[HIGH COURT OF AUSTRALIA.]

THE MINISTER FOR WORKS FOR WESTERN AUSTRALIA . . . . . } APPELLANT;
PLAINTIFF,

AND

GULSON . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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SYDNEY, *Aug.* 8.

MELBOURNE, *Oct.* 3.

Latham C.J., Rich, Starke, McTiernan and Williams JJ.

*Crown—Commonwealth and States—Binding effect of Commonwealth legislation on Crown in right of States—National Security (Landlord and Tenant) Regulations (S.R.* 1941 *No.* 275—1943 *No.* 273), *reg.* 15 (1), (2).

*Held*, by *Rich*, *Starke* and *Williams* JJ. (*Latham* C.J. and *McTiernan* J. dissenting), that the *National Security (Landlord and Tenant) Regulations* do not bind the Crown in right of a State. So *held* by *Rich* and *Williams* JJ. on the ground that an intention to bind the Crown does not appear in the Regulations in express terms or by necessary implication, and by *Starke* J. on the construction of the Regulations. *Per Latham* C.J. and *McTiernan* J.: There is no general rule of construction of Commonwealth statutes whereby they are presumed not to bind the Crown in right of the States in the absence of express provision or necessary implication.

*R.* v *Sutton*, (1908) 5 C.L.R. 789, considered.

Decision of the Supreme Court of Western Australia: *Minister for Works* v. *Gulson*, (1944) 45 W.A.L.R. 90, reversed.

APPEAL from the Supreme Court of Western Australia.

An action was brought by way of summons under the provisions of the *Local Courts Act* 1904-1930 (W.A.) in the Local Court at Fremantle, by the Minister for Works for Western Australia, for

the recovery from the defendant, W. T. Gulson, of the possession of a "dwelling known as Warders Quarters situate at 9 Holdsworth Street, Fremantle."

The dwelling was a stone building containing five rooms and conveniences valued at £795, adjacent to the Fremantle Gaol—the main State gaol—and was one of a number of similar dwellings owned by the Public Works Department of Western Australia.

In 1942, owing to enemy action, actual and prospective, along the coast of Western Australia, the army authorities ordered an immediate evacuation of Fremantle Gaol and took possession of the gaol premises. In compliance with that order the State Government evacuated approximately two hundred prisoners to a bivouac camp hurriedly established at Barton's Mill, about twenty miles from Perth. The army authorities eventually released some of the quarters, including the subject dwelling, from army occupation, and the State Government made them available to civilians for residential purposes.

Gulson, who was a sergeant of police, was transferred to Fremantle for duty as such at the latter end of 1942, and, on 7th December 1942, he went into possession of the subject dwelling as tenant thereof at the rental of £1 2s. 6d. per week. The terms and conditions of the tenancy were set forth in a memorandum of agreement made on 29th March 1943 between the Minister for Works for Western Australia of the one part and Gulson of the other part.

The behaviour of the evacuated prisoners at Barton's Mill caused considerable concern and upon the army authorities releasing to the State Government part of the main gaol some of the prisoners were taken back to the Fremantle Gaol. Warders necessary for the maintenance of discipline and the proper control of the prisoners were transferred to Fremantle Gaol from Barton's Mill whenever accommodation could be found for them.

On 8th July 1943, Gulson was notified in writing by the Under-Secretary for Works that his, Gulson's, tenancy of the dwelling would terminate on 26th July 1943 as the dwelling was "again required for official purposes." At that time the dwelling was, and continued to be, urgently required for official purposes.

On 13th July 1943, Gulson informed the Under-Secretary in writing that he would vacate the dwelling as soon as he could obtain a suitable house, and, on 17th November 1943, he was threatened with legal proceedings unless he vacated the dwelling on or before 26th November 1943. Gulson's efforts to obtain another suitable house were abortive and there was not any evidence that any suitable house was available during his tenancy of the dwelling.

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Rent for the dwelling was paid by Gulson on demand by the Minister's agent at all times. Receipts obtained by him from the agent for rent paid after the first notice to quit on 8th July 1943 were marked "without prejudice," but occasionally the receipts given were not so marked.

Gulson continued in possession of the dwelling and on 29th December 1943 the Minister commenced the action to recover possession of the dwelling.

Gaols and police barracks or quarters are public works within the meaning of those words as defined in s. 2 of the *Public Works Act* 1902-1933 (W.A.), and under s. 32 of that Act the Minister has power to let public works not required for immediate use.

The magistrate dismissed the summons on the ground that the Minister was bound by the *National Security* (*Landlord and Tenant*) *Regulations*, provisions of which had not been complied with by the Minister in several material respects.

The Full Court of the Supreme Court of Western Australia affirmed the magistrate's decision: *Minister for Works* v. *Gulson* (1).

From that decision the Minister appealed to the High Court.

The relevant provisions of the *National Security* (*Landlord and Tenant*) *Regulations* are sufficiently set forth in the judgments hereunder.

*Dunphy* K.C. (with him *Holmes*), for the appellant. Under s. 32 of the *Public Works Act* 1902-1933 (W.A.) the Minister was entitled, in the circumstances, to let the premises on such terms as he thought fit, including the provision for the termination of the tenancy upon the giving of a week's notice thereof to the tenant. The dwelling was formerly used for the purposes of a State governmental function and was, and is, again required for those purposes, that is, the protection of the State. The Crown is not bound by an Act of Parliament except by express mention or necessary intendment (*Roberts* v. *Ahern* (2); *Halsbury's Laws of England*, 2nd ed., vol. 31, pp. 521, 522). In particular the Crown has been held "not bound" by statutes relating to or as follows:—emergency legislation—*Attorney-General* v. *Hancock* (3), *In re Hutley's Legal Charge*; *Barnes* v. *Hutley* (4); rent restriction—*Clark* v. *Downes* (5), *Wirrall Estates Ltd.* v. *Shaw* (6); rating—*Mersey Docks and Harbour Board Trustees* v. *Cameron* (7); Statute of Frauds—*Addlington* v. *Cann* (8); bankruptcy — *Commissioners of Taxation* (*N.S.W.*) v. *Palmer* (9);

(1) (1944) 45 W.A.L.R. 90.
(2) (1904) 1 C.L.R. 406, at p. 417.
(3) (1940) 1 K.B. 427.
(4) (1941) Ch. 369.
(5) (1931) 145 L.T. 20.
(6) (1932) 2 K.B. 247.
(7) (1865) 11 H.L.C. 443 [11 E.R. 1405].
(8) (1744) 3 Atk. 141 [26 E.R. 885].
(9) (1907) A.C. 179.

stamp duty—*The Commonwealth* v. *New South Wales* (1); garnishee and charging orders—*Ex parte Patience*; *Makinson* v. *The Minister* (2); companies—*In re Henley & Co.* (3), *Re Commonwealth Agricultural Service Engineers Ltd.* (4), *Federal Commissioner of Taxation* v. *Official Liquidator of E. O. Farley Ltd.* (5), *Re Ockerby & Co. Ltd.* (6); debtors—*Attorney-General* v. *Edmunds* (7); life assurance—*Attorney-General for New South Wales* v. *Curator of Intestate Estates* (8); insurance—*Broken Hill Associated Smelters Pty. Ltd.* v. *Collector of Imposts* (*Vict.*) (9); prescription—*Perry* v. *Eames* (10); limitation—*Public Works Commissioners* v. *Pontypridd Masonic Hall Co. Ltd* (11); arbitration—*Crown* v. *Colonial Mutual Insurance Co.* (12); common law procedure—*Thomas* v. *The Queen* (13); locomotives—*Cooper* v. *Hawkins* (14); local government—*Hornsey Urban District Council* v. *Hennell* (15); and maritime conventions—*The Loredano* (16). Some of the decisions referred to above are in respect of legislation similar to the *National Security* (*Landlord and Tenant*) *Regulations*. The principle that the Crown is not bound by a statute except by express mention or necessary intendment applies in favour of the Crown in right of a State with respect to both State and Commonwealth legislation (*Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.* (17); *Keith's Dominions as Sovereign States* (1938), pp. 147, 447)—and see *In re E. O. Farley Ltd.* (18). The rule as expressed and applied in *R.* v. *Sutton* (19) is in conflict with the proposition that the Crown is one and indivisible. If the contention is to be accepted that all Commonwealth legislation binds the Crown in right of a State, or that by virtue of s. 109 of the Constitution there is a conflict of laws which is automatically decided in favour of the Commonwealth, the unanimous decision in *Federal Commissioner of Taxation* v. *Official Liquidator of E. O. Farley Ltd.* (5) could never have been made. It is obvious, therefore, that these contentions cannot be absolute. The principles enunciated in *Roberts* v. *Ahern* (20) were, at least, impliedly approved in *Farley's Case* (21). Commonwealth legislation therefore does not

