[HIGH COURT OF AUSTRALIA.]

THE STATE OF NEW SOUTH WALES . PLAINTIFFS;

AND

THE COMMONWEALTH . . . . . DEFENDANTS.

H. C. OF A. 1908.

MELBOURNE, *October* 13, 14, 15, 21.

Griffith C.J., Barton, O'Connor, Isaacs and Higgins JJ.

Constitutional Law—"Surplus revenue"—Distributable among States—"Expenditure"—Money appropriated to a trust fund but not disbursed—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 81, 83, 87, 89, 93, 94, 105—*Surplus Revenue Act* 1908 (*No.* 15 *of* 1908), *secs.* 3, 4—*Old-age Pensions Appropriation Act* 1908 (*No.* 18 *of* 1908)—*Coast Defence Appropriation Act* 1908 (*No.* 19 *of* 1908).

The words "surplus revenue" in sec. 94 of the Constitution denote the same sum as the aggregate amount of the balances required by sec. 89 to be paid monthly to the States.

Sec. 89 does not require exact balances to be struck at the end of each month, but the monthly payments are to be of approximate amounts, having regard to the probable total financial operations of the year.

The Commonwealth Parliament has authority to appropriate money out of the Consolidated Revenue for a specific purpose, and money so appropriated, although not yet actually disbursed, is "expenditure" within the meaning of sec. 89 of the Constitution, and cannot form part of the "surplus revenue" distributable among the States under sec. 94 until the actual disbursement of it for that purpose is no longer lawful or no longer thought necessary by the Government.

Held, therefore, that the sums appropriated by the *Old-age Pensions Appropriation Act* 1908 and the *Coast Defence Appropriation Act* 1908, were properly deducted from the revenue for the financial year in which the appropriations were made in order to ascertain the "surplus revenue" payable to the States in respect of that year under sec. 94 of the Constitution and sec. 4 of *Surplus Revenue Act* 1908.

Semble, per Higgins J.—Even if secs. 89, 93 and 94 of the Constitution mean that the States can only be debited with moneys actually paid, Parliament has power, under sec. 93, to alter this system so as to allow contemplated expenditure to be debited, and it has exercised that power.

H. C. OF A. 1908.

THE STATE OF NEW SOUTH WALES v. THE COMMONWEALTH.

IN an action brought in the High Court by the State of New South Wales against the Commonwealth the following special case was stated by the parties for the opinion of the Full Court.

"1. This is an action brought to recover from the defendants the sum of £160,000, which sum the plaintiffs claim as moneys payable to the said State by the Commonwealth as surplus revenues of the Commonwealth for the month of June 1908.

"2. By proclamation dated 3rd June 1908 the Treasurer of the Commonwealth, under the provisions of sec. 62A of the *Audit Acts* 1901-1906, established a Trust Account to be known as the 'Harbour and Coastal Defence (Naval) Account' and defined the purpose of such Trust Account to be the payment of the cost of the Harbour and Coastal Defence of the Commonwealth.

"3. By proclamation dated 3rd June 1908 the said Treasurer, under the provisions of sec. 62A of the *Audit Acts* 1901-1906, also established a Trust Account to be known as the 'Invalid and Old-age Pensions Fund,' and defined the purpose of such Trust Account to be the payment of Invalid and Old-age Pensions.

"4. In or about the month of June 1908 the Parliament of the Commonwealth passed the *Coast Defence Appropriation Act* 1908, by which the sum of £250,000 was appropriated out of the Consolidated Revenue Fund for the purposes of the aforesaid Harbour and Coastal Defence (Naval) Account. This Act came into force on 10th June 1908.

"5. In or about the month of June 1908 the Parliament of the Commonwealth passed the *Old-age Pensions Appropriation Act* 1908, by which the sum of £750,000 was appropriated out of the Consolidated Revenue Fund for the purposes of the aforesaid Invalid and Old-age Pensions Fund. This Act came into force on 10th June 1908.

"6. In or about the month of June 1908 the Parliament of the Commonwealth passed the *Invalid and Old-age Pensions Act* 1908. This Act was assented to by the Governor-General in the King's name on 10th June 1908.

"7. In or about the month of June 1908 the Parliament of the Commonwealth passed the *Surplus Revenue Act* 1908. This Act came into force on 13th June 1908.

"8. In the month of June 1908, after the passing of the afore-

said Acts, the Treasurer, purporting to act under and in accordance with the said Acts, or some of them, paid to the credit of the aforesaid Harbour and Coastal Defence (Naval) Account the sum of £250,000, and to the credit of the aforesaid Invalid and Old-age Pensions Fund the sum of £182,000; and debited these sums against the States on the ground that the same formed portion of the expenditure of the Commonwealth within the meaning of the *Surplus Revenue Act* 1908.

"9. The proportion of these amounts debited to New South Wales was £160,000, and the balance payable and paid to the said State was thereby reduced by that sum.

"10. No payment has been made or, save as aforesaid, authorized, nor has any obligation been incurred to make any payment out of the said sum of £250,000 so appropriated as aforesaid to the said Harbour and Coastal Defence (Naval) Account.

"11. No proclamation under sec. 2 or under sec. 19 of the *Invalid and Old-age Pensions Act* 1908 has been made.

"12. The question for the opinion of the Court is:

"Was the said sum of £160,000 lawfully deducted from the balance payable to the State of New South Wales?

"13. It is agreed between the parties that judgment shall be entered for the plaintiffs for £160,000, or for the defendants, according to the decision of the Court upon the question submitted, with costs of the action and special case."

Dr. Cullen K.C., and *Knox* K.C. (with them *Blackett*), for the plaintiffs. The question depends upon the validity of the *Surplus Revenue Act* 1908 so far as it attempts by sec. 4 (4) (*d*) to give a meaning to the word "expenditure." Under sec. 94 of the Constitution the Commonwealth is bound to pay to the States month by month all "surplus revenue." That is intended to be a permanent provision, as is recognized by sec. 105. The term "surplus revenue" means the balance of "revenue" over "expenditure." See secs. 87, 89, 93. The States did not intend that large spending powers should be given to the Commonwealth: See the draft Bill of 1891; *Quick and Garran's Constitution of the Australian Commonwealth*, p. 831. No power to accumulate revenue for several years was intended to be given,

H. C. OF A. 1908.

THE STATE OF NEW SOUTH WALES v. THE COMMONWEALTH.

but the intention was that as large balances as possible should be paid over to the States. The governing sections of the Constitution as to the duty of the Commonwealth are secs. 89 and 93; Sec. 87 is not an independent provision, and is only temporary. It prevents a diminution of the proportion of the revenue which is to be paid to the States. The term "expenditure" means a payment made in discharge of an obligation of the Commonwealth. The obligation need not necessarily be contractual, but may be imperfect, and the payment must be authorized by appropriation. It is not sufficient, however, that the appropriation should be one which is to take effect at some indefinite or long distant future time, although it is not necessary to contend that the appropriation should be limited to the particular financial year in which it is made.

