[HIGH COURT OF AUSTRALIA.]

THE STATE OF NEW SOUTH WALES . . PLAINTIFF;

AGAINST

THE COMMONWEALTH AND OTHERS . DEFENDANTS.

[No. 3.]

H. C. OF A. 1932.

SYDNEY, *April* 18, 22; *May* 3.

Gavan Duffy C.J., Rich, Starke, Dixon, Evatt and McTiernan JJ.

Constitutional Law—Validity of Commonwealth legislation—State funds—"Balance standing to the credit of the State" at bank—Attachment by Commonwealth—Validity—Trust moneys—"Public moneys"—Cestuis que trust—Rights against State—Relation between State and its bankers——The Constitution (63 & 64 *Vict. c.* 12), *sec.* 105A—*Constitution Alteration* (*State Debts*) 1928 (*No.* 1 *of* 1929), *sec.* 2—*Financial Agreements Enforcement Act* 1932 (*No.* 3 *of* 1932), *sec.* 15*—*Acts Interpretation Act* 1901-1930 (*No.* 1 *of* 1901—*No.* 23 *of* 1930), *sec.* 15A—*Audit Act* 1902 (*N.S.W.*) (*No.* 26 *of* 1902), *secs.* 5, 17-21, 30.

Sec. 15 of the *Financial Agreements Enforcement Act* 1932 is expressed to empower the Treasurer of the Commonwealth, during the currency of a proclamation under sec. 7 of that Act, to require the chief executive officer in

* The *Financial Agreements Enforcement Act* 1932 provides, by sec. 15, that "(1) At any time during the currency of any proclamation, the Treasurer may serve, or cause to be served, upon the chief executive officer in Australia of any corporation carrying on the business of banking, a notice in writing requiring that officer (*a*) to render forthwith to the Treasurer or to an authorized person a return of the amount of the balance standing to the credit of the State to which the proclamation relates, in the books of the corporation, whether upon fixed deposit, current account or otherwise, specifying the amount of the balance standing to the credit of the State under each of those heads; and (*b*) to pay to the Treasurer or authorized person forthwith, or within such period . . . as is specified in the notice, the whole of that amount or such part of it as is specified by the Treasurer in the notice, and thereafter to pay to the Treasurer or authorized person, within a period or to an amount specified in the notice, any further moneys subsequently received by the corporation on account of the State. (2) The receipt of the Treasurer or authorized person shall be a good discharge to the corporation of its obligation to pay the said moneys to the State, and, upon payment thereof to the Treasurer or authorized person, the corporation shall be exempt

Australia of any bank to furnish "a return of the amount of the balance standing to the credit of the State" referred to in the proclamation, and, within a stated period, to pay the amount of such balance to the "authorized person" indicated, as well as any further moneys subsequently received by the bank on account of the State, to be applied towards the discharge of any liabilities of that State that may have accrued under the Financial Agreements between the State and the Commonwealth.

Held, by *Rich*, *Starke*, *Dixon* and *McTiernan* JJ. (*Gavan Duffy* C.J. and *Evatt* J. dissenting), that these provisions constitute a valid exercise of the power conferred upon the Commonwealth by sec. 105A of the Constitution.

Held, further, by *Rich*, *Starke*, *Dixon* and *McTiernan* JJ., that even if otherwise the section would receive a construction which would extend its application to moneys beyond the Commonwealth power sec. 15A of the *Acts Interpretation Act* 1901-1930 would confine its operation to those within that power and preclude an interpretation which would result in its invalidity.

In addition to ordinary revenue the State of New South Wales deposited with its bankers moneys received by it under certain statutes and orders of Court for specific purposes and to meet particular claims, such as, for example, estates administered by the Master-in-Lunacy, the Public Trustee and the Registrar of Probates respectively, and claims by suitors and litigants. The accounts were kept by the banks under various descriptive headings, moneys deposited being allocated to the relevant accounts upon the receipt, subsequent to payment in, from the State of a "distribution sheet," and by an agreement between the State and the banks the accounts were treated as one account, withdrawals being permitted from any account, whether in debit or otherwise, provided the combined account was in credit, interest being allowed by each of the banks on any amount held by it in excess of £100,000. The banks stated that they had not been informed, and were unaware, that any of the moneys deposited by the State were "trust" moneys.

Held, by *Rich*, *Starke*, *Dixon* and *McTiernan* JJ., that such moneys were not received by the Crown in right of the State in a fiduciary capacity so as to remain specifically the property in equity of the suitors or others concerned, but went into the general resources of the State; and that, accordingly, the sums at credit of the bank account were attachable under sec. 15 of the *Financial Agreements Enforcement Act* 1932.

from any liability to the State in respect thereof, in any proceedings whatsoever. (3) Any moneys received by the Treasurer or an authorized person in pursuance of this section shall be dealt with as if they were moneys received by him under or by virtue of the provisions of section seven of this Act . . . . (5) Notwithstanding the foregoing provisions of this section, if the Treasurer is satisfied (*a*) that any moneys paid to him or to an authorized person in pursuance of this section include moneys deposited by any person as security for the supply of goods, the performance of services or the carrying out of any work, and (*b*) that the conditions on which the moneys were deposited have been fulfilled, the Treasurer may refund those moneys, and any refund so made shall, as between the person making the deposit and the State, be deemed to have been made by the State."

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MOTION for Declaration and Injunctions.

By a writ of summons, to which the Commonwealth, the Honourable Joseph Aloysius Lyons as Treasurer of the Commonwealth, the Commonwealth Bank of Australia, the Bank of New South Wales and the Commercial Banking Co. of Sydney Ltd. were joined as defendants, the State of New South Wales claimed (1) a declaration that sec. 15 of the *Financial Agreements Enforcement Act* 1932 was *ultra vires* the Commonwealth Parliament and was invalid; (2) a declaration that certain notices in writing, dated 9th April 1932, caused to be served by the Commonwealth Treasurer pursuant to sec. 15 of the said Act upon the chief executive officers in Australia of the Commercial Banking Co. of Sydney Ltd. and of the Bank of New South Wales respectively, corporations carrying on the business of banking, requiring such officers (*a*) to render forthwith to the Commonwealth Bank of Australia, being an authorized person within the meaning of the said Act, a return of the amount of the balance standing to the credit of the State of New South Wales in the books of the two first-named banks respectively, whether upon fixed deposits, current account or otherwise, specifying the amount of the credit balance under each of those headings, and (*b*) to pay to the Commonwealth Bank of Australia forthwith the whole of such amounts, and thereafter to pay to such bank within a period of two months any further moneys subsequently received by the said two first-named banks respectively on account of the State of New South Wales, were invalid; (3) orders restraining (*a*) the Commercial Banking Co. of Sydney Ltd. and the Bank of New South Wales from paying such moneys to the Commonwealth Bank of Australia, (*b*) the last-named bank from receiving such moneys without the consent of the State of New South Wales and (*c*) the Commonwealth Treasurer from acting in any way under the notices in question or either of them or under sec. 15 of the Act; (4) an order directing the respective banks to repay to the State of New South Wales all moneys paid to the Commonwealth Bank of Australia in pursuance of such notices or either of them; and (5) orders for ancillary relief.

