other matters, than those for which the extradition shall have taken place,

[45] *E.g.* France, Extradition Law of March 10, 1927, Art. 27; Switzerland, Federal Extradition Law of January 22, 1892, Art. 8.

[46] Treaty of 5th February 1873, 63 *B.F.S.P.* 19. *Cf.* the treaties with Belgium, Denmark, Ecuador, Ireland, Norway, Spain and Uruguay.

[47] Code of Criminal Procedure Governing Extradition, 1930. An English translation is given in *Harvard Research in International Law: Extradition* 29 *American Journal of International Law*. Spec. Supp., App. VI, p. 407 (1935).

[48] U.S. Code, Title 18, Chapter 209 (1964 ed.).

[49] Treaty of 22nd December 1931, 135 *B.F.S.P.* 323, 163 *L.N.T.S.* 59.

until he has been restored, or has had an opportunity of returning, to the territories of the High Contracting Party by whom he has been surrendered.

A court might conceivably hold that detention in custody on an extradition warrant from a third country was 'custody . . . on account of any other matters' within the meaning of the treaty. On the other hand, 'any other matters' might well be argued to be limited to matters *ejusdem generis* with 'crime or offence' *i.e.* by the law of the contracting party, and thereby to exclude re-extradition for crimes committed elsewhere from its purview. The question is sufficiently important to invite urgent clarification.[50]

3. A novel provision in the Act is section 17 (7) which permits a magistrate to order, after committal, that a fugitive be held at a place other than a place of imprisonment if to do so would be prejudicial to the health of the fugitive. It might be considered strange that there is no power to delay surrender on these grounds nor under the similar provisions of the Extradition (Commonwealth Countries) Act, but that such a power is given under Part II of the latter Act, applying to neighbouring possessions,[51] and implicitly in the Service and Execution of Process Act also.[52]

4. The doubts raised in the English case of *Minervini*[53] have been laid by one of the stipulations in the definition clause, which declares that a ship or aircraft of, or registered in, a foreign State shall be deemed to be part of that foreign State for the purposes of the Act.

5. The present Act applies to Australia's overseas territories, including the Trust Territories of New Guinea and Nauru. Previously the two Trust Territories acted under their own separate Extradition Ordinances which applied the Imperial Extradition Act 1870, subject to certain modifications, to those Territories.[54]

6. The Act, by section 6, 'excludes the operation of' the Imperial Extradition Act 1870-1935. (The same term is used in section 6 of the Extradition (Commonwealth Countries) Act.) It is interesting to reflect that these Acts are the first to repeal outright the provisions of an Imperial Act of paramount force since the adoption of the Statute of Westminster by Australia in 1942. The term 'exclude' is probably the most appropriate one to employ in order to effect the repeal of an enactment in so far as it previously applied to Australia where it may continue to apply elsewhere. It may also have been used, however, in a secondary sense to exclude the possible survival of the

[50] It would seem that essentially the same question of interpretation could arise under all the extradition treaties to which Australia is a party other than those listed *supra*, n. 46, where the provisions quite clearly do not cover re-extradition.

[51] Section 26 (6).

[52] Section 18 (6).

[53] *Reg. v. Governor of Brixton Prison, Ex parte Minervini* [1959] 1 Q.B. 155.

[54] Nauru: Extradition Ordinance No 7 of 1957; New Guinea: Extradition Ordinance 1927-1933.

Imperial Acts in the laws of the States.[55] Although the assignment of functions under the Imperial Acts of 1870[56] and 1881[57] passed to the federal authorities after Federation, the corpus of the statutes could arguably have continued to reside in the States, thus necessitating an express 'occupation of the field' by the federal legislature. These interesting questions cannot be examined fully within the limitations of the present paper.[58]

7. The powers of receiving foreign extradition requisitions and of authorizing magistrates to issue warrants were vested under the old Act in the Governor-General. All such powers are now exercised by the federal Attorney-General. A warrant for the arrest of an alleged fugitive, issued by an authorized magistrate in any State or Territory of the Commonwealth may be executed in any other State or Territory also (section 16 (2)).

