[HIGH COURT OF AUSTRALIA.]

UNIVERSAL FILM MANUFACTURING COMPANY (AUSTRALASIA) LIMITED } PLAINTIFF;

AGAINST

THE STATE OF NEW SOUTH WALES AND ANOTHER . . . . . } DEFENDANTS.

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SYDNEY, *Aug.* 10, 15, 16, 17; *Nov.* 25.

Isaacs A.C.J., Higgins, Gavan Duffy, Powers, Rich and Starke JJ.

*Income Tax (N.S.W.)—Payment to person outside State for right to use picture films—Liability of person making payment as representative taxpayer—Revenue from films constituted a trust fund—Payments thereout to person outside State—Constitutional law—Action in High Court for declaration of invalidity of State statute—Jurisdiction not exercised—Income Tax (Management) Act* 1912 (*N.S.W.*) (*No.* 11 *of* 1912), *secs.* 11*-14, 18A*—*Income Tax (Management) Amendment Act* 1925 (*N.S.W.*) (*No.* 26 *of* 1925), *sec.* 5*.

The plaintiff company in New South Wales entered into an agreement with an American corporation which conferred upon the plaintiff company, subject to the performance of certain terms and conditions, the sole and exclusive right and licence to distribute, exhibit and exploit, and to lease and license others to exhibit and display in Australia motion pictures or films therein mentioned. One of the terms was that all moneys and income received by the plaintiff should constitute a trust fund and be held in trust for the parties in accordance with their interests as therein specified. Other terms were to the effect that the plaintiff should from time to time during the term of the agreement pay in New York to the American corporation a sum equal to 65

* Sec. 11 of the *Income Tax (Management) Act* 1912 (N.S.W.) provides that "(1) The tax upon any income shall be payable by the person (hereinafter called the principal taxpayer) who is beneficially entitled to such income: Provided that (*a*) if the principal taxpayer is a company, the tax upon the income of the company shall be also payable by the public officer of the company; (*b*) if the principal taxpayer . . . is a foreign company not registered in the State and is entitled to income from goods sold in the State by an agent, or to income from any business carried on in the State by an agent, or to income received in the State by an agent, the tax on such income shall be also payable by such agent . . .; (*c*) if the principal taxpayer is entitled to income received on his behalf by a trustee . . . or other person lawfully empowered or authorized to receive such income, the tax on such income shall be also payable by such trustee . . . or other person; (*d*) if the principal taxpayer is resident out of the State and is entitled to income being interest payable upon money

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per cent of the total gross film revenue derived from all sources whatsoever and, after payment of the 65 per cent, should be entitled to retain and keep the remaining 35 per cent for its full and complete compensation and interest under the agreement. The Commissioner of Taxation of New South Wales, purporting to act under sec. 18A of the *Income Tax (Management) Act* 1912 (N.S.W.) as amended by sec. 5 of the *Income Tax (Management) Amendment Act* 1925 (N.S.W.), assessed the plaintiff company as representative taxpayer for income tax in respect of moneys paid by it to the American corporation under the agreement. An action was brought in the High Court by the plaintiff company, against the State of New South Wales and the Commisioner of Taxation, claiming declarations that sec. 18A as amended was invalid as being in contravention of certain provisions of the Commonwealth Constitution and that the assessment was void.

*Held*, by *Isaacs* A.C.J., *Gavan Duffy*, *Rich* and *Powers* JJ. (*Starke* J. dissenting), that the plaintiff company was not made liable by the Act to payment of income tax in respect of the moneys paid by it to the American corporation:

By *Isaacs* A.C.J. and *Powers* J., on the ground (1) that in sec. 18A the words "pays or credits or agrees to pay or credit" referred to a payment or crediting in New South Wales, and (2) that the money sought to be taxed was not, within the meaning of sec. 18A, "money paid as consideration for" any of the matters there mentioned;

By *Rich* J., on the ground that, even if a liability to the tax was imposed by sec. 18A upon the American corporation, no liability was imposed upon the plaintiff company as representative taxpayer in respect of the moneys paid by it to the American corporation either by sec. 18A itself or by sec. 11 or any other section of the Act.

*Held*, also, by *Isaacs*, *Gavan Duffy*, *Powers*, *Rich* and *Starke* JJ. (*Higgins* J. dissenting), that the Court should not determine the question of the validity of sec. 18A, the determination of that question not being necessary to secure the rights of the plaintiff company.

secured by a mortgage of any land in the State the tax on such income shall be also payable by the mortgagor. . . . The persons by whom income tax is payable under paragraphs (*a*), (*b*), (*c*), and (*d*) are hereinafter called representative taxpayers." Sec. 18A (enacted by sec. 5 of the *Income Tax (Management) Amendment Act* 1925 (N.S.W.) provides that "If any person in New South Wales pays or credits or agrees to pay or credit to any person whose principal place of business is outside the State, in this section referred to as the foreign taxpayer, any money as consideration for (*a*) the purchase or lease for exhibition in this State of any motion picture film not manufactured within the Commonwealth; or (*b*) the purchase or lease for use in the State of any advertising matter used or to be used in connection with any such film; or (*c*) the right or licence to exhibit or use in any manner in the State any such film or advertising matter; or (*d*) any other right in connection with the use or exhibition in the State of any such film or advertising matter, such money shall be deemed to be taxable income of such foreign taxpayer, and in respect thereof the foreign taxpayer shall be deemed to be the principal taxpayer, and the person in the State paying or crediting or agreeing to pay or credit such money shall be deemed to be the representative taxpayer."

ACTION referred to the Full Court.

