

[HIGH COURT OF AUSTRALIA.]

ALLPIKE PLAINTIFF ;

AND

THE COMMONWEALTH AND OTHERS . . . DEFENDANTS.

H. C. OF A.
1948.

PERTH,

Sept. 13, 14.

War Service Estate—Undrawn pay, deferred pay and allowances—Payment to persons other than personal representative—Whether beneficial interest conferred—Constitutional validity of legislation—Defence power—Severability—War Service Estates Act 1942-1943 (No. 57 of 1942—No. 39 of 1943), ss. 4, 5, 7 (1)†, 8—Acts Interpretation Act 1901-1946 (No. 2 of 1901—No. 7 of 1941), s. 15A.*

Latham C.J.,
Dixon and
McTiernan JJ.

M., a member of the Australian Imperial Forces, died while a prisoner of war in Borneo. At the date of his death there was accumulated to the credit of his account with the Commonwealth as a member of the military forces the sum of £665 18s. 1d. which represented undrawn pay, deferred pay and interest on deferred pay. This sum constituted the war service estate of M. within the meaning of the *War Service Estates Act 1942-1943*. By his will M. gave the whole of his moneys to A., but appointed no executor. A. was granted letters of administration with the will annexed of the estate of M. Both before and after the grant A. requested payment to her from the Commonwealth and the District Finance Officer, the “authorized person” in and for the State of Western Australia appointed under the *War Service*

* Section 4 defines “war service estate” as follows :—“(a) the net amount of pay (including deferred pay), allowances or other money due to a member by the Commonwealth after the deduction of any amounts owing to the Commonwealth and such mess debts or other debts due to naval, military or air force institutions, as the Minister, in writing, directs; and (b) personal property or effects of a member in the care, control or custody of the naval, military or air force authorities at the time of the death of the member, or which came into that care, control or custody after the death of the member.”

† Section 7 (1) provides :—“An authorized person may pay or deliver the war service estate of a deceased member—(a) to the personal representative of the deceased member; (b) to any person who, in the opinion of the authorized person, is beneficially entitled thereto; (c) to a Public Trustee, in accordance with section ten of this Act; (d) to such persons or persons included in such class of persons as are prescribed; (e) to such persons or persons included in such classes of persons as the Minister specifies; or (f) to any one or more of the persons referred to in the preceding paragraphs of this sub-section.”

Estates Act 1942-1943, of the said sum of £665 18s. 1d., but payment to her was refused. The "authorized person" directed that the sum be divided in equal proportions between the brother and sisters of M. H. C. OF A. 1948.

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Held, that upon the true construction of s. 7 (1) of the *War Service Estates Act*, (i) the "authorized person" might take his choice among the courses specified; and (ii) where payment was made to a person other than the personal representative of the deceased member and other than to a Public Trustee, the beneficial interest would vest in the payee.

Held, further, that even if it should be beyond the legislative power of the Commonwealth to control the devolution, on the death of a member of the military forces, of property other than pay deferred pay and allowances (as to which the Court expressed no opinion), the definition of "war service estate" is severable, and s. 7 (1) validly operates in respect of such moneys.

CASE STATED.

An action was brought in the original jurisdiction of the High Court by Danah Allpike as administratrix with the will annexed of Henry Arthur Marsh against the Commonwealth, the District Finance Officer, Perth 5th Military District, the "authorized person" in and for the State of Western Australia, appointed under the *War Service Estates Act 1942-1943*, and the brother and sisters of Henry Arthur Marsh, deceased, claiming declarations as to her right to have paid to her, as administratrix with the will annexed of the deceased's estate, the sum of £665 18s. 1d. or such sum as represented undrawn and deferred pay and other emoluments and allowances due to him as a member of the Australian Imperial Forces, or, if the authorized person were entitled to pay them to the brother and sisters of the deceased, as to her beneficial right to such moneys.

The parties concurred in stating a special case for the consideration of the High Court. The case was substantially as follows:—

1. WX8794 Sapper Henry Arthur Marsh a member of the Australian Imperial Forces but formerly of Coolgardie in the State of Western Australia, miner, died on 8th June 1945 at Sandakan, Borneo, whilst engaged on war service.