(1) (1906) 3 C.L.R. 807, at p. 814.
(2) (1940) 40 S.R. (N.S.W.) 96, at p. 104; 57 W.N. 65, at p. 68.
(3) (1878) 9 Ch. 469.
(4) (1928) S.A.S.R. 342.
(5) (1940) 63 C.L.R. 278.
(6) (1922) 25 W.A.L.R. 25.
(7) (1870) 22 L.T. 667.
(8) (1907) A.C. 519.
(9) (1918) 25 C.L.R. 61.
(10) (1891) 1 Ch. 658, at p. 665.
(11) (1920) 2 K.B. 233.
(12) (1903) 5 W.A.L.R. 46.
(13) (1874) L.R. 10 Q.B. 44.
(14) (1904) 2 K.B. 164.
(15) (1902) 2 K.B. 73.
(16) (1922) P. 209.
(17) (1920) 28 C.L.R. 129, at pp. 130, 153-155, 159.
(18) (1939) 40 S.R. (N.S.W.) 240, at p. 247; 56 W.N. 203, at p. 205
(19) (1908) 5 C.L.R. 789.
(20) (1904) 1 C.L.R. 406.
(21) (1940) 63 C.L.R., at pp. 285-287, 290, 292, 294, 298, 300, 301, 317, 323, 324.

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automatically bind the Crown in right of a State. If upon an examination of Commonwealth legislation it appears that the Crown is not expressly mentioned or covered by necessary implication that legislation does not apply to the Crown in right of a State. The statement in the Court below that the defence power is an exclusive power and that in construing laws relating to defence a reference to the Crown, whether express or implied, should be treated as meaning the Crown in right of the Commonwealth, is erroneous and is not in accordance with the judicial expressions in *Carter* v. *Egg and Egg Pulp Marketing Board* (*Vict.*) (1). In any event any judicial pronouncement with respect to the exclusiveness of the defence power in relation to the principle " the Crown is not bound " was not intended to apply to anything but an exercise of the defence power proper, and was not applicable to the whole of the very wide ramifications of what might be termed the incidental or ancillary powers. The *National Security* (*Landlord and Tenant*) *Regulations* do not contain any direct reference to the Crown, nor is there any implication against the Crown. An express provision that the Crown in right of a State and the Commonwealth is bound is contained in the under-mentioned Regulations made under the *National Security Act* :—*Evacuated Areas*, *Maritime Industry*, *Salvage*, *War Service Moratorium*, and *Building Operations*, and an implication to that effect arises in Regulations made under the Act as follows :—*Blacksmithing Trades Dilution*, *Boilermaking Trades Dilution*, *Boot Trades Dilution*, *Electrical Trades Dilution*, *Engineering Trades Dilution*, *Sheet Metal Trades Dilution*, *Metal Moulding Trades*, *Debtors' Relief* (except as to debts due on recognizance or bond), *Holidays and Annual Leave*, *Hours of Work* and *Shipwrights' Trade Dilution*. No such provision is inserted in the *National Security* (*Landlord and Tenant*) *Regulations*. Such a provision does occur in the *National Security* (*War Service Moratorium*) *Regulations* : see reg. 6. Reg. 30 of the *War Service Moratorium Regulations* incorporates certain portions of the *Landlord and Tenant Regulations* for the benefit of protected persons. It is conceded that in this respect the Crown is bound, but it strengthens the proposition that the Crown is not otherwise bound by the *Landlord and Tenant Regulations*. The only provisions of the *Landlord and Tenant Regulations* applicable in Western Australia are those concerning termination of tenancies, the recovery of possession of premises and the ejectment of tenants. In all other respects landlords and tenants in Western Australia are governed by the provisions of the *Increase of Rent* (*War Restrictions*) *Act*

(1) (1942) 66 C.L.R. 557, at pp. 572, 583, 590, 597, 598.

1939-1943 (W.A.). The State Act and those portions of the *Landlord and Tenant Regulations* applicable to the State should be read and considered as a whole (*Australian Law Journal*, vol. 18, p. 16). So read and considered s. 14 of the State Act governs this appeal in that it expressly exempts the Crown. The State Act was enacted prior to the gazettal of the *Landlord and Tenant Regulations* ; therefore the presumption is that at the date of the gazettal of the Regulations the Commonwealth Parliament knew the statutory position in Western Australia and that had it been intended to make the Regulations binding on the Crown in right of that State a special recital to that effect would have been inserted.

*L. D. Seaton*, for the respondent. The *Landlord and Tenant Regulations* bind the Crown in right of the States. The rule laid down in *R.* v. *Sutton* (1) is merely one of construction. When Commonwealth legislation is under consideration the rule of construction has to be read as applying to the Crown in right of the Commonwealth, and, prima facie, when State legislation is under consideration the rule of construction has to be read as applying to the Crown in right of the State. The Regulations were promulgated under the defence power. That power, being a power to legislate for the defence of the Commonwealth and of the several States, prima facie introduces the States as subject to that legislative power. The Court below used the word " inclusive " in the sense that the States are excluded from the power to legislate upon matters within the scope of the Commonwealth legislation. Once the Commonwealth does legislate on a topic upon which it is entitled to legislate it becomes exclusive within the scope of that legislation by virtue of s. 109 of the Constitution. The language of the *Landlord and Tenant Regulations* in itself is wide enough to include the States as landlords. There is nothing in the nature of the subject matter or in the terms of the Regulations themselves to justify an implication that the States are excluded from the operation of the Regulations. The language of reg. 15 and succeeding regulations is general in its application and is as capable of being applied to the Crown as any other legislation which has been held to apply to the States. It is just as general as the provisions of the statutes respectively considered in *R.* v. *Sutton* (1) and *Pirrie* v. *McFarlane* (2). Those cases establish that the rule of construction that the Crown is not bound is limited to the Crown in right of the executive acting under the particular legislation. However the language of reg. 15 affects a

(1) (1908) 5 C.L.R. 789. (2) (1925) 36 C.L.R. 170.

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State in its application, it affects it no more than it does an individual in that respect. That language is still wide and general and sufficient and apt to cover a State as a landlord. The intention of the Regulations is to provide for or regulate a situation of landlord and tenant in respect of the difficulties which have arisen due to the war. Those difficulties, e.g., inability to secure accommodation, are just as severe on a tenant of a State as they are on a tenant of a subject. As the Regulations are directed more to the protection of tenants than of landlords, there is not any reason to differentiate the case of a tenant of a State from the case of a tenant of a private person or corporation. The *Engineers' Case* (1) is not an authority for the proposition that the States are not bound by Commonwealth legislation unless express provision therefor is made in the legislation. The principle of that case is that if the Commonwealth legislation be valid, that is, within the legislative power, then no consideration of State or State boundaries necessarily arises. If the States be within the particular legislative power of the Commonwealth, e.g., the defence power, then if the language used in the legislation be general and not inapt to include the States, prima facie they are included. The onus is upon those who contend that the States are not covered by general words in Commonwealth legislation to show some sufficient indication in the legislation itself to free the States from being bound by that legislation. As shown in the *Engineers' Case* (2), any argument which might be raised on *R.* v. *Sutton* (3) that the principle that the Crown is bound applies only in the case of legislation enacted by the Commonwealth Parliament under an exclusive power, cannot be supported because that has no relevance to the matter. There is not any regulation which has expressly bound the Crown in right of a State without also binding the Crown in right of the Commonwealth. There are, however, many regulations where on the face of them it is difficult to understand why they should not apply to the Crown in right of a State but in which there is not any mention of the Crown or the States, e.g., *Man Power Regulations*, *Land Transfer Regulations*, *Land Transport Regulations*, *Food Control Regulations*, *Prices Regulations* (except in respect of one matter only), *Rationing Regulations*, and *Mobilization of Services and Property Regulations*. Where it was intended that the States should be excepted from the operation of particular regulations it has been expressly so provided : See proviso to reg. 22 (2), *Prices Regulations* ; reg. 19 (1) (*b*), *Coal Control Regulations*.