An action was brought in the High Court by the Universal Film Manufacturing Co. (Australia) Ltd. against the State of New South Wales and the Commissioner of Taxation of that State in which the statement of claim as amended at the hearing was as follows :—

1. The plaintiff is a company duly incorporated under the laws of the State of New South Wales and entitled to sue in and by its corporate name and style and its registered office is situate in Sydney in the said State.

2. The plaintiff Company at all relevant times has carried on the business of distributing motion picture films under the agreement hereinafter mentioned throughout the State of New South Wales and other States of the Commonwealth and for the purposes of such business has acquired motion picture films which it hires to the proprietors of motion picture theatres throughout New South Wales and the other States of the Commonwealth.

3. Universal Pictures Corporation is a foreign corporation duly incorporated under the laws of the State of New York United States of America and has its principal place of business and head office in New York City in such State. At all relevant times it has carried on the business of manufacturing and acquiring outside the Commonwealth motion picture films.

4. A great number of motion picture films manufactured outside the Commonwealth have been and are being imported into the State of New South Wales by the plaintiff Company and many other companies resident in such State and carrying on therein the business of motion picture distributors under contracts for the purchase or lease of such films for exhibition in the said State and elsewhere in the Commonwealth or under contracts conferring a right or licence to exhibit the same in the said State and elsewhere in the Commonwealth.

5. Such contracts have been and are being made with the manufacturers or other owners of such films and such manufacturers or other owners have at all material times their principal place of business outside the State of New South Wales.

6. The manufacturers or such other owners aforesaid have supplied and do supply under the said contracts to the person or

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company who purchases or leases the said films or who acquires from them the right or licence to exhibit or use such films with advertising matter for use in connection with such films, such advertising matter being manufactured outside the Commonwealth.

7. The plaintiff Company and the said other companies have imported and do import into the State of New South Wales large quantities of advertising matter so supplied as aforesaid for use in the said State and elsewhere in the Commonwealth in connection with the films so imported by them as aforesaid.

8. The plaintiff Company entered into a certain agreement dated 14th August 1923 with the said foreign corporation at Sydney aforesaid which agreement has been extended by two several agreements also entered into at Sydney aforesaid dated respectively 1st August 1924 and 23rd July 1925 and by the said agreement so extended as aforesaid the said foreign corporation agreed to give and the plaintiff Company agreed to accept delivery at certain places in the United States of America of certain motion picture films manufactured outside the Commonwealth and the plaintiff Company undertook to distribute such films to exhibitors in Australia. Under the said agreement so extended as aforesaid the said foreign corporation agreed to sell to the plaintiff Company certain advertising matter manufactured outside the Commonwealth for use in connection with such films and the plaintiff Company agreed to accept delivery of the same in the United States of America and to use the same accordingly. Under the said agreement so extended as aforesaid the plaintiff Company agreed to pay at New York City aforesaid to the said foreign corporation certain moneys as consideration for the right or licence to exhibit and to use such films in Australia and for the purchase of such advertising matter for use in Australia in connection with such films.

9. Under the said agreement so extended as aforesaid the plaintiff Company accepted delivery of certain motion picture films and advertising matter in the United States of America in accordance with the terms thereof and in due performance of the said agreement so extended as aforesaid brought the same from the United States of America into the Commonwealth at Sydney aforesaid and passed

customs entries for the same and distributed the same in New South Wales and other States of the Commonwealth.

10. During the year ended 30th June 1926 the plaintiff Company paid to the said foreign corporation at New York City aforesaid certain moneys under the said agreement so extended as aforesaid of which said moneys the sum of £37,387 was paid as consideration for the right or licence to exhibit and use such motion picture films in the State of New South Wales and for the purchase of such advertising matter for use in the said State in connection with such films in accordance with and under the terms of the said agreement so extended as aforesaid.

11. The defendant William Henry Whiddon as Commissioner of Taxation of the State of New South Wales claims that the said sum of £37,387 so paid by the plaintiff Company to the said foreign corporation as aforesaid is taxable income of the said foreign corporation under and by virtue of sec. 18A of the New South Wales *Income Tax (Management) Act* 1912 as amended by the *Income Tax (Management) Amendment Act* 1925 and has purported to assess and has served upon the plaintiff Company a document purporting to be a notice of an assessment made by him under such Acts claiming payment by the plaintiff Company as representative taxpayer under such section of the sum of £9,346 as income tax payable by the plaintiff Company in respect of the said sum of £37,387 by virtue of the said Acts and of the *Income Tax (Amendment) Act* 1925.

12. As will appear by the said notice when produced the plaintiff Company is required to pay the said sum of £9,346 on or before the 29th June 1927.

13. The plaintiff Company has refused and still refuses to pay the said sum of £9,346 and the defendant William Henry Whiddon threatens and intends to enforce payment thereof by the plaintiff Company.

14. The plaintiff Company submits that sec. 18A aforesaid and the said *Income Tax (Amendment) Act* 1925 are and each of them is *ultra vires* the Legislature of the State of New South Wales inasmuch as both and each of them infringe secs. 90, 92 and 117 of the Commonwealth Constitution and that the said alleged assessment and the said notice are and each of them is void and of no effect.

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14A. The plaintiff Company submits that the Commonwealth Parliament by Act No. 25 of 1921 (*Customs Tariff* 1921) having legislated under the powers conferred by sec. 51 (I.) and (II.) of the Constitution of the Commonwealth sec. 18A of the *Income Tax (Management) Act* 1912 as amended by the *Income Tax (Management) Amendment Act* 1925 and the *Income Tax (Amendment) Act* 1925 are inconsistent with such legislation and invalid under sec. 109 of the Commonwealth Constitution to the extent that they impose taxation on films and advertising matter and that the whole of the said section and Act are invalid because the provisions thereof are not severable.