In an affidavit filed on behalf of the State in support of the motion referred to hereunder, Thomas Dwyer Kelly, the expenditure

accountant to the State Treasury, deposed (*inter alia*), substantially, (1) that moneys and accounts of the said State, and of the public accounts, and of the officials and corporations of the Crown in right of the State of New South Wales were being, and had for many years past been, kept with the Bank of New South Wales and the Commercial Banking Co. of Sydney Ltd.; (2) that an agreement made between the Colonial Treasurer of the State and the said banks provided (*inter alia*) that "of the total daily net credit balance of the Treasurer's General Banking Account in both banks . . . £200,000—i.e., . . . £100,000, with each bank—shall be held free of interest. The balance with each bank in excess of £100,000 to bear interest at the rate of two pounds per centum per annum, subject to the bank's right of determination at seven days' notice." Such agreement was expressed to commence on 17th October 1931, was terminable by three months' notice, and was "applicable to all government departments including the Sydney Harbour Trust, the Miners' Accident Relief Board, and other similarly constituted bodies"; (3) that in places in New South Wales where the banks in question had no branches, public officers of the State had accounts with other banks; (4) that the Colonial Treasurer had received letters dated 11th April 1932 from each of the banks in question which, after referring to the receipt by the respective banks of the notice above referred to, proceeded: "In view of this notice, the bank will be unable to pay cheques drawn upon Government accounts presented after the receipt of the notice, and will return such cheques with the answer 'Refer to drawer' . . . The notice . . . has made it necessary that all credits established at the request of, and on account of the Government, departmental or otherwise, be cancelled, and I hereby give you notice accordingly"; (5) that a notice as above had been sent by the Commonwealth Treasurer to all other banks carrying on business in New South Wales; (6) that in the course of his duty he had prepared from returns furnished by the banks in question a statement of the cash balances of the Colonial Treasurer's Accounts as on 11th April 1932 (annexure "B"), which was as follows:—

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CREDIT BALANCES	
Special Deposits Accounts	£22,862,956
Sydney Harbour Trust Fund	47,156
Government Railways Fund	581,727
State Transport (Co-ordination) Fund	32,374
Road Transport and Traffic Fund	88,358
Metropolitan Transport Trust—General Fund	210,354
Newcastle and District Transport Trust—General Fund	3,234
Supreme Court Accounts	482,586
Commonwealth Treasury Bills (Sydney) Account	16,110,000
DEBIT BALANCES	
Consolidated Revenue Account	£14,027,247
General Loan Account	5,324,943
Loans Expenditure Suspense Account	1,290,888
Closer Settlement Account	646,047
Advances for Departmental Working Accounts and other purposes, and advances to be recovered	11,560,159
Grain Elevators Freight Suspense Account	45,128
Metropolitan Water, Sewerage and Drainage Board Advance Account	5,845,500
Grafton-Kyogle to South Brisbane Railway Advance Account	175,000
Coal Purchase Suspense Account	13,974
London Remittance Account	296,375
Amounts not brought to account	1,107,895

—showing a total net cash balance in such banks of £85,589; (7) that for very many years past the accounts referred to in (6), *supra*, had been treated as one account for the purpose of utilizing the aggregate credit balance and so enabling money to be withdrawn from any of such accounts for any lawful expenditure to which that account was applicable although it might be in debit; (8) that the statement of cash balances referred to in (6), *supra*, did not include (*inter alia*) any credit balances on certain special public moneys accounts of officers established for the receipt of moneys the destination of which was uncertain or of deposits on land ballots which would be shortly returned and certain trust moneys such as trust accounts under the *Child Welfare Act* 1923, and that he (the deponent) was unaware of the amount of such credit balances; and (9) that the functions of the Crown in right of New South Wales, and of persons and corporations representing the Crown in such right, extended over the whole of New South Wales, and the effect of the notices in question was to hamper seriously the discharge of the functions of the Crown in right of New South

Wales and to cause it substantial losses. In a "short explanation concerning the accounts referred to" in (6), *supra*, furnished by Kelly as an annexure to his affidavit (marked "C") he stated (*inter alia*) that the Special Deposits Accounts included amongst other moneys, trust moneys of which the State Treasurer was, by statutory obligation, a trustee and custodian, some of the trust moneys included being, e.g., the Bankruptcy Suitors Fund (Act No. 25 of 1898), Bankruptcy Unclaimed Dividend Fund (Act No. 25 of 1898), Municipal Council of Sydney Sinking Fund (50 Vict. No. 13), Testamentary and Trust Fund (Perpetual and Permanent Trustee Companies' Acts), Unclaimed Moneys, Security Deposits lodged by tenderers and contractors; also included in such Special Deposits Account were the funds of the Government Insurance Office, and if the Office were prevented from operating on such funds it would be difficult to visualize the serious effect not only upon the Office but upon the Government itself; that in respect of the Sydney Harbour Trust Fund, the Government Railways Fund, the Metropolitan Transport Trust General Fund, the Newcastle and District Transport Trust General Fund, trust moneys also were paid into such Funds and such trust moneys could be dealt with in accordance with the respective trusts without appropriation by Parliament. The Supreme Court Accounts comprised—(*a*) the Colonial Treasurer's Master-in-Equity Account, which consisted solely of trust funds held on behalf of suitors and persons interested in suits in Equity, the funds being in nowise the property of the Government, and the account being operated upon only in pursuance of an order or decree of the Supreme Court under rules 288 and 289 of the *Consolidated Equity Rules* of 1902; (*b*) the Colonial Treasurer's Master-in-Lunacy Account, the whole of the money in such account being the property of persons and patients under the *Lunacy Act* for whom it was held in trust by the Master-in-Lunacy (*vide* secs. 130 and 131 of the *Lunacy Act of* 1898 (N.S.W.)); (*c*) the Colonial Treasurer's Public Trustee Account, all moneys paid into such account being without exception moneys collected in respect of various trusts and clients, which were trust moneys and did not belong to the Government; (*d*) the Colonial Treasurer's Prothonotary's Account, being moneys paid into Court by litigants under statutes or orders

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of Court, and being moneys belonging either to litigants or to private persons held in suspense for various reasons; and (*e*) the Colonial Treasurer's Registrar of Probate Account, the moneys paid into such account being wholly trust moneys belonging to deceased estates paid in by order of the Probate Judge whose order was required before any money could be paid out to any person interested.

Affidavits by the managers of the head offices of the Bank of New South Wales and the Commercial Banking Co. of Sydney Ltd. respectively set out, in substance, that in addition to the accounts referred to by Kelly there were other Government accounts kept at the head offices and also at various branches of those banks throughout the State, the total debit balances of such accounts being shown in Kelly's affidavit under the heading of "Amounts not brought to account"; that as between the Government as customer and each of the banks as banker all the accounts referred to were treated as one account so that withdrawals from any account though it was in debit were permitted by each bank so long as the whole account at such bank, on such combination, was in credit; that the practice, which was of many years standing, was for the State Treasury to pay into each bank towards the end of each banking day a considerable sum of money to the credit of the Government generally and subsequently to supply each bank with a distribution sheet specifying the different Government accounts to which the sum so paid was to be allocated and the respective amounts to be credited to each account; that other moneys were paid in direct by Government officials to the credit of the various accounts; that all moneys received as above by each bank were received as moneys of His Majesty the King in right of the State of New South Wales, the banks not being informed by the Government or the Treasury or the officials paying in such moneys as to whether the whole or any part were trust moneys, and the banks did not know how such moneys were dealt with in the Government's books; that there was only one Special Deposits Account in the books of each bank and neither of the banks had been informed or knew that such account represented or included the accounts referred to in the annexure to Kelly's affidavit; that so far as the other accounts referred to in the

annexure were concerned neither of the banks had been informed or knew that any of the moneys paid into such accounts were trust moneys; that the State Treasurer had no account with either bank styled "The Trust Account"; that the various accounts were drawn upon by cheques only, no order of Court or other authority being produced to either of the banks.

The plaintiff moved for a declaration and injunctions as claimed in the writ, and during the course of the argument it was agreed between the parties that the hearing of the motion should be treated as the trial of the action, subject, so far as the Bank of New South Wales and the Commercial Banking Co. of Sydney Ltd. were concerned, to the order of the Court being a declaration simply as to validity or invalidity, or to such injunction as the Court might grant being of such a nature as the banks would be able to give effect to.