8. Judicial functions under the Act are assigned as follows: The hearing of an extradition application is by a magistrate of a State authorized to hear such applications by the terms of an arrangement between the Governor-General and the State Governor duly gazetted (section 24). Appeals against committal for surrender are by way of application for *habeas corpus* 'to a court of competent jurisdiction.' Applications for discharge of a fugitive who has been committed for return but has not been conveyed out of Australia for 2 months, must be made to the Supreme Court of a State or territory which is invested by section 19 (2) with federal jurisdiction for this purpose. Where any question of the interpretation of a treaty arises in the course of any of these proceedings, they may not be removed into the High Court; section 25 of the Act states that for the purposes of section 38 of the Judiciary Act, matters arising under an extradition treaty shall be deemed *not* to be a matter arising directly under a treaty.

THE EXTRADITION (COMMONWEALTH COUNTRIES) ACT 1966 (CTH)

The first thing that will be noticed about this Act, which replaces the Imperial Fugitive Offenders Act 1881 in Australia, is the use of the word 'extradition' in the title. Under the 1881 Act the use of the word was avoided altogether; that Act spoke of the 'return' or 'surrender' of fugitive offenders. Among writers the term 'rendition' was commonly used to distinguish intra-Commonwealth surrender from extradition with foreign States. That the distinction has now been

[55] Constitution of the Commonwealth of Australia, s. 109. *Cf. Wenn v. A.-G.* (Vic.) (1948) 77 C.L.R. 84.

[56] By the Extradition Act (Cth) 1903, s. 4, the contrary decision of *Re Gerhard* (1901) 27 V.L.R. 655 was nullified.

[57] So held by the High Court in *McArthur v. Williams* (1936) 55 C.L.R. 324 overruling *McKelvey v. Meagher* (1907) 4 C.L.R. 265.

[58] See further Castles, 'The Paramount Force of Commonwealth Legislation since the Statute of Westminster' (1962) 35 *Australian Law Journal* 402.

abandoned is no mere exercise in semantics; the real effect of the Act is to put Commonwealth extradition on broadly the same footing as foreign extradition and to clothe it with many of the safeguards contained in the latter but not previously in the former.

The Australian Act is the first Act to be passed in any member country of the Commonwealth to implement the scheme drawn up in London in April 1966 at a conference of Commonwealth Law Ministers, to replace the Fugitive Offenders Act 1881 (Imp.). It is expected that other Commonwealth countries will also act soon to implement the Scheme.

The London Scheme of 1966 was the culmination of a series of discussions extending over several years.[59] It represents not only a considerable diplomatic success from the point of view of the Commonwealth of Nations, but also what must be regarded by the rest of the world as in effect (if not exactly in form) the world's most widely applied multilateral extradition convention. This alone carries its own impact; but more significantly for the rest of the world, the standards embodied in the Scheme will undoubtedly find their way into extradition treaties affecting non-Commonwealth countries also. There is a natural tendency for treaties of wide application, short of creating conventional international law, to influence other treaty-makers. Indeed, the provisions in the Commonwealth Scheme relating to political offences were themselves based on the provisions of the European Extradition Convention of 1957. The Commonwealth Scheme may be especially influential in this respect since, more than any other convention or arrangement, it has been accepted by a group of countries of greatly diverse political, social, geographic and economic conditions. This influence will, of course, be especially strong where a Commonwealth country is negotiating a bilateral extradition treaty with a foreign State.

The two principal defects of the Fugitive Offenders Act 1881 were (1) its diminishing territorial operation and (2) the absence of any exclusion of political offenders from the operation of that Act.