15. The plaintiff Company fears that unless restrained by the declaration order and injunction of this Honourable Court the defendant William Henry Whiddon as Commissioner of Taxation as aforesaid will proceed to enforce the provisions of the Acts aforesaid and to recover from the plaintiff Company the said sum of £9,346 and otherwise to act upon the said alleged assessment and notice of assessment and thereby cause loss and damage to the plaintiff Company.

The plaintiff Company claimed :—

(1) A declaration that sec. 18A of the *Income Tax (Management) Act* 1912 as amended by the *Income Tax (Management) Amendment Act* 1925 and the *Income Tax (Amendment) Act* 1925 are *ultra vires* the Legislature of the State of New South Wales ;

(2) A declaration that the said alleged assessment by the defendant William Henry Whiddon and the said notice are and each of them is void and of no effect ;

(3) An injunction restraining the defendants and their officers and agents and each of them from charging levying or collecting the said sum of £9,346 or any part thereof and from otherwise proceeding upon or under the said assessment ;

(4) An order that the defendants pay to the plaintiff Company the costs of this action ;

(5) Such further or other relief as to the Court may seem meet.

The following admissions were made by the parties :—

1. That a great number of motion picture films manufactured

outside the Commonwealth have come and are still coming into the State of New South Wales from overseas under contracts made by the plaintiff Company and many other companies resident in the said State and carrying on therein the business of motion picture distributors, such contracts being contracts for the purchase or lease of such films for exhibition in the said State and elsewhere in the Commonwealth or contracts conferring a right or licence to exhibit the same in the said State and elsewhere in the Commonwealth;

2. That the manufacturers or other owners of such films with whom the plaintiff and such other companies have entered and do enter into such contracts are persons having their principal place of business outside the said State;

3. That advertising matter manufactured outside the Commonwealth has been and is being supplied under the said contracts to the plaintiff and such other companies by such manufacturers or other owners for use in connection with such films in the said State and elsewhere in the Commonwealth;

4. That the plaintiff Company entered into the agreement (Ex. A) with Universal Pictures Corporation referred to in par. 3 of the statement of claim, and that such agreement was extended by two several agreements dated respectively 1st August 1924 and 23rd July 1925; that the said agreement and the said two agreements for the extension thereof were made at Sydney in the said State;

5. That under the said agreement so extended as aforesaid Universal Pictures Corporation from time to time delivered to a common carrier certain motion picture films and advertising matter for carriage from the United States of America to the said State and forwarded to the plaintiff Company bills of lading covering the said films and advertising matter; that the plaintiff Company passed customs entries for the same at Sydney in the said State and distributed the same in the said State and elsewhere in the Commonwealth;

6. That the exclusive right to exhibit the said motion picture films in the said State was conferred upon the plaintiff and the said other companies respectively by virtue of the said contracts.

The agreement Ex. A which is referred to in the admissions and in which the Universal Pictures Corporation is called

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"Universal" and the plaintiff Company is called "Distributor," contained the following provisions :—

"First, Universal hereby grants to the Distributor the sole and exclusive right and licence, subject to the performance by the Distributor of the terms and conditions herein required to be performed by it, to distribute, exhibit and exploit and to lease and license others to exhibit and display, for the term and in the territory mentioned, such motion pictures as are hereinafter . . . set forth. . . . Third, the territory in and throughout which the Distributor is authorized so to distribute, exhibit and exploit and to lease and license others to exhibit and display said motion pictures is the territory known as Australia. Fourth, Universal agrees to deliver and the Distributor agrees to accept delivery of and fully distribute all motion pictures manufactured, produced or acquired and released by Universal during the term of this contract except such pictures as Universal in its absolute and uncontrolled discretion may consider not available for distribution within the territory hereinabove specified. . . . Fifth, the rights hereby given and granted to the Distributor shall be upon the following express conditions, the prompt and punctual performance of which by the Distributor are of the very essence of this agreement and conditions precedent to compliance herewith by the Universal, all of which the Distributor hereby covenants and agrees to perform :— . . . . (b) All moneys and income received by the Distributor as hereinafter in this paragraph specified, shall constitute a trust fund and shall be held in trust for the parties hereto, in accordance with their respective interests as hereinafter specified. The Distributor shall pay to the Universal each and every week, during the term of this agreement, a sum equal to sixty-five per cent of the total gross film revenue derived from all sources whatsoever, directly or indirectly, including leases, contracts, distribution, exhibitions, receipts from exchanges, sub-leases, sub-licences, or otherwise, without any deduction whatsoever. However, that any moneys received by the Distributor in the nature of recovery of prepaid expense for the exhibitor shall not be subject to division with Universal. . . . After the Universal shall have been fully paid its sixty-five per cent of the gross revenue as above provided, the

Distributor shall then be entitled to retain and keep the remaining thirty-five per cent thereof as and for its full and complete compensation and interest hereunder. The term gross revenue as used herein means all revenue from the distribution of pictures."

On 27th June 1927 an injunction was granted by *Isaacs* A.C.J. restraining the defendants until the hearing of the action from charging, levying or collecting the tax purporting to have been imposed and from taking any proceedings against the plaintiff Company in respect of the assessment which had been made.

The action coming on for hearing was referred to the Full Court.

The only matter argued was the validity of sec. 18A of the *Income Tax (Management) Act* 1912, and as the Court expressed no opinion upon that matter the arguments are not reported.

*Flannery* K.C. and *Browne* K.C. (with them *Barton* and *Harper*), for the plaintiff.

*Brissenden* K.C. (with him *H. E. Manning*), for the defendants.

*Teece* K.C. (with him *Badham*), for the Commonwealth intervening.

*Cur. adv. vult.*

The following written judgments were delivered :— Nov. 25.