2. The testator made and executed his last will and testament dated 14th November 1940 and by such will he gave the whole of the moneys herein mentioned to the plaintiff but did not appoint an executor.

3. On 16th September 1946, letters of administration with the will annexed of all and singular the real and personal estate of the testator were granted by the Supreme Court of Western Australia (in its probate jurisdiction) to the plaintiff as the sole beneficiary named in the will.

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4. The defendant Robert James McDonald is the District Finance Officer, Perth 5th Military District and he is the "authorized person" in and for the State of Western Australia appointed under the *War Service Estates Act* 1942-1943.

5. At the date of the death of the testator there was accumulated to the credit of his account with the Commonwealth as a member of the Australian Imperial Forces being part of the military forces of the Commonwealth the sum of £665 18s. 1d. being:—

Undrawn pay	£507 16s. 2d.
Deferred pay	150 16s. 0d.
Interest on deferred pay	..	7	5s. 11d.

£665 18s. 1d.

6. By the death of the testator such sum of £665 18s. 1d. constituted the war service estate of the testator within the meaning of the *War Service Estates Act* 1942-1943.

7. On 22nd May 1946, after a request had been made by the plaintiff for the said sum the then District Finance Officer wrote to the plaintiff stating that the authorized person under the Act had directed that the sum of £665 18s. 1d. be divided in equal proportions between the brother and sisters of the deceased who are defendants in this action, namely, Ernest William Bradbury Marsh, Dorothy Hughes, Frances Margaret Savage, Gladys Girdwood and Kathleen Adams, and that such sum be paid after the expiration of thirty days.

8. The plaintiff has since the grant to her of letters of administration claimed payment of the sum from the Commonwealth of Australia and the District Finance Officer, but these defendants have refused and still refuse to pay the sum or any portion thereof to the plaintiff, and the defendant the District Finance Officer, in his capacity as the "authorized person" under the Act, has declared and still declares his intention of paying and delivering such sum to the persons mentioned in the preceding paragraph unless restrained by the Court.

9. The defendants claim that the Act (particularly s. 7 thereof) and the regulations made thereunder authorize and entitle the District Finance Officer as the "authorized person" acting thereunder to pay and deliver the sum comprising the war service estate of the testator to the brother and sisters of the testator in the manner aforesaid notwithstanding the plaintiff's claim thereto and that by the Act and regulations such direction as aforesaid and upon payment to them in accordance therewith such brother and sisters will be beneficially entitled to the sums so paid respectively.

Section 7 of the *War Service Estates Act* 1942 provides :—“ An authorized person may pay or deliver the war service estate of a deceased member—(a) to the personal representative of the deceased member ; (b) to any person who, in the opinion of the authorized person, is beneficially entitled thereto ; (c) to a Public Trustee, in accordance with section ten of this Act ; or (d) to such persons or classes of persons as are prescribed or as the Minister specifies.”

This section was amended in 1943 by the deletion of sub-s. (d) and the insertion of the following sub-sections :—“(d) to such persons or persons included in such classes of persons as are prescribed ; (e) to such persons or persons included in such classes of persons as the Minister specifies ; or (f) to any one or more of the persons referred to in the preceding paragraphs of this sub-section.”

The following questions were stated for the opinion of the High Court :—

(1) Whether the said Act and Regulations authorize the payment of the said sum or any part thereof to any person other than the plaintiff as such administratrix and sole beneficiary ?

(2) If the said Act and Regulations do so authorize the payment of such sum or any portion thereof to any persons other than the plaintiff will the person or persons to whom the said sum or any part thereof is so paid be beneficially entitled thereto ?

(3) Alternatively if the said Act and Regulations authorize the District Finance Officer as the authorized person appointed thereunder to pay the said sum or any part thereof to any person or persons other than the plaintiff and if upon such payment such person or persons becomes beneficially entitled to the sum or sums so paid to him or them then is the said Act or so much thereof as authorized such payment or payments for the beneficial interest of the payees beyond the legislative powers conferred upon the Parliament of the Commonwealth of Australia by the Constitution of the Commonwealth ?

