THE REMISSION OF HIGH COURT ACTIONS TO SUBORDINATE COURTS AND THE LAW GOVERNING TORTS

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Under the Constitution the High Court possesses or can be invested by Parliament with considerable original and appellate jurisdiction.[1] In recent years its workload has considerably increased and in an extra-judicial address delivered at the 19th Australian Legal Convention, Sydney, 8th July 1977, the then Chief Justice Sir Garfield Barwick remarked that it had become too heavy to permit of its reasonably expeditious despatch.[2] In his view:

> The difficulty could not be met by an increase in the number of Justices. There is no room for, as it were, a second row of Justices to hear matters in the original jurisidiction. Further the greater the number of Justices participating in the hearing of appeals, the slower the outturn of work is likely to be. Indeed a greater number of participants in hearing an appeal does not necessarily reduce the areas of difference. What was required was the removal of the greater part of the original jurisdiction of the High Court and the whole of the appellate work deriving from the Supreme Courts of the Territories. Various expedients had been thought of since the first suggestions for a new Federal Court were made in 1960. It was ultimately decided last year to make certain amendments to the Judiciary Act, and to those federal statutes in the area of industrial property which necessitated or facilitated resort to the High Court's original jurisdiction. It was also decided to establish a Federal Court with both original and appellate jurisdiction which could hear appeals from the courts of the States in certain matters of invested jurisdiction and appeals from the Supreme Courts of the territories in all matters which could emanate from that source.

The Chief Justice thus suggested at least two solutions — the removal of the greater part of the High Court's original jurisdiction and the removal of its appellate jurisdiction from the Territorial Supreme Courts. The latter was simply achieved by the creation of the Federal Court and its investment

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[1] Commonwealth Constitution ss. 73, 75, 76.

[2] Sir Garfield Barwick, "The State of the Australian Judicature" reproduced in (1977) 51 *A.L.J.* 480 at 488.

with such appellate jurisdiction.[3] But the removal of the greater part of the High Court's original jurisdiction is a more complex matter. Certainly some of the High Court's original jurisdiction is only *potential* jurisdiction in the sense that the Constitution itself does not confer it upon the High Court but merely empowers Parliament to do so. Until the Parliament acts the High Court does not have the jurisdiction and once it has been conferred by the Parliament it can later be withdrawn. This is the case with the High Court's original jurisdiction as set out in s. 76 of the Constitution. It provides:

> The Parliament may make laws conferring original jurisdiction on the High Court in any matter —
> (i) Arising under this Constitution, or involving its interpretation;
> (ii) Arising under any laws made by the Parliament;
> (iii) Of Admiralty and maritime jurisdiction;
> (iv) Relating to the same subject-matter claimed under the laws of different States.

In contrast the High Court's original jurisdiction as set out in s. 75 of the Constitution is *actual* jurisdiction. It is conferred on the High Court by the Constitution itself and cannot be withdrawn by the Parliament except by a constitutional amendment pursuant to s. 128. Section 75 provides:

> In all matters —
> (i) Arising under any treaty;
> (ii) Affecting consuls or other representatives of other countries;
> (iii) In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;
> (iv) Between States, or between residents of different States, or between a State and a resident of another State;
> (v) In which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;
> the High Court shall have original jurisdiction.

Parliament can invest state courts (under s. 77(iii) of the Constitution) and other federal courts (under s. 77(i) of the Constitution) with the High Court's actual and potential original jurisdiction but with regard to the former such investment can only be of jurisdiction concurrent to that possessed by the High Court because of Parliament's inability to take away the High Court's original jurisdiction deriving from s. 75 of the Constitution. In fact state courts have been invested with some of the High Court's actual and potential original jurisdiction by s. 39(2) of the Judiciary Act 1903 (Cth.). Provision has also been made for the investment of the Federal Court with part of the High Court's potential original jurisdiction. This is done by s. 19(1) of the Federal Court of Australia Act 1976 (Cth.) which includes within the Federal Court's original jurisdiction "such original jurisdiction as is vested in it by laws made by the Parliament, being jurisdiction in respect of matters arising under laws made by the Parliament". This therefore envisages the investment in the Federal Court

[3] Federal Court of Australia Act 1976 (Cth.) s. 24.

of all or part of the potential original jurisdiction of the High Court under s. 76(ii) of the Constitution.

Many actions falling within the High Court's original jurisdiction as conferred by s. 75 of the Constitution have to be instituted in the High Court. They cannot be instituted in the Federal Court because it has not been given this jurisdiction. Nor can many such actions be instituted in State courts for s. 38 of the Judiciary Act 1903 (Cth.) makes much of the s. 75 jurisdiction exclusive High Court jurisdiction. Section 38 provides:

> The jurisdiction of the High Court shall be exclusive of the jurisdiction of the several Courts of the States in the following matters:—
> (a) matters arising directly under any treaty;
> (b) suits between States, or between persons suing or being sued on behalf of different States, or between a State and a person suing or being sued on behalf of another State;
> (c) suits by the Commonwealth, or any person suing on behalf of the Commonwealth, against a State, or any person being sued on behalf of a State;
> (d) suits by a State, or any person suing on behalf of a State, against the Commonwealth or any person being sued on behalf of the Commonwealth;
> (e) matters in which a writ of mandamus or prohibition is sought against an officer of the Commonwealth or a federal Court.

Thus actions falling within s. 75 of the Constitution *and* caught by s. 38 of the Judiciary Act have to be instituted in the High Court. Other actions within s. 75 of the Constitution can either be instituted in the High Court or in State courts which are invested with such jurisdiction by s. 39(2) of the Judiciary Act. Thus, for example, actions between residents of different States which is part of the High Court's original jurisdiction under s. 75(iv) of the Constitution but is not embraced within s. 38 of the Judiciary Act can be instituted in either the High Court or a State court (providing it has the necessary subject matter jurisdiction and jurisdiction over the parties).

It might therefore be thought that the High Court is largely saddled with its s. 75 original jurisdiction and cannot divest itself of it however inconvenient it might be. Many actions falling within this jurisdiction have to be commenced in the High Court (by virtue of s. 38 of the Judiciary Act) and with respect to the balance the plaintiff can if he so wishes elect to sue at first instance in the High Court. But provision has been made to remedy this situation. This is achieved not by precluding the institution of such actions in the High Court but by enabling the High Court to remit actions properly commenced in it to other courts for determination.

The Legal Basis of Remission

The remission of cases from the High Court to other courts is authorized by the Judiciary Act. Previously the relevant provision was found in s. 45 which provided:

(1) Any matter which is at any time pending in the High Court, whether originally commenced in the High Court or not, may be remitted for trial to any Court of a State which has federal jurisdiction with regard to the subject-matter and the parties.
(2) The order remitting the matter may be made by the High Court, or a Justice sitting in Chambers, on the application of any party to the matter.

However this was changed in 1976 and the new provision is contained in s. 44.

> Any matter that is at any time pending in the High Court, whether originally commenced in the High Court, or not, may, upon the application of a party or of the High Court's own motion, be remitted by the High Court to any federal court, court of a State or court of a Territory that has jurisdiction with respect to the subject-matter and the parties and, subject to any directions of the High Court, further proceedings in the matter shall be as directed by the court to which it is remitted.

