HIGH COURT OF AUSTRALIA

State of New South Wales

Vs.

Commonwealth

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

21 April 1932

Gavan Duffy C.J.

The Court has considered this case and has reached a conclusion which I shall now state. The members of the Court will give their reasons on a later date. *Evatt* J. and I are of opinion that Part II. (Enforcement against State Revenue) of the *Financial Agreements Enforcement Act 1932* is invalid. *Rich*, *Starke*, *Dixon* and *McTiernan* JJ. are of opinion that Part II. (Enforcement against State Revenue) of the *Financial Agreements Enforcement Act 1932* is a valid law of the Commonwealth and that no declaration of invalidity should be made as claimed by the writ.

Subsequently the following written judgments were delivered:—

April 21

Gavan Duffy C.J.

The Parliament of the Commonwealth, purporting to exercise the power conferred on it by sec. 105A (3), has enacted a statute, No. 3 of 1932, which enables the Commonwealth, on the failure by any State to make a payment prescribed by the "Financial Agreements" defined in the statute, to take from the taxpayers of that State moneys payable by them to the State in satisfaction of the payment which the State has failed to make. Sec. 105A is as follows:—"(1) The Commonwealth may make agreements with the States with respect to the public debts of the States, including—(a) the taking over of such debts by the Commonwealth; (b) the management of such debts; (c) the payment of interest and the provision and management of sinking funds in respect of such debts; (d) the consolidation, renewal, conversion, and redemption of such debts; (e) the indemnification of the Commonwealth by the States in respect of debts taken over by the Commonwealth; and (f) the borrowing of money by the States or by the Commonwealth, or by the Commonwealth for the States. (2) The Parliament may make laws for validating any such agreement made before the commencement of this section. (3) The Parliament may make laws for the carrying out by the parties thereto of any such agreement. (4) Any such agreement may be varied or rescinded by the parties thereto. (5) Every such agreement and any such variation thereof shall be binding upon the Commonwealth and the States parties thereto notwithstanding anything contained in this Constitution or the Constitution of the several States or in any law of the Parliament of the Commonwealth or of any State. (6) The powers conferred by this section shall not be construed as being limited in any way by the provisions of section one hundred and five of this Constitution."

It will be observed that sub-sec. 1 authorizes the Commonwealth to make certain agreements with the States, but does not pretend to authorize the States to make agreements with the Commonwealth.

The States must be authorized by their respective Parliaments. Sub-sec. 4 permits the parties to an agreement to vary or rescind it. If any such agreement is made, sub-sec. 5 provides that it shall be binding upon the Commonwealth and the States parties thereto, notwithstanding anything contained in the Constitution of the Commonwealth or of the several States or in any law of the Parliament of the Commonwealth or of any State. In my opinion the operation of sub-sec. 5 is this: If the Commonwealth and the States have in fact made an agreement the sub-section makes that agreement valid though the parties or some of them had in fact no authority to make the agreement; and it preserves the valid existence of the agreement unless it is varied or rescinded under the provisions of sub-sec. 4. It does not alter the nature or incidents of the agreement, or affect the rights, obligations and duties of the parties under the agreement while it continues to exist. Let us now turn to sub-sec. 3. It is said that the sub-section authorizes the enactment of the statute in question because the statute merely compels one of the parties to an authorized agreement to carry out its obligations under the agreement. My first answer to this contention is that the statute does not merely so compel. It furnishes the Commonwealth with means of obtaining from taxpayers who are no parties to the agreement moneys equivalent in amount to that which would have been received by the Commonwealth from the State had it not failed to perform its obligations under the agreement. But there is another answer. The sub-section does not authorize any coercion of the parties to the agreement. Sub-sec. 1 permits the Commonwealth to make contracts which may require parliamentary authority to enable the parties to carry them out conveniently, effectively, or at all. If such parliamentary authority is required, sub-sec. 3 permits it to be given by one particular Parliament, and that, the Parliament of the Commonwealth. It is to be observed that the laws authorized by sub-sec. 3 are laws for the carrying out by the parties thereto of any such agreement. The Commonwealth is in every case such a party, and if the sub-section authorizes an enforcement against the States it must also authorize an enforcement against the Commonwealth by its own Parliament—a curious position. The truth is that the language of the sub-section is not apt to include a statute enforcing obligations against any of the parties to an agreement. It is also said for the Commonwealth that the statute which its Parliament has enacted may be supported by invoking other powers than that conferred by sec. 105A (3). The Commonwealth Parliament possesses a number of distinct powers, and if it does not specify which of those powers it proposes to exercise in any enactment, the validity of that enactment may be established by invoking any one or more of those powers. But if Parliament chooses to exercise one power, and one power only, its enactment cannot be supported by invoking another power. In this case it is clear to me from the recitals in the statute itself that Parliament intended to exercise the power conferred by sec. 105A (3), and that power only; and it is not for us to say whether it would have been willing or not to exercise any other power if in fact it has not done so. But, as the other members of the Court have debated whether the statute in question is within any of the powers of the Commonwealth, I think it right to say that, in my opinion, having regard to the construction which I have already put on sec. 105A (5), no power is to be found in the Commonwealth Parliament to enact any substantial part of the statute.

I think the plaintiff is entitled to a declaration, but, as the decision of the Court is that the action should be dismissed, it is unnecessary for me to discuss what should be the exact nature of that declaration.

Rich and Dixon JJ.

Sec. 5 of the *Financial Agreements Enforcement Act 1932* provides, in effect, that the Auditor-General shall certify to the Treasurer an amount of money then due and payable and unpaid by a State to the Commonwealth under or by virtue of the Financial Agreements, and that, after

publication of the certificate in the *Gazette*, the Attorney-General may apply in a summary way to this Court for a declaration that the whole or part of such amount is due and payable and unpaid by the State to the Commonwealth. Such a declaration is to be enforceable as a judgment, "and shall, in addition to any other remedies for enforcing such judgment by law provided, operate as a charge upon all the revenues of the State." The section then provides that a resolution may be passed by both Houses bringing into operation secs. 7-13 of the Act in relation to revenues of the State which are specified in the resolution. Thereupon those sections shall, to the extent of the amount so declared by the Court, apply in relation to the State. The effect of secs. 7-13 is to create an involuntary assignment of the specified revenues of the State to the Commonwealth during a period commencing at a date fixed by proclamation and ended by a proclamation. The revenue becomes payable to the Treasurer of the Commonwealth; payment to the Treasurer of the Commonwealth by a person liable to the State operates as a discharge of his liability to the State; the Commonwealth may sue persons liable to the State in respect of any of the specified revenue; no moneys owing in respect thereof may be paid to the State, and such a payment if made shall not operate in discharge of the liability; it is made an offence for a Minister or other officer of a State to receive or permit to be received any such moneys or to give an indemnity in respect of any such payment. The Commonwealth is required to apply the net amount which it receives after payment of the expenses of collection in discharge of any liabilities of the State which have accrued under the Financial Agreements, and to refund to the State any amount received by the Treasurer under the Act in excess of the liabilities of the State to the Commonwealth. When the liabilities of the State are discharged, the Auditor-General shall so certify to the Treasurer, and thereupon a proclamation to that effect shall be issued by the Governor-General, and the period in which the provisions of secs. 7-13 apply shall cease.

In our opinion these provisions are valid. We think that they are within the power conferred upon Parliament by sec. 105A (3) of the *Constitution*, and we also think that they are within the power derived by the Parliament from the operation of secs. 75 (III.), 51 (XXXIX.), and possibly sec. 78, combined with sec. 105A (5). Sec. 105A was inserted in the Constitution by a proposed law approved by the required majority of the electors on 17th November 1928 and afterwards assented to. The amendment was passed by the Parliament and submitted to the electors in pursuance of the Financial Agreement made on 12th December 1927 between the Commonwealth and the States, clause 2 of Part IV. of which provided that the Commonwealth would take the necessary action to submit to the Parliament and to the electors proposals for the alteration of the Constitution in the form in which sec. 105A now stands. By that Agreement the Commonwealth agreed to take over the balance unpaid of the gross public debt of each State, and, in respect of the debts taken over, to assume as between the Commonwealth and the States the liabilities of the State to bondholders. The Commonwealth agreed to pay to bondholders from time to time interest payable on the public debts of the States taken over. Towards the interest payable by the States in each year it agreed to provide certain amounts, and each of the States agreed to pay to the Commonwealth the excess over the amounts so provided necessary to make up the interest charges on its public debt taken over by the Commonwealth. The Commonwealth and the States agreed to establish a sinking fund to answer the public debts taken over, and agreed that the contributions which they each undertook to make should be debts payable to the National Debt Commission. Each State agreed with the Commonwealth that it would by the faithful performance of its obligations under the Agreement indemnify the Commonwealth against all liabilities whatsoever in respect of the public debt of that State taken over by the Commonwealth. The Agreement further contained provisions for the control of future borrowing by the States and the Commonwealth, and of the conversion, renewal, redemption and consolidation of the public debts of the Commonwealth and of the States. As a

consequence of these provisions any new securities required, whether upon a conversion or renewal of an existing loan or because of further borrowing, would be issued upon the credit of the Commonwealth. Inasmuch as the terms of this Agreement did not conform with sec. 105 of the *Constitution*, it was necessary before its permanent provisions could become operative that the powers of the Commonwealth should be increased. The Constitutions of the States contained nothing to prevent them, with the authority of their Legislatures, from entering into and carrying out the Financial Agreement. But under the Constitution of each of the States the pecuniary obligations of the States cannot be answered out of the consolidated revenue except under parliamentary appropriation. The general doctrine is that all obligations to pay money undertaken by the Crown are subject to the implied condition that the funds necessary to satisfy the obligation shall be appropriated by Parliament. Indeed, opinions have been expressed in this Court that, in the absence of any provision in the Commonwealth Constitution authorizing an impairment of this constitutional principle embedded in the Constitution of the States, legislative powers confided to the Commonwealth Parliament by sec. 51 of the *Federal Constitution* which otherwise extend to the operations of the States do not authorize the imposition upon the States of obligations which are not subject to the condition that funds shall be appropriated by the Parliaments of the States (see *Australian Railways Union v Victorian Railways Commissioners*[1]). If the liabilities which the States incurred to the Commonwealth under the Financial Agreement be subject to this condition, the power of the Commonwealth to exact payment would depend upon the action of the State Legislatures. No doubt the Commonwealth might maintain a suit to enforce such an obligation in this Court; for the matter would be one in which the Commonwealth was a party (sec. 75 (III.)). But the obligation to be enforced would be conditional, and no judgment pronounced in accordance with the obligation could defeat the condition. The power conferred upon the Parliament by sec. 51 (XXXIX.) to make laws with respect to matters incidental to the execution of any power vested by the Constitution in the Federal Judicature clearly authorizes laws for carrying into execution all the judgments which the judicial power has power to pronounce (per *Marshall* C.J., *Wayman v Southard*[2]). But this would not authorize the Legislature to disregard the condition of the obligation which has passed into the judgment and enforce it as if it were unconditional. On the other hand, if the obligation incurred to the Commonwealth by the States be unconditional, and the Constitution of the State impose no obstacle to the assumption of an obligation which is absolute and independent of parliamentary appropriation, we can see no reason why judgment should not be given according to the nature of the obligation, and why a law should not be made by the Parliament for the enforcement against the State of such a judgment. It is true that secs. 65 and 66 of the *Judiciary Act 1903-1927* recognize the principle that the liabilities of the Crown in right of the States are subject to parliamentary appropriation of funds. This accords with the general character of the liabilities of the States usually put in suit. But we can see no reason why, if liabilities of an absolute nature are incurred by the States, the Commonwealth Parliament should not make a different provision. These considerations appear to us to be material to a proper understanding of the constitutional alterations effected by sec. 105A. Sub-sec. 5 of that section provides with respect to agreements of the description contained in sub-sec. 1 that every such agreement and any variation thereof shall be binding upon the Commonwealth and the States parties thereto notwithstanding anything contained in this Constitution, or the Constitution of the several States, or in any law of the Parliament of the Commonwealth, or of any State. In our opinion the effect of this provision is to make any agreement of the required description obligatory upon the Commonwealth and the States, to place its operation and efficacy beyond the control of any law of any of the seven Parliaments, and to prevent any constitutional principle or provision operating to defeat or diminish or condition the obligatory force of the Agreement. In the case of the States there is no constitutional qualification of the binding force of such an agreement to which the words "notwithstanding

anything contained in ... the Constitution of the several States" could more directly relate than that which requires parliamentary appropriation of funds to satisfy the condition upon which the liabilities of the States are incurred. In our opinion it follows that the Parliament can, in the exercise of the power given by sec. 51 (XXXIX.), enable this Court, in a proceeding by the Commonwealth to recover money owing by a State to it under the Financial Agreement, to pronounce a judgment that is unconditional, and can enact laws for the enforcement of that judgment against the State. Sec. 105A arms the Parliament with further powers. Sub-sec. 3 provides that the Parliament may make laws for the carrying out by the parties thereto of any such agreement. In this sentence, we think the word "for" expresses the end or purpose, and the words "carrying out by the parties" are equivalent to performance or fulfilment by the parties. The considerations supplied by sub-sec. 5 again go far to determine the meaning and application of this provision. The clause, in our opinion, authorizes the enactment of laws calculated to bring about performance of their obligations by the parties; laws to procure the fulfilment of the agreement. The words "the parties thereto" appear in sub-secs. 4 and 5 as well as in sub-sec. 3, and no doubt they are restrictive. They prevent the power from extending to the regulation of matters which might be considered conducive to effectuating the purposes of the agreement although not directly relating to actual performance by the parties. For instance, if the Commonwealth agreed with one State that money should be borrowed by them jointly at specified rates of interest, the Parliament could not under this power legislate to prevent competition on the money-market. But we cannot agree with the argument that the words "by the parties thereto" prevent the Parliament from adopting measures for satisfying liabilities created by the agreement in default of literal fulfilment by the parties. A law which provides the alternative to voluntary performance by the parties and compels involuntary satisfaction appears to us to be properly described as a law for the carrying out by the parties thereto of the agreement. Two other meanings were suggested of sub-sec. 3. It was said that its purpose was to enable the Federal Parliament to establish later agreements as valid and binding just as sub-sec. 2 authorized the Parliament to validate the Agreement made before the commencement of the alteration. Among the many answers to this contention the shortest is, perhaps, that the words "carrying out" cannot mean creating or establishing the agreement, but must mean acting under it. In the second place, it was suggested that the provision was intended to enable the Parliament to facilitate the carrying out of the agreement by empowering the parties to do things in performance of it which, in virtue of their Constitutions or otherwise, they were unable to do, or by making provision for matters which arose in the course of its performance. It is difficult to see what legal disabilities could exist to impede the parties in the performance of such an agreement. Subsec. 5 makes the agreement binding notwithstanding anything contained in the Constitutions or laws of the States or the Commonwealth, and whatever the parties must do by law they clearly may do. Why the Parliament should need additional powers to provide for matters arising in the course of the agreement did not clearly appear; and we did not find it easy to apprehend the exact nature of the supposed problems which might arise in the course of performing the agreement and admit of resolution by a power which on its terms could not add to or supplement the agreement, but could only provide for the carrying out thereof by the parties thereto. Moreover, it is evident from the terms of the Financial Agreement itself that, unless it is rescinded, no new agreement, as distinguished from a variation of the old Agreement, can be made for a very long time to come, because there can be little public debt of the States which is not comprised in the existing Agreement. Yet an examination of the Financial Agreement failed, in our opinion, to disclose any important matter to which the power would apply if it received such a restricted construction. It appears to us that in the construction of sub-sec. 3 the intention of sub-sec. 5 to make the obligations of the Financial Agreements paramount should be of great weight, and when this is considered in relation to the magnitude of the financial liabilities of the States taken over by the Commonwealth and the plain dependence of the Commonwealth upon the performance