[ISAACS J.—"Expenditure" must mean something different from "payment," for sec. 82 refers to "payment of expenditure."

O'CONNOR J.—In your view, if the Parliament desires to spend £2,000,000 on war ships and not to pay for them out of one year's revenue, it could not before purchasing set aside a yearly sum out of revenue until the amount was made up, but would have to borrow the money?]

Either that or pay in instalments.

[HIGGINS J.—In sec. 89 "expenditure *incurred*" may include expenditure which the Commonwealth has taken upon itself to make as well as money which it has in fact spent.]

Sec. 89 clearly provides for striking a cash balance of receipts over payments. If at any time a difference arises as to the period at which a particular debit of expenditure should be made, this Court will decide with reference to the necessity of the particular case. The provision for monthly payments provided by sec. 89 is to be taken literally. The Treasurer cannot deduct from the balance payable to the States an amount which he anticipates that he will at some future date spend. There must be a balance struck every month. The only alternative to giving a strict meaning to "expenditure" is that Parliament have an absolute discretion as to what they will treat as expenditure and to prevent any surplus existing although they have not spent the money. The mere fact of there being an

appropriation does not create expenditure. At any rate there has been no such appropriation in Acts Nos. 18 or 19 of 1908 as to create expenditure. Those Acts are not in fact Appropriation Acts for they merely transfer money from one government account to another. Whatever is the meaning of "expenditure," there has been none here, for all that has been done is that a mere book-keeping entry has been made. The Treasurer may close the account at any time he pleases, and the money thereupon becomes a part of the Consolidated Revenue Fund. An appropriation may be made when the money appropriated is not in the Treasury. How then can appropriation be expenditure? A sum so appropriated could not be deducted from revenue to arrive at the balance payable to the States. The strength of the case for the defendants is said to be that the argument for the plaintiffs denies to the Commonwealth Parliament the exercise of the usual and ordinary power of Governments to accumulate revenue for anticipated expenditure. It is not a usual and ordinary thing for a Government to set aside surplus revenue and call that setting aside "expenditure." The relation of the States and the Commonwealth in respect of surplus revenue bears a close analogy to that of principal and agent, and the duty under secs. 89 and 93 of paying to the States is the same as that of an agent who is directed to pay to his principal the balance of his receipts over expenditure on account of the principal. Sec. 4 (4) (*d*) of the *Surplus Revenue Act* 1908 is either *ultra vires* or futile.

[GRIFFITH C.J.—In making a new provision as authorized by sec. 94 of the Constitution the Parliament may use the word "expenditure" in a different sense from that in which it is used in the Constitution. That is not attempting to extend the meaning of the word in the Constitution.]

Reading secs. 93 and 94 of the Constitution together, what the Parliament was authorized to do was to alter the basis upon which the surplus revenue had to be accounted for to the States, and to adopt any mode of distribution it should think fit. But in some shape or form the Commonwealth must account for the surplus revenue, and must account for it monthly. The Parliament cannot cut down the rights of the States under sec. 94, and

H. C. OF A. 1908.

THE STATE OF NEW SOUTH WALES v. THE COMMONWEALTH.

they cannot place a new definition upon the words "surplus revenue" in that section. Sec. 87 is a negative section, and cannot be read as extending the power of the Parliament. The general object of secs. 89, 93, and 94 was the protection of the States.

It is not a proper use of the word "expenditure" to define it as including money neither paid away nor even contracted to be paid away. A thing cannot be called "expenditure" so long as it remains under the control of the person to whom it belongs, or which does not involve an irrevocable parting with the control of the money. The words of the Constitution should be given their plain meaning: *McCowan* v. *"The Niobe"* (1); *State of Tasmania* v. *Commonwealth* (2). The argument of inconvenience cannot be used unless the Act is obscure: *Craies on Statute Law*, 4th ed., p. 88. There is nothing impracticable in this interpretation of the sections. If the States are overpaid in any month an adjustment can afterwards be made. On the other hand, if sec. 94 bears the wide meaning contended for by the defendants it might just as well have been left out so far as it is any protection to the States. The States are entitled to complain when a monthly payment is overdue.

Groom (A-G. for the Commonwealth) and *Mitchell* K.C. (with them *Starke*), for the defendants. The Commonwealth is entitled to debit as expenditure money set aside for the specific purpose of future disbursement, even though the Parliament or the Executive may have to decide at a later date the details of the expenditure of that money. The Constitution must be looked at as a whole to see the nature of the powers conferred upon the Parliament. If the words will bear a meaning which will not impair the functions of the Commonwealth Government, that meaning should be given to them: *Story on the Constitution*, 5th ed., par. 419, p. 321. The powers given to the Parliament by sec. 51 of the Constitution as to bounties, borrowing, defence, State banking, and immigration involve large outlays of money, and cannot be effectively executed unless there is also power to set aside large sums of money for future expenditure. Secs. 51 (xxxvi.), 81, 83, 94, and 105 of the Constitution set out the per-

(1) (1891) A.C., 401.

(2) 1 C.L.R., 329, at pp. 338, 357, 359.

manent financial powers of the Parliament. By them the Parliament is invested with the same powers of appropriation for specific purposes as are the State Parliaments in respect of their revenue. It had been the practice in Victoria and New South Wales before federation to treat money appropriated to trust funds as expenditure. That was done, for instance, in respect of money paid into trust funds under the *Land Act* 1869 (Vict.), sec. 42; the *Land Act* 1884 (Vict.), sec. 78; the *Land Sales by Auction Fund Act* 1891 (Vict.), sec. 2; the *Railway Loan Redemption Act* 1889 (N.S.W.); and the *Public Works and Closer Settlement Funds Act* 1906 (N.S.W.). See Votes and Proceedings of the Legislative Assembly (Vict.) 1894-5, vol. II., p. 332; Votes and Proceedings of the Legislative Assembly (N.S.W.) 1897, vol. II., p. 487. That is a natural meaning of the word "expenditure" in connection with Government accounts and the establishment of a system of constitutional government. If the Parliament has appropriated money for a purpose which has not expired, that is "expenditure." Should the purpose expire or should the money come again into the Consolidated Revenue Fund in any other way, the money may then become "surplus revenue." The words "surplus revenue" in sec. 94 do not necessarily mean the same thing as balance of revenue over expenditure. That contention, however, is not necessary here. The monthly payments mentioned in sec. 94 do not mean payments of actual monthly cash balances, but merely the estimated balances after providing for all contingencies. The actual balances will be determined at the ordinary yearly periods, when adjustments can be made in the case of under-payment or over-payment to the States. There is nothing in secs. 89 or 93 to limit the meaning of the word "expenditure." The case for the Commonwealth may be rested on the two Acts Nos. 18 and 19 of 1908 alone, and apart altogether from the *Surplus Revenue Act* 1908. If it is said that sec. 89 of the Constitution, as incorporated in sec. 94, gives the States larger rights than are given by sec. 94, then Parliament has "otherwise provided" by the *Surplus Revenue Act* 1908.