Both provisions authorize the remission of matters pending in the High Court whether originally commenced there or not. Thus they are not confined to actions involving the original jurisdiction of the High Court and could be used to remit appeals. It is, however, more likely that remission will be ordered in respect of original actions. Chief Justice Barwick certainly contemplated the use of s. 45 to considerably reduce the workload of the High Court's original jurisdiction particularly its diversity jurisdiction (actions between residents of different states):

> The amendment of the terms of the former s. 45, allowing as it does the remission *ex mero motu* of any pending case, will permit a very considerable reduction in the workload in the Court's original jurisdiction. It has been thought to be of convenience to litigants to resort to the diversity jurisdiction of the Court. The mobility which the motor car and the improvement of Australian roads has given the citizen, coupled with the frequency with which road collisions occur, has given rise to actions for negligence between residents of different States. Often the accident giving rise to the action occurs in a State other than the State of the residence of either participant. Consequently, a considerable number of actions for negligence have been commenced in the High Court. The State courts, by reason of s. 39 of the Judiciary Act, have the federal diversity jurisdiction but practitioners have appeared cautious about relying on that circumstance to ensure the jurisdiction of a court in a State in which the accident did not occur, in which the defendant party does not reside, or perhaps in which he cannot be served. Before the amendment, the High Court had no certain means of remitting such cases to a State court for disposal. The amendment now allows of this.
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> The Court has begun the practice of remitting all such cases, at

> least so soon as they are set down for hearing, but also at times, at earlier stages of the litigation, to a State court for disposal. In addition, there are other causes of action between residents of different States which are sought to be litigated in the original jurisdiction of the High Court. These can also now be remitted to State courts.[4]

The new s. 44 goes beyond the old s. 45 in at least two respects. In the first place remission is authorized to "any federal court, court of a State or court of a Territory" whereas the previous provision merely authorized remission to "any Court of a State which has federal jurisdiction". Thus the range of courts is wider. Moreover it seems that the selected court does not have to be one which has been specifically invested with federal jurisdiction. Thus remission of a diversity suit could be made, for example, to a territorial court even though such courts have not been specifically invested with federal diversity jurisdiction under s. 39(2) of the Judiciary Act. In this sense s. 44 itself operates to invest territorial courts with federal jurisdiction once a matter is remitted to it by the High Court. But the selected court must still have jurisdiction with respect to the subject matter and parties and it is arguable that this imposes limitations on the investment effected by s. 44. Take for example the subject of patents. As the case of *Beecham Group Ltd.* v. *Bristol-Myers Co.*[5] shows, prior to the amendment in 1976 of the Patents Act 1952 (Cth.) certain actions involving patents had to be instituted in the High Court and other courts did not have jurisdiction. Amendments in that year however conferred jurisdiction on the Supreme Courts of the States and territories. Had these amendments not been effected it is arguable that the High Court could not have remitted a patent action to a territorial Supreme Court because it would have lacked subject matter jurisdiction in relation to certain patent actions. A diversity suit, however, could be remitted to such a court even though it has not been invested with federal diversity jurisdiction because the subject matter of a diversity suit is usually a contract or tort and territorial courts are competent to hear such actions. But as we shall see the High Court has tended to read down the qualification in s. 44 that the remitted court be one which has jurisdiction "with respect to the subject-matter and the parties".

The second respect in which s. 44 is broader than its predecessor is that it enables the High Court to remit a case to another court on its own motion. The old s. 45 was expressed to operate only "on the application of any party to the matter". In the words of Sir Garfield Barwick "it was at least doubtful" whether the court could act without such a request.[6] However the present provision expressly empowers the High Court to remit a case "of the High Court's own motion" as well as "upon the application of a party".

There remains a question of the constitutional validity of s. 44 of the Judiciary Act especially in relation to its use to remit cases falling within the

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[4] *Supra* n. 2 at 489.
[5] (1977) 14 A.L.R. 591.
[6] *Supra* n. 2 at 488-89.

High Court's original jurisdiction as set out in s. 75 of the Constitution to other courts. One view is that the High Court has a duty to exercise its original jurisdiction. This view suggests an obligation on the High Court to exercise its s. 75 jurisdiction and implies a right on the part of a plaintiff who has an action falling within s. 75 of the Constitution to have it determined in the High Court. The opposing view is that s. 75 does no more than confer on the High Court an authority to adjudicate, it carries with it no obligation to exercise that jurisdiction.

Various arguments have been put in favour of one view or the other.[7] In favour of the view that the High Court is under an obligation to exercise its jurisdiction it can be said that the courts have traditionally regarded themselves as under an obligation to exercise their jurisdiction. Indeed inferior courts can be compelled by the issue of the writ of mandamus to exercise their jurisdiction.[8] Further it can be argued that in the absence of an obligation to exercise it, a grant of jurisdiction becomes of little utility. Lindell argues that this is the least persuasive argument.[9] However it must be remembered that with regard to the diversity jurisdiction its purpose (whether justified or not) was to provide a federal forum for the resolution of disputes between residents of different states. The remission of a federal diversity suit to a State court (as is increasingly done by the High Court) is clearly inconsistent with this purpose.[10] Presumably a similar purpose underlies the other bases of federal jurisdiction in s. 75(iv) of the Constitution, *viz.*, actions between States or between a State and a resident of another State. These objectives, however, would not be compromised by the remission of a High Court action to the Federal Court as opposed to a State court.

On the other hand there are arguments against the existence of an obligation on the part of the High Court to exercise its jurisdiction. In the first place it has been said that there is no means of compelling the High Court to exercise its jurisdiction since the prerogative writs only lie against inferior courts.[11] Another argument, championed by Professor Howard,[12] is that it is often inconvenient and inappropriate for the High Court to exercise its s. 75 jurisdiction. This is often the case with regard to diversity suits involving simple contracts or torts or, in the past, custody applications. Howard says:

> The fact is that the High Court is not the appropriate tribunal in the Australian context to hear such matters as custody applications. Equally, since our State judiciary is and always has been above all

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[7] See Lindell, "Duty to Exercise Judicial Review" in Zines (ed.) *Commentaries on the Australian Constitution* (1970) 151-57; Cowen and Zines, *Federal Jurisdiction in Australia* (2nd ed. 1978) at 75-81; Howard, *Australian Federal Constitutional Law* (2nd ed. 1972) at 194-97; Pryles and Hanks, *Federal Conflict of Laws* (1974) at 134-41.

[8] Lindell, *op. cit. supra* n. 7 at 153-54.

[9] *Id.* 155.

[10] As to the purpose of federal diversity jurisdiction see Pryles and Hanks, *op. cit. supra* n. 7 at 107-119.

[11] Lindell, *op. cit. supra* n. 7 at 153.

[12] Howard, *op. cit. supra* n. 7 at 196.

> suspicion of bias in favour of local residents or in any other matter, there is no basis of public interest at all in compelling the High Court to waste its time on trials which have no bearing on its major constitutional functions. There is nothing to stop it exercising its jurisdiction if it wishes to do so but it seems doctrinaire to elevate an unqualified grant of jurisdiction to the level of a legislative command to exercise that jurisdiction whatever inconsistency or inconvenience it produces.[13]

The point of inconvenience and inappropriateness is undoubtedly true and the possibility of bias of State courts against out-of-state residents, which is the justification of federal diversity jurisdiction, has never been demonstrated in Australia. None the less in other areas the High Court has maintained constitutional prescriptions however inappropriate they might be. Thus in relation to the distinction, drawn in the Constitution, between interstate and intrastate trade and commerce Kitto, J. said: "This Court is entrusted with the preservation of constitutional distinctions, and it both fails in its task and exceeds its authority if it discards them, however out of touch with practical conceptions or with modern conditions they may appear to be. . . ."[14]

It is possible to adopt an intermediate position and to accept an obligation on the part of the High Court to exercise its original jurisdiction but nevertheless to admit certain exceptions. Of course the wider the exceptions the closer one comes to in fact denying an obligation to exercise the jurisdiction and conversely the narrower the exceptions the more the obligation will be maintained.

There has in fact been little Australian authority on this question but it is unlikely that the High Court would accept the existence of an obligation to exercise its jurisdiction without exception. Sir Garfield Barwick, before he was appointed to the High Court, apparently thought that the former s. 45 of the Judiciary Act was valid.[15] The High Court itself has not welcomed the exercise of federal diversity jurisdiction. It has sought to discourage litigants from instituting such actions in the High Court by threatening to refuse costs to a successful plaintiff[16] or awarding costs on the lower scale of a State court which would have been competent to hear the action.[17] In *The Queen* v. *Langdon; ex parte Langdon*[18] Taylor, J. went further and intimated that the High Court might refuse to exercise its diversity jurisdiction in some cases such as where the governing State law conferred a discretion that was more appropriately exercised by the State Court.[19]

In the United States the Supreme Court has said that a court having

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[13] *Ibid.*

[14] *Airlines of New South Wales Pty. Limited* v. *New South Wales (No. 2)* (1965) 113 C.L.R. 54 at 115.

[15] Sir Garfield Barwick, "The Australian Judicial System: The Proposed New Federal Superior Court" (1964) 1 *Fed. L. R.* 1 at 14-15.

[16] *Faussett* v. *Carol* (1917) 15 W.N. (N.S.W.) No. 12, Cover Note (14 August, 1917).

[17] *Morrison* v. *Thwaites* (1969) 43 A.L.J.R. 452.