ISAACS A.C.J. This is an action instituted in this Court in original jurisdiction, seeking relief against an assessment under the New South Wales income tax legislation. The circumstance attracting the original jurisdiction is that the matter involves the interpretation of the Commonwealth Constitution since the validity of sec. 18A of the State *Income Tax (Management) Act* 1912, and sec. 5 of the *Income Tax (Management) Amendment Act* 1925 is challenged as in conflict with secs. 90, 92, 51 (I.) and 109 of the Constitution. The " matter " being thus placed within the jurisdiction of this Court, the rights of the parties to the controversy are to be determined. The plaintiff claims generally (1) a declaration of invalidity of the section, and (2) a declaration that the assessment

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is void and of no effect, and (3) an injunction restraining enforcement of the assessment, (4) costs and (5) further and other relief. It is plain the whole subject is open so far as the law relating to the validity of the assessment is concerned. The question of constitutional invalidity was strenuously argued. The parties seem to have been willing to concede the legal applicability of sec. 18A to the admitted facts of the case. That is to say they were apparently willing to admit that apart from the Federal Constitution the State law created a liability. But there are powerful reasons for the Court not acting on that view if it finds the law otherwise.

Apart altogether from any constitutional question the duty of the Court is stated by *Jessel* M.R. in *Chilton* v. *London Corporation* (1). It is there said of the question of a certain right alleged by plaintiff and not denied by defendant:—" If the right by itself is one which cannot be supported in law, it cannot entitle the plaintiff to judgment merely because the defendant does not deny the right. *The Court is bound to give judgment according to law.*" The Master of the Rolls continues: " But then it is said, though the right is not known to the common law, it may be created by Act of Parliament, and the Judge is bound to assume, when not disputed by the pleadings, that it has been so created." The learned Judge would not accede to that; and even took judicial notice of all Acts of Parliament, and therefore that there was no such Act. Here we have the very enactment brought before us for construction and interpretation. Even though that construction and interpretation was intended for the ultimate purpose of applying the Federal Constitution, the process was an essential one, and, if it leads to the conclusion that the case does not fall within the section, that is incident to the operation and has its legal consequences. In addition to that which I may call the ordinary course of the Court, there is in this case another principle to remember. A Court will not proceed to declare a statute invalid unless that be necessary as a step in determining the rights of parties. It is necessary, therefore, before determining the constitutional question, to see whether the interest of the plaintiff is such as to call for that determination. And that necessity requires the prior inquiry as to whether the plaintiff would,

(1) (1878) 7 Ch. D. 735, at p. 740.

apart from the Commonwealth Constitution, be liable to pay the tax claimed. The first step consequently is to examine the facts, which are admitted.

(1) *The Facts.*—The material facts are these:—The plaintiff, a New South Wales company, entered into certain agreements, the latest being dated 23rd July 1925, at Sydney with an American corporation called the Universal Pictures Corporation, which I shall refer to as the Universal, having no office or representative in New South Wales and not carrying on business there. By those agreements the plaintiff in the first place acquired from the Universal the sole and exclusive right and licence, *inter alia*, to exhibit certain motion pictures on terms stipulated. Among the terms stipulated were these:—That the gross receipts from the exhibition of the pictures "shall constitute a trust fund and shall be held in trust for the parties hereto, in accordance with their respective interests as hereinafter specified." That is the governing provision as to the beneficial ownership of the gross receipts. Then the "respective interests" of the parties in the "trust fund" are stated thus:—"The Distributor" (that is, the plaintiff) "shall pay to the Universal each and every week, during the term of this agreement, a sum equal to sixty-five per cent of the total gross film revenue . . . . After the Universal shall have been fully paid its sixty-five per cent of the gross revenue as above provided, the Distributor shall then be entitled to retain and keep the remaining thirty-five per cent thereof as and for its full and complete compensation and interest hereunder." The Distributor is to render weekly statements of, *inter alia*, gross receipts, the statements being posted to the Universal in New York. Not more than five days after the end of each week "the Distributor shall make payment to Universal of Universal's share of the gross film revenue for the said week such payment to be made in New York." Then, besides the exclusive rights of exhibiting pictures, the plaintiff also, by a distinct set of provisions in the agreement, became entitled and bound to purchase advertising matter at a lump price, that is, at actual cost plus 10 per cent. The pictures themselves remain the property of the Universal. The agreement provides that it in no wise constitutes a partnership between the

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parties, and it also declares that it is to be construed under the laws of the State of New York. As to the last-mentioned provision, we have not any material before us to show that the laws of New York place any construction on the agreement different from that according to the law of New South Wales.

As to the gross receipts derived from exhibiting the pictures, it seems plain to demonstration that the moment they are received they form a trust fund, to 65 per cent of which Universal is instantly beneficially entitled, to the remaining 35 per cent of which the plaintiff is instantly beneficially entitled. This is a trust which a Court of equity would in a proper case enforce. In other words, the plaintiff is at once the trustee of the Universal as to the 65 per cent. It is bound to discharge its trust obligation by paying each week a sum equal to 65 per cent of the gross revenue. If it does so, then, like any other trustee who has a right to bank trust funds, its trust obligation is discharged. But the words "a sum equal to" do no more than say the identical moneys received need not be specifically divided. The plaintiff's right to retain 35 per cent is only after full payment of the 65 per cent to the Universal. The trust interest of the Universal is carefully guarded and preserved. Consequently the case is not one where the grantor of the right is simply the creditor of the grantee, who is merely the debtor, there being no trust fund, but merely the general liability and ability of the debtor relied on to satisfy his personal obligation. Further, the payment of the 65 per cent is to be made and in this case was made in New York.

