[HIGH COURT OF AUSTRALIA.]

THE FEDERAL COMMISSIONER OF TAXATION AND ANOTHER . . . . . Respondents, } Appellants;

AND

THE OFFICIAL LIQUIDATOR OF E. O. FARLEY LIMITED (IN LIQUIDATION) AND ANOTHER . . . . . Applicant and Respondent, } Respondents.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 2-4; *June* 28.

Latham C.J., Rich, Starke, Dixon, Evatt and McTiernan JJ.

Crown—Debts due to Crown—Commonwealth and State debts—Priority inter se—Winding up—Companies—Taxation—Powers of Commonwealth and State Parliaments to affect priorities—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 51 (ii.), (xvii.), (xx.), (xxxix.)—*Companies Act* 1899 (*N.S.W.*) (*No.* 40 *of* 1899), *secs.* 134 (*a*), 264—*Income Tax Assessment Act* 1922-1934 (*No.* 37 *of* 1922—*No.* 51 *of* 1934), *secs.* 57 (1), 59—*Sales Tax Assessment Act* (*No.* 1) 1930-1935 (*No.* 25 *of* 1930—*No.* 8 *of* 1935), *secs.* 30 (1), 32 (1) (2) (4)—*Post and Telegraph Act* 1901-1934 (*No.* 12 *of* 1901—*No.* 45 *of* 1934), *secs.* 4, 5, 93, 97 (*m*)—*Income Tax* (*Management*) *Act* 1928 (*N.S.W.*) (*No.* 35 *of* 1928), *secs.* 56, 58.

In the winding up of an insolvent company under the *Companies Act* 1899 (N.S.W.) debts due to the Crown in right of the Commonwealth and debts due to the Crown in right of the State of New South Wales have priority, by virtue of the prerogative, over debts due to a subject; but as between the debts due to the two Governments there are but coexisting rights standing on an equality in the absence of valid legislation disturbing that position.

Neither sec. 59 of the *Income Tax Assessment Act* 1922-1934 nor sec. 32 of the *Sales Tax Assessment Act* (*No.* 1) 1930-1935 operates to give priority in the winding up of a company in a State to debts owing to the Crown in right of the Commonwealth in respect of income tax and sales tax over debts owing to the Crown in right of the State. So *held* by *Latham* C.J., *Rich*, *Starke*,

Evatt and *McTiernan* JJ. upon the construction of those sections, and by *Dixon* J. (*Evatt* J. *contra*) upon the ground that to construe them as intending to postpone the claim of a State in a winding up in respect of a mere debt for tax to a similar claim of the Commonwealth would or might produce invalidity.

Observations on the question whether in the administration of assets in one jurisdiction of the Crown debts due to the Crown in respect of all other jurisdictions must be preferred to debts due to a subject.

Quære whether it is within the legislative power of a State to affect the priority which under the prerogative the Crown in right of the Commonwealth has over the subject in a competition of claims in an administration of assets.

Quære whether the fact that the Crown in right of a State has obtained judgment for a debt due to it by a company operates to give that debt priority, in the winding up of the company, over a debt otherwise of equal degree due to the Crown in right of the Commonwealth.

Decision of the Supreme Court of New South Wales: *In re E. O. Farley Ltd.*, (1939) 40 S.R. (N.S.W.) 240; 56 W.N. (N.S.W.) 203, affirmed.

APPEAL from the Supreme Court of New South Wales.

A summons, in which the applicant was the official liquidator of E. O. Farley Ltd.—a company in course of being wound up—and the respondents were the Federal Commissioner of Taxation, the Director of Posts and Telegraphs, and the Commissioner of Taxation for the State of New South Wales, was taken out for the determination of the following questions arising in the winding up:—(*a*) Whether all claims in respect of moneys due to the Crown in right of the Commonwealth of Australia and the State of New South Wales should be paid *pari passu*; and (*b*) whether any and if so what claims in respect of moneys due to the Crown in right of the Commonwealth of Australia should be paid in priority to the claims in respect of moneys due to the Crown in right of the State of New South Wales.

The claims of the Commonwealth were in respect of (*a*) income tax in the sum of £3,116 4s. 10d., assessed under the Federal *Income Tax Assessment Act* 1922-1931, for the years 1928-1931 inclusive; (*b*) sales tax in the sum of £48 4s. 10d. assessed under the *Sales Tax Assessment Act* (*No.* 1) 1930 for the year 1935; and (*c*) telephone service charges in the sum of £22 15s. 4d. made pursuant to the *Post and Telegraph Act* 1901-1934. The claims of the State of New South Wales were in respect of (*a*) income tax in the sum of £2,840 17s. 4d. assessed under the *Income Tax* (*Management*) *Act* 1928

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(N.S.W.) for the years 1928-1930 inclusive, for which it had obtained judgment in 1932; and (*b*) unemployment relief tax in the sum of £199 4s. 6d. for the year 1930, payable under the *Unemployment Relief Tax (Amendment) Act* 1930 (N.S.W.). All these debts were debts due to the Crown.

The company's total assets were approximately of the value of £2,700.

An order for the compulsory winding up of the company under the provisions of the *Companies Act* 1899 (N.S.W.) was made on 18th December 1935. The official liquidator of the company appointed by the order duly gave notice to the Federal Commissioner of Taxation and to the Commissioner of Taxation for the State of New South Wales. The Federal commissioner replied by requiring that a sum of £200 be set aside for sales tax. The State commissioner, while stating that £3,000 or more was owing for income tax, required only £1,500 to be set aside. At a later date the Federal commissioner required that "a sufficient sum of money should be set aside to meet Commonwealth income tax." A further notice specifying a sum of £3,116 4s. 10d. in respect of income tax was given by the Federal commissioner on 9th October 1939, shortly before judgment on the summons was given by the Supreme Court, but the notice was not part of the material upon which the adjudication of that court proceeded.

The summons was heard before the Chief Judge in Equity with the assistance of two other justices by virtue of sec. 6 of the *Equity Act* 1901 (N.S.W.).

The Supreme Court, by majority, decided that all claims in the winding up of the company in respect of moneys due to the Crown in right of the Commonwealth and of the State of New South Wales should be paid *pari passu*: *In re E. O. Farley Ltd.* (1).

From that decision the Federal Commissioner of Taxation appealed to the High Court. Upon the hearing of the appeal the Postmaster-General, by consent, was added as a respondent to the summons and as an appellant in the appeal.

The relevant statutory provisions are sufficiently set forth in the judgments hereunder.

(1) (1939) 40 S.R. (N.S.W.) 240; 56 W.N. (N.S.W.) 203.

Weston K.C. (with him *S. G. O. Martin*), for the appellants. The notice given by the Commissioner of Taxation for New South Wales does not comply with the requirements of sec. 58 of the *Income Tax (Management) Act* 1928 (N.S.W.). Sec. 59 of the *Income Tax Assessment Act* 1922 clearly implies that it is not enough for the liquidator to set aside a sum of money; the sum of money so set aside must be utilized by him to pay the debt due to the Crown. The *Companies Act* 1899 (N.S.W.) does not bind the Crown; therefore sec. 264 of that Act does not operate to incorporate any of the provisions of the *Bankruptcy Act* 1924-1933 with respect to the rights and privileges of the Crown (*Re Keep, McPherson Ltd.* (1)).

In New South Wales the priority of the Crown has been displaced on the principle of *Attorney-General* v. *De Keyser's Royal Hotel Ltd.* (2), that is, there were incorporated in 1936 in the *Companies Act* provisions similar to the old bankruptcy provisions, therefore the principle of *Food Controller* v. *Cork* (3) displaced the prerogatives of the Crown. In sec. 32 of the *Sales Tax Assessment Act* (*No.* 1) 1930-1935 the legislature itself has said, in effect, that the setting aside of a sum out of the assets of a company in course of being wound up is a provision to be made by the liquidator for paying the tax. This view is emphasized by sub-sec. 4 of that section. The effect of the afore-mentioned Federal statutory provisions is that the liquidator concerned is thereby commanded to pay in full the debts due to the Crown in right of the Commonwealth, and, if the assets are insufficient to meet all the debts of the company, the other creditors, including the Crown in right of a State, must abate. The rule that the Crown is not bound by a statute unless expressly named therein is limited in the manner indicated in *R.* v. *Sutton* (4). The only Crown not bound by a Federal statute is the Commonwealth Crown. Sec. 32 is exactly parallel to sec. 17 of the (*Dominion*) *Special War Revenue Act* 1915, under consideration in *In re Silver Brothers Ltd.* (5). That case is an authority in favour of the appellants. The canon of construction that the Crown is not bound by an Act of the Commonwealth Parliament unless expressly named therein, or unless named by necessary implication, does not

(1) (1931) 48 W.N. (N.S.W.) 180.
(2) (1920) A.C. 508.
(3) (1923) A.C. 647.
(4) (1908) 5 C.L.R. 789.
(5) (1932) A.C. 514.

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apply to the Crown in right of a State (*R.* v. *Sutton* (1); *Pirrie* v. *McFarlane* (2)). The latter decision is partly based upon the view that this canon of construction does not apply as between competing Crowns; it only gives immunity in the legislature by which the legislation was passed. The decision was not based upon any view as to separate juristic personalities; it was based upon the view that the legislation was meant to issue its commands to subjects; the State in legislation of the Commonwealth is a subject. The telephone charges constitute a debt due to a Minister of the Crown: See the *Post and Telegraph Act* 1901-1934, sec. 93, and the regulations made under that Act. Those regulations have effect as valid statutory provisions of the Federal Parliament and override any law of the State. Wherever a debt exists to the Commonwealth under a Federal statute, that is, not a common-law debt, then that statute means that that debt is to be paid absolutely, therefore there is priority over any debt due to the Crown in right of a State. This result is brought about by sec. 109 of the Constitution, which gives predominance to Federal legislation. The decision in *In re Silver Brothers Ltd.* (3), that Crown debts as between Commonwealth and State are payable *pari passu*, is not applicable to this case.

Bridge (in lieu of *G. Lytton Wright* on active service), for the respondent official liquidator, submitted to such order as the court saw fit to make.

Maughan K.C. (with him *Leaver*), for the respondent Commissioner of Taxation for the State of New South Wales. Neither sec. 59 of the *Income Tax Assessment Act* 1922-1934, nor sec. 32 of the *Sales Tax Assessment Act* (*No.* 1) 1930-1935, interferes with or alters in the slightest degree whatever the common-law rights of the Crown in right of the Commonwealth or in right of a State. The right of the Crown to priority is a right to the debt as a whole; the amount is certain and the right is certain, whereas the amount under those sections is uncertain. The right to priority belongs to the Crown in all its capacities, that is, whether in right of the Commonwealth or of a State;

(1) (1908) 5 C.L.R., at pp. 795, 797, 801, 805-807, 809, 816.
(2) (1925) 36 C.L.R. 170, at pp. 179, 218, 219, 225
(3) (1932) A.C. 514.

it is a right that exists wherever the liability has been incurred (*In re Oriental Bank Corporation; Ex parte The Crown* (1); *In re Commonwealth Agricultural Service Engineers Ltd.* (2); *In re Union Theatres Ltd.* (3)). This case rests entirely on the common-law prerogative rights of the Crown and is not encroached upon by either sec. 59 of the *Income Tax Assessment Act* 1922-1934, or sec. 32 of the *Sales Tax Assessment Act* (*No.* 1) 1930-1935. There is not any resemblance between the provisions of those sections and the provisions of the statute considered in *In re Silver Brothers Ltd.* (4). Those statutes deliberately created a charge and gave a priority, but the Federal Acts do not create a charge. The position which obtained at the commencement of the Federal taxation provisions, that is, that in respect of debts due to them respectively the Commonwealth and the State concerned were entitled to share *pari passu*, was not in any way altered or affected by those provisions; they are still entitled to share *pari passu*. Sec. 59 and sec. 32 are not aimed at setting up an order of payment and priorities, but are sections which provide for a certain administrative step to be taken by the liquidator in all cases. The sections do not in terms direct payment away of the money set aside, or direct in any way how it is to be applied. That omission was deliberate on the part of the legislature. The only requirement is that a liquidator shall set aside a sum sufficient to provide for tax payable then or thereafter. If the Federal Commissioner for Taxation should fail to notify the liquidator as to what he, the commissioner, thinks sufficient to provide for the payment of income tax and/or sales tax then there would not be any obligation on the part of the liquidator to set aside any sum.

