REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

1923.

[HIGH COURT OF AUSTRALIA.]

THE REPATRIATION COMMISSION . . APPELLANT;
DEFENDANT,

AND

KIRKLAND . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM A DISTRICT COURT OF NEW SOUTH WALES.

H. C. OF A. 1923.

SYDNEY, *April* 6, 9.

MELBOURNE, *May* 22.

KNOX C.J., HIGGINS, RICH and STARKE JJ.

Distress—Pound-breach—Goods vested in Repatriation Commission—Exemption from distraint—Statutory corporation for public purpose—Department of Government—Pound upon premises where goods distrained—Australian Soldiers' Repatriation Act 1920 (*No.* 6 *of* 1920), *secs.* 7, 8, 11, 14, 15, 47, 50, 52, 53, 55, 57, 58, 60—*Australian Soldiers' Repatriation Regulations* 1920 (*Statutory Rules* 1920, *No.* 112), *regs.* 164-166, *Form D—Repatriation* (*Staff*) *Regulations* (*Statutory Rules* 1920, *No.* 150), *reg.* 4 (*a*)—*Landlord and Tenant Act* 1899 (*N.S.W.*) (*No.* 18 *of* 1899), *sec.* 51.

Held, that the Repatriation Commission, established by the *Australian Soldiers' Repatriation Act* 1920, being a statutory corporation charged with the administration of that Act, which was designed to carry out objects peculiarly within the province of the Commonwealth Government, and the administration being subject to the control of a Minister of State, is entitled, in respect of property vested in it pursuant to the Act, to the same privileges and

H. C. OF A. 1923.

REPATRIATION COMMISSION v. KIRKLAND.

immunities as the Crown would have had if the property had been vested in it; and, therefore, that goods vested in the Commission are not liable to be distrained.

In re Drew, (1919) V.L.R., 600; 41 A.L.T., 65, and *In re Sykes*, (1918) 18 S.R. (N.S.W.), 118, discussed.

Quære (*per Higgins* J.), as to the right to sue the Commission as such (not the individual members) for the tort (if any)—and particularly in a District Court of New South Wales.

Sec. 51 of the *Landlord and Tenant Act* 1899 (N.S.W.) provides that "(1) Any person lawfully taking any distress for rent may impound . . . the distress . . . in such places or on such part of the premises chargeable with the rent as are most fit and convenient for the impounding and securing such distress . . . . (3) If any pound-breach or rescous is made of any goods or chattels distrained for rent the person grieved thereby shall in a special action on the case for the wrong thereby sustained recover his treble damages" &c.

Held, that under that section goods distrained for rent may not lawfully be impounded upon the premises chargeable with the rent unless the goods have been lawfully distrained.

Thompson v. *Friedlander*, (1886) 4 N.Z.L.R. (C.A.), 168, followed.

Held, therefore, that an action under sec. 51 (3) of the *Landlord and Tenant Act* 1899 to recover treble damages for pound-breach would not lie in respect of goods vested in the Commission which had been seized by the plaintiff upon premises owned by him and thereon impounded.

APPEAL from a District Court of New South Wales.

An action was brought in the District Court of the Metropolitan District, at Sydney, by Bessie Pauline Kirkland against the Repatriation Commission in which the plaintiff, by her particulars of claim, alleged that she by her bailiff had taken certain goods, consisting of household furniture, which then were on a certain dwelling-house and premises held and enjoyed by one Dennis Cheevers as tenant thereof to the plaintiff at a certain weekly rent, as and in the name of distress for a sum of £9 12s. then due and in arrear from Cheevers to the plaintiff for and on account of such rent, and had impounded and secured such goods in a certain pound on the most convenient part of such dwelling-house and premises with intent to sell the same according to statute in such case made and provided; that the defendant by his servants and agents with force and arms broke such pound and rescued the goods contrary to the

form of the statute in that case made and provided; and that the plaintiff had been delayed in recovering her rent in arrear, and had been deprived of the means of obtaining satisfaction of such rent and of the costs and charges of the distress and was likely to lose the same. The plaintiff claimed £30. The defendant gave notice of the following defence (*inter alia*): That the defendant is a body corporate duly constituted by the *Australian Soldiers' Repatriation Act* 1920 for the purposes of that Act and not otherwise; that the goods in question were, prior to the alleged taking by the plaintiff by her bailiff and up to and at the time of the acts complained of, the property of the Crown vested in the defendant as such body corporate as aforesaid; and that the defendant as such body corporate as aforesaid on behalf of and as agent for the Crown entered the dwelling-house and took possession of and removed the said goods as it lawfully could and might do.

The District Court Judge having found a verdict for the plaintiff for £10 10s., the defendant now appealed to the High Court.

The other material facts appear in the judgments hereunder.

Innes K.C. (with him *B. V. Stacy*), for the appellant. The Repatriation Commission under the *Australian Soldiers' Repatriation Act* 1920 is a Department of the Government, and is entitled to the immunities of the Crown (*Attorney-General for the Commonwealth* v. *Balding* (1); *Sydney Harbour Trust Commissioners* v. *Ryan* (2); *Federated Engine-Drivers and Firemen's Association of Australasia* v. *Broken Hill Proprietary Co.* (3); *Roper* v. *Public Works Commissioners* (4); *In re La Société les Affréteurs Réunis and the Shipping Controller* (5); *Coomber* v. *Justices of Berks* (6); *County Council of Middlesex* v. *Assessment Committee of St. George's Union* (7)). *In re Sykes* (8) and *In re Drew* (9) do not apply, for the Acts under which they were decided were quite different from the *Australian Soldiers' Repatriation Act*. If the Commission is entitled to the immunities of the Crown, then goods vested in the Commission

(1) (1920) 27 C.L.R., 395.
(2) (1911) 13 C.L.R., 358.
(3) (1911) 12 C.L.R., 398, at p. 414.
(4) (1915) 1 K.B., 45.
(5) (1921) 3 K.B., 1.
(6) (1883) 9 App. Cas., 61.
(7) (1897) 1 Q.B., 64, at p. 70.
(8) (1918) 18 S.R. (N.S.W.), 118.
(9) (1919) V.L.R., 600; 41 A.L.T., 65.

