[HIGH COURT OF AUSTRALIA.]

ASTON . . . . . APPELLANT;
INFORMANT,

AND

IRVINE . . . . . RESPONDENT.
DEFENDANT,

ASTON . . . . . APPELLANT;
INFORMANT,

AND

JENKINS . . . . . RESPONDENT.
DEFENDANT,

CONWAY . . . . . APPELLANT;
DEFENDANT,

AND

ASTON . . . . . RESPONDENT.
INFORMANT,

THE QUEEN

AGAINST

DUGGAN AND IRVINE;

EX PARTE ASTON.

THE QUEEN

AGAINST

DUGGAN AND JENKINS;

EX PARTE ASTON.

H. C. OF A. 1955.

MELBOURNE, *Oct.* 4, 5, 6, 7; 17.

Dixon C.J., McTiernan, Williams, Webb, Fullagar, Kitto and Taylor JJ.

Constitutional Law (Cth.)—Judicial power—Executive power—Legislative power as to service and execution throughout the Commonwealth of process—Statute—Validity—Execution of warrant for apprehension of person in State other than that of issue—Provision for indorsement of warrant in State of execution—

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By magistrate etc. having power to issue warrants in that State—Power conferred on magistrate etc. to remand to State of issue of warrant or to admit to bail or discharge person apprehended—Jurisdiction conferred on judge of the Supreme Court of the State to review decision of magistrate etc. by way of rehearing—Whether in his capacity to constitute the Supreme Court—Conspiracy to cheat and defraud—Object of conspiracy—The Constitution (63 & 64 *Vict. c.* 12), *ss.* 51 (xxiv.), 67, 77 (iii.)—*Service and Execution of Process Act* 1901-1953 (*No.* 11 *of* 1901—*No.* 48 *of* 1953), *ss.* 18, 19.

The *Service and Execution of Process Act* 1901-1953 provides as follows :— 18.—(1) Where a Court, a Judge, a Police, Stipendiary or Special Magistrate, a Justice of the Peace or an officer of a court has, in accordance with the law of a State or part of the Commonwealth, issued a warrant for the apprehension of a person, a Magistrate, Justice of the Peace or officer of a court who has power to issue warrants for the apprehension of persons under the law of another State or part of the Commonwealth, being a State or part of the Commonwealth in or on his way to which the person against whom the warrant has been issued is or is supposed to be, may, on being satisfied that the warrant was issued by the Court, Judge, Magistrate, Justice of the Peace or officer (after proof on oath, in the case of a warrant issued by a Magistrate, Justice of the Peace or officer of a court, of the signature of the person by whom the warrant was issued), make an indorsement on the warrant in the form, or to the effect of the form, in the Second Schedule to this Act authorizing its execution in that other State or part of the Commonwealth. (2) . . . . (3) Subject to this section, the Magistrate or Justice of the Peace before whom the person is brought may—(a) by warrant under his hand, order the person to be returned to the State or part of the Commonwealth in which the original warrant was issued and, for that purpose, to be delivered into the custody of the person bringing the warrant or of a constable or other person to whom the warrant was originally directed ; or (b) admit the person to bail, on such recognizances as he thinks fit, on condition that the person appears at such time, and at such place in the State or part of the Commonwealth in which the original warrant was issued, as the Magistrate or Justice specifies to answer the charge or complaint or to be dealt with according to law. (4) . . . (5) . . . (6) If, on the application of the person apprehended, it appears to the Magistrate or Justice of the Peace before whom a person is brought under this section that—(a) the charge is of a trivial nature ; (b) the application for the return of the person has not been made in good faith in the interests of justice ; or (c) for any reason, it would be unjust or oppressive to return the person either at all or until the expiration of a certain period, the Magistrate or Justice of the Peace may—(d) order the discharge of the person ; (e) order that the person be returned after the expiration of a period specified in the order and order his release on bail until the expiration of that period ; or (f) make such other order as he thinks just. 19.—(1) Where—(a) a person apprehended is dissatisfied with an order made under sub-s. (3) or (6) of the last preceding section ; or (b) a Magistrate or Justice of the Peace has made, under sub-s. (3) or (6) of the last preceding section, an order

for the discharge of an apprehended person, or an order for the return or admittance to bail of such a person under the terms of which the person is not, or may not be, required to return or be returned within three months after the date of the order to the State or part of the Commonwealth in which the original warrant was issued, the apprehended person or the person bringing the warrant, as the case requires, may apply to a Judge of the Supreme Court of the State or part of the Commonwealth in which the person was apprehended, sitting in chambers, for a review of the order, and the Judge may review the order. (2) A Judge to whom an application is made for the review of an order may—(a) order the release on bail of the apprehended person on such terms and conditions as the Judge thinks fit; or (b) direct that the apprehended person be kept in such custody as the Judge directs in the State or part of the Commonwealth in which the person is apprehended until the order has been reviewed. (3) The review of the order shall be by way of rehearing, and evidence in addition to, or in substitution for, the evidence given on the making of the order may be given on or in connection with the review. (4) . . . (5) Upon the review of an order, the Judge may confirm or vary the order, or quash the order and substitute a new order in its stead. (6) The order as confirmed or varied, or the substituted order, shall be executed according to its tenor as if it had been made by the Magistrate or Justice of the Peace.

