

failed even if Section 210 went to jurisdiction, because in Section 50 (2) of the Sales Tax Act the Commonwealth had "otherwise expressly declared."¹⁰ This view, no doubt, is based on the principle that Section 50 (2) being a later enactment than Section 39 (2), *pro tanto* repealed it, and also on the general overriding powers of the Commonwealth with respect to Federal jurisdiction.¹¹

The disappointment of the case lies in the absence of any pronouncement on the relation of State Courts to the Federal Judicature, on the rationale of the Commonwealth's power to prescribe procedure in State Courts invested with Federal jurisdiction, and on the relation of Section 51 (xxxix) of the Constitution to Chapter III thereof, although in argument a learned Justice expressed doubts as to whether *pl.* (xxxix), granting its doubtful necessity, applied to the judicial powers at all.

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10. 15 C.L.R. at 313 *per* Griffiths C.J.

11. This latter is the short round of Dixon J.'s judgment on this aspect.

NATIONAL INSURANCE AND THE CONSTITUTION

THE National Health and Pensions Insurance Act 1938 raises a number of interesting constitutional points including, *e.g.*, the fundamental question of whether the insurance power conferred by Section 51 *pl.* xiv, covers such a "national insurance" scheme,¹ and the further question whether the provisions of Sections 168-172 have the effect of purporting to confer part of the judicial power of the Commonwealth on bodies which do not satisfy the requirements of Section 72 of the Constitution. Neither of these problems is discussed in this note which is confined to a third point, *viz.*, whether the Commonwealth Parliament has power to do what it has purported to do in Section 187,² *i.e.*, to require the State Governments to pay contributions to the National Insurance Fund in respect of their employees. This discussion which assumes, of course, that the scheme as a whole is valid, does not pretend to be a full examination of the question but is merely intended to draw attention to the existence of the problem and to some of the relevant considerations and authorities.

Before the *Engineers'* case,³ the answer to this question would undoubtedly have been that such an enactment was *ultra vires*. Now, however, we must ascertain how far that case and subsequent cases have gone in subjecting the States to the legislative power of the Commonwealth. It must be admitted that there are in the *Engineers'* case dicta which are wide enough to justify the view that such a section is within the powers of the Commonwealth. However, there is

1. See on this point Cantor, 2 A.L.J. 219, and Wynes, *Legislative and Executive Powers in Australia*, at pp. 144-5. Both these learned writers take the view that such a scheme is *ultra vires*, though it may be observed, with respect, that the reasons advanced for that contention do not appear wholly convincing.

2. Sec. 187: "The application of this Act shall, subject to the exceptions therein contained, extend to persons employed by the Commonwealth or a State or by any authority of the Commonwealth or of a State."

3. 28 C.L.R. 129.

now, it is submitted, good judicial authority for the proposition that, though the *Engineers'* case establishes that, in the absence of express contrary provision, a grant of legislative power to the Commonwealth should be interpreted as enabling the Parliament validly to make laws affecting the operations of the States and their instrumentalities, at least where the State is not exercising the prerogative power of the Crown and where the Commonwealth Parliament does not discriminate against the States or their instrumentalities,⁴ it is not authority for the view that the Commonwealth Parliament may, in the exercise of its legislative powers, treat the States and their agencies in every respect in the same way as it treats individual subjects. The most important authority on this particular limit to the doctrine of the *Engineers'* case, which is relevant to this note, is the *Railways Union* case.⁵ In that case one of the grounds of the validity of the legislation there in question was that it did not, as was alleged in favour of the view that it was *ultra vires*, have the effect of dealing with State revenues independently of the State Parliaments as does the section now under discussion. In that case there are many dicta directly in favour of the view that such a provision as the section here in question is *ultra vires* the Commonwealth Parliament. Thus Isaacs C.J. said,⁶ "It has never been contended, and I do not suggest that it ever could be properly contended, that anyone but the State Parliament could appropriate the King's State revenue." And he further observes,⁷ "There is nothing in the Federal Constitution which interferes with the State constitutional provisions as to State parliamentary appropriation of State Consolidated Revenue Funds before payment out of those funds." Starke J. held similar views⁸: "But then it is said that this doctrine (*i.e.*, the doctrine of the *Engineers'* case) impinges on the Constitutions of the States, which prohibit moneys being taken out of the Consolidated Fund of the States . . . except under a distinct authorization of the Parliaments of the States. . . . It would require, I agree, the clearest words in the Constitution to interfere with or impair this constitutional principle, embedded in the Constitutions of the States, and I can find nothing in Section 51 *pl.* xxxv or *pl.* xxxix which warrants any such conclusion. . . . The responsibility of producing the fund out of which the obligation (*i.e.*, the obligation to comply with a Federal industrial award) can be met, depends upon provision being made by the Parliaments of the States, if they choose—and only if they choose—so to provide."⁹