Dr. Cullen K.C. in reply. The whole case for the Common-

H. C. OF A. 1908.

THE STATE OF NEW SOUTH WALES v. THE COMMONWEALTH.

wealth is based on the fact that a literal reading of the Constitution will create difficulties in Commonwealth administration. But a non-literal reading will create even greater difficulties in State administration. The argument of inconvenience is only applicable where there is an ambiguity, and there is none here. There is no alternative between interpreting "surplus revenue" as balance of revenue over actual disbursements, and allowing the Parliament to place its own interpretation on those words. The difficulty of ascertaining the correct state of the accounts, at the end of the particular month when payment is made, is imaginary, for the Constitution does not require it to be done. Nor is it necessary to empty the Treasury at the end of a month in order to make the payments, for they need not be made until several months after that in respect of which they are made.

Cur. adv. vult.

The following judgments were read :—

Oct. 21.

GRIFFITH C.J. The question raised for determination in this case is whether two sums of £182,000 and £250,000, part of the revenue of the Commonwealth for the year ending 30th June 1908, over which the Parliament had full power of disposition, ought to be brought into account in ascertaining the sums payable to the States of the Commonwealth as surplus revenue. By two Acts, Nos. 18 and 19 of 1908, it was enacted that there should be payable out of the Consolidated Revenue Fund "which is hereby appropriated accordingly" for the purposes of two trusts accounts established under the Audit Acts, and known respectively as the Invalid and Old-age Pensions Fund and the Harbour and Coastal Defence (Naval) Account, the sum of £750,000 "for Invalid and Old-age Pensions" and the sum of £250,000 "for Harbour and Coastal (Naval) Defence purposes."

The sums first mentioned were placed to the credit of these accounts respectively, but were not actually disbursed during the financial year, and the actual disbursement for the purposes mentioned may, under sec. 5 of the *Surplus Revenue Act* (No. 15 of 1908), be postponed for an indeterminate period. The plaintiffs contend that under these circumstances the money

ought to be distributed amongst the States, and that the attempt to set it aside for future disbursement is *ultra vires* of the Parliament.

Sec. 81 of the Constitution provides that "all revenues . . . . of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution." Sec. 83 prescribes the manner of appropriation, which is to be made "by law." The charges imposed by the Constitution include the cost of collection (sec. 82), the salary of the Governor-General (sec. 3), and Judiciary (sec. 72), and, for ten years at least, an obligation to return annually to the States a sum equal to $\frac{3}{4}$ths of the net revenue from duties of Customs and Excise or apply that sum towards the payment of interest on State debts (sec. 87). Subject to the charges imposed by the Constitution, the Parliament have full authority to appropriate the revenue for any purposes of the Commonwealth.

Sec. 89 enacts as follows:—

"Until the imposition of uniform duties of Customs—

"I. The Commonwealth shall credit to each State the revenues collected therein by the Commonwealth.

"II. The Commonwealth shall debit to each State—

"(*a*) The expenditure therein of the Commonwealth incurred solely for the maintenance or continuance, as at the time of transfer, of any department transferred from the State to the Commonwealth;

"(*b*) The proportion of the State, according to the number of its people, in the other expenditure of the Commonwealth.

"III. The Commonwealth shall pay to each State month by month the balance (if any) in favour of the State."

This section imposes two separate obligations, (1) to keep separate credit and debit accounts for the several States on a prescribed basis, and (2) to pay to each State "month by month" the balance (if any) in favour of the State.

Sec. 93 is as follows:—

"During the first five years after the imposition of uniform duties of Customs, and thereafter until the Parliament otherwise provides:—

H. C. OF A. 1908.

THE STATE OF NEW SOUTH WALES v. THE COMMONWEALTH.

Griffith C.J.

"I. The duties of Customs chargeable on goods imported into a State and afterwards passing into another State for consumption, and the duties of Excise paid on goods produced or manufactured in a State and afterwards passing into another State for consumption, shall be taken to have been collected not in the former but in the latter State:

"II. Subject to the last sub-section, the Commonwealth shall credit revenue, debit expenditure, and pay balances to the several States as prescribed for the period preceding the imposition of uniform duties of Customs."

The effect of this section is to carry on the provisions of sec. 89 until altered, but with power to the Parliament to alter the basis of ascertainment of the amounts payable to the several States interested out of the total amount available for distribution. Standing alone, it is perhaps capable of being construed as also authorizing a provision putting an end to the direction to pay the balance to the States.

Sec. 94 provides that after five years from the imposition of uniform duties of Customs, the Parliament may provide, on such basis as it deems fair, for the monthly payment to the several States of all surplus revenue of the Commonwealth.

The plaintiffs contend that, whatever sec. 93 would mean, standing alone, the effect of sec. 94 is that the Parliament may, but need not, alter the basis of apportionment of the surplus revenue among the States, but that in any case "the monthly payment," *i.e.*, the application prescribed by sec. 89 of all surplus revenue, must continue. The defendants, without conceding this position, do not contest it for the purpose of the present case. I see no reason to doubt the correctness of the plaintiffs' contention, but the point has not been fully argued, and it is not necessary to decide it.

The plaintiffs further contend that they are entitled under the second provision of sec. 89 to receive the monthly balances, ascertained as now directed by the *Surplus Revenue Act* (No. 15 of 1908), and that the balance for each month must be found by deducting from the revenue actually collected during the month the moneys actually expended or disbursed during the month. They say that this is the meaning of the word "expenditure" as

used in sec. 89, and that that section governs the meaning of the word "surplus" in sec. 94.