[DIXON J. referred to *Makin* v. *Watkinson* (5).]

Any construction of the sections which creates or destroys rights in the Commonwealth produces anomalous results. Priority does not arise unless a sum has been set aside; here a sum has not been set aside. This is not a case like *Attorney-General* v. *De Keyser's Royal Hotel Ltd.* (6), where a common-law code superseded a statutory code. Here the common-law priority is quite untouched, therefore

(1) (1884) 28 Ch. D., at p. 649; (1885) 54 L.J. Ch. 327, at p. 330.
(2) (1928) S.A.S.R. 342.
(3) (1933) 35 W.A.L.R. 89.
(4) (1932) A.C. 514.
(5) (1870) L.R. 6 Ex. 25.
(6) (1920) A.C. 508.

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the statute does not provide a complete code. The liquidator would not have committed a breach of the Federal Acts if before he received a notice thereunder he had performed a duty under the State Act. There is nothing inconsistent between the Federal Acts and the State Act, therefore sec. 109 of the Constitution does not apply. The doctrine laid down in *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.* (1) is that the Crown is not bound unless it appears expressly or by necessary implication. The Federal taxation Acts do not contain anything which shows that the Commonwealth intended thereby to oust the prerogative rights of the States.

[EVATT J. referred to *In re H. J. Webb & Co. (Smithfield, London) Ltd.* (2).]

The construction of sec. 59 of the *Income Tax Assessment Act* and sec. 32 of the *Sales Tax Assessment Act* sought for by the appellants is not within the competence of the Federal Parliament under the taxation power, e.g., the Federal Parliament cannot interfere in the winding up of a company to the extent, for instance, if rights are altered, to prescribe what is to be the remuneration of the liquidator (*Waterhouse* v. *Deputy Federal Commissioner of Land Tax (S.A.)* (3)). Sub-sec. 4 of sec. 32 of the *Sales Tax Assessment Act*, which was inserted in 1934, does not alter the construction of sub-secs. 1, 2 and 3 of that section. Although it has the force of a Federal statute the provision in the regulations made under the *Post and Telegraph Act* 1901-1934, that costs and charges incurred under that Act must be paid within a specified period, does not constitute a command by the Federal legislature that such costs and charges must be paid in priority to any other debts owed by the debtor.

Weston K.C., in reply. To the small extent that the *Engineers' Case* (1) dealt with the matter of construction and not power, it supports the view put forward on behalf of the appellants: See the report (4). Upon a liquidator receiving a notice under sec. 59 or sec. 32 he is under a duty (*a*) to set aside the sum indicated, and (*b*) thereout to pay the amount in full. The sum so set aside is an exclusive fund for the purpose for which it was set aside.

Cur. adv. vult.

(1) (1920) 28 C.L.R. 129.
(2) (1922) 2 Ch. 369, at p. 382.
(3) (1914) 17 C.L.R. 665.
(4) (1920) 28 C.L.R., at p. 154.

The following written judgments were delivered :—

LATHAM C.J. The question which arises upon this appeal from the Supreme Court of New South Wales is whether, in the winding up of a company under the *Companies Act* 1899 of New South Wales (not the Act of 1936), claims by the Commonwealth in respect of income tax and sales tax and by the Postmaster-General in respect of telephone charges are entitled to priority over a claim of the State of New South Wales for income tax. By consent the Postmaster-General was added as a party by this court. The question arises upon a summons taken out in the winding up of E. O. Farley Ltd. The summons was heard before a judge in equity with the assistance of two other justices (*Equity Act* 1901, sec. 6).

Jordan C.J. and *Davidson* J. held that certain Commonwealth legislation did not on its true construction purport to give priority to Commonwealth debts over State debts and that the debts due to the Commonwealth and to the State should be paid *pari passu* out of the assets of the company. The assets were insufficient to meet either Commonwealth or State claims in full. *Nicholas* J. (dissenting) held that the Commonwealth legislation did give priority to Commonwealth claims for income tax and sales tax. No similar legislation existed with respect to telephone charges, and *Nicholas* J. agreed that they, as Crown debts, should be paid *pari passu* with the Crown debt constituted by the liability for State income tax. The Commonwealth and the Postmaster-General appeal to this court, claiming priority for the Commonwealth.

All the debts in question are Crown debts : See Commonwealth *Sales Tax Assessment Act* (*No.* 1) 1930-1935, sec. 30 (1) ; Commonwealth *Income Tax Assessment Act* 1922-1934, sec. 57 (1) ; *Post and Telegraph Act* 1901-1934, secs. 4, 5 and 93 ; *Income Tax* (*Management*) *Act* 1928 (N.S.W.), sec. 56. The State commissioner has obtained judgment against the company, but no priority for the State has been claimed on this ground, and the commissioner has not cross-appealed from the decision of the Supreme Court.

The *Companies Act* 1899 provides that where a company is being wound up voluntarily the property of the company shall be applied in satisfaction of its liabilities *pari passu* (sec. 134 (*a*)). Sec. 264 introduces bankruptcy rules in relation to certain matters, which

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have been held to include priorities of creditors (*Re J. Carpenter Hales & Co. Ltd.* (1)). The *Companies Act* 1899, however, does not bind the Crown, and when a company is being wound up under the provisions of the Act the Crown is entitled to priority over other creditors (*In re Henley & Co.* (2) ; *New South Wales Taxation Commissioners* v. *Palmer* (3)). In relation to the *Companies Act* of New South Wales the authority of these cases is not affected by *Food Controller* v. *Cork* (4) where it was held that, under the *Companies (Consolidation) Act* 1908, Crown debts had no priority. This decision was based upon changes made in the law by legislation which was not adopted in New South Wales until the enactment of the *Companies Act* 1936 : See sec. 199 (3) of that Act, which does not apply to the present case because the company is being wound up under the Act of 1899.

The doctrine of the indivisibility of the Crown meets many difficulties as constitutional development takes place in the Dominions of the Crown. The creation of federal constitutions in Canada and Australia and specific legislation in South Africa and Eire do not readily accord with the theory of indivisibility which, simple and natural in the case of a unitary realm, is now being applied to more complex systems of government. It is, however, still the case that no distinction in respect of the prerogative is drawn in relation to Crown debts owing to the government of the United Kingdom, the government of a dominion, or the government of a colony. All such debts are treated upon the same footing, so that in the case of a deficiency of assets to meet the claims all Crown debts are paid *pari passu* (*In re Oriental Bank Corporation ; Ex parte The Crown* (5) ; *In re Commonwealth Agricultural Service Engineers Ltd.* (6) ; *In re Silver Brothers Ltd.* (7)). In the present case the claims in question are made by the Commonwealth and the State of New South Wales. The assets of the company are insufficient to meet all the claims in full and, therefore, upon the basis of the authorities mentioned, unless the position has been altered by legislation, the claims of the Commonwealth and the State will be paid *pari passu*, the Commonwealth

(1) (1926) S.R. (N.S.W.) 420; 43 W.N. (N.S.W.) 116.
(2) (1878) 9 Ch. D. 469.
(3) (1907) A.C. 179.
(4) (1923) A.C. 647.
(5) (1884) 28 Ch. D. 643.
(6) (1928) S.A.L.R. 342.
(7) (1932) A.C. 514.

having no priority over the State. The answer to the question which arises therefore depends upon the effect of relevant legislation.

The *Sales Tax Assessment Act* (*No.* 1) 1930-1935, sec. 32 (1), provides that "where a company is being wound up the liquidator of the company shall give notice to the commissioner within fourteen days after the approval of the shareholders for the winding up has been given, or the order for the winding up has been made, and shall set aside such sum out of the assets of the company as appears to the commissioner to be sufficient to provide for any tax that then is or will thereafter become payable." Sec. 32 (2) is as follows: "A liquidator who fails to give notice to the commissioner within the time specified in the last preceding sub-section or fails to provide for payment of the tax as required by this section shall be personally liable for any tax that then is or thereafter becomes payable in respect of the company." Sub-sec. 4 is as follows: "Notwithstanding anything contained in this section, all costs, charges and expenses which, in the opinion of the commissioner, have been properly incurred by the liquidator in the winding up of a company, including the remuneration of the liquidator, may be paid out of the assets of the company in priority to any tax payable in respect of the company."

The Commonwealth *Income Tax Assessment Act* 1922-1934, sec. 59, is in identical terms (except that it relates to income tax), but this section does not contain any provision corresponding to sub-sec. 4 of sec. 32 of the *Sales Tax Assessment Act* (*No.* 1) 1930-1935. There is no enactment of the same character applying to telephone charges and therefore the position is that there is no basis for an argument that priority in respect of this Commonwealth debt is given by statute.

The State Act (the *Income Tax* (*Management*) *Act* 1928, sec. 58) contains a similar provision relating to State income tax. A liquidator is required to give notice to the State commissioner of his appointment and to set aside such sum as appears to the commissioner to be sufficient to provide for any income tax or additional tax which then is or will thereafter become payable. If the liquidator "fails to comply with" the section he becomes personally liable for tax and is guilty of an offence. These provisions are expressly

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declared to be "subject to the Commonwealth Constitution and any law of the Commonwealth thereunder."

The liquidator in the present case duly gave notice to the Commonwealth and State commissioners. The Commonwealth commissioner replied by requiring that a sum of £200 be set aside for sales tax. Then the New-South-Wales commissioner, while stating that £3,000 or more was owing for income tax, required only £1,500 to be set aside. At a later date the Commonwealth commissioner required that "a sufficient sum of money should be set aside to meet Commonwealth income tax." It was stated at the Bar in the course of argument that a further notice specifying a sum in respect of income tax was given by the Commonwealth commissioner shortly before judgment was given upon the summons in the Supreme Court, but the notice was not part of the material upon which the adjudication of the Supreme Court proceeded. It is claimed for the Commonwealth that the effect of the legislation mentioned is, upon the basis of the facts stated, to give priority to the Commonwealth claims in respect of sales tax and income tax. This contention was accepted by *Nicholas* J., but was rejected by the majority of the court upon the ground that the Commonwealth legislation did not in any way deal with the subject of priority of payment of debts. It therefore becomes necessary to examine in some detail the provisions of the Commonwealth legislation.

In the first place it should be noted that the duty of the liquidator is to set aside such a sum out of the assets of the company as appears to be sufficient to the commissioner to provide for tax. The statutes do not require the commissioner to specify some precise amount of tax as being due. Indeed, the sections relate not only to tax that then is payable but also to tax which "will thereafter become payable." It is, therefore, evident that the sum to be set aside in pursuance of the statutes may prove not to be the sum that is actually payable. If the sections were dealing with priority of debts they would surely deal with the amounts which the liquidator would be justified in paying, and bound actually to pay, to the taxing authority in due course of the winding up. It can hardly be contended that the sections give priority to the Commonwealth over other creditors in respect of sums which the commissioner estimates

as necessary to provide not only for taxation due, but also for taxation which may become payable. After the commissioner had fully complied with the section it would still be necessary for the commissioner to establish the amount and validity of any claim made. Thus the statutes do not give a right to the Commonwealth to receive the sum which is set aside.

Further, the sections do not create a charge over any sum in the hands of the liquidator even when he has set it aside. As *Jordan* C.J. points out, other Commonwealth legislation does make provision in express terms for a charge : See *Estate Duty Assessment Act* 1914-1928, sec. 34 ; *Customs Act* 1901-1936, sec. 153—Cf. *In re Silver Brothers Ltd.* (1), where the amount of excise duty was expressly made a first charge on assets.

The sections impose a personal liability for the tax upon a liquidator who fails to give notice as required or " fails to provide for payment of the tax as required." It is argued that this provision results by implication in the creation of a charge over the sum set aside by the liquidator. These words, in my opinion, only show that the liquidator is required to provide a sum which will be available for the payment of such tax as may be found to be due. The actual amount to be paid and all questions of priority are then left to be determined by the law which is applicable.

It is true that in the case of the *Sales Tax Assessment Act* sub-sec. 4 of sec. 32 does give priority to liquidator's costs &c. over sales tax. This sub-section is introduced by the words, " notwithstanding anything contained in this section." The substance of this provision, introduced in 1934, was necessary if it were desired to give such priority in defeasance of ordinary common-law priority of Crown debts. But the introductory words do appear to me to assume that the section is creating a right which, without the new sub-section, would give priority to sales tax over the costs, &c., mentioned. I cannot, however (as I have said), find in the rest of the section any provision which can properly be so construed. Accordingly, my conclusion as to sales tax is the same as with respect to income tax, viz., that the section in question does not deal with the subject of priorities.