(1) (1920) 28 C.L.R. 129.
(2) (1920) 28 C.L.R., at p. 159.
(3) (1908) 5 C.L.R. 789.

Further, there are a number of Regulations where in certain parts, or with respect to some parts, of the Regulations both the Commonwealth and the States are excepted : see reg. 6A (4), *Civil Defence Workers' Compensation Regulations* ; reg. 4, *Debtors' Relief Regulations* ; reg. 6 (2) (*e*) and reg. 13, *Economic Organization Regulations* ; reg. 17, *Fire-arms and Explosives Regulations* ; reg. 16 (5), *Shipping Control Regulations* ; reg. 5 (1), *War Damage to Property Regulations* ; and reg. 5, *War-time Banking Control Regulations*. Consideration of other regulations is irrelevant in the construction of a particular regulation. Even if such a consideration be relevant an examination of the Regulations, as shown above, reveals such an inconsistency in this matter that it is impossible to deduce any principle of construction therefrom. The onus is upon the appellant State to show that it is not bound by the *Landlord and Tenant Regulations*. This onus has not been discharged.

*Sugerman* K.C. (with him *Dignam*), for the Commonwealth (intervening). It is not necessary, in order to bind the States by Commonwealth legislation, that in every case the intention so to bind should appear by express words in the legislation or by necessary implication from the words used. General words in a Commonwealth statute, words wide enough to include the States, include the Crown in right of the States even though the States or the particular State be not expressly mentioned (*R.* v. *Sutton* (1) ). The submission relied upon by the appellant that the *Landlord and Tenant Regulations* and similar regulations bind neither the Crown in right of the States nor the Crown in right of the Commonwealth depends upon a principle of construction which refers to statutes whereby the Crown would otherwise be deprived of some part of its prerogative, and does not extend to statutes which affect the Crown in any other sense. In particular, it does not extend to statutes which affect the Crown in relation to its engaging in ordinary transactions such as are engaged in between subject and subject. The distinction is between prerogative and a mere right (*Sydney Harbour Trust Commissioners* v. *Ryan* (2) )—and see *R.* v. *Hay* (3). In any event the principle does not apply to statutes which provide for the public good (*Sydney Harbour Trust Commissioners* v. *Ryan* (4) ). It does not appear from the judgment in *Attorney-General* v. *Hancock* (5) that there the Crown had a special statutory right.

(1) (1908) 5 C.L.R. 789.
(2) (1911) 13 C.L.R. 358, at p. 365.
(3) (1924) V.L.R. 97.
(4) (1911) 13 C.L.R., at p. 370.
(5) (1940) 1 K.B. 427.

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*Dunphy* K.C., in reply. *Ryan's Case* (1) is distinguishable. The appellant was not engaged in the business of leasing housing accommodation. The subject letting was an isolated case due to the prevailing abnormal conditions. The Crown has a prerogative right to recover its own property.

*Cur. adv. vult.*

Oct. 3.

The following written judgments were delivered :—

LATHAM C.J. The question which arises upon this appeal is whether the Crown in right of the State of Western Australia is bound by the *National Security* (*Landlord and Tenant*) *Regulations* (Statutory Rules 1941 No. 275 as amended) made under the Commonwealth *National Security Act*.

The title to a cottage at Fremantle was vested in the Minister for Works, in his public capacity as a Minister. He may be regarded as representing the State of Western Australia. The cottage had in the past been used as a residence for a warder at the local gaol. The State no longer required it for that purpose and under a power conferred by the *Public Works Act* 1902-1933 (W.A.), s. 32, the Minister let the premises to W. T. Gulson, who was a sergeant of police, but who occupied the premises simply as a residence under a tenancy agreement and not as an official residence in connection with the performance of his duties. The tenancy agreement provided that either party might terminate the tenancy at any time by giving to the other one week's previous notice in writing. The premises were again required for official purposes and the Minister gave a notice to quit. Gulson, the tenant, relied upon reg. 15 (1) of the *Landlord and Tenant Regulations*, which provided that, except as provided by the regulation, " the lessor of any prescribed premises shall not give any notice to terminate the tenancy or take or continue any proceedings to recover possession of the premises from the lessee or for the ejectment of the lessee therefrom." The premises in question fell within the definition of " prescribed premises." Reg. 15 (2) specified cases in which such a notice might be given. No proof was given that the case fell within any of the exceptions specified in reg. 15 (2). It was contended for the Minister that the Regulations did not bind the Crown in right of the State of Western Australia. The magistrate upon the original hearing rejected this contention and refused to make an order for recovery of possession of the premises. An appeal to the Full Court of the Supreme Court failed and the Minister now appeals to this Court.

(1) (1911) 13 C.L.R. 358.

The *Landlord and Tenant Regulations* are expressed in general terms and contain no specific reference to the Crown. "Lessor" and "lessee" are defined as meaning the parties to a lease, and are wide enough in terms to cover any such party, including the Government of a State, its Ministers or servants. Certain regulations relating to the fixing of fair rents have not been applied to Western Australia. The other regulations (which are operative in Western Australia) relate to termination of tenancies, the recovery of possession of premises, and the ejectment of tenants from premises. In *Silk Bros. Pty. Ltd.* v. *State Electricity Commission of Victoria* (1) opinions were expressed to the effect that the Regulations were within the defence power of the Commonwealth: See the report (2).

It was not contended that the Commonwealth Parliament could not, by suitably framed legislation, bind the Government of a State in respect of the subject matter of the Regulations. In the *Engineers' Case* (3) it was decided that laws validly made by authority of the Commonwealth Constitution bind, so far as they purport to do so, not only the people of every State, considered as individuals, but also as political organisms called States—"in other words bind both Crown and subjects."

The question which arises, therefore, is not a question of constitutional power, but a question of the construction of the Regulations. The question is not whether the Commonwealth Parliament *can* bind the State of Western Australia by the Regulations in question, but whether in fact it has done so.

The appellant relies upon the general rule of construction that the Crown is not bound by a statute unless there is an express provision therein binding the Crown, or it appears by necessary implication that it was intended to bind the Crown. This principle is not a hard and fast rule, but a rule of construction intended to give effect to the intention of the legislature. The grounds of the presumption have been variously expressed, but, whatever the origin of the rule may be, it is now well established that prima facie legislation does not apply to the government of the country, but to the persons in the country who are subject to the legislative powers of the parliament. In the case of a unitary State the application of the principle does not meet certain difficulties which arise under a federal organization of legislative and other governmental power. In the case of a unitary State the principle may be expressed by saying that the King in Parliament is to be presumed to legislate for subjects and

(1) (1943) 67 C.L.R. 1.
(2) (1943) 67 C.L.R., at pp. 17, 18, 20, 21, 23.
(3) (1920) 28 C.L.R. 129, at p. 153.

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not for the Crown, unless a contrary intention clearly appears. In a federal system the States or provinces cannot be described as "subjects" of the federal government, but, as already shown by the passage to which I have referred in the *Engineers' Case* (1), the Commonwealth Parliament may legislate so as to bind a State. Similarly, a State may legislate so as to bind the Commonwealth (*Pirrie* v. *McFarlane* (2)).

The application of this particular rule of construction in a federal system was carefully considered in *R.* v. *Sutton* (3) (the *Wire Netting Case*), where it was held that the rule of construction which prevented the Crown being affected by statutes in the absence of express mention or necessary implication did not apply in respect of all governments in the world which represented the Crown, but only in respect of the government which had authority in the community for which the parliament was legislating. The Commonwealth Parliament has authority in the community of the Commonwealth; a State Government has authority in the community of the State. Mr. Justice *O'Connor* said that the rule was "applicable in the inquiry whether a Commonwealth Act binds the King as representing the Commonwealth. But where the inquiry is whether the Commonwealth Act binds the King as representing one of the States it can have no relevancy" (4). All the Justices concurred in this view—see the report (5). The same principle was applied in the *Steel Rails Case —Attorney-General of New South Wales* v. *Collector of Customs for New South Wales* (6).

The references in these two cases to the exclusive character of the customs power do not limit the scope of the principle to laws passed under an exclusive power. This clearly appears from the *Engineers' Case* (7), in the joint judgment of *Knox* C.J., *Isaacs*, *Rich* and *Starke* JJ.:—"No distinction is made in the Constitution as to Commonwealth authority between its exclusive and its concurrent powers. That distinction affects the legislative power of the States, but not the effect of Commonwealth Acts once made."