H. C. OF A. 1923.

REPATRIATION COMMISSION v. KIRKLAND.

under the Act are exempt from distraint and the distraint was unlawful (*Secretary of State for War* v. *Wynne* (1); *R.* v. *McCann* (2)). The Crown cannot commit a pound-breach. At common law pound-breach is an offence, and sec. 51 of the *Landlord and Tenant Act* 1899 (N.S.W.) cannot be said to have given a right of action to a subject against the Crown for an offence which the Crown cannot commit. There cannot be a pound-breach unless goods have been lawfully distrained (see *Berry* v. *Huckstable* (3)), for a pound implies that goods have been lawfully taken and put into the custody of the law.

[RICH J. referred to *Harris* v. *Thirkell* (4).]

Where the distress is unlawful there can be no damages, and no action will lie for pound-breach (*Cotsworth* v. *Betison* (5); *Parrett Navigation Co.* v. *Stower* (6)).

[KNOX C.J. referred to *Keen* v. *Priest* (7).]

Under sec. 51 of the *Landlord and Tenant Act* 1899, where the goods are impounded on the premises there can be no pound-breach unless the goods were lawfully distrained (*Thompson* v. *Friedlander* (8)).

A. V. Maxwell, for the respondent. The Repatriation Commission is not the Crown, nor is it entitled to be treated as the Crown. Looking at its incorporation, the vesting of property in it and the rights given to it, the intention of the Legislature appears to be to treat the Commission as a body quite apart from the Crown, and not as an agent or servant of the Crown. Its rights are prescribed by the *Australian Soldiers' Repatriation Act*, and the only control which the Crown has over it is in the cases mentioned in secs. 11 (2) and 15. No further control could be given by regulations made under the Act. Sec. 55, which gives priority to claims by the Commission in respect of moneys advanced by it would be superfluous if the Commission were the Crown, and indicates an intention to give the Commission something which it would not otherwise have. Reg. 165 of the *Australian Soldiers' Repatriation Regulations* 1920 would also be superfluous. *In re Drew* (9) and

(1) (1905) 2 K.B., 845.
(2) (1868) L.R. 3 Q.B., 141; 677, at p. 681.
(3) (1850) 14 Jur., 718.
(4) (1852) 20 L.T. (O.S.), 98.
(5) (1696) 1 Ld. Raym., 104.
(6) (1840) 6 M. & W., 564.
(7) (1859) 4 H. & N., 236.
(8) (1886) 4 N.Z.L.R. (C.A.), 168.
(9) (1919) V.L.R., 600; 41 A.L.T., 65.

In re Sykes (1) were rightly decided, and were not touched by *Attorney-General for the Commonwealth* v. *Balding* (2); and the same principles govern this case. The furniture distrained was not the property of the Commission. The real transaction was a loan to Dennis Cheevers by the Commission to purchase furniture with security by way of a bill of sale. Apart from the regulations, the property vested in Cheevers. If the Commission is not the Crown it cannot support its acts by the regulations. Reg. 166 of the *Australian Soldiers' Repatriation Regulations* 1920, under which the Commission purported to act in reference to the goods, is *ultra vires* as being inconsistent with sec. 55 of the Act.

Innes K.C., in reply.

Cur. adv. vult.

May 22.

The following written judgments were delivered :—

KNOX C.J. AND STARKE J. This is an appeal from a judgment for £10 10s. recovered by the respondent against the appellant in the District Court.

The admitted facts are as follows :—Dennis Cheevers, a returned soldier, made application to the Minister of State for Repatriation for assistance to purchase furniture on 23rd April 1920. He was instructed to obtain an invoice of furniture selected by him from a firm of furniture dealers. The invoice and his application were approved of by the State Repatriation Board on 13th May 1920. On 26th May 1920 Cheevers executed a hire-purchase agreement in Form D in the Schedule to the *Australian Soldiers' Repatriation Regulations* 1919 in respect of the articles of furniture selected and approved as aforesaid. On 21st May 1920 an order form was issued requesting A. E. Tibbey, 167 George Street West, Sydney, to supply to the Minister of State for Repatriation and deliver to Dennis Cheevers the said articles of furniture of the value of £35. On 24th May 1920 a claim for £35 in respect of the said furniture was rendered to the Department of Repatriation by A. E. Tibbey, and accompanying the claim was the order form above referred to with a

(1) (1918) 18 S.R. (N.S.W.), 118. (2) (1920) 27 C.L.R., 395.

H. C. OF A. 1923.

REPATRIATION COMMISSION v. KIRKLAND.

Knox C.J. Starke J.

receipt at the foot thereof signed by Cheevers, in which he acknowledged having received goods to the value of £35. The claim was paid by the Department of Repatriation by a cheque, dated 8th June 1920, under the authority of the *Australian Soldiers' Repatriation Act* 1920. Cheevers was indebted to the plaintiff in the sum of £9 12s. for rent, and a distress was levied by the plaintiff on the above-mentioned articles of furniture which were the subject of a hire-purchase agreement in Form D in the Schedule to the *Australian Soldiers' Repatriation Regulations* 1919, and made between Cheevers and the Minister of State for Repatriation. The goods were impounded on part of the premises chargeable with the rent, pursuant to the authority contained in sec. 51 of the *Landlord and Tenant Act* 1899 (N.S.W.). Soon after the distress, the defendant forcibly retook the articles of furniture. The plaintiff's distress was thereby destroyed. But she brought these proceedings against the appellant for a pound-breach and rescue, and claimed the relief provided in sec. 51 (3) of the said Act.

For the appellant it was argued (1) that the goods seized were the property of the Crown or of a body identified for all practical purposes with the Crown; (2) that the goods were therefore exempt from distress; (3) that the taking of the goods as distress was unlawful, and (4) that an action for pound-breach cannot be sustained unless the chattels were lawfully distrained and impounded.