Browne K.C. (with him *Berne*), for the plaintiff. The decision of the Court in *New South Wales* v. *The Commonwealth* [*No.* 1] (1) only goes so far as to declare Part II. of the *Financial Agreements Enforcement Act* 1932 to be valid, and does not affect the validity or otherwise of sec. 15, which is in Part III. of that Act. The section is invalid because its terms are wide enough to include not only the ordinary revenue of the State but also moneys held by the State on trust. Although there is not any account with the State's bankers styled "The Trust Account," it is obvious that a number of the accounts, e.g., the various accounts included in the Supreme Court Accounts, &c., are trust accounts in the sense that trust moneys are paid into such accounts. As such trust moneys are not the property of the State, they cannot be attached by the Commonwealth; and, to the extent at least that the section purports to confer power to attach such trust moneys, it is invalid. The procedure adopted in regard to payments into and withdrawals from the various accounts is in accordance with that prescribed by the relevant Acts and regulations made thereunder, Rules of Court, and more particularly the *Audit Act* 1902, secs. 5, 18, 19-21. (See *Public Trustee Act* 1913-1923 and regulations thereunder,

(1) *Ante*, 155.

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Rules, Regulations and By-laws (N.S.W.) (1930), pp. 11 *et seqq.*; *Government Gazette* (*N.S.W.*), pp. 8 *et seqq.*; *Consolidated Equity Rules* (N.S.W.), rr. 286, 288, 289.) It is outside the power of the Commonwealth to seize the whole balance standing to the credit of the State's account, thereby making it impossible for the State to provide the means to pay cheques drawn on the trust account. The State is a trustee for such money, is liable to pay it as a trustee, and the banks are equally liable to make the money available (*Lyell* v. *Kennedy* (1)). Sec. 15 deals with moneys of that kind which are not the property of the State; the section cannot be made to apply to a part only of the moneys but must apply either to the whole of the money " standing to the credit of the State " or to none at all.

Ham K.C. (with him *E. M. Mitchell* K.C. and *Nicholas*), for the defendants the Commonwealth and the Commonwealth Treasurer. This Court decided in *New South Wales* v. *The Commonwealth* [*No.* 1] (2) that the Commonwealth Parliament has power to pass a law requiring debtors of a State to pay their debts to the Commonwealth instead of to that State so that the receipt of such money would have the effect of liquidating the State's debts to the Commonwealth. Such power extends also to moneys lent by the State to a bank. Apart from the particular terms of the *Audit Act* the fact is that, although moneys might come into the hands of State officers impressed with a trust, if those State officers under the law pay those moneys into the bank the property in the moneys passes to the bank and thereafter the relation between the bank and the State is that of debtor and creditor, and that immediately the State officers have, under the law, parted with the custody of the trust property the rights of the cestuis que trust are a chose in action against the State. *Lyell* v. *Kennedy* (1) refers to the duty of a private trustee, and is, therefore, distinguishable because the State has no obligation as trustee to keep trust moneys apart from its own. A cestui que trust can only take action against a private trustee if the latter has acted unreasonably in the disposition of the funds, whereas as regards the State the right of

(1) (1889) 14 App. Cas. 437. (2) *Ante*, 155.

the cestui que trust is secured by the credit of the State. The agreement between the State and the banks provides that interest shall be paid to the State by the banks on all moneys held in excess of £100,000, and also that the State shall be entitled to draw against a credit in the combined account irrespective of whether the subsidiary accounts are in credit or in debit, which is evidence that neither the State nor the banks regarded the moneys in such accounts as being trust moneys. The State can pay trust moneys into its own account and utilize them in any way in which it is authorized to use State moneys. The Court is no more concerned under sec. 15 to go behind the relationship existing between the State and its bankers than it was to go behind the relationship existing between a subject and the State when considering Part II. The relationship between the banks and the State is that of debtor and creditor, or banker and customer: the property in the money that is deposited in the banks passes to the banks and thereafter the obligation of each bank, apart from the cashing of cheques, is that of a debtor at common law. It follows, therefore, from the decision in *New South Wales* v. *The Commonwealth* [*No.* 1] (1), that by whatever power—whether under sec. 105A (3) of the Constitution alone or under Chapter III. of the Constitution, together with sec. 51 and incidental powers, alone or concurrently—the right of the Commonwealth to attach debts due to the State in respect of present claims can be supported, there is no reason in law which would prevent the application of that principle to debts due to the State in respect of money lent. A cestui que trust of the State is unable to "trace" his moneys because by the *Audit Act* the State is authorized to pay such moneys into a mixed fund which may be used indiscriminately for State purposes; therefore the rule in *Devaynes* v. *Noble* (*Clayton's Case*) (2) does not apply. There is nothing in any of the Acts referred to on behalf of the State which affects the position between the State and its bankers as declared by the *Audit Act*, particularly secs. 5, 18, 19, 21. The principal object of separating the State account into a number of subsidiary accounts is for convenience of accountancy and audit. The moneys standing to the credit of the State's account at the banks could, under the *Audit Act*, secs. 19 and 21, have been properly

(1) *Ante*, 155. (2) (1816) 1 Mer. 572; 35 E.R. 781.

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and voluntarily applied by the State towards the liquidation of its indebtedness under the Financial Agreements; therefore such moneys are properly attachable. Alternatively, if the constitutional power of the Commonwealth is limited to the attachment of moneys due to the State in its own right, then sec. 15 of the *Financial Agreements Enforcement Act* 1932 should be construed as valid but limited to such moneys (*Acts Interpretation Act* 1901-1930, sec. 15A; *Macleod* v. *Attorney-General for New South Wales* (1)).

Teece K.C. (with him *J. A. Ferguson*), for the defendants the Bank of New South Wales and the Commercial Banking Co. of Sydney Ltd. As to whether sec. 15 of the *Financial Agreements Enforcement Act* 1932 is valid or invalid does not concern the defendant banks. The banks have no knowledge that any of the moneys deposited with them by the State or its officers are trust moneys, and, if some are trust moneys, how much. It is impossible for the banks to dissect the moneys deposited with them so as to ascertain what are, and what are not, trust moneys. The use of the words " balance standing to the credit of the State " in sec. 15 shows that the Legislature contemplated that such balance would be all-embracing and would include moneys impressed with trusts in the hands of the bank's customer. The relation of the banks with the State is that of debtor and creditor: there is no privity between a cestui que trust and the banker. The banks could not comply with a notice or order directing them to pay over to the Commonwealth credit balances excluding therefrom such moneys as might be trust moneys: the banks have no knowledge of any trust moneys or the quantum thereof. The Legislature could not have intended such an impossibility; therefore the words of sec. 15 should be given their natural meaning—not a restricted meaning under sec. 15A of the *Acts Interpretation Act*, which would, in effect, be making a new piece of legislation.

[EVATT J. referred to *Australian Railways Union* v. *Victorian Railways Commissioners* (2) and *Huddart Parker Ltd.* v. *The Commonwealth* (3).]

(1) (1891) A.C. 455.
(2) (1930) 44 C.L.R. 319.
(3) (1931) 44 C.L.R. 492.

The natural meaning of the words is consistent with the system of banking of which the Legislature must be deemed to have a knowledge. Although for the purpose of convenience there are several accounts, they are as between banker and customer treated as one account. The State regards all moneys which come to its hands as "public moneys" (see *Audit Act* 1902, sec. 21), and as such lends the moneys to the banks. The agreement between the State and the banks refers to the State's account with the banks as "The Treasurer's General Banking Account."

Street, for the defendant the Commonwealth Bank of Australia. The bank is not concerned one way or the other with the validity or invalidity of sec. 15 of the *Financial Agreements Enforcement Act* 1932: it is simply the agent of the Commonwealth for the receipt of such moneys as may be paid in. The bank, therefore, submits to any order the Court deems fit.