[18] (1953) 88 C.L.R. 151.

[19] See Pryles and Hanks, *op. cit. supra* n. 7 at 163-64.

jurisdiction of a cause not only has a right but also has a duty to exercise that jurisdiction.[20] But a number of exceptions have been created. The doctrine of *forum non conveniens* has been accepted as a ground for dismissing an action.[21] In determining whether it is a *forum non conveniens*, a court can consider not only the interests of the litigants (the situation of evidence and the enforceability of a resulting judgment) but also factors of public interest such as the workload before the court.[22] Acceptance of the doctrine of *forum non conveniens* in the federal context has been criticised particularly in so far as the court may take into account factors of public interest in determining whether to refuse jurisdiction. However such factors may underlie the purpose of s. 44 of the Judiciary Act in so far as it enables the High Court to act of its own motion. Secondly, legislation empowers federal district courts to transfer actions to other more appropriate district courts.[23] Thirdly, under the "abstention" doctrine a federal court may decline to hear an action in certain circumstances. An instance is where the assumption of jurisdiction by the federal court would disrupt an established State policy or administrative process.[24] This rather resembles the limitation suggested by Taylor, J. in the *Langdon Case*.[25]

In recent years Anglo-Australian courts have moved away from a rigid adherence to the principle that jurisdiction once established should be exercised and have broadened exceptions to it. Thus the rule for staying actions which was once dependent on a showing of vexation or oppression or an abuse of the court's process and which proved extremely difficult for a defendant to satisfy[26] has now been liberalised to a point where it is virtually the same (in substance if not in form) as the Scottish and American doctrine of *forum non conveniens*.[27]

In the final result, whatever the arguments for and against the validity of s. 44 of the Judiciary Act, the High Court is the final arbiter of the Constitution. Plainly the High Court welcomes that provision, which enables it to reduce its workload, and has acted pursuant to it to remit a number of cases to State courts. If the High Court accepts the validity of the provision that is the end of the matter, no further redress or avenues of challenge are possible.

Jurisdictional Qualifications for Remission

Under s. 44 of the Judiciary Act the High Court can only remit an ac-

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[20] *Cohens* v. *Virginia* (1871) 6 Wheat. 264, 404; *Canada Malting Co.* v. *Paterson Steamships* (1932) 285 U.S. 413 at 422.

[21] *Gulf Oil Corporation* v. *Gilbert* (1947) 330 U.S. 501.

[22] *Gulf Oil Corporation* v. *Gilbert Id.* at 508-09. See also *Koster* v. *Lumbermens Mutual Casualty Co.* (1947) 330 U.S. 518. But the doctrine of *forum non conveniens* has been held inapplicable to certain federal suits such as civil antitrust actions: *United States* v. *National City Lines* (1948) 334 U.S. 573.

[23] 28 U.S.C. s. 1404(a).

[24] *Burford* v. *Sun Oil Co.* (1943) 319 U.S. 315; Pryles and Hanks, *op. cit. supra* n. 7 at 138-41.

[25] *Supra* n. 18.

[26] See e.g., *H.R.H. Maharanee of Baroda* v. *Wildenstein* [1972] 2 Q.B. 283.

[27] *Rockware Glass Ltd.* v. *MacShannon* [1978] A.C. 795 (H.L.); *Garsealo Nominees Pty. Ltd.* v. *Taub Pty. Ltd.* [1979] 1 N.S.W.L.R. 663. See generally, Pryles, "Liberalising the Rule on Staying Actions — Towards the Doctrines of *Forum Non Conveniens*" (1978) *A.L.J.* 678.

tion to a federal, State or territorial court "that has jurisdiction with respect to the subject-matter and the parties". This seemingly simple qualification has given rise to some difficulties and has in fact been read down by the court.

A court's jurisdiction may be limited by reference to several matters. In the first place its jurisdiction may be limited by reference to the subject-matter of the claim. Thus a court may not be competent to hear certain types of actions or its competence may be limited by reference to the amount in controversy. Thus, for example, under s. 37 of the County Court Act, 1958 (Vic.) the County Court of Victoria has jurisdiction to entertain actions for damages in respect of personal injury where the amount claimed by the plaintiff is not more than $25,000. Superior courts of record, such as State Supreme Courts, have few such limitations on their jurisdiction. However they, like inferior courts, have limitations in respect of the parties. In actions *in personam* (comprising the ordinary contract and tort actions) the defendant must be present within the State at the time proceedings are instituted (generally service of the writ) unless he has submitted to the jurisdiction or has been served with process outside the State under the rules of the court or the provisions of the Service and Execution of Process Act 1901 (Cth.).[28]

Section 44 of the Judiciary Act seems to preserve these limitations on jurisdiction so that, for example, a personal injuries claim for $150,000 damages instituted in the High Court could not be remitted to the County Court of Victoria. So too it might be thought that if the defendant was not present in Victoria the High Court could not remit an original action to the Supreme Court of Victoria unless it was clear that the defendant was prepared to submit to its jurisdiction or the case fell within the provisions authorizing service of process out of the State. The proposition about subject matter jurisdictional limitations being preserved is probably true but the position with regard to *in personam* jurisdiction is much more doubtful.

The High Court first had cause to consider the jurisdictional qualifications for remission in *Johnstone* v. *Commonwealth*.[29] The plaintiff commenced an action in the High Court against the Commonwealth seeking damages for negligence causing personal injuries. The alleged negligence occurred in South Australia but the plaintiff applied for the action to be remitted to the Supreme Court of New South Wales where he resided. The application came on before Barwick, C.J. who referred for the opinion of the Full Court the question whether the Court could under s. 44 of the Judiciary Act remit an action against the Commonwealth to any State Supreme Court or whether it could only remit the action to the Supreme Court of the State in which the cause of action arose. The doubt arose because of the provisions of s. 56 of the Judiciary Act. It provides:

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[28] As to jurisdiction in actions in personam see Sykes and Pryles, *Australian Private International Law* (1979) at 20-42.

[29] (1979) 143 C.L.R. 398.

(1) A person making a claim against the Commonwealth, whether in contract or in tort, may in respect of the claim bring a suit against the Commonwealth —

(a) in the High Court;

(b) if the claim arose in a State or Territory — in the Supreme Court of that State or Territory or in any other court of competent jurisdiction of that State or Territory; or

(c) if the claim did not arise in a State or Territory — in the Supreme Court of any State or Territory or in any other court of competent jurisdiction of any State or Territory.

A divided High Court held 3-2 that s. 44 empowered the Court to remit an action against the Commonwealth in tort to the Supreme Court of any State. Of the majority Gibbs and Aickin, JJ. said that the jurisdictional qualification in s. 44 merely required that the court of remission be competent to hear actions of the type involved in the instant case and between parties of the same status. It did not require the High Court to determine whether on the actual facts of the case the court of remission would have had jurisdiction over the particular parties and the particular subject matter if the action had been commenced in the court of remission in the first place. Thus it was sufficient that the Supreme Court of New South Wales could entertain some claims by a private plaintiff against the Commonwealth in tort. The fact that this particular claim did not arise in New South Wales and therefore could not have originally been commenced in the Supreme Court of New South Wales, under s. 56 of the Judiciary Act, did not matter.