by the States of their obligations under the Agreement to enable it to meet those liabilities, the meaning and purpose of sub-sec. 3 are sufficiently clear. In our opinion it enables the Parliament to enforce performance by the States of their obligations under the Agreement, and it authorizes the main provision of the *Financial Agreements Enforcement Act 1932*, which is sec. 5. But we think that in the absence of sub-sec. 3, or, if a more limited construction of that sub-section were adopted, sec. 5 of the *Financial Agreements Enforcement Act 1932* would, nevertheless, be valid. Sub-secs. 1 and 2 do no more than provide the preliminary conditions which must occur before the jurisdiction of the Court can be invoked by the particular procedure prescribed by sub-secs. 3 and 4. Sub-sec. 5 prescribes the number of Judges by which the jurisdiction may be exercised, and is supported as a valid law by sec. 79 of the *Constitution*. Sub-sec. 6 is an exercise of the power conferred by sec. 51 (XXXIX.) and, perhaps, of that conferred by sec. 78 (see *The Commonwealth v New South Wales*[3]). When it enacts that the judgment shall operate as a charge upon all the revenues of the State, it might, if the obligation which the judgment enforced were subject to and qualified by a constitutional requirement of parliamentary appropriation, go beyond what was incidental to the exercise of the judicial power. But inasmuch as sec. 105A (5), in our opinion, makes the obligation of the agreement absolute, it does no more than attach to the judgment a consequence which belongs to the enforcement of that obligation. Sub-sec. 7 then proceeds to enable the Houses of Parliament by resolution to bring into operation the provisions which effect an involuntary assignment of the State revenue. It is objected that the enforcement of the judgment is thus taken out of the hands of the Court. It is true that writs of execution issue out of the Court, but they issue as of course and more often than not they are directed to executive officers. The Court retains complete control of the judgment, and unless there be something in the conception of judicial power which confines all means of compelling obedience to the judgment to judicial action (and we do not think there is), there seems no reason why the Legislature should not make such provision as it thinks fit to ensure that the judgment is satisfied. Further, it appears to us that secs. 7-13 (1) do no more than provide means for working out the charge created by sub-sec. 6 of sec. 5. When brought into force they operate directly to transfer the revenue and, properly considered, they are provisions attaching to the judgment a legal consequence, the operation of which is contingent, however, upon the resolution of both Houses. The objection made that, according to the title and recitals of the Act, it appears that the Legislature relied upon and intended to exercise only the power conferred by sec. 105A, appears to us to be unsound. In the first place, we do not think an intention to exclude other powers is disclosed by the Act, and, in the next place, we think the observations of *Rich* J. and of *Starke* J. in *Ex parte Walsh and Johnson*[4] respectively provide an answer to the contention.

The further objection that the real purpose of the Legislature was to enforce the agreement, and not the judgment as such, also seems to us to be misconceived. The motives of the Legislature are immaterial. What the statute actually does affords the real test of its validity, and sec. 5 provides for the ascertainment of a liability by the judicial power and attaches the consequences to the judgment. A separate question arises as to the validity of sec. 6. No doubt, as no proclamation has been issued[5] under sec. 7 based upon sec. 6, this is a matter of less practical importance than it might have been. Sec. 6 cannot be supported, in our opinion, as an exercise of the power to legislate upon matters incidental to the execution of any power vested in the Federal Judicature. Its validity must rest upon sec. 105A (3), or upon secs. 61 and 105A in combination with sec. 51 (XXXIX.). Upon the construction which we think sec. 105A (3) ought to receive, the question whether it authorizes sec. 6 depends upon what may be perhaps considered a refined distinction. If its application were contingent upon the existence in fact of an unsatisfied liability in the States to the Commonwealth, the construction which we have placed upon sub-sec. 3 of sec. 105A would clearly support the provisions of sec. 6. But it applies when the Auditor-General has certified that such a liability exists

and the Houses of Parliament have adopted his certificate and passed a resolution in terms of sec. 6 (1). In other words, it is brought into operation upon a reasonable or perhaps vehement presumption of default which may, nevertheless, conceivably be wrong. The State may at once apply on three days' notice for a declaration that it is wrong, and, if the State does not so apply, the Commonwealth must apply within two months for a declaration that it is right. The question is whether a law for the immediate sequestration of the State's revenue upon a strong presumption of default, subject to the State's right to apply to the Court to displace the sequestration, can be considered as an exercise of the power as we have construed it. We have come to the conclusion that this question should be answered in the affirmative. Strong as the measure is, it may be fairly regarded in the conditions which at present prevail, and which we are entitled judicially to notice, as reasonably necessary to ensure payment of a liability if and when judicially established.

Minor criticisms may be made of various provisions of the Act, but none of them goes to the validity of the substantial and important parts of secs. 5 and 6 and secs. 7-13, and, having regard to sec. 15A of the *Acts Interpretation Act 1901-1930*, it is unnecessary to deal with them. The writ in this action attacked the validity of the *Financial Agreements (Commonwealth Liability) Act 1932*, but very little attention was bestowed upon it during the argument. If it purports to impose any liability upon the States which is not imposed by the Financial Agreements, it is clear that that liability can only be imposed under sec. 4 (4), which requires a suit in this Court, and in that suit the State can raise the validity of the Act. In the view which we have taken of the *Financial Agreements Enforcement Act 1932* the Commonwealth Liability Act plays no part. In these circumstances and having regard to the very inadequate treatment it received at the hands of the plaintiff in the discussion before us, we think we ought not to decide its validity. The only relief we can give would be a declaration of right, and this is in our discretion.

We think that the action should be dismissed.

Starke J .

This is an action on the part of the State of New South Wales against the Commonwealth and others claiming a declaration that the whole of the *Financial Agreements (Commonwealth Liability) Act 1932* and the whole of the *Financial Agreements Enforcement Act 1932* are *ultra vires* the Parliament of the Commonwealth, and are invalid, and ancillary relief. In December 1927 the Commonwealth and the States of Australia made an Agreement which is scheduled to the *Financial Agreement Act No. 5 of 1928*. By the Agreement the Commonwealth took over, on 1st July 1929, public debts of the States amounting to over six hundred million pounds, and assumed as between the Commonwealth and the States the liabilities of the States to the bondholders. It was also agreed that the Commonwealth should pay to bondholders, from time to time, interest payable on the public debts of the States taken over by the Commonwealth. The Commonwealth itself was, during a period of fifty-eight years, to provide certain amounts towards the interest payable in respect of the public debts of the States. On the other hand, each State agreed during the same period of fifty-eight years to pay to the Commonwealth the excess over the amounts which the Commonwealth agreed to provide necessary to make up as they fall due the interest charges falling due in that year on the public debt of the State taken over by the Commonwealth. The method by which these payments should be made was to be arranged from time to time between the Commonwealth and the States. A sinking fund was also established by the Agreement at the rate of 7s. 6d. for each £100 of the debts of the States. The Commonwealth agreed to contribute 2s. 6d. for each £100, and the States, each in respect of its debt, 5s. for each £100. Each State also agreed with the Commonwealth that it would, by the faithful performance of its obligation under the Agreement, indemnify the

Commonwealth against all liabilities whatsoever, in respect of the public debt of that State taken over by the Commonwealth, other than the liabilities of the Commonwealth under the Agreement, to pay interest and make sinking fund contributions. This is but an outline of the provisions of the Agreement material to this case. Under this Agreement the Commonwealth took over public debts of the State of New South Wales amounting to more than two hundred million pounds.

An agreement of this kind adjusting the financial relation of the Commonwealth and the States required not only ratification by the Parliaments of the Commonwealth and the States but also an alteration of the *Constitution of Australia*. The Constitution was altered in the manner required by sec. 128 of that Act, and the alteration appears in the Act styled the *Constitution Alteration (State Debts) 1928* (No. 1 of 1929). It provides (sec. 105A):—(1) "The Commonwealth may make agreements with the States with respect to the public debts of the States, including—(a) the taking over of such debts by the Commonwealth; (b) the management of such debts; (c) the payment of interest and the provision and management of sinking funds in respect of such debts; (d) the consolidation, renewal, conversion, and redemption of such debts; (e) the indemnification of the Commonwealth by the States in respect of debts taken over by the Commonwealth; (f) the borrowing of money by the States or by the Commonwealth, or by the Commonwealth for the States. (2) The Parliament may make laws for validating any such agreement made before the commencement of this section. (3) The Parliament may make laws for the carrying out by the parties thereto of any such agreement. (4) Any such agreement may be varied or rescinded by the parties thereto. (5) Every such agreement and any such variation thereof shall be binding upon the Commonwealth and the States parties thereto notwithstanding anything contained in this Constitution or the Constitution of the several States or in any law of the Parliament of the Commonwealth or of any State."

The Parliament of the Commonwealth approved of the Agreement already mentioned before the alteration of the Constitution (No. 5 of 1928), and validated it after the alteration of the Constitution was made (No. 4 of 1929). The Parliament of each State also ratified the Agreement: New South Wales (No. 14 of 1928), Victoria (No. 3554 of 1927), Queensland (18 Geo. V. No. 22), South Australia (No. 1837 of 1927), West Australia (No. 1 of 1928), Tasmania (No. 97 of 1927).

The object of all this legislation is apparent. It was to establish beyond question the validity of the Financial Agreement and all future agreements of the same kind, to render the rights and duties created or imposed thereby unalterable without the mutual agreement of all the parties thereto. The State of New South Wales did not provide certain interest payments upon its public debts in accordance with the Financial Agreement, and this led to the passing of the two Acts attacked in this action. It has been strenuously asserted that these Acts are an interference with the sovereign rights of the States and with the judicial power of the Commonwealth vested in its Courts. But, as has been pointed out more than once in this Court, the States are not sovereign powers. (See *The Commonwealth v New South Wales*[6].) By the Constitution a restriction is placed upon their supposed sovereign rights by the grant to the Federal power of the right and power to legislate with respect to various matters. Again, one of the privileges or rights of a sovereign power is its immunity from action without its own consent. Yet by the Constitution this right or privilege was surrendered, and by sec. 75 jurisdiction is conferred on this Court in all matters in which the Commonwealth or a person suing or being sued on behalf of the Commonwealth is a party, between States, or between a State and a resident of another State (*The Commonwealth v New South Wales*[7]). Hence the rights and duties of the Commonwealth and the States, at least so far as they can be referred to some legal standard, are justiciable and may be determined by judgment (*The Commonwealth v New South Wales; South Australia v Victoria*[8]). The exercise of the judicial

power, however, "essentially involves the right to enforce the results of its exertion." So much is recognized both under our own Constitution and in the United States of America (*Virginia v West Virginia*[9]). The enforcement of judgments against States is not as a rule a question of any importance, for usually provision is "readily and promptly" made to satisfy any such obligation. But if a State refuses or neglects to discharge such an obligation, the question assumes grave dimensions. A Court does not enforce its judgments. The Executive power of the Commonwealth, which is vested in the King under sec. 61 of the *Constitution*, necessarily acts in aid of the judicial power in this respect. In the case of *Australian Railways Union v Victorian Railways Commissioners*[10] I ventured the opinion that nothing in the Constitution, before its alteration by sec. 105A, warranted the conclusion that the Commonwealth could, under its legislative, judicial, or executive functions, interfere with, or impair the constitutional power of the States to appropriate their consolidated revenue funds as by any Act of the State Legislature should be provided in that behalf. I see no reason for departing from this view, not because the obligations on the part of a Government to pay money under a judgment are contingent upon provision being made by Parliament for the discharge of such obligations, but because the provisions of sec. 51 do not explicitly so provide, and no such authority is inherent in or incidental to the executive or judicial power. In the United States of America much greater authority is claimed both for the legislative power and the judicial power (*Virginia Case*). One, however, may well say with Chief Justice *Marshall* that the remedies suggested as incidental to the judicial powers in the *Virginia Case*[11] savour too much of the exercise of the political power to be within the proper province of the judicial department (*Cherokee Nation v State of Georgia*[12]). The judicial remedies are still, I believe, undefined in the United States of America, for West Virginia submitted in the end to the judgments of the Supreme Court of the United States. The argument on the part of the States that the judicial power of the Commonwealth can only be exerted by the Courts mentioned in sec. 71 of the *Constitution* is, of course, quite true. But though the rights and obligations of parties can only be authoritatively determined and adjudicated upon by the judicial power, it does not follow that the remedies for the non-observance of those rights and obligations must be sought through the judicial power and in judicial process. A party may have extra-judicial, as well as judicial, remedies. That depends in some cases upon the agreement of the parties and in others upon the provisions made by a competent legislative authority.

The interpretation of the new and extended powers given by sec. 105A of the *Constitution* must be now considered. The object for which the power is granted must be kept in view. Notwithstanding anything contained in the Constitution or the Constitutions of the States the Financial Agreement is binding on the Commonwealth and the States. It is part of the organic law of the Commonwealth. It can only be varied or rescinded by the parties thereto. Nothing in the Constitution or in the Constitutions of the States can affect it or prevent its operation. It creates rights and duties as between the Commonwealth and the States upon and in respect of which the judicial power of the Commonwealth can be exerted. "The Parliament may make laws for the carrying out by the parties thereto of any such agreement." The words are not technical; to carry out an agreement is but to give effect to it, to perform and execute it, to bring it to a conclusion. Moreover, it is a legislative power operating with respect to agreements that are made obligatory by the Constitution upon both the Commonwealth and the States. Doubtless, the words authorize Parliament to make laws enabling and assisting the parties to perform their agreement. But in their context the words directly point to legislation for the performance and execution of the agreement; legislation that will bring about or tend to bring about, or "is really calculated to effect" that object (*M'Culloch v State of Maryland*[13]), or, in short, the enforcement by appropriate legislation of the agreement. The latter phrase is suggested by two or three amendments in the *Constitution of the United States of America*:

"Congress shall have power to enforce by appropriate legislation ... this Article." "Whatever legislation is ... adapted to carry out the objects" of the amendments is held to be within the power of Congress (*Ex parte Virginia*[14]). Much stress was laid upon the words "for the carrying out by the parties thereto of any such agreement." Certainly they limit the scope of the power and confine it to laws that will bring about, or tend to bring about, performance or execution of the agreement by the parties. But they do not limit the power to laws that simply enable or assist the parties to perform their own agreement. Further, it was said to be unlikely that a power of enforcement was given to the Commonwealth and none to the States. The parties did not contemplate default but if default took place the Commonwealth seems the natural custodian of the power to enforce the Agreement and to provide remedies for non-performance, whether on its own part or on the part of the States. It cannot affect the construction of the clause that the States cannot dictate to the Commonwealth what remedies it should grant in case it makes default in performance of the Agreement. The extent of the power being such as I have stated, the Parliament may exert it against the States because they are parties to the Agreement, and it may use all such means as are adapted to carry out the object of the power, the performance of the Agreement, whether those means be judicial or extra-judicial.