Held (1) that since the persons named as having power to issue warrants exercised that power under the authority of the law and not as agents exercising authority derived from the executive government of the other State and as s. 18 (1) did not involve any interference with the functions of the executive government of the other State it was a valid exercise of the legislative power conferred by s. 51 (xxiv.) of the Constitution. (2) That the use of the powers conferred by s. 18 (1) involved an independent responsibility and did not involve the executive power of the Commonwealth. (3) That sub-ss. (3) and (6) read together did not necessarily amount to a grant of the judicial power of the Commonwealth and were valid. (4) That judicial power is conferred by s. 19, the jurisdiction being conferred on the Judge as a member of the Supreme Court in his capacity to constitute the Court, and that the section is a valid exercise of the legislative power conferred by s. 77 (iii.) of the Constitution. *Parkin* v. *James* (1905) 2 C.L.R. 315, at pp. 343-344; *Medical Board of Victoria* v. *Meyer* (1937) 58 C.L.R. 82, at pp. 93-97 referred to.

Informations were sworn in South Australia against certain persons in Victoria for conspiracy to cheat and defraud, by the use of an electric battery upon a racehorse in a race held in South Australia, contrary to the rules of racing, such persons as should invest money on other horses in the race. It was alleged that the combination involved deception for the purpose of securing a declaration that the horse had won the race, so that the bets and prize-money would follow when according to the rules of racing there would be no title to such a declaration. Warrants were issued in South Australia and indorsed pursuant to s. 18 (1) of the *Service and Execution of Process*

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Act 1901-1953, by a magistrate in Victoria, for the apprehension of the men, who were subsequently apprehended in Victoria.

Held, that, it not appearing upon the suggested facts that the charge was misconceived, the accused should be remanded to South Australia in pursuance of the warrants.

CAUSES REMOVED INTO HIGH COURT UNDER THE *Judiciary Act* 1903-1955.

On 7th July 1955 at Adelaide, South Australia, a warrant was issued for the arrest of Noel William Conway charging him that he on divers dates between 1st April 1955 and 21st May 1955, both dates inclusive, at Glenelg and other places in the said State, conspired with other persons to cheat and defraud such persons as should invest money on horses, other than a horse known as "Thundering Legion", running in a certain horse-racing event, namely the Clarendon Transition Handicap (1st Division) at Morphettville Racecourse on 21st May 1955, by training the said horse to race in the said horse-racing event otherwise than in accordance with the Australian rules of racing, namely by training the said horse to respond to an electric battery and to use the said electric battery on the said horse in the said horse-racing event contrary to s. 270 of the *Criminal Law Consolidation Act* 1935-1952 (S.A.). On 19th July 1955 warrants in similar form were issued for the arrest of Henry William Irvine and Lyall James Jenkins. Each of the warrants was executed in the State of Victoria.

On 9th July 1955 on the application of Detective-Sergeant Ernest Aston, a member of the South Australian Police Force, under s. 18 of the *Service and Execution of Process Act* 1901-1953, an order was made by J. P. Gloster, Esquire, a stipendiary magistrate of the State of Victoria that Conway appear before the Police Court at Adelaide, South Australia, at a certain time to answer the charge and admitting him to bail in the meantime. On 26th July 1955, on the application of Conway, *Gavan Duffy* J. a judge of the Supreme Court of Victoria granted an order nisi to review the decision of the said magistrate.

On 21st July 1955 Aston made similar applications in respect of Irvine and Jenkins. These applications were heard before D. J. Duggan, Esquire, a stipendiary magistrate of the State of Victoria, who delivered the following judgment: "The warrant having been regularly issued by a justice of the peace on information on oath after investigation by police officers and on information received by them, the application for extradition is made in good faith in

the interest of justice. But in this case another consideration must not be overlooked. I have it in evidence from an experienced and knowledgeable police officer from South Australia that the charges against the accused are a common law misdemeanour, that the section in the Act merely fixes a penalty for conspiracy and does not create an offence, that there is no legislation in South Australia which makes the rules of racing law in South Australia, that there is no law to prohibit the use of a battery on a horse in training or in a race and that the *Lotteries and Gaming Act* (S.A.) makes all contracts either parol or in writing by way of gaming or wagering void. It may well be that the racing code is offended against if such practices, as alleged, were carried out, and no doubt the racing control body is vested with power to punish. But as to whether there has been a breach of the law of the State if the charge alleged be true is a matter of grave doubt. In believing there has not I feel that it would be unjust and oppressive to extradite the accused. They will both be discharged ".

On 9th August 1955, on the application of Aston, *Gavan Duffy* J. granted orders nisi to review these decisions.

On 24th August 1955 the orders nisi to review came on for hearing before *Gavan Duffy* J., who, after hearing argument, in pursuance of s. 40A of the *Judiciary Act* 1903-1955 proceeded no further with the hearing and the causes were by virtue of the said section removed into the High Court.