The High Court was primarily concerned with s. 56 of the Judiciary Act which is in the nature of a venue provision rather than a jurisdictional provision. However Aickin, J. made it quite clear that in his view the *in personam* jurisdiction of the remission court over the actual defendant to the action was not relevant. Thus he said that in the case of a diversity action between residents of different States it was no part of the High Court's function to determine whether the court of remission would have possessed *in personam* jurisdiction over the particular defendant in accordance with the provisions for service of process out of the jurisdiction and the rule about submission and so on. He concluded:

> These considerations appear to me to support the view that the effect of s. 44 is to confer federal jurisdiction on State courts in cases where this Court remits a case to them, and that federal jurisdiction is in those same matters in which this Court has federal jurisdiction by virtue of s. 75 of the Constitution. That jurisdiction is coextensive with the jurisdiction of this Court, subject only to the Supreme Court having jurisdiction over the same kind of party and the same kind of subject matter as that over which the High Court has jurisdiction, without investigation of the question of whether the Supreme Court would have had jurisdiction (whether State or Federal) over the particular parties and the particular subject matter if the action in

> question had been commenced in that Supreme Court rather than in the High Court.[30]

Gibbs, J. who came to the same conclusion was led to this result because:

> There is no reason to give s. 44 a narrow, restrictive construction. If the Parliament had intended that remitter should be made only to a court already invested with jurisdiction it would have been very easy to say so. Strong reasons of convenience may in a particular case demand that a matter pending in this Court should be remitted to a Supreme Court other than that in which the cause of action arose. There may be claims in tort against the Commonwealth which did not arise in any State or Territory, e.g., claims that arose on the high seas or abroad; on the construction suggested by the Commonwealth, this Court would be constrained to hear such cases itself, there being no court already having jurisdiction to which they could be remitted. It would not serve any useful purpose to confine the words of s. 44 in the manner suggested and to fetter a power of remitter which was obviously intended to be large and general. The section does not compel a remitter to be made — it confers a discretion, to be exercised after due consideration of all the circumstances of the case — and it is not immaterial that the discretion which s. 44 confers is entrusted to this Court which is the ultimate judicial authority in the Commonwealth; provisions granting such a discretion should be liberally construed.[31]

The majority decision can be seen as desirable in terms of giving the High Court maximum flexibility to order the remission of a case under s. 44 of the Judiciary Act. But the reasons advanced by Gibbs, J. are not particularly convincing. His first reason was that it would have been easy for Parliament to say that remitter should only be made to a court already invested with jurisdiction if this is what it had intended. However with respect, the qualification that appears in s. 44 and which requires that the court of remission "has jurisdiction with respect to the subject matter and the parties" is open to this very interpretation. It seems more naturally to refer to jurisdiction over the actual subject matter of the action and the particular parties before the court than to the general type of action and status of the parties as the High Court held. This point was tellingly made by the dissenting justices — Stephen and Jacobs, JJ. Stephen, J. noted that because the claim arose in South Australia and was a claim in tort against the Commonwealth, only the High Court and the Supreme Court of that State had jurisdiction under s. 56 of the Judiciary Act. He continued:

> If, then, s. 44 of the Judiciary Act is to be invoked as enabling the present action to be tried in the Supreme Court of New South Wales it can only be because it permits this Court, by the making of an order under s. 44, to create jurisdiction in a Supreme Court where none before existed: I do not so read it. On the contrary, as I would read it,

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[30] *Id.* 408.
[31] *Id.* 402.

> in describing the variety of courts to any of which this Court may remit a matter, it includes as part of that description the words already quoted referring to their possession of jurisdiction both as to subject matter and as to parties. Unless a court to which remission is contemplated conforms to that description, which the Supreme Court of New South Wales does not, it is not, in my view, a court to which the power of remission extends.
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> The possession by this Court, at the time of remission, of jurisdiction both as to subject matter and as to parties is undoubted, but this fact does not further the position. This Court's jurisdiction is to try the matter and, although power is now also given to remit it pursuant to s. 44 for trial in a State or federal court such as is described in the section, that is the limit of the power conferred: there is no power conferred upon this Court to invest with jurisdiction, in claims against the Commonwealth, courts which would not otherwise possess such jurisdiction. It would no doubt be desirable that this Court's power of remission should not be restricted in this way. However that is a matter for the legislature.[32]

The second reason put forward by Gibbs, J. was that there may be some claims in tort against the Commonwealth which did not arise in any State or territory, e.g., claims that arose on the high seas or abroad; which on the more narrow construction of s. 44 would have to be heard by the High Court itself as there would be no court already having jurisdiction to which they could be remitted. In making this point Gibbs, J. appears to have overlooked s. 56(1)(c) of the Judiciary Act which would enable actions against the Commonwealth which arose on the high seas or abroad to be initiated in the Supreme Court of any State or territory.

The point adverted to by Aickin, J. in the *Johnstone Case*, that remission can be made to a court which does not possess *in personam* jurisdiction over the particular defendant (or did not when proceedings were instituted in the High Court), subsequently arose in *Sealey* v. *Grollo & Co. Pty. Ltd.*[33] There the plaintiff issued a writ out of the High Court Registry in Western Australia claiming an injunction against the defendants for breach of a letters patent owned by the plaintiff. Both defendants were domiciled in Victoria and the alleged breach of patent occurred in the Northern Territory or in Victoria. The High Court remitted the proceedings to the Supreme Court of Western Australia. The defendant then applied to the latter court seeking an order (1) that the proceedings be stayed on the ground that the court lacked jurisdiction over the defendants; or (2) that proceedings be stayed because the court was a *forum non conveniens*; or (3) that the proceedings be transferred to the Supreme Court of Victoria pursuant to s. 147(1) of the Patents Act 1952 (Cth.).

On the question of jurisdiction the defendants argued that the Supreme Court of Western Australia was not competent because the defen-

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[32] *Id.* 403.
[33] [1980] W.A.R. 179.

dants were incorporated in Victoria, carried on business in that State but not in Western Australia and that further the alleged breach of patent did not occur in WesternAustralia. Wallace, J. discussed this contention:

> With respect, I cannot agree. Section 44 of the Judiciary Act simply provides for the remittal of matters by the High Court to prescribed courts having the jurisdiction with respect to the subject matter and the parties, and this means no more than the legislation has conferred jurisdiction upon the Supreme Court of Western Australia to deal with patent matters. The jurisdiction exists, the subject matter is that of a breach of a patent owned in Western Australia. Paragraph 1 of the Chambers summons therefore fails.[34]

Wallace, J. thus seemed to say that the only jurisdictional qualification imposed by s. 44 of the Judiciary Act related to the subject matter of the action. As the Supreme Court of Western Australia could deal with patents this was an end to the matter. Curiously, though, this seems to ignore the express requirement in s. 44 that the court of remission have jurisdiction with respect to "the parties" as well as with respect to the subject matter.

The question of the requirement of *in personam* jurisdiction, on the part of the court of remission, was considered by the High Court in *Weber* v. *Aidone*.[35] The plaintiff (respondent) commenced a diversity action in the High Court seeking damages for personal injuries sustained by him and for the death of his wife as a result of a motor collision caused by the alleged negligence of the defendant (appellant). The plaintiff resided in Victoria, the defendant in South Australia and the collision occurred in South Australia. The defendant made application under s. 44 of the Judiciary Act to remit the action to the Supreme Court of South Australia. Aickin, J. held that the balance of convenience was in favour of the remission of the action to the Supreme Court of Victoria and so ordered. The defendant then appealed to the Full Court and contended that the Supreme Court of Victoria lacked jurisdiction. Gibbs, C.J. with whom the other justices agreed, rejected this contention:

> It was submitted by Mr. Johnston who appeared for the appellant that this decision is distinguishable, and that the Supreme Court of Victoria is not a court that has jurisdiction with respect either to the subject-matter or the parties in the present action. Clearly the Supreme Court of Victoria has jurisdiction with regard to the subject-matter of the action, which is an action for damages for negligence. It was submitted that the inclusion of a claim for *solatium* meant that the Supreme Court lacked jurisdiction to deterine the whole matter, but now that the claim for *solatium* has been abandoned it is no longer necessary to consider that argument. Clearly also, the Supreme Court of Victoria has jurisdiction with respect to a plaintiff who resides in Victoria. Further, that court has jurisdiction with respect to a defen-

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[34] *Id.* 180.
[35] (1981) 55 A.L.J.R. 657.

> dant who resides in South Australia, if that defendant is served within the jurisdiction, or, if served outside the jurisdiction, enters an unconditional appearance, or if the case is one in which the plaintiff can obtain leave to proceed under the *Rules of the Supreme Court of Victoria* or under the Service and Execution of Process Act 1901 (Cth.). Whether the Supreme Court of Victoria would have had jurisdiction in the present action, if it had been instituted in that court in the first instance, depends on whether any of the conditions just mentioned would have been satisfied and is therefore a matter of conjecture. But *Johnstone* v. *Commonwealth of Australia* is authority for the proposition that even if that court would not have had jurisdiction with respect to the defendant (the present appellant) if proceedings had been instituted in that Court in the first instance, it has jurisdiction with respect to the parties within the meaning of s. 44 of the Judiciary Act.
>
> For these reasons I would hold that there was power to remit the present action to the Supreme Court of Victoria.[36]

In the United States a different view has been adopted though the position is not entirely analogous and the legislation is differently worded. 28 U.S.C. s. 1404(a) provides that "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought". Thus a federal district court can transfer an action to another federal district court. It is a transfer between courts of equal status having limited territorial jurisdiction within the United States. In contrast s. 44 of the Judiciary Act provides for the remission of a case from the national court to a State (or other) court having more limited territorial jurisdiction. Transfer is possible under 28 U.S.C. s. 1404(a) only to another district court where the action "might have been brought" while s. 44 of the Judiciary Act provides for remission to a court "that has jurisdiction with regard to the subject-matter and the parties". The High Court's rather loose interpretation of this qualification in *Johnstone* v. *Commonwealth*[37] would have been more difficult to justify in relation to the wording of the American provision.