(2) *Sec.* 18A.—In my opinion the facts of this case place it entirely outside the purview of the section: first, because the actual payment was agreed to be made, and was made, outside New South Wales; and, further, because the agreed distribution of the business receipts is not sufficient to satisfy the expression "money as consideration."

As to the first reason, it depends on the true interpretation of the expressions "pays or credits or agrees to pay or credit." *Ex necessitate* the words "pays" and "credits" refer only to acts done within New South Wales. A "person in New South Wales" could not naturally do the act of paying or crediting elsewhere. To extend those words to world-wide application would be to embrace

transactions clearly beyond the territorial competency of the State. For instance, if, as suggested, a New South Wales merchant who empowered someone in New York or London there to purchase and pay for goods, could bring the section into intended operation, so as to tax the American or English vendors as principal taxpayer in respect of his price, a jurisdiction would be assumed which is wholly indefensible, and even although the buyer derived his means of payment from New South Wales. I apply the doctrine of *Macleod* v. *Attorney-General for New South Wales* (1). But it was said further that the phrase " agrees to pay or credit " is different, because, the agreement being made in New South Wales, it matters not where the payment is to be made or out of what source. So long as an agreement of purchase is made—it is said—in New South Wales, the payment in England out of English sources of a lump sum as full consideration to the English vendor makes him amenable to the taxing power of New South Wales.

I cannot assent to so vast a jurisdiction. No doubt the agreement in New South Wales is on ordinary principles a subject of local control. But that is altogether different from assuming jurisdiction to control the subject matter itself of the agreement, situate and arising entirely in another jurisdiction. There are two grounds, then, on which I interpret " pay or credit " in the phrase " agrees to pay or credit " as limited to New South Wales. One ground is that I apply the doctrine of *Lindley* M.R. in *In re Birks* ; *Kenyon* v. *Birks* (2), adopted by this Court in *Brunswick Corporation* v. *Baker* (3). The learned Master of the Rolls said : " I do not know whether it is law, or a canon of construction, but it is good sense to say that whenever in a deed, or will, or other document, you find that a word used in one part of it has some clear and definite meaning, then the presumption is that it is intended to mean the same thing where, when used in another part of the document, its meaning is not clear." The other ground is that the words are, at least, ambiguous. That is a circumstance which, besides linking up with the observations of *Lindley* M.R., forms in a case like the present an independent ground for rejecting the wider interpretation. In taxation legislation,

(1) (1891) A.C. 455.
(2) (1900) 1 Ch. 417, at p. 418.
(3) (1916) 21 C.L.R. 407, at p. 417.

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unless the language unambiguously includes the case the Crown fails. (See per Lord *Parker of Waddington* for the Privy Council in *Brunton* v. *Commissioner of Stamp Duties* (*N.S.W.*) (1) and per Lord *Hobhouse* for the same tribunal in *Harding* v. *Commissioners of Stamps* (*Q.*) (2).) In order to find whether this condition is satisfied we are not at liberty to depart from the very words of the legislation. Lord *Haldane* L.C. in *Inland Revenue Commissioners* v. *Herbert* (3) said: "The duty of a Court of law is simply to take the statute it has to construe *as it stands*, and to construe its words according to their natural significance." That is the first great rule. To emphasize this, great Judges have told us that we are not to paraphrase the Act and then treat the paraphrase as if the Legislature had made that the law. Lord *Halsbury* L.C. in *Gresham Life Assurance Society* v. *Bishop* (4) observed: "I deprecate a construction which passes by the actual words and seeks to limit the words by what is supposed to be something *equivalent* to the language used by the Legislature." The Lord Chancellor was in harmony with what has first been said by Lord *Denman* C.J. in *Everard* v. *Poppleton* (5) and Lord *Macnaghten* in *Mussummat Durga Choudhrain* v. *Jawahir Singh Choudhri* (6).

The second reason for holding the case outside the section is, as above stated, that the money sought to be taxed is not within the meaning of the statutory phrase "money as consideration." The mere fact that sec. 18A is inserted in an Income Tax Act and that the money is called "income" cannot alter the essential nature of the enactment. (See, for instance, *Lawless* v. *Sullivan* (7).) Where a grantee pays or credits or agrees to pay or credit "money as consideration" it means ordinarily and naturally money of the grantee, money of which he has the beneficial ownership, his liability resting on contract only. But where, as here, a grantee of an exclusive licence undertakes that all moneys received by him "shall constitute a trust fund and shall be held in trust for" both grantor and grantee in fixed proportions, the grantor's proportion

(1) (1913) A.C. 747, at p. 760.
(2) (1898) A.C. 769, at p. 776.
(3) (1913) A.C. 326, at p. 332.
(4) (1902) A.C. 287, at p. 291.
(5) (1843) 5 Q.B. 181, at p. 184.
(6) (1890) L.R. 17 Ind. App. 122, at p. 127.
(7) (1881) 6 App. Cas. 373, particularly at p. 380.

having priority, it cannot with any propriety be said that the grantee is paying "money as consideration" in the usual and ordinary and natural sense. He is executing a trust obligation. If trustees carry on business for several *cestuis que trust*, including it may be themselves, and they distribute the fund in the prescribed proportions, they are only handing over to each what is already beneficially his own. And here, although the local company has the exclusive right of exhibition, it is only, after all, a right to collect a fund, of which 35 per cent is from the moment of receipt its property and 65 per cent the property beneficially of the grantor. The plaintiff receives the 65 per cent as trustee for the beneficial owner, the foreign company. Now, the Act is explicit as to such a position. Sec. 11 (1) says: "The tax upon any income shall be payable by the person (hereinafter called the principal taxpayer) who is beneficially entitled to such income." Proviso (*c*) says: "If the principal taxpayer is entitled to income received on his behalf by a *trustee* . . . or other person lawfully empowered or authorized to receive such income, the tax on such income shall be also payable by such trustee . . . or other person." Again, at the end of sub-sec. 1: "The persons by whom income tax is payable under . . . (*c*) . . . are hereinafter called representative taxpayers." Then secs. 12, 13 and 14 apply as to duties, limitations of responsibility and indemnity.