(1) (1932) A.C. 514.

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The statutory provisions operate in aid of any priority which may exist according to law, but they do not purport to create any priority. If the sections were construed as dealing with priorities and as substituting a priority depending upon the statutes for the common-law priority depending upon the prerogative, the result would be that the Crown would lose all priority if the commissioner did not give notice to the liquidator under the section that he had a claim in respect of tax. There is, in my opinion, nothing in either of the sections to support such a view of their meaning.

Argument has been addressed to the court with respect to the position of a liquidator who first receives a notice from a State commissioner and subsequently from a Commonwealth commissioner and the question has been asked whether in the case of a deficiency of assets the Commonwealth requirement overrides the State requirement, or whether on the other hand the State law operates so that the liquidator is only required under the Commonwealth law to set aside so much as he can out of any balance in his hands after setting aside a sum in accordance with the requirement of the State commissioner. This question and similar questions, however, do not arise in any practical form if, as I think is the case, the sections do not deal with questions of priority.

For the reasons stated I am of opinion that the judgment of the Supreme Court was right and that the appeal should accordingly be dismissed.

RICH J. The official liquidator of the respondent company, in the course of its winding up, found that the funds at his disposal were insufficient to pay in full debts due to the Commonwealth and the Postmaster-General and a debt due to the State of New South Wales. When the matter came before the State Court *Jordan* C.J. and *Davidson* J. held that the debts due to the Commonwealth and to the State should be paid *pari passu* out of the assets of the company. *Nicholas* C.J. in Eq., however, took the opposite view so far as income tax and sales tax were concerned. The question appears to me to resolve itself into one of the operation to be given to the relevant Acts of Parliament. It is trite learning that the Crown is one and indivisible and pervades the Commonwealth and

the six States of Australia. But the powers and rights of the Crown are separately administered by and distributed to the Commonwealth and these States. The Federal taxes and State taxes are specialty debts. The latter passed into judgment debts, but no point is made of this by the State of New South Wales. "The King's debt, and his prerogative to be preferred before other creditors arises from the regard the law hath to the publick good beyond any private interest" (*Bacon's Abridgement*, 7th ed. (1832), vol. III., p. 514). This preference extends by virtue of the prerogative both to debts due to the Commonwealth and those due to a State unless excluded or abridged by legislation. But in the instant case the competition is between the Commonwealth and a State. Although the winding up of the company is governed by State law it does not follow that State legislation can take away the priority of debts due to the Commonwealth by virtue of the prerogative. Sec. 59 of the *Income Tax Assessment Act* 1922-1934 and sec. 32 of the *Sales Tax Assessment Act* 1930-1935, which are in similar form, lay a duty upon a liquidator in a winding up. In effect the assets of such a company are brought into charge out of which the debts when ascertained are to be paid, the liquidator becoming a tax collector for the Crown. The notice prescribed by the Acts merely adds a personal liability on the liquidator. The provisions of these Acts do not distinguish between companies unable to pay debts in full and companies able to do so. Every liquidator must in due time notify the commissioner of the winding up and then set aside what appears to the commissioner to be sufficient assets to pay the tax already payable or to become payable in respect of the company. The sections assume that the commissioner may be trusted to tell the liquidator how much appears necessary to the commissioner to meet the taxes. The assumption betokens a misplaced confidence if we are to judge by what took place in the present case. For the liquidator has received a number of notices misstating or erroneously estimating the amounts. A corresponding provision finds a place in the State law—See *Income Tax (Management) Act* 1928, sec. 58. In the absence of these provisions it would seem to be clear enough that debts of equal degree due to the Commonwealth and those due to the State would rank equally as claims in an administration of

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assets. It is true that intricate considerations may be involved on the journey to this conclusion. But it is one which all who have dealt with the matter arrive at, *quacunque via*. The difficulty in the case is to know how these statutory provisions affect the matter. I share with *Nicholas* C.J. in Eq. the feeling which appears to underlie his judgment, that to work out the setting aside directed without withdrawing the fund from the claims of the State presents a prima-facie difficulty. But I cannot escape the conviction that the Commonwealth sections were drafted without any intention of affecting the position of the State, whose priorities were almost certainly not adverted to. The provisions are concerned with prevention of the escape of funds from the claims of the Commonwealth treasury. This is shown by the fact that solvent companies are as much the subject of the legislation as insolvent companies. And also by the fact that in the immediately succeeding section of the *Income Tax Assessment Act* a similar provision is made for the winding up by an agent of the business of his principal if an absentee. Having regard to the nature of the State's right of priority over debts due to the citizen and of equal ranking with the Commonwealth I think we ought not to treat a general section as affecting these rights of the States unless compelled to do so by clear and explicit language. They are rights of the State treasury of the same description as those of the Commonwealth and considerations of governmental comity and constitutional practice apart from any question of power justify a presumption against interference by the Commonwealth legislation. I therefore concur in the construction placed upon the provisions by the majority of the Supreme Court.

I agree that the appeal should be dismissed.

STARKE J. A summons was issued in the Supreme Court of New South Wales in the matter of the liquidation of E. O. Farley Ltd. for the determination of the following questions arising in the winding up :—

1. Whether all claims in respect of moneys due to the Crown in right of the Commonwealth of Australia and the State of New South Wales should be paid *pari passu*.

2. Whether any and if so what claims in respect of moneys due to the Crown in right of the Commonwealth of Australia should be paid in priority to the claims in respect of moneys due to the Crown in right of the State of New South Wales.

The Supreme Court decided that all claims in the winding up of the company in respect of moneys due to the Crown in right of the Commonwealth and the State of New South Wales should be paid *pari passu*. The Commissioner of Taxation for the Commonwealth appeals from that decision.

It appears that the claims of the Commonwealth were in respect of (*a*) income tax assessed under the Federal *Income Tax Assessment Acts* 1922-1931, for the years 1928-1931 inclusive, (*b*) sales tax assessed under the *Sales Tax Assessment Act* 1930 (*No.* 1) for the year 1935, (*c*) telephone service charges made pursuant to the *Post and Telegraph Act* 1901-1934. The claims of the State of New South Wales were in respect of income tax assessed under the *Income Tax (Management) Act* 1928 for the years 1928, 1929, and 1930, for which it had obtained judgment in 1932, and also for unemployment-relief tax for the year 1930 payable under the *Unemployment Relief (Tax) Amendment Act* 1930. The amount realized in the liquidation of the company is insufficient to pay in full all these claims, hence the summons already mentioned.

Income tax and sales tax due to the Commonwealth are debts due to the King by force of the Federal *Income Tax Assessment Act* 1922-1930, sec. 57, and *Sales Tax Assessment Act* (*No.* 1) 1930-1935, sec. 30. The telephone service charges are authorized under the *Post and Telegraph Act* 1901-1934 and the regulations made thereunder (Act, sec. 97 ; Statutory Rules 1927, No. 145). The Act, by sec. 65, requires that charges collected under the Act be paid to the Treasurer and placed to the credit of the consolidated revenue fund and sec. 93 provides that the Postmaster-General may recover the same in any court of competent jurisdiction. The Postmaster-General is the Minister of State for the Commonwealth charged with the administration of the *Post and Telegraph Act* 1901-1934 (secs. 3 and 5). The charges form part of the public revenues of the Commonwealth recoverable by one of the responsible Ministers of the Crown, namely, the Postmaster-General, and accordingly are

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debts or claims of the Crown (*In re West London Commercial Bank* (1)). The *Income Tax* (*Management*) *Act* 1928 (N.S.W.), sec. 56, enacts that income tax shall be deemed a debt due to the Crown and shall be collected and received by the commissioner on account of and shall be paid to the consolidated revenue. So, too, the *Unemployment Relief* (*Tax*) *Amendment Act* 1930 (N.S.W.) enacts that the tax shall be charged levied, collected and paid for the use of His Majesty (sec. 2). It is also a Crown debt or claim. The claims of the Commonwealth and the State are thus both for debts due to the Crown and therefore stand in equal degree. And the assets of the company, as already stated, are insufficient to pay all these debts in full.

Apart from any statutory provision, the prerogative right of the Crown to be paid debts due to it in priority to debts due to a subject is well settled (*In re Henley & Co.* (2) ; *New South Wales Taxation Commissioners* v. *Palmer* (3) ; *Food Controller* v. *Cork* (4)). There is no competition, however, in this case between the rights of the Crown and its subjects but between the prerogative right of the Crown in respect of debts due to the Commonwealth and the prerogative right of the Crown in respect of debts due to the State. Apart from any constitutional or statutory provision these debts being of equal degree should prima facie rank *pari passu* (*In re Oriental Bank Corporation ; Ex parte The Crown* (5) ; *In re Silver Brothers Ltd.* (6)).

The Commonwealth and the States have each constitutional authority to tax and there is nothing in the Constitution of the Commonwealth which expressly or by necessary implication gives the taxes imposed by the Commonwealth under its constitutional authority any priority over those imposed by the States under their constitutional authority (*Engineers' Case* (7)). Certain restrictions are imposed upon the Commonwealth's power of taxation (Constitution, secs. 51 (ii.) and 99) and certain forms of taxation are denied to the States (sec. 90) but apart from such provisions taxation is a domain of legislation which both the Commonwealth and the States may exercise concurrently subject to the provisions of sec.

(1) (1888) 38 Ch. D. 364.
(2) (1878) 9 Ch. D. 469.
(3) (1907) A.C. 179.
(4) (1923) A.C. 647.
(5) (1884) 28 Ch. D., at p. 649.
(6) (1932) A.C., at p. 525.
(7) (1920) 28 C.L.R., at pp. 154-157.

109 of the Constitution: "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

The mere imposition of a tax involves no inconsistency. "The two taxations"—Commonwealth and State—"can stand side by side without interfering with each other" (*In re Silver Brothers Ltd.* (1)). But when the question of priority arises the Commonwealth claims that its legislation confers an overriding priority in respect of Commonwealth taxation, and necessarily prevails over any State legislation imposing taxation and creating debts which prima facie rank *pari passu* with any taxation imposed under Commonwealth legislation.

The Commonwealth *Income Tax Assessment Act* 1922-1934, sec. 59, provides:—"(1) Where a company is being wound up the liquidator of the company shall give notice to the commissioner within fourteen days after the approval of the shareholders for the winding up has been given or the order for the winding up has been made, and shall set aside such sum out of the assets of the company as appears to the commissioner to be sufficient to provide for any income tax that then is or will thereafter become payable. (2) A liquidator who fails to give notice to the commissioner within the time specified . . . or fails to provide for payment of the tax as required by this section shall be personally liable for any income tax that then is or thereafter becomes payable in respect of the company." The *Income Tax* (*Management*) *Act* 1928 of New South Wales also, in sec. 58, provides that a liquidator shall, subject to the Commonwealth Constitution and any law of the Commonwealth thereunder, give notice in writing to the commissioner within fourteen days after his becoming liquidator and shall set aside such sum out of the estate or property of the company as appears to the commissioner to be sufficient to provide for any income tax which then is or will thereafter become payable by such company. Any person who fails to comply with any of the provisions of the section becomes personally liable for any tax which then is or will thereafter become payable by such company and in addition shall be guilty of an offence and be liable to a penalty.

(1) (1932) A.C., at p. 521.

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The duty of the liquidator to set aside moneys depends in each Act upon the commissioner communicating to him the sum that appears to the commissioner sufficient to provide for taxation. If there be a deficiency of assets it may well happen that the liquidator cannot comply with both requirements, in which case I apprehend that the requirements of the Commonwealth Act would prevail both by reason of the provisions in sec. 109 of the Constitution and the provision in the State Act itself that the requirement is subject to the Commonwealth Constitution and any law of the Commonwealth thereunder.

But what is to happen if the liquidator sets aside moneys under the provisions of the State Act before he receives any communication from the commissioner under the Commonwealth Act? The solution of the problem presented for our consideration, namely, the overriding priority of the Commonwealth hinges, I think, upon whether the Acts appropriate and charge the moneys set aside with payment of the taxation for which they are set aside or whether they are merely administrative provisions directing the retention of funds to meet taxation before any distribution of assets is made but in no wise affecting substantive rights whether of priority or otherwise. If the former view were correct, I should think that the commissioner who got in first and had moneys set aside to meet taxation that then was or might thereafter be payable, might rely upon the appropriation or charge so effected and resort to such moneys to the exclusion of any other creditor. Priority might in many cases thus depend upon the order of communication from Federal or State authority. On the other hand, if the sections have no relation to substantive rights whether of priority or otherwise and aim rather at safeguarding the collection of revenue the priorities of the Crown and the States can easily be adjusted on any distribution of the assets of the company.