In *Hoffman* v. *Blaski*[38] the United States Supreme Court held that a transfer could only be ordered under s. 1404(a) to another district that was a proper venue for the action, under the United States code, and whose courts had personal jurisdiction over the defendants independently of their wishes. Thus the defendants had to be resident within the transferee district or otherwise subject to the jurisdiction under the provisions for service of process *ex juris*. Absent these factors, an action could not be transferred to a district on the grounds that the defendants were, at the time of the application for the transfer, prepared to submit to the jurisdiction of the transferee court.

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[36] *Id.* 658-59.
[37] *Supra* n. 29.
[38] 363 U.S. 335, 4 L. ed. 2d 1254 (1960).

The American provision more obviously directs attention to the jurisdiction of the transferee court as at the date the action was originally commenced. However the Australian provision could be construed as referring to the remission court's jurisdiction as at the time when remission is sought. If this is so then it is arguable that as far as *in personam* jurisdiction is concerned and even accepting the narrow construction of s. 44 of the Judiciary Act put forward by Stephen and Jacobs, JJ. in the *Johnstone Case*, the High Court can always order the remission of an action to a State court on the *defendant*'s motion because in making the application the defendant would be submitting to its jurisdiction.

Selection of the Appropriate Court

The High Court's broad construction of s. 44 means that there will often be a broad choice of courts to which a case can be remitted. What principles guide the High Court in selecting the court of remission? *Weber* v. *Aidone*[39] suggests that at least in diversity suits involving torts the test is the balance of convenience and the High Court should remit the action to the Supreme Court of the State that is the most convenient forum. *Weber*'s *Case*, which is noted above, involved an action brought by a Victorian plaintiff against a South Australian defendant involving a collision which occurred in South Australia. The defendant sought remission of the action, commenced in the High Court, to South Australia but Aickin, J. ordered the remission of the action to the Supreme Court of Victoria. This course was apparently supported by the plaintiff who had undertaken to abandon its claim for *solatium*, which was not recoverable under Victorian law, if proceedings were remitted to Victoria.

A number of factors pointed to the suitability of trial in South Australia. Not only was it the State where the defendant resided and the place of the accident but liability was disputed and at least six witnesses resided in South Australia. Moreover the insurer, who would bear any liability, was the State Government Insurance Commission of South Australia. The factors pointing to Victoria included the plaintiff's residence there and the fact that the plaintiff had only spent one night in hospital in South Australia but a considerably longer period in hospital in Victoria where he had been treated for depression. Aickin, J. held that the balance of convenience was slightly in favour of remission to Victoria. He recognized that the greater number of witnesses resided in South Australia but considered that the difficulties involved in taking the plaintiff's medical witnesses to South Australia outweighed the problems of bringing the South Australian witnesses to Victoria. On appeal the Full Court declined to hold that Aickin, J. had erred in the exercise of his discretion because he gave insufficient consideration to the fact that the accident occurred in South Australia.

The next case, *Guzowski* v. *Cook*[40] also involved a diversity action in

[39] (1981) 55 A.L.J.R. 657.
[40] (1981) 56 A.L.J.R. 282.

tort concerning a motor collision. The action was commenced in the High Court and the plaintiff sought remission to the Supreme Court of Victoria while the defendant sought remission to the Supreme Court of Queensland. The collision occurred in Queensland at the time when both the plaintiff and the defendant were resident there. Some months later, however, the plaintiff returned to Victoria where he had resided five years earlier. After the collision the plaintiff suffered a nervous breakdown and since returning to Victoria he had been hospitalised in Melbourne and treated by four doctors.

Gibbs, C.J. expressed difficulty in determining which would be the more appropriate forum. The defendant relied upon the fact that the accident occurred in Queensland, that there were a number of witnesses resident there, that the plaintiff had, before returning to Victoria, engaged Queensland solicitors who had done a substantial amount of work in connection with the claim, that the insurer was a Queensland corporation and that another action arising out of the same collision had been brought in the District Court in Queensland. The plaintiff, on the other hand, relied upon his present residence in Victoria and the number of medical witnesses there.

Gibbs, C.J. discounted entirely the fact that another action involving the same collision was pending in the District Court of Queensland because the present proceedings would not be remitted to a District Court in either State. However he decided in favour of remission to the Supreme Court of Queensland for two reasons:

> The first is that at the time of the actual collision the plaintiff was resident in Queensland, and that his nervous breakdown occurred in Queensland. Since the cause of the breakdown is a very important issue in the case, it is possible, although it does not appear from the material that this is so, that there will be potential witnesses, medical or lay, in Queensland who may be able to give evidence as to the cause of the nervous breakdown.

The second matter is, that it is apparent that the Supreme Court of Victoria would not have had jurisdiction if the action had been commenced in that Court, unless of course the defendant had entered an unconditional appearance, or had been served within the jurisdiction. In other words, if the proceedings had not been instituted in this Court, the overwhelming likelihood is that they would have been instituted in the Supreme Court of Queensland.[41]

It is difficult to take issue with the Chief Justice's decision but two points may be noted. In *Weber* v. *Aidone*[42] Gibbs, C.J. read down the jurisdictional qualification in s. 44 of the Judiciary Act and held that a High Court action could be remitted to the Supreme Court of a State which did not possess *in personam* jurisdiction over the defendant. There is surely

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[41] *Id.* 282-83.
[42] *Supra* n. 39.

some irony in his subsequent decision in *Guzowski* v. *Cook*[43] that possession of *in personam* jurisdiction is an important factor in determining the appropriate court of remission.

The second noteworthy point is that the result in *Gozowski* v. *Cook* was the opposite to that in *Weber* v. *Aidone*. In both cases the defendant and witnesses to the accident resided in the State where the accident occurred while the plaintiff and (at least some) medical witnesses resided in another State. However in one case that action was remitted to the plaintiff's State while in the other case the accident was remitted to the defendant's State.

The third case in the series, *Robinson* v. *Shirley*[44] marks somewhat of a departure from *Weber* v. *Aidone*[45] and *Guzowski* v. *Cook*[46] and raises the question of whether considerations of choice of law are relevant in choosing the court of remission.

Mr. and Mrs. Robinson were residents of New South Wales who on 21 December, 1979 issued a writ out of the principal registry of the High Court (in Sydney) claiming damages for negligence occasioning personal injuries arising out of an accident which occurred on 4 January, 1974 in Queensland. The defendants, who were residents of Queensland, sought the remission of the actions to the Supreme Court of Queensland. Mr. Robinson died on 10th November, 1980 and Mrs. Robinson obtained a grant of probate of his will by the Supreme Court of New South Wales. Mrs. Robinson then obtained an order by consent that she carry on her husband's action as executrix.