The American company is therefore clearly and effectively liable to pay income tax to the State of New South Wales on the 65 per cent gross income—which by agreement is also net income in this case—in the ordinary way and at the ordinary rates, just as the local company is liable as to its 35 per cent. There is no escape from contributing to the State Treasury in respect of what is received from New South Wales sources.

Some very powerful arguments were addressed to us on the subject of invalidity. In the circumstances no expression of judicial opinion on that subject would be in accordance with recognized practice or be more than *obiter*. I therefore say nothing on that subject but reserve my opinion for a future occasion should the necessity arise.

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My brother *Gavan Duffy* wishes me to say that he has read this judgment and agrees with the result at which I have arrived. My brother *Powers* authorizes me to say he agrees with my judgment.

HIGGINS J. This case, so elaborately argued, has taken a curious turn—as I think, a mistaken turn. I had, after the argument, and with much care, drafted a judgment containing my definitive opinion as to the only question raised by the pleadings or suggested by counsel—the question as to the validity of the New South Wales *Income Tax (Management) Act of* 1912 (sec. 18A); but some of my learned brothers think that we should not answer that question. The reason, as I understand it, is that, in their opinion, sec. 18A does not apply to the facts stated and proved. Both parties assumed—honestly assumed—that the section did apply to the facts, and they merely contested the validity of the Act itself under the Commonwealth Constitution. It was only because of this question arising under the Constitution that the action could have been brought in this Court (Constitution, sec. 76 (I.)). If there were a question as to the Act applying to the facts, that question would be a fit question to be decided in the Supreme Court of New South Wales; but inasmuch as it is thought that the Act does not apply to the facts, this Court is not, it appears, to decide the constitutional question which properly falls within its jurisdiction. It is said that a Court will not proceed to declare a statute invalid unless that be necessary as a step in determining the right of the parties. That is true, when properly understood; but it refers to the right of the parties in so far as regards the matters at issue in the action before the Court; and it is a principle at the foundation of our legal system of legal procedure that when parties are at issue in an action as to alleged right A the Court has no power to give judgment as to alleged right B. The Court can deal with nothing but the issues of fact and of law raised in the pleadings, unless it be asked to do or to aid something which is illegal in the strict sense.

To show that I am not overstating the position, I need only refer to the statement of claim. In the statement of claim, after stating details, and that the Commissioner of Taxation claims that a sum of £37,387 paid to a foreign corporation is taxable income under

sec. 18A and has served on the plaintiff Company a notice of assessment claiming £9,346 from the plaintiff Company (as representative taxpayer) as income tax, the plaintiff states summarily its whole contention, its only issue, an issue of pure law, thus: "The plaintiff Company submits that sec. 18A . . . is *ultra vires* the Legislature of the State of New South Wales inasmuch as" it "infringes secs. 90, 92 and 117 of the Commonwealth Constitution and that the said . . . assessment . . . is void and of no effect." This undoubtedly means "void" because of infringing the said sections. Then the prayer is for (1) a declaration that the said sec. 18A is *ultra vires* the Legislature of the State; (2) a (consequent) declaration that the assessment and notice are void and of no effect; and (3) an injunction restraining the defendants from collecting the said sum of £9,364 and from otherwise proceeding upon or under the said assessment. Moreover, in the interlocutory injunction order which was issued *ex parte* by my brother *Isaacs* before trial, the order was made restraining the defendants until the hearing from collecting, &c., the tax purporting to be imposed by the Amendment Act of 1925, "*or from otherwise enforcing the provisions of that Act and of sec.* 18A *of the Income Tax (Management) Act* 1912 *as amended.*" It was not suggested from first to last, that the provisions of sec. 18A were not enforceable against the plaintiff if the Act were valid under the Constitution. When the case came before the Court, counsel for the plaintiff Company said: "If the section is valid, we should be liable to some tax; the question is to be confined to the validity of sec. 18A." The argument proceeded, and when the case was called on next day, my brother *Isaacs*, speaking for the whole Bench, said that as the question to be settled affected the Constitution, it would be advisable to notify the Attorney-General for the Commonwealth. This was done; and counsel for the Attorney-General obtained leave to intervene, and his counsel argued at length that the Act was beyond the State powers. He would not have been allowed to intervene but for the constitutional point. Then, as a new constitutional point was suggested—that the Act was unconstitutional under sec. 109 of the Constitution, as being inconsistent with the Federal Acts imposing duties of customs—this additional constitutional point was allowed by the Courts to be argued. Now,

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after the Court reserved judgment, the suggestion is made that we should decide a matter as to which there is no contention of any sort—an issue which is not an issue in the cause before us. It is quite true that if the Court found that the constitutional point was not necessary to decide, if it found that the parties were making pretence as to the need for deciding the point—were holding in reserve a question as to the application of the Act to the facts, the Court could protect itself from such an abuse of its process; it could even stay the proceedings. But there is no suggestion of that sort in this case; and it has to be noted, in addition, that in any future action for recovery of the tax the issue as to the application of the Act to the facts, the parties to this case would probably be estopped from denying that it so applied. For the issue on this subject was traversable, and was not in fact traversed in this action (*Hoysted* v. *Federal Commissioner of Taxation* (1)). But it is a mistake to think that any rule of practice has been laid down in this Court, or has been applied in the practice of the United States (the difficulty could not well arise in English practice) to such an effect as suggested here—that if parties admit an Act to apply to the facts, and the contention on one side is merely that the Act is valid, and on the other that the Act is invalid, the Court has power at the hearing of the action to question the admission which the parties have made as between themselves and to decide an issue which has not been raised on the record. The utmost extent to which the Courts of the United States seem to have gone seems to be as stated in *Black's Constitutional Law.* There it is stated (2nd ed., p. 59):—"Courts are not eager to annul Acts of the Legislature. A becoming respect for a co-ordinate branch of the government will make them loath to adjudicate the grave question of the constitutional validity of a statute, and they will not do so *when the matters or questions presented by the record do not require it.* The decision of a case will be rested on grounds which do not involve a determination as to the validity of the statute *if there be any such in the case.*" There is no such other ground in this case. Besides, this practice of the Courts is a self-imposed duty, based on very good grounds, and not a rigid rule imposed by