Seaton K.C. (with him *Kott*), for the plaintiff. The statute means that the authorized person should pay in the order set out in s. 7 (1), as amended, i.e., first to the personal representative ; if there is none, then to the person thought to be beneficially entitled ; and if there is no such person, to the Public Trustee and so on. Alternatively, payment may be made to any person enumerated but without prejudice to the beneficial title. If these constructions fail, the provision is void because (a) it is outside the defence power ; (b) it amounts to acquisition without just terms under s. 51 (xxxi.) of the Constitution. Paragraph (a) of the definition of “ war

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service estate" in s. 4 includes "other money." It is not uncommon for a soldier to pay money to his own credit in his pay book. As to par. (b) of the definition, "war service estate" is defined as meaning any service as a member in time of war. The limit of the power is to legislate as to the disposal or control of soldiers' property: it does not extend to title (s. 12 of the *Defence Act* 1903-1941; *Johnston Fear & Kingham & The Offset Printing Co. v. The Commonwealth* (1); s. 15A of the *Acts Interpretation Act* 1901-1946; *The Commonwealth v. Hazeldell Ltd.* (2)).

Louch K.C. (with him *O'Sullivan*), for the defendants the Commonwealth and the District Finance Officer. This case only deals with pay and allowances. At common law the soldier has no right thereto (*The Commonwealth v. Quince* (3); *The Commonwealth v. Welsh* (4)). The executor can be in no better position (*Gidley v. Lord Palmerston* (5)). But by s. 12 of the *Defence Act* 1903-1941 the soldier is given a limited right to sue for pay. Marsh had no transmissible right of action: he was not a "person who has been a member of the defence force"; therefore he did not come within s. 12. The undrawn pay never belonged to Marsh; it still remained in the bounty of the Crown. There is, therefore, no question of the interference with statutory rights or personal rights (*Administration Act* 1903-1945 (W.A.), s. 3). He did not die possessed of or entitled to the military pay or allowances. In the *War Service Estates Act* and regulations thereunder the Crown is disposing of its bounty to the people best entitled. There is no question here of constitutional validity; no-one can doubt that pay and allowances are within the defence power. Payment under s. 7 (1) may confer beneficial rights (*Shirlaw v. Sinclair* (6)).

Guthrie, for the other respondents. These respondents adopt the arguments of *Louch* K.C. as to the Crown's position with reference to pay and allowances. The amendments to s. 7 (1) are significant: "whole or any part" is an important addition. It allows "authorized persons" to deal with different parts in different ways. The payee may be chosen as a beneficiary or a trustee. Section 10 supports this view. As to "other money" the definition of "war service estate" may be construed to include moneys paid to his credit by the soldier with the District Finance Officer, but this portion of the definition is severable. Deferred pay carries

(1) (1943) 67 C.L.R. 314.

(2) (1918) 25 C.L.R. 552.

(3) (1944) 68 C.L.R. 227.

(4) (1947) 74 C.L.R. 245.

(5) (1822) 3 B. & B. 275 [129 E.R. 1290].

(6) (1946) 64 W.N. (N.S.W.) 138.

interest under the regulations. Those words may be eliminated by s. 15A of the *Acts Interpretation Act* 1901-1946. In this case there could be no acquisition under s. 51 (xxxi.) of the Constitution: the estate consists entirely of moneys to which in his lifetime the soldier had no right.

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Seaton K.C., in reply. The common law position of a soldier as to his pay does not exist in Australia to-day. The *War Financial (Military Forces) Regulations* (Statutory Rules No. 218 of 1941) ("shall be entitled"; "shall be paid") create a legal right to pay and allowances. The regulations do not contain the counterpart of reg. 541 of the *Air Force Regulations* and hence *Welsh's Case* (1) is distinguishable. The last part of the definition of a "member" covers people who may not come within *Gidley v. Palmerston* (2).

The following judgments were delivered:—

LATHAM C.J. This is a special case stated upon questions of law arising in an action in which the plaintiff Danah Allpike as administratrix with the will annexed of the estate of Henry Arthur Marsh deceased claimed against the defendants the Commonwealth of Australia and the District Finance Officer of the 5th Military District and a brother and four sisters of the deceased, certain declarations.