In *In re E. O. Farley Ltd.* (8) it was said by the Full Court of New South Wales that in the *Engineers' Case* (9) the doctrine enunciated in *R.* v. *Sutton* (3), as above stated, was emphatically repudiated. This view is evidently based upon what was said in the *Engineers' Case* (10) where reference was made to arguments before

(1) (1920) 28 C.L.R., at p. 153.
(2) (1925) 36 C.L.R. 170.
(3) (1908) 5 C.L.R. 789.
(4) (1908) 5 C.L.R., at p. 806.
(5) (1908) 5 C.L.R., at pp. 796 (*Griffith* C.J.), 801 (*Barton* J.), 814 (*Isaacs* J.), 817 (*Higgins* J.).
(6) (1908) 5 C.L.R. 818.
(7) (1920) 28 C.L.R., at p. 159.
(8) (1939) 40 S.R. (N.S.W.) 240; 56 W.N. 203.
(9) (1920) 28 C.L.R. 129.
(10) (1920) 28 C.L.R., at p. 152.

the Court in which distinctions, of which the Court disapproved, had been drawn between the "Imperial King," the "Commonwealth King," and the "State King" as if they were separate "persons"; and the Court emphasized the unity of the Crown. But no critical reference was made to the decision in *R.* v. *Sutton* (1). Indeed, the decision in the case was reaffirmed by the reference to it by *Knox* C.J., *Isaacs*, *Rich* and *Starke* JJ. (2) and by *Higgins* J. (3). I can find nothing in the *Engineers' Case* (4) which should be regarded as overruling or disapproving the decision or the principle of the decision in *Sutton's Case* (1), except that it must be taken that the Court in the *Engineers' Case* (4) did not approve of the suggestion of *Griffith* C.J. made in *Sutton's Case* (5), and by *Isaacs* J. (6), that "the Crown, as the head of the Commonwealth Government, is for many, if not all, purposes a separate juristic person from the Crown as head of a State Government." In the *Engineers' Case* (4) the Court said the Crown was one juristic person, and not several juristic persons, but it did not comment upon the rule laid down in *Sutton's Case* (1), which was expressed by *Isaacs* J. in that case by saying, with respect to Commonwealth statutes, that "there can be no room for the contention that the Crown, as representing the States, is not bound without express words or necessary implication" (7). Indeed, any comment upon that rule would have been clearly irrelevant in the *Engineers' Case* (4). In that case the Court was considering whether a Commonwealth Act (the *Arbitration Act*) which expressly purported to bind the States could validly do so. In view of the explicit reference to the States in the Act, any consideration of the question whether or not a Commonwealth Act should be presumed not to bind the States unless they were expressly mentioned would have been completely irrelevant. No reference whatever to this question was made in the *Engineers' Case* (4), in which many decisions were reviewed and some were expressly overruled. *Sutton's Case* (1) was not expressly overruled, but was expressly said to be a correct decision that the Crown in right of a State was bound by a general Commonwealth Act (the *Customs Act*) which contained no reference to States.

After the *Engineers' Case* (4), in *Pirrie* v. *McFarlane* (8), *Higgins* J. referred to *Sutton's Case* (1) as a case in which it was held by all the judges of the Court that the rule of construction as to the King not being bound by a statute "in a Commonwealth Act applies to

(1) (1908) 5 C.L.R. 789.
(2) (1920) 28 C.L.R., at p. 159.
(3) (1920) 28 C.L.R., at p. 165.
(4) (1920) 28 C.L.R. 129.
(5) (1908) 5 C.L.R., at p. 797.
(6) (1908) 5 C.L.R., at p. 813.
(7) (1908) 5 C.L.R., at p. 814.
(8) (1925) 36 C.L.R., at p. 218.

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the King as head of the Commonwealth Government, not to the King as head of the State Government." In the last-mentioned case *Higgins* J. emphasized the distinction between the King in his Federal capacity and the King in his State capacity: "The King in his State capacity is presumed, prima facie, not to mean to bind himself; and it is generally expedient to use express words in a State Act in order to bind him and his State servants. But in a State Act no such presumption arises as to Federal servants—servants of the King in his Federal capacity; and where there is no such presumption, there is no need for express words" (1). Accordingly a State Act was interpreted by *Higgins* J. and the majority of the Court as applying to Commonwealth servants, not by reason of an express provision in the Act stating that servants of the Crown should be bound, but, as explained by *Starke* J. (2) (with whom *Knox* C.J. agreed), because the State had power to make the general law in question, and there was no "limitation upon the States, expressed or implied in the Constitution, with respect to interference with persons who are Federal officers."

These arguments appear to me to be applicable *e converso* in the present case. There is no limitation, expressed or implied in the Constitution, which prevents the Commonwealth Parliament from including State officers within the scope of legislation otherwise within its powers. The Commonwealth law in the present case, made under the defence power, applies to all lessors and all lessees. The Commonwealth Parliament has power to bind the States by its legislation under the defence power—that power indeed expressly relates to "the naval and military defence of the . . . several States" (Constitution, s. 51 (vi.)), and defence legislation prima facie binds the States. Thus there is neither any general rule of construction of Commonwealth statutes nor any limitation expressed or implied in the Constitution which precludes the application of such legislation to the States.

What I have said appears to me to provide a reply to the contention that because the Crown is one and indivisible the rule that the Crown is not bound by a statute expressed in general words applies so as to create a presumption that a State Government is not bound by any Commonwealth Act (or regulation). The principle that the Crown is one and indivisible is very important and significant from a political point of view. But, when stated as a legal principle, it tends to dissolve into verbally impressive mysticism. It is of little assistance in a practical system of law where a Commonwealth can

(1) (1925) 36 C.L.R., at p. 218. (2) (1925) 36 C.L.R., at p. 228.

sue a State, a State can sue a Commonwealth, and a State can sue a State; where the same position exists as between a Dominion and a Province in Canada; and where, to take another example, the Dominion of New Zealand has the same share in the Government of the Union of South Africa as the Union has in the Government of the Dominion, namely, no share at all. Indeed, the statement that the Crown is one and indivisible is almost invariably followed by a sentence beginning with "but," or is introduced by a sentence beginning with "though." I take as an example a passage from *In re Silver Brothers Ltd.* (1):—"It is true that there is only one Crown, but as regards Crown revenues and Crown property by legislation assented to by the Crown there is a distinction made between the revenues and property in the Province and the revenues and property in the Dominion. There are two separate statutory purses. In each the ingathering and expending authority is different." Another example is to be found in the *Engineers' Case* (2), where it is said that "though the Crown is one and indivisible throughout the Empire, its legislative, executive and judicial power is exercisable by different agents in different localities, or in respect of different purposes in the same locality, in accordance with the common law, or the statute law there binding the Crown." Similar statements that the Crown is indivisible, followed by the necessary and obvious qualification that in practice the law has to deal with a number of quite separate governments, all representing the Crown, can be found in *R.* v. *Sutton* (3); the *Engineers' Case* (4) and *The Commonwealth* v. *Colonial Combing, Spinning and Weaving Co. Ltd.* (5).

It may be suggested that certain cases show that, in relation to all statutes of all parliaments within the Empire, the doctrine of the unity and indivisibility of the Crown does really operate because it has been held that Crown debts wherever arising take priority over other debts. Thus in *In re Oriental Bank Corporation; Ex parte The Crown* (6), Crown debts originating in Victoria, Ceylon, Mauritius and Natal were all treated as having priority over other debts in the winding up in England of a company incorporated in England. *Chitty* J. said: "No distinction was drawn in argument, and very properly, between the rights and prerogatives of the Crown suing in respect of Imperial rights, and the rights of the Crown with regard to the colonies" (7)—Cf. *Liquidators of the Maritime Bank of Canada*

(1) (1932) A.C. 514, at p. 524.
(2) (1920) 28 C.L.R., at p. 152.
(3) (1908) 5 C.L.R., at p. 809.
(4) (1920) 28 C.L.R., at p. 159.
(5) (1922) 31 C.L.R. 421, at p. 439.
(6) (1884) 28 Ch. D. 643.
(7) (1884) 28 Ch. D., at p. 649.