I agree that the word "surplus" in sec. 94 must be interpreted with reference to sec. 89, and that the surplus is the same thing as the aggregate amount of the balances which are required to be returned monthly to the States—no more and no less. The word "expenditure" does not necessarily mean disbursements actually made, although that is its meaning in some contexts. But, when it is used in a direction as to the mode of making up accounts for the purpose of striking a balance, it may have a wider meaning.

The real question for determination is, in my opinion: What is the meaning of the words "balance" and "surplus" as used in secs. 89 and 94. In a transaction between principal and agent, if the agent were required to pay over monthly to his principal all moneys collected for him after deducting disbursements made on the principal's behalf, I agree that the agent could only bring into account actual disbursements made by him in the course of the month.

But, just as in the construction of a specification for a patent it is necessary to ascertain the subject matter and the sense in which the words used would be understood by persons conversant with it, so is it in the construction of a federal Constitution which regulates the relations between the federal Government and the Governments of the States. These are by no means the same as those of principal and agent.

Used in this connection, the word "surplus" itself connotes some period of time over which the transactions which are to result in a surplus are to extend. The word is one commonly used in relation to public finance, and always as connoting such a period—often called the "financial year." This must be so from the nature of the case, since the operations of government are continuous and extend over long periods. The revenue is not collected, nor are disbursements made, in equal amounts from day to day, or from month to month. Thus it must happen that in one month the receipts largely exceed the disbursements, while in another the disbursements exceed the receipts. The word "surplus," used in such a connection, must therefore be

H. C. OF A. 1908.

THE STATE OF NEW SOUTH WALES v. THE COMMONWEALTH.

Griffith C.J.

read in a sense which recognizes this condition and gives effect to it. And, since the divisible surplus under sec. 89 is made up of the aggregate of the balances payable month by month to the States, it follows that the balances themselves must be so calculated that the aggregate shall not exceed the amount of the surplus itself. It follows that, until the time has arrived at which the actual surplus is known, the calculation can only be approximate.

For these reasons it is impossible to hold that the balances are to be finally struck as of the last day of every month.

The plaintiffs rested their whole case upon this contention, which is in my judgment untenable. But the real foundation of the claims of the States is, I think (although disavowed by the plaintiffs' counsel), a notion that the "financial year" is part of the order of nature as regards government finance, so that the surplus must be finally ascertained and distributed at intervals not longer than a year. The practice of making an annual balance in public accounts is no doubt both usual and for many purposes convenient. But it depends upon positive legislation (at present the *Audit Act* as amended by the *Surplus Revenue Act*), which cannot control the construction of the Constitution. In all cases, whether in public or private affairs, in which the existence and amount of a surplus is to be ascertained, an account must be taken, and it cannot be finally taken until the period has elapsed during which the disbursements to be charged to the debit side of the account may be made. If that period is a year, then the accounts can be made up yearly. But, so long as it continues to be lawful to make further disbursements from the moneys at the credit side of the account, the surplus cannot be finally ascertained. If the period were a year no one would dispute this position.

The appropriation of public revenue is, in form, a grant to the Sovereign, and the Appropriation Acts operate as an authority to the Treasurer to make the specified disbursements. A contractual obligation may or may not be added by some statutory provision or by authorized agreement, but it does not arise from the appropriation. The Appropriation Act does, however, operate as a provisional setting apart or diversion from the

Consolidated Revenue Fund of the sum appropriated by the Act. So far, therefore, as regards the ascertainment of a surplus for any given period, all moneys the expenditure of which during that period is authorized must be taken into account in making up the provisional balances. It is entirely in the discretion of the Parliament when authorizing the expenditure of the public revenue to fix the period during which it may be disbursed. It follows that, if a sum of money is lawfully appropriated out of the Consolidated Revenue for a specific purpose, that sum cannot be regarded as forming part of a surplus until the expenditure of it is no longer lawful or no longer thought necessary by the Government.

In my opinion the Acts Nos. 18 and 19 of 1908 make such a lawful appropriation, which, under sec. 5 of the *Surplus Revenue Act*, is operative for an indeterminate period. I do not think that the circumstance that in one case further detailed directions as to the mode and conditions of expenditure were contemplated is material.

I have not thought it necessary to discuss at greater length the meaning of the word "expenditure" as used in sec. 89, since, if the word "balance" is used in the sense that I have indicated, the word "expenditure" must have a meaning large enough to include authorized as well as actual disbursements.

For these reasons I am of opinion that the plaintiffs have no present cause of action against the Commonwealth.

I express no opinion upon the effect of placing the sums in question to the credit of Trust Accounts. But, if the contention of the plaintiffs as to the construction of the Constitution were correct, I see great difficulty in the way of holding that anything short of actual disbursement would be effectual to withdraw the money from the operation of the express direction to pay the surplus to the States or apply it in payment of interest on State debts.

BARTON J. This case was argued for the plaintiff State on the basis that, notwithstanding the payment out of the Treasury to the credit of the Invalid and Old-age Pensions Fund and the Harbour and Coastal Defence (Naval) Account respectively, of

H. C. OF A. 1908.

THE STATE OF NEW SOUTH WALES v. THE COMMONWEALTH.

Barton J.

the two sums of £182,000 and £250,000, those moneys still remain due to the several States, the proportion payable to New South Wales being the £160,000 claimed in this action. To sustain that contention the payments by the Treasurer must be shown to have been without constitutional authority. The apparent authority is put forward in the shape of the two Acts Nos. 18 and 19 of 1908, the *Old-age Pensions Appropriation Act* 1908 and the *Coast Defence Appropriation Act* 1908. If these Acts do not constitute a real authority it must be because they are inoperative, and as abundant funds were in the Treasury when they were passed, they can only fail of operation if they are invalid. Each of them is on its face for a purpose for which the Commonwealth has power to make laws. It is said that their purposes are not sufficiently defined. That argument was not closely pressed, and I have no doubt that the purposes of the appropriations are amply defined if the Acts are otherwise warranted by the Constitution. I should have held that opinion if the expedient of opening a new trust account in each instance had not been adopted. It is optional, but not compulsory, to make further parliamentary definition of the destination of the funds. The real attack on these Acts, then, is on this ground—that the appropriations themselves could not legally be made for lack of power to make them. But the more I try to discover how this is made out the greater becomes the difficulty. It is for those who impeach the validity of a legislative Act to make out their case. I cannot see, albeit their arguments were earnest and, if I may say so with respect, most able, how counsel for the plaintiff State have discharged themselves of that burden.