In the first place, a declaration was claimed that the deceased, who was a soldier who died while a prisoner of war in Borneo, was immediately prior to his death entitled to a sum of £665 18s. 1d. or such other sum as represented undrawn and deferred pay and other allowances due to him as a member of the Australian Imperial Forces. Secondly, the plaintiff, being not only the administratrix with the will annexed of the deceased, but also the sole beneficiary under that will, claimed that she was entitled to have paid to her the whole of the said moneys. The defendants other than the Commonwealth of Australia and Robert James McDonald are, as I have said, a brother and sisters of the deceased soldier. It has been determined by the relevant authorities that the deferred pay and allowances should be paid to and distributed among the brother and sisters of the deceased, and the Commonwealth and the Finance Officer have refused to pay the moneys to the plaintiff.

The questions which arise depend upon the true construction of the *War Service Estates Act* of 1942 as amended in 1943. Section 7 of the 1942 Act provides that:—"An authorized person may pay

(1) (1947) 74 C.L.R. 245.

(2) (1822) 3 B. & B. 275 [129 E.R. 1290].

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or deliver the war service estate of a deceased member—(a) to the personal representative of the deceased member; (b) to any person who, in the opinion of the authorized person, is beneficially entitled thereto; (c) to a Public Trustee, in accordance with section ten of this Act; or (d) to such persons or classes of persons as are prescribed or as the Minister specifies.” The reference to s. 10 introduces inferentially into s. 7 the provision that payment of money to a public trustee shall be a discharge to the Commonwealth and, further, that where money has been paid or delivered to a public trustee he shall, “upon receipt of a request in writing from an authorized person, repay or re-deliver to that person the money or property, or such part thereof as remains unadministered.”

Section 8 provides that:—“The payment or delivery of any money or other property in pursuance of this Act shall operate as a discharge of the Commonwealth, and of every person making or authorizing the payment or delivery on behalf of the Commonwealth, from any liability in respect of the money or other property.”

These provisions relate to what is called “war services estate of a deceased member.” “Member” is defined in s. 4 to mean “a person who is or has been a member of the naval, military or air forces of the Commonwealth,” and other persons who have been associated with the activities of those forces in the manner set forth in the definition. “War service estate” is defined in the following manner:—“(a) the net amount of pay (including deferred pay), allowances or other money due to a member by the Commonwealth after the deduction of any amounts owing to the Commonwealth and such mess debts or other debts due to naval, military or air force institutions, as the Minister, in writing, directs; and (b) personal property or effects of a member in the care, control or custody of the naval, military or air force authorities at the time of the death of the member, or which came into that care, control or custody after the death of the member.” Section 5 provides that the Act shall apply in respect of the war service estate of any person dying or killed while a member on war service, or within three months after he ceased to be on war service. It will be observed that “war service estate” includes, first, pay and allowances, secondly, other money due to a member by the Commonwealth, and thirdly, personal property or effects of a member in the care &c. of the naval, military or air force authorities at the time of the death of the member or after that death.

The position of a member of the forces in relation to the subject matter of pay, deferred pay and allowances is the result of the common law and Commonwealth legislation. As far as the common

law is concerned, a member of the forces has no contractual right and no right of action during his life against the Crown for the purpose of recovering such moneys. The *Defence Act* of the Commonwealth, however, provides in s. 12 that after his discharge a member of the defence force may sue for and recover pay and moneys due to him under his engagement or any agreement with the Commonwealth. We have heard argument as to whether the *War Financial (Military Forces) Regulations* (S.R. 1941 No. 218) create a legal right to pay and allowances. In various places in those regulations there are provisions that moneys "shall be paid" and that a soldier shall be "entitled" to moneys. There were similar provisions in the *Air Force Regulations* which were considered in the case of *The Commonwealth v. Welsh* (1) and there are statements in the reasons for judgment in that case which strongly support the contention made on behalf of the defendants in this case that those provisions do not create a legal right in the soldier or other member of the forces. But in *Welsh's Case* (1) there was a provision which was interpreted by the Court as expressly restating the common law: reg. 541. There is no such regulation in the case of the relevant army regulations.

