[HIGH COURT OF AUSTRALIA.]

McGLEW . . . . . PLAINTIFF;

AND

THE NEW SOUTH WALES MALTING COMPANY LIMITED . . . . DEFENDANTS.

H. C. OF A. 1918.

SYDNEY, *Nov.* 25, 26, 28.

Griffith C.J., Barton, Gavan Duffy, Powers and Rich JJ.

*Constitutional Law—Legislative power of Commonwealth Parliament—Civil process of State Court—Service and execution in another State—Security for costs—Investing State Court with Federal jurisdiction—Matter arising under law made by Commonwealth Parliament—The Constitution* (63 & 64 *Vict. c.* 12), *secs.* 51 (XXIV.) *and* (XXXIX.), 76, 77—*Service and Execution of Process Act* 1901-1912 (*No.* 11 *of* 1901—*No.* 18 *of* 1912), *sec.* 12.

The power conferred by sec. 51 (XXIV.) of the Constitution on the Commonwealth Parliament to make laws with respect to the service and execution throughout the Commonwealth of the civil process and the judgments of the Courts of the States extends to the extra-territorial operation of writs of summons issued by such Courts when served. It is incidental to the execution of that power that a defendant should be enabled to seek for and obtain from the plaintiff security for the costs of an action instituted by a writ to which extra-territorial operation is so given. The Parliament has power under sec. 76 (II.) of the Constitution to confer upon the High Court original jurisdiction to determine judicially the propriety of ordering such security to be given, and under sec. 77 (III.) to invest the Courts of the States with similar Federal jurisdiction.

*Held*, therefore, that sec. 10 of the *Service and Execution of Process Act* 1901-1912, which provides that any defendant served under the Act with a writ of summons may apply to the State Court out of which the writ was issued or a Judge thereof for an order compelling the plaintiff to give security for costs, and that upon such application the Court or Judge may make the order, confers Federal jurisdiction upon such Court and is within the legislative power of the Commonwealth Parliament.

MOTION.

On 9th April 1918 a writ of summons was issued in the Supreme Court of South Australia by Charles Thomas McGlew, a resident of South Australia, for service in New South Wales upon the New South Wales Malting Co. Ltd., a company incorporated in New South Wales and having its registered office in Sydney. The Company had no branch office, nor did it carry on business, in any other State.

By the writ the plaintiff claimed £282 9s. 11d. as damages for breach of a contract alleged to have been made between the plaintiff and the defendants in South Australia. The writ was served on the defendants in New South Wales. The defendants not having entered an appearance to the writ, the plaintiff on 5th June 1918 obtained an interlocutory judgment. The damages were subsequently assessed at £257 19s. 1d., and on 15th July 1918 judgment was entered for the plaintiff for that sum and costs. On 26th August 1918 a certificate of that judgment was registered in the Supreme Court of New South Wales pursuant to sec. 21 of the *Service and Execution of Process Act* 1901-1912. The defendants thereupon moved in that Court to set aside the registration of that certificate on the ground (*inter alia*) that the judgment was a nullity within New South Wales.

Pursuant to sec. 40A of the *Judiciary Act* the cause was removed into the High Court, and the motion now came on for hearing.

*Knox* K.C. (with him *Bavin*), for the defendants. The *Service and Execution of Process Act* 1901-1912 is invalid by reason of the provisions of sec. 10 being *ultra vires* the Commonwealth Parliament. The Act is passed under the power conferred by sec. 51 (XXIV.) of the Constitution, which is intended to enable effective service of a writ issued by a Court of a State to be made outside the territorial limits of that State. But sec. 10 imposes a condition that the Court out of which the writ is issued may order security for costs to be given, which is a matter with regard to which the Parliament of the State alone has power to legislate. The Commonwealth Parliament cannot, under the guise of imposing a condition, legislate as to matters which are within the exclusive jurisdiction of the States (*R.* v.

H. C. OF A. 1918.

McGLEW v. NEW SOUTH WALES MALTING CO. LTD.

*Barger* (1); *Attorney-General for the Commonwealth* v. *Colonial Sugar Refining Co.* (2)). The Parliament of the Commonwealth cannot authorize a Court of a State to do something which the Parliament of that State has not authorized that Court to do, unless it invests that Court with Federal jurisdiction. The only relevant power to invest the Courts of the States with Federal jurisdiction is that with respect to matters arising between residents of different States, but residence in different States is not made the test of the application of the *Service and Execution of Process Act*. The language of sec. 10 is not apt to confer Federal jurisdiction, and sec. 13 shows that the intention of the Act was merely to extend the arm of the State Courts so as to enable parties to be brought before them. It was the intention of sec. 51 (xxiv.) of the Constitution to enable that to be done, and not to authorize Federal jurisdiction to be conferred upon the State Courts. The Commonwealth Parliament might have provided that no process should be effective under the *Service and Execution of Process Act* unless the Court from which such process issued had jurisdiction to order security for costs to be given. If sec. 10 is *ultra vires*, the whole Act falls with it, for it is not severable (*R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Whybrow & Co.* (3); *Owners of s.s. Kalibia* v. *Wilson* (4)). Sec. 12, which provides that a judgment obtained against a defendant who has been served with a writ under the Act is to have the same force and effect as if the writ had been served in the State in which the writ was issued, does not make the judgment which was obtained in this case one which will be enforced in New South Wales. The mere presence of a defendant in a State at the time a writ is served does not necessarily enable a Court of that State to pronounce a judgment which will be enforced in another State. There must be something that can be called residence of the defendant in that State. If the Court decides against the defendants, a stay should be granted to enable them to apply to the Supreme Court of South Australia for leave to defend the action. A question as to the limits *inter se* of the constitutional powers of the Commonwealth and

(1) 6 C.L.R., 41.
(2) (1914) A.C., 237, at p. 254; 17 C.L.R., 644, at p. 653.
(3) 11 C.L.R., 1, at p. 26.
(4) 11 C.L.R., 689, at pp. 697, 702.

those of a State, within the meaning of sec. 40A of the *Judiciary Act*, arose, for if sec. 10 of the *Service and Execution of Process Act* is valid a State law forbidding the Supreme Court of a State to order security for costs to be given would be invalid.