Browne K.C., in reply. The Court will have regard to all the facts. The moneys are received by the State and the banks in a fiduciary capacity as trustees, and the persons beneficially entitled to the moneys so banked have the right to trace such moneys (*In re Hallett's Estate*; *Knatchbull* v. *Hallett* (1)). The provisions of the various Acts and regulations as regards the banking by the State of moneys received relate to procedure only, and not to the ownership of such moneys (*Public Trustee* v. *Hutt River Board* (2)). No right of the State to borrow money from various accounts and to treat all accounts as one, whether for the purpose of convenience, interest or audit, can destroy the right of beneficiaries to follow up by rights *in rem* (*Sinclair* v. *Brougham* (3)). The persons entitled to the trust funds have the first claim to the moneys standing to the credit of the State's account (*In re Hallett's Estate*). As the State's moneys at the banks are "mixed" funds and the banks are unable to distinguish between them, none of the moneys are attachable.

Cur. adv. vult.

(1) (1880) 13 Ch. D. 696.
(2) (1915) 34 N.Z.L.R. 753.
(3) (1914) A.C. 398.

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April 22.

GAVAN DUFFY C.J. In this case my brother *Evatt* and I are of opinion that sec. 15 of the *Financial Agreements Enforcement Act* 1932 is invalid.

RICH J. My brothers *Starke*, *Dixon* and *McTiernan* and I think that the section is valid and that the action should be dismissed. The action will be dismissed, and the costs of the Bank of New South Wales, the Commercial Banking Co. of Sydney Ltd. and the Commonwealth Bank of Australia will be paid by the plaintiff. The reasons of the Court will be given at a later date.

May 3.

The following written judgments were delivered :—

GAVAN DUFFY C.J. AND EVATT J. We have already stated in full our reasons for holding that the whole of Part II. of the *Financial Agreements Enforcement Act* is invalid (1). For the same reasons, we are of opinion that the whole of sec. 15 of the Act is invalid, and that a declaration should be made to that effect.

RICH AND DIXON JJ. The State of New South Wales claims, in this action, relief against measures taken by the Commonwealth under sec. 15 of the *Financial Agreements Enforcement Act* 1932, and challenges the validity of that section.

Sec. 15 (1) purports to enable the Treasurer of the Commonwealth, during the currency of a proclamation under sec. 7, to require any bank to pay to the Treasurer the amount of the balance standing to the credit of the State in the books of the corporation and any further moneys subsequently received by the bank on account of the State. The moneys so paid are to be applied towards the discharge of any liabilities of the State which have accrued under the Financial Agreements. A proclamation may be issued only after a resolution of the Houses of Parliament pursuant to sec. 5 or sec. 6. Thus the substantial effect of sec. 15 is to bring additional moneys into charge as a result of those sections coming into operation. Upon the construction which a majority of this Court has placed upon sec. 105A of the Constitution, there can be no doubt that such a provision would be within the powers of the Parliament if it is limited to moneys belonging to the State which it might (without

(1) *Ante*, pp. 171 *et seqq.*; pp. 192 *et seqq.*

any change in proprietary right) apply in the liquidation of its liabilities. It is said, however, that sec. 15 actually extends to moneys which are not the property of the State and for that reason is invalid.

In support of this view of the meaning and application of sec. 15, the provision contained in sub-sec. 5 is relied upon. This sub-section relates to contractors' deposits. The money deposited by a contractor with the State does not remain specifically the property of the contractor, or at any rate it does not usually so remain. The State simply incurs a liability to repay an equivalent amount of money when the conditions have been fulfilled. Whether sub-sec. 5 does not go too far in attempting to enable the Treasurer of the Commonwealth to settle the liabilities existing between the State and the contractor is another question. It is a question which does not require consideration because sub-sec. 5 is clearly severable from the remainder of the section.

In our opinion sec. 15 is valid. Even if otherwise it would receive a construction which would extend its application to moneys beyond the reach of the Commonwealth power, sec. 15A of the *Acts Interpretation Act* 1901-1930 would confine its operation to those within that power and preclude an interpretation which would result in its invalidity.

Notices have been served under sec. 15 upon the Bank of New South Wales and the Commercial Banking Co. of Sydney, the banks at which the public accounts of the State are kept, requiring them to pay to the Treasurer of the Commonwealth the amount of the balance standing to the credit of the State. The public account is kept in many sub-accounts or divisions, but for a very long time they have been treated as one account for the purpose of utilizing the aggregate balance and thus enabling money to be withdrawn from any of the accounts for any lawful expenditure to which the account is applicable although that particular account may be in debit. So on 11th April 1932, the day on which the notices were served, the aggregate balance of both banks in favour of the State was £85,589, obtained by setting off debit balances in various accounts amounting to £40,333,156 against credit balances in others amounting to £40,418,745. Among the accounts

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Rich J. Dixon J.

in credit are certain special deposit accounts and other accounts connected with the administration of "funds" for answering particular claims, and the State contends that these contain trust moneys in which the State has not the beneficial property. A conspicuous instance is given in the Supreme Court Accounts. These accounts include the Colonial Treasurer's Master-in-Equity Account, the Colonial Treasurer's Master-in-Lunacy Account, the Colonial Treasurer's Public Trustee Account, the Colonial Treasurer's Prothonotary's Account, and the Colonial Treasurer's Registrar of Probate Account. The total amount to the credit of the Supreme Court Accounts on 11th April 1932 was £482,586, and it is said that the various litigants and others in respect of whom moneys were paid in so as to create this amount are entitled amongst them to this credit as specific property. This contention does not appear to us to be consistent with the arrangement made by the State with the banks by which the amounts at the credit of these accounts is included in the aggregate amount at the State's credit for the purpose of drawing on other accounts, nor with the condition of the accounts which shows an aggregate balance of £85,589 only, an amount less by £396,997 than the total amount at credit of the Supreme Court Accounts. But, in our opinion, the contention is ill founded. The Crown in administering justice and otherwise in performing its sovereign functions receives moneys from the subject, not as trustee of those specific moneys, but in the exercise of its powers of government. The subject is entitled to repayment of an equivalent amount of money, and he relies upon the whole credit of the State as his security. The specific money paid is not segregated but loses its identity in the general funds of the Treasury. This truth is obscured by the fact that for the convenient and orderly administration of the finances of the State, as well as for the security of the subject, it is necessary to maintain in the Treasury distinct accounts of the receipts and disbursements in relation to every separate purpose and to keep corresponding bank accounts, and that this is provided for by law. But it does not follow that the doctrines of equity which enable a cestui que trust to fasten upon moneys received by the trustee in his fiduciary capacity and to treat any bank account into which they go, or any sort of property

into which they are transformed, as trust property specifically, or as subject to a charge in favour of the trust, apply to the moneys received by the Crown. The Crown is not liable for the moneys in specie, but is liable only to repay money of the same amount; and this is so notwithstanding the fact that statutory obligations may exist requiring a separation in account and an appropriation in account of moneys so that they may ever be ready against the fulfilment of the Crown's obligations. Although the inapplicability to the Crown of the doctrines of equity relating to the tracing of trust moneys arises rather from the nature of the position which the Crown occupies as a sovereign exercising the functions of government than from statutory enactment, yet the *Audit Act* appears clearly to recognize that the existence of "funds" at the Treasury and accounts for special purposes impresses no specific moneys with any equitable charge or other right of property in favour of the subject but leaves the actual moneys at the credit of the Crown its property to be dealt with according to law. Sec. 18 of the *Audit Act* 1902 enacts that the Consolidated Revenue Account, the General Loan Account, the Trust Account, the Special Deposits Account and such other accounts as the Treasurer may open shall be kept in such bank, or banks, as the Treasurer may in writing direct; sec. 19 provides that the several accounts of the Government in any Bank shall, for interest purposes, be considered as one account. It may be observed that, if part of the moneys contained in the one account and so dealt with were the specific property of others, it would be a statutory invasion of private right to treat them as available credits for the purpose of keeping down interest or debits in other accounts. Sec. 21 enacts that all moneys paid into any bank by the Treasurer to any account under the *Audit Act* shall be deemed to be public moneys, and to be lent by His Majesty to the bank. Again this looks in the same direction and regards all moneys as "public" including "trust moneys" (see definition of "public moneys"—sec. 5) and as all alike resulting in a Crown debt. It is true that sec. 30 speaks of moneys coming into the possession or under the control of a person in the Public Service by virtue of his office or employment for or on account of, or for the use or benefit of, any other person. But the directions

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which the section proceeds to give show that, while the other person retains his full and absolute right in respect of such an amount of money against the Crown, the actual money paid to the officer goes to a public account and ceases to be itself the specific property of that person.