All that remains for consideration is whether the Acts attacked in this case fall within the description of a law for carrying out by the parties the Financial Agreement. Part II. of the *Financial Agreements Enforcement Act* deals with enforcement against State revenue. By the interpretation clause the State includes any public authority, incorporated or unincorporated, constituted under the laws of a State which has power to levy rates, taxes, or charges, or collect revenue for a public purpose, and is declared by the Governor-General by proclamation to be a public authority for the purposes of this Act, but does not include a municipal council, shire council, or local governing authority. Again, specified revenue means such revenue or such class of revenue of a State specified or described in a resolution passed by each House of Parliament in pursuance of this Act. The States are organized in the usual legislative, executive, and judicial departments, but the executive departments have, invariably, not only a central administration, but also various organizations and agencies constituted for the purposes of government. They are creatures of the State and exercise part of its functions. The interpretation clause adopts this well known constitutional development and declares that they shall be included within the term "The State." It does not extend the obligations of the States under the Financial Agreements to other bodies but simply includes the State and its organizations, agencies, and creatures within the provisions of the *Enforcement Act*. There is nothing, to my mind, unlawful in this provision. Following the interpretation clause comes Part II. of the Act, "Enforcement against State Revenue." By sec. 5 a summary method is provided of obtaining a binding and authoritative decision of the amount due and payable by a State under the Financial Agreement. The decision of the matter is remitted, as is necessary, to the judicial power and the jurisdiction is vested in this Court. That provision is clearly warranted by the provisions of sec. 76 of the *Constitution*. The requirement of a certificate from the Auditor-General of the amount due is made a condition of the exercise of this summary jurisdiction, and by sec. 22 is made prima facie evidence that the amount certified is due. The Constitution itself (sec. 76) warrants the former provision and decisions of this Court the latter (*Williamson v Ah On*[15]). A declaration of the amount due is enforceable as a judgment of the Court and in addition operates as a charge upon all the revenues of the State. The right and jurisdiction of the Court to pronounce such a judgment being established, the Parliament has clearly the right under sec. 105A to use appropriate means for making that judgment effective against the State and its governmental agencies. A charge has long been known and treated as an appropriate remedy in aid of judgments (compare *Judgments Act 1838*, 1 & 2 Vict. c. 110, sec. 13). A new and novel method of enforcing the declaration or

judgment of the Court is also provided in sec. 5 (7) of the Act. It cannot be described as judicial process, but the Parliament is not confined to judicial process in the enforcement of judgments. It may, if it thinks fit, use extra-judicial means, and to it is assigned by sec. 105A of the *Constitution* a discretion "with respect to the means by which the powers" conferred by that section "are to be carried into execution." Upon the declaration of the Court that any amount is due by the State to the Commonwealth each House of Parliament may resolve that certain provisions of the Act shall apply in relation to the State specified in the resolution, and thereupon the revenue of the State specified in the resolution and included in a proclamation shall as from a date fixed by proclamation, and during the currency of the proclamation, be payable to the Treasurer of the Commonwealth or to persons authorized by him. The means chosen are relevant to, and adapted to the enforcement of the judgment against the State, and beyond this the matter is one for the discretion of Parliament. If the provision had been in the simple form adopted in New South Wales (*Claims Against The Government and Crown Suits Act 1912*, No. 27, sec. 11 (2))—"In the event of such payment not being made within sixty days after demand, execution may be had for the amount, and levied upon any property vested in the Government"—the relevance and propriety of the law as a means of enforcing the judgment would not, I suppose, have been denied, assuming, of course, that sec. 105A warrants laws enforcing the Financial Agreement. But it was the extra-judicial character of the provisions in sec. 5 (7) and sec. 7 that was, to some extent, relied upon for the purpose of invalidating them. The fallacy, with respect, resides in the view that Parliament cannot adopt extra-judicial methods as well as judicial process for the enforcement of the Financial Agreement and judgments establishing rights and duties thereunder. Some reliance was placed upon the authority to receive the State revenue "during the currency of the proclamation," but the only revenue authorized to be collected under sec. 5 is the amount declared by the High Court to be due and payable by the State.

I now come to the attack upon sec. 6 of the Act. In case of urgency and in order to protect the interests of the Commonwealth until the question of the liability of the State has been determined by the High Court, each House of Parliament may, if the Auditor-General gives a certificate setting forth the amount of money due and payable by a State to the Commonwealth, approve and adopt the certificate and resolve that by reason of urgency it is desirable that certain provisions of the Act shall apply immediately in relation to the State specified in the resolution, and thereupon the revenue of the State specified in the resolution and included in a proclamation shall, as from a date fixed by proclamation and during the currency of the proclamation, be payable to the Treasurer, or persons authorized by him. This provision, unlike the provision of sec. 5, operates without previous legal process of any kind. But as soon as practicable after such a resolution, and in any event within two months, the Commonwealth must apply to this Court for a declaration that the amount stated in the resolution, or part thereof, is due and payable by the State, or the State may apply at any time after the resolution has been passed for a declaration that no amount, or a smaller amount, is payable. The procedure cannot, I think, be treated as in aid of judicial proceedings or as preserving for the purposes of effective judicial process the revenue of the State. It is a form of self-help or self-redress given to the Commonwealth in respect of the obligation undertaken by the States to it under the Financial Agreement. In many instances the law grants a person liberty to help himself without any recourse to judicial proceedings for a declaration of his rights. If the Parliament has, as I think it has, full and plenary power to enforce the Financial Agreement, then it can, in my opinion, grant to any of the parties to this Agreement the mode of self-help or self-redress contained in sec. 6 of the Act. Thus the Act might more simply have provided that in case of default on the part of the States in performance of their obligations under the Agreement, the Commonwealth may collect and apply the revenues of the States in and towards satisfying such obligations. This is no invasion of

the judicial power, for it does not begin until some tribunal which has power to give a binding and authoritative decision is called upon to take action (*Huddart Parker & Co v Moorehead*[16]; *Shell Co of Australia v Federal Commissioner of Taxation*[17]). Conditioning the right of self-help or self-redress upon the certificate of the Auditor-General and resolutions of the Houses of Parliament may prevent error and to hasty action, but it does not alter the character of the remedy given. The duty of the Commonwealth and the right of the States to apply to the High Court for a declaration of the amount due are for the purpose of determining whether any obligation on the part of the State exists and whether the remedy of self-redress given by sec. 6 has been rightly exercised. In my opinion, therefore, sec. 6 of the Act is valid and within the competence of Parliament. The provisions of secs. 8, 9, 10, 11 and 12 are all ancillary to secs. 5 and 6, incident to the expressed power in sec. 105A of the *Constitution* and necessary to its execution. The Commonwealth may sue for moneys which it is authorized to collect; protection is given to persons who pay in accordance with the Act; sanctions are imposed for the contraventions of the Act of any of the provisions contained in those Parts. Lastly sec. 13 is but an extension of the provisions of secs. 5 and 6. Parts III. and IV. of the Act are included within the claim for a declaration that the *Financial Agreements Enforcement Act* is invalid. But, with the exception of the provision contained in sec. 15, little argument was addressed to the Court with regard to them. It is better to reserve those provisions for further consideration. It is better also that sec. 15 should have further consideration, and its operation upon trust and other funds discussed.

The *Financial Agreements (Commonwealth Liability) Act 1932* was also attacked, but little or no argument was advanced with regard to it. It should also be reserved for further consideration though it seems, at first sight, calculated to effect an object of the Financial Agreement, namely, the taking over of the State debts by the Commonwealth and the assumption by the Commonwealth as between the Commonwealth and the States of the liabilities of the States to the bondholders.

Evatt J .

The State of New South Wales, supported by the States of Victoria and Tasmania, which were granted leave to intervene, challenges the validity of the Commonwealth Acts No. 3 of 1932 and No. 2 of 1932 and asks for appropriate declarations.

The Act No. 3 of 1932 is called the *Financial Agreements Enforcement Act*. It describes itself as "An Act to provide for the carrying out of the Financial Agreements between the Commonwealth and the States by the parties thereto, and for other purposes." Whether this is a true description of its contents will presently appear.

The general purpose and effect of the Act is to prescribe two methods for setting in motion machinery in order to secure the receipt by the Commonwealth of moneys sufficient to meet all liquidated amounts owing "by a State to the Commonwealth under or by virtue of the Financial Agreements."

The first method is that prescribed by sec. 5. The Commonwealth Treasurer may at any time request the Commonwealth Auditor-General to furnish him with a certificate in writing stating the amount of any debt owing by any State to the Commonwealth under the Financial Agreements. The Auditor-General duly furnishes the certificate and the Treasurer is bound to publish it in the *Commonwealth Gazette*. After such publication the Commonwealth Attorney-General may apply to the Full Court of the High Court for a "declaration" that the whole or part of the sum of money mentioned in the certificate is due and payable to the Commonwealth by the State in question. The

declaration is to be made in pursuance of motion and upon three days' notice to the State. The "declaration," when made, is to be "a judgment of the High Court in favour of the Commonwealth against the State." It is not only enforceable as a judgment but it is to operate "as a charge upon all the revenues of the State."

After such a "declaration" secs. 7 to 13 of the Act may be brought into play, provided each House of the Commonwealth Parliament resolves to that effect. It is significant that secs. 7 to 13 of the Act may operate although other litigation is still pending in this Court as to the liability of the States to the Commonwealth under the Financial Agreements (sec. 5 (8)).

The jurisdiction of the High Court to make a "declaration" under sec. 5 arises only after the Auditor-General has given the certificate to the Treasurer and the Treasurer has published it in the *Gazette*. Further, the proceedings in the High Court are between two parties only, the Commonwealth applicant and a State respondent. To all the Financial Agreements there are seven parties, consisting of the six States in addition to the Commonwealth itself.

Before referring to the sanctions and directions imposed by secs. 7 to 13, it is convenient to describe the second method by which they can be brought into operation.

Sec. 6 enables the Houses of the Commonwealth Parliament to bring secs. 7 to 13 into force and effect against a State even before the High Court has made any "declaration" affirming any liability to the Commonwealth. Resolutions of the two Houses may be moved by or on behalf of a Minister approving and adopting the Auditor-General's certificate and stating that by reason of urgency secs. 7 to 13 should be applied immediately to the specified revenues of the State in alleged default "in order to protect the interests of the Commonwealth until the question of the liability of the State has been determined by the High Court."

Upon such a resolution being carried, secs. 7 to 13 take effect although there are pending in the High Court legal proceedings which will determine the question of the State's alleged liability to the Commonwealth. It is provided that, as soon as practicable, and within two months after the carrying of the resolution, the Commonwealth Attorney-General must apply to the High Court for a declaration that the amount stated in the resolution or any part thereof is owing by the State to the Commonwealth. Further, the State may also, at any time after the passing of such a resolution, apply to the High Court for a declaration that no amount or a smaller amount than that stated in the resolution is owing by it to the Commonwealth. But secs. 7 to 13 continue to operate while the High Court is actually dealing with those applications for a "declaration," and until the moment when the Court declares that no part of the amount stated in the resolution is due and payable and unpaid by the State in question to the Commonwealth.

Secs. 7 to 13 may thus be invoked by way either of sec. 5 or sec. 6. To say that these sections provide a startling method of making up the actual or alleged debt of the State to the Commonwealth is an understatement. The resolution of the Houses which must precede the application of the sections specifies revenues or classes of revenues of the State. A Commonwealth proclamation then issues making all specified revenues of the States payable to the Treasurer of the Commonwealth or such persons as he authorizes. The individual citizen must pay to the Commonwealth any moneys which he owes to the State and which would have formed part of the specified revenues of the State if received by it. He must pay not only debts existing at the date of the proclamation but those coming into existence during its currency. If he pays the Commonwealth, his liability to the State is discharged. If he does not pay the Commonwealth, the moneys may be

recovered at its suit. If he pays the State he commits an offence, heavy penalties are imposed upon him, and he is still liable to pay the Commonwealth. Any State Ministers of the Crown or State officers who receive or permit the receipt of such debts are guilty of an offence.

The main difference between the methods provided by secs. 5 and 6 for such "execution" against State revenues is that, in the former case, a "declaration" of the High Court must precede execution, while in the case of sec. 6 execution may be levied before any declaration is made by the Court. This difference is important because, in the case of sec. 5, the "declaration" of the High Court is an assurance (subject to appeal) that money is due and payable and unpaid. In the case of sec. 6, however, there is no such assurance.

It has been contended that the Auditor-General's function in making a certificate is the comparatively simple one of ascertaining whether money is due and unpaid, and that he is not entitled to have regard to any set-off payable by the Commonwealth to the State under the Financial Agreements or otherwise. The most favourable way to the Commonwealth of regarding sec. 6 is that the State's revenues may only be taken when there is a real probability that money is owing by it to the Commonwealth, and that the consequences which ensue upon an actual "declaration" by the High Court that the State is in default in its payments, are merely anticipated, so as to safeguard the interests of the Commonwealth during the relatively short period in which a declaration one way or the other must be made.

The main question which is discussed in the present judgment is the validity of sec. 5, so far as it presents features common to itself and sec. 6. But sec. 6, regarded separately, can hardly be defended, unless the constitutional power of the Commonwealth Parliament authorizes it to give the Commonwealth the right of levying "execution" against the revenues of a State, not only at a time when nothing may be owing in fact by the State to the Commonwealth, but without any control of the issue of such "execution" being given to the judicial organs. In respect of this taking of State revenues in advance of the High Court's decision, the Commonwealth, through its various non-judicial organs, combines the roles of plaintiff, Judge, and executioner. The High Court is deliberately prevented from staying this extra-judicial process (sec. 6 (7)), which, as has been indicated, may lawfully continue until the point of time when the Court declares that no part of the amount stated in the resolution is owing by the State to the Commonwealth.

In the meantime, however, irreparable damage may be sustained by the State, and the exercise of its legislative and executive capacities may be completely paralyzed. In this way sec. 6 strikes a serious blow at the special and exclusive authority given by the Constitution itself to the High Court to exercise judicial power in all controversies between the Commonwealth on the one hand and the States on the other.

It is better, however, to consider the great issues of this case in relation to sec. 5. It is indisputable that if sec. 5 cannot be justified as a valid piece of Commonwealth legislation, sec. 6 must also be invalid.

Sec. 5, like sec. 6, provides very drastic sanctions for the partial enforcement of the Financial Agreements. But sec. 5, unlike sec. 6, can operate only in the event of a judicial declaration of default on the part of any State which is a party to the Agreements. Nowhere in the Act is there any provision which gives to any State or to the States as a whole any right of enforcing the Financial Agreements in the event of the Commonwealth failing to perform any or all of the obligations and duties which the Agreements have thrown upon it.

It is not true, therefore, to regard sec. 5 or, indeed, any part of the statute as a law for the enforcement of the Financial Agreements. It is a law for the enforcement of the Agreements as against the States of the Commonwealth, and against them alone. The statute expressly discriminates against the States and in favour of the Commonwealth. The Constitution makes no general prohibition against the passing of discriminatory enactments, but their presence in this, as in other Commonwealth legislation, may reveal its real nature and character. It has to be seen whether the Commonwealth Parliament has been given any legislative jurisdiction to make applicable, as against the States alone, the remedies contained in the present legislation.