The question, however, as to whether there is a legal right to recover pay in the case of a man who dies while still a member of the forces and who has therefore never been discharged from the forces is not decisive of any of the questions in this case. The well-established position at common law as stated in *Dunn v. The Queen* (2) and more recently in the case of *Lucas v. Lucas* (3) is that no such right existed. In the case of the Commonwealth, therefore, such right as there is is the creation of Commonwealth statute or Commonwealth regulation. That right may be altered by the authority which created it. Therefore the *War Service Estates Act* may vary or modify any right which has been created, if indeed such a right has been created, by the *War Financial Regulations*. Accordingly, there can be no question as to the authority of the Commonwealth Parliament to attach conditions to the payment of military pay and (as it is a matter of bounty, as Mr. Louch has said) to determine the circumstances in which and the persons to whom payment shall be made.

The position, however, may be different with respect to the other constituents of "war service estate." The second element of "other money due to a member by the Commonwealth" is described in words which may well be construed *ejusdem generis*. It is not,

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(1) (1947) 74 C.L.R. 245.

(3) (1943) P.D. 68.

(2) (1896) 1 Q.B. 116.

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however, necessary in this case to determine whether that is so. If the words apply to all money due on any account to a member of the forces by the Commonwealth it is obvious that there would be grounds for a strong argument that such a provision was beyond the power of the Commonwealth Parliament to make laws with respect to defence.

As to the third element in war service estate—personal property or effects of a member in the care or control of the authorities at the time of his death or thereafter—again there is a strong argument that the defence power does not extend to enable the Commonwealth Parliament, simply because a man was a member of the forces, to determine the destination of personal property and effects which have no relation to his service other than the accident that at the time of his death they happened to be in the care, custody or control of the naval, military or air force authorities. But if the Act does go too far in dealing with either the second constituent or the third constituent of “war service estate” as defined in s. 4, it is, I think, plain that these provisions are severable from the rest of the Act, and that, whatever view may be taken as to their validity, there can be no doubt as to the validity of the provision dealing with pay and allowances. The provisions as to pay and allowances can operate independently of the other provisions with exactly the same effect in relation to pay and allowances whether the other provisions are regarded as still being contained in the Act or not. Section 15A of the *Acts Interpretation Act* permits the Court to maintain the provisions relating to pay and allowances as valid, even though the Court were of opinion (a matter which we do not decide) that the other provisions were invalid.

If that is so the only other question which arises is the question as to the effect of payment or delivery by an authorized person of the whole or any part of the war service estate of a deceased member in pursuance of the provisions of s. 7. Here the question is whether the payment in the present case produces the result that the recipients, the brother and sisters of the deceased, will receive the £665 beneficially so that they will become full owners thereof, or whether they will receive it subject to an obligation to account to the person who is the beneficiary under the will of the deceased. It is submitted for the plaintiff that this provision should be construed as a provision dealing only with payment or delivery of things which have been in the possession of the deceased member at the time of his death so as to secure a legal quittance to the Commonwealth so that all the rights of persons in relation to that property remain in force in accordance with the ordinary law. On the other

hand, it is pointed out that though payment or delivery to the personal representative of the deceased member is a payment or delivery to him in that capacity so that he is bound by the obligations of a personal representative, and though similarly payment or delivery to a public trustee is payment or delivery to the public trustee subject to the performance of his functions as a public trustee, yet in s. 7 (1) (b) there is provision for payment to any person who in the opinion of the authorized person is beneficially entitled to the property in question. That provision certainly provides for a direct payment to a person beneficially entitled for the purpose of enabling that person to hold the property as his own. Now, does s. 7 provide effectively for a payment which will confer a beneficial interest upon the recipients in this case? Light is thrown upon this provision by the amendment made in 1943, when par. (d) was omitted from s. 7 (1) and other provisions were inserted. The amending Act inserted in s. 7 the following paragraphs, which I read in conjunction with the initial words:—"An authorized person may pay or deliver the war service estate of a deceased member—(d) to such persons or persons included in such classes of persons as are prescribed; (e) to such persons or persons included in such classes of persons as the Minister specifies; or (f) to any one or more of the persons referred to in the preceding paragraphs of this sub-section." Prior provisions provide for payment to the personal representative of the deceased member or to the public trustee. It is therefore apparent that this amendment is intended to bring about the result that payment or delivery may be made to a person who does not receive the property in a representative capacity and subject to the duties of either a personal representative as executor or administrator or as a public trustee. These provisions show that it was intended by Parliament that when payment was made to persons not holding the positions or having the status to which I have referred, the payment could be made so as to confer upon them the beneficial interest.