The applications for remittal came on for hearing in the High Court in Brisbane though apparently there were further hearings or at any rate judgment appears to have been delivered in Canberra.[47] Brennan, J. said there was no doubt that Mr. Robinson's cause of action survived for the benefit of his estate either by virtue of s. 15D of the Common Law Practice Act, 1867-1978 (Qld.) or by virtue of s. 2 of the Law Reform (Miscellaneous Provisions) Act, 1944 (N.S.W.). He said the provisions were not merely procedural and thereby distinguished them from a defence that the actions were statute barred under the Queensland Law Reform (Limitation of Actions) Act, 1956 (Qld.) which had been advanced by the defendants but subsequently abandoned. Thus while the Queensland statute of limitations did not apply to actions commenced in the High Court (at any rate in Sydney) the situation was otherwise with regard to the survival of action provisions. It might be observed, however, that if the High Court was technically exercising jurisdiction in Canberra, the existence of a survival of actions provision under the law of the Australian Capital Territory should have been considered and would have been necessary because of

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[43] *Supra* n. 40.
[44] (1982) 56 A.L.J.R. 237.
[45] *Supra* n. 39.
[46] *Supra* n. 40.
[47] So much appears from the report of the case in the Australian Law Journal Reports immediately under the name of the case.

s. 79 of the Judiciary Act 1903 (Cth.) and the rules of private international law.[48]

On the question of what was the appropriate court to which the actions should be remitted, Brennan, J. noted that the measure of damages to which the deceased's estate was entitled fell to be determined in accordance with the *lex fori*. It was possible that the measure of damages which could be recovered in Queensland and New South Wales could be different. However he did not think that this was a proper consideration to take into account:

> It would not be appropriate to allow the difference in benefits to the plaintiff conferred by two systems of law to affect the exercise of the discretion, which is intended to facilitate the course of litigation rather than to enhance or diminish a plaintiff's rights or correspondingly alter a defendant's obligations.[49]

The decisive factor which influenced Brennan, J. was the place of the tort. In his honour's view an action in tort ought to be remitted to the *locus delicti*:

> . . . the choice of the Court to which the action is remitted determines the body of law which is to be applied to it. Where the action is a claim for damages in tort, there are powerful reasons for adopting the law of the place where the tort is committed. If it were not for the existence of an obligation under that law, no cause of action would be enforceable under any other body of law which might be made applicable to the resolution of the matter. The law of the place where the tort was committed is the law which first gives rise to the cause of action, and it is material that the Courts of a State or Territory other than the State or Territory in which the tort was committed would not have jurisdiction unless the defendant were served within the State or Territory or unless he entered an unconditional appearance, for the plaintiff could not otherwise make the defendant amenable to that Court's jurisdiction: *cf. Weber* v. *Aidone* (1981) 55 A.L.J.R. 657 and *Guzowski* v. *Cook* (1981) 38 A.L.R. 297.[50]

Brennan, J. therefore thought that the action should be remitted to the Supreme Court of Queensland to be determined according to Queensland law. The plaintiff who sought remittal to New South Wales argued that it was the more convenient venue. But Brennan, J. observed:

> The plaintiff seeks remittal to the Supreme Court of New South Wales, however, submitting that Sydney would be the more convenient venue for trial than Brisbane. I am not persuaded that convenience in the conduct of the trial is a factor which is capable of affecting the exercise of the discretion which must choose between two systems of law which

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[48] As to the rules of private international law survival of action provisions see Sykes and Pryles *op. cit. supra* n. 28 at 335-36.

[49] *Supra* n. 44 at 239.

[50] *Ibid.*

> confer rights of different measures upon the plaintiff. But it is not necessary for me to decide that question in the present case, for the balance of convenience does not clearly favour a trial in Sydney.[51]

These remarks are significant. The two earlier cases indicated that the major factor in determining the court of remission was the balance of convenience. Brennan, J. clearly had reservations about it and considered that in general the determining factor at least in tort actions was the *locus delicti*.

This leads to the question of why the *locus delicti* is so important. In Brennan's view it is because its law "first gives rise to the cause of action" and "were it not for the existence of an obligation under that law, no cause of action would be enforceable under any other body of law". This is a statement of the classic vested rights doctrine advanced by the American judges Holmes, J. in *Slater* v. *Mexican National Railway*[52] and Cardozo, J. in *Loucks* v. *Standard Oil Co. of New York*[53] and to some extent adopted by Willes, J. in *Phillips* v. *Eyre*.[54] It was accepted by Professor Dicey in England and pushed to extraordinary lengths by Professor Beale at Harvard. However the theory was effectively destroyed by Cook and Lorenzen.[55] It is no longer advocated by writers and Dr. Morris, the current general editor of the classic English text on the Conflict of Laws (Dicey and Morris), has remarked "[w]e may as well admit it: the vested rights theory is dead".[56] It is quite clear that the role assigned to the *lex loci delicti* in tort actions has diminished. The High Court has tended to give primacy to the *lex fori* rather than the *lex loci delicti*[57] and it may even be possible to apply the *lex fori* without reference to the *lex loci delicti* in appropriate cases.[58]

This is not to say that remission to the *locus delicti* is inappropriate. It can be justified on grounds of convenience for often witnesses to the tort will be resident there. Indeed if the principle of remission to the convenient forum is accepted, it could be said that *prima facie*, at least, a case should be remitted to the *locus delicti* at least if one of the parties to the action is also resident there.

Finally one wonders whether, after the High Court ordered the remission of the action to the Supreme Court of Queensland, it was necessary for the plaintiff/testatrix to obtain the reseal or a grant of probate or to be appointed administratrix *ad litem* in Queensland. For it is clear that had the action been originally commenced in Queensland her title deriving from a New South Wales grant would not have been recognized in Queensland absent a separate appointment in Queensland.[59] Perhaps, however, the

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[51] *Ibid.*

[52] (1904) 194 U.S. 120 at 126.

[53] (1918) 120 N.E. 198 at 201.

[54] (1870) L.R. 6 Q.B. 1.

[55] Cook, *Logical and Legal Bases of the Conflict of Laws* (1942); Lorenzen, *Selected Articles on the Conflict of Laws* (1947).

[56] Morris, *The Conflict of Laws* (10th ed. 1980) at 505.

[57] *Koop* v. *Bebb* (1951) 84 C.L.R. 629; *Anderson* v. *Eric Anderson Radio & T.V. Pty. Ltd.* (1965) 114 C.L.R. 20.

[58] *Cf. Chaplin* v. *Boys* [1971] A.C. 356.

[59] *Electronic Industries Imports Pty. Ltd.* v. *Public Curator* [1960] V.R. 10.

High Court would take the view that if the plaintiff's title was recognized in the High Court it also had to be recognized by the Queensland court.

The most recent case on remission is the decision of the High Court in *Pozniak* v. *Smith*.[60] The plaintiff, a resident of New South Wales, sought damages in respect of personal injury suffered by him as a result of the negligent driving of a motor vehicle by the defendant, a resident of Queensland. The accident happened in Queensland. Like the previous cases, the action fell within the High Court's original jurisdiction by reason of the diversity of residence of the parties. Proceedings were instituted in the High Court but the plaintiff sought remission to the Supreme Court of New South Wales while the defendant applied for remission to the Supreme Court of Queensland. The defendant admitted liability but at issue was a claim that the plaintiff was guilty of contributory negligence. The quantum of damage was also in issue.

Not surprisingly the plaintiff argued that the balance of convenience was the most important factor affecting the exercise of the Court's discretion to remit while the defendant, relying on the observations of Brennan, J. in *Robinson* v. *Shirley*,[61] contended that the case should be remitted to the State in which the cause of action arose.

There was a complicating factor in *Pozniak* v. *Smith* in that there were certain differences between Queensland and New South Wales procedural laws which could have affected the ultimate result of the action. For instance in Queensland an award of damages in the form of lump sum compensation for future loss was to be calculated in accordance with actuarial tables at a discount rate of five per cent.[62] In similar circumstances an award determined according to the law of New South Wales would require the application of a discount rate of three per cent.[63] Thus the High Court noted, "a decision in favour of New South Wales would have the effect of conferring a fortuitious advantage on the plaintiff and a corresponding disadvantage on the defendant".[64]

In determing whether such a result could be justified, Gibbs, C.J., Wilson and Brennan, JJ. in their joint judgment, proceeded to consider what criteria, if any, existed to guide or control the exercise of the discretion. They first examined the purpose of federal diversity jurisdiction and concluded that it was intended to provide an impartial forum for the resolution of disputes between residents of different States and was not intended to provide a different body of law for the resolution of such matters.[65] It followed, in the Court's view, that the criteria was not to be sought in a consideration of the source of the jurisdiction. Neither could it be discerned

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[60] (1982) 56 A.L.J.R. 707.
[61] *Supra* n. 44.
[62] Common Law Practice Act 1867-1981 (Qld.) s. 5.
[63] *Todorovic* v. *Waller* (1981) 56 A.L.J.R. 59.
[64] *Supra* n. 60 at 710.
[65] As to the justification for federal diversity jurisdiction see Pryles and Hanks, *op. cit. supra* n. 7 at 107-119.

from the terms in which the power to remit was conferred by s. 44 of the Judiciary Act.