In the case of relations between subject and subject the fiduciary character of one person or the proprietary right of the other leads Courts of equity to require that the exact moneys paid over or obtained shall be dealt with, shall be identified, and shall be appropriated so as to remain the identifiable property of the beneficial owner. But it has always been considered by Courts of equity that the highest form of security for trust funds was an investment upon the public credit of the country, and conformably with this view moneys received by the Crown might properly be conceived as represented no longer by specific property retaining its identity and charged with an equity in favour of the subject, but as transformed into an obligation of the State to repay an equivalent sum. Accordingly rule 286 of the *Equity Rules* provides that all moneys paid into Court in any estate, suit or proceeding in equity shall forthwith be deposited in such bank as may for the time being be named by the Government of the State in that behalf *to the credit of the State Treasurer at the rate of interest from time to time arranged between the Court and the State Treasurer.* This means that the moneys lose their identity but the State provides the interest and incurs an obligation to repay them. It also means that a distinct and separate account shall be kept by the State for the purpose of answering the obligation and separating the liability and the credits to answer it from other accounts, but not for the purpose of enabling the specific funds to be traced as property in specie of the subject: compare rule 288.

Again, under sec. 38 of the *Public Trustee Act* 1913 moneys payable into the Public Trustee's Account by the Public Trustee are deemed to be the property of His Majesty for the purposes of the Act, and are recoverable in like manner as money due to the Crown is recoverable. Secs. 39 to 42 provide for the due accounting for moneys received and the separateness of the Public Trustee's accounts. Under regulations promulgated on 3rd January 1930 all

moneys received by the Public Trustee in that capacity are to be banked to the credit of an account called "The Colonial Treasurer's Public Trustee Account" in the Bank of New South Wales. Capital moneys lying to the credit of the account are allowed interest at such rate as may from time to time be arranged between the Colonial Treasurer and the Public Trustee computed on the daily balance of the account, but they may be placed on deposit for a fixed period with the Colonial Treasurer at interest. It might have been possible for the Public Trustee to deal with trust funds altogether independently of the Treasury, but when the course was taken of making his account a Treasury account, it followed that the Treasury became, not the custodian of specific funds to be followed as identifiable property in its hands, but the acknowledged debtor of the trust, paying interest for the investment with it of the moneys. These observations apply also to moneys paid under the *Lunacy Act* 1898, sec. 130, whether to the Consolidated Revenue or to a trust fund, and also to the Colonial Treasurer's Registrar of Probate Account, which appears to represent moneys paid into Court under orders made in the probate jurisdiction.

Other accounts which were said to contain moneys impressed with a trust or equitable interest are contained in special deposit accounts. They include the accounts mentioned in secs. 102 (1) and (6) and 105 of the *Bankruptcy Act* 1898, although it might have been thought that these accounts would now stand in the name of the State Debt Commissioners (see sec. 9 of the *State Debt and Sinking Fund Act* 1904). Similar principles apply to these accounts. Moneys at the credit of the Testamentary Trust Fund established under the Trustee Companies' Acts, sec. 20 or sec. 21, appear to be invested with the Treasury. This is true also of the sum "lodged as a trust fund with the Colonial Treasurer" at interest under sec. 4 of Act No. 13 of 1886. The Special Deposits Account includes the Compensation Insurance, the Fire and Marine Insurance, the General Accident Insurance and the Treasury Guarantee Funds. These funds could not in any event be regarded as the proceeds of property or money held in a fiduciary character, but they are deposited at interest with the Treasury: see sec. 4 of Act No. 18 of 1927. A number of other accounts are kept at the banks which

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represent "funds" established under various statutes for public purposes. These are "funds" set apart, not to answer claims of the subject against the Crown, but some expenditure belonging to the administration of government or of some incorporated instrument of the State. A recent example is the State Transport (Co-ordination) Fund established under secs. 25 and 26 of Act No. 32 of 1931. Such "funds" belong to the State in its own right.

In our opinion the action fails and should be dismissed.

The defendant banks should receive their costs from the plaintiff.

STARKE J. In this action the State of New South Wales claims a declaration that sec. 15 of the *Financial Agreements Enforcement Act* 1932, and notices given by the Commonwealth pursuant to that section, are invalid, and also orders restraining the Commonwealth Bank of Australia, the Bank of New South Wales, and the Commercial Banking Co. of Sydney Ltd. from acting under the said notices or under sec. 15 of the Act.

This Court has already decided that the Parliament of the Commonwealth has complete and plenary powers under the Constitution to enforce against the States the Financial Agreement scheduled to the *Financial Agreement Validation Act* 1929 (No. 4 of 1929) (*New South Wales* v. *The Commonwealth* [*No.* 1] (1)). The States are subjected by the Constitution to the legislative power of the Commonwealth to enforce and execute the Agreement. The national power is paramount and may be exerted against the property, moneys, and revenues of the States in whatever form they exist, and wherever found. (Cf. *Commonwealth of Virginia* v. *State of West Virginia* (2).) And it should be remembered that this authority can be exerted by the whole power of the Commonwealth, legislative, executive, and judicial. Under the legislative power to enforce the Financial Agreement, the Parliament has enacted the *Financial Agreements Enforcement Act*, which provides that certain revenue and other funds of any State in default under the Agreement shall be paid to the Commonwealth in and towards satisfaction of the liabilities of that State under the Agreement. Under sec. 15 the Treasurer of the Commonwealth may also require

(1) *Ante*, 155.

(2) (1918) 246 U.S. 565.

any corporation carrying on the business of banking to pay to him, or some authorized person, the amount of the balance standing to the credit of the State in default, whether upon fixed deposit, current account, or otherwise, or such part thereof as he specifies.

Moneys standing to the credit of a State in the books of a banker to the State constitute prima facie a debt payable by the banker to the State, and the provision of sec. 15 is, on its face, undoubtedly within the legislative power of the Commonwealth as interpreted by this Court. But it is insisted that moneys standing to the credit of the State with its bankers may be, and are in fact in this case, impressed with trusts or interests in favour of persons or bodies other than the State and its agencies. Nothing in the power conferred upon the Parliament to make laws for the carrying out by the parties thereto of the Financial Agreement authorizes a law directing payment of moneys or the transfer of property to the Commonwealth other than the revenue, moneys, or property of a State, or its agencies. The power does not authorize the Parliament to make laws directing the payment of money or properties belonging to private citizens or other bodies or corporations, in and towards satisfaction of the obligations of a State under the Financial Agreement.

A broad legal distinction, however, exists between the relation of a banker and his customer and the relation between the customer himself and those who pay him moneys (*Union Bank of Australia Ltd.* v. *Murray-Aynsley* (1); *Thomson* v. *Clydesdale Bank Ltd.* (2)). Liability for repayment of funds which can be traced or followed into a banker's hands arises only where it can be shown that there was knowledge on the banker's part, not merely that the fund was received from the customer, but knowledge that the payment was a misapplication of the fund made in violation of the customer's duty and obligation.

The Government of New South Wales pays to its bankers, the Bank of New South Wales and the Commercial Banking Co. of Sydney Ltd., towards the end of each banking day a considerable sum of money to the credit of the Government generally, and subsequently supplies its bankers with a distribution sheet specifying

(1) (1898) A.C. 693. (2) (1893) A.C. 282.