The case raises three questions. The first is whether the Act and regulations authorize certain payments. I have not said anything about the regulations because regulations cannot be used for the purpose of interpreting the Act; but it may be said at this point that the regulations do authorize the payment to brothers and sisters of the deceased member of the forces. The first question is:—" (a) Whether the said Act and Regulations authorize the payment of the said sum or any part thereof to any person other than the Plaintiff as such administratrix and sole beneficiary." That question should be answered: "Yes." " (b) If the said Act

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and Regulations do so authorize the payment of such sum or any portion thereof to any persons other than the Plaintiff will the person or persons to whom the said sum or any part thereof is so paid be beneficially entitled thereto." That question should be answered: "Yes." The third question is:—"(c) Alternatively if the said Act and Regulations authorize the District Finance Officer as the authorized person appointed thereunder to pay the said sum or any part thereof to any person or persons other than the Plaintiff and if upon such payment such person or persons becomes beneficially entitled to the sum or sums so paid to him or them then is the said Act or so much thereof as authorizes such payment or payments for the beneficial interest of the payee beyond the legislative powers conferred upon the Parliament of the Commonwealth of Australia by the Constitution of the Commonwealth." That question should be answered: "No, in respect of the moneys in question in this case." That answer shows that the Court is not purporting to decide any matter in this case going beyond the subject matter of pay and allowances as referred to in par. (a) of the definition of "war service estate." Then the case states that the parties have agreed that judgment shall be entered in the action in such terms as the Court shall think fit.

The effect of the answers to the questions which I have stated is that the action should be dismissed.

DIXON J. The fact that controls the decision in this case is that the subject matter of the litigation is confined to undrawn pay, deferred pay and interest on deferred pay. Interest on deferred pay should, I think, be treated as an accessory to deferred pay and as falling within the same statutory provision as undrawn pay and deferred pay. The District Finance Officer, acting as the authorized person within the meaning of s. 4 of the *War Service Estates Act* 1942-1943, has declined to act under s. 7 (1) (a) of that Act and to pay those funds to the personal representative of the deceased member. The deceased member died on service. He was a prisoner of war and because of that fact his undrawn pay and deferred pay amount to an unusually large sum. He died testate and letters of administration with his will annexed have been granted. The District Finance Officer as the authorized person chose to act under reg. 7 of the *War Service Estates Regulations* 1943 as amended and pursuant to s. 7 (1) (d) of the Act, which is the provision under which that regulation is made. So acting he directed that the money should be divided in equal proportions among the brother and sisters of the deceased.

The *War Service Estates Act* contains provisions which may extend further than the defence power of the Commonwealth warrants. It deals with the war service estate as an artificially defined conception consisting of three classes of property or personal effects. It first of all speaks of the nett amount of pay, including deferred pay and allowances. It then speaks in the second place of other money due to a member of the forces by the Commonwealth. Thirdly, it speaks of the personal property or effects of a member in the care, control or custody of the naval, military or air force authorities at the time of the death of the member or which come under that care, control or custody after the death of the member. With respect to the mass which is composed of those items, it enables or purports to enable the authorized person to pay or deliver the war service estate of a deceased member to any of a category of people. An attack has been made upon what the authorized person in this case has decided to do and the attack is based upon substantially three positions. It is said that as a matter of construction s. 7 does not enable him to do what he intends to do. It is said that if as a matter of construction it does enable him to do it the statute is to that extent void. I have said that the grounds of attack amount to three because the first argument, which concerns construction, is divided into two. It is said that in enumerating a list of things which the authorized person may do the statute is setting out an order of acts and that he must go through the list in an order of priority. If he is unable by reason of the facts to do the first thing authorized he must proceed to the second, and so on *toties quoties*. Thus in every case he is to pay or deliver the war service estate to, first the personal representative if he can, and if he cannot, then to a person he thinks should be entitled, third to the public trustee, fourth to such persons as are prescribed, fifth to such persons as the Minister specifies, and lastly to any one or more of them.

In my opinion it is impossible to give this construction to the provisions. They plainly mean that he may take his choice among all the courses which are specified. That, I think, appears clearly on the reading of the provision.