On 8th September 1955, on the application of Aston, as prosecutor, *McTiernan* A.C.J. granted orders nisi for writs of mandamus directed to D. J. Duggan, Esquire, together with, in one order nisi, Irvine, and, in the other, Jenkins, as respondents, to hear and determine the applications and to make the orders sought.

On the causes coming on for hearing in the High Court, that Court, for the sake of greater certainty, made orders under s. 40 of the *Judiciary Act* 1903-1955 removing the causes into the High Court.

The relevant statutory provisions are sufficiently set out in the judgment of the Court hereunder.

R. R. St. C. Chamberlain Q.C. (with him *W. A. N. Wells*), for Aston. It is a conspiracy to cheat if there is an agreement to play a game for money contrary to the known and recognized rules. It is a conspiracy to defraud if there is an element of misrepresentation in the process. [He referred to *Reg.* v. *Orbell* (1); *Reg.* v.

(1) (1703) 6 Mod. Rep. 42 [87 E.R. 804].

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Hudson (1); *Reg.* v. *Timothy* (2); *R.* v. *De Berenger* (3); *Reg.* v. *Aspinall* (4); *R.* v. *Weaver* (5).]

Gregory Gowans Q.C. (with him *J. M. Cullity*), for Irvine. Section 18 (1) and (2) of the *Service and Execution of Process Act* 1901-1953 involves the discharge of functions which are part of the executive power of the Commonwealth. The appointment of officers to discharge those functions is governed by s. 67 of the Constitution. [He referred to *Renton* v. *Renton* (6); *Ffrost* v. *Stevenson* (7); *R.* v. *Federal Court of Bankruptcy*; *Ex parte Lowenstein* (8); *Huddart Parker & Co. Pty. Ltd.* v. *Moorehead* (9); *Bradshaw* v. *The Commonwealth* (10); *R.* v. *Murray and Cormie*; *Ex parte The Commonwealth* (11); *Edwards* v. *The Commonwealth* (12); *Myers* v. *United States* (13).] The practice in the United States of making use of State officers for the implementing of Federal laws under the Fugitive Offenders and Fugitive Labour provisions of the Constitution is now said to rest upon comity between the United States and the several States and upon State consent, although a wider doctrine formerly prevailed. [He referred to *Prigg* v. *Commonwealth of Pennsylvania* (14); *Ex parte Kentucky* v. *Dennison* (15).] Section 18 (3) attracts the same considerations. These sub-sections are invalid for lack of appointment under s. 67 of the Constitution. Section 18 (6) involves the discharge of either executive functions or judicial functions. If executive functions, s. 18 (6) attracts the same considerations as s. 18 (1), (2) and (3) and is invalid for the same reason. If judicial functions, s. 18 (6) involves the exercise of the judicial power of the Commonwealth under Chap. III and not any other judicial power. As such it is invalid because it is not vested in a State court under s. 77 (iii.) of the Constitution and cannot be vested otherwise. Even if s. 18 (6) involves judicial functions and is not otherwise invalid it would fall with s. 18 (1), (2) and (3) which are invalid. Section 19 is dependent on s. 18 and is not severable from it, and, consequently, is invalid, whatever the nature of the power conferred. Section 19

(1) (1860) Bell 263 [169 E.R. 1254].
(2) (1858) 1 F. & F. 39 [175 E.R. 616].
(3) (1814) 3 M. & S. 67 [105 E.R. 536].
(4) (1876) 2 Q.B.D. 48, at pp. 59, 64.
(5) (1931) 45 C.L.R. 321, at pp. 334, 349.
(6) (1918) 25 C.L.R. 291, at pp. 296, 297, 299, 300.
(7) (1937) 58 C.L.R. 528, at p. 564.
(8) (1938) 59 C.L.R. 556, at p. 569.
(9) (1909) 8 C.L.R. 330, at pp. 355 et seq., 366, 377-381, 384, 386.
(10) (1925) 36 C.L.R. 585, at pp. 589, 590, 591, 595, 596, 598.
(11) (1916) 22 C.L.R. 437, at pp. 452, 453.
(12) (1935) 54 C.L.R. 313.
(13) (1926) 272 U.S. 52 [71 Law. Ed. 160].
(14) (1842) 16 Pet. 539, at pp. 613 et seq. [10 Law. Ed. 1060, at pp. 1088 et seq.].
(15) (1861) 24 How. 66, at p. 107 [16 Law. Ed. 717, at p. 729].