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v. *Receiver-General of New Brunswick* (1); *In re Silver Brothers Ltd.* (2); *Federal Commissioner of Taxation* v. *Official Liquidator of E. O. Farley Ltd.* (3). But it should be observed that in the *Oriental Bank Corporation Case* (4) what were called two prerogatives of the Crown were in question (as to which see *Food Controller* v. *Cork* (5))—not only the "prerogative" that the Crown was not bound by a statute in the absence of express words or necessary implication, but also the prerogative based upon the long-established rule of the common law that whenever the right of the Crown and the right of a subject with respect to the payment of a debt of equal degree come into competition, the Crown's right prevails: See *Oriental Bank Corporation Case* (6); *In re Henley & Co.* (7). The latter prerogative is based upon what was described in *R.* v. *Wells* (8) as "an incontrovertible rule of law, that where the King's and the subject's title concur, the King's shall be preferred" —see *Commissioners of Taxation (N.S.W.)* v. *Palmer* (9). In the other cases just mentioned relating to priority of Crown debts (*Maritime Bank Case* (1), *Silver Brothers' Case* (2), *Farley's Case* (3)), no reference was made to the presumption that the Crown is not bound by a statute unless expressly mentioned, no reasoning was based upon that presumption, and those cases are not authorities with respect to the meaning or the scope of that presumption. In the *Oriental Bank Corporation Case* (4) the court did not have to consider any question relating to the application of the presumption in a federal system of government. These cases are authorities that "the incontrovertible rule of law" as to priority of Crown debts should be applied unless a statute clearly overrides it. But they do not, in my opinion, affect in any way the clear decision of five Justices in *R.* v. *Sutton* (10) that the presumption as to the Crown not being bound by a statute enacted in general terms, with no express or implied reference to the Crown, should not be applied so as to bring about either State exemption from Federal statutes or Federal exemption from State statutes. The question as to whether a Commonwealth statute applies to a State or whether a State statute applies to the Commonwealth should be determined in each case as a matter of construction by reference to its object and purpose as ascertained by a consideration of the specific provisions of the

(1) (1892) A.C. 437.
(2) (1932) A.C. 514.
(3) (1940) 63 C.L.R. 278.
(4) (1884) 28 Ch. D. 643.
(5) (1923) A.C. 647, at pp. 660, 669.
(6) (1884) 28 Ch. D., at p. 648.
(7) (1878) 9 Ch. D., at pp. 481, 482.
(8) (1807) 16 East. 278, at p. 282 [104 E.R. 1094, at p. 1096].
(9) (1907) A.C. 179.
(10) (1908) 5 C.L.R. 789.

statute concerned, independently of any presumption as to the Crown prima facie not being bound in either case. This view makes it unnecessary for me to consider the contention of the Commonwealth (intervening) based upon *Sydney Harbour Trust Commissioners* v. *Ryan* (1), that even if the rule of construction did apply, it was applicable only to the prerogative or regal rights of the Crown, and not to such matters as a weekly tenancy, in relation to which (it was contended) the Crown should be regarded as being in exactly the same position as any other landlord.

The question, therefore, in my opinion, is simply a question of construction of the Regulations. The question is whether the Regulations apply to a State Government and its Ministers. They are capable of so applying according to their terms, because the words " lessor " and " lessee " are wide enough to include State Governments and their Ministers. There is, as already stated, no difficulty arising from lack of power to bind State Governments. As *Higgins* J. said in the *Engineers' Case* (2), many Commonwealth laws must, without express mention of State Governments, be construed as applying to them: See also per *Griffith* C.J. in the *Steel Rails Case* (3). I mention by way of example laws dealing with customs, postal services, lighthouses, quarantine, weights and measures, bills of exchange and promissory notes, and immigration. Such laws, though expressed in general terms, would, I suggest, prima facie bind the States and servants of the States.

I proceed, therefore, unassisted and unimpeded by any presumption, to consider the object and purpose of the Regulations, as ascertainable from their terms, in order to reach a conclusion whether the Regulations were intended to bind a State Government and its Ministers.

The object and purpose of the Regulations is plainly to protect tenants in their occupation of premises at a time when there is a great shortage of accommodation, and when many heads of families are absent from their homes. The object is to prevent ejection of tenants by a landlord except in certain specified circumstances, which are set forth in reg. 15 (2). The Regulations are not designed to protect landlords, but to limit the rights of landlords in respect of tenants. The position of a tenant who hires a cottage from the Crown is exactly the same *qua* tenant as if an individual or a company were his landlord. I agree with what *Dwyer* J. said in the Full Court of Western Australia: " If war-time necessities require that some

(1) (1911) 13 C.L.R. 358.
(2) (1920) 28 C.L.R., at p. 164.
(3) (1908) 5 C.L.R., at p. 833.

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protection in the way of fixation of rent, security of tenure, and so forth, should be given to tenants, I can find no real reason why tenants of properties belonging to a State should be in any different position from other tenants. To leave any considerable body of tenants without protection would prejudice the stability of the whole protective structure. It is notorious that the State, through its various instrumentalities, for example those dealing with housing schemes, farm settlements, and similar matters, has a large number of tenants, probably far beyond those holding from any person." Accordingly, in my opinion, there is no reason to be derived from the general object and purpose of the Regulations which would exclude the applicability of the Regulations to a State Government which had chosen to let premises as a residence.

In my opinion there is nothing in the specific provisions of the Regulations which makes them inapplicable to a State. It was urged in argument that the permitted grounds of eviction as set out in reg. 15 (2) were not applicable to a State Government. There are altogether ten permitted grounds. Five of these grounds refer to the conduct or behaviour of the lessee in failing to pay rent, to observe the terms of his lease, or to take care of the premises, in being guilty of conduct which is a nuisance, or in being convicted of certain offences. These grounds relate only to the acts or omissions of a tenant and cannot be affected in any way by the fact that the State is the landlord. Of the other grounds, (*e*), (*fa*), (*g*) and (*h*) depend in whole or in part upon the position or intentions of the lessor. They are as applicable to a State landlord as to any other landlord. It may be unlikely that a State owns a parsonage (ground (*fa*) ), but if a State happened to own a parsonage and had let it, that ground would be applicable. Ground (*f*) is inapplicable in the case of a State. It is—" That the premises are reasonably required by the lessor for his personal occupation or for the occupation of some person who ordinarily resides with, and is wholly or partly dependent upon, him." But this ground is equally inapplicable in the case of a company, and it could hardly be contended that for this reason the Regulations are not applicable to companies which are landlords.

The Regulations contain other provisions for the protection of tenants—e.g., prohibiting sale or leasing within twelve months after recovery of possession under the Regulations, preventing discrimination against tenants who have children, requiring a court to take into consideration the availability of alternative accommodation for a dispossessed tenant, prohibiting the receipt and giving of bonuses

in addition to rent. These provisions, and the other provisions of the Regulations, are as capable of application to a State which is a landlord as to any individual person or corporation which is a landlord, and the necessity for the protection of tenants is the same in all cases.

Accordingly, I am of opinion that the Regulations are constitutionally capable of application to a State Government and its Ministers; that there is no rule of construction which creates a presumption against their applicability; that, construed according to their terms, they are so applicable; that there is no provision in the Regulations which is inconsistent with such application; that the Regulations are applicable in the case of the Minister for Works; and that therefore the decision of the Full Court was right and the appeal should be dismissed.

RICH J. I have read the reasons of my brother *Williams*, and, as I am in entire accordance with them, should have been well content simply to adopt them, were it not that some of my brethren take a different view. I think it desirable, therefore, to add, as briefly as may be, a statement of my reasons for holding that the appeal should be allowed.

The question for decision is whether a magistrate was right in holding that a regulation, made under the authority of the *National Security Act* 1939-1943, which forbids the institution of proceedings for the ejectment of a tenant unless certain conditions are fulfilled, is binding upon the Government of Western Australia, a view in which the Supreme Court of that State concurred. It is elementary that a statute does not bind the Crown unless an intention in that behalf is expressly stated, or is necessarily implied in what is expressly stated. The provisions of the *National Security Act* are such as to raise a necessary implication that it binds the Crown, and it therefore authorizes the making of regulations which bind the Crown; but the same rule applies to regulations so made as applies to statutes, and the Regulations in question are not expressed to bind the Crown. It has been contended that, in the case of a Commonwealth statute or regulation, the rule applies only to the Crown in the sense of the Government of the Commonwealth and not to the Crown in the sense of the Government of a State, and alternatively, if

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this be not correct, that an implication that the relevant regulation binds the Crown is necessarily involved in the nature of its provisions. I disagree with both contentions.