The first defect resulted from a problem of interpretation. The old Act spoke of surrender between 'parts of Her Majesty's dominions'. While all former dominions retained the 1881 Act as part of their statute law after independence (although some later replaced the Act with their own legislation[60]) some courts took the view that, as a

[59] Command 3008. It was at first contemplated that a multilateral convention should be concluded, but this suggestion was later dropped when some members took the view that it was unnecessary for Commonwealth countries to impose formal legal obligations on one another and when it also became apparent that some member States would not be ready to implement the convention as quickly as others. The present Scheme, which imposes no obligations but which provides the agreed basis for national legislation, was adopted instead. *Parliamentary Debates, ibid.*, 1815.

[60] *E.g.* Ghana, Act No 22 of 1960; India, Act No 34 of 1962.

matter of statutory interpretation, a Commonwealth republic could not be 'a part of Her Majesty's dominions' and therefore could not be within the operation of the Act in the absence of saving legislation. Indian courts regarded the Act as no longer applicable to India after 1950;[61] British courts, on the other hand, continued to return fugitives under the Act to India because of the saving provisions which declared that all laws should continue to apply to India notwithstanding its status as a republic.[62] In the Scheme and the present Act the term 'Commonwealth country' is used.

The second defect was pointed up by an especially embarrassing case diplomatically in the United Kingdom in 1963.[63] The extradition of Chief Anthony Enahoro was requested by Nigeria from the United Kingdom on charges of treason. Treason was an offence specifically covered by the Fugitive Offenders Act, but even had it been an offence not so named but covered under the general category of returnable offences punishable by 12 months' imprisonment or more, unlike the Extradition Act, the Act of 1881 would have afforded no protection to political offenders.[64] It must be remembered that the Act of 1881 was the product of its own age, of an Empire effectively controlled by Great Britain, owing a common allegiance to the Crown, and throughout which offences against the law of the land were offences against the Queen's peace.

The provision of the Scheme relating to political offences was adopted in the form proposed by Australia which was based on Article 3. 2 of the European Convention. In the Australian Act the provision is identical with the corresponding provisions of the Extradition (Foreign States) Act:—

> 11.—(1) The Attorney-General shall not give a notice under sub-section (1) of the next succeeding section, or issue a warrant under sub-section (2) of section 17 of this Act, in respect of a fugitive from a declared Commonwealth country if the Attorney-General has substantial grounds for believing that—
>
> (a) the requisition for the surrender of the fugitive, although purporting to have been made in respect of an offence for which, but for this section, he would be liable to be surrendered to that country, was made for the purpose of prosecuting or punishing him on account of his race, religion, nationality or political opinions; or
>
> (b) if the fugitive is surrendered to that country, he may be prejudiced at his trial, or punished, detained or restricted in his personal liberty, by reason of his race, religion, nationality or political opinions.

61 *State of Madras v. Menon* [1954] A.I.R. 517 (S. Ct).

62 *Re Government of India and Mubarak Ali Ahmed* [1952] 1 All E.R. 1060.

63 *Reg. v. Governor of Brixton Prison; Ex parte Enahoro* [1963] 2 Q.B. 455.

64 The view that section 10 of the Act could be so interpreted, advanced in *Re Government of India and Mubarak Ali Ahmed* [1952] 1 All. E.R. 1060, was decisively rejected in *Zacharia v. Republic of Cyprus* [1962] 2 All E.R. 438 (H.L.).

The effect of the provision is thus to subject Commonwealth extradition to the same safeguard as regards political offenders as is afforded in extradition proceedings with foreign States.