(1) (1926) A.C. 155; 37 C.L.R. 290.

law which cannot yield to special circumstances. The observations of *Jessel* M.R. in *Chilton* v. *London Corporation* (1) have been cited as an authority in support of this novel proposition; but, with the utmost respect, I must say that they do not touch the question. That case is essentially a mere decision under the rules of pleading (Order XIX., r. 13; Order XXXII., r. 6). An inhabitant of a village claimed that the inhabitants had a "right" of "lopwood" within a certain season of the year; the defendant admitted the "right" with qualifications; but the Master of the Rolls said that there was no such right known to the law, and that he could not grant judgments on admissions of law, but on admissions of facts. "The Court is bound to give judgment according to law"—an obvious truth. But no admission made between the parties could add to the number of easements, or *profits à prendre*, which the law can recognize; whereas, in this case the parties merely admit, in effect, that the plaintiff has been doing acts of the character described in sec. 18A. In *Chilton* v. *London Corporation* the admission was an admission of pure law, which the Courts must refuse to act on; in this case the admission was that there were facts which fitted the Act, a matter of mixed law and fact.

In my opinion, any expression of judicial opinion on this issue which is not raised in the pleadings would be merely *obiter*—on the issue as to the application of the Act to the facts; and I think it is my clear duty to decline to meddle with such an issue as it is not within the course of our duty. But I must not be taken as dissenting from the view expressed by my brother *Starke* on the merits of this issue if the issue were before us. As for the issue which is before us—the validity of the Act under the Constitution—I withhold my opinion for a very different reason. I withhold it out of respect for my learned brothers, who think that we should not express an opinion, and my opinion would not be that which the parties need—the judgment of the Full Court.

The humour of the situation is that the plaintiff came to this Court as the Court for constitutional questions, but is not to get the constitutional question decided: the parties have to be content with a decision of this Court as to the application of the New South

(1) (1878) 7 Ch. D., at p. 740.

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Wales Act to facts, a matter which is primarily for the New South Wales Courts.

RICH J. The plaintiff in this case complains of a notice of assessment addressed to it by the Commissioner of Taxation of New South Wales by which he notifies it, as the representative of the Universal Pictures Corporation, New York, U.S.A., that he has assessed the amount of State income tax payable by it as the representative taxpayer of the Universal Pictures Corporation, New York, U.S.A. The plaintiff is selected as a representative taxpayer because it is within the State of New South Wales and within that State made an agreement with the Universal Pictures Corporation, New York, U.S.A., under which that Corporation agreed to deliver and the plaintiff agreed to accept delivery of and fully distribute all motion pictures manufactured, produced or acquired and released by the Corporation. From the proceeds of the exhibition and use of pictures the plaintiff was required by the terms of this agreement to constitute a trust fund and to hold it for the parties to the agreement in accordance with their respective interests as therein specified. The plaintiff was to pay to the Corporation each and every week during the term of the agreement a sum equal to 65 per cent of the total gross film revenue derived from all sources whatsoever and to retain 35 per cent. It may be doubted whether this was an agreement to pay or credit any money as consideration for the purchase or lease for exhibition of a motion picture film or the right or licence to exhibit or use any such film or any other right in connection with the use or exhibition of any such film. But by par. 10 of the statement of claim the plaintiff alleged that it paid to the Universal Pictures Corporation at New York City the moneys to which the notice of assessment in fact relates as consideration for the right or licence to exhibit and use motion pictures in New South Wales and for the purchase of advertising matter for use in the said State in accordance with the agreement, and this allegation is admitted by the defence. Be this as it may, the agreement does not bring the plaintiff within any of the descriptions of sec. 11 (1) (*a*), (*b*), (*c*) or (*d*) of the New South Wales *Income Tax (Management) Act* 1912-1925, and therefore, although

it may be deemed to be a representative taxpayer, it appears to have incurred no liability as such under the provisions of sec. 11.

The plaintiff's complaint is that it is sought to be affected with liability under sec. 18A of that Act and that this section violates the provisions contained in sec. 90, in sec. 92, in sec. 117, or in sec. 109 of the Federal Constitution. But, whatever may be the true answer to these questions, they cannot be raised at the suit of a taxpayer who upon the terms of the State enactment which is said to offend against the constitutional provisions is exposed to no liability under the State law. If upon the proper construction of the State enactment the plaintiff is not liable for the tax sought to be imposed upon it by the State officer it would not be right, because, assuming the State officer's contention as to the construction of the State Act were correct, a Federal question might arise, to exercise the original jurisdiction of this Court by entertaining the suit. It is therefore necessary to ascertain whether the *Income Tax (Management) Act* 1912-1925 is actually so framed as to impose, if valid, an obligation upon the plaintiff to pay the tax assessed.