It has been decided by the highest authority that, in constitutional theory, the Crown is one and indivisible (*Williams* v. *Howarth* (1) ). It is by the Crown that all legislative and administrative authority is exercised throughout the Empire, although in each constitutional area such authority can be exercised by the Crown only through the agencies of the appropriate parliament and the appropriate group of constitutional ministers, so that, legalistically, it would be more strictly accurate to speak of the State of Western Australia in the right of the Crown than of the Crown in the right of the State of Western Australia (*Theodore* v. *Duncan* (2) ). Thus, the prerogatives of the Crown are the prerogatives of a single, universal Crown, and enure for the benefit of each and every part of the Empire, save to the extent to which in any part any particular prerogative has been abrogated or diminished (*In re Bateman's Trust* (3) ). The principle was applied by this Court in *Federal Commissioner of Taxation* v. *Official Liquidator of E. O. Farley Ltd.* (4) in relation to competing rights of the Crown as creditor to be preferred above other creditors of equal degree, for the benefit of different treasuries. The constitutional principle that the Crown is one and indivisible is not limited to cases in which it is the scope of the prerogative which is in question. This is clear from *Williams* v. *Howarth* (1). It applies to the Crown in all its capacities ; but it is not inconsistent with this that the Crown should, by appropriate parliamentary action, be shorn, in certain of its fields, of rights or immunities which it retains in others. The theory of the unity of the Crown produces, in relation to the rule now in question for the construction of statutes, the two-fold result that, first, the Crown in all its capacities is prima facie not bound by a statute made in any part of the Empire unless this is provided for expressly or by necessary implication, and second, a provision that a statute binds the Crown binds it prima facie in all its capacities unless a contrary intention appears. The second of these results is established by such cases as *Attorney-General for Quebec* v. *Nipissing Central Railway Co.* (5) and *Pirrie* v. *McFarlane* (6) : the first is a corollary of the second. It is true that a different

(1) (1905) A.C. 551.
(2) (1919) A.C. 696, at p. 707.
(3) (1873) L.R. 15 Eq. 355.
(4) (1940) 63 C.L.R. 278.
(5) (1926) A.C. 715.
(6) (1925) 36 C.L.R. 170.

opinion was expressed in *R.* v. *Sutton* (1), as one of the grounds for holding that the Government of New South Wales was bound by a Commonwealth *Customs Act*; but the ghost of the heresy of Crown schizophrenia propounded in that case was laid in such explicit terms in the *Engineers' Case* (2) (where *R.* v. *Sutton* (1) was cited to lead up to an observation that "the utmost confusion and uncertainty exist as the decisions now stand") that I feel some surprise at the attempt which has been made to resuscitate it.

The regulation in question not being expressed to bind the Crown, prima facie it does not bind the Crown in any of its capacities; and since there is, in my opinion, nothing in its nature or terms which necessarily implies an intention to bind the Governments of the States, I am of opinion that the appeal should be allowed: Cf. *Attorney-General* v. *Hancock* (3); *In re Hutley's Legal Charge*; *Barnes* v. *Hutley* (4).

It is not, perhaps, irrelevant to add that in cases where it is intended that regulations under the *National Security Act* should bind the Crown they do so in express terms, e.g., *Debtors' Relief Regulations*, reg. 4 (*c*), *Manual of National Security Legislation*, 4th ed., p. 231, and reg. 6 of the *War Service Moratorium Regulations*, *Manual*, 4th ed., p. 1070.

STARKE J. Appeal from a judgment of the Supreme Court of Western Australia dismissing an appeal from the Local Court of Western Australia giving judgment for the respondent in an action brought by the appellant to recover possession of a house and land occupied by the respondent. The premises were vested in the Crown and had been used as part of the Fremantle prison. In 1943 the premises were not occupied as a prison, and part thereof, known as No. 9 Holdsworth Street, Fremantle, was let by the appellant, the Minister for Works for Western Australia, to the respondent, a police sergeant, upon a weekly tenancy at a weekly rental of 22s. 6d. and determinable by either party giving to the other one week's previous notice in writing.

In July 1943 the premises were urgently required for official purposes, and the appellant determined the tenancy in accordance with its terms. But the respondent did not vacate the premises and

(1) (1908) 5 C.L.R. 789.
(2) (1920) 28 C.L.R., at pp. 152, 153.
(3) (1940) 1 K.B. 427.
(4) (1941) Ch. 369.

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ultimately relied upon the provisions of the *National Security* (*Landlord and Tenant*) *Regulations*, which provide that, except in certain cases immaterial here, the lessor of any prescribed premises shall not give any notice to terminate the tenancy or take or continue any proceedings to recover possession of the premises from the lessee or for the ejectment of the lessee therefrom. "Prescribed premises" means any premises, with certain exceptions immaterial here, and includes any part of any premises and any land or appurtenances leased with any premises and extends to any specified premises which the Minister administering the Regulations may by order declare.

The question for determination is whether these Regulations apply to and bind the States.

The constitutionality of the Regulations was not attacked on the argument before this Court. By a rule of construction, it was said, however, that the Crown is not bound by a statute unless specially named or included by necessary implication despite the distinction taken in *R.* v. *Sutton* (1) between the Crown in right of the Commonwealth and the Crown in right of the States. A rule of construction is not, however, "inflexible, but is merely a presumption in favour of a particular meaning in case of ambiguity" (*Craies* on *Statute Law*, 4th ed. (1936), p. 7). So the construction of the Regulations depends upon the language used in relation to the subject matter. Ordinarily it may be said, as was said in *Attorney-General* v. *Donaldson* (2), that prima facie the law as made by Parliament is made for subjects and not for the Crown. And, assuming, that which I am not prepared to concede, that the Commonwealth can regulate the land policies of the States in relation to their tenants under the defence power, still such regulations would require the most explicit and the clearest words. The regulation in the present case certainly uses general words, but that is not enough, and an examination of various provisions in the Regulations indicates that they concern the relationship of landlord and tenant between subject and subject. Thus the Regulations, if they apply to the States, make no provision for determination of tenancies in cases in which the premises are urgently required, as in this case, for public purposes. And, further, they provide that the premises shall not be sold or agreed to be sold

(1) (1908) 5 C.L.R. 789.
(2) (1842) 10 M. & W. 117, at p. 124 [152 E.R. 406, at p. 409].

until after the expiration of a period of twelve months immediately succeeding the date on which possession was obtained (reg. 15 (10) ), and prohibit the refusal to let dwelling-houses to an applicant with a family (See reg. 20, sub-regs. 1, 3 and 4), and require that an order shall not be made for the recovery of possession of any prescribed premises unless the court is satisfied that suitable alternative accommodation in lieu of the prescribed premises is immediately available for the accommodation of the person occupying the prescribed premises (reg. 15 (14) ), and prohibit contracting out (reg. 17), all which provisions are singularly inapt if applied to political bodies such as the States and inconsistent, as I think, with their constitutional position.

The appeal should be allowed.

McTiernan J. In my opinion this appeal should be dismissed.

It is settled by the case of *R.* v. *Sutton* (1) that the decision of the question whether the Executive Government of any State is bound by a Commonwealth statute is not governed by the rule of construction regarding the application of a statute to the Crown in a unitary system of government. That rule, generally stated, is that the Crown is not bound by a statute unless expressly mentioned or it appears by necessary implication that the statute was intended to bind the Crown.

The above-mentioned decision was given upon the Commonwealth *Customs Act* ; this Act was passed under an exclusive power of the Commonwealth Parliament. The reasoning upon which the decision is based, cannot, in my opinion, be confined to a Commonwealth Act passed under the exclusive powers of the Commonwealth Parliament. It applies, I think, with equal force to a statute passed in pursuance of the concurrent powers of the Parliament.

The principle applied in reaching the decision was stated by *Griffith* C.J. in these words : " This being the meaning of the rule, it follows that it does not apply to every person who in any part of the world represents the Crown, but only to those representatives of the Sovereign who have executive authority in the place where the law applies, and, even there, only as to matters to which that executive authority extends " (2). The principle is stated by *Barton* J. in these words : " It is *its own* Executive Government,

(1) (1908) 5 C.L.R. 789.

(2) (1908) 5 C.L.R., at p. 796.