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the different Government accounts to which the sum paid in should be allocated, and the respective sum to be credited to each account. Thus the moneys paid in may be allocated to Consolidated Revenue Account, Loan Account, Special Deposits Account, Supreme Court Account, and so forth. But the bankers do not know whether any of the moneys are trust moneys in the hands of the Government or how the moneys from time to time standing to the credit of the Government are treated in the books of the Treasury. All these accounts as between the Government and its bankers are treated as one account so that withdrawals from any account, though it be in debit, are permitted by the banker so long as the account taken as a whole is in credit. Further, by agreement between the Government and its bankers the total daily net credit balance of the general banking account with each banker exceeding £100,000 bears interest at the rate of two per cent per annum, subject to the banker's right of determination at seven days' notice. Facts such as these are wholly insufficient to impress moneys standing to the credit of the Government in its account with its bankers with any trust or equitable interest in favour of any private citizen or other body. Indeed, it would be wholly impossible for the Government business to be carried on if facts such as these were sufficient to put the banker upon inquiry as to the sources from which the Government obtained the moneys paid into the banks or the purposes to which those moneys should be applied. But the relation of the Government to those from whom it collected or received moneys must also be considered. It has been said that the Crown always recognizes equitable interests but that there is no jurisdiction to enforce a trust against it (*Pryce-Jones* v. *Williams* (1); *Hodge* v. *Attorney-General* (2); *Robertson, Civil Proceedings by and against the Crown*, pp. 482-485); but I assume that such trusts or interests can be established against the Crown or the Government of New South Wales under the *Claims against the Government and Crown Suits Act* (No. 27 of 1912). "'The guiding principle is, that a trustee cannot assert a title of his own to trust property. If he destroys a trust fund by dissipating it altogether, there remains nothing to be the subject of the trust. But, so long as the trust

(1) (1902) 2 Ch. 517, at p. 520. (2) (1839) 3 Y. & C. 342; 160 E.R. 734.

property can be traced and followed into other property into which it has been converted, that remains subject to the trust. A second principle is, that if a man mixes trust funds with his own, the whole will be treated as the trust property, except so far as he may be able to distinguish what is his own,' that is, that the trust property comes first" (*In re Hallett's Estate* (1)). And funds impressed with any such trust or charge or interest in the hands of the State, and paid or purporting to have been paid to the Commonwealth pursuant to the *Financial Agreements Enforcement Act*, would, I apprehend, remain in the hands of the Commonwealth subject to the same trusts, charges or equitable interest notwithstanding anything contained in the Act. It is clear, I think, that moneys paid by the State into its banking accounts which were collected or received on the following accounts do not fall within these principles: Consolidated Revenue Account, General Loan Account, Loan Expenditure Account, Treasury Bills Account, London Remittance Account, various departmental working accounts, e.g., Advance and Drawing Accounts, Grain Elevators Account, Grafton-Kyogle Railway Account, Coal Purchase Account. All such accounts represent the ordinary revenue and expenditure accounts of the State itself or loans raised by it. Again, the moneys collected or received from various State agencies and paid into the general banking account of the State do not fall within these principles: Government Railways (Act No. 30, 1912, and amending Acts); Sydney Harbour Trust Fund (Act No. 1, 1901—Act No. 46, 1928); Metropolitan Transport Trust Funds (Act No. 18, 1930); State Transport Co-ordination Fund (Act No. 32, 1931); Closer Settlement Fund (Act No. 38, 1928). All such accounts merely represent the moneys of the State in the hands or under the control of its agencies. But I shall refer later to a provision in some of the Acts that if any money in a fund has been received on trust then it may be dealt with in accordance with such trust without appropriation of Parliament.

The *Government Insurance Act* 1927-1930 enables the Government of New South Wales to carry on the business of insurance and direct that premium and other moneys received shall be paid into the

(1) (1880) 13 Ch. D., at p. 719.

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Special Deposits Account at the Treasury. But, though the Act contemplates the separation of the insurance funds of the Government from its other funds, still it creates no trust in favour of insurers. The business is the business of the State and the moneys collected or received in that business are State moneys.

This brings me to some special accounts, namely, (1) Supreme Court Accounts including Lunacy and Probate Accounts; (2) Public Trustee's Account; (3) Special Deposits Accounts; (4) trust moneys referred to in the terms of Acts such as the *Sydney Harbour Trust Act* 1901-1928 (No. 1 of 1901—No. 46 of 1928), sec. 76 (2).

No particular words are necessary to create a trust. All that is necessary to establish the relation of trustee and cestui que trust is to prove that the legal title to property or money is in one person, and the equitable or beneficial title in another (*Hardoon* v. *Belilios* (1)). But cases of trust must be distinguished from cases of loan. A customer pays money to the credit of his account with a banker. The banker becomes a debtor for the amount, but he is not a trustee.

(1) The Supreme Court Accounts are the moneys of suitors or trustees paid into Court, but a Court assumes no fiduciary character and is not a trustee for the suitors or persons who pay the moneys into Court, though such moneys are under its control and order. The receipt or collection of such moneys by the Court is an exercise of the judicial function of the State and not an assumption of any fiduciary character. The payment of the moneys under Rules of Court, or otherwise, to the credit of the State or the State Treasurer at interest arranged with the State Treasurer, is but using the credit of the State for the furtherance of the judicial function. Neither the Government nor the Court thereby assumes any fiduciary character, but the suitors and others have thus at their back the credit of the State for the purpose of meeting any claim or rights established as to the moneys under the control or order of the Courts.

(2) The Public Trustee Account requires separate consideration. Under the *Public Trustee Act* (No. 19 of 1913 and No. 13 of 1923) the office of Public Trustee is created. He is authorized to act as a trustee, as an executor or administrator, as collector of estates under an order to collect, and as an agent or attorney. He has all

(1) (1901) A.C. 118, at p. 123.

the same powers, duties and liabilities, and is subject to the control and orders of any Court as a private person acting in the same capacity. He may invest moneys in his hands in various forms of security. It is thus clear that he has a fiduciary character, and is seised or possessed of considerable property upon various trusts. Under reg. 5 of the Regulations of 1930, made pursuant to the *Public Trustee Act*, "all moneys received by the Public Trustee in that capacity shall be banked each day to the credit of an account called 'The Colonial Treasurer's Public Trustee Account' in the head office of the Bank of New South Wales." And in reg. 25 provisions are made for payment of interest on capital moneys lying to the credit of this account. By sec. 38 of the Act it is provided that "moneys in or payable into the Public Trustee's Account . . . shall be deemed to be property of His Majesty for the purposes of this Act, and shall be recoverable in like manner as money due to the Crown is recoverable." As already stated, the State accounts in the Bank of New South Wales are treated as one account, but in this account there is a subdivision styled the Colonial Treasurer's Public Trustee Account in which is credited various moneys collected in respect of various trusts from various clients. It is questionable whether the *Public Trustee Act* contemplated the merging of a Public Trustee Account into the general banking account of the State so that withdrawals from any account in debit are allowed if the whole account in combination is in credit. But I pass this by. The provisions of the Act and Regulations destroy the character of moneys paid into the Public Trustee's Account as trust moneys which can be identified and followed into the hands of the Crown. They, in truth, involve a lending of moneys to the State at interest, and an assumption by the State of the relation of a debtor to the Public Trustee.

(3) Special Deposits Account—This account includes a variety of items, such as deposits on contracts, tenders, the Municipal Council of Sydney Sinking Fund (Act No. 13, 50 Vict.), unclaimed dividends and other moneys. But in none can it be said, so far as the facts are before us, that the State holds the money in any fiduciary capacity upon any specified trust or trusts. The obligation of the State in respect of the special deposits is that of a debtor to a creditor.

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(4) Trust moneys referred to in the terms of Acts such as the *Sydney Harbour Trust Act* 1900-1928, sec. 76 (2). In my opinion, no trust is impressed upon the Harbour Trust Fund, which consists of rates, loan moneys, fines, &c. It can only be expended for the purposes for which the same are appropriated by Parliament, and sec. 76 simply enables an expenditure from the fund in certain cases without appropriation.