Mr. *Maxwell*, for the respondent, admitted, in our opinion rightly, that if the first of these propositions were established the second followed (*Secretary of State for War* v. *Wynne* (1)). The most important question in this action depends, therefore, on the relation of the appellant to the Crown, and involves an examination of the provisions of the *Australian Soldiers' Repatriation Act* 1920, under which the Repatriation Commission was constituted, and of the Regulations made under that Act.

In *Fox* v. *Government of Newfoundland* (2) the Judicial Committee was called upon to consider the relation of certain Boards of Education to the Government for the purpose of deciding whether balances in the books of a bank to the credit of these Boards were entitled to priority as Crown debts. The criterion adopted by their

(1) (1905) 2 K.B., 845 (2) (1898) A.C., 667.

Lordships was whether the Boards were branches or departments of Government—mere agents of the Government—or bodies independent of the Government with discretionary powers of their own.

The remarks in *Federated Engine-Drivers and Firemen's Association of Australasia* v. *Broken Hill Proprietary Co.* (1) as to the Sydney Board of Water Supply and Sewerage may also be referred to upon the question of the relationship of a public body to the Crown, though not for the legal consequences that were held in that case to flow from the relationship (see *Amalgamated Society of Engineers* v. *Adelaide Steamship Co.* (2)). A somewhat analogous doctrine is involved in *Jones* v. *Mersey Docks Trustees* (3). *Blackburn* J., in delivering the opinion of the Judges, said (4):—"Long series of cases have established that where property is occupied for the purposes of the government of the country, including under that head the police, and the administration of justice, no one is rateable in respect of such occupation. And this applies not only to property occupied for such purposes by the servants of the great departments of State, such as the Post Office . . . the Horse Guards . . . or the Admiralty . . . ; in all which cases the occupiers might strictly be called the servants of the Crown; but also to property occupied by local police . . . to county buildings occupied for the Assizes, and for the Judges' lodgings . . . or occupied as a County Court . . . or for a jail . . . . In these latter cases it is difficult to maintain that the occupants are, strictly speaking, servants of the Sovereign, so as to make the occupation that of Her Majesty; but the purposes are all public purposes, of that kind which, by the constitution of this country, fall within the province of government, and are committed to the Sovereign, so that the occupiers, though not perhaps strictly servants of the Sovereign, might be considered *in consimili casu*."

It was pointed out by this Court in *Attorney-General for the Commonwealth* v. *Balding* (5), when dealing with the *Australian Soldiers' Repatriation Act* 1917-1918, that the object of that Act, the re-establishment in civil life of persons who have served in the defence forces

(1) (1911) 12 C.L.R., 398, at pp. 414, 425, 441, 451.
(2) (1920) 28 C.L.R., 129.
(3) (1865) 11 H.L.C., 443.
(4) (1865) 11 H.L.C., at pp. 464-465.
(5) (1920) 27 C.L.R., 395.

H. C. OF A. 1923.

REPATRIATION COMMISSION v. KIRKLAND.

Knox C.J. Starke J.

of the Commonwealth when they are discharged from such services, was intimately connected with the defence of the Commonwealth, and the character impressed on the Repatriation Fund by that Act was described in that case as entirely public, of Commonwealth creation, for Commonwealth purposes and under Commonwealth direction and control. Further, the repatriation of soldiers was considered of so much public importance that in 1917 his Excellency the Governor-General in Council established a Repatriation Department as a department of State of the Commonwealth. The Act now under discussion, No. 6 of 1920, replaces the Act of 1917-1918 and the *War Pensions Act* 1914-1916, which it repealed, and the observations in *Balding's Case* (1), quoted above, apply to it with at least equal force. And by the *Repatriation (Staff) Regulations* (Statutory Rules 1920, No. 150, reg. 4 (*a*)) the Repatriation Commission appointed under the Act of 1920 is responsible to the Minister for the general working of the Department and for all administrative business thereof.

The provisions of the Act taken generally, and especially those contained in secs. 7 (1), 11 (2), 50, 52, 57 (*b*) and 58, establish that the Commission is in the strictest sense a department of Government, or at all events so practically identified with it as to be indistinguishable. It is a statutory corporation charged with the administration of an Act designed to carry out two objects which are peculiarly within the province of the Government, namely, the re-establishment in civil life of persons who have served in the defence forces, and the provision of pensions and benefits for persons incapacitated and the dependants of persons killed or incapacitated as a result of active service in those forces. Adopting the words of *O'Connor* J. in *Sydney Harbour Trust Commissioners* v. *Wailes* (2), it is "a corporation . . . to which is handed over the administration of what is really a Government department." If so, the Commission is entitled, in our opinion, in respect of the property vested in it pursuant to the Act, to the same privileges and immunities as the Crown itself would have had if the property had been vested in it.

Mr. Maxwell relied on sec. 55 of the Act. The contention was that if the Commission were merely an agent of the Crown the provision

(1) (1920) 27 C.L.R., 395. (2) (1908) 5 C.L.R., 879, at p. 885.

would be unnecessary. But the section, which first appeared in a slightly different form in the Act of 1917, rather accentuates the close relationship of the Commission to the Crown, and it may well have been enacted *ex majore cautelâ* in view of the extension of the operation of the Fund and of the obligations laid on the general revenue by the Act. The learned counsel also relied on reg. 165 (*d*) of Statutory Rules 1920, No. 112, imposing on the hirer of chattels an obligation to pay and keep paid all rents payable in respect to the premises where the chattels hired or any of them are situated. He said that this provision was unnecessary if the chattels were the property of the Crown and so exempt from distress. But this regulation may fairly be regarded as designed to prevent the Commission from becoming involved in litigation concerning chattels hired. In any event the existence of these provisions cannot displace the dominant purpose and intent of the Act. The decision of the Supreme Court of Victoria in *In re Drew* (1) was also relied upon. That decision may perhaps be distinguished on the ground that the advance in question in that case was made by the trustees of the Fund under the Act of 1916. If it cannot be so distinguished, then it is wrong. But we refrain from passing any concluded opinion upon the matter in this case.