is also invalid because—(a) if it is the Supreme Court upon which powers are conferred they are non-judicial functions conferred on a State court and the conferring is unauthorized by Chap. III or any other head of power. [He referred to *Parkin and Cowper* v. *James* (1); *Medical Board of Victoria* v. *Meyer* (2); *Re Alstergren and Nosworthy* (3); *Queen Victoria Memorial Hospital* v. *Thornton* (4).] (b) If it is not the Supreme Court upon which powers are conferred they are executive powers forming part of the executive power of the Commonwealth and the section is invalid for lack of appointment under s. 67 of the Constitution. It would be unjust or oppressive to order the return of Irvine to the State of South Australia. [He referred to *R.* v. *Secretary of State for India*; *Ex parte Ezekiel* (5); *Re George* (6); *O'Donnell* v. *Heslop* (7); *Re Alstergren and Nosworthy* (8).] The elements necessary in the object of a conspiracy to cheat and defraud are that it must embrace the obtaining of a valuable thing from the persons conspired against for the benefit of the conspirators and there must be something in the nature of a fraud. There is something more than not playing the game required. The agreement which flows from nomination of a horse is with the racing club, not with the other competitors. [He referred to *Ellesmere* (*Earl*) v. *Wallace* (9).] The nominator does not agree that he will fulfil all the conditions applicable to him laid down in the rules of racing but he does agree that, insofar as those rules subject him to penalties for breach, he will accept those penalties. There is no representation by the nominator as to the existence of facts which the rules of racing require to be fulfilled or as to the ultimate fulfilment in the course of the race of all the rules or requirements laid down. In all the cases which have been cited there was a misrepresentation of some sort. [He referred to *R.* v. *Orbevill* (10).] *Glanville Williams* on *Criminal Law* (1953) (General Part), p. 541, suggests that the object of a conspiracy must at least be the commission of a tort. None of the cases go further than the view that, even if the object is not so limited, it goes beyond the commission of acts which would enable civil relief to be obtained either at law or equity. [He referred to *R.* v. *Weaver* (11); *Crofter Hand Woven Harris Tweed Co.* v. *Veitch* (12); *Reg.* v. *Newland* (13).] Conspiracy is

(1) (1905) 2 C.L.R. 315, at p. 342.
(2) (1937) 58 C.L.R. 62, at pp. 72 et seq., 80, 81, 93 et seq.
(3) (1947) V.L.R. 23, at p. 26.
(4) (1953) 87 C.L.R. 144.
(5) (1941) 2 All E.R. 546.
(6) (1909) V.L.R. 15, at p. 18.
(7) (1910) V.L.R. 162, at pp. 170, 171.
(8) 1947) V.L.R. 23, at p. 29.
(9) (1929) 2 Ch. 1.
(10) (1701) 12 Mod. 499 [88 E.R. 1474].
(11) (1931) 45 C.L.R. 321, at p. 357.
(12) (1942) A.C. 435, at pp. 439 et seq.
(13) (1954) 1 Q.B. 158, at pp. 164-166.

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peculiarly a case in which the prosecutor should be held to the particulars given. [He referred to *Reg.* v. *Aspinall* (1); *R.* v. *Pollman* (2).]

J. M. Cullity, for Jenkins. We adopt the submissions made on behalf of Irvine. On the facts it would be unjust and oppressive to send Jenkins to the State of South Australia for trial.

E. D. Lloyd, for Conway. We adopt the arguments already advanced save that we say that s. 19 of the *Service and Execution of Process Act* 1901-1953 is valid.

Dr. *E. G. Coppel* Q.C. (with him *C. I. Menhennitt*), for the Commonwealth of Australia, intervening by leave. The inconvenience arising out of the territorial limitations on the powers of colonial legislatures is exemplified by *Ray* v. *M'Mackin* (3) and *Reg.* v. *Call*; *Ex parte Murphy* (4). In order to deal with the matter the Imperial Parliament passed the *Fugitive Offenders Act* 1881 (44 & 45 Vict. c. 69) (Imp.) which was applied to the Australian Colonies as a group by an Order in Council made on 23rd August 1883 and the Federal Council of Australasia passed the *Australasian Civil Process Act* 1886 (*The Victorian Statutes* 1890, vol. 7, p. 997) and the *Australasian Judgments Act* 1886 (*The Victorian Statutes* 1890, vol. 7, p. 1012). Section 51 (xxiv.) of the Constitution must be read and construed in the light of the history of the matter. The purpose of the power was to extend the area within which State judicial machinery could operate. The subject matter does not embrace the judicial power of the Commonwealth because no Commonwealth judicial process is involved and the section is free from the limitations of Chaps. II and III of the Constitution. [He referred to *Melbourne Corporation* v. *The Commonwealth* (5).] Even if the power is of an executive nature it is not a power of the Commonwealth executive but in aid of a State executive. The power under s. 18 (1) of the *Service and Execution of Process Act* 1901-1953 is ministerial in nature because it involves no discretion once the necessary facts are established. The justice who indorses the warrant is not executing Commonwealth law. To execute a law is to enforce it, not to carry it out. Under s. 18 (3) the justice must act judicially but only in the sense that he is given a discretion

(1) (1876) 2 Q.B.D. 48, at pp. 56, 59, 64-67.
(2) (1809) 2 Camp. 229, at p. 233 [170 E.R. 1139, at p. 1140].
(3) (1875) 1 V.L.R. (L.) 274, at p. 280.
(4) (1881) 7 V.L.R. (L.) 113.
(5) (1947) 74 C.L.R. 31, at pp. 78, 79.