Finally I must add that sec. 15A of the *Acts Interpretation Act* 1901-1930 resolves many of the objections taken to sec. 15 of the *Financial Agreements Enforcement Act*. "Every Act, whether passed before or after the commencement of this section, shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power." Assume that the language of sec. 15 of the *Financial Agreements Enforcement Act* plainly and unequivocally includes moneys of persons or bodies other than the moneys, revenues, or property of a State or its agencies, still, the *Acts Interpretation Act* is "a legislative declaration of the intention of Parliament that, if valid and invalid provisions are found in the Act of Parliament, however interwoven together, no provision within the power of Parliament shall fail by reason of such conjunction, but the enactment shall operate on so much of its subject matter as Parliament might lawfully have dealt with" (*Newcastle and Hunter River Steamship Co.* v. *Attorney-General for the Commonwealth* (1); *Australian Railways Union* v. *Victorian Railways Commissioners* (2); *Huddart Parker Ltd.* v. *The Commonwealth* (3)). Consequently, sec. 15 would thus be confined in its application to so much of the balance standing to the credit of the State as was within the limits of the constitutional authority of Parliament. But, as already indicated, none of the funds to which our attention has been called in this case are, on the facts proved, beyond the reach of the constitutional power of the Parliament.

The action must accordingly be dismissed.

(1) (1921) 29 C.L.R. 357, at p. 369. (2) (1930) 44 C.L.R., at p. 386.
(3) (1931) 44 C.L.R., at pp. 512-513.

McTIERNAN J. This is an action in which the plaintiff, the State of New South Wales, claims a declaration that sec. 15 of the *Financial Agreements Enforcement Act* is *ultra vires* the Parliament of the Commonwealth and invalid, and a declaration that certain notices in writing, dated 9th April 1932, caused by the Treasurer of the Commonwealth to be served pursuant to the above-mentioned section upon the executive officers respectively of the defendants the Bank of New South Wales and the Commercial Banking Co. of Sydney Ltd., are invalid. The plaintiff also claims consequential relief, namely (*inter alia*) orders restraining the above-mentioned banking companies and their executive officers respectively from paying to the defendant the Commonwealth Bank of Australia the moneys referred to in the above-mentioned notices, and that defendant from receiving any part of such moneys without the consent of the plaintiff. The proclamation having been issued in relation to the plaintiff, the State of New South Wales, under sec. 7 of the *Financial Agreements Enforcement Act* 1932, these notices required the executive officers of the Bank of New South Wales and the Commercial Banking Co. of Sydney Ltd., respectively, to render forthwith to the Commonwealth Bank of Australia as an authorized person within the meaning of the Act (sec. 4) a return of the amount of the balance standing to the credit of the plaintiff, and to pay to the Commonwealth Bank of Australia forthwith the whole of such amount, and thereafter to pay to it within a period of two months any further moneys subsequently received by them respectively, on account of the plaintiff (sec. 15 (1) (*a*), (*b*)).

It was submitted on behalf of the plaintiff that upon the true construction of sec. 15 it extended to moneys standing to the credit of the State in which some person may have the beneficial interest. Upon that construction it was contended that sec. 15 is a law which purported to make available property other than that of a State for the satisfaction of its liabilities under a Financial Agreement mentioned in the Act, and was, therefore, not authorized by sec. 105A or any other provisions of the Constitution of the Commonwealth. Whether, upon its proper construction, sec. 15 extends to moneys in which some other person has an interest

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and for whom the State is a trustee or to whom it stands in some other fiduciary relationship, it is clear that the section does apply to moneys standing to the credit of the State with a banking corporation which the State may lawfully apply to its own purposes. These purposes would include, if the State saw fit so to apply such moneys, the satisfaction of any liability to which it is subject under any of the above-mentioned Financial Agreements. If the operation of the section were, upon its true construction, limited to the character last above-mentioned, it would clearly be a valid exercise of the legislative powers of the Commonwealth (*New South Wales* v. *The Commonwealth* [*No.* 1] (1)). I agree that, by force of sec. 15A of the *Acts Interpretation Act* 1901-1930, the section should be read so as not to exceed the legislative power of the Commonwealth, if upon the construction of the language which the Legislature has used, it has the wide operation contended for by the plaintiff. Having regard to the object and purpose of the *Financial Agreements Enforcement Act*, in my opinion the language in which sec. 15 is expressed does not require the construction that Parliament intended to empower the Commonwealth to ensure the payment to it of any moneys standing to the credit of the State to answer its liability under a Financial Agreement, other than the moneys which the State might lawfully draw and disburse for its own purposes. Upon this construction it is not necessary to apply sec. 15A of the *Acts Interpretation Act* 1901-1930 to hold the section to be valid. I do not think that sub-sec. 5 of sec. 15 of the *Financial Agreements Enforcement Act* demonstrates that it was the intention of Parliament that sec. 15 should have the wide operation which was contended for by counsel for the plaintiff. The relationship which would arise between the person depositing money with the State for the purposes mentioned in the sub-section and the person making the deposit would be debtor and creditor, not trustee and cestui que trust or bailee and bailor. Upon the fulfilment of the conditions mentioned, the money would be due from the State to the depositor upon the footing of debtor and creditor. The question, however, remains open, whether the Commonwealth may legislate to authorize

(1) *Ante*, 155.

the Treasurer to determine the rights of the depositor *vis-à-vis* the State in the manner provided by sub-sec. 5. The invalidity of sub-sec. 5 would not invalidate sec. 15 entirely, as it is severable from the rest of the section.

The question remains whether the money standing to the credit of the plaintiff in the Bank of New South Wales and in the Commercial Banking Co. of Sydney Ltd. to which the notices were directed, was subject to the power of the Commonwealth under sec. 15 of the Act. It was contended by the plaintiff that these moneys were not subject to the power for the reason that they were earmarked with certain trusts or charged with certain equitable interests in favour of other persons.

The issues raised by this contention may be determined by inquiry into the true nature of these funds in the hands of the banks and in the hands of the State. By sec. 17 of the *Audit Act* 1902 of New South Wales, the Treasurer of the State, whose official designation is the Colonial Treasurer, "may agree with any bank or banks upon such terms and conditions as he may think fit for the receipt, custody, payment, and transmission of public moneys, . . . and for the making of advances, and as to the charges respecting the same, and the interest payable by or to the bank or banks upon balances or advances, and generally for the conduct of the banking business of the State." Pursuant to this authority and acting on behalf of the Government of New South Wales, the Treasurer made an agreement, which was expressed to commence on 17th October 1931, with the Bank of New South Wales and the Commercial Banking Co. of Sydney Ltd. It provided (*inter alia*) that of the total daily net credit balance of the "Treasurer's General Banking Account" in both banks £200,000 (that is, £100,000 with each bank) shall be held free of interest, the balance with each bank in excess of £100,000 to bear interest at the rate of two per cent per annum, subject to the bank's right of determination at seven days' notice. "Public moneys," for whose "receipt, custody, payment and transmission," the Treasurer is authorized by sec. 17 of the *Audit Act* to make such an agreement, are defined by sec. 5 of that Act to include "all revenue, loan, trust, and other moneys whatsoever, received by, for, or on account of the State, and all moneys and fees