In the first place, these appropriations did not purport to be for the service of the financial year in which they were made—1907-1908. They were not limited as to time, and the two sums, so long as they remained credited to their respective accounts, could have been further dealt with as Parliament might direct, though there was nothing to prevent the Executive from disbursing them at once for the purposes defined, so far as statutory authority to do so was concerned. Had they indeed been limited to the services of last financial year, they would still have been available at any time afterwards under sec. 5 of the *Surplus Revenue*

Act, which applies to every trust account established under the Audit Acts, and saves an appropriation for the purposes of any such account from lapsing "at the close of the financial year for the service of which it was made." Hence *quacunque viâ* these are not appropriations the terms of which necessitate their being disbursed within the year, unless there is some constitutional provision which makes it illegal to defer their actual disbursement. Can Parliament then, if it so desires, form by successive appropriations out of revenue a fund for a purpose demanding an ultimate large expenditure, the utility of which would in its judgment be impaired or nullified if the money could not be accumulated for two or more years? Does the Constitution expressly or impliedly forbid such a process? This Court is not to consider whether such a course would not be harsh or unjust on the one hand, or in the highest interest of the public on the other. Is it constitutional, in the legal as distinct from the political sense? I confess that the alleged prohibition is not disclosed to me by a very patient consideration of the Constitution and of the arguments which it is said to support. It is not of itself an objection to the constitutional legality of an appropriation, otherwise warranted, either that it is not in terms restricted to the service of the year, or that the actual disbursement of the money so appropriated may not or cannot be made or completed within the year of appropriation. In the latter case laws other than the Constitution might have interposed some obstacle, but no such obstacle exists here. These moneys have been "drawn from the Treasury of the Commonwealth . . . under appropriation made by law": sec. 83. To become "surplus revenue," so as to be claimable by the plaintiff State, they must have been either wholly unappropriated for any purpose of the Commonwealth, or appropriated for something which is not such a purpose—that is, illegally.

But, it is said, sec. 87 prevents these sums from being expended after the close of the financial year. It is conceded that their withdrawal from the Treasury by the appropriations made has not reduced the sum available to the States out of the net revenue from Customs and Excise below three-fourths of its total. (It may be mentioned, by the way, that the money in question has

H. C. OF A. 1908.

THE STATE OF NEW SOUTH WALES v. THE COMMONWEALTH.

Barton J.

not been identified with Customs and Excise revenue, but no point is made of that). But it is urged that the terms of that section show that all appropriations made for the purposes of the Commonwealth out of Customs and Excise revenue shall be "applied annually by the Commonwealth towards its expenditure," and that this phrase means "spent within the year in which the revenue was received."

I have given much consideration to this argument, and for a time it impressed me. But I have come to the conclusion that "applied" towards expenditure means set apart or appropriated towards that purpose, so that the appropriation may be debited against the Commonwealth in the year's account, no matter if the actual disbursement takes place after the close of the financial year. This construction is strengthened by the recurrence of the expression in the second branch of the section, which, as to the balance aggregating three-fourths or more, prescribes that it shall "in accordance with this Constitution, be paid to the several States, or *applied* towards the payment of interest on debts of the several States taken over by the Commonwealth." I can see no reason at all why funds to be so applied should not under this section be appropriated, *i.e.*, applied towards this purpose in a particular financial year, and be remitted to the bondholders, though the financial year has closed, unless there is an express Statute requiring another course, and the question what may be the provisions of such a Statute when passed cannot affect the construction of a section of the Constitution. As for the word "expenditure," which was the subject of much discussion, I quite agree that it primarily means the money paid out, or the act of payment out, whether completed or not. But it also means money to be paid out, and it means money that is in course of being paid out. In sec. 82 it clearly means money remaining to be paid out, for the section assumes that the money is received in the form of revenue before it can be "applied to the payment of the expenditure." I think it must equally have that meaning in sec. 87, and that is all the more reason why the word "applied" should in that section be construed as "appropriated"; so that when the payment is actually undertaken it may be lawful in terms of sec. 83.

The claim was further supported by a contention that these sums could not be debited to the several States in view of the terms of secs. 89 and 93, so far as they are repeated by sec. 4 of the *Surplus Revenue Act* passed under the power given in sec. 94. Only an exact cash balance, and one to be made up and handed over monthly *ad unguem*, could, it was urged, satisfy the sections. No expenditure could be debited except money actually spent, and every penny spent must be debited in the same month, with the result that in the present case the disputed money, not having been disbursed last June, could not be debited in that month, therefore it must not be debited at all, and therefore, again, it must be made available to the States under sec. 4 (3) of the *Surplus Revenue Act* 1908. Taking it as a matter of course that the *Surplus Revenue Act* uses the words of the Constitution in this behalf in their original meaning, we must start with the clear presumption that the framers of the Constitution had no intention to make an unworkable instrument of it. If a literal construction would have that unreasonable effect, and a more reasonable one is equally open, the latter should of course be adopted, *ut res magis valeat quam pereat.* Now, the construction contended for is plainly unreasonable. It would mean that in some months, when receipts fell below federal disbursements, the federal Treasury would have a debit balance, and therefore could not give the States anything with which to meet their needs. On the other hand, when the Treasurer found that he had received in a month a vast sum more than he had actually paid out for the purposes of the Commonwealth, he would have to pay the whole excess over to the States at once, knowing, perhaps, that there were millions to be met the next month and *ex hypothesi* a depleted Treasury to face them. So the attempt to act on an exact monthly cash basis would, instead of easing finance, lead to the alternate embarrassment, more or less acute, of abundantly solvent authorities. We must also suppose, if the construction contended for is correct, that in choosing the old basis of bookkeeping practically as it stood, the federal Parliament, having a free hand to legislate within sec. 94, deliberately chose to hamper and injure itself and the States—the one as much as the others—by such a process. Now, it

H. C. OF A. 1908.

THE STATE OF NEW SOUTH WALES v. THE COMMONWEALTH.