There are some old authorities which say that, if a distress be taken without cause and impounded, the party cannot justify the breach of the pound to take it out of the pound, because the distress is then in the custody of the law (*Co. Lit.*, 47b, 160b; *Cotsworth* v. *Betison* (2)). But, whatever may be the case as to a common pound, the language of the *Landlord and Tenant Act*, sec. 51, shows, as was said in *Thompson* v. *Friedlander* (3), that a person, "to entitle himself to . . . damages in respect of breach of a pound, being such only by virtue of that statute, must show that he had lawfully taken the distress, and further, that the premises on which the distress was impounded were held as tenant by the person against whom the distress was made." The words of the statute are "Any person *lawfully* taking any distress . . . may impound . . . the distress . . . in such places or on such part

(1) (1919) V.L.R., 600; 41 A.L.T., 65.
(2) (1696) 1 Ld. Raym., at p. 105.
(3) (1886) 4 N.Z.L.R. (C.A.), at p. 177.

H. C. OF A. 1923.

REPATRIATION COMMISSION v. KIRKLAND.

Knox C.J. Starke J.

of the premises chargeable with the rent as are most fit and convenient for the impounding . . . such distress."

We do not stay to inquire whether the provisions of sec. 51 (3) bind the Crown or its administrative organs sued as such, for the taking of goods absolutely privileged from distress is in our opinion an illegal distress. (See *Foa on Landlord and Tenant*, 5th ed., p. 557.) Consequently the appeal must, in our opinion, be allowed.

HIGGINS J. Some furniture, bought by the Minister of State for Repatriation, was in the dwelling of Cheevers, a returned soldier, under a hire-purchase agreement dated 20th May 1920; and the monthly instalments payable had not been paid. Cheevers owed rent to Kirkland for the dwelling, and Kirkland seized the goods in distress, impounding them on the premises with a view to sale; but the officers of the Repatriation Commission came and took possession of the goods on 30th October 1922. Kirkland brought an action against the Commission for pound-breach, and the District Court (*Armstrong* D.C.J.) has given judgment for the plaintiff for ten guineas. The Commission appeals; and the first question is, had Kirkland any right to distrain on these goods?

Under the hire-purchase agreement, the goods were to be the property of Cheevers absolutely when the price, £35, had been paid; but if any obligation were not complied with, Cheevers was forthwith to return the goods to the Minister. According to reg. 131 (*b*) made under the *Repatriation Act* of 1917-1918 in force in May 1920, the Minister had power to enter the premises of Cheevers and take possession of and remove the goods whenever any obligation of Cheevers was not complied with: and under reg. 132 the goods remained the property of the Minister (notwithstanding any other law to the contrary) until, and should become the property of Cheevers when, and only when, Cheevers should have complied with all his obligations. These provisions are in substance repeated in regs. 166 (2) and 167 of the Statutory Rules 1920, No. 112, made under a later Act of 1920; but this Commission, created by the later Act, is substituted for the Minister. The Act of 1920 repealed the Act of 1917-1918; but it provided (sec. 3) that any right, privilege, obligation or liability acquired, accrued or incurred under any Act

repealed should, subject to the Act of 1920, continue as if arising thereunder; and by reg. 197 of the Statutory Rules 1920, No. 112, the Commission might (notwithstanding the repeal of the Act of 1917-1918 and the expiration of the regulations made thereunder) exercise all the powers and functions of the Minister under the Act of 1917-1918 and the regulations thereunder, as if the name of the Commission were substituted therein for the name of the Minister. By sec. 11 (3) of the Act of 1920 all the real and personal property, securities, &c., vested in the Minister in pursuance of any repealed Act became vested in the Commission "subject to the trusts upon which" they were held by the Minister. The trusts were, as I gather from the original *Australian Soldiers' Repatriation Fund Act* 1916 (sec. 7), for purposes for the assistance and benefit of Australian soldiers and of their dependants.

It is clear, therefore, that the goods seized in distress by the landlord were goods vested, not in the tenant in default, but in a stranger to the letting—at first in the Minister under the Act of 1917-1918, afterwards in the Commission, under the Act of 1920. At common law, of course, a distress may be levied on a stranger's goods on the premises leased. The goods were impounded on the premises as under sec. 51 of the New South Wales *Landlord and Tenant Act* 1899. Sec. 51, following the provisions of sec. 10 of the English Act 11 Geo. II. c. 19, provides that "Any person *lawfully* taking any distress for rent may impound or otherwise secure the distress . . . in such places or on such part of the premises chargeable with the rent as are most fit," &c. Until 11 Geo. II. c. 19 there had been no power to impound on the premises. The distraint seems unimpeachable, unless the goods belonging to the Commission ought to be treated as goods of the Crown, and in right of the Crown protected from distress. If the goods were the property of the Crown, the landlord had no right to distrain on them (*Secretary of State for War* v. *Wynne* (1)). This exceptional privilege enjoyed by the Crown, this exemption from distress, is not to be regarded as an unreasonable survival of despotism; like other privileges attached to the Crown prerogative, it is a recognition of the principle that all private interests are subordinate to the public needs. As John Locke put the matter, the

(1) (1905) 2 K.B., 845.

H. C. OF A. 1923.

REPATRIATION COMMISSION v. KIRKLAND.

Higgins J.

prerogative of the King consists in the discretionary power of acting for the public good where the positive laws are silent (*Locke on Government*, sec. 166). So long as the prerogative is under the control of the people, the privileges which it carried enure to the benefit of the people as a whole; and this exemption of Crown goods from distress tends, in this instance, to the freedom of the Crown and its agencies in carrying out the functions committed to them for the benefit of returned soldiers and their dependants.