By way of exception; extradition between Australia and New Zealand and British islands in the Pacific[65] is not subject to the exception of political offenders. The justification for differentiating in this respect between contiguous and more distant Commonwealth countries has not been stated. Certain inferences can, however, be drawn from the debates in the House of Representatives. Under the old Act, Australia, New Zealand, and all the British Pacific possessions were grouped under Part II of the Act which provided a simplified system of rendition by backed warrants. The main difference between the two procedures was that no evidence of guilt was required under Part II. These features have been retained in the new Act in Part III—'Extradition to and from certain Commonwealth Countries neighbouring Australia.' The intention of the Government in Part III was 'to preserve our existing extradition procedures with Commonwealth countries neighbouring Australia and its territories'.[66] In addition to this the thought obviously in the Government's mind was that there was such an identity of interests and aspirations between Australia and New Zealand that any limitation of political offences would be unnecessary and possibly undesirable. What was said respecting the United Kingdom applied *a fortiori* to New Zealand. In explaining the provisions (subsequently abandoned) of the original Bill which would have made it possible for Australia to have given power by regulation to surrender fugitives accused of political offences to Commonwealth countries specially designated, the Attorney-General said:

> Whilst it has been thought necessary to include in the Bill limitations on the surrender of fugitives for political offences, it is recognized that there are some countries, such as the United Kingdom itself, whose attitudes to offences such as treason and sedition are so like our own that we would not wish to restrict the surrender of fugitives to one of those countries for one of those offences.[67]

Part IV (the provisions of which were in any event only enabling provisions pending the making of separate bilateral arrangements) was excised in the Committee stages of the proceedings in the House of Representatives in accession to the views of several private members, who felt that if and when such arrangements materialized a special bill to implement them should be presented.[68] No such reservation was felt about Part III, despite the fact that certain British Pacific

[65] Fiji, Gilbert and Ellice Islands Colony and the British Solomon Islands Protectorate.
[66] *Parliamentary Debates*, H.R., p. 1818.
[67] *Ibid.*, 1816.
[68] *Ibid.*, 2050-1.

island possessions are included in that Part in addition to New Zealand.

The express protection of political offenders was not the only major change introduced by the London Scheme on Commonwealth extradition and implemented by the present Act. In two other important respects the system of Commonwealth extradition is put upon the same footing as extradition with foreign States.

The extradition principle of specialty is for the first time imported into the arrangements between Commonwealth countries. By sections 11 (3) and 22 of the Act a fugitive must be given an opportunity to return to the requested State before being tried in the requesting State for any offence committed prior to surrender other than the offence for which extradition was given or an offence of which he could be convicted upon proof of facts upon which the requisition was based. Unlike the corresponding provisions of the Extradition (Foreign States) Act, a fugitive may be prosecuted for other offences if the assent of the requested State is obtained.

Re-extradition to a third State is similarly prohibited, subject to the same proviso. In this connexion the same problem arises as under the Extradition (Foreign States) Act,[69] but doubtless Commonwealth countries will all soon have legislated in accordance with the London Scheme and the problem will thereby have been obviated.

The principle of double criminality also finds its place in Commonwealth extradition law for the first time. The Act defines an extraditable offence as an offence against the law of a declared Commonwealth country, the act or omission constituting which would also constitute an offence against the law of that part of Australia where the fugitive is found. In addition, the act must be punishable by a maximum penalty of death or imprisonment for not less than twelve months by the law of the *requesting* State (but not necessarily by the law of Australia), and it must be an act which is described in the Schedule to the Act or one which would be described there if a reference to any intent, state of mind or circumstances of aggravation were included in the description. The Schedule of crimes was drawn up at the London Conference and annexed to the Scheme. The same list, with a few minor additions in order to comprehend some special treaty crimes, is to be found in the Extradition (Foreign States) Act.

OTHER NOTEWORTHY FEATURES

1. A restriction on surrender which is not contained in the Extradition (Foreign States) Act but which is found in this Act is that surrender may be refused where the Attorney-General is satisfied that

[69] *Supra*, p. 197. The Imperial Act of 1881 contains no prohibition of re-extradition, nor does the Fugitive Offenders legislation of Canada (R.S.C., 1952, c. 127), Ghana (Act No 22 of 1960) or India (Act No 34 of 1962).