Turning to the plaintiff's contention that the balance of convenience provided the most important criterion and that New South Wales was the most convenient forum, their honours were inclined to agree that the balance favoured a hearing in New South Wales. Both the specialist medical witnesses were in New South Wales and the injured plaintiff was himself there. But trial in Queensland was not impracticable or unjust because the plaintiff could be examined in New South Wales and evidence could be taken on commission. Their Honours continued:

> We do not seek to minimize the relevance of the factor of convenience in a case where the applicable law in the competing jurisdictions is substantially similar. It is then of great importance. However, in our opinion, it cannot go beyond that, unless the circumstances are wholly exceptional. The balance of convenience cannot be allowed to lead to injustice. The only safe course, in a case where the relevant law in the competing jurisdictions is materially different in its effect on the rights of the parties, is to remit to the State whose law has given rise to the cause of action. As Brennan, J. observed in *Robinson* v. *Shirley*, the power "is intended to facilitate the course of litigation rather than to enhance or diminish a plaintiff's rights or correspondingly alter a defendant's obligations" (p. 239).
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> Accordingly, in our opinion, in a case such as the present, the Court has no real choice, notwithstanding the breadth of the discretion, but to remit the matter to the Supreme Court of Queensland. Only in that forum, as the respective laws now stand, will the parties have their dispute determined consistently with justice according to law.
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> We would order that the matter be remitted to the Supreme Court of Queensland.[66]

We can conclude, then, that Gibbs, C.J., Wilson and Brennan, JJ. may well have ordered remission to New South Wales, if the relevant laws in both States had been the same, because New South Wales was the more convenient forum on a balance of convenience test. However where trial in the respective States would have lead to different results, as in the instant case, the balance of convenience test had to give way to the principle of remitting to the State where the cause of action arose except perhaps where trial there would be impracticable or unjust.

Earlier in their judgment, Gibbs, C.J., Wilson and Brennan, JJ. had broached the question of whether the Court could remit the action to the Supreme Court of New South Wales on condition that that court apply Queensland law. Their Honours decided that this was not possible:

The law of Queensland touching the conduct and determination of

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[66] *Supra* n. 60 at 711.

> actions for damages in respect of personal injury arising out of the negligent driving of a motor vehicle differs in significant respects from the law of New South Wales. It was suggested in argument that the power to remit an action to another court carries with it a power to give directions as to the law which is to be applied by the remitter were to be made in favour of the Supreme Court of New South Wales, that Court could be required to apply the law of Queensland in the disposition of the matter. Such a construction of s. 44 cannot be countenanced. The phrase "subject to any directions of the High Court" controls the statement in the section which immediately follows it, namely, "further proceedings in the matter shall be as directed by the court to which it is remitted". Clearly, in our opinion, the power in this Court to give directions is confined to matters of procedure. The substantive rights of the parties will be determined by the law of the forum.[67]

Mason, J., in a separate judgment, also considered this point and decided that the High Court could not give such a direction for it would be contrary to s. 79 of the Judiciary Act 1901 (Cth.) which requires a court exercising federal jurisdiction to apply the law of the State or Territory in which it sits.

Mason, J. agreed in result with the rest of the Court that the action should be remitted to the Supreme Court of Queensland. However his analysis and approach differed somewhat from his brethren. Mason, J. outlined four possible approaches for determining the court of remission. The first was to apply the balance of convenience test. This was, in his view, the traditional factor which determined venue though generally only in a context where there was no choice of law problem. He concluded that the balance of convenience concept:

> . . . is not designed to operate as a selector of the applicable law and it has no direct relevance to the choice of law. Its one virtue is that it is an objective and independent criterion, leading to a result which in many cases may be reasonable, but in some cases it may lead to a hearing by the court of the State where the medical witnesses reside and that will probably coincide with the State in which the plaintiff resides. Yet the law of that State may have little or no connexion with the cause of action. There is even the possibility that issues will be raised and witnesses called in order to establish a balance of convenience favouring remission to a court of a particular State.[68]

The second approach was to adopt the *lex loci delicti* as Brennan, J. had done in *Robinson* v. *Shirley*.[69] In the view of Mason, J. it had obvious attraction in that it provided a clear and objective test which identified the law which made unlawful the act or omission complained of at the time

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[67] *Id.* 709-10.
[68] *Id.* 712.
[69] *Supra* n. 44.

when it occurred. Therefore it was generally the law most closely connected with the circumstances giving rise to the cause of action and immediately furnished the plaintiff a cause of action. However in saying this Mason, J. expressly refused to endorse the vested rights theory, as Brennan, J. had done in *Robinson* v. *Shirley*[70] and, in conforming to modern Conflict of Laws theory, Mason, J. recognized that it was no longer accepted today.

The problem that Mason, J. saw with the application of the *lex loci delicti* was that the *locus delicti* might, in particular cases, merely be fortuitious and bear no significant relationship to the circumstances:

> Yet the question whether the *lex loci delicti* remains the most appropriate law to be applied in all cases is very much open to debate. What of the case where a passenger in a car is injured by the negligence of a driver in State A and both, being relatives, are resident in State B? Or of the case where X assaults Y when both are on holiday in State A, each being residents of State B? And there are cases in which an alleged wrongful act is connected with many jurisdictions, for example, "where a negligent act takes place in one country and harm is suffered in another, or a person is defamed through media such as radio or television" (*Dicey and Morris on The Conflict of Laws* (10th ed., 1980), p. 933; *Gorton* v. *Australian Broadcasting Commission* (1973) 22 F.L.R. 181).[71]

A third possibility would be for the action to be remitted to the State whose law had the most significant relationship with the occurrence and the parties, sometimes called the proper law of the tort. In most, though not all, cases Mason, J. thought that this would result in remitter to a State in which the alleged tort was committed.

The fourth approach envisaged by Mason, J. would be to remit to the court which would ordinarily have exercised jurisdiction in the case but for the circumstance that the plaintiff commenced his action in the High Court. This would generally be the place where the defendant resided. But there were problems with this approach:

> If the courts were to adopt a criterion favouring the court which possesses inherent jurisdiction as the recipient of a remitter, the applicable law in the receiving court might well differ from the law which would have applied in this Court, because in fixing the place of hearing this Court, if it declined to remit, would not have exclusive or paramount regard to the State of residence of the defendant. Indeed, underlying the wide scope accorded to the power to remit in *Johnstone* was a recognition of the desirability of minimizing the effect of the strict jurisdictional limits of State and federal courts, limits which might materially constrain the choice of this Court in selecting a recipient. By adopting a broad construction, the Court ensured that a hearing and determination after remitter would, as nearly as possible,

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[70] *Ibid.*
[71] *Supra* n. 60 at 713.

> approximate a hearing in this Court. It would not be consistent with that approach to now adopt a criterion which would restrict the exercise of the discretion to a court having inherent jurisdiction. This would be to undo the good work already done in *Johnstone*.[72]

Mason, J. concluded that it would be wrong to adopt any of the above approaches as an inflexible rule but thought that generally the *locus delicti* should be selected in tort cases for personal injury:

> All that I have said induces me to conclude that it would be a mistake to say that in every case of the class now under consideration we should apply an inflexible approach. We should preserve the width of the discretion, the object of which is to do justice between the parties. That will be done if, generally speaking, we select in personal injury cases, if not all tort cases, the courts of the State where the injury occurred, so that the law of that State, the *lex loci delicti*, will determine the rights and liabilities of the parties, unless, with respect to the particular issue, some other State has a more significant relationship with the occurrence and the parties, in which event the case will be remitted to that State and its law will be applied.
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> The pursuit of this approach in the present case inevitably leads to a remission to the Supreme Court of Queensland. Queensland was the State of occurrence of the act complained of. Apart from the fact that the plaintiff resides in New South Wales and that he was a temporary visitor in Queensland, a fact at least counterbalanced by the circumstance that the defendant is and has been a resident of Queensland, no other State has any relationship with the occurrence and the parties.[73]

Some Conclusions and Reflections

1. The High Court has broadly construed s. 44 of the Judiciary Act and has read down the jurisdictional qualification there imposed. As a matter of juristic analysis this construction is open to question but it can be justified by the pragmatic consideration that it gives the High Court maximum latitude in selecting the court of remission.
2. The great majority of cases on s. 44 concerned federal diversity jurisdiction (actions between residents of different States) and involved torts. The Court's remarks on the criteria for selecting the court of remission, and the comments made in this conclusion, should be viewed in this context and as primarily directed toward such actions.
3. The High Court has said that the purpose of s. 44 of the Judiciary Act is to facilitate the course of litigation rather than to enhance or diminish a plaintiff's rights or a defendant's obligation.
4. The initial approach which the High Court employed to select the court of remission, the balance of convenience test, has given way to the prin-

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[72] *Id.* 714.
[73] *Ibid.*

ciple of remitting a case to the *locus delicti* at least where the laws of the competing jurisdictions differ.