But is the Commission a Crown agency within this principle? The relation of the Commission to the Crown is determined mainly by the Act No. 6 of 1920—the *Australian Soldiers' Repatriation Act* 1920—which came into force by proclamation on 1st July 1920. This Act created the Commission, which shall, "*subject to the control of the Minister*" (that is, the Minister of State for Repatriation) "be charged with the general administration" of the Act; and the Commission is a body corporate, capable of suing and being sued (sec. 7). The Commission consists of three members appointed by the Governor-General in Council (sec. 8). The members of the Repatriation Board for each State are appointed by the Governor-General on the recommendation of the Commission (sec. 14). The Minister may suspend any Commissioner from office, laying before Parliament his grounds (sec. 15). The Commission can make recommendations to the Governor-General for regulations as to the granting of assistance and benefits to soldiers or their dependants (sec. 47); and under this section coupled with sec. 60 the Governor-General can make, and has made, the regulations applicable to the hire-purchase agreements. The transaction is called an "advance" by the regulations (Statutory Rules 1919, reg. 129; Statutory Rules 1920, reg. 164). Under sec. 52 all sums of money granted in pursuance of this Act, other than moneys raised under sec. 49 or contributed under sec. 53, shall be payable out of moneys from time to time appropriated by Parliament; and under sec. 53 contributions in money or in kind may be made for any of the purposes of sec. 47. Under sec. 55 "claims in respect of moneys advanced by the Trustees of the Australian Soldiers' Repatriation Fund" (under an Act of 1916) "or by the Minister" (under the Act of 1917-1918), or by "the Commission" (under this Act of 1920) "shall have the same

priority with respect to the payment of debts as if the money had been advanced by the Crown."

I have stated some only of the relevant provisions of the Act of 1920. The Commission is a corporation, and is charged with the general administration of the Act; but the administration is *subject to the control of the Minister*. The Minister is a member of the Executive Council which advises the Governor-General in the Government of the Commonwealth, in exercising the executive power of the Commonwealth; and he has been appointed to administer the Department of Repatriation, established by Order in Council (*Gazette*, 4th October 1917). The Governor-General is the King's representative, and exercises, subject to the Constitution, the powers which the King assigns to him (sec. 2 of the Constitution), and all the executive power is vested in him (sec. 61); the Minister is one of the advisers of the Governor-General; the Commission is under the control of, is subordinate to, the Minister. Further—under the *Repatriation* (*Staff*) *Regulations* (Statutory Rules 1920, No. 150), reg. 4 (*a*), the Commission is responsible to the Minister for the general working of the Department, and for all administrative business thereof; and under sec. 60 of the Act of 1920, the Governor-General may make (and has made) regulations prescribing all matters which are required or permitted to be prescribed or which are necessary or convenient to be prescribed for giving effect to the Act. The links of the chain, therefore, seem to be complete; the Commission is an agent or instrument of the executive power in administering the Act; and whatever hinders the Commission in the exercise of its legitimate functions hinders the Crown.

But not all public activities—activities for the benefit of the public—can be treated as Crown activities. For instance, it is not the Crown that administers the Harbour Trust Acts or the Local Government Acts. In England the Horse Guards, the Admiralty, the Post Office, the Judiciary, are departments of State, and are clearly within the Government functions in the proper sense; the Mersey Docks &c. Board, the Ecclesiastical Commissioners, the Copyhold Commissioners, even Trinity House (for lighthouses, &c.), are not. The line of demarcation was drawn distinctly in connection with the liability to poor rates under the Act 43 Eliz. c. 2. This

H. C. OF A. 1923.

REPATRIATION COMMISSION v. KIRKLAND.

Higgins J.

Act made all beneficial occupiers of property liable to the poor rate, but the Crown was not expressly mentioned as liable. In *Mersey Docks and Harbour Board Trustees* v. *Cameron* (1) it was held by the House of Lords, after consultation with the Judges, that property in the occupation of the Crown, or in that of persons using it exclusively in and for the service of the Crown, is not rateable; but that trustees constituted by Act of Parliament, especially appointed to have the control of certain docks, in order to maintain them for the benefit of the shipping frequenting that port, were liable to be rated, though their occupation was only for the purpose of the Acts, and they derived no benefit from the occupation. Lord *Westbury* said (2): "The only occupier exempt from the operation of the Act is the King, because he is not named in the statute, and the direct and immediate servants of the Crown, whose occupation is the occupation of the Crown itself." This statement was amplified in *Coomber* v. *Justices of Berks* (3) by Lord *Watson*, on the basis of other expressions of Lord *Westbury*, thus:—"The exemption extended not only to the immediate and actual servants of the Crown but to all other persons, not being servants of the Crown, whose occupation was ascribable to a bare trust for purposes required and created by the Government of the country. And seeing that, in my opinion, the administration of justice, the maintenance of order, and the repression of crime, are among the primary and inalienable functions of a constitutional Government, I have no hesitation in holding that Assize Courts and police stations have been created for proper government purposes and uses, although the duty of providing and maintaining them has been cast upon county or other local authorities." The principle was applied so as to make the contrast very striking in *Middlesex County Council* v. *St. George's Union Assessment Committee* (4). The County Council was assessed to poor rate in respect of a guild hall, part A of which was used by the County Council, part B for the holding of Courts, part C for both purposes: and it was held that part A was liable, that part B was not, and part C was liable to the extent of the value of the occupation by the County Council.

(1) (1865) 11 H.L.C., 443.
(2) (1865) 11 H.L.C., at pp. 501-502.
(3) (1883) 9 A.C., at p. 74.
(4) (1897) 1 Q.B., 64.

What I have stated shows, I think, that the functions of the Repatriation Commission have been expressly made functions of the Executive Government in the strict sense; and, in my opinion, that is sufficient to make the privilege of exemption from distress apply to the goods under the hire-purchase agreement. But, if and so far as material, it has also to be remembered that defence is a primary and inalienable function of all Governments, whether constitutional or despotic; and that any repatriation scheme is intimately associated with defence. According to *Blackstone*, "the principal use of Government is to direct that united strength" (of the community) "in the best and most effectual manner." Subject to certain statutes, at common law the King is the first in military command in his dominions; and he has the sole power of raising and regulating fleets and armies (and see also 13 Car. II. c. 6). To treat well those who have risked their lives and submitted to sacrifices on behalf of the Crown is an encouragement to men to run such risks and to submit to similar sacrifices in the future; and repatriation may well be regarded as a matter incidental to defence (*Attorney-General for the Commonwealth* v. *Balding* (1)).