> . . . by reason of (a) the trivial nature of the offence that a fugitive is alleged to have committed or has committed; (b) the accusation against a fugitive not having been made in good faith or in the interests of justice; or (c) the passage of time since the offence is alleged to have been committed or was committed, and having regard to the circumstances under which the offence is alleged to have been committed or was committed, it would be unjust, oppressive or too severe a punishment to surrender the fugitive, or to surrender him before the expiration of a particular period.

This provision is less comprehensive than the corresponding provision of the Act of 1881; the 'wide view' of section 10 of the old Act[70] has here been narrowed to take into account only one additional ground for relief, *viz* 'the passage of time since the offence . . . was committed.' In view of the more extensive protection of the rights of the fugitive in other respects given by the new Act and the general intention evidenced by the Act to assimilate Commonwealth to foreign extradition, it is perhaps not unreasonable that the scope of the new provision has been narrowed. Certain considerations which in the past have on occasions led courts to discharge a fugitive may now, however, be unavailable.[71]

An identical power is given to the magistrate at the hearing and to a court on an application for *habeas corpus*.[72] This is to be contrasted with the powers in section 11 (1) relating to political offences which are exercisable by the Attorney-General alone and not by a judicial authority. It will be noted, however, that there is an overlap between the provisions of that section and ground (b) quoted immediately above; a requisition with the ulterior motive of punishing on account of race, religion, nationality or political opinion would be also 'an accusation . . . not having been made in good faith or in the interests of justice.' It is difficult to avoid this conclusion despite the fact that judicial interpretation of the corresponding provision of the Act of 1881 had rejected the idea that its scope embraced the protection of political offenders generally.[73] The same provisions are repeated yet a further time in section 27 which relates to extradition with neighbouring Commonwealth countries on backed warrants. Here the power is vested solely in judicial hands because the executive plays no part at all in proceedings under Part III of the Act.

2. The Act provides for the resolution of the problem of conflicting requisitions. Where a requisition is received from more than one

[70] *Ex parte Naranjan Singh* [1961] 2 W.L.R. 980; *Re Gorman* [1963] N.Z.L.R. 17; *McArthur v. Williams* (1936) 55 C.L.R. 324, 331-32, 350, 364-65.

[71] *E.g. Ex parte McCheyne* [1951] T.L.R. 1155.

[72] Section 16.

[73] *Zacharia v. Republic of Cyprus* [1962] 2 All E.R. 438 (H.L.) especially *per* Lord Radcliffe at 446-47. Lord Hodson said at 456: 'This is not to say that the Court in exercising its discretion could not take into account evidence that the application was being made for the return of a fugitive as an act of revenge whether actuated by political motives or not.'

Commonwealth country for the surrender of the same fugitive, the Attorney-General may determine to which country surrender shall be made, having regard to the relative seriousness of the offences to which the requisitions relate, the respective dates of the requisitions and the citizenship of the fugitive.[74] The Extradition (Foreign States) Act is silent on this question because the problem of conflicting requisitions is often (although not in all cases) to be determined by the specific provisions of individual extradition treaties. Where the treaty itself is silent on the point, there might be argued to be a conventional rule of international law that would assign priority, where the seriousness of the offences was equal, to the requisition received first in point of time.

3. Evidence of criminality required to be adduced in proceedings under this Act in order to secure an order for return is the same as in proceedings under the Extradition (Foreign States) Act. Under both Acts the test the magistrate must apply at the hearing is the same test that he applies in committal proceedings in the exercise of his normal jurisdiction. If there is produced to the magistrate

> such evidence as could in the opinion of the Magistrate, according to the law in force in the State or Territory of which he is a Magistrate, justify the committal for trial of the person if the act or omission constituting that crime had taken place in, or within the jurisdiction, of that State or Territory, and the Magistrate is satisfied in other respects that the fugitive is liable to be surrendered under the Act, he will order his committal to await return.[75]

This provision settles what had recently become an anomalous situation with regard to the weight of evidence required in Commonwealth proceedings. The formula used in the 1881 Act was that such evidence should be produced as according to the law ordinarily administered by the magistrate 'raises a strong or probable presumption that the fugitive committed the offence.' Some courts and writers had taken the view that these words required a higher standard of proof than would be required at ordinary committal proceedings or under the Extradition Act of 1870.[76] Other courts took the view that the standard of proof was the same in all three kinds of proceedings[77] and pointed, *inter alia,* to the origin of the phrase 'strong or probable presumption' in section 25 of the Indictable Offences Act 1848.[78]

[74] Section 13.