Now, the application of such remedies to States possessing the powers of responsible self-government is entirely without precedent in the constitutional history of Britain and the British Dominions.

Viscount *Haldane*, speaking for the Privy Council in the year 1923, said:—

It has been a principle of the British Constitution now for more than two centuries, a principle which their Lordships understand to have been inherited in the *Constitution of New Zealand* with the same stringency that no money can be taken out of the consolidated fund into which the revenues of the State have been paid, excepting under a distinct authorization from Parliament itself. The days are long gone by in which the Crown, or its servants, apart from Parliament, could give such an authorization or ratify an improper payment. Any payment out of the consolidated fund made without parliamentary authority is simply illegal and *ultra vires*, and may be recovered by the Government if it can, as here, be traced (*Auckland Harbour Board v The King*[18]).

And this Court, in *Amalgamated Society of Engineers v Adelaide Steamship Co*[19], said:—

For the proper construction of the *Australian Constitution* it is essential to bear in mind two cardinal features of our political system which are interwoven in its texture and, notwithstanding considerable similarity of structural design, including the depositary of the residual powers, radically distinguish it from the American Constitution. Pervading the instrument, they must be taken into account in determining the meaning of its language. One is the common sovereignty of all parts of the British Empire; the other is the principle of responsible government (*Knox* C.J., *Isaacs*, *Rich* and *Starke* JJ.).

A preliminary question of grave constitutional importance is therefore raised by the nature of the sanctions provided to meet the case of breaches of the Financial Agreements on the part of any State of the Commonwealth. Is it within the constitutional competence, either of the Federal Parliament or of the Federal Judicature itself, to authorize or direct the execution of judgments by the seizure of any or all of the King's State revenues, for the purpose of meeting a proved liability on the part of a State either to an individual or to the Commonwealth itself?

In the *Engineers' Case*[20] this question was by no means determined. It was decided by this Court (in accordance with the express terms of the question in the case stated as amended at the hearing) that the Parliament of the Commonwealth has power to make laws "binding on the States" with respect to conciliation and arbitration for the prevention and settlement of industrial disputes

extending beyond the limits of one State[21].

But it does not follow that Federal laws which are binding on the State can be made enforceable by a judgment of the Federal Courts authorizing the seizure in execution of the King's State revenues. And in the recent case of *Australian Railways Union v Victorian Railways Commissioners*[22] *Isaacs* C.J., who always gave a broad and liberal interpretation to Commonwealth constitutional powers, said:—

It never has been contended, and I do not suggest it ever could be properly contended, that anyone but the State Parliament could appropriate the King's State revenue.

The same learned Justice also suggested that if an industrial award binding upon a State were followed by a judicial decision declaring the duty of the State to pay the sum awarded, the position would probably be that the Courts have "power to declare rights and pronounce judgments, leaving it to Parliament to find money for payment of the judgments against the Crown"[23].

In the same case *Starke* J. also referred to the constitutional practice which prohibits moneys being taken out of the consolidated revenue fund of the States except under a distinct authorization from their Parliaments.

"It would require, I agree," he said, "the clearest words in the Constitution to interfere with or impair this constitutional principle, embedded in the Constitution of the States, and I can find nothing in sec. 51, pl. XXXV. or pl. XXXIX., which warrants any such conclusion. And in the absence of any such provision in the Constitution, sec. 106 is conclusive"[24].

He added:—

If a right be established against a State or a body managing its activities under the Commonwealth Arbitration laws, then the Courts must assume that "provision necessary to satisfy that obligation will be readily and promptly made" (*R. v Fisher*[25]; *Attorney-General v Great Southern and Western Railway Co of Ireland*[26]). In the last resort, however, if an obligation under an arbitration award made pursuant to the *Commonwealth Conciliation and Arbitration Acts* involves the provision of funds by the Parliaments of the States, then that obligation cannot be discharged, nor its penal sanctions broken, unless the necessary provision be made[27].

Isaacs C.J. and *Starke* J. were two of the four Justices who were responsible for the leading judgment in the *Engineers' Case*. It seems likely, therefore, that although laws of the Parliament of the Commonwealth are "binding" upon a State, judicial decisions declaring the liability of a State to pay moneys in accordance with such "binding" laws may not be capable of execution by seizure of the King's State revenues. Implicit in the judgments delivered in the *Australian Railways Union Case*[28] is the principle that political and not legal sanction may have to be relied on in order to induce State Legislatures to appropriate moneys for the purposes of meeting all judgments against the Crown in right of the State.

The whole financial system of the States is designed to secure not only that State revenues shall not be expended for any purpose in excess of the amount granted for such purpose by an Act of its

Legislature, but also that no revenues shall be expended for any purpose not already authorized by resolution of the various Legislative Assemblies. As *Maitland* has said, "supply ... has been voted, as I have already described, for specified purposes" (*Constitutional History of England*, p. 447).

As long ago as the year 1786 Lord *Mansfield* observed—

that great difference had arisen since the Revolution with respect to the expenditure of the public money. Before that period, all the public supplies were given to the King, who in his individual capacity contracted for all expenses. He alone had the disposition of the public money. But since that time, the supplies have been appropriated by Parliament to particular purposes, and now whoever advances money for the public service trusts to the faith of Parliament (*Macbeath v Haldimand*[29]).

Lord *Mansfield* added—

that according to the tenor of Lord *Somers's* argument in the *Banker's Case*[30], though a petition of right would lie, yet it would probably produce no effect. No benefit was ever derived from it in the *Banker's Case*; and Parliament was afterwards obliged to provide a particular fund towards the payment of those debts. Whether, however, this alteration in the mode of distributing the supplies had made any difference in the law upon this subject, it was unnecessary to determine; at any rate, if there were a recovery against the Crown, application must be made to Parliament, and it would come under the head of supplies for the year[31].

Nearly a century and a half has passed since the judgment referred to. In that period popular Houses have assumed full responsibility over the assessment, levying, collection, appropriation and management of public charges upon the people. So far as England is concerned the *Parliament Act 1911* has defined the relative functions of Lords and Commons in respect to, *inter alia*—

"the imposition, repeal, remission, alteration, or regulation of taxation; the imposition for the payment of debt or other financial purposes of charges on the consolidated fund, or on money provided by Parliament, or the variation or repeal of any such charges" (1 & 2 Geo. V. c. 13, sec. 1 (2)).

"It follows, accordingly," says *May*, "that the Lords may not amend the provisions in Bills which they receive from the Commons ... so as to alter, whether by increase or reduction, the amount of a rate or charge, its duration, mode of assessment, levy, collection, appropriation or management; or the persons who pay, receive, manage, or control it; or the limits within which it is leviable" (*May*, *Parliamentary Practice*, 11th ed., p. 575).

So far as the Dominions are concerned, the same broad principle is almost universally applied, at any rate since the Privy Council, in the year 1886, answered questions relating to the respective functions of the Legislative Council and the Legislative Assembly of Queensland in regard to Money Bills. The New South Wales practice has been embodied in a valuable memorandum on the whole subject contained in Mr. Speaker Levy's observations, his letter to Dr. A. B. Keith, and the

latter's reply thereto (Papers L. A., October 22nd, 1929, *Hansard*, December 6th, 1928, pp. 2602-2604).

In a real sense the King's State revenues are impressed in the hands of the King's representative and the responsible State Ministers with the stamp of moneys already devoted by the law to some service of the King. It would be a serious intrusion upon this constitutional system if, in the absence of authorizing State legislation, moneys granted to His Majesty by the Legislatures of a State for the express purpose of providing for specified services, could be taken in execution to satisfy any judgment against the King in right of the State. It is not correct to say, without qualification, that they are the King's moneys.

It is clear enough that the adoption of the opinions expressed in the *Australian Railways Union Case*[32] by *Isaacs* C.J. and *Starke* J. might be sufficient to warrant the conclusion that the main provisions of the *Financial Agreements Enforcement Act* are *ultra vires*. The declared purpose of that Act is to enforce an established State liability by seizure of any or all of the revenues of the State. It is true that the revenues, which the Commonwealth as judgment creditor selects, would ordinarily be taken before their receipt at the State Treasury or by an accounting officer of the State. But the Act treats these moneys as property of and debts accruing to the State. The intervention of the Commonwealth at a point of time anterior to the actual receipt of the moneys by State officials is designed so as to intercept part of the specified State revenues. What takes place clearly amounts to what *Isaacs* C.J. described in the *Australian Railways Union Case* as an "invasion" of the revenues of the State.

If the moneys to be taken at the order of the Commonwealth Treasurer are not to be regarded as part of the revenues of the State, the law authorizing their taking must be regarded in part at least as a Federal law imposing taxation. To take moneys from the people is to tax the people. A law does not cease to be a law imposing taxation merely because the amount of money to be taken has already been determined by State laws and assessments issued thereunder. In the result, it is the Commonwealth which takes and taxes, and as the *Financial Agreements Enforcement Act* makes such taxation leviable only in the case of and with respect to a State of the Commonwealth which is in default, the law must operate so as to discriminate between States. But this is expressly forbidden by the Constitution (sec. 51 (II.)). On the whole, however, it is simpler to take the heading of Part II. of the *Financial Agreements Enforcement Act*, "Enforcement against State Revenue," at its word and treat the moneys payable by the State taxpayers to the State as part and parcel of the State's revenues.

In order to distinguish the present case from that of the *Australian Railways Union Case*[33], where the liability of a State to pay its employees the wages fixed by binding Commonwealth awards was considered by *Isaacs* C.J. and *Starke* J., it is argued that the obligation of the State to observe the Financial Agreements is unconditional because it is binding notwithstanding anything contained in the Constitution of the State (sec. 105A (5)), whereas an award made under Commonwealth law is only enforceable against a State subject to sec. 106 of the *Commonwealth Constitution*, which recognizes the continuance in existence of the Constitutions of the States. But this distinction is not satisfactory. The power of the Commonwealth Parliament to authorize the issue of the legal command which makes Federal industrial awards binding upon a State, springs not merely from sec. 51 (XXXV.) of the *Constitution* itself but from covering clause V. of the Imperial Act to which the Constitution is scheduled. By virtue of the covering clause the binding quality of valid Commonwealth legislation is assumed to be of the same order as the Imperial Act itself. Both bind "notwithstanding anything in the laws of any State." Moreover, the financial system which is the

basis of responsible government in the States can hardly be said to be really "contained" in the State Constitution, regarded as a written enactment. The more reasonable conclusion is that the Financial Agreements are "binding upon" the States just as valid Federal laws and awards may be binding. The obligation is not conditional but unconditional. Enforcement of judgments relating to such obligations is a different question.

But such question need not be discussed further for the purposes of the present case because of the conclusion that sec. 5 is invalid for reasons quite apart from the important principles expounded by *Isaacs* C.J. and *Starke* J. in the *Australian Railways Union Case*[34]).

It will, therefore, be assumed that there is no constitutional objection to sec. 5 merely because the sanctions it embodies are directed at the seizure of moneys which are part of the revenues of the State. The validity of the section has still to be tested.

It is elementary that those who affirm the validity of secs. 5 and 6 must be able to point to some legislative power of the Commonwealth Parliament, which authorized their enactment. "The burden," said Viscount *Haldane* L.C. in *Attorney-General for the Commonwealth of Australia v Colonial Sugar Refining Co*[35], "rests on those who affirm that the capacity to pass these Acts was put within the powers of the Commonwealth Parliament to show that this was done."

For such purposes it is not directly relevant to point to the declaration in sec. 105A (5) that the Financial Agreements shall be "binding upon the Commonwealth and the States parties thereto notwithstanding anything contained in this Constitution or the Constitution of the several States or in any law of the Parliament of the Commonwealth or of any State." It may be assumed that this declaration makes the Agreements fully binding upon the States, and binding in such a way as neither they nor the Commonwealth may lawfully abrogate, alter, denounce, or repudiate them under their respective constitutional powers. But the *Financial Agreements Enforcement Act* is the product of the Commonwealth Legislature, which is a Parliament with defined and specific powers. The relevant question is whether the Commonwealth Constitution has given the Parliament power to enact such a law.

Three suggestions have been made.

1.

Sec. 105A (3) gives legislative power to the Commonwealth to "make laws for the carrying out by the parties thereto of any such agreement." It is said that the Act is such a law.

2.

It is suggested also that the Act is a law with respect to "matters incidental to the execution of" a power vested by the Constitution in the Government of the Commonwealth (sec. 51 (XXXIX.)).

3.

It is also suggested that the Act is a law with respect to "matters incidental to the execution of" a power vested by the Constitution in the Federal Judicature (sec. 51 (XXXIX.)), or, in the alternative, a law under sec. 78 "conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power."

It is best to deal with these suggestions in the order stated.

The power contained in sec. 105A (3) is to make laws for the "carrying out by the parties" of financial agreements of the class described in sec. 105A (1). The power extends to future agreements more obviously than it does to agreements made before the commencement of sec. 105A. But it will be assumed that it applies equally to both classes. The natural meaning of the words "carrying out" is giving effect to or putting into operation. The phrase "carrying out" has been used frequently by Australian Legislatures when referring to regulations made by the Executive under the authority of an Act of Parliament. These regulations often deal with matters which are necessary or convenient to be prescribed for "carrying out or giving effect" to the Act itself. In this context, "carrying out" the Act by binding regulations means the making of laws of a subordinate character for the purpose of implementing, facilitating and providing machinery ancillary to the principal commands of the Act itself.

It is very important to remember that the power given to the Commonwealth Parliament in sec. 105A (3) was the result of action on the part of the Commonwealth Parliament in accordance with an arrangement between the Commonwealth and the States as described in the first Financial Agreement of 1927. That Agreement recited that permanent effect could not be given to the proposed scheme unless the Constitution of the Commonwealth "is altered so as to confer on the Parliament of the Commonwealth power to make laws for carrying out or giving permanent effect to such proposals." This recital seems to be anticipating the operative part of the Agreement under which the Commonwealth undertakes to submit proposals for altering the Constitution so as to enable the Commonwealth Parliament to make laws both for validating the Agreement itself (sec. 105A (2)) and for the carrying out by the parties of the Agreement (sec. 105A (3)).

But the contention made on behalf of the Commonwealth is that "carrying out" includes the provision of any and every means calculated to result in the performance by the parties to the Agreement of all their obligations under it. So construed, the power would admit of few, if any, limitations. It would not only enable the Commonwealth to seize State property and State revenues but to pass special taxation laws for the purpose of extracting funds from a defaulting State. Was it for such purposes that the seemingly innocuous phraseology of sec. 105A (3) was agreed to by all the Parliaments of the States? Mr. *Ham* has argued that the obligations of the Commonwealth to bondholders in respect of the payment of interest on State debts "taken over" under the Permanent Provisions of the 1927 Agreement, were assumed and must be met by the Commonwealth whether the States pay their interest to the Commonwealth or not; and he concludes that drastic powers of enforcement against defaulting States must have been in the contemplation of the parties who agreed upon sec. 105A (3).