It is clear, also, that, if agency for the Crown is once established, the fact that the agent is a corporation does not prevent the Crown's exemption from attaching to the agent. The Crown's exemption from the *Statute of Limitations* was held by *Bankes* L.J. to be available in favour of the Commissioners for Public Works for moneys paid by mistake; the Commissioners having a statutory right to bring the action in their own names (*Public Works Commissioners* v. *Pontypridd Masonic Hall Co.* (2): see also *In re La Société les Affréteurs Réunis and the Shipping Controller* (3); *Dixon* v. *Farrer* (4); *R.* v. *McCann* (5)). Nor does the fact that the goods are directly vested in the agent of the Crown, not in the Crown itself, prevent the application of the exemption (*Amherst* v. *Sommers* (6); *Hornsey Urban District Council* v. *Hennell* (7)).

Certain cases, however, have been cited as interpreting the Repatriation Act; but they do not seem to me to affect the problem

(1) (1920) 27 C.L.R., 395.
(2) (1920) 2 K.B., 233.
(3) (1921) 3 K.B., 1.
(4) (1886) 17 Q.B.D., 658; 18 Q.B.D., 43.
(5) (1868) L.R. 3 Q.B., 141, 677.
(6) (1788) 2 T.R., 372.
(7) (1902) 2 K.B., 73.

H. C. OF A. 1923.

REPATRIATION COMMISSION v. KIRKLAND.

Higgins J.

with which we have to deal here. The case of *In re Sykes* (1) was decided under the Act of 1916 alone, before sec. 19 of the Act of 1917-1918 came into force (the section conferring priority on repatriation claims). The decision was given on 3rd April 1918, and the new Act came into force by proclamation on 8th April. It was held by *Street* J. that the trustees under the Act of 1916 had no right to priority in a bankruptcy over the other creditors of the returned soldier. But the position of the trustees under the Act of 1916 was very different from the position of the Minister under the Act of 1917-1918, or of the Commission under the Act of 1920. Under the Act of 1916, the trustees of the Fund were not under the control of the Government, and the Government as such could not interfere with the discretion of the trustees. Nor could the Government control the State War Councils except by imposing conditions in regulations, and there was no obligation on the Government to impose such conditions. Under the circumstances, it was held by *Street* J. that the case of *Fox* v. *Government of Newfoundland* (2) applied. There the Government, having once placed the annual subsidy for education to the credit of the various denominational boards in their respective banks, had no more to do with the subsidy, had no more control: and the boards were not agents for the Government, but were entitled to use their own discretion as to the mode of expenditure. In *In re Drew* (3), before the Victorian Full Court, the Minister (under the Act of 1917-1918) claimed priority over other creditors of the returned soldier, in the administration of the estate in the Insolvency Court. But the Minister did not claim priority on the ground discussed in this case. His claim for priority was there based on two grounds, set out in the special case stated by the Court of Insolvency: (1) "*that the debt is a debt due to the Crown*"; (2) that under the Act of 1917-1918, sec. 19, "it has the same priority as if the money had been advanced by the Crown." The question asked by the Court of Insolvency was confined to these two grounds. The Full Court declined to discuss the second ground, as the validity of sec. 19 was attacked, and it was conceived that the Full Court had no jurisdiction, because of sec. 38A of the *Judiciary Act*, to entertain

(1) (1918) 18 S.R. (N.S.W.), 118.
(2) (1898) A.C., 667.
(3) (1919) V.L.R., 600; 41 A.L.T., 65.

that ground. But, in order to find whether it, the special case, could be decided apart from sec. 19, the Full Court dealt with the first ground; and it decided that the repatriation debt is not a "*debt due to the Crown.*" I certainly find it difficult to see what other answer could be given, seeing that the Crown was not the creditor in whom the debt, the chose in action, was vested. The debt was due to the Minister; the Minister would be the proper plaintiff. But the point was not taken in the special case or by the Minister's advisers that, apart from sec. 19, the debt, though due to the Minister, was a debt as to which the Minister was agent for the Crown, and therefore a debt which carries with it the Crown's right to priority. The question as to the validity of sec. 19 then came before the Full High Court, in *Attorney-General for the Commonwealth* v. *Balding* (1); and we held, unanimously, that the section was valid under the constitutional power to make laws with respect to defence (Constitution, sec. 51 (VI.)). Under these circumstances I think we may fairly treat the point now taken as a new point, not really affected by the previous repatriation decisions.

The right to exemption from distress, therefore, prima facie, applies to these goods; but has any Act negatived the exemption, expressly or by necessary implication? It is not sufficient for the respondent to show that other exemptions have been expressly given; as, for instance, that the debt due to the Commission is to have priority "as if the money had been advanced by the Crown" (sec. 55). This is shown by *Hornsey Urban District Council* v. *Hennell* (2), where there were clauses in many relevant Acts expressly to protect the Crown; "but the intention *that the Crown shall be bound* . . . must clearly appear either from the language used or from the nature of the enactments." In other words, the exemption already conferred by the common law remains unless unmistakably taken away or negatived; and the expression of other exemptions is not sufficient. The same reasoning applies to the argument of the respondent drawn from reg. 165 (*d*) of Statutory Rules 1920, No. 112, under which the hirer of the goods is put under an obligation to promptly pay all rents, &c., for the premises (see also *Smithett* v. *Blythe* (3)).

(1) (1920) 27 C.L.R., 395. (2) (1902) 2 K.B., at p. 80.
(3) (1830) 1 B. & Ad., 509.

H. C. OF A. 1923.

REPATRIATION COMMISSION v. KIRKLAND.

Higgins J.

I am of opinion, therefore, that the goods were not liable to distress.