[75] Section 15 (6) where the fugitive is a convicted person and not an accused, the evidence adduced must be 'sufficient . . . to satisfy the Magistrate that the person has been convicted of that crime.'

[76] La Forest, *Extradition to and from Canada* (1961) 108, and authorities there cited.

[77] *Ex parte Bidwell* [1937] 1 K.B. 305, 14 (*per* Swift, J.); *Re Schtraks* [1962] 2 All E.R. 176, 186 (*per* Lord Parker C.J.); Shearer, 'Extradition and Asylum in Australia' in O'Connell (ed.), *International Law in Australia,* 578-80 (1965).

[78] 11 & 12 Vict. c. 42, s. 25.

The House of Lords in *Armah v. Government of Ghana and Anor*[79] in 1966 by a majority sided with the former view and thereby settled the question for so long as the Act of 1881 should survive. The effect of the decision was to subject to a more exacting standard evidence of guilt in proceedings between countries sharing a common allegiance and institutions than in proceedings with foreign countries. The unambiguous equation of the weight of evidence required under both of the new Acts is therefore clearly a rejection of the majority view of the House of Lords in *Armah's case*.

CONCLUSIONS

1. Extradition between Australia and foreign States under the new Act of 1966 is carried out in most respects in the same way as under the Imperial Act of 1870. The only changes of significance lie in the power now given to Australia to implement the extradition treaties which it may henceforth wish to conclude in its own name with other countries, and the more comprehensive definition of political offences.

In any revision of the Act, attention might be directed to (a) extending to the judicial forum a concurrent power to consider certain aspects of the political nature of offences or the consequences of surrender which are at present reserved solely to executive discretion, and (b) the substitution of a 'no-list' formula similar to that adopted in the European Extradition Convention[80] and a growing number of bilateral treaties,[81] for the present specific denomination of extraditable offences, in order to minimize problems of characterization. Provision might also be made for the authorization of custody in Australia of persons in transit under an extradition order made outside Australia to another country.[82]

2. Extradition between Australia and Commonwealth countries by contrast, has undergone significant changes as a result of the new Australian Act of 1966. The intention and the effect of the legislation has been to place Commonwealth extradition upon the same footing as extradition with foreign countries. Save for the absence of the necessity of making treaty arrangements, the procedure and safeguards of the two systems are in all essential respects identical. No longer, therefore, does the Commonwealth Scheme wear in any real sense the appearance of a 'regional arrangement'.

3. Part III of the Extradition (Commonwealth Countries) Act

[79] [1966] 3 All E.R. 177 (H.L.).

[80] 359 *United Nations Treaty Series* 273, art. 2.

[81] The no-list method has been adopted in 75 out of a total of 154 treaties printed in the *League of Nations Treaty Series* and volumes 1-500 of the *United Nations Treaty Series*. Of the 38 treaties registered since 1945, 26 adopt the no-list in preference to the enumerative method.

[82] *E.g.* Republic of South Africa, Extradition Act 1962, s. 21. This proposal was made by the British Royal Commission on Extradition in 1878 but was never implemented.

does, however, contain a truly regional arrangement applicable to certain countries neighbouring Australia. The provisions of this Part are very similar to the provisions applying to the States of Australia *inter se* of the Service and Execution of Process Act. Yet even here there are anomalies. The necessity of adducing a *prima facie* case of guilt as a condition of extradition between parts of an Empire sharing common institutions, language and judicial methods, has, it would appear, been based on considerations of distance.[83] Malaya and Singapore were never grouped, however, together with Australia under Part II of the Act of 1881, nor are they under Part III of the new Act. In order to return a fugitive from Darwin to Singapore, evidence must be adduced sufficient to commit for trial; to return a fugitive from Perth to Fiji, on the other hand, the mere production of a duly authenticated warrant is sufficient.