which he must exercise fairly. [He referred to *Hope* v. *Evered* (1); *Lea* v. *Charrington* (2).] The issuing of a summons is not a judicial act. [He referred to *Donohoe* v. *Chew Ying* (3); *R.* v. *Thom Sing* (4); *Renton* v. *Renton* (5).] Section 18 (6) merely lays down the grounds upon which and the manner in which the administrative discretion is to be exercised. It cannot be assumed that the functions, judicial or administrative, in ss. 18 and 19 are the same. It is common to find a statute providing for judicial review of the decision of an administrative tribunal. [He referred to *Medical Board of Victoria* v. *Meyer* (6); *Minister of State for Navy* v. *Rae* (7).] The section which preceded the present s. 19 did confer judicial power on the Supreme Courts. [He referred to *O'Donnell* v. *Heslop* (8); *Re Alstergren and Nosworthy* (9).] The power conferred by s. 19, if judicial power, is not part of the judicial power of the Commonwealth, which only takes in matters referred to in the relevant sections in Chap. III of the Constitution. [He referred to *Re Judiciary and Navigation Acts* (10); *Pirrie* v. *McFarlane* (11).] The interlocutory step of ordering that a person be taken to another State for trial is not a matter, which must involve substantive rights. [He referred to *Hooper* v. *Hooper* (12).] If s. 19 of the *Service and Execution of Process Act* 1901-1953 confers Federal jurisdiction on the Supreme Court, the conferring is justified as a matter arising under a law of the Commonwealth. [He referred to *McGlew* v. *New South Wales Malting Co. Ltd.* (13); *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Barrett* (14).] The reasoning in *John Sanderson & Co.* v. *Crawford* (15) is opposed to that in *McGlew* v. *New South Wales Malting Co. Ltd.* (16).

R. R. St. C. Chamberlain Q.C., in reply. Section 51 (xxiv.) of the Constitution is a self-contained grant of power which justifies ss. 18 and 19 of the *Service and Execution of Process Act* 1901-1953. Any workable system of extradition involves both administrative processes by the courts of the extraditing State and judicial processes in the other State because it involves an interference with the liberty of the subject. If s. 18 of the Act is justified by s. 51 (xxiv.) of the Constitution, s. 19 is justified under ss. 76 (ii.)

(1) (1886) 17 Q.B.D. 338.
(2) (1889) 23 Q.B.D. 45.
(3) (1913) 16 C.L.R. 364, at pp. 368, 369.
(4) (1911) 13 C.L.R. 32.
(5) (1918) 25 C.L.R. 291, at pp. 296, 297.
(6) (1937) 58 C.L.R. 62.
(7) (1945) 70 C.L.R. 339.
(8) (1910) V.L.R. 162, at p. 175.
(9) (1947) V.L.R. 23, at p. 26.
(10) (1921) 29 C.L.R. 257, at pp. 265-267.
(11) (1925) 36 C.L.R. 170, at p. 198.
(12) (1955) 91 C.L.R. 529, at p. 535.
(13) (1918) 25 C.L.R. 416, at p. 420.
(14) (1945) 70 C.L.R. 141, at pp. 155, 168.
(15) (1915) V.L.R. 568.
(16) (1918) 25 C.L.R. 416.

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and 77 (iii.). Alternatively both sections are justified by ss. 76 (ii.) and 77 (iii.) of the Constitution. The power given by s. 18 (3), (6) is judicial power. The dictum in *Huddart Parker & Co. Pty. Ltd.* v. *Moorehead* (1) that justices in committing for trial are performing administrative functions is based on *Cox* v. *Coleridge* (2). Throughout the 19th century, however, justices were progressively divested of their administrative powers and became judicial officers exercising judicial functions: see *Stephen's History of the Criminal Law* (1883), vol. 1, pp. 216 et seq. The question whether a person is to be sent to another State for trial is a matter. Whether or not a tribunal is a court in a State depends upon State law. [He referred to *The Commonwealth* v. *District Court of the Metropolitan District* (3); *Reg.* v. *Davison* (4).]

Cur. adv. vult.

Oct. 17.

THE COURT delivered the following written judgment:—

These are three orders nisi to review granted by a judge of the Supreme Court of Victoria in purported pursuance, as it seems, of s. 19 of the *Service and Execution of Process Act* 1901-1953. They come before this Court because, upon the orders being moved absolute before the learned judge, a contention was raised that s. 19 was ultra vires of the Parliament of the Commonwealth, and thereupon his Honour held that the proceedings were transferred to this Court in pursuance of s. 40A of the *Judiciary Act* 1903-1955. To avoid any argument as to the correctness of the view that s. 40A applied we made an order under s. 40 of the *Judiciary Act* removing the causes into this Court.