The first limb of sec. 59 of the Federal Act merely directs the setting aside of moneys sufficient to provide for taxation. It does not provide in terms that Commonwealth taxation shall rank for payment in priority to all other claims and such a privilege should be conferred in clear and unequivocal words and not by mere implication. Moreover, there are no words of appropriation or of charge in the first limb of the section. It merely directs that a sum

be set aside as appears to the commissioner to be sufficient to provide for taxation. The second limb of the section deals with the failure of the liquidator to observe the section and has no relevance to the question whether the Commonwealth has or has not priority in the moneys set aside over all other claims. In my opinion, the Commonwealth legislation is not dealing with substantive rights whether of priority or otherwise but is for the purpose of restraining the distribution of the funds of a company in liquidation in aid and protection of the revenue. The section in the State Act is open to the same interpretation. The *Income Tax Assessment Act* 1936, sec. 215, differs slightly from sec. 59 of the Act of 1922-1934, but the 1936 Act is not applicable to this case, and in any case the variance in language does not appear to affect the question of priority as between the Commonwealth and the States. The *Sales Tax Assessment Act* 1930-1935 (*No.* 1) contains, in sec. 32, much the same provisions as to sales tax as is contained in sec. 59 of the *Income Tax Assessment Act* 1922-1934, but there is an additional sub-section which requires notice : it provides that the costs, charges and expenses which have been properly incurred by the liquidator in winding up including his remuneration may be paid out of the assets of the company in priority to any tax payable in respect of the company. The sub-section reinforces the general rule applied in the winding up of companies—See *Webb* v. *Whiffin* (1)—and possibly it was inserted to allay doubts but, other than as an aid to interpretation, the sub-section has no bearing upon the priority *inter se* of Commonwealth and State taxation.

The *Post and Telegraph Act* 1901-1934 contains no such provisions as are found in the *Income Tax Assessment Act* 1922-1934 and the *Sales Tax Assessment Act* 1930-1935 nor any other provision conferring priority in respect of Commonwealth charges over State taxation.

The *Companies Act* 1899 (N.S.W.) remains for consideration.

E. O. Farley Ltd. was compulsorily wound up under that Act and both the Commonwealth and the State proved their debts or claims in the liquidation of that company. The claim of the Commonwealth to priority over the State arises in that liquidation.

(1) (1872) L.R. 5 H.L. 711, at p. 735.

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The distribution of assets *pari passu* is the rule of the Act and it is re-enforced by sec. 264, which prescribes that in the winding up of any company under the Act the same rules shall prevail and be observed as regards the respective rights of secured and unsecured creditors and the proof and allowance of debts or claims against the assets of the company as may be in force for the time being under the laws of bankruptcy with respect to the estates of bankrupts. But it is settled that the rights of the Crown are unaffected by the *Companies Act* 1899 and the *Bankruptcy Act* 1898 of New South Wales (*In re Henley & Co.* (1); *In re Oriental Bank Corporation; Ex parte The Crown* (2); *New South Wales Taxation Commissioners* v. *Palmer* (3)) and that position is not displaced by the Commonwealth *Bankruptcy Act* 1924-1933, though that Act in sec. 5 (3) binds the Crown as representing the Commonwealth or any State and in sec. 84 prescribes the order of priority in which the estate of a bankrupt shall be applied. It has been held in New South Wales that the *Companies Act* 1899, by sec. 264, incorporates the provisions of the Commonwealth *Bankruptcy Act* 1924-1933 as being the laws of bankruptcy which are for the time being operative in the State but does not incorporate any of the provisions of the Commonwealth *Bankruptcy Act* with respect to the rights and privileges of the Crown, because the State *Companies Act* does not bind the Crown (*Re London Furnishing Co. Ltd.* (4); *Re Keep, McPherson Ltd.* (5)). The decision in *Re Keep, McPherson Ltd.* (5) is supported by the speech of Lord *Wrenbury* in *Food Controller* v. *Cork* (6) and in any case represents, in my judgment, the proper construction of the *Companies Act* 1899. It is unnecessary to consider the *Companies Act* 1936, which is not applicable to this case. But it would seem from secs. 199 and 297 of that Act and the decision of the House of Lords in *Food Controller* v. *Cork* (7) that the law has been altered.

It was not argued on this appeal that the State of New South Wales acquired any priority over the Commonwealth by reason of the fact that it had obtained judgment for the tax due to it and,

(1) (1878) 9 Ch. D. 469.
(2) (1884) 28 Ch. D. 643.
(3) (1907) A.C. 179.
(4) (1930) 48 W.N. (N.S.W.) 27.
(5) (1931) 48 W.N. (N.S.W.) 180.
(6) (1923) A.C., at pp. 671, 672.
(7) (1923) A.C. 647.

indeed, the question was not open. But it must not be assumed that priority can be obtained by one government over another by the simple expedient of obtaining a judgment for the amount of its tax. In the administration of assets, debts due to the Crown, whether by matter of record or by specialty, stand first in the order of priority and they may possibly be regarded as of the same degree (*Williams* on *Executors*, 11th ed. (1921), vol. 1, pp. 767, 773 et seq.; *Robbins and Maw, Devolution of Real Estate and Administration of Assets*, 3rd ed. (1901), p. 162). And, further, I suppose that if one government obtained a judgment for its tax so could the other, for its tax and their debts would thus become again of the same degree and the same nature.

The result is that the decision of the Supreme Court that all claims in the winding up of the company in respect of moneys due to the Crown in right of the Commonwealth and the State of New South Wales should be paid *pari passu* is right and should be affirmed.

Dixon J. In a winding up of an insolvent company the Commonwealth has proved for assessed Federal income tax and sales tax and for telephone charges, and the State of New South Wales has proved for assessed State income tax and for unemployment-relief tax. The amount due to the Commonwealth alone exceeds the value of the assets and so does the amount due to the State. The question for determination is, in effect, how these debts rank.

The forum of the winding up is New South Wales and the question is governed by the law in force in that State at the time the winding up commenced. The compulsory winding up of the company commenced on 18th December 1935, but the company was then in the course of a voluntary winding up, which had commenced on 25th October 1935. If such a question were to arise in New South Wales, not as at those dates, but now, its determination would turn upon the validity and effect of sec. 297 (1) (*d*) of the *Companies Act* 1936 (N.S.W.), sec. 215 of the Federal *Income Tax Assessment Act* 1936, sec. 32 of the *Sales Tax Assessment Act* (*No.* 1) 1930-1936, and sec. 264 of the *Income Tax* (*Management*) *Act* 1936 (N.S.W.). These provisions differ from the corresponding legislation which they supersede, and it is upon the old legislation that we must decide

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the present appeal. Questions of difficulty arise out of the new set of provisions as well as out of the old, but they are not the same questions. This is unfortunate because, while it is not possible by our decision to dispose of any of the difficulties existing under the new provisions, there are implicit in the matter before us considerations, which, whether we do or do not deal with them expressly in the course of our reasons, will almost inevitably be found to have a bearing upon those difficulties when, and if, they come up for determination.

Federal income tax and sales tax and telephone charges are debts due to the Crown in right of the Commonwealth. The Federal taxes are due by statute as personal obligations and are, therefore, specialty debts, and, if it matters, I am disposed to think that the telephone charges are of the same degree. (See sec. 57 of the *Income Tax Assessment Act* 1922-1935, sec. 30 of the *Sales Tax Assessment Act* (*No.* 1) 1930-1935, secs. 3, "telegraph," "telegraphic," 4, 5, 93, and 97 (*m*) of the *Post and Telegraph Act* 1901-1934 and S.R. 1927, No. 145, reg. 40, *Cork and Bandon Railway Co.* v. *Goode* (1).) The State taxes are also statutory obligations *in personam* and are debts due to the Crown in right of the State of New South Wales: See sec. 56 of the *Income Tax* (*Management*) *Act* 1928-1934. But before the winding up commenced the company's liability for these taxes passed into judgment debts; for the State commissioner signed judgment against the company. It will be necessary to consider whether as judgment debts the State taxes are of a higher degree than the debts owing to the Commonwealth. But this is only one step in determining the question whether the assets are to be applied towards payment of the debts due to the Commonwealth and State ratably or according to a preference or priority. The condition of the legislation gives that question an intricacy which tends to obscure the considerations ultimately governing its determination. But at the foundation of the case lies the question, what, apart from statute, determines the order in which a debt due to the Commonwealth and a debt due to a State rank in the administration of assets. This question being answered, the inquiry then is how, if at all, the order of ranking is disturbed by legislation, an inquiry

(1) (1853) 13 C.B. 826 [138 E.R. 1427].

depending on the meaning and operation of State and Federal enactments. But, though the whole matter falls into this main division, I think clearness and brevity will best be served by going step by step through the considerations affecting the conclusion.

1. What then determines how debts due to the Commonwealth and debts due to the State are to rank *inter se* in an administration of assets of the debtor, that is, on the assumption that the order is not governed by any valid State or Federal enactment ?

Such an administration may take place when the estate of a deceased debtor is administered by his legal personal representative or by the court, when the affairs of a company or other body are wound up, where there is a bankruptcy and also, in effect, when the debtor is a lunatic so found, or occupies a similar position—See *In re D* (*A Lunatic Patient*) [*No.* 2] (1)—and perhaps there are other instances.

Whenever the law undertakes or requires an administration of assets for the discharge of liabilities, then, among debts of equal degree, debts due to the Crown are preferred to debts due to the subject. This principle flows from the general prerogative by which " where the right of the Crown and the subject concur, that of the Crown is to be preferred. . . . A prerogative depending, first, on the principle that no laches is to be imputed to the King. . . . and, secondly, on the ground that by the King is in reality to be understood the nation at large to whose interest that of any private individual ought to give way " (per *Alderson* B., *Giles* v. *Grover* (2)). " The King by his prerogative regularly is to be preferred in payment of his duty or debt by his debtor before any subject, although the King's debt or duty be the latter ; and the reason thereof is, for that *thesaurus regis est fundamentum belli, et firmamentum pacis* " (*Co. Litt.* 131b). In its modern application the doctrine means that the government of the country is entitled to priority of payment as a fiscal right and not merely as a result of a rule for the administration of assets. Thus, in America, the State of New York has succeeded to this right of the Crown, because, under its constitution, the common law was continued as the law of the State and in virtue

(1) (1926) V.L.R. 467, at p. 484.
(2) (1832) 1 Cl. & F. 72, at p. 93 [6 E.R. 843, at pp. 851, 852].

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of the common law such a right belonged to the State as sovereign, that is, sovereign before the Union: See *Central Trust Co.* v. *New York City & Co., Railway N.R.* (1), *Re Carnegie Trust Co.* (2) and, per *Brandeis* J., *Marshall* v. *New York* (3).