The manner in which sec. 18A is inserted in the Principal Act, and the reference to taxpayer, income, principal taxpayer, and representative taxpayer (terms defined or employed by the Principal Act) make it clear that it is to be read and understood as an integral part of the Principal Act. Sec. 18A requires that money to which it relates shall be deemed to be taxable income of the person it describes as the foreign taxpayer. It may well be that upon the pleadings the money for which the plaintiff is sought to be made liable comes within the description to which the section relates and that it is to be deemed to be the taxable income of Universal Pictures Corporation. The person in New South Wales paying or crediting or agreeing to pay or credit such money is then to be deemed to be the representative taxpayer. Again, it may well be that the plaintiff answers this description. But this section contains no words which purport to render the representative taxpayer liable to pay in that character and the conditions which determine that liability must be found in the provisions of the Principal Act.

By sec. 13 of the Principal Act the representative taxpayer shall not be personally liable as such to the payment of tax upon the

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income of the principal taxpayer to a greater amount than the income of which he has the receipt or disposal. It is difficult to apply sec. 13 to sec. 18A, at least in the case where money to which sec. 18A refers becomes taxable income only because it is paid or credited to the foreign taxpayer. Until it is paid or credited to the foreign taxpayer it is not taxable income, at least unless it is so paid pursuant to some antecedent agreement. But when it is paid or credited it ceases to be in the disposal of the representative taxpayer. It can never be possible that the representative taxpayer has the receipt of money which is taxable income by virtue of the provisions of sec. 18A, and it is difficult to say that he has the disposal of it. A definite sum of money only emerges as taxable income by virtue of its actual payment or crediting whether there be any antecedent agreement or not. Passing this by, sec. 13 is a negative section only, and does not positively impose any liability upon a representative taxpayer. Indeed sec. 11 appears to contain the provisions of the Principal Act which affirmatively impose liability upon representative taxpayers. Sub-sec. 1 of this section, by its proviso, enumerates four cases in which persons who are by that sub-section denominated representative taxpayers become liable to pay tax. As has already been pointed out, none of these four cases is applicable to the particular facts of the case now before the Court; but it seems to follow from the provisions of the Principal Act that in no others can a representative taxpayer become liable. Sec. 12 applies in respect only of any tax payable by the representative taxpayer as such, and therefore operates only when some other provision of the Principal Act has already imposed an obligation to pay.

It follows that no liability is imposed upon the plaintiff by the legislation of which he complains, assuming it to be valid.

STARKE J. Little attention was given at the Bar to the question whether the agreement of 4th August 1923, extended in operation by two agreements dated 1st August 1924 and 23rd July 1925, fell within the terms of sec. 18A of the *Income Tax (Management) Acts* 1912-1925 of New South Wales. The agreements were made

between the Universal Pictures Corporation—an American corporation—and the plaintiff—an Australian company. They conferred upon the plaintiff, subject to the performance of their terms and conditions, the sole and exclusive right and licence to distribute, exhibit and exploit, and to lease and license others to exhibit and display, in Australia motion pictures or films therein mentioned. One of the terms of the agreement was that all moneys received by the plaintiff should constitute a trust fund and be held in trust for the parties in accordance with their interests as therein specified. Other terms were to the effect that the plaintiff should pay in New York to the American Corporation during the term of the agreement a sum equal to 65 per cent of the total gross film revenue derived from all sources whatsoever, and that it should be entitled to retain and keep the remaining 35 per cent thereof for its full and complete compensation and interest under the agreements. It is an agreement to exploit the motion pictures or films, to collect the proceeds, to keep a separate or trust fund and to pay to the American company 65 per cent of the gross proceeds. In my opinion, that constitutes within the meaning of sec. 18A an agreement to pay money as consideration for the right or licence to exhibit or use in the State of New South Wales the motion pictures or films. An action at law could, in my opinion, be maintained upon the express promise to pay money without asserting the rights of the American company in the trust fund. Likewise, in my opinion, any payment to the plaintiff pursuant to the promise in the agreement would constitute payment of money as consideration for the right or licence to exhibit or use the motion pictures or films.

New York is named in the agreement as the place of payment, but the payment or agreement to pay contemplated by sec. 18A must be, it is said, payment or agreement to pay in New South Wales, or the Act would be beyond the constitutional powers committed to the State of New South Wales. Sec. 18A, however, is only a section in an Income Tax Act which attempts to prescribe a standard by which the taxable income is measured in a certain case; it should be read with the rest of the Act. In sec. 9 we find that income means income derived from any source in the State, and, what is more, sec. 10 (*g*) enacts that nothing in the Act shall apply to income derived from sources outside the State. That, as

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it seems to me, is the real limitation upon the generality of sec. 18A and, so read, the section in no way transcends the constitutional powers committed to the State. Further, the provisions as to the representative taxpayers to be found in sec. 11 of the Act cannot, to my mind, cut down the express and substantive provision contained in sec. 18A itself.

The majority of the Court, however, are of a contrary opinion. Therefore upon the question whether sec. 18A does or does not contravene the Constitution of Australia I express no opinion. I refrain from doing so because I am in entire agreement with the view of the majority that the jurisdiction of this Court to determine whether a statute contravenes the Constitution should only be invoked, and according to the settled practice of this Court is only invoked, when it is found necessary to secure and protect the rights of a party before it against unwarranted exercise of legislative power to his prejudice.

ISAACS A.C.J. For the reasons stated no declaration can be made as to the constitutional validity of sec. 18A. Inasmuch as that was the only ground pleaded for impeaching the assessment, it is impossible in the present state of the pleadings to make any conclusive order. The parties are at liberty to amend as they may be advised and to apply.

*Parties to be at liberty to amend as they may be advised and to apply.*

Solicitors for the plaintiff, *Allen, Allen & Hemsley.*

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

B. L.