The absence of full safeguards against extradition for political offences in proceedings under this Part, and the presumed reasons therefor, have been noted earlier.[84] As in the case of internal rendition within Australia, the principle of double criminality is not applicable to proceedings under this Part,[85] nor is extradition confined to 'extradition crimes'.[86] By contrast with internal rendition within Australia, the grounds upon which a magistrate may refuse or delay the surrender of a fugitive are less liberal under Part III of the Act of 1966. Under the latter Act it must be 'unjust or oppressive' for one of three stated reasons to return a fugitive, before a magistrate may exercise his discretion.[87] Under the Service and Execution of Process Act, on the other hand, it is a separate ground that 'for any reason it would be unjust or oppressive to return the person . . .'[88] The anomalies ought, it is submitted, to be rectified.

4. On the whole, the regional arrangements with which Australia is concerned have been working smoothly and without practical diffi-

[83] *Cf. Armah v. Government of Ghana and Anor* [1966], 3 All E.R. 177, *per* Lord Pearce at p. 198. The practice of civil law countries, on the other hand, has been to dispense with the requirement of adducing any evidence of guilt, even in extradition to distant foreign countries; *e.g.* the European Extradition Convention, 1957, *loc. cit.* Of course this aspect of civil law practice must be weighed against the common refusal of these countries to extradite their own nationals.

[84] *Supra*, p. 202.

[85] Section 24, and *pace,* so far as the Service and Execution of Process Act is concerned, *Ex parte Conway* [1946] Q.W.N. 31.

[86] Section 24 does not refer to a 'fugitive' as does the corresponding provision of Part I but to a 'person accused', thus avoiding the incorporation by reference of extradition crimes secured through the definition section (section 4).

[87] Section 27. *Supra,* p. 204.

[88] Section 18 (6). See *O'Sullivan v. Dejneko* (1964) 110 C.L.R. 498. This has led to at least one instance of a further anomaly, although the circumstances of the case were unusual. In *Re Alstergren and Nosworthy* [1947] V.L.R. 23 the Full Court of the Supreme Court of Victoria discharged a fugitive under this section, holding that it was unjust and oppressive to order return where the whole of the evidence which could be adduced against him was before the Court (this, it will be noted, is the unusual circumstance of this case) and was such that no magistrate could properly find on it a case fit to be sent for trial.

culty. Although extradition with more distant countries, both within and without the Commonwealth of Nations, has hitherto been infrequent, it can be expected to increase in the future with the development of ever swifter travel facilities and the gradual world-wide easing of immigration formalities. The new Acts are a creditable achievement of their authors and place Australia in a better position than formerly to deal with these problems effectively and yet with liberal allowance for the protection of the individual.

RECENT DEVELOPMENTS IN THE DOCTRINE OF PRIVITY*

According to the doctrine of privity of contract, no-one is entitled to enforce, or is bound by, the terms of a contract to which he is not an original party.[1] This article is not concerned with attempts to impose restrictions on strangers to the consideration,[2] but with those contracts which purport to confer a benefit, whether by way of gift or exemption from liability. Comment is further confined to issues arising out of two recent cases: *Beswick v. Beswick*[3] and *Coulls v. Bagot's Executor and Trustee Co. Ltd.*[4]

Beswick v. Beswick

By a written agreement, Peter Beswick, an elderly coal merchant, transferred the goodwill and trade utensils of his business to his nephew, John Beswick. The consideration provided by the latter consisted of a promise to employ his uncle as a consultant for the rest of his life at £6.10.0 a week (the time to be put in by the old man to be at his own absolute discretion) and a promise that in the event of Peter Beswick's death he would pay his widow Ruth an annuity to be charged on the business at the rate of £5 a week.