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declared by this Act to be public moneys." In the books of one or both of these banks there are accounts of the Treasurer styled respectively as follows: "Consolidated Revenue Account," "General Loan Account," and other accounts as set out in annexure "B" to the affidavit of Thomas Dwyer Kelly, the expenditure accountant to the Treasury of the State of New South Wales. It appears by this affidavit that for very many years, such of the above-mentioned accounts as are in each bank respectively, have been treated as one account for the purpose of utilizing the aggregate credit balance and so enabling money to be withdrawn from any of the accounts for any lawful expenditure to which the account is applicable although it may be in debit. On 11th April 1932 the total net cash balances in the above-mentioned banks, respectively, in Sydney to the credit of the plaintiff State were £63,007 and £22,582. On the same date, however, for example, in the Bank of New South Wales the Consolidated Revenue Account was in debit £10,451,654, while the "Special Deposits Account" was in credit £17,589,709 and the "Supreme Court Accounts" were in credit £482,586. The result was that on that date the maximum sum which could be drawn by the plaintiff against either of the two last-mentioned accounts was only £63,007, the amount of the total net cash balance in that bank on that day. For the Bank of New South Wales it was further deposed that a practice had been followed for many years in pursuance of which the Treasurer pays into that bank towards the end of each banking day, a considerable sum of money to the credit of the Government generally, and subsequently supplies the bank with a distribution sheet which specifies the different Government accounts to which the sum so paid in is to be allocated and the respective amounts to be credited to each account. For the Commercial Banking Co. of Sydney Ltd. it was deposed that all moneys paid into that bank to the credit of any of the above-mentioned accounts of the State in its books are paid in by the Treasurer or some officer of the State. It is further deposed that all the moneys which are paid to either bank to the credit of any of the above-mentioned accounts are received by the banks respectively as moneys of His Majesty in the right of the State of New South Wales, and no information is given by or on behalf of the Government

or the Treasurer, or the officers paying in these moneys, whether the whole, or any part of them, are trust moneys in the custody of the Government, and that neither bank has any knowledge how such moneys are dealt with in the books of the Treasury or of the Department of the Government from which they are received. For the State of New South Wales it was explained that the "Special Deposits Account" includes (*inter alia*) a number of accounts established under various statutes, e.g., Bankruptcy Suitors Fund, Bankruptcy Unclaimed Dividend Fund (Act No. 25, 1898), Municipal Council of Sydney Sinking Fund (Act 50 Vict. No. 13), Testamentary and Trust Fund (*Perpetual and Permanent Trustee Companies' Acts*). It also includes the Compensation Insurance Fund, Fire and Marine Insurance Fund, General Accident Insurance Fund, and Treasury Guarantee Fund. As to these four funds last mentioned, it was stated that they belong to the Government Insurance Office of the plaintiff and the expenditure from these funds is limited to the purposes of the *Government Insurance Act* 1927-1930. It was also said that the Treasurer is by statute a trustee and custodian of the moneys in all the above-mentioned accounts which are included in the Special Deposits Account. It was further deposed on behalf of the State of New South Wales that the "Supreme Court Accounts" include—Colonial Treasurer's Master-in-Equity Account, Colonial Treasurer's Master-in-Lunacy Account, Colonial Treasurer's Public Trustee Account and Colonial Treasurer's Prothonotary Account and the Colonial Treasurer's Registrar of Probate Account. Payment out of these accounts is governed by the following Statutory Rules and statutes respectively—rules 288 and 289 of the *Equity Rules* 1902, sec. 130 of the *Lunacy Act* 1898, *Public Trustee Act* 1913 (as amended by Act No. 13 of 1923) and the Regulations made thereunder, the *Common Law Procedure Act* 1899 and the Rules made thereunder, and the *Wills, Probate and Administration Act* 1898 and the Rules made thereunder. For the Bank of New South Wales and the Commercial Banking Co. of Sydney Ltd., it was deposed that all the accounts specified under the heading "Supreme Court Accounts" are opened by the Colonial Treasurer, and they are all drawn upon by officials authorized by him, and that neither bank was informed nor does it know whether the amounts standing to the credit of

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such accounts are trust funds or whether any particular amounts which are paid in to such accounts from time to time are trust funds. It was further deposed that no order of any Court is produced nor is any notice of such an order given to the bank before any moneys are withdrawn from any such account, but cheques are drawn upon these accounts by persons authorized by the Treasurer and these cheques are paid by the bank without the production of any order of the Court. Moreover, the practice has been to make a transfer from one of such accounts to some other account of the plaintiff upon written direction to that effect by an authorized official. The submission made on behalf of the plaintiff, particularly with reference to the moneys in the Special Deposits Account and the Supreme Court Accounts, that they are trust moneys paid into the banks by the Treasurer as a trustee and are impressed with a trust in the hands of the bankers, is, in my opinion, quite inconsistent with the practice deposed to by Mr. Thomas Dwyer Kelly, which has been followed for many years, under which the Treasurer operates upon the balance of all the accounts in combination and applies the moneys so obtained indiscriminately for the purposes of the Government. I think that this practice was in conformity with law, and that the moneys paid by the Treasurer into the Special Deposits Account and the Supreme Court Accounts and the other accounts are not in the bank earmarked with any trust or subject to any equitable interest. When the moneys paid into these accounts were received by the Treasurer they became "public moneys" within the meaning of the *Audit Act* 1902. Sec. 18 of that Act is in these terms: "The Consolidated Revenue Account, the General Loan Account, the Trust Account, the Special Deposits Account, and such other accounts as the Treasurer may open shall be kept in such bank or banks as the Treasurer may in writing direct." Sec. 19 provides: "The several accounts of the Government in any bank shall, for interest purposes, be considered as one account." Sec. 21 is in these terms: "All moneys paid into any bank by the Treasurer, or by any such person as aforesaid, to any account under this Act, shall be deemed to be public moneys, and to be lent by His Majesty to the persons or body corporate to whom or to which such bank belongs." It may be noted also that sec. 17, under which the Treasurer

made the agreement with the banks, refers to the "receipt, custody, payment, and transmission of public moneys." The result, in my opinion, is that the Bank of New South Wales and the Commercial Banking Co. of Sydney Ltd. receive the moneys paid by the Treasurer into the accounts which have been mentioned, as moneys the property of the King in right of the State of New South Wales, which were lent by the State to the banks respectively. When the actual practice of the Treasury and the banks in respect of Government accounts is considered with the provisions of the *Audit Act*, it becomes quite clear that the balance of the moneys standing to the credit of the State is the ostensible property of the State available for the satisfaction of the obligations of the State, whether voluntarily or involuntarily, as a result of the exercise of the powers of the Commonwealth under sec. 15 of the *Financial Agreements Enforcement Act* 1932. Whether, if it appeared that some subject of the State of New South Wales had an equitable charge or other interest upon or in the balance, this circumstance would disentitle the Commonwealth to exercise the power given by sec. 15 and take over the fund subject to the charge or equitable interest, or otherwise, is not a matter which I think requires decision, for upon the question as to the relationship of the Treasurer representing the State to the persons from whom the money in these accounts was received or as to who are entitled to receive payments out of these accounts, I agree with the joint opinion of my brothers *Rich* and *Dixon* and the opinion of my brother *Starke*. The receipt of these moneys by the Treasurer does not constitute the State a trustee of them, and the effect of the Acts and statutory rules relating to these accounts is not to constitute the State a trustee of specific moneys therein, so that the persons above mentioned can claim that specific moneys in the accounts are earmarked with a trust in their favour or that the aggregate moneys in an account with which such specific moneys were mixed is subject to a charge. In this view the moneys received by the Treasurer were not, in effect, divested of their character of trust funds or freed from any charge by sec. 21 of the *Audit Act* 1902. Forthwith upon their receipt by the Treasurer they became part of the public moneys of the State, and the persons entitled to be paid out of the Accounts which have been mentioned

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became dependent on the credit of the State but are not entitled to any charge upon the moneys which at the relevant date were standing to the credit of the plaintiff.

The action should be dismissed.

Action dismissed. Costs of the defendants the Commonwealth Bank of Australia, the Bank of New South Wales and the Commercial Banking Co. of Sydney Ltd. to be paid by the plaintiff.

Solicitor for the plaintiff, *J. E. Clark*, Crown Solicitor for New South Wales.

Solicitor for the Commonwealth and the Commonwealth Treasurer, *W. H. Sharwood*, Commonwealth Crown Solicitor.

Solicitors for the Commonwealth Bank of Australia, *Allen, Allen & Hemsley.*

Solicitors for the Bank of New South Wales, *Allen, Allen & Hemsley*, and *Perkins, Stevenson & Co.*

Solicitors for the Commercial Banking Co. of Sydney Ltd., *Dibbs, Parker & Parker.*

J. B.