The matters arose in this way. Informations were sworn in South Australia against Irvine, Jenkins and Conway for conspiracy to cheat and defraud by the use of an electric battery upon a horse named "Thundering Legion" in a race to be held at Morphettville on 21st May 1955. The charge against each of them was that he conspired with other persons to cheat and defraud such persons as should invest money on other horses in the race. Aston, a detective sergeant of the South Australian police, then appeared before a Victorian magistrate, who, pursuant to s. 18 (1) of the *Service and Execution of Process Act* 1901-1953, made an indorsement on each of the warrants authorizing Aston, among others, to execute the warrants and bring, as the case might be, Irvine, Jenkins and

(1) (1908) 8 C.L.R. 330, at pp. 355-357.
(2) (1822) 1 B. & C. 37, at p. 50 [107 E.R. 15, at p. 20].
(3) (1954) 90 C.L.R. 13.
(4) (1954) 90 C.L.R. 353, at pp. 366 et seq., 370.

Conway respectively, if apprehended in Victoria, before the magistrate or some other justice of the peace of the State of Victoria to be dealt with according to law. All three were apprehended within Victoria and brought by Aston before magistrates. The magistrate before whom Irvine and Jenkins were brought took the view that the facts did not disclose an indictable conspiracy under South Australian law and he discharged the two men, acting apparently under s. 18 (6) (*c*) of the *Service and Execution of Process Act*. The magistrate before whom Conway was brought took the contrary view and made an order requiring him to appear before the Police Court at Adelaide on 27th July 1955 to answer the charge, admitting him to bail.

The three orders nisi now before us were granted to review these decisions, further bail being taken from Conway.

The validity of s. 18 as well as of s. 19 of the *Service and Execution of Process Act* is impugned before this Court and it is convenient to begin by considering s. 18. Sub-section (1) of that section deals with a warrant for the apprehension of a person which has been issued in accordance with the law of a State or part of the Commonwealth. The sub-section is expressed to empower the making in another State or part of the Commonwealth of an indorsement on the warrant authorizing its execution in that State or part of the Commonwealth and the bringing of the person apprehended before the magistrate indorsing the warrant or before some justice of the peace. The conditions to be fulfilled are that the person against whom the warrant has been issued should be, or should be supposed to be, in, or on his way to, that State or part of the Commonwealth, and that the person making the indorsement should be satisfied that the warrant was issued as required by the sub-section, proof of the signature to the warrant being given.

The persons to whom the sub-section entrusts this power of indorsing warrants are described in the following terms, "a magistrate, justice of the peace or officer of a court who has power to issue warrants for the apprehension of persons under the law of another State or part of the Commonwealth". ("Another" means other than that in which the warrant was issued.)

It is contended that the legislative power of the Commonwealth does not extend to conferring such an authority upon magistrates, justices of the peace and officers appointed by a State. The like contention is made with respect to the power conferred by sub-ss. (3), (5) and (6) of s. 18 but it is desirable to deal first with the argument in its application to sub-s. (1). The power given by that sub-section is, of course, ministerial. The legislative power exercised

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is conferred by s. 51 (xxiv.) of the Constitution which provides that the Parliament may make laws with respect to the service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States. The nature of this power, as well as the prior history of the subject to which it relates, provides strong ground for interpreting it as enabling the federal legislature to regulate the manner in which officers of the law in one State should act with reference to the execution of the process of another State. It is a legislative power given to the central legislature for the very purpose of securing the enforcement of the civil and criminal process of each State in every other State. It is given to the central legislature because before federation it had been found that territorial limitations upon colonial power made the effective reciprocal action of the colonies in this field difficult, to the point of impossibility: see, for example, *Ray* v. *M'Mackin* (1), and other cases cited in *Quick & Garran, The Annotated Constitution of the Australian Commonwealth* (1901), pp. 614-619. It is a power to be exercised in aid of the functions of the States and does not relate to what otherwise is a function of the Commonwealth. No doubt the words "throughout the Commonwealth" include the Territories, at all events those within Australia, but that involves no material qualification of the statement.

The magistrates, justices of the peace and other officers mentioned by sub-s. (1) as having power to issue warrants for the apprehension of persons under the law of a State exercise that power under the authority of the law, which reposes it directly in them. They are not agents vicariously exercising an authority derived from the executive government of the State as a principal. To give them the power in question involves no interference with the functions of the executive government of the State. There is no constitutional principle or rule of construction standing in the way of an interpretation of s. 51 (xxiv.) which supports such a provision as s. 18 (1): cf. *Holmgren* v. *United States* (2); *Robertson* v. *Baldwin* (3) and *Willoughby, Constitutional Law of the United States*, 2nd ed. (1929), vol. 1, p. 120. But a novel argument is advanced. It is that s. 18, including sub-s. (1), amounts to an attempt to entrust to State officers, officers not appointed pursuant to s. 67 of the Constitution, a function forming part of the executive power of the Commonwealth which by Chap. II must, as it is said, be exercised by the

(1) (1875) 1 V.L.R. (L.) 274.
(2) (1909) 217 U.S. 509, at pp. 517-518 [54 Law. Ed. 861, at p. 865].
(3) (1896) 165 U.S. 275, at p. 280 [41 Law. Ed. 715, at p. 717].

Governor-General and the Ministers and officers appointed in accordance with its provisions.