In the self-governing dominions and colonies of the Crown the prerogative right of priority operates to entitle the treasury of the dominion or colony to payment of debts due to the government in priority to debts due to its subjects. In other words, the claims of the government of the country are preferred to those of its subjects in accordance with the modern understanding of the principle. But the claims of other parts of the Empire have been thought entitled to a like preference over the claims of the citizens of the part under whose laws the assets of the debtor are administered. Thus in a winding up in England payment has been ordered of a debt due to the Crown in right of the Colony of Victoria in priority to debts due to English creditors (*In re Oriental Bank Corporation; Ex parte The Crown* (4)). The indivisibility of the Crown is said to be the justification for this conclusion: See a number of judicial dicta supporting this position collected by *Murray* C.J. in *In re Commonwealth Agricultural Service Engineers Ltd.* (5). But the unity of the Crown does not mean that distinctions do not exist between the parts of the King's dominion for and in respect of which the rights of the Crown are exercised. A right or prerogative of the Crown in right of New Zealand, to take an example, and conferred by, or subsisting under, the law of New Zealand, by which debts due to the Crown in that right are to be preferred to debts due to subjects of the Crown, forms part of the governmental and fiscal system of New Zealand. If the Government of New Zealand, to pursue the example, proves its debt in a winding up in Newfoundland, why should the New-Zealand treasury be preferred to ordinary creditors in Newfoundland? It is not in accordance with the division of the Empire into separate polities that a prerogative of government affecting the treasury of one part of the Empire should be exercisable in another part and, moreover, exercisable to the prejudice of the citizens of that other

(1) (1888) 110 N.Y. 250, at p. 259.
(2) (1912) 206 N.Y. 390.
(3) (1920) 254 U.S. 380, at p. 382 et seq. [65 Law. Ed. 315, at p. 317].
(4) (1885) 52 L.T. 170; 28 Ch. D. 643.
(5) (1928) S.A.S.R., at pp. 352-357.

part. The right of priority is one affecting the revenues and ingatherings of the Crown in right of the dominion. On the corresponding side of liabilities and expenditure there is no doubt that the strictest separation is necessary. No suit can be maintained against the Crown in right of Great Britain or of a dominion or colony in respect of a liability unless it is to be satisfied out of the British exchequer or the treasury of that dominion or colony (*Attorney-General* v. *Great Southern and Western Railway Co. of Ireland* (1)). In his reasons for this conclusion Lord *Phillimore* states the proposition more generally :—" The property of the Crown in the dominion is held for the purposes of that dominion. Its benefits accrue to the dominion exchequer, and liabilities in connection with it must be discharged out of the same exchequer " (2).

To illustrate the difficulties inherent in the view that in the administration of assets in one jurisdiction of the Crown debts due to the Crown in right of all other jurisdictions must be preferred to debts due to the subject, it is enough to ask to which legislature does the power to abolish the priority belong. Is it within the province of the legislature of one dominion, that controlling the *lex fori*, to destroy a prerogative right of the Crown in right of another dominion ? Or is it within the territorial power of the legislature of the creditor dominion to affect the order of the application of assets in another dominion ?

But it is one question whether the priority of Crown debts over those due to a subject runs throughout the Empire independently of the exchequer to receive payment; it is another and entirely different question how that priority operates in a federation like Australia, composed of Commonwealth and States, each with a separate treasury, but all combining to form one self-governing dominion. We are not here concerned with the question whether a debt due to the Crown in right of one State has priority in another State over debts due to subjects : Cf. *In re Commonwealth Agricultural Service Engineers Ltd.* (3). The question is between a State and the Commonwealth.

There can be no doubt, of course, that as between a debt due to the State and a debt of equal degree due to a subject, the former would under the prerogative be entitled to priority. And, in my opinion, there can be no doubt that the prerogative would confer

(1) (1925) A.C. 754, at pp. 773, 774, 779, 780.

(2) (1925) A.C., at p. 779.

(3) (1928) S.A.S.R. 342.

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upon a debt due to the Commonwealth priority over a debt of equal degree due to a subject. This consequence flows from the fact that the executive power of the Commonwealth is vested in the Crown, which, of course, is as much the central element in the Constitution of the Commonwealth as in a unitary constitution. The United-States Government did not succeed to the sovereignty of the British Crown and therefore inherited none of its common-law powers or privileges. The reasons why the United-States Government has none but a statutory preference have no application to our Constitution: Cf., per *Story* J., *United States* v. *State Bank of North Carolina* (1). The Commonwealth Constitution, an enactment of the Imperial Parliament, took effect in a common-law system, and the nature and incidents of the authority of the Crown in right of the Commonwealth are in many respects defined by the common law. The prerogative which gives Crown debts priority over those due to a subject is in this way carried into the executive authority of the Commonwealth. It follows that in an administration of assets in a State of the Commonwealth, apart from statute, debts due to a subject rank behind debts due to either the Commonwealth or the State. But as between debts due to the governments there are but coexisting rights standing on an equality. The States' right of preference over a subject, arising as it does from the Crown prerogative, may fall under sec. 106 of the Constitution and enjoy whatever protection that provision gives. But when two governments are in competition with one another and not with their subjects, whose claims are *ex hypothesi* postponed to those of both governments, then their ranking *inter se*, unless a legislature has power to regulate the priorities between them and has done so, must depend upon the consequences deduced from the establishment within one territory of two governments under the Crown, neither subordinate to the other. The fact that one is not subordinate to the other is enough to negative any priority depending on the nature and character of the creditor. The question is of course confined to debts amounting to obligations *in personam*. It assumes that neither government claims a right of property. In

(1) (1832) 31 U.S. 29, at p. 35 [8 Law. ed. 308, at p. 310], and notes in 77 Law. Ed. 758 et seq. and 83 Law. Ed. 1230 et seq.

debts of equal degree due to the respective governments there is, in my opinion, an equal right, and, accordingly, when the Crown in right of the Commonwealth and the Crown in right of the State come into competition in respect of such debts, the two treasuries are entitled to a ratable distribution.

The question whether the legislative power of the State can postpone the Commonwealth and the question how far the legislative power of the Commonwealth can disturb the priorities and prefer the Commonwealth are matters for separate consideration. The power of the State is a question that appears to me to arise in connection with the legislation which must be first dealt with.

2. Under the *Companies Act* 1899 (N.S.W.), which is based upon the English Acts of 1862 and 1867, the general rule in winding up is that all liabilities of the company shall be paid out of the assets *pari passu*: Cf. secs. 107 (*b*) and 134 (*a*) and *Webb* v. *Whiffin* (1). But, according to the decisions, neither this statutory rule nor the provisions of the Act by which process against the property of the liquidating company is or may be restrained bind the Crown: See *In re Henley & Co.* (2); *In re Oriental Bank Corporation*; *Ex parte The Crown* (3). But by sec. 264 (1) of the *Companies Act* 1899 (N.S.W.) it is provided that in a winding up the same rules shall prevail and be observed as regards the proof and allowance of debts or claims against the assets of the company as may be in force for the time being under the laws of bankruptcy with respect to the estates of bankrupts. This provision is taken from the English *Judicature Act* 1875. When *In re Henley & Co.* (2) was decided it had been held that these words did not incorporate into the law governing winding up the rules in bankruptcy with respect to the priority of debts: *In re Albion Steel and Wire Co.* (4). Whether on the facts of *In re Henley & Co.* (2) the bankruptcy provisions at that time in force (sec. 37 of the *Bankruptcy Act* 1869) could have any application is obscure, but on the view then held of the effect of sec. 10 of the *Judicature Act* the bankruptcy provision was left out of account: See the report (5). Afterwards, however, a different view of the language of sec. 10 was adopted by the courts, and, as Lord *Wrenbury* in his

(1) (1872) L.R. 5 H.L., at pp. 718, 724, 734, 735.
(2) (1878) 9 Ch. D. 469.
(3) (1884) 28 Ch. D., at p. 649.
(4) (1878) 7 Ch. D. 547, at p. 550.
(5) (1878) 9 Ch. D., at p. 471 *arg.*

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work on *Companies* said (10th ed. (1924), p. 484), "the section introduced into winding up the bankruptcy rules 'as to debts and liabilities provable' which must be construed (at all events for winding-up purposes) to include all rules as to priorities expressly enacted by any statute and made applicable in the event of bankruptcy." The decisions which produce this result relate to the administration of the estates of deceased persons, but they fix the meaning of the words. They are *In re Leng*; *Tarn* v. *Emmerson* (1), *In re Heywood*; *Parkington* v. *Heywood* (2), and *In re Whitaker*; *Whitaker* v. *Palmer* (3). It was never decided that sec. 10 of the *Judicature Act* did not bind the Crown, though in the course of distinguishing *In re Henley & Co.* (4) Lord *Wrenbury* in *Food Controller* v. *Cork* (5) explained it on that ground, mistakenly, as I think. *In re Churchill (Lord)*; *Manisty* v. *Churchill* (6) did not so decide; it depends on the view that sec. 10 did not import the bankruptcy law of priorities: See the argument (7) and *In re Williams*; *Jones* v. *Williams* (8) there cited. On the contrary, in *In re Oriental Bank Corporation*; *Ex parte The Crown* (9), *Chitty* J. says: "It is not necessary to decide, but it may be that so much of the *Bankruptcy Act* of 1883 as relates to the Crown's priority is imported into winding-up proceedings by the 10th section of the *Judicature Act* 1875." This suggestion appears to me to be correct. What is incorporated in the law of winding up is a coherent and systematic body of rules—the rules with regard to the proof and allowance of debts and claims, including, by construction, priorities. Such a body of rules does not easily admit exceptions. To treat the Crown as impliedly excepted and therefore as not bound by the procedural requirements of proof, by the principles affecting secured debts and by the order of priorities is to throw disorder into the system and impair its coherence. Adopting the view suggested by *Chitty* J. the result would be that the Crown might pursue its ordinary remedies against the assets of the company, ignoring the winding up, and the liquidator might as a short cut be permitted to pay the

(1) (1895) 1 Ch. 652, at p. 657.
(2) (1897) 2 Ch. 593, at p. 598.
(3) (1901) 1 Ch. 9.
(4) (1878) 9 Ch. D. 469.
(5) (1923) A.C., at p. 671.
(6) (1888) 39 Ch. D. 174.
(7) (1888) 39 Ch. D., at p. 175.
(8) (1887) 36 Ch. D. 573, at pp. 582, 583.
(9) (1884) 28 Ch. D., at p. 649.

Crown debt to avoid process; but, if the Crown proved, then it became subject to the bankruptcy rules as to priorities. This is the effect of the *Oriental Bank Corporation Case* (1) decision. In the present case Commonwealth and State have proved in the winding up.

In *Re J. Carpenter Hales & Co. Ltd.* (2) *Long Innes* J. decided that sec. 264 of the *Companies Act* 1899 (N.S.W.) introduced into winding up the bankruptcy rules as to preferential payments; and, though perhaps a difficulty may be felt because the provision, unlike sec. 10 of the *Judicature Act*, stands in the same Act as the sections providing for payment of liabilities *pari passu*, it seems right to construe it as having the same meaning and effect as its English counterpart. It has also been decided that when Federal legislation became the source of the rules in bankruptcy sec. 264 then applied to the Commonwealth *Bankruptcy Act* in the same manner as formerly it had done to the State *Bankruptcy Act* (*Re London Furnishing Co. Ltd.* (3); *Re Keep, McPherson Ltd.* (4)). Now sec. 84 (1) (*h*) of the Commonwealth *Bankruptcy Act* 1924-1933 places Federal and State income tax to which a bankrupt has been assessed, not exceeding the largest amount owing for any one year, among the debts ranking sixth in the order of priority; a provision construed in *Deputy Federal Commissioner of Taxation* v. *Stranger* (5). Is the result to reduce the Crown's priority, State and Federal, to the same rank in a winding up? In answering this question it must be kept clearly in view that the Federal enactment does not apply to a winding up of its own force or in virtue of any exercise of Federal legislative power. It so operates only because State legislation, that is sec. 264, picks it up and gives it an application to companies. The change in the order of priority in the winding up depends therefore on State legislative power and nothing else. The order of preference thus prescribed affects the priority which debts due to the Commonwealth would otherwise possess over debts due to subjects. Is it within the legislative power of the State to affect the priority which belongs to debts due to the Commonwealth in virtue of the prerogative?

(1) (1884) 28 Ch. D. 643.
(2) (1926) 26 S.R. (N.S.W.) 420; 43 W.N. (N.S.W.) 116.
(3) (1930) 48 W.N. (N.S.W.) 27.
(4) (1931) 48 W.N. (N.S.W.) 180.
(5) (1934) 50 C.L.R. 468.