But it is urged that even if the goods were not liable to distress, as Crown goods, the Commission is liable for pound-breach, as it seized goods which were, in fact, though wrongly, in the custody of the law; that the remedy of the Commission was by action for trespass or conversion or replevin. Text-writers certainly favour the view that the rescue of goods before they are impounded can be justified where the distress is unlawful on the ground that no rent is due, or that the goods are privileged; but that pound-breach, after the impounding, cannot be justified on similar grounds—the goods, after the impounding being in the custody of the law (see *Foa on Landlord and Tenant*, 2nd ed., p. 445). This view is based mainly on a passage in *Co. Lit.*, 47b: "If the distress be taken of goods *without cause*, the owner may make rescous; but if they be distrained *without cause*, and impounded, the owner cannot break the pound and take them out, because they are then in the custody of the law" (and so *Cotsworth* v. *Betison* (1)). It is not clear to my mind, but I shall assume in favour of the respondent, that this distinction as to the pound-breach did, at common law, apply to the Crown's goods privileged from distress; but even if it did, it by no means follows that the Crown, or its agents, cannot seize Crown goods, not in a common pound (as in Coke's time), but impounded on the rented premises under the special power conferred by 11 Geo. II. c. 19, sec. 10 (New South Wales *Landlord and Tenant Act*, No. 18 of 1899, sec. 51). The Court of Appeal of New Zealand evidently thought not (*Thompson* v. *Friedlander* (2)). In that case, the distress was levied on 3rd July, the tenancy having ceased on 1st July; and *Richmond* J., who gave the judgment of the Court, said (3): "Whatever might have been the case with regard to a person suing for actual damage for breach of a common pound, it is, we think, clear from the language of the statute of George, that a person, to entitle himself to single damages or to treble damages in respect of breach of a pound, *being such only by virtue of that statute*, must show that he had lawfully taken the distress, and further, that the premises on which the distress was impounded were held as tenant

(1) (1696) 1 Ld. Raym., 104.
(2) (1886) 4 N.Z.L.R. (C.A.), 168
(3) (1886) 4 N.Z.L.R. (C.A.), at p. 177.

by the person against whom the distress was made." In that case the distress was levied after the tenancy had ceased, and there could be no pound, under the section, on premises not held by the debtor as a tenant; in the present case, the premises were held by the debtor as tenant at the time of the distress; and that fact may make a distinction, as there may be a pound in Cheevers' case, although the Crown's goods ought not to have been seized. However, I fall back on the words of sec. 51, which expressly and clearly allow the action for pound-breach (where the pound is on the premises) only if the distress has been "lawfully" taken: (1) "Any person *lawfully* taking any distress for rent may impound . . . the distress . . . in such places or on such part of the premises chargeable with the rent as are most fit," &c., and (3) "If any pound-breach or rescous is made of any goods . . . distrained for rent the person grieved thereby shall in a special action on the case for the wrong . . . recover his treble damages," &c. There is therefore, no pound on the premises where the goods have not been lawfully taken in distress; and these goods have not been lawfully taken.

In my opinion, the appeal should be allowed. But I desire to guard myself against any misapprehension by saying that no objection has been raised as to the form of the action. It is not disputed that the Commission actually authorized the officers to seize the goods; and therefore the principles which forbid the suing of one agent of the Crown for the acts of other agents do not apply (see *Raleigh* v. *Goschen* (1); *Bainbridge* v. *Postmaster-General* (2)). The Commission being sued in its corporate capacity, any damages would have to come either from the repatriation assets or from parliamentary appropriation; and it might even be argued that the Commissioners as individuals are liable in their own estates for the alleged trespasses. Moreover, is there power to sue the Crown, or a Crown agent, in the District Court, for a tort (see *Judiciary Act*, sec. 56)? But, if the appeal be allowed, these questions need not be decided in this case.

Rich J. This was an action for the recovery from the defendant (appellant) of damages for a pound-breach purported to have been

(1) (1898) 1 Ch., 73.

(2) (1906) 1 K.B., 178.

H. C. OF A. 1923.

REPATRIATION COMMISSION v. KIRKLAND.

Rich J.

committed by the defendant on 30th October 1922 in respect of certain goods claimed to be the property of the defendant, and for rescue of such goods from a distress levied by the plaintiff (respondent).

The action was instituted in the District Court of the Metropolitan District, New South Wales, and was heard before his Honor Judge *Armstrong* sitting as such District Court. With diffidence, his Honor found for the plaintiff for the amount of £10 10s. From that decision the defendant (appellant) has appealed to this Court.

I do not propose to restate the facts. I would only emphasize the fact that no goods were seized except those now claimed to be " the property of the Crown vested in " the appellant " on behalf of and as agent of the Crown."

This appeal comes to this Court direct from the District Court, which is a State Court. We have, therefore, to see whether the District Court was on this occasion a " Court exercising federal jurisdiction " within the meaning of sec. 73 of the Constitution.

Sec. 39 (2) of the *Judiciary Act* invests with federal jurisdiction all Courts of the States within the limits of their several jurisdictions " in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon it," except certain matters of constitutional powers *inter se* which are not here material. The only relevant " matters," so far as I can see, are " matters " mentioned in sec. 75 of the Constitution, par. III., namely, " in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party." Difficult questions may arise as to the precise meaning of the words " on behalf of the Commonwealth." But they, in my opinion, at all events, include a case where the party sued is a direct agent of the Commonwealth and defends in respect of acts done as such agent and in respect of property that is Commonwealth property.

The alleged wrongful acts complained of took place after the commencement of the *Australian Soldiers' Repatriation Act* 1920, which by proclamation commenced on 1st July 1920. The question then is as to the status of the Commission and the ownership of the property under that Act. Sec. 7 enacts that " for the purposes of this Act there shall be a Repatriation Commission," and then come

some highly significant words, " which shall, subject to the control of the Minister, be *charged with the general administration of this Act.*" And by sec. 58 the Commission is to furnish to the Minister annually for presentation to Parliament a report of " the administration and operation of this Act." The " administration " of a Commonwealth Act is part of the general Commonwealth executive authority, and that by sec. 61 of the Constitution is vested in the Sovereign. Prima facie, therefore—even though it be subject to the control of a political officer—the Commission is charged with governmental administrative power. It is appointed by the Governor-General (sec. 8), it is paid by the Commonwealth (sec. 9), and any expenditure exceeding £5,000 must be approved by the Minister (sec. 11). All property is, by sec. 11 (3), vested in the Commission subject to whatever " trusts " it was previously subject to in the hands of the Minister or State Repatriation Board or person holding for either. Those were public trusts, and for the purposes of the Repatriation Acts secs. 20 and 21 are framed on the basis of a Commissioner's service being service as employee of the Commonwealth for which he gets a " salary " (sec. 17 (2) (*a*)). Part III. deals with pensions which are expressly payable by the " Commonwealth " (sec. 23). The Commission administers these (see particularly secs. 23, 32 and 33, and the Second Schedule). Sec. 52 provides for appropriation of public moneys for the purposes of the Act.