Barton J.

will be observed that it is not the literal direction of sec. 89, on which the whole contention is based, that the credits and debits are to be made in this arbitrary fashion. The Commonwealth is not bound to make its debits at any stated time. Why may it not defer a debit—a bookkeeping entry—from one month, when it would have the effect of dislocating the whole financial system, to another, so that transactions may proceed smoothly—always supposing that Commonwealth and State each get their own—the Commonwealth its expenditure by debiting it at the time when it may justly do so, and the State its revenue from Commonwealth sources by a monthly payment of the excess of credits over debits? Are the hands of the Commonwealth to be tied thus against the interests of all concerned, and is that the intention of sub-sec. III. of sec. 89 or of sub-sec. (3) of sec. 4 of the *Surplus Revenue Act*? We may be sure that the process to which it is intended to give further life by the last mentioned Act has never been such as is contended for. The Constitution does not render the Commonwealth the mere agent of the States to handle certain of *their* revenues and to have a dole for its work. That is not any part of the purpose of a national Government, especially of one to which the Customs and Excise are assigned with exclusive legislative and executive control as to imposition, collection and management. As well might we foster the assumption that exists in some quarters, that the Commonwealth is an alien body without rightful foothold on Australian soil, lacking citizens to enjoy the national protection and defend the national rights. When the Constitution speaks of revenues of the Commonwealth it means revenues which belong to the Commonwealth, although it cast upon Australians collectively the duty of providing out of their annual revenue for the political needs of large bodies of their number resident in the several States. The money appropriated from the Consolidated Revenue Fund, withdrawn from the Treasury and paid to the credit of the two trust accounts (see special case paragraph 8) was in my judgment expenditure within the meaning of the Constitution. It was lawfully devoted to the purposes expressed. While the appropriation stood it could not lawfully be devoted to any other purpose, though its disbursement

might be deferred, and it was lawfully debited to the States within the powers given by the Constitution and by the *Surplus Revenue Act*. It follows, in my opinion, that the question asked in the special case must be answered in the affirmative, and that judgment ought to pass for the defendant Commonwealth.

H. C. OF A. 1908.

THE STATE OF NEW SOUTH WALES v. THE COMMONWEALTH.

O'Connor J.

O'CONNOR J. The *Surplus Revenue Act* 1908 put an end to the temporary expedient contained in secs. 89 and 93 of the Constitution for distributing amongst the States their share of Commonwealth revenue. It also, in pursuance of sec. 94 of the Constitution, substituted a new system of accounts as a basis for monthly distribution amongst the several States of all surplus revenue of the Commonwealth.

In the form in which the question is submitted for our consideration one feature of the substituted system is attacked. But the controversy really involves much wider considerations. The contention of the State of New South Wales amounts to this, that the Constitution does not authorize the Parliament to determine what is surplus revenue for the purposes of sec. 94 on any other basis than the relation of actual revenue to actual expenditure, and that money, drawn from the Consolidated Revenue under parliamentary appropriation for a purpose of the Commonwealth and paid into an account to be paid out for that purpose at a future date, is not expenditure within the meaning of the provision of the Constitution which ensures to the States the monthly payment of the surplus revenue of the Commonwealth.

The controversy turns upon the proper interpretation which should be placed on the expression "surplus revenue" in sec. 94. It is conceded by counsel for the Commonwealth, for the purposes of this argument at least, that the States are entitled to have distributed amongst them all revenue left over after the Commonwealth expenditure has been provided for. It is admitted by counsel for the State that the Commonwealth Parliament, subject to the restriction temporarily imposed by sec. 87 of the Constitution, may expend what it thinks fit in the execution of the powers conferred on it. Each party uses the word "expenditure" in a different sense, and the Court must determine which

H. C. OF A. 1908.

THE STATE OF NEW SOUTH WALES v. THE COMMONWEALTH.

O'Connor J.

meaning will most effectually carry out the intention of the Constitution.

In a mercantile transaction, if a question arose as to the basis on which the balance of income over expenditure should be ascertained, there is no doubt that the narrower meaning, that of money actually expended or paid out, might well be taken to be *primâ facie* the natural meaning. But the subject matter of a document is always an important element in the consideration of the language which it uses, and the adjustment of the rights under the Constitution of States and Commonwealth respectively in the revenue collected by the Commonwealth involves considerations entirely different from those governing a merely mercantile transaction. In ascertaining the real meaning of the obligation imposed on the Commonwealth to distribute monthly amongst the States all its surplus revenues regard must be had to the nature, incidents and usual methods of dealing with public revenue and public expenditure under a system of parliamentary government, the annual accounting to Parliament, the estimating in that accounting of revenue and expenditure for the coming year, the necessity of obtaining in advance parliamentary sanction for expenditure, and sometimes of ear-marking and putting by out of revenue moneys required to meet the requirements of government. Such are the conditions under which the obligations of the Commonwealth to the States must under our Parliamentary system necessarily be performed. The difficulty of interpreting the expression in its narrower sense becomes the more apparent if a system such as the State contends for is tested by its practical working. The question naturally arises, at what periods is the balance on the basis of actual expenditure to be ascertained? It must be either month by month or at such period as the Commonwealth shall determine. The latter alternative would enable the Commonwealth to keep out of the account any sum for any period pending adjustment. Under that system the complaint of the State could have no foundation.

Their counsel was therefore driven to maintain that the right of the States was to an ascertainment of the surplus every month by the balancing of revenue collected against the moneys expended each month. The impossibility of carrying on the opera-

tions of government under such a system are too obvious to need further comment, and the interpretation which would lead to that result must be rejected if any other interpretation is reasonably possible. In my opinion it is only by adopting the wider meaning of the word "expenditure," the meaning natural and appropriate in adjusting financial relations between Commonwealth and States under a system of parliamentary government, that full effect can be given to the Constitution.

It is no doubt the right of the States under sec. 94 to have returned to them every month all revenue of the Commonwealth which remains after providing for Commonwealth expenditure. But the Commonwealth is entitled in accordance with well recognized methods of public finance to accumulate revenue to be paid out later in the execution of some Commonwealth power. When moneys are duly appropriated out of the Consolidated Revenue and allotted for such special purpose they may be treated in the ascertainment of surplus revenue as Commonwealth expenditure. But if the moneys are for any reason not expended and go back into the Consolidated Revenue they must again be brought into the account between the Commonwealth and the States, and the debit readjusted.

I am, therefore, of opinion that the Commonwealth is entitled under the powers conferred by the Constitution to charge against the States as Commonwealth expenditure the amounts paid out of the Consolidated Revenue under special appropriation into the two funds mentioned in the special case.

It follows that, in my opinion, the State of New South Wales was not entitled to sue for the £160,000 claimed as its share in the debit charged, and that the judgment must be entered for the defendants.

ISAACS J. If the *Surplus Revenue Act* 1908 is valid the sum of £160,000 claimed by the State of New South Wales has been lawfully deducted by the Commonwealth. That Act cannot in any view of the effect of sec. 94 of the Constitution be invalid unless it purports to authorize the Commonwealth to deduct that which is "surplus revenue" within the meaning of sec. 94.

To determine that point we must go back to sec. 81 of the

H. C. OF A. 1908.

THE STATE OF NEW SOUTH WALES v. THE COMMONWEALTH.