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It appears to me that the substantial nature and purpose of the priority belonging to the debts due to the Commonwealth is decisive against the power of the State to impair or destroy it by legislation. The priority is a right of the executive government, founded, as *Story* J. said in *United States* v. *State Bank of North Carolina* (1), upon motives of public policy, in order to secure an adequate revenue to sustain the public burdens and discharge the public debts. The administration of assets and the winding up of companies are matters over which the State legislative power extends. But it does not follow that, as an incident of providing a complete set of rules for the application of assets in an administration or winding up, the State legislature may detract from or adversely affect governmental rights of the Commonwealth. In many respects the executive government of the Commonwealth is affected by the condition of the general law. For instance, the general law of contract may regulate the formation, performance and discharge of the contracts which the Commonwealth finds it necessary to make in the course of the ordinary administration of government. Where there is no Federal statute affecting the matter, an exercise of the legislative power of the State over the general law of contract might incidentally apply in the case of the Commonwealth alike with the citizen. In the practical administration of the law, the decision of questions of that sort depends less upon constitutional analysis than on sec. 80 and perhaps sec. 79 of the *Judiciary Act* 1903-1939. There is, however, a clear distinction between the general law, the content or condition of which, though a matter for the legislatures of the States, may incidentally affect Commonwealth administrative action, and, on the other hand, governmental rights and powers belonging to the Federal executive as such. The priority of debts due to the Crown has always been treated as a matter of prerogative and falls under the latter head. I am, therefore, of the opinion that the New-South-Wales *Companies Act* 1899 could not operate to introduce into the winding up of companies an order of priority which postponed a debt due to the Commonwealth and, accordingly, that it does not draw in so much of sec. 84 (1) of the *Bankruptcy Act* 1924-1933 as places assessed Federal

(1) (1832) 31 U.S., at p. 35 [8 Law. Ed., at p. 310].

income tax for one year sixth in the order and, in its application to the Commonwealth, sec. 89, which ranks all debts *pari passu* if not otherwise provided for.

Does sec. 264 of the *Companies Act* 1899 (N.S.W.) nevertheless make applicable so much of the bankruptcy provision as postpones State income tax? In my opinion the bankruptcy rule as to the ranking of Federal and State income tax is one and indivisible. The application of the rule to one without the other produces quite a different policy and result. To put both State and Federal Crown debts out of the order so that they take priority under the prerogative may leave other debts ranking, no doubt behind Crown debts, but otherwise in the same order. But to separate Crown debts due to the Commonwealth from those due to the State is to introduce a new and different order between the two governments. Accordingly I think that as a consequence of the inapplicability of the rule in relation to debts due to the Commonwealth, the bankruptcy rule in relation to debts due to the State is also inapplicable.

3. Next it is necessary to consider some State and Federal enactments specifically dealing with the duties of liquidators respecting taxes payable by a company that is being wound up. The enactments, which are in substantially the same form, are sec. 59 of the *Income Tax Assessment Act* 1922-1934, sec. 32 of the *Sales Tax Assessment Act* (*No.* 1) 1930-1935, and sec. 58 (1) (*c*) of the *Income Tax* (*Management*) *Act* 1928 (N.S.W.).

This legislation took its beginning in sec. 45A of the Federal *Income Tax Assessment Act* 1915-1918, a provision which has not become less obscure as it has been developed under the influence of amendment, consolidation and reproduction. Sec. 59 of the *Income Tax Assessment Act* 1922-1934 imposes on every liquidator two duties. Within fourteen days of the commencement of the winding up he must notify the commissioner. Then he must set aside out of the assets of the company such sum as appears to the commissioner to be sufficient to provide for any income tax that then is or will thereafter become payable. Failure to comply with either of these obligations makes him personally liable for any income tax that then is or thereafter becomes payable in respect of the company. This is the full effect of the express provisions of the

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section. It is framed, as will be noticed, upon the assumption that the assets will suffice to meet the present and future tax. Its counterpart in the *Sales Tax Assessment Act* perhaps departs from this assumption, because it contains an additional sub-section authorizing the payment out of the assets of costs, charges and expenses which, in the opinion of the commissioner, have been properly incurred by the liquidator and his remuneration. The State income-tax provision does not include this sub-section and it follows the Federal income-tax section, subject to two qualifications. One is that it includes receivers, legal personal representatives, agents and others besides liquidators of companies. The other qualification is that it is expressed to be "subject to the Commonwealth Constitution and any law of the Commonwealth thereunder." In all three of the sections the obligation placed on the liquidator is to set aside such sum as to the commissioner appears sufficient, but the liquidator is not given expressly any means of finding out what the commissioner thinks sufficient. If the only amount to be provided was the tax already due, that is, assessed and payable, the inference might be that the liquidator must find out for himself; but as future tax is included the case is one where the fact upon which the duty of one party depends is outside the range of his information and within that of the other party. In the interpretation of a covenant where the covenantor "is to do a thing which lies within the peculiar knowledge of the opposite party, then notice ought to be given to him. That is the common sense of the matter" (per Lord *Abinger* C.B. in *Vyse* v. *Wakefield* (1)). The same rule of construction was applied to a statute in *London and South Western Railway Co.* v. *Flower* (2), though certainly *Brett* J. said the particular statute was next door to a contract (3). The rule was applied in this court to a statutory provision in *Stevens* v. *Colonial Sugar Refining Co. Ltd.* (4). It seems, therefore, that an implication should be made in favour of the liquidator by which his duty is made contingent on the receipt of some notice from the commissioner of the amount to be provided for tax. I should

(1) (1840) 6 M. & W. 442, at p. 453 [151 E.R. 485, at p. 489].
(2) (1875) 1 C.P.D. 77.
(3) (1875) 1 C.P.D., at p. 85.
(4) (1920) 28 C.L.R. 330.

think, however, that where the commissioner carries in a proof for tax due, as was done in the present case, that is sufficient notice that at least the amount proved for ought to be set aside.

It is further to be noticed that the section does not say that the amount set aside is to be applied in payment of the tax. It is to be a sum "sufficient to provide for any income tax," &c. There seems to be an assumption that the commissioner is entitled to receive payment in full out of the assets, and on that assumption that section requires the liquidator to retain the money for the purpose and not to part with it. The direction to "set aside such sum out of the assets" means, I think, no more than that the liquidator is to retain the amount and is not to distribute it or to appropriate it to some other purpose.

The section contemplates the winding up of a solvent company as much as, if not more than, an insolvent company. It may have been prompted by experience of defeat of the commissioner's claims when companies reconstructed. Perhaps it assumed that, where a company's assets were insufficient to pay all its debts, the prerogative gave the commissioner first priority. Such an assumption was not consistent with the express provisions of the *Companies Acts* in force at the time in three States: Victorian *Companies Act* 1915, secs. 207, 208, Tasmanian *Companies Act* 1920-1935, secs. 208, 209, Western Australian *Companies Act* 1893, sec. 154. But I think that there is no indication of any intention to replace any priority under the prerogative by the statutory right; the provision assumes priority *aliunde*. Probably the truth is that the draftsman of sec. 59 of the *Income Tax Assessment Act* did not examine the state of the law upon which his section would operate and did not consider the various states of fact which might arise in a liquidation according to the sufficiency of the assets, the extent of the liabilities, and the existence of different classes of creditors.

It is improbable that there was any advertence to the possibility that the claims of the State commissioner might be defeated if the liquidator set aside a provision for Federal tax. But, if a fund were set aside and thus withdrawn from the distribution otherwise authorized or required by law, how could that consequence be avoided? The State section, by its reference to the Constitution

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and the laws of the Commonwealth, appears to notice the possible conflict or competition. Even in the absence of any Federal legislation, for the reasons I have already given, I think that sec. 58 of the State *Income Tax (Management) Act* could not operate to postpone the claims of the Commonwealth to those of the State. To allow it to do so would mean that an exercise of the legislative power of the State could destroy or impair a governmental or fiscal right of the Commonwealth.

Independently of any actual or possible collision with sec. 59 of the Federal *Income Tax Assessment Act* 1922-1935, sec. 58 of the State Act ought not to be understood as affecting the right of the Commonwealth to rank equally with the State in a competition between debts of equal degree.

4. The question then is whether, on the other hand, the right of the State to rank in the same way equally with the Commonwealth is prejudiced by sec. 59 of the Federal Act.

It is a more difficult question, but, again, the considerations which control the answer are, I think, to be found in the nature and extent of the legislative power under which sec. 59 was enacted. From beginning to end the constitutional character of the two rights or claims of the State which would be affected must be kept steadily in view. The right of the State to receive payment of its debts before the subject springs from a prerogative of government; and the State's claim to stand on an equality with the Commonwealth in respect of demands upon the same fund is the consequence of the Federal system by which two governments of the Crown are established within the same territory, neither superior to the other.

They are not rights conferred by the Federal Constitution, but they do depend on the existence of the State as a separate government. The Federal Constitution does not imply as a matter of meaning or intention that debts due to the Crown in right of the State shall, in a distribution of assets, stand on an equality with debts due to the Commonwealth. If it did so, there would, of course, be an end of the matter. But it does mean to establish two governments, State and Federal, side by side, neither subordinate to the other, and it is this that gives rise to their equality in a competition of claims to be satisfied out of assets in a course of administration.

The right of the State to rank equally with the Commonwealth is not a thing that falls exactly under sec. 106 of the Constitution. Even if it be treated as forming part of the " constitution " of the State, it is not easy to regard it as existing as at the establishment of the Commonwealth. But to destroy the equality does spell an interference with an existing governmental right of the State flowing from the constitutional relations of the two polities. The *Engineers' Case* (1) shows that this consideration may not be enough to protect the right of the State from the exercise of a specific legislative power of the Commonwealth. The claim that debts of equal degree due to the Crown in right of the State and in right of the Commonwealth rank equally in a distribution of assets, unlike the claim that the Crown is to be preferred to the subject, does not depend upon the prerogative and is therefore not within the reservation made in the *Engineers' Case* (2) in favour of the " prerogative in the broader sense," whatever that reservation may mean. On two previous occasions I have attempted to reduce to a brief legal statement the doctrine which I understand that case to establish : See *Australian Railways Union* v. *Victorian Railways Commissioners* (3) and *West* v. *Commissioner of Taxation (N.S.W.)* (4). It is a rule of construction of the legislative powers expressly conferred by the Constitution upon the Parliament of the Commonwealth. For present purposes it is enough to repeat the general proposition. " The principle is that whenever the Constitution confers a power to make laws in respect of a specific subject matter, prima facie it is to be understood as enabling the parliament to make laws affecting the operations of the States and their agencies. The prima-facie meaning may be displaced by considerations based on the nature or the subject matter of the power or the language in which it is conferred or on some other provision in the Constitution. But, unless the contrary thus appears, then, subject to " certain " reservations, the power must be construed as extending to the States " (5).

The power given by sec. 51 (xvii.) to make laws with respect to bankruptcy and insolvency is an example of a legislative power which, as a result of this principle, might be interpreted as enabling

(1) (1920) 28 C.L.R. 129.
(2) (1920) 28 C.L.R., at p. 143.
(3) (1930) 44 C.L.R. 319, at p. 390.
(4) (1937) 56 C.L.R. 657, at p. 682.
(5) (1937) 56 C.L.R., at p. 682.

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the Parliament of the Commonwealth to destroy or vary the ranking of debts due to the State and Commonwealth in any administration of assets falling under the description of bankruptcy or insolvency. For it is a specific power, and priority in the distribution of assets among a bankrupt's creditors is a matter to be governed by bankruptcy legislation. It is a subject to be dealt with as a coherent whole, and prima facie no reason appears why the position of the Crown in right of the State and of the Commonwealth as a creditor should not be governed by laws made in the exercise of the power, alike with the position of ordinary creditors. In the United States the power of Congress to establish uniform laws on the subject of bankruptcies has been held to extend to insolvent corporations (*Ashton* v. *Cameron County Water Improvement District* (1)). But, even if this power of the Parliament of the Commonwealth were construed to include the insolvency of trading companies, it would not support sec. 59 of the *Income Tax Assessment Act* 1922-1934, or sec. 32 of the *Sales Tax Assessment Act* (*No.* 1) 1930-1935. For the provisions of those sections relate to winding up independently of the solvency or insolvency of the company. Thus the sections could not be considered laws with respect to bankruptcy or insolvency.

Another specific power is sec. 51 (xx.) of the Constitution, which confers power upon the Parliament to make laws with respect to foreign corporations and trading or financial corporations formed within the limits of the Commonwealth. But, apart from any other consideration, the definition of "company" in sec. 4 of the *Income Tax Assessment Act* 1922-1934 makes it impossible to refer sec. 59 to this power. "Company" is defined to include all bodies or associations corporate or unincorporate, though not partnerships. Sec. 59 is therefore not a law with respect to corporations and moreover it extends beyond trading and financial companies. For instance, it includes mining companies. The *Sales Tax Assessment Act* (*No.* 1) 1930-1935, sec. 3, contains the same definition of company.