5. Brennan, J. in *Robinson* v. *Shirley*[74] and Gibbs, C.J., Wilson and Brennan, JJ. in *Pozniak* v. *Smith*[75] decided that actions should be remitted to the *locus delicti* because the law of the place created the cause of action. This reason for selecting the *locus delicti* is open to strong objection and the vested rights or *obligato* theory was expressly rejected by the High Court in *Koop* v. *Bebb*.[76] As Cook pointed out long ago, there is no logical reason why a court could not award damages for an act that was innocent where committed but which constituted a tort according to the *lex fori* or the law of some third State. Even in *Phillips* v. *Eyre*[77] itself where Willes, J. said that a tort generally derived its birth from the law of the place, he conceded that this was not an invariable rule and it was possible for "exceptional legislation" of another State to render tortious an act which did not give rise to civil liability under the *lex loci delicti*.[78] It should be noted too that in so far as Willes, J. adopted the vested rights doctrine in *Phillips* v. *Eyre* his observations were not confined to torts and extended to contracts. Thus he said that prima facie a contract was "the creature of the law of the place" and therefore governed by the *lex loci contractus*. But this old presumption that the *lex loci contractus* is the proper law of a contract has to all intents and purposes disappeared and is never resorted to today.[79] It is a further demonstration that the vested rights theory is no longer accepted.

6. In *Pozniak* v. *Smith*[80] Mason, J. expressed the view that the remission of a case should not lead to the application of a different law to that which would have been applied had the action proceeded in the High Court.[81] It is suggested, with respect, that this is a factor which should play little part in determining the court of remission as things presently stand. The High Court generally exercises its jurisdiction in Canberra and, under s. 79 of the Judiciary Act, is required to apply the law of the Australian Capital Territory when sitting there. This includes the Conflict of Laws rules administered in the Australian Capital Territory but the choice of law rule in torts primarily looks to the *lex fori*.[82] Thus the principle advocated by Mason, J. would generally result in the remission of the action to the Supreme Court of the Australian Capital Territory.

7. A central problem which has yet to be squarely faced by the High Court is the unsatisfactory choice of law rule applicable to torts. This primarily looks to the *lex fori*.[83] The rule derives from the case of *The Halley*[84] and

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[74] *Supra* n. 44.
[75] *Supra* n. 60.
[76] *Supra* n. 57 at 643-44.
[77] *Supra* n. 54.
[78] *Id.* 29.
[79] *Op. cit. supra* n. 56 at 751-52.
[80] *Supra* n. 60.
[81] *Id.* 711 and 714.
[82] *Supra* n. 57.
[83] *Ibid.* See generally Sykes and Pryles, *op. cit. supra* n. 28 at ch. 13.
[84] (1868) L.R. 2 P.C. 193.

was formerly the choice of law rule in Germany. The rule arose at a time when tort and crime were closely associated and when delictual and criminal liability were seen as merely different aspects of the law's reaction to identical violations of the social order.[85] Thus torts were determined in accordance with the *lex fori* in the same way as crimes were. Today, however, the basis of tortious liability is generally considered to be compensation rather than moral condemnation[86] and the case in favour of the application of the *lex fori* to torts has substantially diminished. In *Anderson* v. *Eric Anderson Radio & T.V. Pty. Ltd.*[87] Kitto, J. recognized that the persistence of the rule in favour of the *lex fori* "has been cogently criticized by text-writers" and conceded that "the whole subject may perhaps need to be re-examined some day". However he did not feel justified in doing so in that case because the classic rule had not been directly challenged and made the subject of full argument.

The unsatisfactory nature of the *lex fori* rule is apparent in relation to the question of the remission of tort actions from the High Court to a State Court because the selection of the State forum directly determines the law to be applied. Choice of law varies with choice of forum. Moreover in a case where the plaintiff institutes his action in a State court in the first instance, the chosen forum may not have *the* significant connection or indeed *a* significant connection with the subject matter of the action yet it will be compelled to apply its substantive law to the case.

In recent years the courts have recognized the need to have a degree of flexibility in selecting the substantive law to govern torts. The process was started by the House of Lords in *Chaplin* v. *Boys*[88] and has been accepted by some Australian courts.[89] The courts have not gone so far as to jettison the traditional rule in *Phillips* v. *Eyre*[90] and adopt the concept of the proper law of the tort, that is, the law of the State which has the most significant relationship with the occurrence and the parties. However at least some judges have been prepared to accept the proper law as an exception to the *Phillips* v. *Eyre* rule in appropriate cases.

The reason usually given for not adopting the proper law of the tort as the primary rule in substitution for the *Phillips* v. *Eyre* rule is that it is liable to make for uncertainty because in particular cases it may be difficult to determine the proper law.[91] But this could be overcome, as Mason, J. intimated in *Pozniak* v. *Smith*,[92] by presuming the *lex loci delicti* to be the proper law unless circumstances indicated otherwise. Of

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[85] Kahn-Freund, "Delictual Liability and the Conflict of Laws" (1968) 124 *Recueil des Cours* I at 20-21.

[86] *Ibid.*

[87] *Supra* n. 57 at 28.

[88] *Supra* n. 58.

[89] *Corcoran* v. *Corcoran* [1974] V.R. 164; *Kemp* v. *Piper* [1971] S.A.S.R. 25; *Warren* v. *Warren* [1972] Qd. R. 386.

[90] *Supra* n. 54.

[91] See the speech of Lord Wilberforce in *Chaplin* v. *Boys*, *supra* n. 58.

[92] *Supra* n. 60.

course it could also be maintained that the *lex fori* should be presumed to be the proper law but this would tend to return us to the present unsatisfactory situation where choice of law varies with choice of forum. The advantage of the *lex loci* presumption is that it tends to uniformity in result, irrespective of the forum of the action. Also it is perhaps more logical to presume that the place where the tort is committed is the more interested forum than the place that the plaintiff selects for the institution of the action.

8. If the suggested new tort rule were adopted (application of the proper law with a presumption that it is the *lex loci delicti*) then uniformity would result for all courts would apply the same law to determine the substantive liability of the defendant. As far as choice of law is concerned, it would not seem to matter where the High Court remitted an action. However it would be a mistake to think that all choice of law problems would disappear. Courts would still apply their own procedural law and differences in procedural law can affect the result of a case. Indeed the difference in the assessment of damages at issue in *Pozniak* v. *Smith*[93] was probably a procedural matter.

This probably does no more than underscore the point made by writers on the Conflict of Laws that the procedural classification should be tightly reined and that wherever possible matters affecting the outcome of a case should be classified as substantive.[94]

Ultimately every possible variation in the outcome of a case flowing from differences in procedural rules can not be taken into account by the High Court. It is suggested that if there is uniformity in the selection of the substantive law, as between the States, this is enough and the High Court should not further consider questions of applicable laws. The Court should simply allocate the case to a State court by applying the balance of convenience test.

9. If the torts choice of law rule is not altered, or until it is altered, it is obvious that selection of the State of remission will be critical in determining the substantive applicable law. In these circumstances there is much to be said for adopting the view put forward by Mason, J. in *Pozniak* v. *Smith*,[95] *viz.* that the action should be remitted to the *locus delicti* unless with respect to the particular issues some other State has a more significant relationship with the occurrence or the parties or (adding a further exception to that proposed by Mason, J.) unless trial in the *locus delicti* would be so inconvenient as to constitute an injustice. The *locus delicti* is not selected because its law creates the tort or gives rise to the obligation but because it is presumed to be the most interested jurisdiction in the absence of factors pointing to another State.

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[93] *Ibid.*

[94] Cook, *op. cit. supra* n. 55 at ch. VI. But *cf.* Ailes, "Substance and Procedure in the Conflict of Laws" (1941) 39 *Mich. L.R.* 392.

[95] *Supra* n. 60.