Isaacs J.

Constitution, which I take to be the governing provision upon the question. It provides that all revenues or moneys raised or received by the Government shall form one Consolidated Revenue Fund, and then come the all-important words:—"to be appropriated for the purposes of the Commonwealth." It also prescribes that the appropriation shall be in the manner and subject to the charges and liabilities imposed by the Constitution. There are charges, such as, for instance, the cost of collection and management &c., and there are liabilities, such as certain salaries, and the three-fourths of Customs and Excise duties under sec. 87, which must first be satisfied. But the "charges and liabilities" once provided for, the Parliament has unrestricted power to "appropriate for the purposes of the Commonwealth" every penny of the revenue in the Consolidated Revenue Fund. It is an inseparable consequence of this position that money appropriated by law for the purposes of the Commonwealth cannot at the same time be appropriated and applied to State purposes. "Appropriation of money to a Commonwealth purpose" means legally segregating it from the general mass of the Consolidated Fund and dedicating it to the execution of some purpose which either the Constitution has itself declared, or Parliament has lawfully determined, shall be carried out. So long as that purpose remains unfulfilled but still existent and awaiting performance, it appears to me a hopeless contention that money which stands "appropriated" for that purpose, and therefore unavailable for any other Commonwealth purpose, is yet money which not only may, but in such circumstances as the present, must, be diverted from the Commonwealth altogether and paid over irrevocably to the States.

Such money cannot, as it seems to me, be regarded as "surplus revenue." Surplus revenue means free revenue, that is, not marked out by Parliament as required by the Commonwealth for carrying out purposes lawfully resolved upon. In this instance Parliament, having thought it necessary that Harbor and Coastal Naval Defences should be undertaken for which £250,000 would or might be required, a perfectly lawful purpose, granted that sum to His Majesty accordingly, and to make good the grant appropriated the same amount for the purposes mentioned, and

made it payable out of the Consolidated Revenue Fund for the purposes of the trust account known as the Harbor and Coastal Defence (Naval) Account. So that there were really four distinct determinations by Parliament:—

(1) To provide coastal naval defence.

(2) To grant £250,000 to the King to meet the cost.

(3) To appropriate the amount for the purpose.

(4) To pay it out of the Consolidated Fund to a trust account, which is a branch of a separate fund, to be used for the specified purpose.

To these may be added the standing provision in the amended *Audit Act*, contained in sec. 62A, sub-sec. (6) that "moneys standing to the credit of a Trust Account may be expended for the purposes of that account."

It is nevertheless said that the money must still be considered "surplus revenue" within sec. 94, and paid over to the State of New South Wales because, as it is contended, so long as it in fact remains in the hand of the Commonwealth for any purpose, it is not actually expended, and therefore cannot be included as "expenditure," and consequently remains "surplus revenue."

Assuming that "expenditure" is a necessary and implied factor in arriving at "surplus revenue" for the purposes of sec. 94, it cannot be understood in the restricted sense of actual payment. Reading the whole of the financial clauses together, and contemplating them as part of a scheme of government, the primary object of which is the creation and maintenance of the Commonwealth, proceeding for the effectuation of its purposes on traditional lines of parliamentary and responsible government, it appears impossible to read "expenditure" as confined to the physical act of handing over money to the public creditor. The language of sec. 82, which draws a distinction between "payment" and "expenditure" which still requires payment, is opposed to the rigid interpretation suggested.

It would be singular if the moment before payment to a creditor a given sum is surplus revenue belonging to the States, and yet the instant after actual payment the States should have no claim in respect of that money or any equivalent sum by reason of its deduction. If, on the other hand, it is conceded

H. C. OF A. 1908.

THE STATE OF NEW SOUTH WALES v. THE COMMONWEALTH.

Isaacs J.

that the position is altered by the existence of an obligation to pay—such as a debt, or a judgment, or an Act conferring bounties or old-age pensions—the whole substratum of the argument is gone. Once relieved from the necessity of actual payment, what test remains, short of appropriation for payment? If Parliament has enacted that certain purposes shall be executed, and the necessary money appropriated to defray their cost, what difference can it make to the States that the particular creditor is not yet selected, or that the contract is not yet actually signed on behalf of the Commonwealth Government? I agree that payment to the credit of a trust fund makes no difference. It is not disputed the Commonwealth after satisfying prior charges and liabilities could, if it were so disposed, create obligations and pay away the whole of its available revenue to meet them, leaving no surplus whatever. Sec. 94 creates no guarantee that a surplus shall exist. It presupposes a surplus—that is a sum not stated by law to be needed for declared Commonwealth purposes. If no surplus should exist, the States, it is admitted, would have no legal cause of complaint. In this the section stands in marked contrast with sec. 87.

Undertakings decided upon by the Commonwealth may from their nature require deliberation as to final form, and if, before actual commitment to details, time for consideration is taken, can it reasonably be said, that although the cost is fixed, and the required money expressly appropriated to the purpose, that money is still in the eye of the law "surplus revenue" distributable perforce among the States? This would leave the Commonwealth with its purpose bare and barren, and incapable of fulfilment until fresh means were sought. It is no answer to say other moneys would probably reach the Treasury, because they may be needed for other purposes. The argument, if acceded to, would probably either drive the Commonwealth to hasty and ill considered action so as to actually disburse its revenue, in satisfaction of its purposes, or else compel it to find fresh ways and means, possibly burdensome.

As a constitutional requirement lasting for all time it would be serious, though, if the law stood so, it would, of course, have to be so declared.

I say nothing about the difficulty in the way of the plaintiffs' contention of fixing the time, whether at the end of a month or a year, when the claim of the States would mature. Independently of that consideration the matter is clear to me for the reasons I have given, and in my opinion, therefore, the question submitted must be answered in the affirmative and judgment entered for the defendants.

HIGGINS J. In this action the State of New South Wales claims, in effect, that the several States are entitled to receive, month by month, from the Commonwealth the whole of the revenue collected by the Commonwealth that has not been actually expended by the Commonwealth—that has not been applied in actual payment by the Commonwealth. If this claim is right, the Commonwealth Parliament has no power to provide out of its revenue in fat months for expenditure which it foresees in the near future—say for naval defence, or for financial assistance to a State (under sec. 96 of the Constitution); and the power of the Commonwealth Treasurer in making financial arrangements must be grievously crippled. But if such is the meaning of the Constitution, it is our duty to give effect to it.