The whole scheme is a Governmental scheme intimately connected with defence. For convenience, efficiency and justice, the Commission is created to act for the Crown in disbursing Crown moneys for services to the Crown immediately in right of the Commonwealth, but in reality to the Crown as representing the Empire. There is no reason whatever for introducing any element of detachment from the Crown in action or in interest. Parliament has simply created a very special department for a very special purpose, and for convenience has " vested " the property in that department. But " vested " only means placing the formal ownership in the Commission as a Government department. In *Perry* v. *Eames* (1) the question was whether the Commissioners of Her Majesty's Works and Buildings, in whom the Bankruptcy Court buildings were " vested "

(1) (1891) 1 Ch , 658.

H. C. OF A. 1923.

REPATRIATION COMMISSION v. KIRKLAND.

Rich J.

to be appropriated to such purposes as the Lord Chancellor should direct, were entitled to invoke the Crown's prerogative of immunity from sec. 3 of the *Prescription Act*. *Chitty* J., after referring to the *Mersey Docks Trustees* v. *Cameron* (1) and *R.* v. *McCann* (2), said (3):—"The judgment of Lord *Blackburn* in *R.* v. *McCann* (also a rating case) is much to the same effect; at p. 146 he expressly places a trustee for the Crown in the same position as a servant of the Crown. Now in the cases before me the Crown's absolute beneficial ownership for the purposes of the Act is expressly manifested by a public statute, and it is obvious that the bare legal estate was vested in trustees merely for the purposes of more convenient administration by a department of the Queen's Government. I am of opinion, then, that the prerogative of the Crown takes these cases out of the operation of the 3rd section." The same can be said of the present case.

It was argued that sec. 55 was opposed to this conclusion. But it will be noticed that the "Trustees of the Australian Soldiers' Repatriation Fund," "a Board" and "a local Committee" are included in that section. Very serious questions might well arise how far these bodies could be said to represent the Crown in the necessary sense, and it is not unnatural that, to avoid an argument of *expressio unius exclusio alterius*, the Minister (who clearly represents the Crown) and the Commission (which, in my opinion, also represents the Crown) should have been included. So far from detracting from the primary conclusion, sec. 55 strengthens it, because priority of the Crown could hardly have been intended for money that was not regarded by Parliament as the Crown's property. Besides, the final words are "as if the money had been advanced by the Crown," that is, in the name of the Crown.

The appeal is, therefore, competent.

But the same considerations show that the property distrained upon was Crown property. Mr. *Maxwell* admitted that, if so, he had no case. That is, however, a matter of law, and I proceed to consider it.

The action is for pound-breach by direction of the Commission.

(1) (1865) 11 H.L.C., 443. (2) (1868) L.R. 3 Q.B., 141, 677.
(3) (1891) 1 Ch., at p. 669.

Although the Commission represents the Crown as mentioned, it could not plead Crown authority for doing an illegal act in the nature of "pound-breach." There are various kinds of "pounds" in law with reference to distress. The pound is one of the most ancient survivals of our common law, and distress has come down with it, Distress, as the learned editors of *Bullen on Distress*, 2nd ed., p. 3. say, in its origin was not a means of satisfying a debt, but of compelling a person to do something, or leave something undone. Eventually it became usual to take a distress without previous legal process, and as a pledge. Once taken, the common law required the distrainer for rent immediately to remove the goods from the premises for the purpose of impounding them elsewhere. This, up to 11 Geo. II., c. 10, sec. 19, was his obligation at the peril of being a trespasser *ab initio* (*Bullen*, p. 171). He had to take the goods to a duly constituted pound, which, say the learned editors, was either the common pound of the locality or the private pinfold or close of the distrainer. If at the present time removal takes place, the common law respecting the pounding must still be observed. As soon as the distress is impounded in any lawful pound wherein the goods are in the custody of the law (*Green* v. *Duckett* (1); *R.* v. *Butterfield* (2); *Russell on Crimes*, 6th ed., vol. I., p. 882), and whether they are lawfully put there or not, it is an offence called "pound-breach" to retake them from the pound, that is, to wrest them from the custody of the law. There appears to be one exception, which is immaterial here (*Bullen on Distress*, 2nd ed., p. 246).

Rescue before impounding, i.e., before the law has become the custodian, is a lawful remedy where goods are unlawfully taken. The statute of Geo. II. made a great change in the method of impounding, and that appears now in the local Act, *Landlord and Tenant Act* (No. 18 of 1899), sec. 51, with a very slight alteration of language. Sec. 51 enacts that any person lawfully taking any distress on the premises chargeable with the rent may there impound and sell it. It also provides for an action in case of pound-breach, which is the action brought in the present case. But it follows from what I have said that, as the common law was not pursued in

(1) (1883) 11 Q.B.D., 275, at p. 281. (2) (1893) 17 Cox C.C., 598.

H. C. OF A. 1923.

REPATRIATION COMMISSION v. KIRKLAND.

Rich J.

this case, there was in law no impounding unless the respondent was a "person lawfully taking" the distress.

I say nothing as to what would be the case if there had been an impounding of distrainable goods along with the goods here in question. There might then have been a lawful pound, though it also contained goods not distrainable (*Harvey* v. *Pocock* (1)). But in this case it appears there were no other goods than these, and these, being Crown goods, were not lawfully taken (*Secretary of State for War* v. *Wynne* (2)).

There having been no lawful distress, there was nothing to justify a statutory impounding, and therefore there was no lawful pound and no pound-breach. The appeal must of course be allowed.

Appeal allowed. Judgment appealed from reversed and plaint dismissed with costs. Respondent to pay costs of appeal.

Solicitor for the appellant, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

Solicitors for the respondent, *A. J. McLachlan & Co.*

B.L.

(1) (1843) 11 M. & W., 740.

(2) (1905) 2 K.B., 845.