The authority for the sections must be sought in the power given by sec. 51 (ii.) to make laws with respect to taxation. It may be conceded at once that all questions relating to the recovery of taxes

(1) (1936) 298 U.S. 513, at p. 536 [80 Law. Ed. 1309, at p. 1317], and note in 79 Law. Ed. 1139.

imposed by the Parliament fall under the legislative power with respect to taxation. In the exercise of that power the Parliament may impose the tax either on property or on the person, may make it a charge on specific real or personal property or a personal liability of the taxpayer, or may impose a personal liability and secure it over property. Having made the tax a personal liability, that is, a debt, as in the present case, the Parliament may make particular provisions to facilitate the enforcement of the liability and to ensure the actual recovery of the debt. Measures of this sort are incidental to the main purpose of the power and, independently altogether of sec. 51 (xxxix.), fall under the power. To require a liquidator to set aside assets to answer a debt due to the Commonwealth for tax so that the claim of the Treasury will not be defeated is doubtless within the ambit of the legislative power with respect to taxation.

But another question arises when the debt due to the Commonwealth for tax is brought into competition with a like debt due to the State, and an attempt is made under the power with respect to taxation to defeat the claim of the State to stand on an equality. That question is whether it is fairly incidental to the taxation power to subordinate the State's claim to that of the Commonwealth, when both claims depend on debt and come into competition in an administration of the assets of the debtor. In considering this question it is important to notice its limited character. It is concerned only with the existence under the taxation power of an authority to exclude an equal claim of the State of exactly the same nature. It is concerned only with an authority to do so when both claims are in debt, that is to say, when the Commonwealth law has chosen to create a personal obligation and the State law has done the same. It is concerned only with an authority to exclude a right of the State of a governmental and fiscal nature, a right arising from the co-ordinate position under the Constitution of the State and Commonwealth, a right to stand on an equality in the satisfaction of personal obligations due to each of them, a right confined to the relations *inter se* of the two governments in case of competition.

Unless it can be clearly affirmed that the Commonwealth Parliament has such an authority under the taxation power, then, I think,

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sec. 59 of the *Income Tax Assessment Act* and sec. 32 of the *Sales Tax Assessment Act* (*No.* 1) should not be construed as attempting to affect the equality upon which State and Commonwealth debts of the same degree rank. No doubt is cast on the general validity of these sections. All that is in question is whether they can and do operate to postpone the State to the Commonwealth. I have described the inquiry as depending upon what is incidental to the taxing power because it appears to me that no legislative authority to produce the precise consequence ascribed to sec. 59 can be found unless it is considered to be incidental or ancillary to that power. Everything which is incidental to the main purpose of a legislative power is contained within the grant of the power. It carries authority to make all laws which are "necessary or proper" to effectuate the power. But, in determining whether to produce some specific consequence is ancillary or incidental to an acknowledged power, the nature of the thing it is sought to do is all important. The exact nature of the thing now in question I have already endeavoured to describe. But the special character of the main power itself must also be kept in view. For it is the natural relation between the power and the thing done that determines whether the doing of the thing is a proper incident of the power, and the existence of such a relation or connection depends on the limits and the purpose of the power on the one side and, on the other side, on the nature of what it is sought to do. Neither in the nature nor in the form of the taxation power is there anything to suggest that the relations of the two governments *inter se* or any rights of the States are involved. Indeed, in the *Engineers' Case* (1) the taxation power was singled out as an instance of a legislative power the extent of which in relation to the States might in the future come up for special consideration. It is not like powers over specific fields of law or of activity or conduct, such as bankruptcy and insolvency, bills of exchange and promissory notes, copyright, patents and trade marks, currency, coinage and legal tender, weights and measures, &c. The specific subject matter in powers of that character could not be effectually regulated if, when the State in the course of its operations entered on the field, it was immune

(1) (1920) 28 C.L.R., at p. 143.

from the Federal law. Such reasoning, however, has no application when the question is whether, as an incident of or for the better effectuation of a power of raising revenue by taxing the citizen, Commonwealth legislation may destroy the equality upon which the claims of the two governments stand by reason of the co-ordinate position of the State and Commonwealth under the Constitution.

Incidental powers are not stretched to cover such important consequences as interferences with the fiscal and governmental rights of the States or the relations between the States and the Commonwealth. It appears to me that a close consideration of the nature of the result which the provisions of sec. 59 are said to produce is enough to show that it ought not to be regarded as properly incidental to the effectuation of the power in respect to taxation. After all, we are dealing with two concurrent powers of taxation involving no natural conflict and having the same end in view, the supply of revenue to the respective governments from the same ultimate source.

In my opinion the Federal provisions ought not to be construed as affecting the equality upon which the debts owing for tax to the State and Commonwealth otherwise stand.

Accordingly I do not think that sec. 59 of the *Income Tax Assessment Act* 1922-1934 and sec. 32 of the *Sales Tax Assessment Act* (*No.* 1) 1930-1935 operate to destroy the ranking of the debts due for Federal and State tax, that is, the equal ranking of such debts when of equal degree.

5. But, inasmuch as between the debts due to the two governments there is no statutory regulation of the order of payment or priority, the fact that the State Commissioner of Taxation obtained judgment appears to me to give rise to a question whether the State debt for tax has not become a debt of higher degree than the debts to the Commonwealth for tax and for telephone charges.

The question has not, however, been raised by the parties and it may be that it can have no importance under the legislation now in force. It is, therefore, enough to state what are the considerations upon which it turns and how they appear to operate. At common law a debt of record was of higher degree than a specialty. A judgment debt is a debt of record and a debt due by statute is a specialty. The

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King's debt is to be preferred to that of the subject only when the debts are otherwise of equal degree : *Comyns Digest, Administration*, vol. 1, c.2, 4th ed. (1800), pp. 336, 337. By statute 33 Hen. VIII. c. 39, sec. 50, certain specialties of the King are raised to the same rank as debts of record, but it is plain from the statute that the specialties intended are bonds or other writings obligatory.

By 4 & 5 Wm. and Mary, c. 20, judgments in the courts at Westminster did not obtain priority until they were docketed, by the Clerk of Essoins in the Common Pleas, by a clerk of the Dockets in the King's Bench and by the Master of the Office of Pleas in the Exchequer. But apparently the statute did not apply to the Crown and in any case it was not in force here and was not transcribed.

In a winding up debts of whatever degree have always been payable *pari passu*, that is, apart from specific statutory preferences. But, as already explained, the provisions under which debts are payable *pari passu* have been held not to bind the Crown. The result appears to be that, unless the common-law order of debts could not apply to such an administration of assets as a winding up, a judgment debt due to the Crown remains of higher degree than a debt due to the Crown by statute. The order of debts at common law developed in the administration of assets by executors and administrators of deceased persons. But there is no ground that I can discover for confining it to such administrations. On the contrary, to take an example, bankruptcy legislation has, from the beginning, carefully provided for ratable distribution and it seems to have been regarded as necessary to exclude the common-law order of debts : See 34 & 35 Hen. VIII. c. 4, sec. 1 ; 13 Eliz. c. 7, sec. 2 ; 21 Jac. I. c. 19, sec. 9 ; *Newland's Case* (1) ; *Orlebar* v. *Fletcher* (2).

It would, therefore, appear that the judgment debt due to the Commissioner of Taxation of New South Wales ranks first and the debts due to the Federal Commissioner of Taxation and to the Postmaster-General next.

But in the Supreme Court the State of New South Wales claimed no priority and no cross-appeal has been brought by it from the

(1) (1706) 1 P. Wms. 92 [24 E.R. 308.] (2) (1721) 1 P. Wms. 737 [24 E.R. 592.]

order that claims of the Crown in right of the Commonwealth and of the State be paid *pari passu*.

In my opinion the appeal of the Commonwealth fails on the grounds I have stated.

In the view I have adopted no question arises out of the order in which notices to set aside funds were given to the liquidator and out of the insufficiency and defectiveness of some of the notices.

EVATT J. In a winding up under the provisions of the New South Wales *Companies Act* 1899, the Commonwealth is claiming that certain debts owed by a company in respect of (*a*) Commonwealth sales tax, (*b*) Commonwealth income tax, and (*c*) Commonwealth telephone charges, should rank and be paid by the liquidator in priority to other debts owing by the company to the Crown in right of the State of New South Wales in respect of (i) State income tax, and (ii) State unemployment-relief tax. It is quite plain and, indeed, not disputed (A) that all the debts of the company, whether payable to the Commonwealth or to the State agencies, are Crown debts, and (B) that, as a consequence, either the Commonwealth or the State would (in the absence of the other) be entitled to enforce the prerogative right of the King to preferential payment.

The present dispute has arisen because the Commonwealth contends (*a*) that debts owing to it should be paid in preference to debts owing to any State of the Commonwealth, and (*b*) that, in relation to debts arising from the imposition of Commonwealth income tax and Commonwealth sales tax, the Commonwealth's right to be paid in priority to the States is established by certain Commonwealth enactments. The dispute is not an academic one, because the assets of the company in liquidation are insufficient to pay in full the proved or admitted debts either of the Commonwealth or of the State.

In federal systems like that of Canada and Australia, complex and difficult questions of constitutional law arise whenever both the central and local governments claim the benefit of the special prerogative rights of the King. The main reason for this is that such matters are not dealt with expressly in the written constitutions. In relation to the constitution of the Dominion of Canada, the

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accepted general rule is that "the *British North America Act* has made a distribution between the Dominion and the Provinces of executive authority which, in substance, follows that of legislative powers" (*Lefroy* on *Canadian Constitutional Law* (1918), p. 169). The application of this rule to executive power and to certain aspects of the royal prerogative is discussed in the *Bonanza Creek Gold Mining Co. Ltd.* v. *The King* (1). There is also a guarded reference to the matter in the *Engineers' Case* (2).

Joseph v. *Colonial Treasurer* (*N.S.W.*) (3) furnished a good illustration of the general rule that the division of *legislative* power as between Commonwealth and State may determine the authority which is capable of exercising a relevant prerogative of the King. There it was held that the royal prerogative as to war, so far as it concerns the States as well as the Commonwealth, is exercisable by the King's representative in the Commonwealth to the exclusion of the King's representative in any of the six States. The decision in question is based upon the exclusive character of the Commonwealth defence power, and the obvious necessity that the war prerogative should be vested in a single authority. What is, however, frequently overlooked in the discussion of these difficult questions is the fact that the royal prerogatives are so disparate in character and subject matter that it is difficult to assign them to fixed categories or subjects and thereby to determine whether they are exercisable by the Commonwealth Executive or that of the State or by both or by neither. In a study of this topic which I made in 1924, I suggested that, for the purposes of the Commonwealth Constitution, a relevant and often decisive classification of these disparate prerogatives might be made in accordance with certain principles.

In the first place, there are many royal prerogatives by virtue of which the King or his representative (the question of the extent to which the King's representative in self-governing Dominions and Crown Colonies may be entitled to exercise the prerogatives of the King is of course a separate question which cannot here be discussed) is entitled to act, e.g., to declare war, to make peace. Such prerogatives may be said to be executive in character, and, for want of a

(1) (1916) 1 A.C. 566, at pp. 580, 586, 587.
(2) (1920) 28 C.L.R., at pp. 143, 144.
(3) (1918) 25 C.L.R. 32.

better phrase, they may be described as " executive prerogatives." In the second place, the Crown is, by virtue of its common-law prerogatives, entitled to the benefit of certain preferences, immunities and exceptions which are denied to the subject. Illustration of such prerogatives are the right of the King to be paid by a debtor before all other creditors, and the rule that the King is immune from the processes of his courts. In the third place, there are certain royal prerogatives which partake of the nature of property, e.g., the right to escheats, the prerogative right in relation to royal metals, the right to treasure trove, the ownership of the foreshore and of the bed of the ocean within territorial limits. This third group may be described as constituting the proprietary rights of the King enjoyed by virtue of the prerogative. Perhaps I may add that, in the recent case of *Attorney-General for New South Wales* v. *Butterworth & Co. (Australia) Ltd.* (1) *Long Innes* C.J. in Eq. adopted the classification I had suggested for an analogous purpose. With that purpose, such authorities as *Chitty*, *Stephen*, *Anson* and other authorities were in no wise concerned.

Prior to the inauguration of the Commonwealth, the prerogatives of the King, so far as they were exercisable at all on the advice of Ministers in the territory now described as the Commonwealth of Australia, were exercisable by the Governors of the several colonies (acting on the advice of the Ministers of each colony).