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in this case that of the Commonwealth, that the Parliament is deemed not to include by general words 'unless that construction be clear and indisputable upon the text of the Act.' A State Executive cannot claim the protection of the doctrine where it is not the King's agent. The Federal Executive is the King's only agent in cases where the Federal power is exclusive. When that power wholly occupies the field, as in the case of the control of the customs, the State Governments are *ex necessitate* out of that field, which knows as occupants one government and one people, the Australian Government, and the Australian people who give it life" (1). This statement is, it seems to me, applicable to a law made by the Commonwealth under concurrent powers: such a law is paramount over State law which is inconsistent with it. *O'Connor* J. said:—"Such being the principle upon which the rule of construction rests, it is obviously applicable only in the determination of the question whether the King, as representing the community whose legislation is under consideration, is or is not bound by enactment. It cannot be applied to determine whether the enactment binds the King as representing some other community. It is applicable in the inquiry whether a Commonwealth Act binds the King as representing the Commonwealth. But where the inquiry is whether the Commonwealth Act binds the King as representing one of the States it can have no relevancy. Coming now to the application of the principle of construction to the enactments in question, it would follow that, although that principle may be used to ascertain whether the King, as representing the Commonwealth, is bound by the *Customs Act*, it cannot be used in the inquiry whether the King, as representing the community of New South Wales, is bound by the Constitution or by the *Customs Act*. In such a case the obligation of the Crown as representing the community of New South Wales to obey the Constitution and laws, such as the *Customs Act* passed under its authority, depends upon entirely different considerations" (2). *Isaacs* J., as he then was, said:—"No doctrine of law, however applicable to the purely unitary form of government, can, if inconsistent with the great, essential and dominant purpose of the Federal Constitution, be allowed to prevail. Any theory, therefore, is inadmissible which would permit the States, merely because allegiance

(1) (1908) 5 C.L.R., at pp. 801, 802. (2) (1908) 5 C.L.R., at pp. 806, 807.

is owed to the same Crown, to claim entire exemption from the general operation of a Federal law, regulating a matter of national concern, and made by virtue of a granted power of such a nature that the exemption would or might either utterly frustrate the legislation or render it practically ineffective. The regulation of foreign trade and commerce and the imposition of customs duties are necessarily powers of that character " (1). *Higgins* J. said :—" It seems to me to be also correct to say that the doctrine of construction applies to the Government of the State in State Acts, to the Government of the Commonwealth in Federal Acts. In other words, the Crown to be considered in applying the doctrine to a *Customs Act* is the Crown of the Commonwealth—the separate ' juristic person ' referred to in *Municipal Council of Sydney* v. *The Commonwealth* (2). To my mind, indeed, if ss. 106-109 of the Constitution be rightly considered, most of the difficulties as to the conflict of powers will vanish. The States' laws, and the States' powers to make laws, are all ' subject to the Constitution ' ; and the Commonwealth laws made under the Constitution override any conflicting State laws made within the States' powers ; and, so far as regards customs machinery provided by the Commonwealth Parliament, the State officials must submit to it as if they were private persons. They are not servants of the King so far as regards importation ; and the burden lies upon them, as it lies on other subjects of the King, of showing that they are exempted, without express words to that effect, from the obligations created by a Federal Act " (3).

The Regulations now in question do not in express terms bind any Executive Government. It would follow from *R.* v. *Sutton* (4) that if the provisions contained in the Regulations had been enacted under the defence power as a statute no presumption would arise that Parliament did not intend to bind the Executive Government of any State. The principle established by *R.* v. *Sutton* (4) is applicable to regulations made by the Executive Government of the Commonwealth as well as to statutes passed by the Commonwealth Parliament. If regulations are based upon a statute made in the exercise of any legislative powers under which the Commonwealth may pass laws binding on the States the construction of the regulations is not governed by a presumption that they are

(1) (1908) 5 C.L.R., at pp. 813, 814.
(2) (1904) 1 C.L.R. 208, at p. 231.
(3) (1908) 5 C.L.R., at pp. 817, 818.
(4) (1908) 5 C.L.R. 789.

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not intended to bind the Executive Government of any State unless it is expressly mentioned or it is a necessary inference that this agency of the Crown is bound. Such regulations, if validly made, would bind the Executive Governments of the States if the language of the regulations in its ordinary natural sense covers them and they are not expressly or by necessary implication excepted.

The language of reg. 15 of the present Regulations, read with the definitions in reg. 4 of " lessor," " lessee " and " prescribed premises," covers the appellant and the action which the appellant took to recover possession of the premises. The Executive Governments of the States are not in express terms excepted from the Regulations. The provisions of the Regulations do not raise any necessary implication that reg. 15 is not intended to apply to the Executive Governments of the States. The plain object of the Regulations is to remedy conditions resulting from war-time emergencies which affect the general body of tenants. These include numerous tenants to whom premises have been let as homes by the States. There is no necessary inference that the Executive intended to exclude those tenants from the protection which the Regulations give to lessees.

The appellant did not raise the question whether it is within the Constitution and the *National Security Act* 1939-1943 to bring the Executive Governments of the States within the scope of reg. 15. I do not deal with that question, but it is not to be inferred that I have any doubt that the regulation is a valid exercise of the powers of the Commonwealth. In this connection it is to be noticed that the respondent was not occupying the premises the subject of this case for any purpose of the Executive Government or the State, but solely as a house.

In my opinion the doctrine of *R.* v. *Sutton* (1) regarding the application of Federal law to the Executive Government of a State is not impaired by any other decision and it provides a sound ground for holding that the appellant is bound by reg. 15 ; nothing that has been decided on the question whether the Crown is indivisible implies that the Executive Governments of the several States cannot be bound by a Federal law if the Executive Government of the Commonwealth is not bound by it.

(1) (1908) 5 C.L.R. 789.

WILLIAMS J. The material facts are that by a memorandum in writing made on 29th March 1943, the appellant, the Minister for Works for Western Australia, leased a certain cottage forming part of the warders' quarters for Fremantle Gaol, erected on a portion of the Crown lands of that State on which the gaol stands, to the respondent from 7th December 1942 upon a weekly tenancy determinable at any time by either party giving to the other one week's previous notice in writing. The land was leased by the appellant under the authority of s. 32 of the *Public Works Act* 1902-1933 (W.A.), which authorizes the Minister to lease land not required for immediate use for any term not exceeding twenty-one years. On 8th July 1943, the appellant gave the respondent notice in writing terminating the tenancy as from 26th July 1943, but the respondent refused to vacate the premises on that date.

The appellant thereupon issued a summons in the Local Court of Western Australia held at Fremantle under the provisions of the *Local Courts Act* of that State for an order for the possession of the premises. When the summons came on to be heard the respondent raised the contention that he was entitled to the benefit of reg. 3 (2) of the *National Security* (*Landlord and Tenant*) *Regulations*, made under the provisions of the *National Security Act* 1939-1943, so that he could only be ejected in accordance with reg. 15 of these Regulations, and this contention was upheld by the magistrate, and, on appeal, by the Full Court of Western Australia.

The crucial question that arises on the appeal from the Full Court to this Court is whether these Regulations are binding upon His Majesty as the sovereign head of the State of Western Australia. The appellant relies upon the principle of construction that where the prerogative, rights, or property of the Crown are affected, the Crown is not bound by a statute unless it is named in it or there arises a necessary implication from the purpose and provisions of the statute that it was intended to bind the Crown. Counsel for the Commonwealth submitted that the principle of construction "has been sometimes misunderstood and extended beyond the purpose for which it was laid down," and that the true principle is that "the King cannot in any case whatever be stripped by a statute, which does not specifically name him, of any part of his ancient prerogative, or of those rights which are incommunicable and appropriated to him as essential to his regal capacity" (*Sydney Harbour*

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*Trust Commissioners* v. *Ryan* (1) ). But it is clear, I think, that the principle applies to all property vested in the Crown, or in some Minister (as in the present case), or public authority on behalf of the Crown. For instance, in *Gorton Local Board* v. *Prison Commissioners* (2) the principle was applied where the facts were very similar to the present case because the question arose whether plans for two blocks of houses which were to be built for officers' quarters on part of the land on which a prison was erected had to be approved by the Local Board, and that case was followed in *Cooper* v. *Hawkins* (3), where the question was whether a locomotive owned by the Crown and driven by a servant of the Crown on Crown service was subject to the *Locomotives Act* 1865 (Imp.). The principle has been applied to exempt premises owned by the Crown from the operation of the *Rent Restrictions Acts* 1920 and 1923 (Imp.) (*Wirrall Estates Ltd.* v. *Shaw* (4) ). It has also been applied by the Privy Council to the case of debts due to the Crown (*Commissioners of Taxation (N.S.W.)* v. *Palmer* (5) ).