It is unnecessary to pursue the various implications of this argument. It is enough to say that s. 18 confers specific legal powers upon the magistrates, justices of the peace and officers authorized by State law to issue warrants of apprehension. The use of these powers involves an independent responsibility and does not involve the executive power of the Commonwealth.

The validity of sub-s. (2) is *a fortiori*. A claim, however, may be made that sub-s. (3), considered with sub-s. (6) of s. 18, involves the judicial power of the Commonwealth. If these sub-sections do confer any part of the judicial power of the Commonwealth a difficulty might arise, because they confer power not on a State court but upon the magistrate and the justice of the peace. Section 77 (iii.) of the Constitution empowers the Parliament to invest any court of a State with federal jurisdiction. A justice of the peace is not a court and in at least one State he has no strictly judicial functions. And although a magistrate may constitute a court of petty sessions sub-ss. (3), (5) and (6) do not invest him with authority in that capacity. The authority committed by sub-ss. (3), (5) and (6) to the magistrate or justice is susceptible of being treated as a judicial function. For the question whether a person actually within one State is liable to be sent under a law of the Commonwealth for trial to another State might be treated by the legislature as a matter arising under a law made by the Parliament within s. 76 (ii.) for the purpose of s. 77 (iii.) of the Constitution. But the scheme of s. 18 and s. 19 seems to be to treat the magistrate or the justice as exercising a preliminary discretion to grant, so to speak, process ministerially and then to submit for judicial review by a judge of the Supreme Court the whole question of the liability of the person apprehended to be returned to the State originating the proceeding.

Sub-section (3) of s. 18 gives to the magistrate or justice before whom is brought the person apprehended under the indorsed warrant a bare power to order him to be returned in custody to that State or to admit him to bail to appear there. Sub-section (6) enables the magistrate or justice to discharge him if it appears that the charge is of a trivial nature, that the application for his return is not made in good faith in the interests of justice or that for any reason it would be unjust or oppressive to return him at all or until the expiration of a certain period. This does not necessarily amount to a grant of the judical power of the Commonwealth and there is no reason to treat the provision as unconstitutional.

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But s. 19 gives the accused person, if his return is directed, or the person bringing the warrant, if the accused is discharged, a right to resort to a judge of the Supreme Court for a review of the matter. The review is by way of rehearing and may be on fresh evidence. The judge may confirm vary or quash the order and substitute a new order. He may release the accused on bail and exercise other incidental powers. Closely as the powers of the judge may resemble the authority of the magistrate or justice, the provision nevertheless does appear to treat the question as a matter arising under federal law for decision by a court of justice. There is no reason why it should not be so treated. The pattern of the legislation resembles in a very general way the pattern of the taxing laws which enable the commissioner or a board of review to make a binding assessment subject to appeal to the Court in its original jurisdiction. Section 19 involves an exercise of the legislative power conferred on the Parliament by s. 77 (iii.) of the Constitution. Notwithstanding the fact that the jurisdiction is in terms conferred on a judge of the Supreme Court of a State and not upon the court *eo nomine*, it is a valid exercise of the power. For the jurisdiction is conferred on every judge as a member of the court. In other words, it is in his capacity to constitute the court that he is named: see *Parkin and Cowper* v. *James* (1) and *Medical Board of Victoria* v. *Meyer* (2). It means no more than that the court shall be constituted by one judge.

The attack on the validity of s. 18 and s. 19 therefore fails.

It remains to consider whether the three accused men ought or ought not to be sent to Adelaide for trial on a charge of conspiracy. This is a question which is before us since the whole cause was removed, and although doubtless we might remit it for the consideration of the judge of the Supreme Court, it is better for us to decide it here.

It would be unjust or oppressive to return the accused to Adelaide if the facts as they are alleged or appear make it clear that there was no indictable conspiracy. On this ground it is urged that we should decide in favour of their immediate discharge. To refuse to give effect to this contention means no more than that the men must be remanded to Adelaide. For a decision at this stage for their return does not, of course, mean that we hold that there was a conspiracy. That is essentially a matter of fact depending upon proof beyond reasonable doubt at the trial. Indeed such a decision ought not to foreclose the accused even upon a point of

(1) (1905) 2 C.L.R. 315, at pp. 343, 344.

(2) (1937) 58 C.L.R. 62, at pp. 93-97.