*Leverrier* K.C. (with him *Rogers*), for the plaintiff. Sec. 10 of the *Service and Execution of Process Act* is a valid exercise of the power given by sec. 51 (XXIV.) and (XXXIX.) of the Constitution. The provision for security for costs is one reasonably necessary to effectually carry out the power given by sec. 51 (XXIV.). The Parliament might have said that a judgment obtained under the Act should not be enforceable unless the defendant had had an opportunity of obtaining security for costs, and it could appoint a person to whose satisfaction security for costs should be given, and who should judicially determine whether such security should be given. It might have enacted that a Judge of the High Court should determine whether security should be given, and might under sec. 76 (II.) of the Constitution have conferred jurisdiction on the High Court to determine the matter. The necessity for making provision for security for costs is a matter arising under a law made by the Commonwealth Parliament, namely, the *Service and Execution of Process Act*. If the Parliament could have conferred jurisdiction on the High Court to deal with the ordering of security for costs to be given, it could under sec. 77 (III.) invest a Court of a State with Federal jurisdiction to deal with the matter; and that is what has been done by sec. 10.

*Blacket* K.C. (with him *Flannery*), for the Commonwealth intervening.

*Knox* K.C., in reply. The question of security for costs is not a matter arising under a law made by the Commonwealth Parliament within sec. 76 (II.) of the Constitution. Such a matter only arises where a law within the competence of the Parliament confers rights or obligations.

*Cur. adv. vult.*

H. C. OF A. 1918.

McGLEW v. NEW SOUTH WALES MALTING CO. LTD.

NOV. 28.

The judgment of GRIFFITH C.J. and BARTON, POWERS and RICH JJ., which was read by GRIFFITH C.J., was as follows :—

The efficacy of the civil process of a Colony was limited by the territorial limits of the Colony, beyond which limits the writs of the Supreme Court were, as it used to be said, mere waste paper.

By the Constitution (sec. 51 (XXIV.)) power was given to the Commonwealth Parliament to legislate with respect to the service of State writs throughout the Commonwealth and the execution of judgments obtained under them. This power is obviously not limited to the mode of performance of the manual act of service, but extends also to the extra-territorial operation of the writ when served. Similar provision had been made by the Federal Council Act.

Such provisions, by the effect of which a defendant might be summoned to appear in the Supreme Court of a distant State, and defend at his own expense a claim possibly without any foundation, were obviously open to great abuse. It was incidental, in our opinion, to such provisions to take precautions against that danger. Pl. XXXIX. of sec. 51 would, we think, clearly cover such a case, even if it were not sufficiently implied by the nature of the power itself. (On that point see per Lord *Selborne* L.C. in *Small* v. *Smith* (1).)

The mode adopted by the Parliament was to allow a defendant to seek for and obtain from the plaintiff security for the costs of the action. Such proceedings are familiar in domestic Courts, and are invariably the subject of judicial determination ; that is to say, they are determined by the exercise of judicial power. If, then, the Parliament could provide for the giving of security, it follows that it could also enact that the propriety of giving it should be determined judicially—in other words, by the exercise of the judicial power of the Commonwealth. The jurisdiction to exercise that power was original jurisdiction, which, in such case, would arise, within the meaning of sec. 76 (II.) of the Constitution, under a law made by the Parliament, and might therefore be conferred upon the High Court. By sec. 77, any Court of a State might be invested with a like jurisdiction. This is exactly what the Parliament did. It provided

(1) 10 App. Cas., 119, at p. 129.

in sec. 10 for the exercise of judicial power, *i.e.*, the judicial power of the Commonwealth, and said that it should be exercised by the Supreme Courts of the States in which the suits were pending. In our opinion, the Courts were thereby invested with Federal jurisdiction in respect of such matters.

The Act in question is not the only instance of investing State Courts with Federal jurisdiction in respect of merely incidental matters in a suit (see, *e.g.*, *Judiciary Act*, secs. 17 and 45). No particular form of words is necessary to invest the Court with such jurisdiction ; it is sufficient that the Court is empowered to exercise it.

The objection that the Act is an invasion of State rights is therefore without foundation.

The cause having been removed into this Court, we must pronounce the proper judgment upon the motion, which, in our opinion, is that it be dismissed with costs, including costs in both Courts.

(After reading the above judgment, *Griffith* C.J. stated that *Gavan Duffy* J. desired him to say that he did not propose to deliver any judgment in the case.)

*Motion dismissed with costs in the High Court and the Supreme Court. Stay of proceedings for three weeks.*

Solicitors for the plaintiff, *Isbister, Hayward & Magarey*, Adelaide, by *Sly & Russell.*

Solicitors for the defendants, *Perkins, Stevenson & Co.*

Solicitor for the Commonwealth, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

B. L.