The answer to this argument is that it is very unlikely that the possibility of a State's inability or unwillingness to meet its interest payments was thought of at the time the Agreement was entered into. If the enforcement as against the States of their contractual obligations is the idea behind sec. 105A (3) the language is singularly ill-adapted to hint at, much less express, such a thought. The word "enforcement" would have been the obvious word to use. Further, the assumption that the Commonwealth has agreed unconditionally to make interest payments on the specified State debts should not be made. On the contrary there is much to be said for the view that clause 2 of the Permanent Provisions (Part III.) of the 1927 Agreement has been deliberately devised in order to make the Commonwealth's duty to pay interest to bondholders upon the debts therein described,

strictly conditional upon each State fulfilling, from time to time, its duty to pay the interest money to the Commonwealth.

It was admitted by counsel for the Commonwealth that it was not solely to meet cases of default on the part of the States that sec. 105A (3) was included, and that it was also intended that the Commonwealth should be vested with legislative power to pass laws providing machinery necessary or desirable in the working out of many matters generally described in existing and future financial agreements. But it is far more likely that this was the sole intention of sec. 105A (3). The sounder inference is that the parties intended that the natural meaning of "carrying out" in its context should be adhered to, and that default by the parties, not having been feared, was not provided against. It was anticipated that much might have to be done by the parties in the course of any financial agreement being performed. For instance, an agreement providing for the management of debts would require that some controlling authority should be empowered to regulate the method and lay down the scheme of management. Again, the Commonwealth might be bound to raise money from time to time in pursuance of decisions of the Loan Council. Matters of such a character might require detailed regulation by the Commonwealth Parliament under sec. 105A (3). Moreover, the power extends to future agreements which might require Commonwealth legislation for them to operate at all. Such legislation could be passed under sec. 105A (3).

At this point it is convenient to notice two arguments which were addressed to the Court. It was said for the Commonwealth that legislation of the character just described could have been passed by the Commonwealth Parliament in exercise of the power given by sec. 51 (XXXIX.), without the insertion of sec. 105A (3) in the *Constitution*, and that, therefore, laws for enforcing the Financial Agreements should be regarded as contained within the scope of the sub-section. The first step in this argument is not sound. Further reference will be made later to the meaning of sec. 51 (XXXIX.), as laid down by the Privy Council. For present purposes, it can be said that placitum *xxxix.* cannot justify the passage of a law which would bind both the Commonwealth and the six States in relation to their carrying out of functions described in the general terms which characterize the first Financial Agreement. Sec. 51 (XXXIX.) refers only to existing powers vested by the Constitution in specified instrumentalities of the Commonwealth, but all financial agreements, although binding upon the Commonwealth, are binding as agreements and do not confer any special constitutional "powers" upon the Government of the Commonwealth. The State Governments are bound equally. In any event, the Commonwealth Parliament could not, under sec. 51 (XXXIX.), pass laws which would be binding upon the States in respect of the exercise by them of any of the rights or duties created by the Financial Agreements. Hence there was required some such machinery provision as sec. 105A (3), in order that one set, and not seven diverse sets, of rules and regulations could be promulgated for carrying out all existing and future agreements. It was obviously convenient to select the Commonwealth Parliament as the law-making authority for such purpose, and such a selection was made in sec. 105A (3).

The second argument to be noticed was that so clearly submitted by Mr. *Mitchell*. He said that a law "for the carrying out" of financial agreements meant a law "for the performance" of such agreements, because to "carry out" an agreement was to "perform" it. And he argued that it necessarily followed that laws providing remedies for breaches of the agreements by any of the parties were laws for their "performance" because, after the remedies had been fully exercised, the result would be that the parties had "completed" or "carried out" or "performed" the agreements.

That part of the argument which identifies "carrying out" with "performance" is unimpeachable. But there is a vast distinction between the performance by A of an agreement made between A and B,

and what occurs when A does not perform it, is successfully sued by B for breach of agreement, and has execution issued against his property in order to satisfy the judgment debt. It is not true in fact or in law to say that, after the entry of such satisfaction, A has "performed" or "carried out" his agreement. A has made reparation for his breach of contract, but to say that he has "carried out" his contract is exactly the opposite of the truth. So too, it can never be said of a State of the Commonwealth which is unable to carry out and does not carry out its part of any financial agreement and against which High Court proceedings are taken and execution levied, that it has "carried out" or "performed" the agreement.

The answer to Mr. *Mitchell's* argument is that laws providing remedies in the event of any of the parties not carrying out, i.e., committing breaches of the Financial Agreements are not contemplated by sec. 105A (3) because they are not laws for "the carrying out by the parties" of the Agreements.

This interpretation of sec. 105A (3) is greatly supported by the consideration that the Commonwealth Parliament's power under sec. 105A (3) with reference to financial agreements, is to make laws for their carrying out "by the parties thereto." These words can only be ignored at the price of committing the familiar fallacy *a dicto secundum quid ad dictum simpliciter*. The Commonwealth itself is a necessary party to every financial agreement described in sec. 105A (1). The legislative power of the Commonwealth under sec. 105A (3) extends as much to regulating the carrying out of the Agreements by the Commonwealth itself as by any or all of the States. It is obvious that the sub-section does not look to the passing of laws by the Commonwealth Parliament for the purpose of making available to the States, or any of them, remedies designed to coerce the Commonwealth in the event of any default or non-performance on its part. The power to adopt such coercive measures against the Commonwealth in cases of breaches by it of any of the terms of the Financial Agreements, is inconsistent with any real exercise of such a power by the Commonwealth Parliament itself. This indicates that in sec. 105A (3) the parties were considering matters to be provided for in the course of performing the Agreement, not remedies and sanctions to be adopted in cases of non-performance, either by the Commonwealth itself or by any of the other parties.

Even if the provision of sanctions or additional sanctions to meet cases of non-performance, is to be treated as included in sec. 105A (3), the present legislation cannot be truly described as a law providing sanctions in the event of non-performance "by the parties" of their obligations under the Agreements. The legislation is designed to effect a different end. It is to be in force for two years only, a very small portion of the full duration of the Permanent Provisions of the main Financial Agreement. No sanctions or remedies of any character are made available to the States. The law is not a "properly framed law" within sec. 105A (3), but an attempt to saddle the States with a more rigid code in relation to the performance of their contractual duties than that which remains applicable to the Commonwealth itself. (Cf. *In re Insurance Act of Canada*[36].)

Moreover, even if the power in sec. 105A (3) extends to enforcement, the enforcement must refer to enforcement by the judicial process of the High Court, which, at the time of the making of the first Financial Agreement and of the constitutional change later effected by sec. 105A itself, was invested with power to hear and determine all controversies between the Commonwealth and the States. That jurisdiction is given by the Constitution to the High Court of Australia by direct grant under sec. 75 (III.) of the *Constitution* (*The Commonwealth v New South Wales*[37]). The jurisdiction is not dependent upon Federal legislation nor can the Federal Parliament impair or derogate from its free exercise.

This aspect of the case is of importance. The enforcement of a contract by executing judgments

declaring its breach pertains to the judicial power. In *Waterside Workers' Federation of Australia v J. W. Alexander Ltd*[38] *Isaacs* and *Rich* JJ. said:—

The arbitral function is ancillary to the legislative function, and provides the *factum* upon which the law operates to create the right or duty. The judicial function is an entirely separate branch, and first ascertains whether the alleged right or duty exists in law, and, if it binds it, then proceeds if necessary to enforce the law. Not only are they different powers, but they spring from different sources in the Constitution. The arbitral power arises under sec. 51 (XXXV.); the judicial power under sec. 71.

Later they said[39]:—

And when the award is made and the right established, the law presumes the parties will obey it. Enforcement by a Court is an entirely separate matter. It arises on breach or threatened breach. But that is the case with every right. A right of property or a contractual right may exist, and, if violated, the law provides for its enforcement. But breach is not presumed. It follows that enforcement is in its nature an entirely separate process from the creation of the right.

In the same case *Barton* J. spoke of judicial power "in the spheres of the reception, institution, determination of controversies, and the enforcement of the determination"[40]. Previously *Barton* J. approved of the description of judicial power by Mr. Justice *Miller* of the Supreme Court of the United States of America as "the power of a Court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision"[41]. And in *Federal Commissioner of Taxation v Munro*[42] *Isaacs* J. said "the concept of judicial power includes enforcement."

If, contrary to the opinion expressed, sec. 105A (3) is interpreted as enabling the Commonwealth Parliament to provide additional remedies so as to enforce the judgments of the High Court in cases of breaches of the many terms of the Financial Agreements, it is still part of the definition of the power that its exercise should be really and truly a provision for the "carrying out" of the Agreement "by the parties thereto." The attempt to confer upon the High Court jurisdiction to make a "declaration" of default by some parties only to the Agreement, with sanctions applicable to them only, is quite inconsistent with the words of sec. 105A (3). The Agreement may be varied or rescinded "by the parties thereto" (sec. 105A (4)), i.e., *all* the parties thereto. The same interpretation must be given to sec. 105A (3).

The main feature of sec. 6 of the *Financial Agreements Enforcement Act* is that the new form of "execution" may be levied by the Commonwealth against a State before the High Court makes any "declaration" affirming a liability of the State to the Commonwealth. But the operation of sec. 5 is such that this Court, intended by the Constitution to be the only authority capable of determining controversies and superintending remedies in all disputes between the Commonwealth and the States, is sought to be restricted to a subordinate and almost impotent role in its jurisdiction over disputes relating to the Financial Agreements. There may be an action already pending in this Court for the purposes of deciding one or more of such disputes. Notwithstanding this, revenues of a State may be seized at the will of the Houses of the Commonwealth Parliament although the Commonwealth is, at the time of the High Court's declaration, in the position of having itself broken its obligations to the defaulting State. The only issue which the Court can deal with in making or

refusing a declaration under sec. 5 or sec. 6 is whether the moneys in question or part of them are due and payable and unpaid from a State to the Commonwealth. This does not enable the State to claim by way of set-off that there is a debt either under the Financial Agreements or otherwise owing by the Commonwealth to it, and unpaid, and exceeding the amount of the debt admittedly owing by the State to the Commonwealth. But in the ordinary exercise of this Court's jurisdiction under sec. 75 (III.) such a defence would successfully confess and avoid the Commonwealth's claim. The right of the Court to allow such a defence is implied in its constitutional power. The Court could not allow it, if it obeyed the legislation now under review. All that the High Court is allowed to do is to make a "declaration" in relation to unpaid debts of the State without being able, at the same time, to render any judgment in relation to cross-claims and cross-demands of the State against the Commonwealth.

It can hardly be denied that such legislation is a serious impairment of the constitutional jurisdiction of this Court under sec. 75 (III.). Under that section the State, as well as the Commonwealth, is entitled to institute proceedings in relation to claims arising under the Financial Agreements. The Court has complete control of the judicial settlement of all such controversies. In truth, one most serious objection to the validity both of sec. 5 and sec. 6 is that they set up a scheme for enforcing the rights of one party only, under an Agreement which gives rights to seven parties, and that this is done under conditions which effectually prevent the High Court from rendering complete justice when any State and the Commonwealth are in dispute as to their rights under the Financial Agreements. Yet every notion of justice requires that the Court shall see to it that to each contending party is assigned his due.

There is a real inconsistency between the method of approaching the High Court prescribed by the Constitution and by the *Financial Agreements Enforcement Act*. The High Court has no jurisdiction under sec. 5 or sec. 6 except upon the occurrence of the preceding events described in each section. But by virtue of sec. 75 (III.) of the *Constitution* the Court has continuous authority to adjudicate in actions commenced either by the Commonwealth or by a State for the purpose of establishing the rights and liabilities of the parties under the various Financial Agreements. Referring to the High Court's power and duty to decide "all matters" between Commonwealth and State under sec. 75 (III.), *Knox* C.J., in *The Commonwealth v New South Wales*[43], said:—

This power is conferred by the Constitution itself on this Court to take cognizance of this matter. Any legislation by Parliament directed to conferring this power would, therefore, be as superfluous as legislation by Parliament to restrict the limits of the jurisdiction would be ineffective.

Further reference will be made to this aspect of the case in considering whether the *Financial Agreements Enforcement Act* is a law under sec. 51 (XXXIX.) in relation to the powers of the High Court. But it is reasonably clear that secs. 5 and 6 are not authorized by sec. 105A (3) of the *Constitution*.

Now it was sec. 105A (3) to which Parliament was addressing its attention and which it was intending to exercise when the *Financial Agreements Enforcement Act* was passed. This is clearly shown by the recitals. And the question at once arises whether Parliament has not sufficiently expressed an intention to limit its legislation to what may be authorized by sec. 105A (3) alone. No previous decision covers the case of the present legislation, which is deliberately drafted in exercise of the legislative power contained in sub-sec. 3. No answer of a satisfactory character has been

made to the point, but it will be assumed in favour of the Commonwealth that the Commonwealth Parliament intended that if its legislation could be justified under *any* legislative power, the *Financial Agreements Enforcement Act* should be treated as an exercise of such power.

But the fact that the main power to which the legislation was directed is that contained in sec. 105A (3), is not without significance. For legislation framed to effectuate one purpose, and as an exercise of one power, will seldom be fortunate enough to be a "properly framed" execution of legislative powers which were either deliberately put aside or not thought of by those responsible for its framework and general scheme.

The first suggestion is that secs. 5 and 6 may be laws authorized by sec. 51 (XXXIX.) and the question is whether they are, in truth, laws incidental to the exercise of any power vested by the Constitution in the Government of the Commonwealth.

It is here that we have the great assistance of the judgment of the Judicial Committee in the *Sugar Case*[44]. There it is authoritatively established that laws to be valid under sec. 51 (XXXIX.) must deal with matters which are truly incidents in the exercise of some existing constitutional power vested in the organs of Government and the persons described in placitum *xxxix.* "These words," said Viscount *Haldane* (sec. 51 (XXXIX.)) "do not seem to them to do more than cover matters which are incidents in the exercise of some actually existing power"[45].

So far as sec. 61 of the *Constitution* is concerned, it merely describes in general terms what is called the "executive power of the Commonwealth." Such power, says the section, "extends to the execution and maintenance of this Constitution and of the laws of the Commonwealth." This, said *Isaacs* J. in *The Commonwealth v Colonial Combing, Spinning and Weaving Co*[46],

marks the external boundaries of the Commonwealth executive power, so far as that is conferred by the Constitution, but it leaves entirely untouched the definition of that power and its ascertainment in any given instance.

Later on he adds that the description of the executive power in sec. 61

does not determine the existence or non-existence of the necessary power in relation to a given case, any more than marking the territorial domain determines a similar question in relation to State executive action. Having ascertained in a given case that the constitutional domain has not been transgressed, we may have to go further and find whether on that field in the circumstances the power in fact exerted was lawful[47].

It follows that sec. 61 has no bearing upon the present question.

In considering the legislative power under sec. 51 (XXXIX.) we must have regard to what relevant power is vested by the Constitution in the Government and see what is involved in such power being exercised. The Commonwealth Parliament may only pass laws dealing with matters which, in relation to the governmental power in actual exercise, can truly be described as incidental.