What has actually been done is that the Treasurer has (under the *Audit Acts* 1901-1906, sec. 62A) established a trust account called the "Harbour and Coastal Defence (Naval) Account," and a trust account called the "Invalid and Old-age Pensions Fund;" and that the federal Parliament has by two Appropriation Acts of 10th June 1908 appropriated out of the Consolidated Revenue Fund for the purposes of the former trust account £250,000, and for the purposes of the latter trust account £750,000. The Parliament has also passed an Act which was assented to on the same 10th June 1908 giving rights to invalid and to old-age pensions. This Act can be brought into force to-morrow, or any day, by proclamation, but it must come into force on 1st July 1909 at the latest (sec. 2). After it comes into operation, the Minister "shall" (not "may") out of moneys to be appropriated by Parliament from time to time pay the pensions provided by the Act. It is clear, therefore, that the Parliament means business—that it is not deducting moneys from the revenue on mere

H. C. OF A. 1908.

THE STATE OF NEW SOUTH WALES v. THE COMMONWEALTH.

Higgins J.

speculation. On the same 10th July 1908 the *Surplus Revenue Act* was passed; and it came into force by proclamation on 13th June 1908. This last Act puts an end to the provisions of sec. 93 of the Constitution, and substitutes other provisions. The plaintiffs' counsel contend that sec. 4 (4) (*d*) is invalid, as an attempt to alter the meaning of the Constitution; because it provides that "all payments to Trust Accounts, established under the *Audit Acts* 1901-1906, of moneys appropriated by law for any purpose of the Commonwealth shall be deemed to be expenditure."

It is not contended that the federal Parliament has in any way transgressed "the Braddon clause": sec. 87—the section which ensures to the States that not more than a quarter of the net revenue from Customs and Excise shall be applied annually to Commonwealth expenditure. The Commonwealth Parliament has kept within its quarter; but, foreseeing large commitments in the near future, it has put aside, appropriated, part of the fourth to meet them, and the Treasurer is given power, so long as he does not exceed the quarter under the Braddon clause, to pay to the credit of these trust accounts such further moneys of the Consolidated Revenue Fund as the Governor-General in Council thinks necessary. There is no doubt that this would be merely a good business arrangement of an ordinary kind in the case of an unfettered Parliament; and the question is, is such a transaction forbidden to the federal Parliament.

The plaintiffs' counsel rest their case principally on secs. 89, 93 and 94 of the Constitution. Sec. 89 states the modes of crediting revenue, debiting expenditure, and paying balances to the several States, before the imposition of uniform duties of Customs; and sec. 93 incorporates these same provisions by reference, and applies them to the period of five years after the imposition of uniform duties, "and thereafter until the Parliament otherwise provides." *Primâ facie*, this allows the Parliament to make any change that it thinks fit in any of the provisions of sec. 93, even as to the balances which it has to pay. *Primâ facie*, it allows the Parliament to debit the States with sums which have not been actually paid, as well as with the sums which have, (assuming that the word "expenditure" in the Constitution is

confined to sums actually paid). But it is said that this power is qualified by sec. 94. Sec. 94 enables Parliament, after five years from the imposition of uniform duties, to provide "on such basis as it deems fair, for the monthly payment to the several States of all surplus revenue of the Commonwealth." This section seems merely to enable Parliament to alter the rights of the several States *inter se* as to any surplus revenue; it does not cut down any right which Parliament has to make "other provision" under sec. 93; but, whatever be the basis of distribution of any surplus revenue, that distribution is to remain a monthly distribution. This sec. 94 leaves the question, "what is surplus revenue" to be answered *aliunde*.

If, therefore, secs. 89, 93 and 94 of the Constitution do mean that the States can only be debited with moneys actually paid, I am strongly inclined to think that Parliament has the power, and has exercised the power, of altering this system, and of allowing contemplated expenditure to be debited.

It may not be necessary in this case to go so far; for I am also of opinion, with my learned colleagues, that on the true construction of sec. 89, the word "expenditure" includes not only the moneys actually paid, but the moneys which Parliament has appropriated to be expended until it finds that the money so appropriated is not wanted, that is to say, practically until the appropriation lapses. In this case, by the express provision of sec. 5 of the *Surplus Revenue Act*, the provisions of the *Audit Acts* (sec. 36), which make appropriations lapse at the close of the financial year, are made inapplicable to trust accounts such as those now in question. The word "expenditure" has not, as was urged by plaintiffs' counsel, the primary meaning of moneys already expended. Primarily, indeed, it is an abstract noun; but it is often used to express collectively, in financial matters, moneys actually expended and to be expended. The strongest argument in favour of the plaintiffs is in the word "balance" in sec. 89—the Commonwealth (after crediting to each State its share of the revenues, and debiting its share of the expenditure) is to pay to each State month by month "the balance (if any) in favour of the State." But this phraseology is quite consistent with the view of the word "expenditure" which I have indicated. The

H. C. of A. 1908.

THE STATE OF NEW SOUTH WALES v. THE COMMONWEALTH.

Higgins J.

States must ultimately get all moneys not actually paid by the Commonwealth; but before ascertaining the monthly balance payable to each State, the past and coming expenditure of the Commonwealth has to be taken into account; and the decision of Parliament that money will be required for expenditure is not a decision which the judicial department should review. Moreover, as to the words "surplus revenue" in sec. 94, I concede, on the one hand, that this must be equivalent to the sum of the balances payable to the States; but, on the other hand, I think that it merely means that sum which the federal Parliament has left over its requirements, and available for distribution amongst the States.

This view seems to be confirmed on a consideration of the other sections of the Constitution. In the first place—and this seems to be the key of the position—there is nothing in the Constitution to compel the Parliament to appropriate only for a year or for any limited term. So far as the Constitution is concerned—although such a course might interfere with the working of responsible government—Appropriation Acts might cover five or more years to come, for the ordinary annual services of the Government (sec. 53), and for other services. Again, sec. 82 distinguishes between "payment" and "expenditure"; for it prescribes that "the revenue of the Commonwealth shall in the first instance be applied to the *payment* of the *expenditure* of the Commonwealth." So, in sec. 87, it is provided that of the net revenue from duties of Customs and of Excise not more than one-fourth shall be *applied* annually by the Commonwealth towards its *expenditure*. In these sections, the word "expenditure" is used in the sense which I regard it as having in sec. 89 as including that which is to be expended, as well as that which has been expended. For these reasons, I think that the claim of the plaintiffs should fail.

Judgment for the defendants with costs.

Solicitor, for the plaintiffs, *J. V. Tillett*, Crown Solicitor for New South Wales.

Solicitor, for the defendant, *C. Powers*, Crown Solicitor for the Commonwealth.

B. L.