The second suggested construction is that whilst the authorized person may take any of those courses he must take them without prejudice to the beneficial title to property which he disposes of under s. 7. Upon this construction, in other words, the provisions are not directed towards making a beneficial distribution of the war estate, but only to disposing of it so that the Commonwealth may obtain a discharge and also confide it to some person who may

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be entrusted with the assets with which the Commonwealth does not wish to be encumbered.

As a matter of language and considering the question only as a matter of interpretation and independently of validity, that construction I think is clearly wrong. Something might possibly have been said for it if one's attention were confined to Act No. 57 of 1942, but it is quite clearly displaced by the amendments made by Act No. 39 of 1943. But in the case of each of the two alternative interpretations of s. 7 (1) for which Mr. *Seaton* argues, I do not think that it is right that the Court should arrive at a conclusion merely by a construction of the language used and the intention which that discloses. The Court must also be guided by the considerations of the ambit of power and of validity, because no construction which would take the provisions outside power should be adopted. It is upon that doctrine or principle—a principle which is developed and put into statutory form by s. 15A of the *Acts Interpretation Act*—that Mr. *Seaton* very largely depends for the able argument which he has advanced. But if the provisions were construed in the manner I have stated and confined in their operation to pay, deferred pay and interest on deferred pay they would contain nothing that in my opinion would carry the provisions outside power.

As the Court is now constituted it would be unwise for us to pronounce any definite opinion as to the invalidity of any portion of the Act unless we find ourselves in such a position as to make it necessary to do so in order to decide the case. I am content to adopt many of the assumptions made in the argument for the plaintiff as hypotheses from which the construction of the Act may proceed. Without deciding or indicating any opinion upon the matter I propose to assume that so much of par. (a) of the definition of "war service estate" as speaks of "other money due to a member by the Commonwealth" could not be supported, that is supposing that the wide construction which I think was intended is given to s. 7 (1) as now amended. I am, moreover, content to assume that the whole of par. (d) of the definition of "war service estate" could not be supported upon this hypothesis. It was suggested that the validity of part of s. 5 is also involved and that some assumption should be made as to its invalidity. Upon the necessity of making that assumption I am not so clear. Section 5 extends the operation of the Act to the war service estate of a person dying or killed within three months after he ceased to be on war service as well as to a member who dies during war service. The extension of three months is the point to which the argument

on the part of the plaintiff is directed. It has to be remembered, however, that the war service estate, even on the definition of both pars. (a) and (b), is limited to moneys that have not been paid over and to personal property and effects which still remain in the care, control or custody of the authorities or which afterwards come to their care, control or custody. With that in view it is probable that s. 5 is not reasonably open to any attack which is independent of the attack made on the definition of war service estate or of the operation of s. 7 upon that definition.

Upon the assumptions I have mentioned the problem in the case, as it seems to me, comes down to the question whether, in applying s. 15A of the *Acts Interpretation Act* so as to adopt no construction which would spell invalidity, you are to be governed by the natural meaning of s. 7 (1) and are to apply s. 15A to the definition or you are to be governed by the definition and are to apply s. 15A to s. 7 (1). On the one hand it would be possible perhaps to adopt Mr. *Seaton's* construction of s. 7 (1) and thus save the definition. On the other hand, it is possible, on the assumptions as to validity which I am making, to consider how the definition can be severed so as to leave s. 7 (1) bearing its natural meaning. I think that the validity of the definition must give way in part to s. 7 (1) because, while the definition is plainly divisible, the meaning of s. 7 (1) is incapable of the moulding that would be necessary. It seems to be abundantly clear that the legislature, at all events in making the amendment, if not in adopting the original provision, intended to vest in the authorized person complete power to dispose as he thought just of the war estate; that is to say, of the beneficial interest as well as formal legal control or title. Artificially to narrow the meaning of s. 7 (1) is to give it an unintended operation at the expense of a very clearly expressed intention. I think that such a course ought not to be adopted. Assuming that the parts of the definition which I have mentioned could not be supported upon the basis of the intended meaning of s. 7 (1), I think that it is quite possible to excise notionally from the definition of "war service estate" the references to other money and the whole of par. (b) and to leave an operative provision which *pro tanto* gives effect to the intention of the legislature. It is a course which s. 15A would authorize. There is nothing to suggest in the context of the Act that the legislature meant that all the parts of the definition of "war service estate" should be interdependent so that if any part went the rest would go as not being intended to stand alone. It appears to me to be a provision setting out two or three descriptions of assets, each description being of a distributive character and