Neither the *National Security Act* nor the *Landlord and Tenant Regulations* name the Crown expressly. If the Act was not intended to bind the Crown, regulations made under the Act could not do so (*Food Controller* v. *Cork* (6) ; *Re Keep, McPherson Ltd.* (7) ). But, in the case of the Act, it follows, I think, from the decision of the House of Lords in *Attorney-General* v. *De Keyser's Royal Hotel Ltd.* (8), and particularly from the speech of Lord *Atkinson* (9), that the Act, which deals with what is the special trust and duty of the King to provide for, namely the defence and security of the realm, and prescribes the methods by which that purpose is to be effected, discloses a sufficiently clear and unmistakable intention to bind the Crown.

The Act is sufficiently wide, therefore, to authorize the Executive to make regulations which bind the Crown, but each set of regulations will only do so if they name the Crown or an intention to that effect appears by necessary implication. The *Landlord and Tenant Regulations* do not expressly name the Crown, and I have been

(1) (1911) 13 C.L.R., at p. 365.
(2) (1904) 2 K.B. 165 (note).
(3) (1904) 2 K.B. 164.
(4) (1932) 2 K.B. 247.
(5) (1907) A.C. 179.
(6) (1923) A.C., at pp. 671, 672.
(7) (1931) 48 W.N. (N.S.W.) 180.
(8) (1920) A.C. 508.
(9) (1920) A.C., at p. 536

unable to find anything in their purpose or provisions from which there appears any necessary intention to that effect.

It has been contended, however, that, in the case of Commonwealth legislation, the principle of construction only applies to the Crown as sovereign head of the Commonwealth, and that the Crown as sovereign head of a State is in no better position than a private individual. This contention found favour with the Full Court of Western Australia, and is supported by the view, expressed by this Court in *R.* v. *Sutton* (1), that, in the construction of Commonwealth statutes relating to matters within the exclusive control of the Commonwealth Government, the principle only applies to His Majesty as head of the Commonwealth Government and not to His Majesty as head of a State Government. If this is the true position with respect to Commonwealth Acts passed in the exercise of exclusive powers, it is difficult to see why the position should not be the same in the case of statutes passed in the exercise of concurrent powers, but it is unnecessary to pursue this question further, because I agree with *Jordan* C.J. in *In re E. O. Farley Ltd.* (2), for the reasons there stated, that the decision in *R.* v. *Sutton* (1) that the *Customs Act* there in question was binding on the Sovereign as head of a State can only be supported by the implication of a necessary intention to be gathered from the purpose and provisions of the Act to that effect. The view expressed in *R.* v. *Sutton* (1) is, in my opinion, inconsistent with two decisions of the Privy Council one given before and the other after that case was decided. In *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick* (3), the Privy Council held that under the *British North America Act* 1867, which confers exclusive powers on both the Dominion and Provincial Governments, the Provincial Government of New Brunswick, being a simple contract creditor of the Maritime Bank of the Dominion of Canada, constituted under a law of the Dominion, in respect of public moneys of the Province deposited in the name of the Receiver-General of the Province, was entitled to payment in full over the other depositors and simple contract creditors of the bank, its claim being for a Crown debt to which the prerogative attached. In that case, therefore, the Privy Council

(1) (1908) 5 C.L.R. 789.
(2) (1939) 40 S.R. (N.S.W.), at p. 247; 56 W.N., at p. 205.
(3) (1892) A.C. 437.

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held that the Queen as the sovereign head of the province of New Brunswick had the full prerogative rights of a Sovereign under a law made by the Parliament of the Dominion. In *In re Silver Brothers Ltd.* (1) the *Interpretation Act* 1906 passed by the Dominion Parliament, s. 16, enacted that no provision in any Act was to affect the Crown unless it was expressly stated therein that the Crown was to be bound thereby. The Privy Council held that in a bankruptcy in the Province of Quebec, where the assets were insufficient to discharge both a sum due for a tax under a Dominion statute and a sum due for Provincial taxes, the Dominion statute, having regard to s. 16 of the *Interpretation Act*, had to be read as though it provided that the priority enacted should not operate so as to diminish any rights of the Crown in any Province, with the result that the two debts would rank *pari passu* as claimed by the Province. In *Federal Commissioner of Taxation* v. *Official Liquidator of E. O. Farley Ltd.* (2) this Court applied the decision in *In re Silver Brothers Ltd.* (1) to the winding up of a company in New South Wales, and held that debts due to the Crown as the sovereign head of the Commonwealth and of the State of New South Wales should be paid *pari passu*.

It has been made quite clear by the judgment of the Privy Council in *Theodore* v. *Duncan* (3) that "the Crown is one and indivisible throughout the Empire, and it acts in self-governing States on the initiative and advice of its own Ministers in these States," a view to which full effect was given in the discussion on this question that occurs in the joint judgment of *Knox* C.J., *Isaacs* J., *Rich* J. and *Starke* J. in the *Engineers' Case* (4). This does not mean, of course, that the Commonwealth Parliament, in legislating within its powers, cannot create priorities between the King as sovereign head of the Commonwealth and the King as sovereign head of a State (*South Australia* v. *The Commonwealth* (*Uniform Tax Case*) (5) ), or make the legislation binding or not binding upon the Crown as sovereign head of the Commonwealth or of a State as the case may be, but whenever it is intended that His Majesty shall be bound in respect of his prerogative, rights or property, whether as the sovereign head of the United Kingdom

(1) (1932) A.C. 514.
(2) (1940) 63 C.L.R. 278.
(3) (1919) A.C., at p. 706.
(4) (1920) 28 C.L.R., at p. 152.
(5) (1942) 65 C.L.R. 373.

or any part of the British Empire, it is necessary that he shall be expressly named or that a necessary implication to that effect shall appear from the statute. This construction is in accordance with the statements in the joint judgment in the *Engineers' Case* (1) that "it may be that even if s. V. of the Act 63 & 64 Vict. c. 12 had not been enacted, the force of s. 51 of the Constitution itself would have bound the Crown in right of a State so far as any law validly made under it *purported to affect the Crown in that right* . . . These considerations establish that the extent to which the Crown, considered in relation *to the Empire or to the Commonwealth or to the States*, is bound by any law within the granted authority of the Parliament, *depends upon the indication which the law gives of intention to bind the Crown.*" (The italics are mine.) These statements can only mean that the Crown in right of a State is only bound by Commonwealth legislation when the legislation shows expressly or by implication an intention to that effect. It is clear, therefore, to my mind, that when this Court in the *Engineers' Case* (2) swept away the cobwebs of construction arising from the doctrine of the implied immunity of instrumentalities, it also swept away at the same time the anomalous principle laid down in *R.* v. *Sutton* (3) that in the case of Commonwealth legislation the Crown in right of a State was bound unless the State could show that the legislation was not intended to bind the State. A case in this Court in which it was held that the King as sovereign head of the United Kingdom was not bound by a Victorian Act is *Broken Hill Associated Smelters Pty. Ltd.* v. *Collector of Imposts* (*Vict.*) (4).

In the present case I am unable to find any necessary implication to bind the Crown as the sovereign head of the State of Western Australia by the *Landlord and Tenant Regulations*, and would therefore allow the appeal.

*Appeal allowed with costs. Judgment of magistrate and order of Supreme Court of Western Australia set aside. Order respondent do give possession of the dwelling known as Warders Quarters situate at 9 Holdsworth Street, Fremantle, to the appellant on or before 31st*

(1) (1920) 28 C.L.R., at pp. 153, 154.
(2) (1920) 28 C.L.R. 129.
(3) (1908) 5 C.L.R. 789.
(4) (1918) 25 C.L.R. 61.

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*October* 1944. *Respondent to pay the appellant's costs of the proceedings before the magistrate and of the appeal to the Supreme Court.*

Solicitor for the appellant, *E. A. Dunphy* K.C., Crown Solicitor for Western Australia, by *A. H. O'Connor*, Crown Solicitor for New South Wales.

Solicitor for the respondent, *L. D. Seaton*, Perth.

Solicitor for the Commonwealth (intervening), *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

J. B.