By sec. 61 of the Commonwealth Constitution, the " executive power " of the Commonwealth became exercisable by the Governor-General as the Queen's representative. This section, however, does not determine whether any specific royal prerogative is exercisable by the Governor-General on the one hand or by the Governors of the several States on the other. By sec. 106, there is a general saving of the Constitutions of each State of the Commonwealth. Sec. 70 vests certain powers of the Governors in the Governor-General. But this section would seem to be restricted in application to those prerogatives which partake of the nature of " executive prerogatives." As to such prerogatives, the rule of the Canadian cases would suggest that the division of subject matters suggested by secs. 51 and 52 of our Constitution affords a guide analogous to

(1) (1938) 38 S.R. (N.S.W.) 195.

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that provided by secs. 91 and 92 of the *British North America Act*. It seems plain that, as a general rule, those prerogatives which, prior to federation, were exercisable through the King's representative in the area of a colony, are, so far as they partake of the nature of proprietary rights, still exercisable by the executives of the various States and for the benefit thereof: Cf. *The Commonwealth* v. *New South Wales* (*The Metals Case*) (1). Thirdly, with reference to the preferences, immunities and exceptions which the King enjoys by virtue of his prerogatives, there is nothing in our Constitution which suggests that the States have been stripped of them. On the other hand, it is equally evident that, after federation, similar prerogatives become exercisable by the Governor-General as the King's representative in respect of the Commonwealth, and this, despite the absence of any express reference to the matter in the Constitution. An illustration of this is afforded by *Repatriation Commission* v. *Kirkland* (2), where it was assumed, *sub silentio* but rightly, that the Crown in right of the Commonwealth is entitled to exercise the royal prerogative exempting Crown property from distress for rent. Such an immunity had previously been enjoyed by the colonies, and, after federation, the States still possessed it.

It does not follow that prerogatives of the Crown which after, and in spite of, federation were still exercisable by the Governors of the States could not be adversely affected by Commonwealth legislation under secs. 51 and 52 of the Commonwealth Constitution. One illustration of this is afforded by *The Commonwealth* v. *New South Wales* (1). Under sec. 51 (xxxi.) of the Constitution, the Commonwealth was given power to make laws in respect to the acquisition of property from a State for any purpose in respect of which the Commonwealth Parliament has power to make laws. This important Commonwealth power expressly contemplates the vesting in the Commonwealth of property rights which have belonged to a State. There was a difference of opinion in *The Commonwealth* v. *New South Wales* (1) as to whether the Commonwealth *Lands Acquisition Act* was expressed in terms sufficiently clear to vest in the Commonwealth the prerogative right in relation to royal metals found in lands acquired by the Commonwealth from the State of New South Wales under the *Lands Acquisition Act*. But there seems to have been a unanimous opinion that, in properly framed Commonwealth

(1) (1923) 33 C.L.R. 1.

(2) (1923) 32 C.L.R. 1.

legislation under sec. 51 (xxxi.), the prerogative rights in respect of the royal metals possessed by the States may lawfully be terminated by the legislation of the Commonwealth, providing it complies with the constitutional restrictions in sec. 51 (xxxi.).

Another illustration of the principle that Commonwealth legislation may validly cut down or destroy prerogative rights of a State was suggested in the doctoral thesis to which I have already referred:— "The general principles as to division of the prerogatives between the Commonwealth and States have also been referred to, and it has been seen, it is submitted, that the legislative *indicia* provided for us in secs. 51 and 52 of the Constitution are only useful in connection with those prerogatives which are in the nature of executive powers. So far as the prerogatives of preference and immunity on the one hand, and proprietary rights on the other, the question of distribution between central and local authority has to be solved from other parts of the Constitution, subject always to the operation of valid Commonwealth laws. For instance, even the prerogative of preference enjoyed by the Government of New South Wales could obviously be destroyed by valid Commonwealth legislation on the subject of 'bankruptcy and insolvency.' Apart from the effect, however, of Commonwealth legislation, the heads of legislation themselves do not determine in what authority these particular prerogatives lie." The above passage may require some qualification and modification, but, in essence, I believe that it is substantially correct, and it is in accordance with the decision in *In re Silver Brothers Ltd.* (1) which was pronounced in 1932.

From the above discussion of principle, two rules may be deduced. The first is that, unless one can point to valid Commonwealth legislation cutting down or destroying the prerogative right of the State to be paid in preference to other creditors, that right still exists upon the same footing as the similar right of the Commonwealth. Further, by its very nature, such prerogative right postulates a preference over the subject alone, and not over the Crown in any other capacity. It follows that, if there is a fund insufficient to pay both Commonwealth and State debts, the fund should be shared by both Commonwealth and State, the cash claim of each abating ratably. The second rule is that, if there is valid Commonwealth legislation which

(1) (1932) A.C. 514.

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terminates or abridges the prerogative right of the State to be paid in priority, then that legislation must be given effect to.

The first rule is sufficient to dispose of the claim of the Commonwealth that it is entitled to be paid in priority to the debts of the State the debt constituted by its telephone charges. For no legislation of the Commonwealth purports to elevate the debt so constituted over the debts owing to the State. But the Commonwealth claims, in respect of the Commonwealth sales tax and the Commonwealth income tax, that valid legislation has been passed, which, on its proper construction, entitles the Commonwealth debt to be discharged in priority to the debts owing to the State of New South Wales.

I therefore turn to examine the Commonwealth legislation relied upon by the appellants. The enactments are sec. 59 of the *Income Tax Assessment Act* 1922, and sec. 32 of the *Sales Tax Assessment Act* 1930. They are framed in terms which for present purposes may be regarded as indistinguishable. They provide that, on the winding up of a company, the liquidator shall give notice to the commissioner, and, thereupon, the liquidator's duty (the sanction for non-fulfilment being personal liability to pay the income tax due by the company) is to " set aside such sum out of the assets of the company as appears to the commissioner to be sufficient to provide for any income tax " then or thereafter payable. Curiously enough, a New-South-Wales statute (the *Income Tax (Management) Act* 1928, sec. 58), contains a similar provision imposing a similar duty upon, *inter alia*, liquidators of any company which is being wound up; though in that case, the duty it imposes is " subject to the Commonwealth Constitution and any law of the Commonwealth thereunder."

The first question is whether it is competent for the Commonwealth Parliament, in legislation passed under the power of taxation contained in sec. 51 (ii.) of the Constitution, to enact that, in the payment of debts owing by a debtor, sums due to the Commonwealth in respect of taxation lawfully imposed by that authority shall be paid in priority to debts owing to a State. In my opinion, this question must be answered in favour of the Commonwealth. I think that Commonwealth legislation upon the topic of " taxation "

may lawfully provide for any method of enforcement designed to ensure payment in full of the debt which *ex hypothesi* has been validly created by the Commonwealth. Such legislation may include novel methods of enforcing the debt. Obviously the legislation may require payment to the Commonwealth in preference to payment to other *private* creditors, because that merely produces a result corresponding to that produced by the exercise of the royal prerogative of preferential payment. As a matter of expediency, it may be thought undesirable to trench upon the similar prerogative exercisable by the State governments. But the power cannot be so restricted. In the case of *The Commonwealth* v. *Queensland* (1), the legislative power of the Commonwealth with respect to borrowing (sec. 51 (iv.)) was thought sufficient to entitle the Commonwealth to enact a law exempting the bondholder from payment of income tax imposed by State law in respect of the interest on Commonwealth bonds. Whatever may be thought of this far-reaching decision, it says, in effect, that the Commonwealth may, in certain cases, actually nullify to some extent income-tax legislation of a State directed to its own residents in respect of income actually received by such residents. No doubt there are some limitations upon the taxation power of the Commonwealth. Presumably, it could not, in purported exercise of the taxation power, exempt individuals and corporations from State laws imposing taxation; for the power contained in sec. 51 (ii.) deals with Commonwealth taxation, and, as was pointed out by Sir *Robert Garran* :—" It can hardly be questioned that these words refer only to Commonwealth taxation, uniform throughout the Commonwealth for Commonwealth purposes, and do not cover control of State taxation. Nothing in any decision of the High Court suggests a doubt of this; and indeed the principles of interpretation laid down by the court make doubt impossible " (*The Case for Union*, (1934), p. 27).

But legislation which merely cuts down the States' prerogative of prior payment in relation to tax owing to the Commonwealth does not go nearly as far as the Commonwealth *Financial Emergency (State Legislation) Act* 1932 which Sir *Robert Garran* deemed invalid,

(1) (1920) 29 C.L.R. 1.

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or as sec. 52B of the *Commonwealth Inscribed Stock Act* 1911, which was held to be valid in *The Commonwealth* v. *Queensland* (1). Further, although it is a decision on the Canadian Constitution, the case of *In re Silver Brothers Ltd.* (2) suggests, not obscurely, that, under the taxation power, the Commonwealth Parliament is competent to enact that its taxation assessments shall be paid in priority to debts owing by the same debtor to the State Governments. Such an enactment is strictly relevant to the subject of taxation for Commonwealth purposes. It would be otherwise if it attempted to destroy altogether the States' claim to priority over private creditors; for in such a case, the Commonwealth enactment could no longer be regarded as sufficiently connected with the subject matter of Commonwealth taxation mentioned in sec. 51 (ii.) of the Constitution.

The question remains whether the Commonwealth enactments which I have already summarized do secure priority in payment to the Commonwealth as against the States. As to this, the *Silver Case* (2) also illustrates the principle that, before holding that a prerogative belonging to a State has been trenched upon or cut down by Commonwealth legislation, the court should be able to find in the legislation express words, or very strong, perhaps necessary or irresistible, implication.

Is it reasonably clear from the Commonwealth enactments here relied upon that Parliament intended to cut down the pre-existing prerogatives of the State governments ? In my opinion, the answer is : No. It is argued on behalf of the appellants that the sections are clear. They are not clear in favour of the contention of the appellants. So far as their actual terms are concerned, they merely direct the liquidator to " set aside " such a sum of money as the commissioner has indicated will, in his opinion, be a sufficient amount for the purpose in hand. Such " setting aside " seems to be quite consistent with provisional action pending the final adjustment of the rights of the creditors in due course of administration. It is argued that, if this is all that is intended, the Commonwealth revenue would not benefit at all. But the answer to this is that, in the ordinary course, the Commonwealth will be benefited, for, if

(1) (1920) 29 C.L.R. 1. (2) (1932) A.C. 514.

the liquidator does his duty, he will have the moneys in hand, and there will be considerably less risk of dispersion of assets to the possible prejudice of the Commonwealth as a preferred creditor. As Mr. *Maughan* pointed out in his able argument, the Commonwealth enactments (*a*) do not purport in terms to deal with priority at all, (*b*) leave untouched any prerogative rights of the Crown, and (*c*) do not attempt to impose upon the liquidator any other duty than that of " setting aside " the money. If so, it seems right to conclude that the sections are merely administrative provisions designed to secure the setting aside of the money pending final administration, all questions of priority and preference being determined by the law to be found elsewhere than in the section. The Commonwealth enactments may be contrasted with that considered by the Privy Council in *In re Silver Brothers Ltd.* (1), where sec. 17 of the special war Act was expressly directed to the right of priority of the Canadian revenue authorities over all other claims. Even there, having regard to other legislation, it was thought that the language did not prejudice the rights of the Province of Quebec. Here, however, the case in favour of the States is far stronger.

For these reasons, the appeal should be dismissed.

McTiernan J. I agree that the appeal should be dismissed.

The taxes due by the company to the State of New South Wales and to the Commonwealth, namely, the income taxes and the sales tax, and the telephone charges also, are, by force of the statutes under which the company incurred these several liabilities, Crown debts. As such these liabilities are, according to well-settled principles, all debts of equal degree although due to the Crown in different rights. These debts, therefore, are payable *pari passu* unless the Commonwealth has by valid legislation bound the liquidator to prefer its debts to those due to the State. In my opinion, neither sec. 32 (1) of the *Sales Tax Assessment Act* (*No.* 1) 1930-1935 nor sec. 59 of the Commonwealth *Income Tax Assessment Act* 1922-1934, the provisions upon which the Commonwealth relies, displays the intention to alter the order in which the Commonwealth

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taxes ranked for payment. The claim that the telephone charges should be paid before the State taxes is not supported by any provisions the object of which is to give priority to these charges.

Appeal dismissed with costs.

Solicitor for the appellants, *H. F. E. Whitlam*, Commonwealth Crown Solicitor.

Solicitors for the respondent official liquidator, *Owen Jones & Co.*

Solicitor for the respondent Commissioner of Taxation (N.S.W.), *J. E. Clark*, Crown Solicitor for New South Wales.

J. B.