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intended to apply to anything which came within the description, even though other things which, according to the literal meaning of the language, come within the description, might be found incapable of doing so. It follows that the definition is severable and may be good as to one description of asset although bad as to another. Accordingly, so much of par. (a) of the definition of "war service estate" as relates to pay which is due and to deferred pay and to any accessory of deferred pay, stands as not necessarily invalidated by any other portion of the provision.

Upon this view, the present case must depend upon the question whether, standing alone and on its own basis, the provision relating to the nett amount of pay, deferred pay and allowances due is outside the legislative power of the Commonwealth. It is quite clear that it cannot be outside legislative power if the view submitted by Mr. *Louch* for the Commonwealth is correct, viz., that there is nothing contained in the legislation affecting the army which would overcome the common law rule, a rule obtaining traditionally in the British armed forces, that all engagements between those in the military service of the Crown and the Crown are voluntary only on the part of the Crown, and give no occasion for an action in respect of any alleged contract, as Lord *Esher* said in *Dunn v. The Queen* (1). We have not perhaps had an adequate opportunity of studying the *War Financial (Military Forces) Regulations*, upon which in part Mr. *Seaton* rests his argument that a change has been effected in the operation of this rule, and I do not propose to pronounce any concluded opinion upon the effect of those regulations. But my impression is that they do not effect a change and that they do leave the common law position of the army unaffected by anything but s. 12 of the *Defence Act*. But whether that is so or not, I think that pay, deferred pay and allowances are so closely associated with defence and with the maintenance of an army that the Commonwealth has legislative jurisdiction over the whole subject. I do not think that any reasonable ground exists upon which to base an attack upon the legislative power to direct the destination of the unpaid pay or allowances of a deceased soldier. The provision applies prospectively from the passing of the Act in 1942 to persons who die after the date of the statute. So far as they are concerned, the provision deals with the devolution on death of money which will become payable under statute. Whether there will or will not be a right vested in them to the pay or deferred pay or allowances while they are serving as soldiers, the provision attaches to their title to the money a condition affecting

(1) (1896) 1 Q.B. 116, at p. 122.

its devolution on death. To do this is within the defence power. I think there is no basis for the argument that s. 51 (xxxi.) of the Constitution must be invoked in order to support a legislative direction of the course of devolution on death of property when such a thing falls within the purposes of the Commonwealth. Such a direction involves no acquisition of property and raises no question of just terms. The whole matter of the disposition on death of the pay, deferred pay and allowances of a soldier appears to me to be within Federal legislative power.

For these reasons I agree with the order proposed by the Chief Justice and the answers to the questions which he has suggested.

McTIERNAN J. I agree with the answers which the Chief Justice proposes should be given to the questions in the case.

I am of opinion that the true effect of s. 7 is that the District Finance Officer is lawfully authorized to distribute the moneys in question among the deceased's brother and sisters and that they would be entitled to the beneficial enjoyment of these moneys. Whether these moneys have the character of "bounty" or not, the disposition of them upon the soldier's death is within the legislative control of the Parliament. If the moneys described in s. 4 as "other money" and the personal property described in this section are in a different position, that is, that the Parliament has no power to control their devolution upon the death of the soldier, I think these parts of s. 4 are severable; there is no interdependence between them and the provisions of the Act relating to deferred pay, the moneys now in question.

I agree with the order proposed by the Chief Justice.

Questions answered as follows :—(1) Yes ; (2) Yes ; (3) No, in respect of the moneys in question in this case. Action dismissed. Plaintiff to pay costs of the defendants other than the Commonwealth and the District Finance Officer, Mr. R. J. McDonald.

Solicitor for the plaintiff : *M. Kott.*

Solicitor for the defendants the Commonwealth and the District Finance Officer : *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

Solicitors for the other defendants : *Lohrmann, Tindal & Guthrie.*

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