law that might otherwise be raised upon the committal proceedings in Adelaide or at the trial. All that it means is that upon the facts suggested for the prosecution, if made out, what in law may amount to an indictable conspiracy may reasonably be found. It is not enough that the information as laid is open to criticism, as very likely it is. In the circumstances of this case it must appear that upon the suggested facts the charge of conspiracy is misconceived. It is only in that event that the accused should be discharged now. What is alleged here is more than a combination to violate the rules of racing. It involves deception for the purpose of securing a declaration that the horse had won the race, so that the prize-money and bets would follow, when according to the rules of racing there would be no title to such a declaration but on the contrary there should be a disqualification. It is undesirable to say more now than that these elements in the facts alleged warrant the course of remanding the accused persons to Adelaide in pursuance of the warrants to undergo committal proceedings or trial. A consideration of the cases of *R.* v. *De Berenger* (1); *R.* v. *Hudson* (2); *R.* v. *Donnelly* (3); *Kerford & Box's Digest*, 153 (5 *Aust. Digest* 214); *R.* v. *Aspinall* (4); *R.* v. *Warburton* (5), is enough to show that this course is justified. The orders nisi in the case of *Aston* v. *Irvine* and *Aston* v. *Jenkins* should be made absolute and an order should be made in each of those cases that the person against whom the warrant was granted be returned to South Australia and for that purpose that he be admitted to bail on his recognizance in the sum of £100 with one surety in the same amount to appear at the Police Court at Adelaide on the date and at the time therein specified to answer the charge in the warrant. In the case of *Conway* v. *Aston* the order nisi should be discharged and Conway should be admitted to bail in a like recognizance with one surety. The recognizance will be taken before a judge of this Court.

Aston v. *Irvine.*

It having been considered by Gavan Duffy J. *a judge of the Supreme Court of Victoria that there arose upon the return before him of this order nisi a question as to the limits inter se of the constitutional powers of the Commonwealth and those of the States so that the cause stood removed to*

(1) (1814) 3 M. & S. 67 [105 E.R. 536].
(2) (1860) Bell 263 [169 E.R. 1254].
(3) 28th Nov. (1860), Argus Newspaper (Vict.).
(4) (1876) 2 Q.B.D. 48, at pp. 59, 60.
(5) (1870) 1 C.C.R. 274.

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this Court by virtue of s. 40A *of the Judiciary Act* 1903-1955 *and the order nisi having come accordingly before this Court for hearing and this Court for greater certainty having thereupon made an order under s.* 40 *of the said Act that the cause be removed into this Court, it is now ordered by the Court as follows, viz.:—order nisi made absolute. Order that Henry William Irvine the person mentioned in the warrant be returned to the State of South Australia and for that purpose that he be admitted to bail on his own recognizance in the sum of* £100 *with one surety in the same amount to appear at the Police Court at Adelaide in the State of South Australia on a date and at a time to be specified in the recognizance to answer the charge in the said warrant. Further order that the said Henry William Irvine appear personally with his surety before a judge of this Court in Melbourne at* 10 *a.m. on Monday,* 24*th October* 1955, *so that such recognizance may be then and there taken.*

Aston v. *Jenkins.*

It having been considered by Gavan Duffy J. *a judge of the Supreme Court of Victoria that there arose upon the return before him of this order nisi a question as to the limits inter se of the constitutional powers of the Commonwealth and those of the States so that the cause stood removed to this Court by virtue of s.* 40A *of the Judiciary Act* 1903-1955 *and the order nisi having come accordingly before this Court for hearing and this Court for greater certainty having thereupon made an order under s.* 40 *of the said Act that the cause be removed into this Court, it is now ordered by the Court as follows, viz:—order nisi made absolute. Order that Lyall James Jenkins the person mentioned in the warrant be returned to the State of South Australia and for that purpose that he be admitted to bail on his own recognizance in the sum of* £100 *with one surety in the same amount to appear at the Police Court at Adelaide in the State of South Australia on a date and at a time to be specified in the recognizance to answer the charge in the said warrant. Further order that the said Lyall James Jenkins appear personally with his surety before a judge of this Court in Melbourne at* 10 *a.m. on Monday,* 24*th October* 1955, *so that such recognizance may be then and there taken.*

Conway v. *Aston.*

It having been considered by Gavan Duffy J. *a judge of the Supreme Court of Victoria that there arose upon the return before him of this order nisi a question as to the limits inter se of the constitutional powers of the Commonwealth and those of the States so that the cause stood removed to this Court by virtue of s.* 40A *of the Judiciary Act* 1903-1955 *and the order nisi having come accordingly before this Court for hearing and this Court for greater certainty having thereupon made an order under s.* 40 *of the said Act that the cause be removed into this Court, it is now ordered by the Court as follows, viz:—order nisi discharged. Order that Noel William Conway the person mentioned in the warrant be admitted to bail on his own recognizance in the sum of* £100 *with one surety in the same amount to appear at the Police Court at Adelaide in the State of South Australia on a date and at a time to be specified in the recognizance to answer the charge in the said warrant. Further order that the said Noel William Conway appear personally with his surety before a judge of this Court in Melbourne at* 10 *a.m. on Monday,* 24*th October* 1955, *so that such recognizance may be then and there taken.*

The Queen v. Duggan and Irvine; Ex parte Aston.
Order nisi for mandamus discharged.

The Queen v. Duggan and Jenkins; Ex parte Aston.
Order nisi for mandamus discharged.

Solicitor for Aston, *R. R. St.C. Chamberlain*, Crown Solicitor for the State of South Australia.

Solicitors for Irvine and Jenkins, *T. E. Byrne & Co.*, Ballarat.

Solicitor for Conway, *F. L. Birch.*

Solicitor for the Commonwealth of Australia, intervening, *H. E. Renfree*, Crown Solicitor for the Commonwealth of Australia.

R. D. B.