Perusal of the argument in the *Sugar Case* shows that all of the four Law Lords who dealt with the appeal took the same view of placitum *xxxix.* Lord *Moulton* repeatedly pointed out that "incidental" was quite distinct from "in aid of," "helpful" and "effective for." "Incidental," he said, "does not

mean convenient for, or anything of the kind, or in aid of." Lord *Moulton* said also:— "If I may say so, those matters incidental to mean necessary or usually going with. It is a kind of penumbra to the umbra. It is that which usually surrounds it." Lord *Shaw* said: "So that you have a particular subject, you are exercising a power in it, and something incidental to work out that power." Lord *Dunedin* said: "Turtle soup is in aid of dinner; but is it incidental to it?" These extracts are typical of the views repeatedly expressed by the members of the Privy Council, and the metaphors graphically illustrate the principle embodied in the actual judgment of Viscount *Haldane* which has already been quoted.

The only power vested in the Government of the Commonwealth by the Constitution which can have any possible relation to the present legislation, is that contained in sec. 105A (1). By it the Commonwealth Government is entitled to "make" financial agreements. That is an existing power. How is the power exercised? The power to make agreements is exercised by making them. Placitum XXXIX. authorizes the passing of laws incidental to the making of such agreements. Such laws might provide for the manner in which the Executive is to enter into such agreements, the safeguards to be observed, e.g., giving publicity to the agreements and protecting the signatories, being executive officers, from all personal liability in and about the making of the agreements.

But it is obvious that secs. 5 and 6 are not laws which relate in any way whatever to the execution of the power of the Commonwealth Government to "make" financial agreements. No other power of the Government as such can be pointed to.

Placitum XXXIX. is again invoked in order to suggest that secs. 5 and 6 are laws with respect to the execution of a power vested by the Constitution "in the Federal Judicature." The principle of the *Sugar Case*[48] again applies. We must see what relevant power the Constitution gives to the Judicature, what is involved in the execution of such power, and what matters are truly incidental and subordinate to such execution.

The contention is that the Constitution (sec. 75 (III.)) gives power to the High Court to determine all controversies and matters arising between the Commonwealth and a State, that the liability of a State to the Commonwealth under the Financial Agreements may involve such a controversy, that the Court has power to give judgment in such a matter and that it is an incident to the exercise of such jurisdiction between the States and the Commonwealth, that the judgment should be enforceable against the property and revenues of the parties.

Here it is convenient to dispose of the very faint suggestion from the Bar that sec. 78 of the *Constitution* may authorize the present legislation. The decision of this Court in *The Commonwealth v New South Wales*[49] definitely rejects such a suggestion. Sec. 78 has no relation to laws enabling the bringing of actions in the High Court by the State against the Commonwealth or by the Commonwealth against a State. For such jurisdiction has already been provided for in the Constitution itself (sec. 75 (III.)).

"Obviously," said *Isaacs*, *Rich* and *Starke* JJ., "the matter was one to be dealt with by the Constitution, which created mutual rights and obligations between Commonwealth and States and foresaw the necessity of some tribunal, not the judicial organ of any one State exclusively, to determine or finally determine possible disputes between Commonwealth and States, and between different States, and between States and residents of other States. As to these the Constitution at once enacted sec. 75 as a self-executing provision in the terms mentioned. The words in all matters are the widest that can be used to signify the subject matter of the Court's jurisdiction in the

specified cases. Matters read with the context and in relation to judicial power are limited by the inherent sense of matters which a Court of law can properly determine, that is, by some legal standard"[50].

The same Justices, in holding that the word "matters" included torts, stated that the word included "all claims for infringements of legal rights of every kind—all claims referable to a legal standard of right... The word would, without question, include a claim for breach of contract"[51].

They also pointed out that it was not possible to think that sec. 75 does not itself enable the complaining party—whether Commonwealth or State—to approach the Court for redress[52].

Sec. 78, in their view, does not enable the Commonwealth to sue a State or a State to sue the Commonwealth in the High Court.

"It was," they said, "suggested that sec. 78 enabled the Federal Parliament to declare either the Commonwealth or a State liable for torts. That would be at best a very one-sided provision. It would enable the Commonwealth to render a State liable to the Commonwealth, and to refuse a reciprocal liability. It would also enable the Commonwealth to make one State liable to another, and leave that other irresponsible to the first. In short, there would be no certainty of equal and undiscriminating responsibility to obey the law or make reparation. The always present duty of the Crown to abide by and obey the law (Eastern Trust Co v McKenzie, Mann & Co1(1915) A.C. 750, at p. 759.) would be one of imperfect obligation except so far as the Commonwealth chose to impose a perfect sanction. But in truth sec. 78 has no such ambit or purpose"[54].

And, later, they added:—

Sec. 75 needs no parliamentary enactment to include this case. The jurisdiction conferred by sec. 75 is beyond the power of Parliament to affect. It can aid it and direct the method of its exercise; but it cannot diminish it[55].

It is, therefore, clear that secs. 5 and 6 cannot be supported as legislation passed under the power contained in sec. 78. But are they laws with respect to incidents in the exercise of this Court's jurisdiction under sec. 75 (III.)?

What is the power of the High Court, and what matters are truly incidental to the execution by it of its powers? If secs. 5 and 6 of the *Enforcement Act* dealt with matters merely incidental to the exercise by the High Court of its jurisdiction under sec. 75 (III.), one would naturally expect to find them included in the *High Court Procedure Act* or the *Judiciary Act*. The dominating intention of sec. 75 (III.) is that the High Court shall be clothed with jurisdiction to determine "all" matters between the Commonwealth and the States. It is not, as the judgment of *Isaacs*, *Rich* and *Starke* JJ. indicates, a one-sided provision, but is based upon the principle of reciprocal liability between the Commonwealth and the States and of "equal and undiscriminating responsibility to obey the law or make reparation."

When the High Court exercises this jurisdiction, it administers "equal and undiscriminating" justice to both parties. It is bound to give to each its due. Let it be assumed that it is incidental to the

exercise of this constitutional power that the Court can be empowered by the Legislature to make its judgments effectively operate upon every piece of property owned or controlled by the States or the Commonwealth. The assumption may be true, although the observations in the *Australian Railways Union Case*[56] strongly suggest that it is not.

The assumption does not help the validity of sec. 5 or sec. 6 of the present Act. Neither of those sections is a law dealing only with incidents in the exercise by the High Court of its constitutional jurisdiction. That jurisdiction extends to matters arising under all binding contracts between State and Commonwealth, and not merely to disputes relating to the Financial Agreements.

The decision in the case of *The Commonwealth v New South Wales*[57] shows that the "matters" over which the High Court has jurisdiction under sec. 75 (III.) cannot be limited or restricted by the Federal Parliament, but extend to all claims of right by either State or Commonwealth, and particularly to claims by either that the other has broken the terms of a binding contract, and is liable to pay damages or meet a debt. Such "matters" include, of course, claims by either a State or the Commonwealth that the other has committed breaches of the Financial Agreements, but they include much more. Yet one is prepared to assume, further, that legislation under placitum *xxxix.* may be directed to the making of laws incidental to the exercise of the High Court's jurisdiction to determine questions arising under the Financial Agreements, but under no other agreements. This assumption is no small one, because the relation between what is dealt with in legislation so drafted and the exercise of the constitutional power in "all matters," is scarcely that of a subordinate to a principal thing. For the Legislature's restriction of remedies to cases of judgments relating only to breaches of the Financial Agreements tends to make the Agreements the dominant feature of the legislation, and the exercise of the constitutional power of the High Court which extends uniformly to "all matters" between Commonwealth and State tends to become a very minor feature.

Even on this assumption however, it is impossible to regard secs. 5 and 6, which apply only to "matters" in which the State is defendant and the Commonwealth plaintiff and which, for a period of two years only, invoke drastic sanctions in the event of the States becoming judgment debtors, as being laws with respect to "incidents" in the administration by the High Court of equal justice between the Commonwealth and the States in litigation between Commonwealth and State for the purpose of enforcing Financial Agreements. The true character of secs. 5 and 6 is that they impose special remedies applicable only in the case of judgments against the States. These remedies are directed against the States whenever they become judgment debtors and enure, not for the benefit of every judgment creditor, but for the benefit of the Commonwealth when it becomes judgment creditor.

No one should need to be reminded of the fact that one-sided legislation may be within the ambit of a given power to legislate, although it exercises the power in partial and fragmentary fashion. Reminding may be needed lest another mistake befall. It does not follow from the truth—the truism—that there may be partial and fragmentary exercises of power—that one-sidedness and discrimination in laws are to be considered and weighed only *after* the laws are determined to be within the ambit of power. Full account must be given to all such circumstances when ascertaining whether the laws are within power.

The truth is that, as the Parliament of the Commonwealth can only pass valid legislation with respect to a limited number of subject matters, the ultimate inquiry in each case of dispute is whether the enactment is a law "with respect to" one or other of the specified subject matters. If it answers the suggested description, it will be valid although it may also be correctly described as a

law with respect to a subject matter that is not specified at all, and may also be characterized as one-sided and discriminatory. The first stage of the inquiry is an analysis of the operation of the disputed enactment upon the assumption that it is valid. What does it enact? If it is one-sided, partial or discriminatory, the enactment may be detected as belonging to one class of laws and not at all to another class. Because of their one-sidedness, the relation between disputed enactments and enactments which in substantial operation are of the category of laws with respect to a specified subject matter, may be so distant and so remote that the enactments cannot be said to belong to such a category. And, by reason of the same one-sidedness, the class to which they truly belong may be easily ascertained.

Having regard to these considerations, the question remains: Is sec. 5 a law with respect to "incidents" in the exercise of the High Court's constitutional power and duty to administer justice between State and Commonwealth in litigation between these parties for the enforcement of the Financial Agreements?

Two illustrations will test the matter:—

1.

Can the Legislature of the Commonwealth, acting under sec. 51 (XXXIX.), declare that if a contract, binding both on the Commonwealth and a State and by the terms of which the State is bound to construct a ship for the Defence Department, is declared by the judgment of the High Court to have been broken, such judgment may (if it be in favour of the Commonwealth) be executed by the seizure of any property of the State, but (if it be in favour of the State) be incapable of execution at all?

2.

Can the Legislature of the Commonwealth, acting under sec. 51 (XXXIX.), declare, with respect to an existing contract binding on A and B, who are residents of different States, that any judgment of the High Court under sec. 75 (IV.) of the *Constitution* affirming a breach of contract by A, shall be enforceable by execution against A's person and property, but that no execution shall be levied in the event of B's default?

Counsel did not attempt to support the validity of enactments of an analogous character which were suggested from the Bench during argument. The two examples suggested are harsh and one-sided: that is obvious enough. They are also not valid laws in relation to incidents in the exercise of the judicial power of the High Court, because, instead of providing for the effective enforcement of the judgment whomsoever it may favour, they deny the enforcement of the contract to one party but accord it to the other. It is not a mere incident of the administration of justice between two parties who have made one or more binding contracts, so to act as to make the contracts enforceable against one party but not against the other. Such an act is a hindrance to the equal administration of justice, whoever does it. It does not delay justice: it denies it.

A third illustration which on this part of the case bears a close resemblance to the *Financial Agreements Enforcement Act* may be given:—

3.

Has the Commonwealth Parliament power, under sec. 51 (XXXIX.), to enact with respect to a contract which binds A, a resident of New South Wales, and B, a resident of Victoria, that an action to enforce certain clauses of the contract (which clauses impose duties on A alone) may be brought in the High Court, that no cross-action or set-off can be availed of by A and that execution by *ca. sa.* may follow upon any judgment of the Court which declares that A has committed a breach of the clauses in question?

It is reasonably clear that this enactment belongs to a different category from that of laws which merely prescribe incidents in the exercise of the original jurisdiction of the High Court of Australia under sec. 75 of the *Constitution*. The selection, from the total mass of duties created by the contract, of those which bind one party alone, the disabling of A from defending himself against B's action by cross-claim or cross-demand under the same contract, and the limitation of execution to cases of an ascertained breach of the carefully selected obligations, all assist to remove the law out of the class of those dealing with matters incidental to the exercise by the High Court of its jurisdiction. The exercise by the High Court of its jurisdiction, instead of being the main function around which the law centres, has become a means to an end. That end is the giving of a special advantage to B and the imposition of a special disadvantage upon A. The absence of mutuality and the presence of discrimination show the true nature of the law. The object and purpose of the law is to impede the ordered performance by A and B of the contract, and the intervention of the High Court is provided for in order to secure that object and purpose. The Commonwealth Parliament has no jurisdiction under sec. 51 (XXXIX.) to pass legislation which, under the guise of prescribing incidents in the exercise of the judicial power of the Commonwealth, affects, disturbs and overturns the basis of an existing and binding contract. Legal remedies are the criterion of legal rights.

It is not reasonably possible to describe secs. 5 and 6 as laws prescribing mere incidents in the exercise of the constitutional power vested by sec. 75 (III.) in the High Court as part of the Federal Judicature. On the contrary, the enactments are quite foreign to the nature of the power, which can only be exercised impartially if it is exercised at all. They are not judgment creditors' remedies enactments, but laws which are for the benefit of one party to an agreement in its capacity of judgment creditor.

Nothing that I have said depends in the slightest degree upon the doctrine that the States are "sovereign bodies" and entitled to exercise "sovereign" powers and immunities. Three Justices of this Court took occasion in the case already referred to of *The Commonwealth v New South Wales*[58] to denounce the appellation "sovereign State" as applied to the constitutional position of the State of New South Wales[59].

Neither Mr. *Browne* nor Mr. *C. Gavan Duffy*, who argued the case for the States, called in aid any supposed doctrine of "sovereignty." The phrase is most ambiguous. In some aspects, both the States and the Commonwealth are bodies which may lawfully exercise sovereign powers. The Governors of the States are as much the representatives of His Majesty for State purposes as the Governor-General of the Commonwealth is for Commonwealth purposes. The subjection of the States to the jurisdiction of the High Court is accompanied by a perfectly "equal and undiscriminating" subjection of the Commonwealth to the same jurisdiction. For all purposes of self-government in Australia, sovereignty is distributed between the Commonwealth and the States. The States have exclusive legislative authority over all matters affecting peace, order and good government so far as such matters have not been made the subject of specific grant to the Commonwealth. And the

authority of the State covers most things which touch the ordinary life and well being of their citizens—the maintenance of order, the administration of justice, the police system, the education of the people, employment, the relief of unemployment, poverty, and distress, the general control of liberty. Speaking generally, all these subjects are no lawful concern of the Commonwealth.

On this part of the case the States succeed, not because they enjoy a special immunity, but because the *Financial Agreements Enforcement Act* subjects them to an "unequal and discriminating" jurisdiction. For the purposes of judicial process in this Court, although the States are not sovereign bodies, neither is the Commonwealth. Sec. 75 (III.) of the *Constitution* takes away from the sovereignty of States and Commonwealth but takes equally, and takes alike. The *Financial Agreements Enforcement Act* takes unequally.

My opinion is that the Act is not a valid law of the Commonwealth under sec. 51 (XXXIX.) in relation to the exercise of the High Court's jurisdiction over controversies between Commonwealth and State.

This conclusion is strengthened by the fact that the Financial Agreements are governed by the special constitutional declaration contained in sec. 105A (5). That sub-section makes it clear that the Agreements bind the Commonwealth as well as the six States, bind as agreements, and bind as a whole. Legislation which gives effective remedies to the Commonwealth, to enable it to enforce the duties which the Agreements impose upon the States, but which denies the States any effective remedy for enforcing the Agreements against the Commonwealth, is legislation which is not consistent with the declaration contained in sec. 105A (5).