It is clear that the force of the contention that Section 187 is *ultra vires* is in no way weakened by the *Financial Agreement Enforcement* case,¹⁰ which rested on the special nature of the provisions of Section 105A of the Constitution. This is taken beyond doubt

4. See especially, *West v. Commissioner of Taxes (N.S.W.)* 56 C.L.R. 657.

5. *Australian Railways Union v. Victorian Railways Commissioners*, 44 C.L.R. 319.

6. At p. 352.

7. At p. 353.

8. At pp. 389-390.

9. See also pp. 390-3, where Dixon J. indicates the possibility of such "imperfect obligations" arising.

10. *New South Wales v. The Commonwealth (No. 1)* 46 C.L.R. 155.

by the observations made in that case by Rich and Dixon JJ.¹¹ and by Starke J.¹² That decision must be regarded as turning solely on the operation of the Financial Agreement and Section 105A.

It is accordingly submitted that there is at least very good ground indeed for arguing the invalidity of Section 187 of the National Insurance Act. Such a contention is strengthened by a consideration of the views expressed in *West's* case,¹³ where it is clearly stated that the *Engineers'* case must not be regarded as having said the last word on the interpretation of the Constitution. In that case an interpretation of the *Engineers'* case is given which attributes to it an operation very much narrower than that which it was previously supposed to have had.¹⁴

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11. At pp. 176-7. Their Honours emphasize that the possibility of direct enforcement of the Financial Agreement against the revenues of the States is dependent on the *absolute* nature of the obligations created by that Agreement and Sec. 105A.

12. At pp. 185-6, His Honour stated that he saw no reason for departing from the view he expressed in the *RAILWAYS UNION Case* that the Constitution, as it then stood (i.e., without Sec. 105A), did not justify the view that the Commonwealth could interfere with or impair the constitutional power of the States to deal with their revenues as they thought fit.

13. 56 C.L.R. 657.

14. See especially *per* Dixon and Evatt JJ.

PUBLIC POLICY

*Beresford v. Royal Insurance Co. Ltd.*¹

REMEMBERING the solemn warnings concerning the operation of the doctrine of public policy sounded by the majority of their Lordships in *Fender v. Mildmay*,² it is with some surprise that one reads the decision of the House of Lords in this case. Their Lordships, by upholding the Court of Appeal,³ in reversing the decision of Swift J.,⁴ have decided that, whatever the terms of the assurance policy, it is contrary to public policy to permit the personal representatives of an assured who committed suicide while sane to recover under the policy. One might have supposed that in dealing with a point which was admittedly very doubtful and which has so many ramifications, their Lordships would have rested more on the particular facts of the case which amounted in a sense to a fraud on the respondents. The House of Lords however bases its decision broadly on this wide general principle of public policy: "The absolute rule is that the Courts will not recognize a benefit accruing to a criminal from his crime."⁵ Suicide being admittedly a crime, the conclusion followed inevitably that the Royal Insurance Co. was not liable. The only qualification on the manner in which this principle is stated is that both Lord Atkin and Lord Russell, the only Lords to deliver speeches, desired to reserve their opinions as to the position of third

1. [1938] 2 All. E.R. 602.

2. [1938] A.C. 1; [1937] 3 All. E.R. 402.

3. [1937] 2 All. E.R. 243.

4. [1936] 2 All. E.R. 1052.

5. *per* Lord Atkin [1938] 2 All. E.R. at p. 607.