When his uncle died twenty months later, John Beswick paid one sum of £5 to his aunt but thereafter refused to continue payments. The widow, having taken out letters of administration to her husband's estate, brought suit in both her representative and her personal capacities, requesting *inter alia* an order for specific performance. In the Chancery Court of the County Palatine of Lancaster,[5] Burgess V.C. awarded her nominal damages of forty shillings but refused any further relief.

The Court of Appeal (Lord Denning M.R., Danckwerts and Salmon L.JJ.) held that Mrs Beswick was entitled as administratrix, to a decree of specific performance, and that the Court, in its equitable jurisdiction, had power to order the nephew to pay the arrears and weekly sums during her life. The Master of the Rolls and Danckwerts L.J. (Salmon L.J. expressing no opinion) were agreed that the widow could enforce the obligation in her own name by virtue of section 56(1) of the Law of Property Act 1925 (Eng.). Lord Denning went further to say that the rule preventing third parties from suing on

* We are grateful to Professor H. A. J. Ford for his guidance whilst we were writing this article. He cannot, of course, be held responsible for any errors that remain.

1 Cheshire and Fifoot, *The Law of Contract* (Australian ed. 1966), 529.

2 *Ibid.* 554 ff.

3 [1966] Ch. 538 (C.A.); [1967] 3 W.L.R. 932 (H.L.).

4 (1966-67) 40 A.L.J.R. 471 (H.C.A.), on appeal from the Supreme Court of South Australia: *In the Estate of Coulls* [1965] S.A.S.R. 317.

5 [1965] 3 All E.R. 858.

a contract for their benefit was procedural only and did not impede enforcement by them of their rights.

The House of Lords (Lord Reid, Lord Hodson, Lord Guest, Lord Pearce and Lord Upjohn) unanimously affirmed the order for specific performance, but with like unanimity rejected the *dicta* of the majority of the Court of Appeal regarding the effect of section 56(1). Lord Denning's procedural interpretation of the doctrine of privity was not argued by the respondent in the House of Lords.

Coulls v. Bagot's Executor and Trustee Co. Ltd

Meanwhile another written agreement by which a husband of advancing years had sought to provide for his wife had been considered by the Australian courts. By an informal document headed *Agreement between Arthur Leopold Coulls and O'Neil Construction Proprietary Limited* the husband, Arthur Coulls, in consideration of £5, granted the company the right to quarry stone on his land. The agreement provided for extensions of time and payments of royalties. The last paragraph read:

> I authorise the above Company to pay all money connected with this agreement to my wife, Doris Sophia Coulls, and myself, Arthur Leopold Coulls, as joint tenants (or tenants in common?). (the one which goes to living partner)

The document was signed by Arthur Coulls, by L. O'Neil on behalf of the company and by Mrs Coulls.

On the husband's death, proceedings were commenced by way of originating summons in the Supreme Court of South Australia to determine, amongst other questions, the effect of the agreement.

Mayo J. held that Mrs Coulls was the 'lawful assignee' of the royalties, entitled to demand that payment of them be made to her and to hold them as her own.

His Honour's decision was reversed by the High Court of Australia (Barwick C.J., McTiernan, Taylor, Windeyer and Owen JJ.), where it was held unanimously that there had been no assignment, and by a majority (McTiernan, Taylor and Owen JJ.) that the agreement, on its true construction, was a contract between Mr Coulls and the company together with a revocable mandate to pay royalties to his wife, a mandate which ended at his death. The Chief Justice and Windeyer J. construed it as a promise made by the company to the husband and wife jointly, and therefore enforceable by them both together and, after the death of either, by the survivor. Taylor and Owen JJ. agreed that this would be the result of such a construction.

Having set out the facts in each case and the course of litigation it is proposed to deal with the legal issues, classified under broad headings.