It, therefore, appears that secs. 5 and 6 are not laws for the "carrying out by the parties" of the Financial Agreements, neither are they laws with respect to matters incidental to the exercise of any power vested in the Commonwealth Government or in the Federal Judicature. Nor are they laws in exercise of the legislative power contained in sec. 78 of the *Constitution*.

So far as sec. 15A of the *Acts Interpretation Act 1901-1930* is concerned, it does not operate so as to make valid any part either of sec. 5 or sec. 6. Of sec. 15A the majority of this Court (*Rich*, *Starke* and *Dixon* JJ.) said in *Australian Railways Union v Victorian Railway Commissioners*[60]:—

We think it cannot mean that when the Court has reached the conclusion, as we have done in this case, that a single and indivisible enactment of the Legislature is invalid, the Court is to turn aside from its judicial duties and, assuming the role of legislator, proceed to manufacture out of the material intended to compose the old enactment an entirely new enactment with a fresh policy and operation.

And further[61]:—

The truth is that sec. 15A cannot apply to divert legislation from one purpose to another.

And still further[62]:—

But, adopting the metaphor which was employed to describe the effect of the provision in the *Navigation Act*, it enables the Court to uphold provisions, however interwoven, but it cannot separate the woof from the warp and manufacture a new web.

Secs. 5 and 6 of the *Financial Agreements Enforcement Act* are each "single and indivisible enactments," and it is not possible to separate what is bad in them from one or two things which, in themselves, are innocuous, but which are essential parts of the structure and scheme which the Legislature has seen fit to adopt.

The conclusions of this opinion may be stated as follows:—

1.

The various Financial Agreements between the Commonwealth and the six States confer rights and impose duties upon all the seven parties thereto, and are binding upon each of the seven parties with precisely the same force and effect (sec. 105A (5)).

2.

But the *Financial Agreements Enforcement Act 1932* purports to confer upon one of the parties (the Commonwealth) the right, as against the States, of exercising certain remedies in the event of actual breach (sec. 5) or supposed breach (sec. 6) of portion of the Agreement. The Act confers no remedies whatever upon any or all of the States in the event of the Commonwealth failing to perform its duties to any or all of the States.

3.

Sec. 6 of the Act, if valid, permits revenues of a State to be seized and the exercise of its legislative and executive capacities paralyzed, in advance of any judicial decision that a State is in default, and the High Court is deliberately prevented from staying this extra-judicial process, which may continue until the Court declares that no part of the amount stated in the resolution of the Houses is owing. Sec. 6 impedes the exercise by the High Court of the special and exclusive authority given to it by the Constitution itself in relation to all controversies between the Commonwealth and the States.

4.

Both sec. 5 and sec. 6 of the Act purport to authorize the taking and use by the Commonwealth of the revenues of any State in actual or supposed default quite irrespective of any appropriation by the State Legislature. Such revenues may be and often are moneys devoted by law to special purposes. Most of the legislative and executive functions of the States the Commonwealth has no legal authority to exercise. But it is in relation to the exercise of such functions that the revenues of the States are expressly or impliedly devoted.

5.

In the analogous case where Commonwealth industrial awards "bind" the States (*Engineers' Case*[63]), the enforcement of such awards against the States after proved default raises a grave constitutional question, *Isaacs* C.J. stating in 1930[64]: "It never has been contended, and I do not suggest it ever could be properly contended, that anyone but the State Parliament could appropriate the King's State revenue."

6.

The *Financial Agreements Enforcement Act* must be regarded either as authorizing an invasion of the King's State revenues, or as a law authorizing the taking of moneys from citizens of one State alone. In the latter aspect the law is expressly forbidden by the *Constitution*, sec. 51 (II.).

7.

It is no answer to the former difficulty to point to sec. 105A (5) of the *Constitution* because (*a*) the system of responsible self-government in the various States is hardly to be regarded as something "contained" in their Constitutions, and (*b*) all valid legislation of the Commonwealth Parliament is treated by covering clause V. of the *Constitution* as having the same binding quality as the Imperial Act itself.

8.

But it is assumed for the purpose of this opinion that the constitutional objections to the *Financial Agreements Enforcement Act* mentioned in 6, *supra*, should not be upheld.

9.

The onus still rests upon those who allege that the Act is a valid exercise of the legislative power of the Commonwealth Parliament to point to some authorizing section of the Constitution. For such purposes sec. 105A (5) is not relevant because it confers no legislative power upon the Commonwealth Parliament.

10.

The first suggestion is that the *Financial Agreements Enforcement Act* is a law "for the carrying out by the parties" of the Financial Agreements within the meaning of the power conferred by sec. 105A (3).

11.

But that sub-section (*a*) does not authorize the selection of remedies by the Commonwealth in the event of a party's *not* performing its duties under the Financial Agreements—such power of enforcement after breach of agreement would have been indicated by the use of some such word as "enforcement"; (*b*) does not authorize the passing of legislation which, in its essence, is not as applicable to the Commonwealth itself (being a party) as to any State (being a party). For the Commonwealth Parliament to be invested with the power to "enforce" the Agreements as against the Commonwealth in the event of its breach, is a contradiction in terms. It follows that sec. 105A (3) does not extend to the provision of coercive measures against either Commonwealth or State in the event of default; (*c*) does extend to the passing of legislation by the Commonwealth Parliament prescribing matters to be done and functions to be exercised by the parties in the course of their performance of the Agreements.

12.

It follows that the *Financial Agreements Enforcement Act* is not authorized by sec. 105A (3) of the *Constitution*.

13.

But this was the sole power sought to be exercised by Parliament in passing the legislation in question. Even if it is permissible to bring other powers in aid, the legislation will be difficult to uphold as "properly framed" laws in the exercise of legislative powers not considered or purposely rejected by those who framed the *Financial Agreements Enforcement Act*.

14.

The *Financial Agreements Enforcement Act* is not a law authorized by sec. 51 (XXXIX.) as dealing with any matters which are really incidental to the exercise of any power vested in the Commonwealth Government by the Constitution. In determining this question sec. 61 of the *Constitution* is irrelevant, and the only relevant power of the Government which can be pointed to is sec. 105A (1) of the *Constitution*, which authorizes the Commonwealth Government only to "make" financial agreements. The Commonwealth Government has no *executive* power to enforce any part of the Financial Agreements.

15.

It has been authoritatively determined by this Court in *The Commonwealth v New South Wales*[65] that sec. 78 does not authorize such legislation as the *Financial Agreements Enforcement Act*.

16.

The decision of the Privy Council in the *Sugar Case*[66] shows the ambit of the power contained in sec. 51 (XXXIX.). The suggestion that the *Financial Agreements Enforcement Act* may be regarded as a law dealing with matters incidental to the execution by the High Court of its original jurisdiction to determine all "matters" between Commonwealth and States, cannot be supported.

17.

The decision of this Court in *The Commonwealth v New South Wales*[67] shows that the exercise of the High Court's jurisdiction in matters between Commonwealth and States under sec. 75 (III.) of the *Constitution*, is based upon the principle of reciprocal liability of Commonwealth and States, i.e., "equal and undiscriminating responsibility to obey the law or make reparation" (per *Isaacs* C.J., *Rich* and *Starke* JJ.[68]).

18.

It is assumed in favour of the Commonwealth that, with respect to a selected class of contracts (e.g., the Financial Agreements), the Commonwealth Parliament may pass laws giving judgment creditors remedies by way of execution, and it is again assumed that execution by way of seizure of State or Commonwealth revenues is a remedy not inconsistent with the Federal nature of the Constitution.

19.

But a law which, with respect to the enforcement of the Financial Agreements by the High Court, gives a judgment creditor remedies only in the event of that judgment creditor being the Commonwealth, and denies any remedy to the States, so far from dealing with incidents in the

exercise of the High Court's jurisdiction, provides for something quite foreign to and inconsistent with the impartial administration of justice as between Commonwealth and State.

20.

The *Financial Agreements Enforcement Act* offends against the principle of "equal and undiscriminating responsibility to obey the law or make reparation" which is contained in sec. 75 (III.) of the *Constitution*, as much by narrowing and restricting the constitutional meaning of "matters," as determined by the High Court, for the purpose of executing a judgment in respect of such "matters," as if it provided with respect to all or any "matters" that judgment creditors' remedies should be available to the Commonwealth and never to the States.

21.

The *Financial Agreements Enforcement Act* is inconsistent with sec. 105A (5) of the *Constitution*, because it is implied from that sub-section that the Financial Agreements bind the Commonwealth as well as the States, and bind equally in respect of each and every part of the Agreement. To provide drastic remedies, to be applied only in the event of some of the parties breaking the Financial Agreements, is to effect a substantial alteration in the contractual relationship between the seven parties. The effect of the law is to add special penalty clauses to the Financial Agreements available against the States only, and this is inconsistent with sec. 105A (5) of the *Constitution*.

22.

In the *Financial Agreements Enforcement Act* the High Court's jurisdiction is interposed, not for the purpose of procuring the enforcement of the Financial Agreements, but as a means to another end—namely, the giving of a special advantage to the Commonwealth and the imposition of very special disadvantages upon the States in relation to their performance of duties and their exercise of rights under the Financial Agreements.

23.

Not only therefore is sec. 6, providing for execution against State revenues before any judgment, invalid, but sec. 5 is not authorized by any legislative power of the Commonwealth. No part of either section can be saved under sec. 15A of the *Acts Interpretation Act 1901-1930*. The whole of Part II. of the Act depends upon the validity of these two sections and Part II. is, therefore, *ultra vires* and void.

Both secs. 5 and 6 of the *Financial Agreements Enforcement Act* are *ultra vires* and void, and a declaration should be made that the whole of Part II. of the Act which is dependent upon the validity of secs. 5 and 6 is invalid. It is not necessary to express any conclusion as to the validity of the *Financial Agreements (Commonwealth Liability) Act, No. 2 of 1932*, although enough has been said to show that part of it seems to be based upon a misconstruction of Part III. of the first Financial Agreement.

McTiernan J.

The *Financial Agreements Enforcement Act 1932*, the validity of which is disputed in this action,

contains (*inter alia*) drastic provisions, novel in the law of the Commonwealth, to divert into the hands of the Treasurer of the Commonwealth the revenue of a State flowing into the hands of its officers, who are authorized by the laws of the State to collect it. These provisions are enacted for carrying into effect a judgment which may be obtained by the Commonwealth in proceedings instituted pursuant to the Act against a State for the recovery of moneys certified by the Auditor-General of the Commonwealth to be due and payable and unpaid by the State under and by virtue of the Financial Agreements mentioned in the Act (sec. 5 and secs. 7-13). The statute also makes provision for impounding the revenue of the State prior to the commencement of proceedings so that, if the Commonwealth obtains judgment, the revenue can be applied in satisfaction of the judgment (sec. 6).

It was contended for the States which were represented at the hearing that it is *ultra vires* the Parliament of the Commonwealth to make a law to charge or collect the revenues of a State as a means for enforcing a judgment obtained against it, for the reason that no appropriation of the revenues of a State possessing the system of responsible government can be lawfully made without the approval of its Parliament. An allied contention was that it is an implied condition of the Financial Agreement that a State's obligation under it to pay moneys to the Commonwealth is conditional upon the Parliament of the State voting money to satisfy the obligation, and it is, therefore, *ultra vires* the Parliament of the Commonwealth to make laws for the enforcement of such an obligation on the footing that it is absolute and free of any such condition. In support of these contentions reliance was placed upon views expressed in this Court in *Australian Railways Union v Victorian Railways Commissioners*[69] and the line of cases cited by *Starke* J. at p. 389. It will be observed that the obligation imposed upon the natural or juristic person representing the State, which was in question in that case, arose out of an award of the Commonwealth Court of Conciliation and Arbitration, which was created by Parliament in exercise of the powers contained in sec. 51 (XXXV.) and sec. 51 (XXXIX.) of the *Constitution of the Commonwealth*. But the nature of the obligation which arises out of a Financial Agreement made or validated pursuant to sec. 105A of the *Constitution of the Commonwealth* is affected by sec. 105A (5), which is in these terms: "Every such agreement and any such variation thereof shall be binding upon the Commonwealth and the States parties thereto notwithstanding anything contained in this Constitution or the Constitution of the several States or in any law of the Parliament of the Commonwealth or of any State." The *Financial Agreements Enforcement Act*, which is challenged in this action, applies to agreements upon which sec. 105A operates. The imperious character of the language employed in this sub-section of the Constitution, in my opinion, renders certain the paramount force of any Financial Agreement to which the sub-section applies. It restrains the Commonwealth and every State, which is a party to such an Agreement, from contravening the Agreement and raises the obligations, which the Agreement fastens on the parties, to the level of an obligation arising out of the Constitution itself. Those provisions in the Constitution of a State or in any law of the Parliament of a State, which require that Parliament must appropriate revenue before it can be lawfully applied in satisfaction of the obligation of the State under any agreement or judgment, are clearly included among the "things" which are overridden by sec. 105A (5). The proposition that the payment of moneys due under a relevant Financial Agreement, or the satisfaction of a judgment for moneys found to be due thereunder, must in law depend upon the discretion of the Parliament of a State which is a party to the Agreement, is, in my opinion, repugnant to sec. 105A (5) of the *Constitution*. The Commonwealth is a Government, not a mere confederation of States, and no State within the Commonwealth is entitled to decline to fulfil according to its legal intent any obligation imposed upon it by the Constitution. Sec. 105A (5) is not a dead letter: it pulsates with the vitality of the Constitution itself and imbues with the force of a fundamental law any agreement to which it

applies. In this view the contention cannot be supported that the *Financial Agreements Enforcement Act* is invalid because it attempts to enforce a judgment whether the State Parliament has or has not appropriated revenue. The judgment is a determination given under the judicial power of the Commonwealth that the State is under an obligation, regardless of anything contained in the Constitution or any law of the State to perform its undertaking to pay moneys to the Commonwealth. The duty to obey such an adjudication may be enforced by appropriate laws of the Commonwealth.

The question now arises as to what part of the Constitution of the Commonwealth empowers the Commonwealth to enact secs. 5 and 6. In my opinion sec. 5 is valid under secs. 105A (3) and 105A (5), sec. 75 (III.) and sec. 51 (XXXIX.), and sec. 6 is valid under secs. 105A (3) and 105A (5). There can be no doubt as to the liability of a State to be sued by the Commonwealth in the High Court for moneys due and payable under the Financial Agreement which was validated by the *Financial Agreement Validation Act 1929*. It was decided in *The Commonwealth v New South Wales*[70] that the expression "sovereign State" as applied to a State of Australia is not justified. *Isaacs*, *Rich* and *Starke* JJ., in the course of their joint judgment, said[71]:—"The conclusion to which we were invited to come in interpreting the Constitution upon the assumption that New South Wales is a sovereign State would be both mischievous and unfounded. The term sovereign State as applied to constituent States is not strictly correct even in America since the severance from Great Britain... Still further from the truth is it in Australia. The appellation sovereign State as applied to the construction of the Commonwealth Constitution is entirely out of place, and worse than unmeaning." It was also decided in that case that the High Court had jurisdiction to entertain an action for tort brought by the Commonwealth against the State without the consent of the State. The jurisdiction of the High Court under sec. 75 was referred to by *Knox* C.J. in the above-mentioned case, at p. 204, in these terms: "The unanimous decision of the Court" in *South Australia v Victoria*[72] "was ... that the word matters in sec. 75 meant matters which were of a like nature to those which would arise between individuals and which were capable of determination upon principles of law." In the course of their judgment *Isaacs*, *Rich* and *Starke* JJ. also said[73]:—"The people of New South Wales are not, as are, for instance, the people of France, a distinct and separate people from the people of Australia. The Commonwealth includes the people of New South Wales as they are united with their fellow-Australians as one people for the higher purposes of common citizenship, as created by the Constitution. When the Commonwealth is present in Court as a party, the people of New South Wales cannot be absent. It is only where the limits of the wider citizenship end that the separateness of the people of a State as a political organism can exist. To appeal to the analogy of an entirely foreign independent State is to appeal to an impossible standard. And again this Court is not a foreign Court. It is the tribunal specially created by the united will of the Australian people, as a Federal Court and as a national Court. It has very special functions in relation to the powers, rights and obligations springing from the Constitution and the laws made under it—matters which concern the Commonwealth as the organization of the whole population of this Continent, the States in their relations to the Commonwealth and to each other, and the people in their relation to the Commonwealth and to the States regarded as constituent parts of the Commonwealth." Sec. 105A (3) of the *Constitution* is in these terms: "The Parliament may make laws for the carrying out by the parties thereto of any such agreement." The true content of the power conferred by sec. 105A (3) was much debated at the hearing. I think that it extends to the enactment of laws which invoke the judicial power and aid it when it is exercised for the carrying out by the parties, or any one or more of them, of any relevant Financial Agreement. It may be that it is not every law which Parliament thinks expedient for coercing the parties into carrying out the Agreement that falls within the power conferred by sub-sec. 3. But the power at least extends to the

enactment of such a law which is an aid to the execution of the judgment of the Court pronounced in legal proceedings arising out of the Agreement. This view of the scope of sub-sec. 3 is, in my opinion, confirmed by the fact that the contracting parties are all subject to the jurisdiction of the Court, that the Financial Agreement is not a mere political engagement but a contract of strict legal obligation, and that a breach of the Agreement gives rise to a justiciable matter. That part of sec. 5 which prescribes a speedy method by which the Commonwealth may apply to the High Court for a declaration that an amount of money stated in a certificate of the Auditor-General to be due and payable and unpaid by the State to the Commonwealth is due, is clearly valid as an exercise of the power of the Parliament to make laws incidental to the execution of the judicial power (sec. 51 (XXXIX.)). Sub-sec. 6 of sec. 5, which provides in effect that the declaration made upon such an application by the Commonwealth shall be enforceable as a judgment and shall operate as a charge upon all the revenues of the State, is plainly a law for enforcing the judgment, and is clearly made with respect to a matter which is incidental to the execution of the judicial power. Sec. 7 provides a method of enforcing the judgment. By sec. 5 (6) it is stated that the method contained in sec. 7 is in addition to those already provided by law. In my opinion sec. 7 is also valid as a law with respect to a matter incidental to the exercise of the judicial power. The remainder of Part II. is also valid on that ground. In *Griffin v South Australia*[74] *Isaacs* A.C.J. said:—"In the American case of Virginia v West Virginia2(1918) 246 U.S., at p. 591. White C.J., for a unanimous Court, said: That judicial power essentially involves the right to enforce the results of its exertion is elementary ... And that this applies to the exertion of such power in controversies between States as the result of the exercise of original jurisdiction conferred upon this Court by the Constitution is therefore certain." Light is also thrown upon this question by the following views expressed in the Supreme Court of the United States:—"To provide by legislative action additional process relevant to the enforcement of judicial authority is the exertion of a legislative and not the exercise of a judicial power" (*Virginia v West Virginia*[76]). *Marshall* C.J. said in *Wayman v Southard*[77]:—"The judicial department is invested with jurisdiction in certain specified cases, in all of which it has power to render judgment. That a power to make laws for carrying into execution all the judgments which the judicial department has power to pronounce, is expressly conferred by this clause" (Art. 1, sec. 8, cl. 18), "seems to be one of those plain propositions which reasoning cannot render plainer... The Court, therefore, will only say, that no doubt whatever is entertained on the power of Congress over the subject." This passage is quoted by *Willoughby* on the *Constitution of the United States*, 2nd ed., vol. *ii.*, p. 1297. Reference may also be made to *Bank of the United States v Halstead*[78]; *Board of Commissioners of Knox County v Aspinwall*[79]; *Riggs v Johnson County*[80]. It is a well-established rule that the Executive may lawfully act in the enforcement of a judgment, and a law which empowers the Executive to do so is a valid exercise of the legislative power of the Commonwealth. The effect of secs. 7 and 8 appears to be that the Treasurer or his authorized officer is appointed to collect the revenue of the judgment debtor for the judgment creditor until its judgment is satisfied. When the Parliament has resolved that the provisions of the Act should come into operation, and the Governor-General has issued the prescribed proclamation, the debtors of the State, described in the Act, become the debtors of the Commonwealth, which may recover the debts by the same judicial remedies as were available to the State. The provisions of the Act are, indeed, self-executory, and apart from the provision which enables the Treasurer to receive the money to be paid in satisfaction of the judgment, neither require nor authorize the use of power by the executive officers of the Commonwealth. Nevertheless, by way of precaution, sec. 20 provides that "Nothing contained in this Act shall impair or diminish the control of the High Court over the execution or enforcement of any judgment of the Court." It is clear that the officers of the Commonwealth who may act in the execution of the judgment would not be persons with independent executive authority, as the section reserves to the Court the control over the execution of the judgment. If the

present statute had provided that the judgment recovered under sec. 5 could be enforced by writs issued out of the Court and served upon the debtors of the State, in order to secure payment to the Commonwealth of moneys due and payable by them to the State, I do not think that any attack could have been made upon the validity of such provisions. The method which Parliament has adopted to secure that result is, in my opinion, equally valid as a law for carrying the judgment into effect.

Sec. 6 remains for consideration. It cannot be supported by reference to the judicial power, unaided by sec. 105A (3). I think it is valid under this sub-section. The effect of sec. 6 is, in my opinion, preservative. It interrupts the flow of revenue, thereby preventing its disbursement before the judicial power can operate. Disbursement of revenue by a State may result in the Agreement not being carried out by the parties. Interpreting sec. 105A (3) as a grant of power to make laws which invoke the judicial power and aid it when it is exercised for the carrying out of the Agreement by the parties or any one or more of them, I think that the limits of sec. 105A (3) are not exceeded by a law which preserves the thing that must be paid under the Agreement, that is to say, the revenues of a State, until the judicial power operates. If the Court finds that moneys are due under the Agreement, it is carried out by the transfer of those revenues to the Commonwealth under the authority of a judgment. The revenues of the State are safeguarded by sec. 6 (4), which provides: "At any time after such a resolution has been passed by both Houses of the Parliament, the Attorney-General of the State may apply to the High Court for a declaration that no part of the amount stated in the resolution or a smaller amount than that stated in the resolution is due and payable and unpaid by the State to the Commonwealth." Sec. 75 (III.) of the *Constitution* vests original jurisdiction in the High Court in all matters in which the Commonwealth or a person suing or being sued on behalf of the Commonwealth is a party. This section, as has already been mentioned, enables the Commonwealth to sue a State without its own consent (*The Commonwealth v New South Wales*[81]). An objection was made to secs. 5 and 7 of the *Financial Agreements Enforcement Act* and the subsequent sections for carrying a judgment into effect, that they were bad as an exercise of a power to make a law on a matter incidental to the execution of the authority vested in the Federal Judicature by sec. 75 (III.), because the law does not grant the benefit of the special procedure and methods of enforcing a judgment to the States, parties to a Financial Agreement, and is limited to the enforcement in part of each one of three contracts. The first objection may go to the fairness of the law, but on that aspect of the Act it is not my duty to express any opinion. Moreover, a view as to its fairness is not the final test of the legal validity of such a law. These provisions do not assume to extinguish any liabilities to which the Commonwealth is subject under the Financial Agreements, nor do they deny any State the right to sue the Commonwealth and proceed to judgment and execution according to law if it has a claim founded on all or any one of the Agreements. The remedy given to the Commonwealth may appear to be more drastic and efficacious than those available to any State, but that circumstance is not, in my opinion, fatal to the validity of secs. 5 and 7 or any other sections against which this criticism was made. The second objection, I think, also fails. It is not necessary that the law in question should relate to all the matters or a complete class of matters, e.g., contracts, which are within the scope of sec. 75.

The argument mainly centred upon secs. 5 and 6 and Part II. generally. There was only a very brief discussion of other sections, and of the validity of the *Financial Agreements (Commonwealth Liability) Act*, which was also questioned. The validity of the sections, which I have upheld, does not in any way depend upon that Act. In view of my opinion that Part II., which is headed "Enforcement against State Revenue," of the *Financial Agreements Enforcement Act* is valid, I think that the declaration claimed should not be made.

Action dismissed.

Solicitor for the State of New South Wales, J. E. Clark, Crown Solicitor for the State of New South Wales.

Solicitor for the Commonwealth, W. H. Sharwood , Crown Solicitor for the Commonwealth.

Solicitor for the State of Victoria, F. G. Menzies, Crown Solicitor for the State of Victoria.

Solicitor for the State of Tasmania, A. Banks-Smith, Crown Solicitor for the State of Tasmania.

[1] (1930) 44 C.L.R., at p. 352, per Isaacs C.J., and at p. 389, per Starke J.

[2] [1825] USSC 1; (1825) 10 Wheat, 1, at p. 22.

[3] (1923) 32 C.L.R., at pp. 214-216, 218-220.

[4] (1925) 37 C.L.R., at pp. 126-127, 134-135.

[5] A proclamation under sec. 7 was in fact issued on 7th April after the Court announced its decision and before these reasons were actually published. See Commonwealth Government Gazette 1932, p. 509.

[6] (1923) 32 C.L.R., at pp. 208, 218.

[7] [1923] HCA 23; (1923) 32 C.L.R. 200.

[8] [1911] HCA 17; (1911) 12 C.L.R. 667.

[9] (1918) 246 U.S. 565.

[10] (1930) 44 C.L.R., at p. 389.

[11] (1918) 246 U.S. 565.

[12] [1831] USSC 6; (1831) 5 Peters 1.

[13] (1819) 4 Wheat. 316, at p. 423.

[14] [1879] USSC 52; (1879) 100 U.S. 339, at pp. 345, 346.

[15] [1926] HCA 46; (1926) 39 C.L.R. 95.

[16] (1909) 8 C.L.R., 357.

[17] (1931) A.C., at p. 295; 44 C.L.R., at pp. 542-543.

[18] (1924) A.C. 318, at pp. 326, 327.

[19] (1920) 28 C.L.R., at p. 146.

[20] [1920] HCA 54; (1920) 28 C.L.R. 129.

[21] (1920) 28 C.L.R., at pp. 132, 177.

[22] (1930) 44 C.L.R., at p. 352.

[23] (1930) 44 C.L.R., at p. 354.

[24] (1930) 44 C.L.R., at p. 389.

[25] (1903) A.C., at p. 167.

[26] (1925) A.C., at pp. 766-767.

[27] (1930) 44 C.L.R., at p. 390.

[28] [1930] HCA 52; (1930) 44 C.L.R. 319.

[29] (1786) 1 T.R. 172, at p. 176; 99 E.R. 1036, at p. 1038.

[30] (1690-1699) 11 St. Tri. 136, at p. 159.

[31] (1786) 1 T.R., at pp. 176-177; 99 E.R., at pp. 1038-1039.

[32] [1930] HCA 52; (1930) 44 C.L.R. 319.

[33] [1930] HCA 52; (1930) 44 C.L.R. 319.

[34] [1930] HCA 52; (1930) 44 C.L.R. 319.

[35] (1914) A.C. 237, at p. 255 [1913] UKPCHCA 4; ; 17 C.L.R. 644, at p. 653.

[36] (1932) A.C. 41, at p. 52.

[37] [1923] HCA 23; (1923) 32 C.L.R. 200.

[38] [1918] HCA 56; (1918) 25 C.L.R. 434, at pp. 464-465.

[39] (1918) 25 C.L.R., at p. 465.

[40] (1918) 25 C.L.R., at p. 454.

[41] (1918) 25 C.L.R., at p. 451.

[42] [1926] HCA 58; (1926) 38 C.L.R. 153, at p. 176.

[43] (1923) 32 C.L.R., at pp. 206-207.

[44] [1913] UKPCHCA 4; (1914) A.C. 237; 17 C.L.R. 644.

[45] (1914) A.C., at p. 256; 17 C.L.R., at p. 655.

[46] [1922] HCA 62; (1922) 31 C.L.R., 421, at p. 437.

[47] (1922) 31 C.L.R., at p. 440.

[48] [1913] UKPCHCA 4; (1914) A.C. 237; 17 C.L.R. 644.

[49] [1923] HCA 23; (1923) 32 C.L.R. 200.

[50] (1923) 32 C.L.R., at pp. 211-212.

[51] (1923) 32 C.L.R., at p. 213.

[52] (1923) 32 C.L.R., at p. 213.

[53] (1915) A.C. 750, at p. 759.

[54] (1923) 32 C.L.R., at p. 214.

[55] (1923) 32 C.L.R., at p. 216.

[56] [1930] HCA 52; (1930) 44 C.L.R. 319.

[57] [1923] HCA 23; (1923) 32 C.L.R. 200.

[58] [1923] HCA 23; (1923) 32 C.L.R. 200.

[59] (1923) 32 C.L.R., at p. 210.

[60] (1930) 44 C.L.R., at p. 386.

[61] (1930) 44 C.L.R., at p. 386.

[62] (1930) 44 C.L.R., at p. 386.

[63] [1920] HCA 54; (1920) 28 C.L.R. 129.

[64] (1930) 44 C.L.R., at p. 352.

[65] [1923] HCA 23; (1923) 32 C.L.R. 200.

[66] [1913] UKPCHCA 4; (1914) A.C. 237; 17 C.L.R. 644.

[67] [1923] HCA 23; (1923) 32 C.L.R. 200.

[68] (1923) 32 C.L.R., at p. 214.

[69] (1930) 44 C.L.R., at pp. 352, 389-390, 391-392.

[70] [1923] HCA 23; (1923) 32 C.L.R. 200.

[71] (1923) 32 C.L.R., at p. 210.

[72] [1911] HCA 17; (1911) 12 C.L.R. 667.

[73] (1923) 32 C.L.R., at p. 209.

[74] (1924) 35 C.L.R., at p. 205.

[75] (1918) 246 U.S., at p. 591.

[76] (1918) 246 U.S., at p. 603.

[77] (1825) 10 Wheat., at p. 22.

[78] [1835] USSC 36; (1825) 10 Wheat. 51.

[79] [1860] USSC 5; (1860) 65 U.S. 376, at p. 384.

[80] [1867] USSC 58; (1867) 73 U.S. 166, at p. 187.

[81] [1923] HCA 23; (1923) 32 C.L.R. 200.

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